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Supreme Court of Canada

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S. EDWARD BOLTON, K.C.

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1939

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Right Hon. Sir LYMAN POORE DUFF C.J., P.C., G.C.M.G.

" THIBAUDEAU RINFRET J.

" LAWRENCE ARTHUR CANNON J.

" OSWALD SMITH CROCKET J.

" HENRY HAGUE DAVIS J.

" PATRICK KERWIN J.

" ALBERT BLELLOCK HUDSON J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Rt. Hon. ERNEST LAPOINTE, K.C.

71848—1½

ERRATA

Page 56, f.n. (1) [1913] A.C. 299 should be (2) [1913] A.C. 299.

Page 119, f.n. (5) should be [1922] 1 A.C. 191; and f.n. (5) should be (6) and (6) should be (7); and, in text, 1st f.n. (5) should be (1) and 2nd f.n. (5) should be (3) and f.n. (6) should be (7).

Page 121, f.n. (1) should be [1937] A.C. 327.

Page 129, f.n. (1) should be [1915] A.C. 330, at 343, and f.n. (3) should be [1921] 2 A.C. 91, at 99.

Page 130, f.n. (1) should be [1921] 2 A.C. 91, at 100; and f.n. (3) should be (1819) 4 Wheaton 316, at 436.

Page 136, f.n. (4) should read [1937] A.C. 260 and not 860.

Page 303, f.n. (1) refers to the case of *Lemieux* v. *Côté*.

Page 357, f.n. (1) should be (1883) 6 L.N. 327, at 333.

Page 412, page number in f.n. (2) should be 599.

Page 473, f.n. (1) should be struck out.

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.

B.V.D. Company Limited v. *Canadian Celanese Limited.* ([1937] S.C.R. 221, 441). Leave to appeal granted, 3rd February, 1938.—Appeal dismissed with costs, 23rd January, 1939.

Dallas v. *Home Oil Distributors Ltd.* ([1938] S.C.R. 244). Leave to appeal refused, 18th July, 1938.

Jalbert v. *The King.* ([1937] S.C.R. 51). Appeal dismissed, 17th January, 1938.

Langdon v. *Holtyrex Gold Mines Ltd.* ([1937] S.C.R. 334). Leave to appeal refused with costs, 15th December, 1937.

Price v. *Dominion of Canada General Insurance Company.* ([1938] S.C.R. 234). Leave to appeal refused with costs, 21st July, 1938.

Reference re the Power of the Governor General in Council to disallow Provincial Legislation and the Power of Reservation of a Lieutenant-Governor of a Province. ([1938] S.C.R. 71). Leave to appeal granted, 10th May, 1938. Appeal withdrawn, 16th June, 1938.

Reference re *Alberta Statutes: The Bank Taxation Act; The Credit of Alberta Regulation Act;* and *The Accurate News and Information Act,* ([1938] S.C.R. 100). Leave to appeal granted, 10th May, 1938. Appeal dismissed, 14th July, 1938.

Stephens v. *Falchi.* ([1938] S.C.R. 354). Leave to appeal refused with costs, 25th July, 1938.

A TABLE

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

IN THE MATTER OF THE ESTATE OF CHARLES MILLAR, DECEASED

1937
*Nov. 4.
*Dec. 22.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Will—Construction—Validity—Public policy—Gift at expiration of ten years from testator's death "to the mother who has since my death given birth in Toronto to the greatest number of children as shown by the registrations under the Vital Statistics Act [Ont.]"—"Children"—Not inclusive of illegitimate children—Gift not void as against public policy.

A clause in a will gave the residue of the testator's property to his executors in trust to convert, etc., and "at the expiration of ten years from my death to give it and its accumulations to the mother who has since my death given birth in Toronto to the greatest number of children as shown by the registrations under the Vital Statistics Act [Ont.]. If one or more mothers have equal highest number of registrations under the said Act to divide the said moneys and accumulations equally between them."

Held: (1) The word "children" in said clause did not include illegitimate children.

(2) The clause was not void as against public policy.

Judgment of the Court of Appeal for Ontario, [1937] O.R. 382, affirming judgment of Middleton J.A., [1936] O.R. 554, affirmed.

Per Duff C.J., Davis, Kerwin and Hudson JJ.: Discussion as to the jurisdiction of the courts (in dealing with an attack against a contract or disposition of property as invalid as against public policy) to proceed (there being no contravention of statute law) under some new head of public policy—some principle of public policy not already recognized by judicial decision, in the sense explained in certain cases cited and discussed, particularly in the judgment of Lord Wright in *Fender* v. *Mildmay*, [1937] 3 All E.R. 402, at 425, 426. Decision on that question not given (as being unnecessary in the present case); but inclination intimated of view in favour of that of Lord Wright (restrictive as to the courts' jurisdiction) in his said judgment.

In the present case, it was not argued that the disposition in question was void upon any particular rule or principle established by judicial decision. Therefore, taking the most liberal view of the jurisdiction

*PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

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of the courts, there were at least two conditions which must be fulfilled to justify refusal, on grounds of public policy, to give effect to a rule of law according to its proper application in the usual course in respect of a disposition of property. These conditions are: (1) That the "prohibition is imposed in the interest of the safety of the State, or the economic or social well-being of the State and its people as a whole. It is therefore necessary * * * to ascertain the existence and the exact limits of the principle of public policy contended for, and then to consider whether the particular contract [or disposition] falls within those limits" (*Fender* v. *Mildmay, supra,* at 414); (2) "That the doctrine should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds" (*ibid,* at 407; as to this condition, see also *Egerton* v. *Brownlow,* 4 H.L.C. 1, at 197, *Rodriguez* v. *Speyer,* [1919] A.C. 59, at 135-136, and *Fender* v. *Mildmay, supra,* at 436). In the present case it could not be affirmed that such conditions were fulfilled. It is not sufficient to say that some people may be, or probably would be, tempted by the hope of obtaining the legacy to conduct themselves in a manner injurious to wife and children. (*Egerton* v. *Brownlow, supra,* at 24-26, 85, 86, 126-128).

Per Crocket J. (who agreed with the result in the present case): There is no generally accepted rule of law restricting the long recognized and salutory right and duty of the courts to refuse to enforce any and all contracts and testamentary dispositions of property regularly brought before them for adjudication, which they on sound judicial grounds find to be contrary to public policy in the sense of tending to subvert the public good. The judicial application to contracts and dispositions of property of the principle against contravention of public policy is not limited to contracts or dispositions which contravene the statute law or only those heads of public policy which are recognized by past decisions or to cases which clearly fall within the purview of those decisions. It is the courts' right and duty to bring their own judgment to bear upon the question propounded for their adjudication as to whether or not the purpose of a particular contract or disposition of property contravenes the public good. Nor is "substantial incontestability" as regards harm to the public a necessary condition of a ground of public policy for the exercise by the courts of their right to hold invalid contracts or dispositions of property on such ground. (Discussion of authorities and judicial dicta).

APPEAL from the judgment of the Court of Appeal for Ontario (1), which, affirming judgment of Middleton J.A. (2), held that the word "children," as used in clause 9 of the will of Charles Millar, late of the city of Toronto, in the province of Ontario, deceased, does not include illegitimate children; and that the said clause 9 is not invalid as being against public policy. The said clause is set out

(1) [1937] O.R. 382; [1937] 3 D.L.R. 234.

(2) [1936] O.R. 554; [1937] 1 D.L.R. 127.

at the beginning of the judgment of Duff C.J., now reported. The appeal to this Court was dismissed.

I. F. Hellmuth K.C. and *I. Levinter K.C.* for appellants (next of kin and those claiming under them).

W. N. Tilley K.C. and *B. V. McCrimmon* for the executors and trustees under the will of deceased.

G. T. Walsh K.C. for mothers of legitimate children.

T. R. J. Wray and *R. J. R. Russell* for mothers of legitimate children.

C. R. McKeown K.C. for mothers of children who may or may not be legitimate.

The judgment of Duff C.J. and Davis, Kerwin and Hudson JJ. was delivered by

DUFF C.J.—The question to be determined on this appeal concerns the validity of a clause in the will of the late Charles Millar of Toronto. It is in these words:

> 9. All the rest and residue of my property wheresoever situate, I give, devise and bequeath unto my Executors and Trustees named below in Trust to convert into money as they deem advisable and invest all the money until the expiration of nine years from my death and then call in and convert it all into money and at the expiration of ten years from my death to give it and its accumulations to the mother who has since my death given birth in Toronto to the greatest number of children as shown by the Registrations under the Vital Statistics Act. If one or more mothers have equal highest number of registrations under the said Act to divide the said moneys and accumulations equally between them.

The determination of this controversy as to validity involves the decision of a point of construction, viz., whether the word "children," as here employed, includes illegitimate children. That question was answered in the negative by Mr. Justice Middleton and by the Court of Appeal. We think it sufficient to say that we agree with this conclusion, which rests upon the reasons fully stated in the able judgments delivered by the Chief Justice of Ontario and Riddell J.A. in the Court of Appeal and by Middleton J.A.; and we think it unnecessary to add anything to these reasons.

The remaining question, concerning which we express our views more at length, is raised by the contention that this clause is void as "against public policy." In sup-

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port of that contention we have had a powerful argument from Mr. Hellmuth; but, giving due weight to it, we find ourselves in agreement with the conclusions of the Ontario judges who unanimously held the clause to be valid.

It is convenient to notice first of all the manner in which the principle of law operates, by force of which a contract or disposition of property is held to be invalidated as being obnoxious to the public good on some ground or principle comprehended within the general phrase "against public policy"; and this has not a little relevancy in examining the contentions advanced by the appellant.

As Lord Sumner said in *Rodriguez* v. *Speyer* (1),

> Considerations of public policy are applied to private contracts or dispositions in order to disable * * *

It is the duty of the courts to give effect to contracts and testamentary dispositions according to the settled rules and principles of law, since we are under a reign of law; but there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which over-rides the interest and what otherwise would be the rights and powers of the individual. It is, in our opinion, important not to forget that it is in this way, in derogation of the rights and powers of private persons, as they would otherwise be ascertained by principles of law, that the principle of public policy operates. This is emphasized in the judgments of Lord Thankerton (at p. 414), and Lord Wright (at p. 425), in *Fender* v. *Mildmay* (2).

As regards the doctrine of public policy itself, there is some lack of unanimity upon the point of the jurisdiction of the courts to proceed under some new head of public policy, that is to say, some principle of public policy not already recognized by judicial decision in the sense hereinafter explained. There is high authority for the proposition that,

> It is not at the present time open to the courts of justice to hold transactions or dispositions of property void simply because in the judgment of the court it is against the public good that they should be enforced, although the grounds of that judgment may be novel.

This is the view expressed by Lord Halsbury in a well known discussion of the subject in *Janson* v. *Driefontein*

(1) [1919] A.C. 59, at p. 125. (2) [1937] 3 All E.R. 402.

Consolidated Mines, Ltd. (1). "I do not think," he said, that the phrase "against public policy" is one which in a court of law explains itself. It does not leave at large to each tribunal to find that a particular contract is against public policy.

And, at page 496,

I do not think he [the judge] has any jurisdiction to bring into the discussion his own views of what he may consider an inexpedient thing in his own peculiar view of public policy. To permit such a discussion to arise it must be a question of some public policy recognized by the law.

Alderson B., in his opinion in *Egerton* v. *Brownlow* (2), agrees that such a principle "would altogether destroy the sound and true distinction between judicial and legislative functions," and he adds, "my duty is as a judge to be governed by fixed rules and settled precedents." And Parke B. in his opinion in the same case observes (p. 123):

It is the province of the statesman, and not the lawyer, to discuss, and of the legislature to determine, what is the best for the public good, and to provide for it by proper enactments.

The subject is discussed in, if I may say so, a very illuminating way by Lord Wright in *Fender* v. *Mildmay* (3). His conclusion is that the modern view of the law is that expressed in the observations, which he quotes, of Parke B. in *Egerton* v. *Brownlow* (4), and of Lord Lindley in *Janson* v. *Driefontein Consolidated Mines, Ltd.* (5).

The passage from Parke B. is in these words:

It is the province of the judge to expound the law only; the written from the statutes: the unwritten or common law from the decisions of our predecessors and of our existing courts, from text-writers of acknowledged authority, and upon the principles to be deduced from them by sound reason and just inference; not to speculate upon what is best, in his opinion, for the advantage of the community. Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognized law, and we are therefore bound by them, but we are not thereby authorized to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise.

The sentence taken from Lord Lindley's judgment is this:

public policy is a very unstable and dangerous foundation on which to build until made safe by decision. On this point I venture to remind your Lordships of the weighty observations of Alderson B., and Parke B., in *Egerton* v. *Brownlow* (6).

(1) [1902] A.C. 484, at 491.
(2) (1853) 4 H.L.C. 1, at 106.
(3) [1937] 3 All E.R. 402, at 425, 426.
(4) (1853) 4 H.L.C. 1, at 123.
(5) [1902] A.C. 484, at 507.
(6) (1853) 4 H.L.C. 1, at 106, 123.

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After stating that these passages embody the modern view of the law by which the courts in more recent times have governed themselves in exercising this exceptional jurisdiction, he proceeds—and the precise terms in which he expresses himself should be carefully observed:—

> Public policy, like any other branch of the common law, is governed by the judicial use of precedents. * * * They [the House of Lords in the *Mogul* case (1), in the *Maxim Nordenfelt* case (2) and in *Rodriguez* v. *Speyer* (3)] have proceeded to apply some recognized principle to the new conditions, proceeding by way of analogy and according to logic and convenience, just as courts deal with any other rule of the common law.

and he adds:

> It is true that it has been observed that certain rules of public policy have to be moulded to suit new conditions of a changing world; but that is true of the principles of common law generally.

On the other hand, Lord Atkin (p. 407) expresses the definite opinion that Lord Halsbury's view is "too rigid." Lord Roche (p. 436) says the question is debatable and does not give his own opinion upon it. Neither Lord Thankerton nor Lord Russell of Killowen, I think, intends to pass upon the general question, although the conclusions of both are based upon rules or principles deduced from decided cases. Lord Russell says:

> as I see this case, there is here no question of inventing a new rule of public policy [p. 422].

Lord Wright says he can hardly conceive that at this day a new head of public policy could be discovered.

Before leaving the subject, we ought, perhaps, to refer to three sentences in the opinion of Parke B. in *Egerton* v. *Brownlow* (4) which immediately follow the passages quoted above. They seem to put more pointedly than the sentences which precede them the view which, subject to the explanation by Lord Wright already quoted, would appear to have been the view of Lord Halsbury. The sentences are these:

> The term "public policy" may indeed be used only in the sense of the policy of the law, and in that sense it forms a just ground of judicial decision. It amounts to no more than that a contract or condition is illegal which is against the principle of the established law. If it can be shown that any provision is contrary to well-decided cases, or the principle of decided cases, and void by analogy to them, and within the same principle, the objection ought to prevail.

(1) *Mogul S.S. Co.* v. *McGregor, Gow & Co.*, [1892] A.C. 25.

(2) *Nordenfelt* v. *Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535.

(3) [1919] A.C. 59.

(4) (1853) 4 H.L.C. 1, at 123-124.

He adds:

> But we are clearly of opinion that this cannot be shown here.

We should be disposed to think, if it were necessary to decide the question, that Lord Wright's view was the preferable view. We are, however, for the purpose of disposing of this appeal, under no obligation to decide this particular point touching the limits of the jurisdiction of the courts in respect of this branch of the law; and we are expressing no final opinion upon it.

It has not been argued by the appellants that the disposition in question here is void upon any particular rule or principle established by judicial decision. Such being the case, we think, taking the most liberal view of the jurisdiction of the courts, there are at least two conditions which must be fulfilled to justify a refusal by the courts on grounds of public policy to give effect to a rule of law according to its proper application in the usual course in respect of a disposition of property. First, we respectfully concur in these two sentences in the judgment of Lord Thankerton in *Fender* v. *Mildmay* (1):

> Generally, it may be stated that such prohibition is imposed in the interest of the safety of the state, or the economic or social well-being of the state and its people as a whole. It is therefore necessary, when the enforcement of a contract is challenged, to ascertain the existence and exact limits of the principle of public policy contended for, and then to consider whether the particular contract falls within those limits.

Secondly, we take the liberty of adopting the words of Lord Atkin in his judgment in the same case (at p. 407):

> * * * it [referring to Lord Halsbury's judgment in *Janson's case* (2)] fortifies the serious warning, illustrated by the passages cited above [among them is the passage, already quoted, from the opinion of Parke B.], that the doctrine should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds. I think that this should be regarded as the true guide.

The last sentence makes it plain that we have here no mere *obiter dictum*. As regards the second of these conditions, it was in substance expressed by Lord Truro in *Egerton* v. *Brownlow* (3) in this sentence:

> Judges who are charged with the duty of seeing that dispositions and transactions are not upheld and enforced which are contrary to the spirit of the law, must be presumed to take care not to apply the law to doubtful cases, so as unnecessarily to interfere with transactions which are the subject of judicial investigation.

(1) [1937] 3 All E.R. 402, at 414.
(2) [1902] A.C. 484.
(3) (1853) 4 H.L.C. 1. at 197.

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Lord Parmoor in *Rodriguez* v. *Speyer Brothers* (1) thus emphasizes the admonition:

> My Lords, in considering a rule of law founded on public policy care must always be taken not to introduce new principles which, to be valid, would require the sanction of the Legislature, and to maintain the important limitation, that it is beyond the jurisdiction of tribunals to determine matters of national policy.

Lord Roche, in his judgment in *Fender* v. *Mildmay* (2), says:

> Now, to evolve new heads of public policy, * * * if permissible to the courts at all, which is debatable, would, in my judgment, certainly be permissible only upon some occasion * * * where there was substantial agreement within the judiciary, * * *

We are asked to say that the tendency of this disposition is "against public policy" in the pertinent sense because, it is urged, its tendency is to give rise to a competition between married couples to bring about successive births of children in rapid sequence to the injury of the mothers' health, to the injury of the children, morally and physically, and to the degradation of motherhood and family life. It is even suggested that in cases in which the husband ceased to be fecund in course of the race, the contestants might be tempted to resort to other males to do his office.

The appellants argue that these tendencies bring the case within a sentence inadvertently ascribed to Lord Bramwell, but in fact taken from the judgment of Younger L.J. (now Lord Blanesburgh) in *In re Wallace; Champion* v. *Wallace* (3). That sentence is:

> This is only another way of saying that a tendency to be subversive of the public good within the meaning of the rule now under consideration must be subversive of something in the body politic which every normally constituted citizen of goodwill must, of necessity, desire to preserve.

This sentence, of course, does not define any head of public policy. It lays down a condition which must be present in order to enable the principle of public policy to operate. It leaves untouched the question, what precisely is the principle of public policy contended for in this case. We will, however, not dwell further upon the first condition.

We ask ourselves the question, is the second condition satisfied? Can it be judicially affirmed that for such reasons "the harm to the public" from such dispositions

(1) [1919] A.C. 59, at 135-136. (2) [1937] 3 All E.R. 402, at 436.
(3) [1920] 2 Ch. 274, at 303.

"is substantially incontestable"? Is it so clear that something like general agreement upon the point among judges of this country could be judicially assumed? It will not be overlooked that the Ontario judges unanimously held the opposite view.

It is the evil tendency of such dispositions in respect of some interest of the state, or of some interest of the people as a whole, with which we are concerned. We find it impossible to affirm from any knowledge we have that a policy of encouraging large families by pecuniary rewards to the parents or donations to the children would have a tendency injurious to the state or to the people as a whole; still less that anything like unanimity in favour of such a proposition could be assumed. It is not sufficient to say that some people may be, or probably would be, tempted by the hope of obtaining this legacy to conduct themselves in a manner injurious to wife and children. That sort of argument is conclusively answered in *Egerton* v. *Brownlow* (1) in the judgment of the Lord Chancellor at the trial (pp. 24-26), in the opinion of Mr. Justice Cresswell (pp. 85, 86), and in the opinion of Baron Parke (pp. 126-128). One could easily conjure up the possibility that similar temptations might be inspired by a bequest of a large fortune to the grandchildren of the testator, to be divided equally among them, as inviting each of the children to have a numerous offspring in order to secure for his family as large a proportion as possible of the inheritance.

Conceive the case of a bequest of a large sum of money to each child of a given woman to vest at its birth. Such a bequest might, one could imagine, in some cases give rise to temptations similar to those whose possibility, it is said, is sufficient to invalidate the disposition before us. We do not suppose it would seriously be argued that in such a case the courts could deny the claim of a legatee on grounds of public policy.

In *Egerton* v. *Brownlow* (2), Alderson B. states explicitly, and there can be no doubt about it, that

> a sum of money or an estate left to the first son of a marriage if born within a year of the nuptials, would not be a void bequest or devise.

Would such a devise or bequest be void if given to the second son if born within two years?

(1) (1853) 4 H.L.C. 1.

(2) (1853) 4 H.L.C. 1, at 108.

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The observations of Parke B. in *Egerton* v. *Brownlow* (1) are so pertinent in this connection that we think it right to reproduce them textually:

> Suppose a large estate left to A, subject to the condition of his becoming senior wrangler and senior medallist at Cambridge. Would it be illegal, as tending to induce him to employ the money in corrupting the examiners, or betraying into idleness and profligacy, or destroying his most promising competitors? If a large estate is left to a man conditioned that he should within a stated time marry a countess, would it be void, as tending to induce him to use improper means to effect such an alliance? Or if an estate was to be forfeited in case the devisee did not take holy orders, or become a dean or a bishop, or take a degree of doctor of divinity in a certain time, would it be void, as having a tendency to induce him to obtain those orders, dignities, or distinctions by bad means? So the case of a condition to obtain the royal licence to use a particular name and arms, a most common occurrence, might on similar grounds be impeached, as having a tendency to cause the royal licence to be obtained by corrupt means. So even also the clause, in the form in this will, which is to use "the utmost endeavours to obtain it," might be said to have a similar though a more remote tendency to the same end; and yet to object to either of such clauses, on either ground, seems to be utterly untenable. Nay, a limitation to one for life, remainder to another, might be said to be void, as having a tendency to cause the remainder-man to try to kill the tenant for life; a limitation to first and other sons successively in tail, to induce the second son to destroy the life of the elder by a direct act of murder, or a continued course of cruelty and unkindness, or to use fraudulent artifices to prevent him from marrying. Insurances on lives might be avoided on the same ground. Insurances of property against fire, contracts by burial-clubs to pay sums of money for the funeral of wives or children; in short, there are few contracts in which a suspicious mind might not find a tendency to produce evil; and to hold all such contracts to be void would, indeed, be an intolerable mischief.

The appeal is dismissed. The executors will have their costs of the appeal to this Court as between solicitor and client, and those appointed to represent the different interested parties will have their costs as between party and party, out of the estate.

CROCKET J.—I am in full accord with my Lord the Chief Justice and the learned trial Judge and the Court of Appeal that this bequest for the benefit of the mother or mothers giving birth in the city of Toronto to the greatest number of children during the ten years following the testator's death cannot properly be construed as contemplating illegitimate as well as legitimate births, and that the principle of public policy cannot be successfully invoked against its validity in the circumstances of this

(1) (1853) 4 H.L.C. 1, at 127-128.

particular case. I thus qualify my concurrence in the judgment of the learned Chief Justice because I do not wish to be understood as assenting to the adoption by this Court of a number of the judicial dicta which are set out in his reasons, presumably as being applicable to Canadian as well as to British courts, and, moreover, because I cannot deduce from these dicta any such generally accepted rule of law restricting the long recognized and, in my opinion, salutory right and duty of the courts, both of England and of this country, to refuse to enforce any and all contracts and testamentary dispositions of property regularly brought before them for adjudication, which they on sound judicial grounds find to be contrary to public policy in the sense of tending to subvert the public good. In my view, which I venture to express with the greatest diffidence and respect to those who may think otherwise, it is quite impossible to find any consistent, logical ground in these various dicta to support the contention that the application of this wholesome principle by the courts of this country must now be taken as limited to the extent now contended for.

Some of them seem to be based on the suggestion that the Legislature is the sole repository of the wisdom and public opinion of the country; that in it alone resides the right and power to determine whether any kind or class of contracts do or do not offend against the principle of public policy; and that any attempt, therefore, upon the part of the judiciary of the country to test the validity of any such contract or disposition of property by due consideration of their effect upon the public welfare constitutes an invasion upon the functions of the Legislature. For my part, I cannot understand how the courts of the country in applying this principle can be said to trench in any way upon the legislative power unless it be held that the Legislature's omission to declare any particular kind or class of contract or other disposition of property unlawful must be taken as establishing their incontestable validity. I know of no dictum from which such a rule of law can fairly be deduced.

Other pronouncements in the House of Lords, carrying the great weight and authority of celebrated legal minds, such as the well known pronouncement of Baron Parke in

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Crocket J.

Egerton v. *Lord Brownlow* (1), as to the province of the courts, are brought forward as limiting the judicial application of the principle now under discussion only to contracts and dispositions of property which contravene either the statute law of the country or the unwritten or common law as established by decisions of the past or of the existing courts of the country or to cases which clearly fall within the purview of these decisions. In the passage just referred to it is said:

> Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognized law, and we are therefore bound by them, but we are not thereby authorized to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise.

From the words just quoted it has been sought to deduce the rule that the courts must not venture in any case to bring their own judgment to bear upon the question propounded for their adjudication as to whether the purpose of a particular contract or disposition of property contravenes the public good or not, but the context immediately preceding these words plainly shews, I think, that Parke, B., clearly recognized the right and duty of the courts to determine at least whether any particular case logically falls within the compass of any of the rules of the common law as established by past judicial decisions regarding the contravention of public policy.

Whatever may be the true interpretation of Baron Parke's pronouncement in *Egerton* v. *Brownlow* (1), it is quite apparent, I think, that in later cases it has been used as the basis for the development of a further limitation upon the jurisdiction of the courts of England to adjudicate upon the question of public policy. This will be particularly observed in Lord Chancellor Halsbury's discussion of the subject in *Janson* v. *Driefontein Consolidated Mines, Ltd.* (2), where His Lordship quotes extensively from Baron Parke's reasons in the previous case and denies the right of any court to "invent a new head of public policy." This dictum, if taken literally and it be not *obiter,* and were accepted by the majoriy of the law lords hearing that particular case, would manifestly establish a new doctrine in the application by the courts of the prin-

(1) (1853) 4 H.L.C. 1, at 123. (2) [1902] A.C. 484.

ciple of public policy and limit their consideration of the subject, so far as the common law of England is concerned, to the old heads of that subject as recognized by past decisions. In *Fender* v. *Mildmay* (1), however, Lord Atkin points out that, although Halsbury, L.C., in *Janson* v. *Driefontein* (2)

> appeared to decide that the categories of public policy are closed, and that the principle could not be invoked anew unless the case could be brought within some principle of public policy already recognized by the law

the Lord Chancellor's view did not receive the express assent of the other members of the House, and he added that that view seemed to him "too rigid." Lord Atkin went on to say:

> On the other hand, it fortifies the serious warning, illustrated by the passages cited above, that the doctrine should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds. I think that this should be regarded as the true guide. In popular language, following the wise aphorism of Sir George Jessel, M.R., cited above, the contract should be given the benefit of the doubt. But there is no doubt that the rule exists. In cases where the promise is to do something contrary to public policy, which, for short, I will call a harmful thing, or where the consideration for the promise is the doing, or the promise to do, a harmful thing, a judge, though he is on slippery ground, at any rate has a chance of finding a footing. The contract is unreasonably to restrict a man's economic activities, to procure a marriage between two persons, to oust the jurisdiction of the court. These things are decided to be harmful in themselves. To do them is injurious to public interests.

It is to be observed that this very recent pronouncement clearly recognizes the continued existence of the rule regarding public policy, but that it in turn suggests what on its face appears to be a new condition or limitation for its application, viz.: "only in clear cases in which the harm to the public is *substantially incontestable.*" My Lord the Chief Justice in his reasons expressly adopts this dictum and treats "substantial incontestability" as regards "harm to the public" as a necessary condition for the exercise by the courts of their right to invalidate contracts or dispositions of property on the ground of public policy. With every possible respect I cannot follow His Lordship in the promulgation of such a new doctrine in this country upon the strength of what appears to me to be intended by its author only as a further reinforcement

(1) [1937] 3 All E.R. 402. (2) [1902] A.C. 484.

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of the warnings which are to be found in previous cases as to the danger of judges, in deciding questions involving the consideration of what is and of what is not for the public good, being influenced too much by their own peculiar views, rather than as a pronouncement for the purpose of defining any new rule for the application of the general principle he was discussing. A careful examination of the context in which the expression is contained, as I have above reproduced it, makes it clear to my mind that there was really no thought of propounding any new doctrine. Indeed, Lord Atkin introduces the presumed new doctrine as one which was "illustrated by the passages cited above." Among the passages he cites are the observations of Parke, B., in *Egerton* v. *Brownlow* (1), to which I have already called attention; a passage from the judgment of Jessel, M.R., in *Printing and Numerical Registering Co.* v. *Sampson* (2); one from the judgment of Cave J. (later Lord Cave) in *Re Mirams* (3); one from Lord Davey's judgment in *Janson* v. *Driefontein* (4), and an extract from Marshall on Insurance, 3rd ed., 32, which had been approved by Lord Halsbury in *Janson* v. *Driefontein* (4). Not one of these passages makes use of any such expression as "substantially incontestable," but all of them seem to bear directly upon "the serious warning," which Lord Atkin says is illustrated by them, and to which he was particularly alluding, regarding "idiosyncratic inferences of a few judicial minds." Whatever may be the true significance of the dictum relied on, it ought not, in my opinion, to be made the basis of the promulgation of what will undoubtedly constitute an entirely new doctrine in this country, and one whose adoption by this Court, I fear, cannot but seriously and permanently tie the hands of this and all other Canadian courts in the administration of that very important branch of the law, which specially concerns the moral and social, as well as the economic welfare and the security of the people generally.

Lord Atkin says that there is no doubt that the rule exists and clearly intimates that its application is not subject to the limitation which Lord Halsbury's proposition would place upon it by closing the door against the con-

(1) (1853) 4 H.L.C. 1, at 123.
(2) (1875) L.R. 19 Eq. 462.
(3) [1891] 1 Q.B. 594.
(4) [1902] A.C. 484.

sideration of any new heads or categories of public policy, which limitation he describes as too rigid. Yet a single clause is extracted from one sentence in the very paragraph in which Lord Atkin thus expressed himself and of which no approval can be found in the lengthy reasons of the four other Law Lords who heard the case with him, and put forward as the foundation for the introduction into the courts of Canada of what, with deference, seems to me to be a much more drastic and far-reaching restriction upon the application of the principle of public policy than that suggested by Lord Halsbury, which Lord Atkin himself declined to recognize and termed "too rigid." May we not as well at once renounce the rule entirely as engraft upon it a condition which would render it practically inapplicable? How could any of the courts in any of the provinces of Canada invalidate any contract or disposition of property at all as tending to subvert the public good in the face of a pronouncement by this Court that they have no jurisdiction to do so unless the ground of public policy which is urged against it is one that is "substantially incontestable"? Contravention of public policy has always been recognized as a good plea against the enforcement of any contract or testamentary disposition of property by the courts of this country. The joining of issue on such a plea by the party or parties seeking the enforcement of the particular contract or disposition of property concerned necessarily creates a contestation between the parties, which it becomes the clear duty of a judge to try and to decide judicially. But he is told, notwithstanding the fact that he is now actually confronted with a *bona fide* and serious contestation between the parties before him, that this Court has laid it down that he has no jurisdiction to declare the contract or disposition of property invalid unless he is prepared to adjudge that the ground of public policy, on which it has been definitely challenged, is "substantially incontestable." If he is to ignore his own conscientious conviction upon the point as possibly proceeding from an idiosyncratic view, as has been suggested, where is he to look for a safe footing on which he can judicially determine that the apprehended "harm to the public is substantially incontestable"? It is suggested that he may look for something like general agreement

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upon the point among the judges of this country, or something like unanimity, as I take it, in the public itself, from which he could judicially assume it. But what is he to do in a case involving a ground of public policy which has never before been considered by any Canadian judge? Presumably he must then canvass the public opinion of the country as a whole in relation to the purpose or tendency of the particular contract or bequest and determine whether there would be likely to be anything like unanimity among the people as a whole in regarding it as injurious to the public good.

The recognition of such a method as a proper basis for a binding judicial adjudication by a trial judge of an issue of fact or law regularly brought before him, I very much fear, is itself fraught with quite as much danger to the public good as any possibly erroneous application by him of the rule of public policy could be. If a trial judge errs in taking too narrow a view of the question of public policy, his error in doing so may be as readily corrected on appeal to the higher courts of the country as any other erroneous decision may always be; but who can envisage the ultimate effect upon the country as a whole of the establishment of a rule of law that a trial judge or an appeal judge must in all cases involving the consideration of a question as to what may or may not be for the public good discard his own conscientious conviction upon a sound consideration of the subject and find its solution, either by assuming what the great majority of other judges throughout the country, none of whom have any responsibility in relation to the particular trial and no opportunity of fully considering the purpose or tendency of the particular contract or bequest involved, would be likely to think, or, alternatively, by assuming what the people of the country generally would be likely to think? I cannot help asking myself the question if the recognition at this time of such a rule of law may not tend to undermine the integrity of the whole system upon which the administration of justice in this country has been founded with all its safeguards and restraints to hold judges to the fearless and conscientious discharge of their duties and protect them as well against the danger of being swayed or influenced by what they may believe to be popular feeling or public opinion.

Suppose that a judge is called upon to adjudicate upon the validity of a bequest or devise of the whole of an extensive estate for the purpose of establishing and maintaining a permanent organization for the carrying on throughout the country of a campaign to propagate atheism or infidelity and to undermine the influence of all Christian churches and other religious organizations in Canada. Can it properly be said that a court of justice in deciding that issue cannot bring its own conscientious judgment to bear upon the point and declare the challenged disposition of property invalid because there may be throughout the country a large or substantial body of anti-Christian and anti-religious opinion, which would undoubtedly regard the purpose of the will as legitimate and beneficent? I venture to say unhesitatingly that I do not think so.

Appeal dismissed. The costs of the executors and trustees, as between solicitor and client, and the costs, as between party and party, of the interested parties for whom counsel were appointed to represent them in the Supreme Court of Ontario and who were represented by counsel in this Court, to be paid out of the estate.

Solicitor for the appellants: *Samuel Factor.*

Solicitor for the Executors and Trustees: *A. W. Hunter.*

Solicitors appointed by the Court to represent mothers of legitimate children: *George T. Walsh* and *T. R. J. Wray.*

Solicitor appointed by the Court to represent mothers of children who may or may not be legitimate: *C. R. McKeown.*

1937
*Nov. 1.
*Dec. 7.

HIS MAJESTY THE KING .....APPELLANT;

AND

WILLIAM MANCHUK.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Culpable homicide—As to reduction from murder to manslaughter—Provocation—Cr. Code, s. 261—Acts of third person—Directions to jury—Questions for jury.

An appeal by the Crown from the judgment of the Court of Appeal for Ontario, [1937] O.R. 693, ordering a new trial of accused (who had been convicted at trial on a charge of murder) on the ground of misdirection or failure of proper direction by the trial judge in charging the jury on the question of provocation, was dismissed.

The law with regard to provocation as embodied in s. 261 of the *Cr. Code* does not contemplate the extension of the relative lenity (in reducing culpable homicide from murder to manslaughter) to a case in which provocation received from a third person becomes the occasion of an act of homicide against a victim who, as the offender knows and fully realizes, was not in any way concerned in the provocation. But acts of provocation committed by a third person, which might be sufficient to reduce the offence to manslaughter if the victim had in fact participated in them, may have the same effect where the offence against the victim is committed by the accused under the belief that the victim was a party to those acts, although the victim was not implicated in them in fact. (*Brown's* case, 1 Leech C.C. 148, and *Hall's* case, 21 Cr. A.R. 48, cited and discussed.)

In the present case, the trial judge ought to have asked the jury to consider whether, in the blindness of his passion aroused by his quarrel with the husband of Mrs. S., the accused, suddenly observing Mrs. S. (the victim of the act now in question) within a few feet of the scene of the quarrel and of his mortal assault on the husband, attacked her on the assumption that she was involved in the acts of the husband and daughter. It was a question for the jury whether (*a*) the acts relied upon as constituting provocation were calculated to deprive an ordinary man of self-control to such an extent as to cause an attack upon Mrs. S. of such a character as that delivered by the accused, and (*b*) whether in fact the accused was by reason of what occurred deprived of his self-control to such a degree; and in his attack upon Mrs. S. was acting upon such provocation on a sudden and before his passion had time to cool, and under the assumption that she was involved therein.

APPEAL by the Attorney-General of Ontario (under s. 1023 (2) of the *Criminal Code,* as amended by 25-26 Geo. V (1935), c. 56, s. 16) from the judgment of the Court of Appeal for Ontario (1) which (Fisher and Henderson JJ.A. dissenting) allowed the accused's appeal

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

(1) [1937] O.R. 693; [1937] 3 D.L.R. 343; 68 Can. Crim. Cas. 362.

against his conviction of murder at his trial before McFarland J. with a jury and set aside the conviction and ordered a retrial, on the ground of misdirection or failure of proper direction by the trial judge in addressing the jury on the question of provocation.

W. B. Common K.C. and *E. H. Lancaster K.C.* for the appellant.

Peter White K.C. and *H. M. Rogers* for the respondent.

The judgment of the court was delivered by

DUFF C.J.—We have come to the conclusion that the order directing a new trial should not be disturbed. As there is to be a new trial, we think it better to abstain from a discussion of the facts.

The controversy on the appeal concerns the application of section 261 of the *Criminal Code*, the text of which we quote:

> Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.
>
> 2. Any wrongful act or insult, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool.
>
> 3. Whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact: Provided that no one shall be held to give provocation to another by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

We think it right to emphasize that this section deals with the conditions under which "culpable homicide, which would otherwise be murder, may be reduced to manslaughter," because the act of the accused was committed "in the heat of passion caused by sudden provocation."

The provocation contemplated by the section neither justifies nor excuses the act of homicide. But the law accounts the act and the violent feelings which prompted it less blameable because of the passion aroused by the provocation, leaving the offender in a condition in which he was not at the critical "moment the master of his own understanding," to quote the phrase of Tindal C.J. in

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Hayward's case (1), adopted by the Court of Criminal Appeals in *Hall's* case (2); though still sufficiently blameable to merit punishment—and it may be punishment of high severity—but not the extreme punishment of death. We do not think that the law, as embodied in section 261, contemplates the extension of this relative lenity to a case in which provocation received from one person becomes the occasion of an act of homicide against another who, as the offender knows and fully realizes, was not in any way concerned in the provocation. We do not think section 261 contemplates such a case, for example, as *Simpson's* case (3).

On the other hand, the law has recognized that an offender under the dominion of a passion provoked by wrong or insult may in some circumstances attack a person not in any way concerned with the act of provocation, under the full belief that he has been so; and such circumstances have been held to be sufficient to reduce the crime from murder to manslaughter.

Brown's case (4) would appear, from the report in 1 East's Pleas of the Crown, at p. 246, to have proceeded upon this ground.

Hall's case (5) may have been decided upon similar considerations. There is nothing in any of the reports of the case indicating that there was any direct evidence of the participation of the victim in the attack on the accused upon which the latter relied as constituting provocation, or even that the victim was present at the time. It was held that the jury ought to have been asked to consider the issue of provocation and, accordingly, the court reduced the verdict of murder to manslaughter, although, obviously, as Lord Hewart observes, there were grave difficulties in the way of this defence. There was evidence from which it might have been inferred, if the story of the accused was accepted, that the offender acted upon the assumption that the victim had been one of his assailants. We are disposed to think, after considering the judgment with care, that the Court of Criminal Appeals did not regard the

(1) *Rex* v. *Hayward*, (1833) 6 C. & P. 157, at 159.
(2) (1928) 21 Cr. A.R. 48, at 54.
(3) (1915) 11 Cr. A.R. 218.
(4) *The King* v. *Brown*, (1776) 1 Leech C.C. 148.
(5) (1928) 21 Cr. A.R. 48.

actual participation by the victim in the alleged assault upon the accused as an essential element in the defence of provocation.

True it is that in these cases there was an affray and, both in *Brown's* case (2) and in *Hall's* case (1), the alleged provocation consisted in a violent assault upon the accused. We think, however, that section 261 of the *Criminal Code* leaves exclusively to the tribunal of fact, as an issue of fact, the question whether any particular "wrongful act or insult" is of such a character as to constitute provocation for the purposes of the section; at least subject to the condition expressed in the proviso to the third subsection. And we think, moreover, as regards the source from which the provocation proceeds, that acts of provocation committed by a third person, which might be sufficient to reduce the offence to manslaughter if the victim had in fact participated in them, may have the same effect where the offence against the victim is committed by the accused under the belief that the victim was a party to those acts, although not implicated in them in fact.

We think the trial judge ought to have asked the jury to consider whether, in the blindness of his passion, aroused by the quarrel with the husband, the accused, suddenly observing the wife within a few feet of the scene of the quarrel and of his mortal assault on the husband, attacked her on the assumption that she was involved in the acts of the husband and daughter.

We think it was a question for the jury whether (*a*) the acts relied upon as constituting provocation were calculated to deprive an ordinary man of self-control to such an extent as to cause an attack upon Mrs. Seabright of such a character as that delivered by the accused; and (*b*) whether in fact the accused was by reason of what occurred deprived of his self-control to such a degree; and in his attack upon Mrs. Seabright was acting upon such provocation on a sudden and before his passion had time to cool, and under the assumption that she was involved therein.

At the new trial the presiding judge will, no doubt, impress upon the jury the importance of considering with great care the first of these questions; but he will, of course, instruct the jury that, on the ultimate issue, they must be

(1) (1928) 21 Cr. A.R. 48. (2) (1776) 1 Leech C.C. 148.

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satisfied beyond reasonable doubt that the accused was guilty of murder before convicting him of that crime.

For these reasons, the appeal is dismissed.

Appeal dismissed.

Solicitor for the appellant: *I. A. Humphries.*

Solicitor for the respondent: *H. M. Rogers.*

1937
* Oct. 18.
* Dec. 1.

CANADIAN INTERNATIONAL PAPER COMPANY ..... APPELLANT;

AND

LA COUR DE MAGISTRAT, ARTHUR LARUE, AND FRANÇOIS-X. LACOURSIÈRE ..... RESPONDENTS.

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

Appeal—Jurisdiction—Writ of prohibition—Criminal charge—Leave to appeal granted by appellate court—Supreme Court Act, R.S.C., 1927, c. 35, ss. 36, 41. Arts. 993, 1003 C.C.P.

The Supreme Court of Canada is without jurisdiction to hear an appeal from a judgment of an appellate court in proceedings for or upon a writ of prohibition arising out of a criminal charge, notwithstanding special leave to appeal granted by that court, as the latter could do so validly, under section 41 of the *Supreme Court Act*, only in cases "within section 36" of the Act.

MOTION by the respondents to quash for want of jurisdiction an appeal from a judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Fortier J., and quashing a writ of prohibition issued against the respondent.

L. Méthot K.C. for motion.

Ls. St.-Laurent K.C. contra.

The judgment of the Court was delivered by

CANNON J.—On the 27th January, 1936, François-Xavier Lacoursière, district magistrate, issued a summons

* PRESENT:—Duff C.J. and Cannon, Crocket, Davis and Hudson JJ.

(1) Q.R. 62 K.B. 268.

or warrant against the appellant for infraction to the *Lord's Day Act* (R.S.C., c. 153). The appellant denied the jurisdiction of the magistrate and made an application for a writ of prohibition which issued against the respondents according to an order of Honourable Justice Marchand of the Superior Court. The writ is in the following terms:

> Edouard VIII, par la Grâce de Dieu, Roi de Grande-Bretagne, d'Irlande et des Territoires Britanniques au delà des mers, Défenseur de la foi, Empereur des Indes.
>
> A la Cour de magistrat pour le district judiciaire des Trois-Rivières, siégeant au palais de justice de la dite cité des Trois-Rivières, Arthur Larue, constable et officier spécial, chargé de l'observance de la loi concernant le jour du Seigneur, de la cité des Trois-Rivières et François Xavier Lacoursière, Ecr. magistrat de district dans et pour le district de Trois-Rivières.
>
> Salut:
>
> Nous vous enjoignons de ne pas procéder contre la dite requérante Canadian International Paper Company, sur la plainte portée par le dit intimé Arthur Larue, le 27 janvier 1936, et nous ordonnons que toutes procédures prises contre la dite requérante sur la dite plainte et poursuivies en conformité avec la procédure criminelle, soient arrêtées et interrompues à toutes fins que de droit, et que le dossier du tribunal inférieur soit transmis à notre Cour Supérieure, siégeant dans et pour notre dit district de Trois-Rivières, en notre cité de Trois-Rivières, sans délai, pour être là et alors procédé ultérieurement selon que de droit sur la demande de la dite requérante produite devant cette dite cour, le 3 mars 1936, et nous commandons au dit Arthur Larue de comparaître devant cette dite cour, en notre dit district de Trois-Rivières, en notre dite cité de Trois-Rivières, le sixième jour après signification sur lui de ce présent bref pour répondre à la demande de la requérante contenue dans sa dite requête et dans la déclaration ci-annexée.

Subsequently the writ was quashed by a judgment of the Superior Court (Fortier J.) on the 7th December, 1936, and the Court of King's Bench unanimously upheld his judgment on the 24th February, 1937 (1). On the 4th March, 1937, the Court of King's Bench granted special leave to appeal to this Court.

The respondents now move to quash the appeal for want of jursidiction because these are proceedings for or upon a writ of prohibition arising out of a criminal charge which, under section 36 of the *Supreme Court Act,* are not appealable to this Court.

It must be noted that by section 41 of the Act, the highest court of final resort having jurisdiction in the province in which the proceeding was originated may grant special

(1) Q.R. 62 K.B. 268.

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Cannon J.

leave to appeal to this Court in any case "within section 36," i.e., except in criminal causes and in proceedings for or upon a writ of *habeas cropus, certiorari* or prohibition arising out of a criminal charge, etc. It was not disputed that these proceedings arose to stop the magistrate from hearing the criminal charge laid against the appellant. The learned counsel for the appellant contended, however, that the proceedings under the Code of Civil Procedure are not similar to the prohibition proceedings within the meaning of our section 36. This point seems to have been raised without success in *Gaynor & Greene* v. *United States of America* (1).

Article 1003 of the Code of Civil Procedure says:

The writ of prohibition lies whenever a court of inferior jurisdiction exceeds its jurisdiction.

It is applied for, obtained, contested and executed in the same manner as mandamus, and with the same formalities; and the writ of summons is directed to the court of inferior jurisdiction and to the party proceeding therein.

Under 993,

The writ of summons can issue only upon the authorization of a judge of the Superior Court, granted upon the presentation of a petition, supported by affidavit, affirming the truth of the facts set forth in the petition.

The writ issued in this case prohibits the court, the magistrate and the complainant from further proceeding, in order

que toutes les procédures prises contre la dite requérante sur la dite plainte et poursuivies en conformité avec la procédure criminelle, soient arrêtées et interrompues à toutes fins que de droit;

and it orders also that the record of the Magistrate's Court Court be transmitted to the Superior Court; but Arthur Larue alone is summoned to appear before the Superior Court to answer the petition. As far as the Magistrate's Court and the Magistrate himself are concerned, the writ contains nothing but a prohibition to proceed on a criminal charge and no summons to appear.

English authors and authorities have always been quoted, as far as my knowledge goes, in every reported prohibition case in the province of Quebec. See *inter alia: Bastien* v. *Amyot* (2); *Rossi* v. *Lacroix* (3); *Paris* v. *Couture* (4); *Vannier* v. *Meunier* (5).

(1) (1905) 36 Can. S.C.R. 247.
(2) (1905) Q.R. 15 K.B. 22.
(3) (1929) Q.R. 46 K.B. 405.
(4) (1884) 10 Q.L.R. 1.
(5) (1887) 15 Q.L.R. 210.

In *Rossi* v. *Lacroix* (1), the writ, by inadvertence, did not contain any prohibition and was simply an ordinary writ of summons to which was attached a copy of the original petition. The remarks of Mr. Justice Dorion in this case, at page 411, may be relevant:

Le code de procédure n'a pas créé le bref de prohibition. Il existait en vertu du droit commun. Il était, et il est encore, de la nature d'une ordonnance *nisi causa,* par lequelle il est enjoint à la partie de s'abstenir à moins que cause ne soit montrée tel jour. Cette formule, qui est la formule de toute ordonnance *nisi causa,* comporte un ordre exprès et un avertissement que celui à qui il est donné ne peut procéder qu'à ses risques et périls, et aux risques et périls de sa procédure. Le refus de s'y conformer le constitue en mépris de l'ordre donné.

Le code de procédure ne paraît pas avoir rien changé à cela, et, précisément, l'objet de la demande préalable à l'obtention du bref est de permettre au requérant de faire accompagner le bref d'un ordre de sursis. Le vrai bref de prohibition, c'est le bref péremptoire.

The point raised by the appellant cannot prevail.

Although the Court of King's Bench granted special leave to appeal in this case, we must not forget that they could do so validly only in cases within section 36 of the *Supreme Court Act* by which the granting or refusal of prohibition in criminal cases is expressly excluded from our appellate jurisdiction.

We are clearly of opinion that special leave should have been refused for want of jurisdiction to grant it and that the motion to quash the appeal must be granted with costs against the appellant.

Motion granted with costs.

ROBERT H. BAIRD .....APPELLANT;

AND

DISTRICT REGISTRAR OF TITLES....RESPONDENT.

1937
* Oct. 5.
* Dec. 15.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Companies—Seal—Duplicate or facsimile seal affixed in Vancouver by Quebec company—Deed—Registration refused—Powers of company as granted by incorporating statutes.

A deed, purporting to be a conveyance of land by the Montreal Trust Company (its head office and its seal being both in Montreal) as grantor to the appellant as grantee, was refused registration on the ground that it was executed in Vancouver and a duplicate or facsimile seal affixed thereto. Upon a petition under section 230 of

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

(1) (1929) Q.R. 46 K.B. 405.

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chapter 127 of R.S.B.C., 1924, the trial judge upheld the registrar on the ground that a company can have only one seal, i.e., its common seal, unless enabled thereto by statutory authority. On appeal, the judgment was affirmed on equal division of the appellate court.

Held, that the appeal should be allowed and that there should be judgment directing the registrar to proceed with the registration of the deed under the appellant's application.—In virtue of the enactments of the Quebec statute incorporating the Montreal Trust Company and the amending statutes, it was within the powers of the directors of the company to authorize the sealing of instruments on behalf of the company in this form, by employing a stamp usually kept at the head office or by employing a stamp or stamps kept at branch offices; and this power in virtue of the above enactments could be delegated to an executive committee.

Judgment of the Court of Appeal ([1937] 3 W.W.R. 13) reversed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming on equal division of the court the judgment of Robertson J. and dismissing the appellant's application by way of petition under section 230 of the *Land Registry Act*, R.S.B.C., 1924, c. 127, for a declaration that a certain conveyance in fee, made by the Montreal Trust Company as grantor to the appellant as grantee, was properly executed and for an order directing the Registrar of the Vancouver Land Registration District to proceed with the registration of the said conveyance under the application to him which he had rejected. On November 17, 1937, an application to this Court by the appellant in order to add the Montreal Trust Company as respondent was granted, costs reserved.

W. F. Chipman K.C. for the appellant.

Ls. St-Laurent K.C. for the respondent.

The judgment of the Court was delivered by

DUFF C.J.—The application of the appellant for registration of a certain conveyance in fee of the 30th of June, 1936, purporting to be made by the Montreal Trust Company as grantor to the appellant as grantee, was rejected by the Registrar at Vancouver for reasons in writing given by him and expressed in these words:

This application is summarily rejected on the ground that it is apparent on the face of the document submitted that the same was executed in Vancouver and a duplicate or facsimile seal affixed thereto (the head office of the Montreal Trust Company and the seal of the said

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company being both in Montreal). In fact, solicitor for applicant admits that this is so, claiming that a company can have as many seals as it wishes. In my opinion a company can have only one seal, i.e., its common seal, unless enabled thereto by statutory authority.

The appellant accordingly presented a petition under section 230 of chapter 127, R.S.B.C., 1924, praying a declaration that the conveyance was properly executed and an order directing the Registrar to proceed with the registration of it. This application was dismissed.

On appeal to the Court of Appeal (1) the appellant failed by reason of an equal division, two of the learned judges of that court thinking the appeal should be allowed, and two agreeing with Mr. Justice Robertson.

The question to be determined on this appeal is whether or not the instrument in question was competently executed on behalf of the Montreal Trust Company.

The Montreal Trust Company was incorporated by a statute of the province of Quebec (52 Vict., c. 72). By this statute certain general provisions of the statutory company law of that province are made applicable to the company. By one of these (now section 164 of chapter 223, R.S.Q., 1925):

1. The directors may administer the affairs of the company in all things, and may make or cause to be made for it in its name any kind of contract which it may lawfully enter into.

2. They may make by-laws not contrary to law nor to the charter of the company, for the following purposes:—

(*d*) the appointment, functions, duties and removal of all agents, officers and servants of the company, the security to be given by them to the company and their remuneration;

(*g*) the conduct in all other particulars of the affairs of the company.

By section 9 of the special statute, as amended by (1900) 63 Vict., ch. 77, section 5,

The principal place of business of the company shall be at the city of Montreal, but the company may establish branch offices in other places.

And by section 9 (*a*) of 20 Geo. V, ch. 139,

The affairs of the company shall be managed by a board of not less than five directors and the directors of the company may, from time to time, by by-law, increase or decrease to not less than five the number of its directors.

The directors may, from time to time, by by-law, delegate such of their powers as they see fit to an executive committee consisting of not less than three members of the board.

In virtue of a provision of the *Interpretation Act* in the Consolidated Statutes of Canada ((1859), c. 5, s. 6 (24)),

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which is still in force in Quebec, the Montreal Trust Company is expressly empowered to have a common seal; and there are enactments in the statutes amending the Trust Company's special Act which, obviously, proceed upon the assumption that this is so, and which, indeed, could not be put into effect without the use of a common seal of the company. There is nothing in any of these statutory provisions touching the form of the seal.

One of the by-laws of the company provides that the seal of the company shall be in the form, "Montreal Trust Company, Incorporated 1889."

We think it was clearly within the powers of the directors, as defined by the relevant statutes, to authorize the sealing of instruments on behalf of the company in this form, by employing a stamp usually kept at the head office, or by employing a stamp or stamps kept at branch offices; and that this power, in virtue of the enactment quoted above, could be delegated to the executive committee.

By a by-law, number 9, passed on April 10, 1930, it was provided,

> All the powers and authority of the board of directors are delegated to the executive committee and shall be exercised by it when the board is not in session.

By the company's by-law number 12, the following regulation came into force:

> Any director of the company, together with any one of the following officers of the company, to wit: the general manager, an assistant general manager, a manager, the secretary or an assistant secretary, may exercise all such powers and do all such acts and things as the company itself is authorized to exercise and do, including the management, administration and transaction of all the affairs and business of the company; and for greater certainty, but without limiting the generality of the foregoing, may exercise the following powers:—
>
> To sell, alienate . . . all kinds of property, whether moveable or immoveable, real or personal . . . :
>
> and to sign and execute . . . all such deeds, documents and such instruments as such directors and officers of the company may deem necessary or expedient, all of which deeds, documents and other instruments shall be valid and binding upon the company without further authorization, the whole with full powers of substitution either generally or for specific instances, all such powers may also be exercised and all such deeds, documents and other instruments may also be signed by such other person or persons either alone or otherwise as the board of directors or the executive committee of the company may from time to time by resolution authorize. The seal of the company, when required, may be affixed to all such deeds, documents and other instruments so signed or executed.

Then, by resolution of the 23rd of August, 1935, the executive committee resolved as follows:

> It was resolved that Messrs. R. H. Baird, A. T. Lowe, F. J. Lynn and A. J. Ross, officers of the Royal Bank of Canada, Vancouver, or any one of them, be authorized to sign as an authorized signing officer where the signature of the president, vice-president or a director is required under by-law no. 12 and they are hereby authorized to sign with Robert Bone, manager of the Vancouver office, or Frank N. Hirst, assistant secretary, and all documents so executed shall be binding upon the company without any further authorization. The seal of the company may be affixed to the document so executed.

We think the executive committee was acting within the scope of its authority in passing this resolution, and that the persons named became possessed of the powers which the resolution purports to vest in them. With respect, we are unable to concur in the view, upon which Mr. Justice Robertson acted, that the last sentence contemplates exclusively the seal of the company which is kept in the head office at Montreal and designates exclusively an impression created by that seal. We think such an interpretation of the resolution is unnecessarily narrow; and that, properly read, the resolution contemplates an impression in the form prescribed by the by-law made by any stamp used by agents thereunto properly authorized on behalf of the company.

The instrument is, *prima facie,* the instrument of the company, and there is nothing in the material brought to the notice of this Court or of the British Columbia courts justifying a judicial conclusion that the deed is invalid.

The appeal will, therefore, be allowed and there will be judgment directing the Registrar to proceed with the registration under the appellant's application.

As to costs, the appellants shall have their costs of the appeal to this Court. There will be no costs of the application in this Court to add the Trust Company as a party.

Appeal allowed with costs.

Solicitor for the appellant: *Knox Walkem.*

Solicitor for the respondent: *H. Alan Maclean.*

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*Nov. 22.

JESSIE WHITE AND JAMES WHITE (DEFENDANTS) ..... } APPLICANTS;

AND

THELMA McQUILLEN AND WINSTON McQUILLEN (PLAINTIFFS)... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Appeal—Leave to appeal—Jurisdiction—Amount in controversy—Supreme Court Act, R.S.C., 1927, c. 35, s. 41, par. (f).

In an action by the occupants of a motor-car to recover against the defendants, owner and driver respectively of another motor-car, for damages caused by a motor-car accident, the Court of Appeal for Ontario gave judgment that plaintiff A recover against the defendants $450 and that plaintiff B recover against the defendants $750. On motion by defendants for special leave (refused by the Court of Appeal) to appeal to this Court—

Held: Motion dismissed, as not competent under the *Supreme Court Act* (R.S.C., 1927, c. 35), s. 41, par. (*f*) (providing for leave to appeal "in cases * * * in which the amount or value of the matter in controversy in the appeal will exceed the sum of $1,000").

Motion on behalf of the defendants for special leave to appeal to this Court from the judgment of the Court of Appeal for Ontario (1).

The action was to recover for damages suffered by the plaintiffs by the wrecking of the motor-car owned and driven by the plaintiff Winston McQuillen, in which his co-plaintiff was a passenger, and incurred, so plaintiffs alleged, in an effort to avoid a collision with the motor-car owned by the defendant James White and driven (negligently, so plaintiffs alleged) by the defendant Jessie White. In the statement of claim the plaintiff Winston McQuillen claimed $742.59 damages and his co-plaintiff claimed $3,000 damages.

The trial judge, McEvoy J., dismissed the action with costs. He endorsed on the record: "Should I be wrong and it is held the plaintiffs are entitled to damages, would assess damages to plaintiff Winston McQuillen at $450 and to Thelma McQuillen at $750." No fault was found with this assessment.

*PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

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The plaintiffs appealed to the Court of Appeal for Ontario. That court (Masten J.A. dissenting) allowed the appeal with costs and directed that judgment be entered in favour of the plaintiff Winston McQuillen for $450, and in favour of the plaintiff Thelma McQuillen for $750, with the costs of the action. The formal judgment vacated and set aside the judgment of McEvoy J. and ordered and adjudged "that the plaintiff Winston McQuillen do recover against the defendants the sum of $450 and that the plaintiff Thelma McQuillen do recover against the defendants the sum of $750," together with costs of the appeal and of the action.

Special leave to defendants to appeal was refused by the Court of Appeal. Defendants applied to the Supreme Court of Canada for special leave to appeal.

J. R. Cartwright K.C. for the motion.

G. A. Drew K.C. contra.

A preliminary objection as to jurisdiction to entertain the motion was taken on behalf of the respondents, on the ground that there was no case before the Court in which "the amount or value of the matter in controversy in the appeal will exceed the sum of $1,000" within par. (*f*) of s. 41 of the *Supreme Court Act* (R.S.C., 1927, c. 35).

After hearing argument of counsel for the motion, the Court, after consideration, gave judgment orally dismissing the motion, on the ground that it was not competent by reason of said par. (*f*) of s. 41.

Motion dismissed with costs.

Solicitors for the applicants: *Smith, Rae, Greer & Cartwright.*

Solicitor for the respondents: *J. L. Sheard.*

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* Oct. 18, 19.
* Dec. 1.

GEORGES ROY .....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

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

Criminal law—Offence of stealing a "post letter" from a "post office"—Meaning—Construction—Provincial "parliamentary post office"—Criminal Code, sections 6 and 324—Post Office Act, R.S.C., 1927, c. 161, ss. 2 (h, j, l), 4, 7, 35, 39, 101—Criminal Code, section 364.

The appellant was charged, under section 364 of the Criminal Code, with having stolen "une lettre dans le bureau de poste du Parlement" in the city of Quebec. He was found guilty and the conviction was affirmed by a majority of the appellate court. The appeal in this Court was as to the proper construction of section 364 of the Criminal Code.

Held, Duff C.J. and Davis J. dissenting, that the appeal should be allowed and the conviction quashed.

Per Cannon J.—The control and responsibility of the Dominion post office authorities over the stolen letter ceased from the moment that it was delivered in the main post office to the representative of the provincial authorities.—In law, the letter was abstracted *after* it had been delivered to the duly constituted agents of the provincial authorities and it had passed out of the control of the Dominion post office: the abstraction took place when it was no more a "post letter" or "lettre confiée à la poste."

Per Crocket J.—The parliamentary post office (bureau de poste du Parlement) was not a "bureau de poste" within the meaning of section 364 of the Criminal Code; and, also, the stolen letter was not a "lettre confiée à la poste" at the time of the theft in the sense of that expression as given in section 2 of the *Post Office Act.* The letter at that time was neither in a "post office" nor "being carried through the post," the Post Office Department's control and responsibility of and for it having ceased upon its delivery at the so-called "bureau de poste" which was officered and operated by appointees of the Provincial Government entirely at the latter's expense and over which neither the Quebec city post office nor the Post Office Department of Canada had any control.

Per Kerwin J.—The parliamentary post office was not a "post office" within the meaning of section 2 (*l*) of the *Post Office Act.* A "post office" means any building * * * where any letter which may be sent by post is received * * * ; and it cannot have been intended that any letter which may be sent by post is *in* a post office unless it is *in* a building * * * which is under the control of the Postmaster-General as part of the postal service of Canada. Upon the evidence, the quarters in the Legislative Assembly building in Quebec, set aside by the provincial authorities cannot be said to be part of the postal service of Canada, even though what was done was by the consent or authority of the Postmaster-General.

* PRESENT:—Duff C.J. and Cannon, Crocket, Davis and Kerwin JJ.

Per Duff C.J. and Davis J. (dissenting).—Upon the evidence and in view of the findings of the trial judge, the officials of the Parliamentary Post Office, in all their activities, in undertaking to receive, collect send or deliver letters and in receiving, collecting sending, delivering letters and having in possession letters for the purpose of so conveying and delivering them, were acting under the authority of the Postmaster-General. The Parliamentary Post Office was a post office established by the Postmaster-General in exercise of his powers (section 7) under the *Post Office Act*, and, therefore, a post office within the contemplation of section 364 of the Criminal Code. Accordingly, the letter in question in this case had not ceased to be a "post letter" within the meaning of that section when it was abstracted by the appellant.

APPEAL by the accused from the judgment of the Court of King's Bench, appeal side, province of Quebec, dismissing his appeal, by a majority of the Court, from his conviction by J. H. Fortier J. after a summary trial for having stolen a "post letter" from a "post office" contrary to the provisions of section 364 of the Criminal Code.

F. Choquette K.C. for the appellant.

A. Rivard K.C. for the respondent.

The judgment of Duff C.J. and Davis J. (dissenting) was delivered by

DUFF C.J.—This appeal raises a question as to the scope of section 364 of the Criminal Code under which it is an offence to steal a "post letter" from a "post office." The definition of "post office" in the *Post Office Act* is a very broad one and comprises (*inter alia*) under that term all places where "mailable matter" is "received or distributed, sorted, put up in packets or despatched."

The appellant was charged with having stolen a "post letter" from the post office, which is generally referred to in the record under the designation "the Parliamentary Post Office." He was found guilty. An appeal was taken to the Court of King's Bench on various grounds. Only two of them will require discussion; first, that, "on the evidence," the Legislative Post Office is not a "post office" within the meaning of section 364 of the Criminal Code; and, second, that the letter stolen was not a "post letter" within the meaning of that section.

These questions, in my conception of the evidence and of the findings of the trial judge, are, I am disposed to think,

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questions of mixed fact and law rather than of law; and, moreover, I am disposed to think that in substance the grounds of dissent in the Court of King's Bench are matters of mixed law and fact rather than matters of law. Since, however, I am satisfied that the appeal should be dismissed on the merits, I shall not further discuss the point of jurisdiction.

By section 6 of the Criminal Code:

> In every case in which the offence dealt with in this Act relates to the subject treated of in any other Act the words and expressions used herein in respect to such offence shall have the meaning assigned to them in such other Act.

and before proceeding to the facts, it is convenient first of all to quote the precise terms of the definition of "post office" contained in the *Post Office Act*. That definition is as follows:

> 2 (1) "post office" means any building, room, post office, railway car, street letter box, street stamp-vending box, receiving box or other receptacle or place where post letters or other mailable matter are received or delivered, sorted, made up or despatched.

By section 7 of the Act, the Postmaster-General has authority to,

> "(*a*) establish and close post offices and post routes."

Since there is nothing in the context which "otherwise requires," it follows that "post office" here has the meaning ascribed to the phrase in section 2 (1); and, in consequence, the Postmaster-General has authority under section 7 to establish a post office for providing any one or more of the services mentioned in this definition.

By section 35,

> Subject to the provisions and regulations aforesaid, and the exceptions hereinafter made, the Postmaster-General shall have the sole and exclusive privilege of conveying, receiving, collecting, sending and delivering letters within Canada.

Our attention has not been called to anything in the "provisions and regulations aforesaid" which qualifies the application of this section in its bearing on this appeal. There is another section which ought not to be overlooked. Section 101 is in these words:

> Every person who without the authority of the Postmaster-General, the proof of which authority shall rest on such person, places or permits or causes to be placed or to remain on his house or premises, the words *Post Office*, or any other words or mark which imply or give reasonable cause to believe that such house or premises is a post office or a place for the receipt of letters, shall, on summary conviction, incur a penalty not exceeding ten dollars for each offence.

2. Any person who, otherwise than in conformity with this Act, collects, sends, conveys or delivers, or undertakes to collect, send, convey or deliver any letter within Canada, or receives or has in his possession within Canada any letter for the purpose of so conveying or delivering it, shall, for each and every letter so unlawfully collected, sent, conveyed or delivered, or undertaken so to be, or found in his possession, incur a penalty not exceeding twenty dollars.

The learned trial judge had before him a letter addressed by the Deputy Postmaster-General to the Postmaster at Quebec, who appears to have filled the role of Post Office Inspector for the city of Quebec, dated the 12th of March, 1919. That letter was written in response to a request made by the Legislative Assembly of Quebec "for the installation of a House of Assembly Post Office" and authorized the inauguration of such a post office, which I shall refer to hereafter as the Parliamentary Post Office. There were departmental memoranda, apparently, indicating the character of the office to be established which are not in evidence, but the letter, coupled with the facts found by the trial judge, determines with sufficient accuracy for our present purposes the character of it.

As to outgoing mail, the letter states:

Letters and other matter prepaid by postage stamps would be stamped and "primary" sorted in the Legislative Assembly Post Office. This mail would be sent in "lock" bags to the Quebec Post Office, where it would be carefully looked over before being distributed for despatch * * * All mail for despatch originating with any of the Provincial Departments should be deposited in the Legislative Assembly Post Office.

As to incoming mail,

A duly authorized messenger representing all the Legislative Assembly Departments would call at the Quebec Post Office and sign for all registered mail for all the Departments, which he would deliver as instructed to the several Departments located in the Legislative Assembly building. The lock bag containing the ordinary mail would be sent to the Legislative Assembly Post Office, where it would be distributed and messengers from the various branches call at that post office for the mail.

* * *

Mails would be conveyed as often as required by a courier with horse drawn vehicle, whose services would be paid for by the Legislative Assembly.

Again,

* * * the Legislative Assembly Post Office would be a self-contained operating institution governed by the rules and regulations of the Post Office Department of Canada.

Now, this letter makes it quite clear that this Parliamentary Post Office was established at the request of the Legislative Assembly for the convenience of the Legislative Assembly and the Government departments housed

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in the same building and their employees; and that the intention of the letter is to give the authority of the Postmaster-General to the establishment of such an office, where mail would be received from the Quebec Post Office in one of the Departmental sacks; that such sacks would be opened at the Parliamentary Post Office and the mail contained therein distributed in the usual way to be called for and delivered to persons to whom the mail might be addressed or to messengers of the Departments. It was also contemplated that mailable matter prepaid by postage stamps would be received and stamped with an official stamp of the usual character and provisionally sorted in the Post Office and sent forward in an official bag to the Quebec Post Office. It was contemplated, there can be no doubt, that this Parliamentary Post Office would be used by all the members and employees of the Legislature; as well as by the employees of the Departments. The effect of the letter beyond doubt is to authorize the use of legends indicating where mail would be received as such; where letters, for example, properly stamped, would be collected and dealt with as mail.

The learned trial judge has found as a fact that letters are registered in this Post Office; and it appears that, for a period which ended in 1935, Post Office orders were issued.

The Parliamentary Post Office was to be, as the letter states, under the control of an official designated as Postmaster and there is evidence to the effect that this official receives from the Postmaster of Quebec, who acts as inspector of the post offices in the city of Quebec, the circular communications addressed to postmasters generally and communications sent to him by the inspector are addressed to him as "The Postmaster of the Parliamentary Post Office." The letter of the Deputy Postmaster General, as we have seen, makes it quite plain that the office is to be governed by the rules and regulations of the Post Office Department.

It must have been fairly clear to anybody reading the *Post Office Act* that a "post office" operated in the manner contemplated would, in the absence of authority from the Postmaster-General, infringe the *Post Office Act;* and, on the evidence, the learned judge was entitled to start from the premise that the Parliamentary Post Office

was in fact established and operated under such authority. He has, indeed, found as a fact that the Postmaster of the central post office in Quebec gives instructions and governs and directs the administration of the Parliamentary Post Office and that this is done conformably to the control of this post office by the Postmaster-General and to the circumstance that it is subject to the departmental regulations.

I concur with the following observations of Mr. Justice St. Jacques:

L'établissement des bureaux de poste nécessaires au service des postes relève entièrement du Ministre, et l'on sait que les députés ministres sont particulièrement préposés à l'application des détails de la loi.

C'est dans l'exercice des pouvoirs qui sont confiés au ministère des Postes par les articles 35 et 39 de la loi que ce bureau particulier a été établi dans l'édifice du Gouvernement provincial.

Il est évident que le ministre des Postes, représenté par le sous-ministre, n'a pas voulu que ce bureau ait le caractère complet et absolu des bureaux de poste ordinaires qui sont établis un peu partout dans les cités, suivant les besoins du service des Postes. On a voulu que ce bureau soit simplement un "clearing-house" où seraient transportées par un messager dûment autorisé par le Gouvernement provincial toutes les lettres adressées aux divers services du Gouvernement provincial et qui sont reçues au bureau de poste principal établi dans la cité de Québec, sur la rue Buade.

Il est prévu à ce document, émis par le sous-ministre des Postes en 1919, que le sac fermé contenant le courrier ordinaire serait envoyé au bureau de poste de l'Assemblée Législative où les lettres seraient distribuées, et les messagers des différents services du Gouvernement Provincial pourraient recevoir à ce bureau les lettres qui y parviennent.

Il faut retenir de ce document la phrase suivante:

"In brief, the Legislative Assembly Post Office would be a self-contained operating institution governed by the rules and regulations of the Post Office Department of Canada."

Il est évident que des bureaux semblables existent dans d'autres parties du pays, puisque le sous-ministre dit:

"The office would not be a postal station, but a clearing house, similar to that conducted by the Federal Parliament and applicable to the various Legislative Assemblies."

Jusqu'à 1935, le ministère des Postes permettait aux employés de ce bureau d'émettre des mandats et des bons de poste, tout comme on le fait dans les bureaux de poste réguliers. Ce privilège a été supprimé par le ministère des Postes en 1935.

La recommandation des lettres peut se faire au "bureau de poste du Parlement" qui perçoit le coût de cette recommandation.

Il importe peu, me semble-t-il, que les employés qui travaillent dans ce bureau de poste soient engagés et payés par le Gouvernement provincial. C'est à cette condition que le ministère des Postes a consenti à l'établissement dans l'édifice du Gouvernement provincial d'un tel bureau.

Ce bureau est-il régulier ou non, au sens absolu de la loi? Ce n'en est pas moins un bureau de poste où l'on reçoit des lettres qui ont été

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confiées à la poste et où l'on reçoit également des lettres pour être confiées à la poste.

There was evidence, I repeat, before the trial judge from which he might not improperly conclude that the officials of the Parliamentary Post Office, the postmaster and others, in all their activities, in undertaking to receive, collect, send or deliver letters and in receiving, collecting, sending, delivering letters and having in possession letters for the purpose of so conveying and delivering them, were acting under the authority of the Postmaster-General; and I think Mr. Justice St. Jacques is on solid ground in holding that, in view of the evidence and of the findings of the trial judge, the Parliamentary Post Office was a post office established by the Postmaster-General in exercise of his powers under the *Post Office Act* and, therefore, a post office within the contemplation of section 364 of the Criminal Code. It is a post office within the scope, as I think, of section 7 and constituted as such by the authority of the Postmaster-General. Such being the case, it follows necessarily in my view that the letter in question had not ceased to be a "post letter" within the meaning of section 364 when it was abstracted by the appellant. Admittedly, it was in the Parliamentary Post Office among a number of other letters in process of being distributed when the abstraction occurred.

It was contended before us on behalf of the appellant that the delivery of the post bag to the courier whose duty it was to take the bag from the Quebec Post Office to the Parliamentary Post Office was a delivery to the person to whom the letter was addressed. The dissenting judges in the court below appear to have taken the view that the latter was not delivered until it reached the Parliamentary Post Office. The trial judge was entitled to find, however, as a fact, and in effect did so find, that the courier was acting under the authority of the Postmaster-General in carrying an official bag from one post office to another post office and that there was no delivery to the addressee.

The appeal should be dismissed.

CANNON J.—In his factum, the respondent states the point to be decided by us as follows:

The Court of King's Bench did not come to the same understanding upon the words "post letter." Whilst the majority asserted that the

letter, at the time of its withdrawal by the appellant, was still "in transit," the dissentient minority claimed that at that time it was already in the hands of he to whom it was addressed, or at least that it should be considered so.

Thus this is the disputable point, at the time of the theft, which is not doubted, was the above described letter still, yes or no, a "post letter" in the meaning of the law?

Under the provisions of the Act respecting the postal service, R.S.C., c. 161, section 2, par. (*j*),

"*Post letter*" means *any letter transmitted* by the post or delivered through the post, or deposited in any post office, or in any letter box put up anywhere under the authority of the Postmaster-General, whether such letter is addressed to a real or a fictitious person or not, and whether it is intended for transmission by the post or delivery through the post or not; and *a letter shall be deemed a post letter from the time of its being so deposited to the time of its being delivered to the person to whom it is addressed,* or so long as it remains in the post office or in any such letter box or is being carried through the post; and a delivery to any person authorized by the Postmaster-General to receive letters for the post shall be deemed a delivery at the post office, and a delivery of any letter or other mailable matter at the house or office of the person to whom the letter is addressed, or to *him, or to his servant,* or *agent,* or *other person considered to be authorized to receive the letter or other mailable matter, according to the usual manner of delivering that person's letters,* shall be a *delivery to the person addressed.*"

Exhibit P2 concerning the organization of the post office at the Parliament contains the following about the delivery of the mail addressed to the Parliament Buildings:

Mails will be conveyed as often as required by a courier with horse drawn vehicle, whose services would be paid for by the Legislative Assembly.

* * *

The Legislative Assembly Post Office would be conducted without any expense whatever to the Post Office Department of Canada, and there would be no account for the purchase of stamps in view of the fact that stamps would be purchased as hereinbefore mentioned.

In brief, the Legislative Assembly Post Office would be a self-contained operating institution governed by the rules and regulations of the Post Office Department of Canada. It would be operated and officered *by clerks appointed by authority of the Legislative Assembly,* who would obtain supplies of postage stamps from the City post office and postal stations, or from stamp vendors or sub-offices of their own choosing, *conveying the mail bags both ways between the Quebec Post Office and the Legislative Assembly, without expense to the Post Office Department of Canada in any way.*

An office of this nature would not be recognized as a regular post office, being simply a clearing house, as the Department could not undertake to establish either a sub-office or a regular office in a separate institution such as Provincial Government building, as all post offices have to be for the service of the general public, and under the *direct control* of the Department. Letters and other matter prepaid by postage stamps would be stamped and "primary" sorted in the Legislative

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Assembly Post Office. This mail would be sent in "lock" bags to the Quebec Post Office, where it would be carefully looked over before being distributed for despatch.

A *fully authorized messenger* representing all the Legislative Assembly Departments would call at the Quebec Post Office and *sign for all registered mail for all the Departments* which he would deliver as instructed to the several departments located in the Legislative Assembly Building. The lock bag *containing the ordinary mail would be sent to the Legislative Assembly Post Office,* where it would be distributed and messengers from the various branches call at that post office for the mail.

Exhibit D1 contains the regulation as to the distribution of correspondence:

Art. 246. Distribution des correspondances.

La responsabilité du ministère au sujet d'un objet quelconque de correspondance cesse lorsque la distribution en a été effectuée, soit au destinaire, *soit à une personne dûment autorisée à recevoir sa correspondance,* ou à une personne aux soins de qui cet objet était adressé, et le ministère ne peut entreprendre de faire des recherches relativement au traitement dudit objet lorsqu'il en a disposé régulièrement.

Now, as to what happened to the letter addressed to J. P. Bergeron, we have the evidence of the postmaster, J. B. L. Morin, who is the Federal official in charge of the main post office and of all the stations within the city of Quebec. Here is what he says:

Q. Maintenant, M. Morin, voulez-vous dire à quel endroit se fait la délivrance des lettres destinées au Parlement de Québec?

R. Nous livrons la malle au représentant officiel du Parlement provincial, qui vient quatre fois par jour chercher la malle au bureau de poste de Québec.

Q. A quel endroit?

R. *A l'intérieur du bureau.*

Q. De votre bureau de poste à vous?

R. Au bureau chef, à l'intérieur du bureau.

Q. A la rue Buade?

R. A la rue Buade, au même endroit que toutes les autres malles. C'est remis par le département de l'expédition.

Q. C'est là que vous faites votre délivrance?

R. Oui.

La Cour:

Q. Au bureau central?

R. Au bureau central, M. le Juge.

Me Choquette C.R.

Q. Et une fois que cette délivrance est faite par votre bureau de poste aux employés du gouvernement provincial, avez-vous encore un contrôl sur ces lettres, sur cette malle et ces courriers?

R. Non. Nous n'avons *aucun contrôle,* mais nous coopérons avec le . . .

Q. Avez-vous des employés qui travaillent au Parlement, du ministère des postes?

R. Aucun.

* * *

La Cour:

Q. On vous demande si, parce que cela n'est pas compris dans la liste, vous pensez, vous êtes sous l'impression que ce n'est pas un bureau de poste?

R. Je suis de l'opinion que ce n'est pas un bureau de poste officiel.

* * *

Q. Où est-ce que cette lettre-là a été délivrée par les autorités postales?

R. Dans leur *paquet de malle* destiné au Parlement Provincial.

Q. A quel endroit l'avez-vous délivrée?

R. On l'a délivrée ici, au bureau de poste de Québec.

Q. Et vous l'avez délivrée à qui?

R. * * * A leur employé autorisé là * * *

Q. Leur employé? quel employé?

R. L'employé des * * * du parlement provincial.

Q. Par des employés des postes que vous avez délivré ça?

R. Bien * * * l'employé autorisé à venir chercher la malle.

Q. Avez-vous livré ça à des employés du Ministère des Postes, c'est ça que je vous demande?

Me Dorion C.R.,

Du Ministère Fédéral des postes?

Me Choquette C.R.,

Du Ministère fédéral des postes, Oui?

Du Ministère fédéral des postes, non.

It would, therefore, appear that delivery took place and was completed, as contemplated by Dr. Coulter's letter within the central post office when the duly authorized messenger took out the parcel of letters addressed to the Parliament Building. The dissenting judges, however, seem to have reached the opinion that delivery took place only after it reached Parliament and that it was still under the control of the Dominion authorities between the main post office and the Parliament Building. This does not agree, in my opinion, with the facts as they appear by the evidence of Morin, the only person who really knows about the exact relationship in actual practice between the Dominion Postal Service and the Parliament distribution office. I would say that the control and responsibility of the Dominion post office authorities on this particular letter ceased from the moment that it was delivered in the main post office to the representative of the provincial authorities. Although my views do not agree fully with the dissenting judges in appeal, as to the time and place where delivery took place, I agree with them on the construction of the statutory definition of "post letter." For slightly different reasons, the same conclusion is reached, to wit: in law, the letter was abstracted *after* it had been delivered

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to the duly constituted agents of the provincial authorities and it had passed out of the control of the Dominion Post Office; the abstraction took place when it was no more a "post letter," or "lettre confiée à la poste."

I am of opinion that the conviction should be quashed and the appeal allowed.

CROCKET J.—This is an appeal under s. 1023 of the Criminal Code from a majority judgment of the Court of King's Bench of the province of Quebec affirming a conviction made against the appellant in the Court of Sessions of the Peace for the theft of a letter containing money "dans le bureau de poste du Parlement" in the city of Quebec contrary to the provisions of s. 364 of the Criminal Code. Dorion and Galipeault JJ. were the dissenting judges.

When the appeal came on for hearing in this court Mr. Rivard for the Crown in pursuance of notice objected to the court's jurisdiction to entertain it on the ground that the dissent in the court below was not on a question of law as provided by s. 1023 of the Criminal Code, and moved to quash the appeal for that reason. As this objection appeared to involve a consideration of the grounds of the appeal itself, the learned Chief Justice suggested that it would be more convenient to allow the appeal to proceed and hear counsel on the merits as well as on the jurisdictional objection. The motion to quash and the appeal itself were, therefore, argued together.

As to the motion to quash, Mr. Rivard contended that the record of the dissent appearing in the entry of the formal judgment of the court, under the provisions of s. 1013 of the Criminal Code, shewed on its face that it was a dissent on a question of fact or on a question of mixed law and fact.

This entry stated that Judges Dorion and Galipeault dissented, holding that the charge of theft of a post letter is not proven, and that the evidence only discloses theft of a sum of $1.50, entailing a maximum penalty of six months.

While it may very well be said, if one looks only at the statement "that the charge of theft of a post letter is not proven," that it may indicate a dissent upon a pure question of fact or a mixed question of law and fact, the

words which immediately follow would seem to me to shew that the real basis of the dissent was that the theft which the evidence disclosed as having been committed by the defendant was not the theft of a post letter within the meaning of s. 364 of the Criminal Code, for which he would be liable to a minimum penalty of three years under the provisions of that section.

However this may be, there seems to be no doubt that this court will look at the notes or written reasons of dissenting judges, and whenever necessary at the notes or reasons of the majority judges or any other portion of the record to ascertain the real grounds upon which any dissent is based, if the formal judgment of the court omits to state these grounds specifically or fails to make them clear.

An examination of the written reasons for both the majority and the dissenting judgments in the present case makes it quite clear, as I read them, that the only question considered in the court below was whether upon the undisputed facts disclosed by the evidence the Bureau de Poste du Parlement, where the letter was stolen, was a "bureau de poste" or the letter the appellant was charged with stealing there a "lettre confiée à la poste" within the meaning of s. 364 of the French version of the Criminal Code or s. 2 (the interpretation section) of the Canada *Post Office Act*.

St. Jacques J., who, having been deputed by the court for the purpose, signed the formal judgment containing the ground of dissent as above stated, sets out in his own notes four grounds on which the appeal was heard. All these he describes as "motifs de droit," and states that the facts are not in dispute. After pointing out, as to the first two grounds relied on by the appellant, viz.: (1) The Bureau de Poste du Parlement was not upon the evidence "un bureau de poste au sens de la loi," (2) The letter the appellant was charged with having stolen was not upon the evidence "une lettre 'confiée à la poste' au sens de la loi," that they were in effect one and the same, His Lordship said that there was, therefore, only one point to be decided on the appeal, i.e., "au sujet du sens qu'il faut donner, au regard de la loi, aux mots lettre confiée à la poste." He held, not only that the stolen letter fell within the definition of a "lettre confiée à la poste" given

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in the interpretation section of the Canada *Post Office Act* because it had been posted the previous day in the Quebec City Post Office and was stolen before it had reached the addressee or other person authorized to receive it for him, but also that the "Bureau de Poste du Parlement," though not a regular post office, fell within the definition of "Bureau de poste" given in the same section of that Act as a place where "lettres confiées à la poste" are received.

Létourneau J., in his notes, confirmed the conviction for the reason that the bureau, where the letter was stolen, was a "bureau de poste" in the sense which the Canada *Post Office Act* gives to these words since that office was undoubtedly a place where "lettres confiées à la poste" or other mailable matter were distributed, sorted, etc., within the meaning of that statute.

Walsh J. concurred with the latter and the accused's appeal was, therefore, dismissed for the reasons indicated.

Dorion and Galipeault JJ. dissented from these conclusions of the majority judges on the ground that the accused stole the letter in a place which was not a "bureau de poste" and the letter not a "lettre confiée à la poste," within the meaning of the definition of these expressions given in s. 2 of the Canada *Post Office Act,* for the reason that upon the undisputed facts as disclosed by the evidence, the so-called Parliament post office was officered and operated entirely by appointees of the Quebec Provincial Government, over whom the Post Office Department of Canada had no control, and that the letter in question, at the time it was stolen, had ceased under the provisions of s. 2 of the Canada *Post Office Act* to be a post letter within the meaning of that section.

Dorion J., in his notes, set out the provisions of the Canada *Post Office Act,* which define "bureau de poste" and "lettre confiée à la poste" as well as other provisions of that Act, and also discussed a letter from the Deputy Postmaster-General under date of March 12, 1919, addressed to the then Postmaster of Quebec city regarding the request of the Legislative Assembly for the installation of a post office in the Parliament Building. This letter set forth the conditions under which the proposed office should be instituted and the mail delivered from the Quebec city

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Post Office. Among the conditions stated were: the proposed office would be a self-contained operating institution governed by the rules and regulations of the Post Office Department of Canada; that it would be operated and officered by clerks appointed by authority of the Legislative Assembly, who would obtain supplies of postage stamps from the city post office and postal stations, etc., conveying the mail bags both ways between the Quebec city Post Office and the Legislative Assembly without expense to the Post Office Department of Canada in any way. The letter stated that an office of this nature would not be recognized as a regular post office, being simply a clearing house, as the Department could not undertake to establish either a sub-office or a regular office in a separate institution such as a Provincial Government building, as all post offices have to be for the general service of the public and under the direct control of the Department. It was also stated that a duly authorized messenger representing all the Legislative Assembly departments would call at the Quebec city Post Office and sign for all registered mail for all the departments, which he would deliver as instructed to the several departments located in the Legislative Assembly building; that the locked bag containing the ordinary mail would be sent to the Legislative Assembly post office where it would be distributed and messengers from the various branches call at that post office for the mail.

It is evident, therefore, that all the judges, who heard the appeal in the Court of King's Bench, treated the problem before them, viz.: whether the accused was properly convicted of the offence with which he was charged under s. 364 of the Criminal Code, as one which involved a question or questions of law only inasmuch as all the facts relating thereto were established by undisputed and undisputable evidence.

In my opinion they were right in doing so. No question was involved on the appeal as to the weight or appreciation of evidence by inference or otherwise as in *Gauthier* v. *The King* (1), where it was held by this court, assuming that the question whether there was any evidence to support a conviction should be deemed a question of law, the

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question whether the proper inference has been drawn by the trial judge from facts established in evidence is really not a question of law, but purely a question of fact for consideration. The conviction of the appellant for the theft with which he was charged under s. 364 of the Criminal Code admittedly could not properly have been made if the Bureau de Poste du Parlement was not a "bureau de poste" within the meaning of that section of the Code and of the interpretation section of the Canada *Post Office Act,* or if the letter he was charged with stealing, at the time of the theft, was not a "lettre confiée à la poste" within the meaning of those statutory provisions, no matter what inferences may have been drawn from established facts as to the culpability of the appellant in respect of the commission of the theft of the letter itself. As to whether the place where the theft was in fact committed was or was not such a bureau de poste or the stolen letter such a letter depends entirely on the interpretation of the statutory provisions referred to. The letter of the Deputy Postmaster-General of March 12, 1919, was produced by the Crown on the trial as evidence of the conditions under which the Bureau de Poste du Parlement was instituted and was to be operated. As regards its meaning and effect upon the two vital issues involved in the appeal that also was for the decision of the trial court as a question of law. These two questions are manifestly in my judgment questions of law alone, and two of the judges of the Court of King's Bench having dissented from the majority judgment upon them, I am of opinion that the appellant has a right to a further appeal to this court under the provisions of s. 1023, and that the motion to quash the appeal should be dismissed.

As to the merits of the appeal it is apparent that s. 364 of the Criminal Code creates an offence which relates to the conduct of the postal service of Canada and that in virtue of the provisions of s. 6 of the Code the words "bureau de poste" and "lettre confiée à la poste" must be given the meaning assigned to them by s. 2 of the *Post Office Act,* c. 161, R.S.C., 1927. I am of opinion that the definition of "bureau de poste" given in par. (1) of that section as embodying "a place where post letters or other mailable matter are received or delivered, sorted, made up

or despatched" or, as the French version states it, "un lieu où les lettres confiées à la poste ou autres objets transmissibles sont reçus ou délivrés, distribués, triés, formés en paquets ou expédiés," must be taken as necessarily implying a bureau or place which is under the control and supervision of the Post Office Department of Canada. Otherwise any room or place in any large business establishment which manitains a staff for the receipt, classification, distribution, delivery or despatch of any letters brought to the establishment by its own employees or stamped and addressed for transit through the regular postal service would constitute a post office within the meaning of the *Post Office Act* and of s. 364 of the Criminal Code. I am of opinion also that the definition in the same section of the *Post Office Act* of the words "post letter," or, as it is in the French version, "lettre confiée à la poste" and the proviso that a letter shall be deemed a post letter from the time of its being deposited in any post office "to the time of its being delivered to the person to whom it is addressed, or so long as it remains in the post office or in any such letter box or is being carried through the post" shew that the intention was that no letter should be deemed a post letter within the meaning of the *Post Office Act* unless it be in the custody and control of some post office or branch of the postal service, which is under the direct control of the Post Office Department of Canada.

Although the letter of March 12, 1919, from the Deputy Postmaster-General to the Postmaster at Quebec regarding the agreement for the establishment of the "bureau de poste du Parlement" says that that office would be a self-contained operating institution governed by the rules and regulations of the Post Office Department of Canada, its whole tenor, in my judgment, shews that it is in no sense a post office in the true sense of the *Post Office Act,* but simply a clearing house for the reception and distribution of outgoing and incoming mail for the convenience of the Legislative Assembly and the Departments of the Provincial Government situated in the Parliament Building. Indeed the letter explicitly states that an office of this nature would not be recognized as a regular post office, "as the Department *could not undertake to establish* either a sub-

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office or a regular office in a separate institution such as a Provincial Government building, *as all post offices have to be for the general service of the public and under the direct control of the Department.*"

If I am right in my construction of the two material paragraphs of the Canada *Post Office Act,* it follows that the "bureau de poste du Parlement" is not a "bureau de poste" within the meaning of s. 364 of the Criminal Code, and also that the letter which the defendant was charged with stealing therein was not a "lettre confiée à la poste" at the time of the theft in the sense of that expression as given in s. 2 of the Canada *Post Office Act.* The letter at that time was neither in a "post office" nor "being carried through the post," the Post Office Department's control and responsibility of and for it having ceased upon its delivery at the so-called "bureau de poste" which is officered and operated by appointees of the Provincial Government entirely at the latter's expense and over which neither the Quebec city post office nor the Post Office Department had any control.

For these reasons I would allow the appeal and quash the conviction in so far as it applies to an offence against s. 364.

KERWIN J.—The accused was charged under section 364 of the Criminal Code that he "a volé une lettre dans la bureau de poste du parlement," and the question is what construction is to be placed upon the expression "un bureau de poste" in clause (*b*) of section 364, which, for this purpose, by virtue of section 6 of the Code, is to have the meaning assigned to it by section 2, paragraph (*l*) of the *Post Office Act,* R.S.C., 1927, chapter 161. That paragraph states:—

(*l*) "post office" means any building, room, post office, railway car, street letter box, street stamp-vending box, receiving box or other receptacle or place where post letters or other mailable matter are received or delivered, sorted, made up or despatched.

It is to be noted that not only does it include a building, etc., where post letters are received, etc., but also a building, etc., where other mailable matter is received, etc. By section 2 (*h*):—

"mailable matter" includes any letter, packet, parcel, newspaper, book or other thing which, by this Act or by any regulation made in pursuance of it, may be sent by post.

That is "post office" means any building, etc., where any letter which may be sent by post is received, etc. Now it cannot have been intended that any letter which *may* be sent by post is *in* a post office unless it is *in* a building, room, etc., which building, room, etc., is under the control of the Postmaster-General as part of the postal service of Canada. In my opinion that is the construction to be given to section 364 of the Code.

Section 4 of the *Post Office Act* enacts:—

> 4. There shall be at the seat of government of Canada a department, known as the Post Office Department, for the superintendence and management, under the direction of the Postmaster-General, of the postal service of Canada.

By section 7, the Postmaster-General has authority to do a number of things. By section 35 he has the sole and exclusive privilege of conveying, receiving, collecting, sending and delivering letters within Canada. By section 39 he may establish one or more branch post offices.

It may be assumed that the Postmaster-General would be justified, under his powers, in permitting certain actions to be done to accelerate the work of the postal service proper, such as, for instance, allowing private commercial houses to collect all the mailable matter of its employees and even such as has been deposited by members of the public in receptacles provided by the concerns themselves. He might authorize them to use a machine which would indicate that the postage had been paid. He might permit the inhabitants of an outlying settlement to deal with mailable matter in various ways. He might not object to the sign "Post Office" being used under certain conditions. And it may be assumed that he could from time to time revoke or alter any directions given, or regulations made, by him with respect to such matters.

There is no dispute as to what he has done in the present case. There is in evidence a letter from the Deputy Postmaster-General to the Postmaster at Quebec, and there is certain oral testimony bearing on the question which is uncontradicted. To summarize from such evidence:—

1. Those engaged in what is called the Parliamentary Post Office are employees of the Provincial Government and not of the Post Office Department; as are also the couriers who transport the bags between the Quebec Post Office and the Legislative Assembly Building.

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2. There is a "primary sorting" in the building.

3. Receipts are given for mailable matter which the senders decide to register.

4. At one time money orders were issued although the authority for so doing has since been withdrawn.

5. To quote from the letter of the Deputy Postmaster-General:—

> In brief, the Legislative Assembly Post Office would be a self-contained operating institution governed by the rules and regulations of the Post Office Department of Canada.

But

> An office of this nature would not be recognized as a regular post office, being simply a clearing house, as the Department could not undertake to establish either a sub-office or a regular office in a separate institution such as Provincial Government building, as all post offices have to be for the service of the general public, and under the direct control of the Department.
>
> The office would not be a postal station, but a clearing house, similar to that conducted by the Federal Parliament and applicable to the various Legislative Assemblies. In this case postal note, money orders and savings bank business could not be put into effect, as the Assembly Post Office would not be a regular post office, nor published in the Canada Official Postal Guide.

Bearing in mind all these considerations, the quarters in the Legislative Assembly Building in Quebec, set aside by the provincial authorities, cannot be said, in my opinion, to be part of the postal service of Canada even though what was done was by the consent or authority of the Postmaster-General.

However, what we are asked to do is to construe an expression used by Parliament in describing an offence. Parliament indeed has provided for various offences which may be termed "postal offences" as, for example, section 365 of the Code; and it has seen fit to differentiate between the punishments that may be imposed for such offences. We are not concerned wiht the reason for such distinctions. Unless the courts below are correct in their interpretation of the section under which the accused was charged, he is entitled to have the conviction set aside.

A motion was made to dismiss the appeal for want of jurisdiction but I am of opinion that this appeal is on a question of law on which there has been dissent in the Court of King's Bench, as provided by section 1023 of the Criminal Code. A perusal of the dissenting judgment satisfies me that the dissent was on the proper construction of section 364 of the Code. There are no facts in dispute

and it is not a "question whether the proper inference has been drawn by the trial judge from facts established in evidence" as in *Gauthier* v. *The King* (1). This Court had to consider what was a question of law when the proper construction of a statutory provision was involved in *Township of Tisdale* v. *Hollinger Consolidated Gold Mines* (2). Referring to the finding made by the Ontario Railway and Municipal Board that the property attempted to be assessed was situate on "mineral land," the judgment states at page 323:—

> It seems, as found by the Supreme Court of Ontario, that upon the evidence adduced and the findings of the Board, we would be precluded from interfering therewith if we agree in law with their view as to the meaning of the statute. The construction of a statutory enactment is a question of law, while the question of whether the particular matter or thing is of such a nature or kind as to fall within the legal definition of its term is a question of fact.

In *Loblaw Groceterias Co. Ltd.* v. *City of Toronto* (3), the Court, at page 254, dealt with the argument that

> the courts below having reached the conclusion that the land and building were used as distribution premises, this is a finding of fact with which we ought not to interfere.

The judgment proceeds:—

> But it is a question of law that is made the subject-matter of the right of appeal from the County Judge upon a stated case and we are bound to determine upon the proper construction of the amendment whether or not upon the facts stated the land and building are caught by the increased rate of assessment.

I have not lost sight of what the Court was dealing with in the two cases cited and I am not unaware of the danger of relying upon statements extracted from a judgment without relating them to the facts of the particular case, but the principles therein declared appeal to me as affording a criterion which may usefully be followed in arriving at a conclusion in this case.

It was stated in the dissenting judgment that while the conviction should be set aside, the accused should be found guilty of some other offence. The only other offence suggested is one which would carry with it a sentence which the accused has already served, and under the circumstances, therefore, I would restrict our judgment to allowing the appeal and setting aside the conviction.

Appeal allowed and conviction quashed.

(1) [1931] S.C.R. 416. (2) [1933] S.C.R. 321.
(3) [1936] S.C.R. 249.

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* Oct. 6.
* Dec. 15.

C. T. WARREN (PLAINTIFF).....APPELLANT;

AND

GRAY GOOSE STAGE LIMITED (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Jury trial—Assessment of damages in negligence action—New trial ordered on ground that damages excessive—Jurisdiction of appellate court—Order for new trial set aside.

Where in an action for negligence the damages have been assessed by a jury, an appellate court has no jurisdiction in respect of the amount awarded to rehear the case and control the verdict of the jury. The court is not a court of review for that purpose. If, viewing the evidence as a whole, an appellate court can see plainly that the amount of damages is in law indefensible, or that the trial has been unsatisfactory by reason of misdirection or wrongful admission or rejection of evidence, or if it is demonstrable that the jury have or must have misunderstood the evidence or taken into account matters which could not legally affect their verdict, the court may grant a new trial for the reassessment of the damages. This is not to be taken, however, as an exhaustive statement of the circumstances in which a new trial may be granted for such a purpose. The verdict ought to be set aside in any case in which an appellate court finds it clearly established that the jury had misunderstood or disregarded their duty.

Per Kerwin J.—When an appellate court cannot agree with the jury's estimate of the amount of damages, "the rule of conduct" for that court when considering whether a verdict should be set aside on the ground that the damages are excessive, "is as nearly as possible the same as when the court is asked to set aside a verdict on the ground that it is against the weight of evidence." *Praed* v. *Graham* (24 Q.B.D. 53) approved.

APPEAL and CROSS-APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment of the trial judge, with a jury, awarding $5,392.30 as damages resulting from an automobile accident and ordering a new trial limited to the assessment of damages (unless the parties consented to a reduction of the general damages from $5,000 to $2,000), upon the ground that the amount of the damages fixed by the jury was grossly excessive.

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

J. M. Stevenson K.C. for the appellant.

Thos. N. Phelan K.C. and *Brenton O'Brien* for the respondent.

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

(1) [1937] 1 W.W.R. 465.

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The judgment of Duff C.J. and Crocket, Davis and Hudson JJ. was delivered by

DAVIS J.—The plaintiff (appellant) was a passenger in a public motor car owned and operated by the defendant company (respondent) on an occasion when the car suddenly left the travelled highway and went into the ditch. The plaintiff claimed damages in this action for physical injuries alleged to have been suffered as a result of what occurred. Liability was denied. The action was tried with a jury and on the answers of the jury to certain questions submitted to them the learned trial judge entered judgment against the defendant for $392.30 special damages and $5,000 general damages. The defendant appealed to the Court of Appeal for Saskatchewan (1) and that court affirmed the liability but ordered a new trial limited to the assessment of damages (unless the parties consented to a reduction of the general damages from $5,000 to $2,000) upon the ground that the amount of the damages fixed by the jury was grossly excessive. Both parties appealed from that judgment to this Court.

The motor car was not a regular bus model but was an old seven-passenger car that had been driven for 200,000 miles and had been put into service as a public conveyance. There was evidence that the accident was caused by a break occurring in the steering apparatus which put the car out of control of the driver and there was evidence that part of the steering apparatus had been severely worn and was in a bad state of disrepair. On the other hand, there was evidence, on behalf of the defendant, that the practice had been to have an almost daily inspection of the car and that the car had in fact been inspected and the steering apparatus found in good condition three days before the accident. The jury were of course entitled to disbelieve this evidence if they chose. They found that the defendant had been guilty of negligence and that the negligence was "that proper inspection of the vehicle was not carried out."

At the time of the accident and for some time thereafter it is plain that the plaintiff did not regard the physical injuries which he suffered as of very much account. He

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was a war veteran with a progressive disability which had led to the increase of his pension from a ten per cent disability to a thirty per cent disability and at the time of the accident an application from him for a larger disability pension was pending. After the accident he consulted several doctors, one after the other, over a period of some months. His substantial claim for damages at the trial was made upon his story that he had suffered very considerably from headaches since the accident occurred and that they had resulted in a condition of physical weakness and in a lack of power of concentration on his work which had seriously affected his earning capacity. His business was that of an insurance adjuster. It appears that a diet which one of the doctors prescribed for him had counteracted the headaches but the evidence does not disclose what effect if any the diet had upon his general health.

Counsel for the defendant contends that there is no liability. This contention is put firstly upon the ground that, while the jury found negligence, the answer they gave as to what constituted the negligence, i.e., the absence of proper inspection of the vehicle, was not in itself negligence and that the very answer negatived all other acts of alleged negligence. We did not require to hear counsel for the plaintiff on this point. While it may well be that want of inspection is not by itself negligence unless there was either some original defect or a state of disrepair which inspection would have disclosed, where, as here, the evidence pointed to a known defect or condition of disrepair in the steering apparatus, the language of the jury read and construed in the light of the evidence and the charge can only be interpreted fairly as meaning that the jury thought that a proper and sufficient inspection would have disclosed the full extent of the faulty condition and that its repair would have avoided the event that happened. A high degree of care is required on the part of common carriers and the lack of inspection as found by the jury was, in view of the evidence, plainly a sufficient finding of negligence.

The mention of an insurance company in the case, which was one of the grounds of the defendant's appeal to the Court of Appeal for Saskatchewan, was not pressed in that

court, perhaps because the complaining party realized that it was as remiss as its opponent in this regard. In any case, as the point was not pressed in the court below, it was not open to the defendant in this Court.

The main proposition advanced by counsel for the defendant before us was that on the evidence no causal relation is proved between the headaches and the accident —that the evidence is so vague that it could not reasonably be concluded that the headaches were the direct result of the accident. But there was some evidence, if believed, sufficient to connect the headaches with the accident. The weight of the evidence was a question solely for the jury and in an admirably clear and direct charge the learned trial judge put that question to the jury as "the big question" to be decided by them.

> If you find he was not suffering from a headache before the accident and that he struck his head on the occasion in question against the back of the front seat of the car and has been suffering headaches since then, it would be a fair inference that it was the blow on the head from the back of the front seat that caused them; and in that case the evidence of Dr. McConnell would be of some importance. But before using the evidence of Dr. McConnell at all you must find that the headaches did not exist before the accident and that he did not suffer from headaches before the accident. Because the evidence of Dr. McConnell is not going to be of any assistance to you in coming to a conclusion as to whether he had these before or after. He says: "Assuming the truth of his history"; that is, assuming the truth of what the plaintiff tells him, then he says: "The condition I found could be due to the accident." But he also says "The condition which I found may have existed long before the accident." So that as to whether he was suffering from those injuries before the accident or whether they commenced after the accident, the evidence of Dr. McConnell does not help you one way or the other. If you find they were non-existent before the accident, then you consider the evidence of Dr. McConnell who says he found the third ventricle was slightly larger than normal, that the left frontal region was abnormal, there was a larger space than normal, and that they were liable to cause headaches.

The jury could not have assessed the general damages at $5,000 unless they had accepted the plaintiff's evidence that the headaches were the direct result of the accident because the other complaints of the plaintiff were admittedly of trifling significance. The jury's finding of liability, affirmed as it was by the Court of Appeal, must stand.

Once liability has been established, any views as to the weakness of the evidence regarded from the point of view of liability (the weight of which evidence, we repeat, was for the jury) must not influence the Court on the amount

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of compensation for the injuries. While it may be that the general damages were awarded on a generous scale, there was no firm ground, in our opinion, on which the Court of Appeal was entitled to set aside the jury's assessment. This was essentially a case for a jury and it is quite impossible for the Court to say that the amount of the damages fixed by the jury was so large that the jury reviewing the whole of the evidence reasonably could not properly have arrived at that amount. Lord Wright in the House of Lords in *Mechanical and General Inventions Co.* v. *Austin* (1) said:

> The appellate court is never the judge of fact in a case where the constitutional judge of fact is the jury. For the appellate court to set aside the verdict of a jury as being against the weight of evidence, merely because the court does not agree with it, would, in my judgment, be to usurp the functions of the jury and to substitute their own opinion for that of the jury: that would be quite wrong. Much more is necessary in order to justify the setting aside of a jury's verdict where there is some evidence to support it.

And at p. 377:

> The jury were, as the Lord Chancellor explains, properly directed and had all the facts fully before them. In considering their award on damages, that view of the evidence most favourable to their finding must be taken, not the view most adverse to it, if or where two views are competent. It is true that the damages awarded ran into big figures, but damages cannot be treated as excessive merely because they are large. Excess implies some standard which has been exceeded.

The authorities are numerous but we might usefully refer to the judgment of the Privy Council in *McHugh* v. *Union Bank of Canada* (1). That was an Alberta case. Beck, J., sitting without a jury, assessed the damages (a mortgagee's negligence case) at $2,800. The Alberta court of appeal set aside the assessment but granted to the plaintiff the option to have it referred back to the clerk of the court at Calgary to take an account within prescribed limits of what damage, if any, the plaintiff had suffered by the negligence of the defendants. Upon appeal to this Court, the majority (Duff and Anglin JJ. dissenting) affirmed the order permitting a reference at the plaintiff's option but varied the directions as to the mode of assessing the damages. Upon further appeal to the Privy Council, the assessment made by the trial judge was restored. Lord Moulton, who delivered the judgment of the Board, said at p. 309:

(1) [1913] A.C. 299.

(1) [1935] A.C. 346 at pp. 373 and 374.

The tribunal which has the duty of making such assessment, whether it be judge or jury, has often a difficult task, but it must do it as best it can, and unless the conclusions to which it comes from the evidence before it are clearly erroneous they should not be interfered with on appeal, inasmuch as the courts of appeal have not the advantage of seeing the witnesses—a matter which is of grave importance in drawing conclusions as to quantum of damage from the evidence that they give. Their Lordships cannot see anything to justify them in coming to the conclusion that Beck J.'s assessment of the damages is erroneous, and they are therefore of opinion that it ought not to have been disturbed on appeal.

The importance of that case lies in the fact that the assessment had been made by the trial judge himself and the court of appeal had jurisdiction to rehear the case and to substitute their findings for his findings. But notwithstanding that both the court of appeal of Alberta and the Supreme Court of Canada had seen fit to set aside the assessment of damages made by the trial judge, the Privy Council restored the assessment. That course undoubtedly would not have been taken had the Privy Council not concluded that the two appellate courts below had erred in principle in interfering with the assessment made by the trial judge.

In the case before us, however, the damages had been assessed by a jury and the Court of Appeal had no jurisdiction in respect of the amount awarded to rehear the case and control the verdict of the jury. The court is not a court of review for that purpose. If, viewing the evidence as a whole, the Court of Appeal can see plainly that the amount of damages is in law indefensible, or that the trial has been unsatisfactory by reason of misdirection or wrongful admission or rejection of evidence, or if it is demonstrable that the jury have or must have misunderstood the evidence or taken into account matters which could not legally affect their verdict, the court may grant a new trial for the reassessment of the damages. This, of course, is not an exhaustive statement of the circumstances in which a new trial may be granted for such a purpose. The verdict ought to be set aside in any case in which the court finds it clearly established that the jury have misunderstood or disregarded their duty.

In this case the jury were properly directed and had all the facts before them and there is no reason for inferring that they took into account any irrelevant consideration in arriving at the amount of the damages.

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The appeal must be allowed and the cross-appeal must be dismissed and the judgment at the trial restored, with costs throughout.

KERWIN J.—The cross-appeal was practically disposed of on the argument. The evidence at the trial was directed to the condition of the automobile and the answer of the jury must be considered in view of that evidence and of the judge's charge. I have no doubt that so reading the jury's answer, it is a sufficient finding of negligence.

As to the appeal of the plaintiff on the question of the amount of damages, I must confess that I was much impressed by Mr. Phelan's contention that there was not shown to be any connection between the accident and the headaches of which the plaintiff complained. That argument is based to a great extent upon the care with which Dr. McConnell answered the questions put to him upon the precise point. However, a perusal of the evidence since the argument satisfies me that while Dr. McConnell was not as emphatic as some expert witnesses in other cases, there was no doubt as to his opinion, the reasons for which he gave simply and clearly. The jury were entitled to give effect to his opinion and, of course, so far as it was predicated upon the symptoms of the plaintiff, as told by the latter to the doctor, the plaintiff was in the witness box and was heard and seen by the jury. The jury apparently accepted the plaintiff's story and their finding cannot be disturbed.

Once granted these premises, I am unable to see how, on the evidence, the amount of the verdict can be challenged. A claim based upon headaches may be suspect but the evidence of the plaintiff as to his loss of earnings, the fact of the encephalographies and the prescribed diets, and the plaintiff's testimony as to his pain and suffering, coupled with the evidence of Dr. McConnell that the plaintiff would have pain, were all questions for the jury to consider. As the Lord Chancellor stated in *Mechanical and General Inventions Co. Ltd. and Lehwess* v. *Austen* (1):

> The jury were the proper constitutional tribunal to assess the damages and it is impossible to say that they have gone so wrong that their assessment must be set aside. It is not a case merely for a nominal but for substantial damages, of which the jury were the judges.

(1) [1935] A.C. 346, at 358.

Part of Lord Wright's judgment in the same case, at page 374, has been transcribed and referred to by this Court in *McCannell* v. *McLean* (1), and I think that the following quotation from the extract,—

> Thus the question in truth is not whether the verdict appeals to the appellate court to be right but whether it is such as to show that the jury have failed to perform their duty.

is particularly appropriate to the case at bar.

Neither from a perusal of the evidence and the judge's charge nor from a careful consideration of the reasons for judgment of the learned judges in the Court of Appeal can I conclude that the jury in this case have failed to do their duty. With great respect I read the latter as indicating nothing more than that the learned judges in the Court of Appeal could not agree with the jury's estimate of the amount of damages, and that is not in my view a correct method of approach. In the *Mechanical and General Inventions* case, Lord Wright, at page 378, points out that in *Praed* v. *Graham* (2), Lord Esher had stated that "the rule of conduct" for the appellate court when considering whether a verdict should be set aside on the ground that the damages are excessive,

> is as nearly as possible the same as where the court is asked to set aside a verdict on the ground that it is against the weight of evidence.

I would allow the appeal with costs throughout and dismiss the cross-appeal with costs.

Appeal allowed with costs.
Cross-appeal dismissed with costs.

Solicitors for the appellant: *Stevenson, McLorg and Bence.*

Solicitor for the respondent: *Gilbert H. Yule.*

(1) [1937] S.C.R. 341.

(2) (1889) 24 Q.B.D. 53.

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* Oct. 21, 22.
* Dec. 15.

GEORGES BUSSIERES (PLAINTIFF) ..... APPELLANT;

AND

THE CANADIAN EXPLORATION LIMITED (DEFENDANT) ..... } RESPONDENT;

AND

LAMAQUE GOLD MINES LIMITED (MIS-EN-CAUSE)

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

Mines and minerals—Mining prospector—Locating mining properties and staking them for employer—Profit-sharing contract—Remuneration being salary, expenses and percentage of the net profits of the sale of properties—Sale by employer to a company for fully paid no par value shares of that company—Right of the employee to percentage of such shares—Valuation of such shares—"Profits."

The appellant, a mining prospector, was employed by the respondent, a mining company engaged particularly in the exploration of mining properties, to locate mining properties and to cause them to be transferred, after staking, to the respondent; he was to be paid a salary of $150 a month and his expenses and in addition he was to be entitled to 10 per cent of the net profits which the respondent might make from the sale or exploitation of the staked claims which it should acquire through his efforts. By the express terms of the contract between the parties, the engagement of the appellant "at the service of" (au service de) the respondent was to be monthly but either one of the parties to the contract could put an end to it by notice of fifteen days. The appellant during a period of about two years staked some forty or more claims in the name of himself or others and transferred or caused the same to be transferred to the respondent. He was paid his salary of $150 a month and his expenses. The respondent later sold forty mining claims to Lamaque Gold Mines Limited, (the mis-en-cause) for the sum of $5,000 and 150,000 fully paid no par value shares of the capital stock of that company. The sale was completed and the cash and share consideration received by the respondent. Within a year of the acquisition of the 150,000 shares and before the financing of the Lamaque Company had been completed and its shares made available to the public, the respondent, without the knowledge of the appellant, sold to its own shareholders (there were only sixteen of them) at the price of 7 cents a share all the 150,000 shares of the Lamaque Company that it had acquired. The respondent arrived at this price of 7 cents a share by taking the actual cost of the shares to be the total expenditures of the respondent in all its mining operations up to that date which (including the salary and expenses of the appellant) had amounted to about $15,500, and deducting therefrom the $5,000 cash received from the Lamaque Company. A few months thereafter, at the time of the institution of this action, shares of the Lamaque Company, although not listed on the market, were being traded in by the public at various prices around $2

* PRESENT:—Duff C. J. and Cannon, Davis, Kerwin and Hudson JJ.

a share. The appellant, putting a value of $3 a share, claimed from the respondent the sum of $45,500, being 10 per cent of the thus estimated net profits of the sale. The respondent alleged in its defence that the shares had only realized their actual cost and that there was no profit in the transaction. The appellant admitted at the trial that eight of the forty claims had not been staked by him, and that twenty-two of the other claims had been staked and transferred by him but had been allowed to lapse by the respondent and subsequently were revived by a new staking on the part of the respondent itself. The trial judge held that the appellant was entitled on the basis of only ten out of forty claims, and awarded him 10 per cent of one-quarter of the 150,000 shares, i.e., 3,750 shares, subject to payment by the appellant to the respondent of 10 per cent of one-quarter of the total net expenditures of the respondent ($15,535.03 less the $5,000 cash payment), i.e., $262.50, and condemned the respondent to deliver to the appellant within fifteen days 3,750 shares of the Lamaque Company provided the appellant paid the respondent the sum of $262.50 and, in default of the respondent delivering said shares, the respondent was condemned (on a valuation of $2 per share) to pay to the appellant $7,237.50 with interest and costs. The respondent appealed from that judgment to the Court of King's Bench and the trial judgment was modified by awarding the appellant only $702.85 with interest and costs. The majority of that Court held that the appellant was entitled to money profits but not to profits in kind (i.e., in shares of the Lamaque Company) and arrived at the money profits in the same manner as the trial judge had but they put a value of 25 cents instead of $2 on the shares of the Lamaque Company. The appellant appealed to this Court, asking that the trial judgment be restored.

Held that the appeal should be allowed and the judgment of the trial judge restored, the latter having made a practical application of the profit-sharing terms of the contract to the particular facts of the case; but the judgment of the trial judge should be varied by limiting the recovery by the appellant to the money value of the shares awarded the appellant as fixed by the trial judge, i.e., $7,237.50. The appellant was entitled to the valuation of $2 a share taken by the trial judge and the price of 25 cents a share adopted by the majority of the appellate court was not a public price. The appellant, as between himself and the respondent, was entitled to have the shares valued on the basis of the public sales of the Lamaque shares.

Per Duff C.J. and Davis and Hudson JJ: There is no precise legal meaning to the word "profits" that can be applied in every case: the construction to be given to the word must be governed by the facts and circumstances of each particular case. *In re The Spanish Prospecting Company Limited* ([1911] 1 ch. 92), ref.

Per Cannon and Kerwin JJ.: It was open to the appellant to adduce evidence of the value of the shares down to the date of the hearing and to claim the highest value shown by such evidence. Such value would represent the damages foreseen or which might have been foreseen when the agreement with the appellant was made. Article 1074 C.C.; *Senécal* v. *Pauzé*, 14 A.C. 637; *Siscoe Gold Mines Limited* v. *Bijakowski* [1935] S.C.R. 193. *Senécal* v. *Hatton* (10 L.N. 50) discussed.

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APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, modifying the judgment of the Superior Court, Chase Casgrain J., and condemning the respondent to pay the appellant the sum of $702.85 with interest and costs, instead of the sum of $7,237.50 with interest and costs as awarded by the trial judge.

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

Aldéric Laurendeau K.C. for the appellant.

Antonio Perrault K.C. for the respondent.

The judgment of Duff C.J. and Davis and Hudson J.J. was delivered by

DAVIS J.—The appellant (plaintiff) is a mining prospector and the respondent (defendant) is a mining company engaged particularly, as its name implies, in the exploration of mining properties. The facts are not now in dispute. The appellant was engaged by the respondent to locate mining properties and to cause them to be transferred, after staking, to the respondent. He was to be paid a salary of $150 a month and his expenses and in addition he was to be entitled to 10 per cent of the net profits which the respondent might make from the sale or exploitation of the staked claims which it should acquire through his efforts. By the express terms of the contract between the parties, the engagement of the appellant " at the service of " (au service de) the respondent was to be monthly but either one of the parties to the contract could put an end to it by notice of fifteen days. The appellant during a period of about two years staked some forty or more claims in the name of himself or others and transferred or caused the same to be transferred to the respondent. He was paid his salary of $150 a month and his expenses; there is no dispute as to that. The respondent later sold forty mining claims to Lamaque Gold Mines Limited (the mis-en-cause), for the sum of $5,000 and 150,000 fully paid no par value shares of the capital stock of that company. The sale was completed and the cash and share consideration received by the respondent. It may be observed in passing that

the respondent and two other mining companies, The Teck-Hughes Gold Mines Limited and Read-Authier Mine Limited, became virtually a promoting syndicate of the Lamaque Gold Mines Limited (hereinafter for convenience referred to as the Lamaque Company).

Within a year of the acquisition of the 150,000 shares and before the financing of the Lamaque Company had been completed and its shares made available to the public, the respondent, without the knowledge of the appellant, sold to its own shareholders (there were only sixteen of them) at the price of 7 cents a share all the 150,000 shares of the Lamaque Company that it had acquired. The respondent arrived at this price of 7 cents a share by taking the actual cost of the shares to be the total expenditures of the respondent in all its mining operations up to that date which (including the salary and expenses of the appellant) had amounted to about $15,500, and deducting therefrom the $5,000 cash received from the Lamaque Company. What was in form a sale of these shares to the respondent's own shareholders was in substance a distribution of what was regarded as a realized profit on the company's capital assets. A few months thereafter, at the time of the institution of this action, shares of the Lamaque Company were being traded in by the public at various prices around $2 a share. Mr. Wilcox, the secretary-treasurer of the respondent, denied that Lamaque shares had sold at any time as high as $3, but he thought it possible that they went above $2.50. He says the shares were never listed on the market but were "sold over the counter. What we call the gutter market.

The appellant was aware of the fact that forty mining claims had been sold by the respondent for $5,000 and 150,000 shares of the Lamaque Company and demanded from the respondent 10 per cent of the net profits on the sale. He did not know then of the sale of the shares at 7 cents a share. The respondent took the position in its defence of the action that the shares had only realized their actual cost and that there was no profit at all in the transaction.

It is perfectly plain that a device so crude and transparent as that adopted by the respondent cannot defeat the appellant's just claim to the fruits of his contract.

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The appellant admitted at the trial that eight of the forty claims had not been staked by him. As to twenty-two of the other claims the appellant said that they had been staked and transferred by him but had been allowed to lapse by the respondent and subsequently were revived by a new staking on the part of the respondent itself. The trial judge however on conflicting testimony ruled all these twenty-two claims out, leaving the appellant entitled on the basis of only ten out of forty claims, and awarded the appellant 10 per cent of one-quarter of the 150,000 shares, i.e., 3,750 shares, subject to payment by the appellant to the respondent of 10 per cent of one-quarter of the total net expenditures of the respondent ($15,535.93 less the $5,000 cash payment), i.e., $262.50, and condemned the respondent to deliver to the appellant within fifteen days 3,750 shares of the Lamaque Company provided the appellant paid the respondent the sum of $262.50 and, in default of the respondent delivering said shares, the respondent was condemned (on a valuation of $2 per share) to pay to the appellant $7,237.50 with interest and costs.

The respondent appealed from that judgment to the Court of King's Bench but there was no cross appeal by the appellant. The Court of King's Bench (Galipeault and Walsh JJ. dissenting) modified the trial judgment by awarding the appellant only $702.85 with interest and costs. The majority of that Court held that the appellant was entitled to money profits but not to profits in kind (i.e., in shares of the Lamaque Company) and arrived at the money profits in the same manner as the trial judge had but they put a value of 25 cents instead of $2 on the shares of the Lamaque Company. The appellant appeals to this Court, asking that the trial judgment be restored. There is no cross appeal by the respondent.

It is contended before us that the parties were in partnership and that the appellant's only remedy is dissolution and taking of the accounts. But it is well established that the mere sharing in profits by a servant or agent does not necessarily create the relationship of partnership. Where a salary is paid to a person by another in addition to a share of profits it is strong evidence that the relation between the two is that of master and servant rather than that of partners. Where as here there is no sug-

gestion that the appellant was to contribute in any way to the losses, if any, of the respondent and the contract is obviously one of service on a monthly salary basis, it cannot be said that the contract created a partnership between the parties. Then it is contended that the appellant was an employee of the respondent and as such was bound by whatever his employer did, that was not fraudulent, and in consequence is bound by the sale of the 150,000 shares at the price of 7 cents each. That is an untenable proposition. Upon the facts of a case such as this, an employer could not bind an employee by a sale such as that put through here.

We are of opinion that the learned trial judge made a practical application of the profit-sharing term of the contract to the particular facts of the case. There is no precise legal meaning to the word "profits" that can be applied in every case. The construction to be given to the word must be governed by the facts and circumstances of the particular case. The question of profits was rather fully discussed in *In re The Spanish Prospecting Company, Limited.* (1) Fletcher Moulton, L.J. said in part at pp. 100 and 101,

> Profits may exist in kind as well as in cash. For instance, if a business is so far as assets and liabilities are concerned in the same position that it was in the year before with the exception that it has contrived during the year to acquire some property, say mining rights, which it had not previously possessed, it follows that those mining rights represent the profits of the year, and this whether or not they are specifically valued in the annual accounts.

Business men dealing fairly and in a practical way with a profit-sharing contract such as we have in this case would find very little difficulty in adjusting and settling the matter but when courts are asked to work out the problem in a strictly legal manner the problem presents real difficulty. The learned trial judge in our view dealt with the matter, in the circumstances of the case, in a practical way.

We are of opinion that the appellant was entitled to the valuation of $2 a share taken by the trial judge. The price of 25 cents a share adopted by the majority of the Court of King's Bench was not a public price. It was a prearranged option price agreed upon by the promoting syndicate (composed of the respondent, The Teck-Hughes

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Company and the Read-Authier Company) before the incorporation of the Lamaque Company for the purchase of 1,800,000 treasury shares of the Lamaque Company as part of the general financing and promotion of the new company. That price cannot fairly be taken as the basis upon which the appellant's rights are to be arrived at. The appellant, as between himself and the respondent, is entitled to have the shares valued on the basis of the public sales of the Lamaque shares. It is contended that the evidence of public sales is unsatisfactory in that they were isolated transactions in more or less small amounts and outside a listed exchange. But it comes with ill grace, we think, from the respondent, in view of the way it dealt with the 150,000 shares, to hew too closely to the line in determining the amount of the real profit made by it through the sale of the mining claims staked for it by the appellant under the contract.

Objection was taken to the form of the judgment at the trial as not being susceptible of execution under the Quebec practice. But, quite apart from the objection, there may have been substantial changes in the market value of the mining shares in question since the date of the delivery of judgment at the trial two years ago, and the most convenient and we think proper course under the circumstances is to vary the trial judgment by limiting the recovery to the money value of the shares as fixed by the trial judge.

We would therefore allow the appeal and direct judgment to be entered in favour of the appellant in the sum of $7,237.50 with interest from the date of the judgment at the trial, and costs throughout.

The judgment of Cannon and Kerwin JJ. was delivered by

KERWIN J.—The agreement between the parties provides that for the work to be done by the appellant, a prospector, for the respondent company, the latter

s'engage à donner au dit Georges Bussières, en plus de son salaire, dix pour cent du bénéfice net qu'elle réalisera sur la vente ou l'exploitation des claims qu'elle acquerra de lui ou par son entremise.

The position accepted by both parties before this Court is that the dispute as to "dix pour cent du bénéfice net" relates to ten mining claims only out of the forty mentioned

by the appellant in his declaration. It is evident that the appellant must abide by the trial judge's finding that the total expenses in connection with the forty claims are the expenses to which the appellant must contribute his quarter share; and, since the respondent has not appealed from the judgment of the Court of King's Bench, the real question before us is the manner in which and the date at which the value of certain shares must be ascertained.

These shares are shares of Lamaque Gold Mines Limited which the respondent received, together with $5,000 in cash, from the Lamaque Company in 1933 as the consideration for the sale to the Lamaque Company of the forty mining claims. The respondent had already paid the expenses in connection with these claims and, after deducting the $5,000, recouped itself for the balance of the expenses by dividing the 150,000 shares of the Lamaque Company among its own shareholders at seven cents per share. The respondent had therefore contended in the courts below that there was no net profit and, therefore, nothing to which the appellant was entitled, but, in view of the fact that the Court of King's Bench disregarded this contention and found the value of each share to be twenty-five cents, it is not open to the respondent to argue that each share is not worth at least that much.

However, the right of the appellant was to receive ten per cent of the shares " en nature " and ten per cent of the $5,000 less his one-quarter share of the expenses. I am of opinion that this is the proper construction of the clause in the contract, particularly considering the nature of the work for which the appellant was engaged and also the fact that it might reasonably be inferred that the parties were contracting on the basis of the mining claims being disposed of in quite a usual manner, i.e., for shares in a company in existence or to be formed; and therefore within the very terms of article 1020 of the Civil Code.

By transferring the Lamaque shares to its shareholders the respondent has rendered itself unable to fulfil its obligation and it must, therefore, pay the value of these shares. It seems futile to suggest that the value is seven cents per share and, with respect, I am unable to agree with the majority of the Court of King's Bench that such value is twenty-five cents per share. The method of arriving at

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the former has been explained above. As to the latter, it is sufficient to point out that that price was fixed by an agreement of December 15, 1932, giving the Teck Hughes Gold Mines Limited the option to purchase a certain number of shares of no par value of a company not yet then formed but which in fact turned out to be Lamaque Gold Mines Limited. To me that cannot possibly be any evidence of the value of the shares. And in any event, I can discover no principle upon which the appellant is limited to the value of the shares either at the time the respondent obtained them or at the time it divided them among its own shareholders.

In June, 1934, the appellant demanded his proportion of the net profits and in August, 1934, served his action. Evidence was produced to warrant the trial judge's finding that on and about such latter date the value was two dollars per share, and while I quite recognize the difference between isolated sales of a few shares and the disposal of a large number, no evidence was given by the respondent to show any other value at the times just mentioned. In my view it was open to the appellant to adduce evidence of the value down to the date of the hearing and to claim the highest value shown by such evidence. Such value would represent the damages foreseen or which might have been foreseen when the agreement with the appellant was made. Article 1074, Civil Code; *Senécal* v. *Pauzé;* (1) *Sisco Gold Mines Limited* v. *Bijakowski.* (2)

Respondent referred to the decision of the Privy Council in *Senécal* v. *Hatton* (3), affirming the judgment of the Court of Queen's Bench for the province of Quebec. In that case the trial judge had condemned the defendant Senécal to pay the par value of certain bonds in his possession, to which the Court found the plaintiff was entitled. The Court of Queen's Bench while maintaining the plaintiff's action decided that he was entitled not to the nominal value of the said bonds but " considering that it is proved in the cause that the said bonds were at the time the appellant got the same, of the value of 25 per cent of the face or nominal value of the said bonds," gave judgment

(1) (1889) 14 A.C. 637. (2) [1935] S.C.R. 193.
(3) (1886) 10 L.n. 50; M.L.R. 1, Q.B. 112.

for an amount representing twenty-five per cent of the par value of the bonds. Chief Justice Dorion does state at page 116:—

Senécal was bound to deliver the bonds, but he was not bound as the alternative to pay the nominal value. What he was bound to do was to pay the market value at the time the bonds were acquired by him. This is the doctrine of all the authors who have written upon failure to fulfil obligations.

But Mr. Justice Ramsay, at page 119, states:—

the right of respondent on his own showing is to have 35 debentures or their value—their greatest value—which seems to me to be 25 cents in the dollar.

Mr. Justice Cross stated that he would be in favour of allowing a higher value in default of the surrender of the bonds "on the principle that Senécal was bound to produce the bonds or give the highest price they were shown to be worth," but he did not dissent from the views of his colleagues as to what the evidence indicated.

In the Privy Council it is stated, at page 51 of the report—

It has been contended that the Court of Queen's Bench was wrong in valuing the debentures at 25 cents to the dollar. It appears to their Lordships that there was evidence upon which the Court were fully justified in arriving at that conclusion. There was evidence that on the 29th of November, 1882, similar debentures were sold at 25 cents to the dollar.

November 29th, 1882, was certainly subsequent to the date the appellant in that case had received the bonds and in any event there was apparently no cross-appeal by the respondent. I believe their Lordships were not laying down any rule contrary to that set forth in the *Pauzé* case. (1) See Mignault, Vol. 5, p. 421. I take it that the appellant before us is entitled to be allowed, in lieu of the transfer to him of the number of shares to which he is entitled, the highest value that the evidence discloses the shares were worth down to the date of the hearing.

As to the defence of prescription, it is necessary to state only that in my opinion articles 2262 and 2267 of the Civil Code do not apply but rather article 2260 as this is a contract for an indeterminate time.

The appeal must be allowed. The judgment of the Superior Court

Condamne la défenderesse à lui remettre, dans les quinze jours de la date du présent jugement, contre paiement de la somme de $262.50, 3,750

(1) (1889) 14 A.C. 637.

1937

BUSSIÈRES v. THE CANADIAN EXPLORATION LIMITED.

Kerwin J.

actions de la Lamaque Gold Mines Limited et, à son défaut de ce faire dans ledit délai à lui payer la somme de $7,237.50, avec intérêt de dépens.

Without determining the question raised as to the form of the judgment, I would, in view of the time that has elapsed since the date of that judgment substitute one for payment by the respondent to the appellant of the sum of $7,237.50 with interest and costs.

Appeal allowed with costs.

Solicitors for the appellant: *Laurendeau & Laurendeau.*

Solicitors for the respondent: *Perrault & Perrault.*

1937

* Oct. 6.

BIRD *v.* BATTAGIN

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

Motor vehicles—Collision of motor cycle with motor car—Measure of damages—Concurrent findings of fact in trial and appellate courts—The Vehicles and Highways Act, 1924, c. 31, s. 47 (1).

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of the trial judge, Ewing J. (2), and maintaining the appellant's action.

The cause of action arose out of a motor accident. The plaintiffs are father and son, the former suing on his own behalf and as next friend of the son, a boy of 19 at the time of the accident. The accident consisted of a collision between a motor car driven by the defendant and a motor-cycle ridden by the infant plaintiff in the mining settlement of Cadomin. The injuries suffered by the plaintiff were serious, resulting in the loss of his right leg. The trial judge found that the defendant was negligent and that the plaintiffs were not guilty of contributory negligence and awarded damages of $1,673.90 to the father and $13,950 to the son. The appellate court, Harvey C.J.A. dissenting, held that the evidence warranted the trial judge's findings and dismissed the appellant's appeal. Harvey C.J.A. dissented on the ground that section 47 (1) of *The Vehicles and Highways Act* applied to the circumstances of the case.

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

(1) [1937] 2 W.W.R. 365. (2) [1937] 1 W.W.R. 719.

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On appeal to the Supreme Court of Canada, after hearing the argument of counsel for the appellant and without calling the counsel for the respondent, the Court dismissed the appeal with costs.

Duff C.J., speaking for the Court, delivered the following oral judgment:

"It is not necessary, Mr. Maclean, to call on you.

"As regards the questions of fact, they have been very fully discussed in the course of the very thorough argument which counsel for the appellant has put before us. We think it only necessary to say that there are concurrent findings of fact and we really see no adequate ground for setting these findings aside.

"As to the statute, our view is that it has no application to the circumstances of this case.

"The appeal is dismissed with costs."

Appeal dismissed with costs.

Sydney Wood for the appellants.

N. D. Maclean K.C. for the respondent.

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* Jan. 10.
* Mar. 4.

IN THE MATTER OF A REFERENCE CONCERNING THE POWER OF HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, UNDER THE BRITISH NORTH AMERICA ACT, 1867, TO DISALLOW ACTS PASSED BY THE LEGISLATURES OF THE SEVERAL PROVINCES, AND THE POWER OF RESERVATION OF THE LIEUTENANT-GOVERNOR OF A PROVINCE.

Constitutional law—B.N.A. Act, ss. 90, 55, 56, 57—Power of Governor General in Council to disallow provincial legislation—Power of Lieutenant-Governor to reserve for signification of pleasure of Governor General Bills passed by legislative assembly or legislative authority of a province.

The power to disallow provincial legislation, vested in the Governor General in Council by s. 90 of *The British North America Act, 1867*, is still a subsisting power. Its exercise is not subject to any

* PRESENT:—Duff C.J. and Cannon, Crocket, Davis, Kerwin and Hudson JJ.

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REFERENCE *re* THE POWER OF THE GOVERNOR GENERAL IN COUNCIL TO DISALLOW PROVINCIAL LEGISLATION AND THE POWER OF RESERVATION OF A LIEUTENANT-GOVERNOR OF A PROVINCE.

limitations or restrictions, save that the power shall be exercised within the prescribed period of one year after the receipt of an authentic copy of the Act by the Governor General.

The fact that, as is the practice in some provinces, the Lieutenant-Governor assents to a Bill in the name, not of the Governor General but of His Majesty, does not impair the legal validity of his assent, nor does it affect the said power of disallowance vested in the Governor General in Council.

Per Duff C.J. and Davis J.: The circumstance that the assent of the Lieutenant-Governor acting under the authority and on behalf of the Crown has been given in a form more august than that prescribed by s. 90 of the *B.N.A. Act* cannot impair in any way the legal validity of his assent that is expressed as the assent of the Sovereign, which in truth, in point of law, it is and is intended to be; and this practice is of no relevancy touching the law governing the matters now in question, which is to be ascertained from the enactments of the *B.N.A. Act*.

As to that practice (assenting in the name of the King), Kerwin J. was of opinion that it is the correct practice. Crocket J. was inclined to the same opinion. Hudson J. was of opinion that the practice is justified. (All three were of opinion that assent in the Governor General's name would have the same effect).

The power to reserve, for the signification of the pleasure of the Governor General, Bills passed by the legislative assembly or legislative authority of a province, vested in the Lieutenant-Governor by s. 90 of *The British North America Act, 1867,* is still a subsisting power. Its exercise is not subject to any limitations or restrictions, save that the discretion of the Lieutenant-Governor shall be exercised subject to any relevant provision in his Instructions from the Governor General.

Liquidators of the Maritime Bank v. *Receiver-General of New Brunswick,* [1892] A.C. 437; *In re The Initiative and Referendum Act,* [1919] A.C. 935; *Bonanza* v. *The King,* [1916] 1 A.C. 566; *British Coal Corpn.* v. *The King,* [1935] A.C. 500; *Wilson* v. *E. & N. Ry. Co.,* [1922] 1 A.C. 202, at 209, 210; *Bank of Toronto* v. *Lambe,* 12 App. Cas. 575, at 587, and other cases, discussed or referred to. The *Statute of Westminster* (1931) 22 Geo V. (Imp.), c. 4, discussed.

REFERENCE, by Orders of the Governor General in Council, of the following questions of law to the Supreme Court of Canada for hearing and consideration, pursuant to s. 55 of the *Supreme Court Act,* R.S.C., 1927, c. 35:—

1. Is the power of disallowance of provincial legislation, vested in the Governor General in Council by section 90 of the *British North America Act, 1867,* still a subsisting power?
2. If the answer to question 1 be in the affirmative, is the exercise of the said power of disallowance by the Governor General in Council subject to any limitations or restrictions and, if so, what are the nature and effect of such limitations or restrictions?

3. Is the power of reservation for the signification of the pleasure of the Governor General of Bills passed by the legislative assembly or legislative authority of a province vested in the Lieutenant-Governor by section 90 of the *British North America Act, 1867*, still a subsisting power?
4. If the answer to question 3 be in the affirmative, is the exercise of the said power of reservation by the Lieutenant-Governor subject to any limitations or restrictions, and if so, what are the nature and effect of such limitations or restrictions?

The (unanimous) answers of the Court to the said questions, as certified to His Excellency the Governor General in Council, were as follows:—

1. The first question referred is answered in the affirmative;
2. The second question referred is answered in the negative, save that the power of disallowance shall be exercised within the prescribed period of one year after the receipt of an authentic copy of the Act by the Governor General;
3. The third question referred is answered in the affirmative;
4. The fourth question referred is answered in the negative, save that the discretion of the Lieutenant-Governor shall be exercised subject to any relevant provision in his Instructions from the Governor General.

Certain Acts of the Legislature of the Province of Alberta (assented to on August 6, 1937, and intituled respectively: "An Act to Provide for the Regulation of the Credit of the Province of Alberta"; "An Act to Provide for the Restriction of the Civil Rights of Certain Persons"; and "An Act to Amend the Judicature Act") were, by Order of the Governor General in Council, dated August 17, 1937 (P.C. 1985), disallowed, which disallowance was duly signified. The Government of the Province of Alberta challenged the constitutional right and competency of the Governor General in Council to disallow the legislation, on the ground that the power of disallowance, which the Governor General in Council had professed to exercise, no longer exists. Therefore the above ques-

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tions 1 and 2 were (by Order in Council, P.C. 2715) referred as aforesaid. The above questions 3 and 4 were added (by Order in Council, P.C. 2802) at the request of the Government of the Province of Alberta.

Due notice of the hearing of the Reference (in accordance with an order of this Court) was given to the Attorneys-General of the several Provinces of Canada.

A. Geoffrion K.C., *J. Boyd McBride K.C.*, and *C. P. Plaxton K.C.* for the Attorney-General for Canada.

O. M. Biggar K.C. and *J. J. Frawley K.C.* for the Attorney-General for Alberta.

(*H. A. MacLean* attended on behalf of the Attorney-General for British Columbia, but did not take part in the argument).

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

THE CHIEF JUSTICE.—The answers to the questions referred to us depend in substance upon the construction of sections 55, 56, 57 and 90 of the *British North America Act*. We think there is nothing to be gained by a verbal analysis of those sections. The plain effect of section 90 is that

> what has been laid down as to the Dominion Parliament in regard to . . . the assent to Bills, the disallowance of Acts, and the signification of pleasure on Bills reserved, is to extend and apply to the Legislatures of the several Provinces as if these provisions were re-enacted and made applicable in terms to the respective Provinces and their Legislatures, with the substitution of the Lieutenant-Governor of the Province for the Governor General, of the Governor General for the Sovereign and for a Secretary of State (*In re The Initiative and Referendum Act* (1)).

The alternative construction, in support of which everything that could be said for it with any degree of plausibility was lucidly put before us by Mr. Biggar, involves the conclusion that the Governor General has never possessed authority to disallow provincial legislation; and that the authority of a Lieutenant-Governor to reserve bills presented to him for assent is a power to reserve such bills for the signification of the pleasure of the Sovereign himself and not that of the Governor General.

This is a novel view put forward now for the first time since the *British North America Act* came into force. Many provincial statutes have been disallowed in the period

(1) [1919] A.C. 935, at 942.

which has elapsed since July 1st, 1867, and bills have been reserved to be dealt with by the Governor General which have been dealt with accordingly; and the regularity of these proceedings has never before been challenged. The power of disallowance by the Governor General has been recognized in at least two judgments of the Privy Council (*Bank of Toronto* v. *Lambe* (1), and *Wilson* v. *E. & N. Railway Co.* (2).)

One argument advanced is that the literal construction of section 90 is inconsistent with the reasons for judgment given on behalf of the Judicial Committee by Lord Watson in *The Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick* (3) and by Lord Haldane in *In re The Initiative and Referendum Act* (4). The question before the Board in the first of those appeals was whether the debt of a bank, in respect of public moneys of a province deposited in the name of the Receiver-General of a province, was entitled to payment in full, over other depositors who were simple contract creditors of the bank, as a Crown debt to which priority attaches by virtue of the prerogative. It was pointed out that previous decisions of the Board had already settled that the territorial rights assigned by section 109 to the provinces became, after the enactment of the *B.N.A. Act,* vested in Her Majesty as the Sovereign head of the province for the benefit of the province and subject to the control of its legislature. As those decisions rested upon the general recognition of " Her Majesty's continued sovereignty under the Act of 1867," it appeared to their Lordships that the revenues of Her Majesty other than territorial revenues, assigned to the provinces by section 126, were vested in the Crown in the same sense. That was the precise point decided, but the judgment of Lord Watson contains an exposition of the relation between the Sovereign and the Provinces which is relied upon by Alberta on this reference. The argument, which appears to have been addressed on behalf of the appellants to their Lordships in that appeal, that the Lieutenant-Governor, neither in legislative nor in execu-

(1) (1887) 12 App. Cas. 575, at 587.
(2) [1922] 1 A.C. 202, at 209, 210.
(3) [1892] A.C. 437.
(4) [1919] A.C. 935.

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tive acts, represented the Crown was rejected on grounds which are summed up in this paragraph (p. 442):

> It is clear, therefore, that the provincial legislature of New Brunswick does not occupy the subordinate position which was ascribed to it in the argument of the appellants. It derives no authority from the Government of Canada, and its status is in no way analogous to that of a municipal institution, which is an authority constituted for purposes of local administration. It possesses powers, not of administration merely, but of legislation, in the strictest sense of that word; and, within the limits assigned by section 92 of the Act of 1867, these powers are exclusive and supreme. It would require very express language, such as is not to be found in the Act of 1867, to warrant the inference that the Imperial Legislature meant to vest in the provinces of Canada the right of exercising supreme legislative powers in which the British Sovereign was to have no share.

In *In re The Initiative and Referendum Act* (1), the Board had to consider whether legislation which, as it was held, would compel the Lieutenant-Governor to submit a proposed law to a body of voters distinct from the Legislature, and would render him powerless to prevent it becoming an actual law if approved by those voters, was invalid. In the course of the judgment delivered by Lord Haldane on behalf of the Judicial Committee, the judgment and the reasons in *The Liquidators of the Maritime Bank* case (2) were recognized by the Board as laying down the governing principles in respect of the relation of the Crown to the provinces. In substance, these judgments declare that, in the appointment of a provincial Governor, the Governor General in Council under section 58 is acting as the Executive Government of the Dominion which, by section 9 of the statute, is declared to be vested in the Queen; in other words,

> the act of the Governor General and his Council in making the appointment is, within the meaning of the statute, the act of the Crown.

Lord Watson proceeds:

> a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor General himself is for all purposes of Dominion government (*Liquidators of the Maritime Bank* v. *The Receiver-General of New Brunswick* (3)).

The act of a Lieutenant-Governor in assenting to a bill or in reserving a bill is the act of the Crown by the Crown's representative just as the act of the Governor General in assenting to a bill or reserving a bill is the act of the Crown.

(1) [1919] A.C. 935. (2) [1892] A.C. 437.
(3) [1892] A.C. 437, at 443.

There is nothing, however, in all this in the least degree incompatible with a Lieutenant-Governor reserving a bill for the signification of the pleasure of the Governor General who is the representative of the Crown or in the disallowance of an Act of the Legislature by the Governor General acting on the advice of his Council who, as representing the Sovereign, constitutes the executive government for Canada.

It seems proper in this connection to call attention to the functions of the Dominion Government respecting the appointment and the removal of a Lieuteant-Governor. By section 58 of the *B.N.A. Act,* the Lieutenant-Governor is appointed by the Governor General in Council by instrument under the Great Seal of Canada. His commission runs in the name of the Sovereign, just as the commissions of other great officers of state (appointed by the same authority under such instruments) run in the name of the Sovereign. But his Instructions emanate from the Governor General and it is the Governor General in Council who determines their character; and in assenting to bills, withholding assent, and reserving bills for the signification of the Governor General's pleasure, he exercises his discretion subject to the Instructions of the Governor General. He holds office during the pleasure of the Governor General (sec. 59). His salary is fixed and provided by the Parliament of Canada.

It is true it appears to have been the practice in Alberta and in some of the other provinces, although the practice is not uniform, for the Lieutenant-Governor to assent to bills in the name, not of the Governor General, but of His Majesty. The circumstance, however, that the assent of the Lieutenant-Governor acting under the authority and on behalf of the Crown has been given in a form more august than that prescribed by the statute could not, of course, impair in any way the legal validity of his assent that is expressed as the assent of the Sovereign, which in truth, in point of law, it is and is intended to be; and this practice is of no relevancy touching the law governing these matters which is to be ascertained from the enactments of the *B.N.A. Act.*

That the Lords of the Privy Council did not consider the principles enunciated in the two judgments just discussed implied as a consequence any qualification of the *ex facie*

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meaning of section 90 seems to follow from the tenor of the passage quoted in the first paragraph of this judgment from that of Lord Haldane in the later of the two appeals.

We come now to the precise questions submitted which are, as to both disallowance and reservation: Is the power still a subsisting power and, if so, is it subject to any limitations or restrictions?

We are not concerned with constitutional usage. We are concerned with questions of law which, we repeat, must be determined by reference to the enactments of the *British North America Acts* of 1867 to 1930, the *Statute of Westminster,* and, it might be, to relevant statutes of the Parliament of Canada if there were any.

Section 90 which, with the changes therein specified, re-enacts sections 55, 56 and 57 of the *B.N.A. Act,* is still subsisting. It has not been repealed or amended by the Imperial Parliament and it is quite clear that, by force of subsection 1 of section 7 of the *Statute of Westminster,* the Dominion Parliament did not acquire by that statute, any authority to repeal, amend or alter the *British North America Acts.* Whether or not, by force of section 91 (29) and section 92 (1) of the *B.N.A. Act,* the Dominion Parliament has authority to legislate in respect of reservation, it is not necessary to consider because no such legislation has been passed.

The powers are, therefore, subsisting. Are they subject to any limitation or restriction?

Once more, we are not concerned with constitutional usage or constitutional practice. Nor is it necessary to consider whether the Parliament of Canada, though not competent to repeal or amend section 90 of the *British North America Act,* possesses authority by legislation to dictate the form or the substance of the Instructions to the Lieutenant-Governors as touching the reservation of bills or the rules and principles by which the Governor General is to be guided in exercising the power of disallowance. Here again, there is no pertinent legislation.

As to disallowance, it was said in the judgment of the Judicial Committee in *Wilson* v. *E. & N. Railway Co.* (1), "It is indisputable that in point of law the authority is unrestricted."

(1) [1922] 1 A.C. 202, at 210.

As to reservation, the statute in express terms (section 55, as re-enacted by section 90) imposes on the Lieutenant-Governor the duty to declare either that he assents to a bill presented to him, or that he withholds assent, or that he reserves the bill for the signification of the Governor General's pleasure. He is to act, the statute says, " according to his discretion, but subject to the provisions of this Act and to . . . . Instructions " of the Governor General.

There is nothing in the *British North America Act* controlling this discretion; nor is there any other statute having any relevancy to the matter.

The power of reservation is subject to no limitation or restriction, except in so far as his discretion in exercising it may be controlled or regulated by the Instructions of the Governor General and it is not suggested that the Instructions contain anything of that character.

The conclusion, therefore, is that the power of disallowance and the power of reservation are both subsisting powers, and that the former is subject to no limitations or restrictions and the latter only to the restriction that the discretion of the Lieutenant-Governor shall be exercised subject to the Governor General's Instructions.

CANNON J.—The following questions were referred by His Excellency the Governor General in Council to this Court for hearing and consideration, pursuant to section 55 of the *Supreme Court Act:*—

1. Is the power of disallowance of provincial legislation, vested in the Governor General in Council by section 90 of the British North America Act, 1867, still a subsisting power?

2. If the answer to Question 1 be in the affirmative, is the exercise of the said power of disallowance by the Governor General in Council subject to any limitations or restrictions and, if so, what are the nature and effect of such limitations or restrictions?

3. Is the power of reservation for the signification of the pleasure of the Governor General of bills passed by the legislative assembly or legislative authority of a province vested in the Lieutenant-Governor by section 90 of the British North America Act, 1867, still a subsisting power?

4. If the answer to Question 3 be in the affirmative, is the exercise of the said power of reservation by the Lieutenant-Governor subject to any limitations or restrictions, and if so what are the nature and effect of such limitations or restrictions?

It appears that these references were deemed advisable as a result of difficulties between the Dominion and the province of Alberta, following the disallowance by the Governor General of three acts passed on August 6th, 1937,

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by the legislature of Alberta. The other Provinces, although duly notified, did not take part in the argument.

After hearing counsel for the Dominion and the province, I have without hesitation reached the conclusion that the four questions should be answered respectively as follows:—

Question 1. Yes. The power of disallowance is and remains in full vigour.

Question 2. The power of disallowance by the Governor General in Council is subject to no limitation or restriction whatsoever, save that it has to be exercised within the period of one year after receipt of the Act by the Governor General.

Question 3. Yes. The power of reservation is and remains in full vigour.

Question 4. The exercise of the power of reservation by the Lieutenant-Governor is subject to no limitation or restriction whatsoever, save that the Lieutenant-Governor is, under the terms of sec. 90 of the *British North America Act*, required to exercise the power "according to his discretion but subject to the provisions of the said Act and to the Governor General's instructions."

And I now proceed to give my reasons for reaching the above conclusions:—

1. The Province of Alberta having raised the controversy, it may be relevant to note that the *Alberta Act*, 4-5 Ed. VII (Canada) c. 3, sec. 3, provides as follows:—

3. The provisions of *The British North America Acts*, 1867 to 1886, shall apply to the province of Alberta in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion, as if the said province of Alberta had been one of the provinces originally united, except in so far as varied by this Act and except such provisions as are in terms made, or by reasonable intendment may be held to be, specially applicable to or only to affect one or more and not the whole of the said provinces.

2. The provisions of the *British North America Act* to be considered read as follows:—

55. Where a Bill passed by the Houses of the Parliament is presented to the Governor General for the Queen's Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to Her Majesty's Instructions, either that he assents thereto in the Queen's Name, or that he withholds the Queen's Assent, or that he reserves the Bill for the Signification of the Queen's Pleasure.

56. Where the Governor General assents to a Bill in the Queen's Name, he shall by the first convenient Opportunity send an authentic Copy of the Act to one of Her Majesty's Principal Secretaries of State,

and if the Queen in Council within Two Years after Receipt thereof by the Secretary of State thinks fit to disallow the Act, such Disallowance (with a Certificate of the Secretary of State of the Day on which the Act was received by him) being signified by the Governor General, by Speech or Message to each of the Houses of the Parliament or by Proclamation, shall annul the Act from and after the Day of such Signification.

57. A Bill reserved for the Signification of the Queen's Pleasure shall not have any Force unless and until within Two Years from the Day on which it was presented to the Governor General for the Queen's Assent, the Governor General signifies, by Speech or Message to each of the Houses of the Parliament or by Proclamation, that it has received the Assent of the Queen in Council.

An Entry of every such Speech, Message, or Proclamation shall be made in the Journal of each House, and a Duplicate thereof duly attested shall be delivered to the proper Officer to be kept among the Records of Canada.

90. The following Provisions of this Act respecting the Parliament of Canada, namely,—the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved,—shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant-Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

3. Blending the three sections with the directions of sec. 90, we find:—

(*a*) Where a Bill passed by the House or Houses of the Legislature is presented to the Lieutenant-Governor of the Province for the Governor General's Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to the Governor General's Instructions, either that he assents thereto in the Governor General's Name, or that he withholds the Governor General's Assent, or that he reserves the Bill for the Signification of the Governor General's pleasure.

(*b*) Where the Lieutenant-Governor of the Province assents to a Bill in the Governor General's Name, he shall by the first convenient Opportunity send an authentic Copy of the Act to the Governor General, and if the Governor General in Council within One Year after Receipt thereof by the Governor General thinks fit to disallow the Act, such Disallowance (with a Certificate of the Governor General of the Day on which the Act was received by him) being signified by the Lieutenant-Governor, by Speech or Message to the House, or, if more than one, to each of the Houses of the Legislature, or by Proclamation, shall annul the Act from and after the Day of such Signification.

(*c*) A Bill reserved for the Signification of the Governor General's Pleasure shall not have any Force unless and until within One Year from the Day on which it was presented to the Lieutenant-Governor for the Governor General's Assent, the Lieutenant-Governor signifies by Speech or Message to the House, or, if more than one, to each of the Houses of the Legislature or by Proclamation, that it has received the Assent of the Governor General in Council.

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An Entry of every such Speech, Message, or Proclamation shall be made in the Journal of the House, or of each House, if more than one, and a Duplicate thereof duly attested shall be delivered to the proper Officer to be kept among the Records of the Province.

4. It was accepted as common ground, at the hearing, that the statutory provisions are clear and that they are unrepealed. Counsel for Alberta agreed entirely with counsel for the Dominion that, when the directions given by section 90 are carried out in connection with sections 55 to 57, we get a perfectly clear statutory direction. One must reach the conclusion that these provisions must be given full force and effect, unless they have been amended by the Imperial Parliament. Far from doing so, the *Statute of Westminster* (1931), 22 Geo. V, Imp. ch. 4, sec. 7, enacts:

7. (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

In my opinion these enactments would give new force, if necessary, to the existing provisions of the *British North America Act* and preserve them. The Imperial Conferences mentioned in the Alberta factum could not and did not purport to change the law. Moreover, the resolutions of these conferences do not apply to the right of the federal government to disallow or to the right of the Lieutenant-Governor to reserve, but to the right of the Governor General to reserve and to the right of the Imperial Government to disallow.

5. Both powers have been often exercised in practice and the Lieutenant-Governors instructed accordingly. All the jurisprudence that has been quoted is to the same effect.

The Judicial Committee, in *Wilson* v. *Esquimalt and Nanaimo Ry. Co.* (1), said, as regards the federal power of disallowance: "It is indisputable that in point of law the authority is unrestricted." How and when the power is to be exercised is a matter to be determined by the Governor General in Council.

(1) [1922] 1 A.C. 202, at 210.

6. It may be added, although it is not by itself a decisive consideration, that chapter 2 of the Revised Statutes of Alberta (1922) provides that in case of reservation by the Lieutenant-Governor of a bill for the assent of the Governor General, the clerk of the legislative assembly shall endorse thereon the date when the Lieutenant-Governor has signified that the same was laid before the Governor General and that the Governor General was pleased to assent to the same. In the case of an Act of the province which has been reserved and afterwards assented to, provisions are made for the coming into force of the legislation.

7. An additional reason for the preservation of this power of disallowance of provincial statutes is its necessity, more than ever evident, in order to safeguard the unity of the nation. It may become essential, for the proper working of the constitution, to use in practice the principle of an absolute central control which seems to have been considered an essential part of the scheme of Confederation; this control is found in the Lieutenant-Governor's power of reservation and the Governor General in Council's power of disallowance.

CROCKET, J.—I take it that questions 1 and 2 submitted on this reference concern only the power of the Governor General in Council to disallow provincial legislation, that is to say, Acts passed by the Legislatures of the several Provinces of Canada, which have been assented to by their respective Lieutenant-Governors. The form of question 1 apparently assumes that s. 90 of the *British North America Act* vested this power of disallowance in the Governor General in Council and merely asks if that power is still a subsisting power.

I am of opinion, not only that the clear and indisputable effect of s. 90, as the question assumes, was to vest the power of disallowance of provincial legislation in the Governor General in Council, but am of opinion also that that power still subsists, precisely as it has subsisted since the coming into force of the *British North America Act* in 1867, unimpaired by the *Statute of Westminster, 1931,*

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or any other enactment of the Imperial Parliament. The *Statute of Westminster* itself expressly declares by s. 7:—

> Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

None of the British North America Acts passed by the Imperial Parliament after the enactment of the principal Act of 1867, viz: the Act of 1871, c. 28, respecting the establishment of new Provinces in Canada; the Act of 1886, c. 35, as to the representation in the Parliament of Canada of territories not then forming part of any Province but forming part of the Dominion; the Act of 1915, c. 45, increasing the number of senators; the Act of 1916, c. 19, extending the duration of the then existing Parliament of Canada; and the Act of 1930, c. 26, confirming certain agreements between the Government of Canada and the western Provinces, purport to alter in any manner, either the respective legislative powers of the Dominion or of the Provinces, or the administrative prerogative of the Governor General in Council in relation to the disallowance of provincial legislation, as provided for in the principal Act of 1867.

While s. 90 of the *British North America Act* of 1867 vests the power of disallowance in the Governor in Council by the very inconvenient method of extending and applying to the Legislatures of the several Provinces the provisions of the Act relating to the assent to bills by the Governor General, the disallowance of Acts by the Queen in Council and the signification of pleasure on bills reserved by the Governor General, "as if those provisions were here re-enacted and made applicable in terms to the respective Provinces and the Legislatures thereof, with the substitution of the Lieutenant-Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of one year for two years, and of the Province for Canada," and does not re-produce these provisions as thus altered, the meaning and effect is perfectly clear, as I have said, so far as the power of disallowance is concerned, once those provisions are examined and re-produced with the required substitutions. The only provisions which the Act contains relating to the disallowance of federal Acts are those which are found in s. 56.

There may be a question as to whether the intention of s. 90 was to substitute "the Governor General's name" for "the Queen's name", concerning the assent to bills in the Legislatures of the Provinces. I am inclined to agree with the conclusion expressed by Dr. Todd in his "Parliamentary Government in the British Colonies" (1894) for the reasons stated at p. 440 by that experienced and eminent authority on that subject, as well as for the reason that it has been definitely decided by the Judicial Committee of the Privy Council that the Lieutenant-Governor is as much the representative of the Sovereign for all purposes of the Provincial Government as is the Governor General for all purposes of the Dominion Government (see *Maritime Bank* v. *Receiver-General of New Brunswick* (1), and *Bonanza* v. *The King* (2); and *In re The Initiative and Referendum Act* (3), that the correct constitutional practice is for the Lieutenant-Governor to assent to or to withhold his assent in the Sovereign's name. This, however, is a mere matter of form. Whether a Bill is assented to by the Lieutenant-Governor of a Province in the King's name or in the Governor General's name, it must be taken to have been assented to in behalf of the Sovereign and to have become an Act which is subject to the exercise of the power of disallowance by the appropriate authority.

Reproducing, then, s. 56 with the substitutions mentioned in s. 90, we have the following provision, which is by the latter section, unmistakably made applicable in terms to the respective Provinces and the Legislatures thereof:

> Where the Lieutenant-Governor of the Province assents to a Bill in the Queen's name (or in the Governor General's name), he shall by the first convenient opportunity send an authentic copy of the Act to the Governor General, and if the Governor General in Council within one year after receipt thereof by the Governor General thinks fit to disallow the Act, such disallowance (with a certificate of the Governor General of the day on which the Act was received by him) being signified by the Lieutenant Governor of the Province by speech or message to the Legislature or by proclamation, shall annul the Act from and after the day of such signification.

This provision having been thus written into our constitutional Act as one of the terms of the compact under which the original Provinces agreed to federate, and having been preserved inviolate by the Imperial Parliament to

(1) [1892] A.C. 437. (2) [1916] 1 A.C. 566.
(3) [1919] A.C. 935.

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the present day together with all other provisions of the Act in relation to the distribution of legislative power between the Dominion and the Provinces as well as in relation to the executive power of the Dominion and Provincial Governments, as is so significantly emphasized by the express terms of the *Statute of Westminster,* I think the answer to question 1 must be in the affirmative.

With regard to question 2 as to whether the exercise of the power of disallowance of provincial legislation by the Governor in Council is subject to any limitations or restrictions, I am of opinion that, in point of law the authority is unrestricted as was distinctly held by the Judicial Committee of the Privy Council, speaking by my Lord the Chief Justice of Canada, in *Wilson* v. *Esquimalt and Nanaimo Railway Co.* (1); and that its exercise by the Governor in Council is subject to no limitation except that which is found in the enactment itself as above reproduced as to the time within which the authority must be exercised and the manner in which the disallowance must be signified, if the latter can properly be said to be a limitation upon the exercise of the power. The enactment plainly applies to any and every bill which becomes an Act of any Provincial Legislature by reason of the Lieutenant-Governor's assent in behalf of the Sovereign, and the words "and if the Governor General in Council within one year after receipt thereof (i.e. after receipt of an authentic copy of the Act by the Governor General to whom the Lieutenant-Governor is required to send such copy) *thinks fit to disallow the Act*" distinctly denote an entirely unfettered discretion on the part of the Governor General in Council so far as the exercise of the power of disallowing the Act is concerned, whether the Act be one which may be found to be *intra* or *ultra vires* of the Legislature, provided such power is exercised within a year after the receipt of the authentic copy by the Governor General. The last words of the enactment concern only the manner in which the disallowance of the Act is to be signified by the Lieutenant-Governor and made effective by the annulment of the Act from the day of such signification, whether

(1) [1922] 1 A.C. 202.

it be by speech or message to the Legislature or by proclamation. We are, of course, concerned here only with legal limitations and restrictions—not with any question of the expediency or inexpediency of the exercise of the power of disallowance in any particular case. That is the responsibility of the Governor in Council entirely.

Questions 3 and 4 with regard to the power of reservation for the signification of the pleasure of the Governor General of bills passed by the Legislative Assembly or Legislative Authority of a Province, which latter expression I assume comprises both the Legislative Assembly and the Legislative Council in any Province, whose constitution still comprises these two separate branches of its Legislature, take substantially the same form as questions 1 and 2 regarding the power of disallowance. They assume that such power of reservation was vested in the Lieutenant-Governors of the Provinces by the same section 90 of the *British North America Act,* and simply ask if it is still a subsisting power. As I have said with regard to the power of disallowance of provincial statutes, I am of opinion not only that the indisputable and clear effect of s. 90, as questions 3 and 4 assume, was to vest the power of reservation of bills for the signification of the pleasure of the Governor General in the Lieutenant-Governor, but am of opinion also that that power still subsists in the Lieutenant-Governors of the Provinces for the same reasons I have indicated in discussing the power of disallowance, s. 90 extending and applying the provisions of s. 55, regarding the presentation to the Governor General of a bill passed by the two Houses of Parliament for the Queen's assent, to the Legislatures of the Provinces in the same way as it extends and applies the provisions of s. 56 and with the same substitutions of the Lieutenant-Governor of the Province for the Governor General and of the Governor General for the Queen. S. 55 with these substitutions would accordingly read, as applied to the Provincial Legislatures, as follows:—

> Where a bill passed by the Legislature is presented to the Lieutenant-Governor of the Province for the Queen's (or the Governor General's) assent, he shall declare, according to his discretion, but subject to the provisions of this Act and to the Governor General's instructions,

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either that he assents thereto in the Queen's (or the Governor General's) name, or that he withholds the Queen's (or the Governor General's) assent, or that he reserves the bill for the signification of the Governor General's pleasure.

The relevant part of s. 57 with the required substitutions stated in s. 90 would read as follows:

> A Bill reserved for the Signification of the Governor General's Pleasure shall not have any Force unless and until within One Year from the Day on which it was presented to the Lieutenant-Governor for the Queen's (or the Governor General's) Assent, the Lieutenant-Governor signifies, by Speech or Message to the Legislature or by Proclamation, that it has received the Assent of the Governor General in Council.

The intention and effect of s. 90, which embodies within it sections 55 and 57 with the above indicated substitutions, to confer upon the Lieutenant-Governor of the Province the power of reservation of bills for the signification of the pleasure of the Governor General is, in my opinion, clear and unmistakable. S. 13 should perhaps also be referred to in this connection. It reads:—

> The provisions of this Act referring to the Governor General in Council shall be construed as referring to the Governor General acting by and with the advice of the Queen's Privy Council for Canada.

I shall, therefore, answer question 3 in the affirmative also.

As to question 4, whether the exercise of the said power of reservation by the Lieutenant-Governor is subject to any limitations or restrictions, I am of opinion that there are no limitations or restrictions to the exercise of the said power other than those indicated by the words " but subject to the provisions of this Act and to the Governor-General's instructions " contained in the enactment itself.

KERWIN J.—Pursuant to the provisions of section 55 of the *Supreme Court Act,* His Excellency the Governor General in Council referred to this Court, for hearing and consideration, the following questions:—

1. Is the power of disallowance of provincial legislation, vested in the Governor General in Council by section 90 of the British North America Act, 1867, still a subsisting power?
2. If the answer to Question 1 be in the affirmative, is the exercise of the said power of disallowance by the Governor General in Council subject to any limitations or restrictions and, if so, what are the nature and effect of such limitations or restrictions?

3. Is the power of reservation for the signification of the pleasure of the Governor General of bills passed by the legislative assembly or legislative authority of a province vested in the Lieutenant Governor by section 90 of the British North America Act, 1867, still a subsisting power?

4. If the answer to question 3 be in the affirmative, is the exercise of the said power of reservation by the Lieutenant Governor subject to any limitations or restrictions, and if so, what are the nature and effect of such limitations or restrictions?

Section 90 of the *British North America Act, 1867,* is as follows:—

90. The following Provisions of this Act respecting the Parliament of Canada, namely,—the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved,—shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant-Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

Sections 55, 56 and 57 are the only provisions in the Act relating to "The Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved," and with the substitutions directed to be made by section 90 would read:—

55. Where a Bill passed by the House or Houses of the Legislature of a Province is presented to the Lieutenant Governor of the Province for the Governor General's Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to the Governor General's Instructions, either that he assents thereto in the Governor General's Name, or that he withholds the Governor General's Assent, or that he reserves the Bill for the Signification of the Governor General's Pleasure.

56. When the Lieutenant Governor of the Province assents to a Bill in the Governor General's Name, he shall by the first convenient Opportunity send an authentic Copy of the Act to the Governor General, and if the Governor General in Council within One Year after Receipt thereof by the Governor General thinks fit to disallow the Act, such Disallowance (with a Certificate of the Governor General of the Day on which the Act was received by him) being signified by the Lieutenant Governor of the Province, by Speech or Message to the House, or, if more than one, to each of the Houses of the Legislature, or by Proclamation, shall annul the Act from and after the Day of such Signification.

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57. A Bill reserved for the Signification of the Governor General's Pleasure shall not have any Force unless and until within One Year from the Day on which it was presented to the Lieutenant Governor for the Governor General's Assent, the Lieutenant Governor signifies, by Speech or Message to the House, or, if more than one, to each of the Houses of the Legislature, or by Proclamation, that it has received the Assent of the Governor General in Council.

An Entry of every such Speech, Message, or proclamation shall be made in the Journal of the House or of each House, if more than one, and a Duplicate thereof duly attested shall be delivered to the proper Officer to be kept among the Records of the Province.

The questions submitted refer in general terms to the power of disallowance of provincial legislation and the power of reservation with reference to Bills passed by the Legislative Assembly or legislative authority of a province. At the date the Act of 1867 came into force, the only provinces to which the substituted provisions could apply were Ontario, Quebec, Nova Scotia, and New Brunswick, but under the powers reserved by section 146 and in pursuance of the relevant Orders of Her Majesty in Council and of the relevant statutes, Imperial and Dominion, that ensued thereunder, these sections became applicable to the other provinces now forming part of the Dominion. No question was raised, and indeed it would appear that none could be suggested, but that the answers to the questions would apply to all the provinces and it is therefore unnecessary to set forth the various orders in council and statutes by which this conclusion is reached.

These sections of the Act (55, 56 and 57 as altered above) are clear and unambiguous and, if this be so, it follows, as stated by Earl Loreburn in *Attorney-General for Ontario* v. *Attorney-General for Canada* (1):

> In the interpretation of a completely self-governing constitution founded upon a written organic instrument, such as the *British North America Act*, if the text is explicit the text is conclusive, alike in what it directs and what it forbids.

In my opinion, the power to reserve and the power to disallow were explicitly conferred by the terms of the provisions referred to, and on the point as to the original existence of these powers, perhaps nothing more requires to be said except to deal with a suggestion of counsel for the Attorney General of Alberta, referred to later. However, it is a matter of at least historical interest that a survey of

(1) [1912] A.C. 571, at 583.

the relevant well-known Quebec Resolutions of 1864 and resolutions adopted at the London Conference of 1866 and of the preliminary drafts of the Act, indicates that these provisions carry out the intention of the Fathers of Confederation. From time to time these resolutions and drafts have been referred to in that sense by the Judicial Committee and this Court in construing various sections of the Act.

There are set forth at pages 48 and 49 of Pope's Confederation Documents, Articles 50 and 51 of the Quebec Resolutions. Identical resolutions were adopted at the London Conference as numbers 49 and 50 respectively and are reproduced herewith as they appear at pages 107 and 108 of the same publication:—

49. Any Bill of the General Parliament may be reserved in the usual manner for Her Majesty's assent, and any bill of the Local Legislatures may, in like manner, be reserved for the consideration of the Governor General.

50. Any Bill passed by the General Parliament shall be subject to disallowance by Her Majesty within two years, as in the case of Bills passed by the Legislatures of the said Provinces hitherto, and in like manner any Bill passed by a Local Legislature shall be subject to disallowance by the Governor General within one year after the passing thereof.

In order to give effect to these Articles, there was inserted in the rough draft of the Bill to provide for the Union, prepared by the London Conference, section 34, reading as follows:—

34. The Governor General may disallow any Bill passed by the Local Legislature within one year after the passing thereof, and upon the proclamation thereof by the Governor it shall become null and void; and no Bill which shall be reserved by the Governor for the consideration of the Governor General shall have any force or authority until the Governor General shall signify his assent thereto and proclamation thereof made within the Province by the Governor of the Province for which such Bill has been passed.

This provision was expanded in the fourth draft as sections 118, 119 and 120:—

118. Where a Bill passed is presented to the Lieutenant-Governor for his assent, he shall declare according to his discretion, but subject to the provisions of this Act, either that he assents thereto or that he withholds his consent, or that he reserves the Bill for the signification of the pleasure of the Governor-General.

119. Where the Lieutenant-Governor assents to a Bill he shall by the first convenient opportunity send an authentic copy of the Act to the Governor-General, and if the Governor-General in Council within one year after the passing thereof, thinks fit to disallow the Act, such disallowance being signified by the Governor-General to the Lieutenant-

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Governor, or by proclamation, shall annul the Act from and after the day of such signification or proclamation.

120. A Bill reserved for the signification of the Governor-General's pleasure shall not have any force unless and until within one year from the day on which it was reserved, the Governor-General signifies to the Lieutenant-Governor, or by proclamation that it has received the assent of the Governor-General in Council; an entry of every such signification or proclamation when transmitted by message from the Lieutenant-Governor, shall be made in the Journals of each House, as the case may be.

In the final draft these sections were omitted and in lieu thereof it was provided by section 93:—

The provisions of Part V of this Act shall extend and apply to the Legislatures of the several Provinces as if those provisions were here re-enacted and made applicable in terms to the respective Provinces and Legislatures thereof.

Sections 54 to 58, inclusive, comprised Part V, and sections 56, 57 and 58 contained the provisions applicable to the Dominion relating to Assent to Bills, Reservation of Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved. Section 93 of the final draft was the precursor of section 90 as it appears in the Act.

We were told that according to the present general practice the Lieutenant Governors of the provinces assent to Bills in the name of the Sovereign and not in the name of the Governor General; and it was suggested by counsel for the Attorney General for Alberta that, to follow the terms of the substituted provisions of section 56, the assent should be in the name of the Governor General. We were also told that this had not always been the practice in each province, and that this is so is indicated in Todd's Parliamentary Government in the British Colonies, 2nd edition, at page 440. It was the opinion of the author of that book, as indicated on pages 440 and 442, that a Lieutenant Governor should assent to or withhold his assent from Bills passed by the Provincial Legislature in the Sovereign's name while, if he saw fit to reserve a Bill, it should be declared that the reservation was "for the signification of the pleasure of His Excellency the Governor General."

With that view I agree. Dealing with the executive power in the Dominion, section 9 of the Act provides:—

The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.

As to the legislative power, section 17 provides:—

There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

The Governor General is the representative of the Sovereign for all purposes of the Dominion Government, so that when a Lieutenant-Governor assents to a Bill in the name of the Governor General, he really assents thereto in the name of the Sovereign. To do so directly in the name of the Sovereign is, therefore, strictly in conformity with the terms of its provisions.

This view is also consistent with the scheme of Union as exemplified throughout the Act and with the expressions of opinion found in three decisions of the Privy Council which were referred to by counsel for Alberta as well as by counsel for the Attorney General of the Dominion. The first of these is *Liquidators of the Maritime Bank* v. *Receiver-General of New Brunswick* (1), where the position of a Lieutenant-Governor of a province was clearly defined. The second is *Bonanza Creek Gold Mining Co. Ltd.* v. *The King* (2), where it was pointed out, at page 580, that the earlier decision had dispelled "whatever obscurity may at one time have prevailed as to the position of a Lieutenant-Governor appointed on behalf of the Crown by the Governor General." In the third decision, *In re The Initiative and Referendum Act* (3), it is stated, at page 941, that the *Maritime Bank* case (1) determined:—

> The Lieutenant-Governor is as much the representative of His Majesty for all purposes of the Provincial Government as is the Governor General for all purposes of the Dominion Government.

At page 943 of this third case the judgment continues:—

> When the Lieutenant-Governor gives to or withholds his assent from a Bill passed by the Legislature of the province, it is in contemplation of law the Sovereign that so gives or withholds assent.

While in none of these cases were the questions referred to this Court before their Lordships, the opinion I have just expressed appears to be in conformity with the above extracts from their judgments.

In any event it could hardly be argued, and in fact was not, that even if the practice in this respect were incorrect, it would render Bills which had been assented to, ineffective as statutes.

It was suggested rather than argued that the recommendations of the Imperial Conferences, and particularly the Conference of 1929, with respect to the constitutional

(1) [1892] A.C. 437. (2) [1916] 1 A.C. 566.
(3) [1919] A.C. 935.

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practice as to the reservation by the Governor General of Bills passed by the Parliament of Canada, could in some way be relied on to show that the rights of reservation and disallowance with reference to provincial Bills or Acts no longer existed. Whatever the effect of the recommendations adopted at any of the Imperial Conferences (and with that problem we are not concerned), it cannot apply to alter the position as between the Dominion and the Provinces under the terms of the *British North America Act*.

This clearly appears from the *Statute of Westminster, 1931*, or to give the full title, "An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930". The third recital therein reads:—

> And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion:

Section 2 is as follows:—

> 2. (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.
>
> (2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

In delivering the judgment of the Privy Council in *British Coal Corporation* v. *The King* (1), Lord Sankey, at page 520, remarks:—

> It is true that before the Statute (*Statute of Westminster*), the Dominion Legislature was subject to the limitations imposed by the *Colonial Laws Validity Act* and by s. 129 of the Act (*The British North America Act, 1867*), and also by the principle or rule that its powers were limited by the doctrine forbidding extra-territorial legislation, though that is a doctrine of somewhat obscure extent. But these limitations have now been abrogated by the Statute. There now remain only such limitations as flow from the Act itself, the operation of which as affecting the competence of Dominion legislation was saved by s. 7 of the Statute, a section which excludes from the competence of the Dominion and Provincial Parliaments any power of "repeal, amendment or alteration" of the Act. But it is well known that s. 7 was inserted at the request of Canada and for reasons which are familiar.

(1) [1935] A.C. 500.

The "familiar" reasons mentioned by the Lord Chancellor are that a section proposed by the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929, to be inserted in the proposed Statute of Westminster in order to make it clear that section 2 and other sections would effect no change in the existing position as between the Dominion and the provinces, was not satisfactory to the latter; and at a Dominion-Provincial Conference held in Ottawa in April, 1931, the terms of what is now section 7 were agreed upon. For present purposes it is sufficient to quote subsection 1 thereof:—

> 7. (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the *British North America Acts*, 1867 to 1930, or any order, rule or regulation made thereunder.

These words are so clear that comment or elaboration would appear to be superfluous.

In my opinion, therefore, the powers referred to still subsist. Again, while this question has not been considered by the Privy Council, as recently as 1921 it was stated in *Wilson* v. *Esquimalt and Nanaimo Railway Co.* (1):—

> It is indisputable that in point of law the authority (i.e., to disallow) is unrestricted.

And still later, in *Attorney-General for British Columbia* v. *Attorney-General of Canada* (2), there appears at page 210 a statement that the Governor in Council disallowed a certain provincial Act within a year from the date of its passing "during which his power of disallowance remained operative."

The circumstances under which the powers referred to may be exercised are matters upon which this Court is not constitutionally empowered to express an opinion since the power of disallowance is granted by the Act to the Governor General in Council and the power of reservation is to be exercised by the Lieutenant-Governor "according to his Discretion, but subject to the Provisions of this Act and to the Governor General's Instructions."

I would, therefore, answer "Yes" to questions 1 and 3, and to question 2,—"The exercise of the said power of disallowance is subject only to the limitation of one year after the receipt of the Act by the Governor General, within which period the Governor General in Council must

(1) [1921] 1 A.C. 202, at 210. (2) [1924] A.C. 203.

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determine whether or not to disallow the Act." So far as I am aware there are no provisions of the *British North America Act* subject to which the discretion of the Lieutenant-Governor as to reservation is to be exercised, and I would therefore answer question 4,—"The exercise of the said power of reservation is subject only to the discretion of the Lieutenant-Governor and to the Governor General's instructions."

HUDSON J.—Section 90 of the *British North America Act* and the other sections incorporated therewith by reference have not been repealed, so that in the case of Acts passed by the legislature of any province and assented to by the Lieutenant-Governor in the name of the Governor General, there is no room for serious argument. The Governor General could without doubt disallow such Acts and in the case of reserved Bills the matter is equally plain.

It appears, however, that the Acts of the Legislature giving rise to this reference were assented to by the Lieutenant-Governor in the name of the King, and in this situation it is argued that under section 90 the power thereby given to the Governor General has no field of operation. It was suggested that any possible alternative inevitably involves some apparent disregard of the words used and that the least possible distortion of the words would appear to be, to omit to make the directed substitution of the "Governor General" for "the Queen" and in this way authorize disallowance by the Sovereign, the Governor General being merely a channel of communication for that purpose. It was further argued that the situation would then correspond with the position of Lieutenant-Governors as defined in the *Maritime Bank* v. *Receiver-General* (1), *Bonanza* v. *The King* (2), and *In re The Initiative and Referendum Act* (3), where it was said:

> The Lieutenant-Governor is as much the representative of His Majesty for all purposes of Provincial Government as is the Governor General for all purposes of Dominion Government.

and

> when the Lieutenant-Governor gives to or withholds his assent from a Bill passed by the Legislature of the Province, it is in contemplation of law the Sovereign that so gives or withholds assent.

(1) [1892] A.C. 437. (2) [1916] 1 A.C. 566.
(3) [1919] A.C. 935.

The Quebec and London Resolutions and early draft Bills of the Confederation Act have been quoted and it is not necessary for me to repeat them. They leave no room for doubt that it was intended that the power of disallowance should be vested in the Governor General and that the Lieutenant-Governors should have the power to reserve legislation for the pleasure of the Governor General. In the final drafting of the Bill there seems to have been some sacrifice of clarity for the sake of brevity.

After the Act was passed the practice was adopted in most of the provinces of giving assent to Bills in the name of the Sovereign. This practice was referred to and approved in Todd's Parliamentary Government in the British Colonies, 1st Ed. (1880), which was then and since has been regarded as standard authority. At page 329 he states:

> In applying these provisions to the case of Bills passed by the provincial legislatures, constituted under the authority of the British North America Act, we arrive at the following conclusions:—
>
> (1) That inasmuch as the Act empowers "the lieutenant-governor" of each province, "in the Queen's name, by instrument under the Great Seal of the province," to "summon and call together" the provincial legislature, and as it is a well-understood principle that all parliaments, whether federal or provincial, are opened in the Queen's name, and by Her governors; and that "legislation is carried on in her name even in provinces, as in Canada, which are directly subordinate to a federal government, instead of to imperial authority," it necessarily follows that the constitutional practice which for the most part prevails in the several provinces of the Dominion, whereby the lieutenant-governor assents to or withholds his assent from Bills passed by the provincial legislature, "in Her Majesty's name," is correct; and that, in this particular, we are not warranted in substituting the name of "the Governor General" for that of "the Queen."
>
> (2) That nevertheless, whenever, "according to his discretion," the lieutenant-governor shall see fit to "reserve" a Bill presented to him for the royal assent, he should declare that he reserves the same "for the signification of the pleasure of His Excellency the Governor General," inasmuch as, in such a case, it is manifestly intended by the *British North America Act* that the term "governor general" should be substituted for that of "the Queen," as indicating the functionary by whom, under such circumstances, the assent or dissent of the Crown is to be declared. This is the interpretation which is put upon the Act by constitutional practice in all the Dominion provinces. And the soundness of this conclusion is confirmed by the obvious intendment of the Act, in regard to the disallowance of provincial Acts as hereinafter stated.
>
> (3) That, whenever the lieutenant-governor shall have assented in the Queen's name to a Bill passed by the provincial legislature, it becomes his duty promptly to forward a copy thereof to the Governor General, in order that if the Governor General in Council should see fit, within one year after the receipt of the said Act, to disallow the same, such

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disallowance may be duly notified to the provincial authorities concerned therein. This also is in accordance with constitutional practice in the Dominion provinces.

(4) And finally, with respect to provincial Bills which have been reserved for the signification of the Governor General's pleasure, it is clear that no such Bill can have any force, or go into operation, unless and until, within one year from the date of its being reserved by the lieutenant-governor, the Governor General shall intimate that the same has received the assent of the Governor General in Council; and an entry of such formal announcement shall be kept in the records and legislative journals of the particular province.

This practice has been continued by these provinces up to the present time. During all of this period, numerous Acts passed by legislatures and assented to by Lieutenant-Governors in the name of the Sovereign have been disallowed by the Governor General, and many Acts passed by legislatures and submitted to Lieutenant-Governors for their assent in the King's name have been reserved for the pleasure of the Governor General. The right of disallowance by the Governor General has, on many occasions, been recognized by the courts in the provinces, by this Court and also by the Privy Council, although it does not appear that in any of these cases the point raised by Mr. Biggar has heretofore been made. Some of the provincial legislatures, and notably Alberta itself, have by their own legislation recognized this procedure.

A rewriting of section 90 to incorporate therein a right of disallowance reserved to the Sovereign, to be finally exercised in London and not in Ottawa, would be contrary to the uniform practice existing since Confederation and a violation of the clear intention of Parliament.

In none of the decisions of the Privy Council dealing with the position of Lieutenant-Governors do their Lordships consider the possible effect of section 90. In any event it is not necessarily inconsistent to hold that an assent by a Lieutenant-Governor is the act of the Sovereign, and at the same time to hold that such act is subject to the right to a subsequent veto by another representative of the Crown.

The assent of the Lieutenant-Governor is the essential act to enable the Governor General to exercise the power of disallowance, and in the application of section 90 it matters not whether the Lieutenant-Governor purports to give his assent in the name of the King or of the King's

representative at Ottawa. I am of the opinion, (1) that the practice adopted of Lieutenant-Governors assenting to Bills in the name of the Sovereign is justified; (2) that nevertheless the power to disallow still remains in the Governor General. The questions submitted should be answered as follows:

Question 1. Yes.

Question 2. The power of disallowance by the Governor General in Council is subject to no limitation or restriction if exercised within the prescribed period of one year.

Question 3. Yes.

Question 4. The exercise of the power of reservation by the Lieutenant-Governor is subject to no limitation or restriction, save that the discretion of the Lieutenant-Governor shall be exercised subject to any relevant provision in his Instructions from the Governor General.

The (unanimous) answers of the Court to the questions referred, as certified to His Excellency the Governor General in Council, are set out on p. 73 *ante*.

Solicitor for the Attorney-General of Canada: *W. Stuart Edwards.*

Solicitor for the Attorney-General of Alberta: *J. J. Frawley.*

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*Jan. 11, 12, 13, 14, 17.
*Mar. 4.

IN THE MATTER OF THREE BILLS PASSED BY THE LEGISLATIVE ASSEMBLY OF THE PROVINCE OF ALBERTA AT THE 1937 (THIRD SESSION) THEREOF, ENTITLED RESPECTIVELY:

"An Act Respecting the Taxation of Banks";

"An Act to Amend and Consolidate the Credit of Alberta Regulations Act"; and

"An Act to Ensure the Publication of Accurate News and Information";

and reserved by the Lieutenant-Governor for the signification of the Governor General's pleasure.

Constitutional law—Alberta statutes—The Bank Taxation Act—The Credit of Alberta Regulation Act, 1937—The Accurate News and Information Act—The Alberta Social Credit Act—Constitutional validity—B.N.A. Act, 1867, ss. 91, 92

The Bank Taxation Act, The Credit of Alberta Regulations Act, 1937 and *The Accurate News and Information Act* are *ultra vires* of the provincial legislature of Alberta.

The Alberta Social Credit Act is *ultra vires* of the provincial legislature. Cannon J. expressing no opinion.

Per Duff C.J. and Davis and Hudson JJ.—Such legislation does not come within section 92 (13 or 16) of the B.N.A. Act; it is not within the power of that province to establish such statutory machinery with the functions for which this machinery is designed and to regulate the operation of it: such machinery, in part at least, as subject matter of legislation, comes within the field designated by "Currency," (s. 91 (14) B.N.A. Act).

Per Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.—Such machinery, as established by *The Alberta Social Credit Act*, in its essential components and features, comes under head no. 15, "Banks and Banking."

Per Duff C.J. and Davis and Hudson JJ.—Even if such legislation is not strictly within the ambit of no. 14 or no. 15, or partly in one or partly in the other, then this legislation is *ultra vires* as its subject-matter is embraced within category no. 2 of s. 91, "Regulation of Trade and Commerce."

Held, by the Court, that the *Bank Taxation Act* is not an enactment in exercise of the provincial power to raise a revenue for provincial purposes by direct taxation, but is legislation which, in its true character and by ascertaining its effect in the known circumstances to which it is to be applied, relates to "Incorporation of Banks and Banking" (s. 91 (15) B.N.A. Act).

Per Duff C.J. and Cannon, Davis and Hudson JJ.—The rate of taxation provided by that Act must be prohibitive in fact and must be known

*PRESENT:—Duff C.J. and Cannon, Crocket, Davis, Kerwin and Hudson JJ.

to the Alberta legislature to be prohibitive. It is not competent to the provinces of Canada, by the exercise of their powers of taxation, to force banks which are carrying on business under the authority of the *Bank Act* to discontinue business; and taxation by one province on a scale which, in a practical business sense, is manifestly prohibitive is not a valid exercise of provincial legislative authority under section 92. Such legislation, though in the form of a taxing statute is "directed to" the frustration of the system of banking established by the *Bank Act*, and to the controlling of banks in the conduct of their business.

Per Crocket and Kerwin JJ.—The *Bank Taxation Act*, instead of being a taxing enactment, is merely a part of a legislative plan to prevent the operation within the province of those banking institutions which have been called into existence and given the necessary powers to conduct their business by the only proper authority, the Parliament of Canada.

Held, by the Court, that *The Credit of Alberta Regulation Act, 1937*, is legislation in relation to "Banking" (s. 91 (15) B.N.A. Act); and, *per* Duff C.J. and Davis and Hudson JJ., it is also legislation in relation to "The regulation of trade and commerce" within the meaning of section 91 (2).

Per Duff C.J. and Davis and Hudson JJ.—This Act is a part of a general scheme of legislation of which *The Social Credit Act* is really the basis; and, that latter Act being *ultra vires*, ancillary and dependent legislation falls with it.

Held, by the Court (except Cannon J.) that *The Alberta Accurate News and Information Act* forms part of the general scheme of social credit legislation, the basis of which is *The Alberta Social Credit Act;* and since that Act is *ultra vires*, ancillary and dependent legislation must fall with it.

Per Duff C.J. and Davis J.—Under the constitution established by the B.N.A. Act, legislative power for Canada is vested in one Parliament and that statute contemplates a parliament working under the influence of public opinion and public discussion. The Parliament of Canada possesses authority to legislate for the protection of that right; and any attempt to abrogate that right of public debate or to suppress the traditional forms of the exercise of such right (in public meeting or through the press) would be incompetent to the legislatures of the provinces. Moreover, the law by which the right of public discussion is protected existed at the time of the enactment of *The British North America Act* and the legislature of Alberta has not the capacity under section 129 of that Act to alter that law by legislation obnoxious to the principle stated.

Per Cannon J.—The mandatory and prohibitory provisions of the *Alberta Accurate News and Information Act* interfere with the free working of the political organization of the Dominion. They have a tendency to nullify the political rights of the inhabitants of Alberta and of the citizens outside the province, as citizens of Canada, and cannot be considered as dealing with matters purely private and local in that province. The federal parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press in discussing public affairs and the equal rights in that respect of all citizens throughout the Dominion. These subjects were matters of criminal law before Confederation, have been recognized by

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Parliament as criminal matters and have been expressly dealt with by the criminal code. Such an Act is an attempt by the legislature to amend the Criminal Code in this respect and to deny the advantage of section 133 (*a*) of that Code to the newspaper publishers.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada in the exercise of the powers conferred by section 55 of the *Supreme Court Act* (R.S.C., 1927, c. 35) of the following questions as contained in the Order in Council referring these questions to the Court:

Whereas there has been laid before His Excellency the Governor General in Council, a report from the Minister of Justice, dated November 2nd, 1937, representing:

1. That it has been, and is, the avowed object of the present Government of the province of Alberta (since its advent to office in September, 1935) to inaugurate in the said province "a new economic order" upon the principles or plan of the theory known as Social Credit:

2. That the said government has since the date aforementioned secured the enactment by the legislature of the province of Alberta of the following statutes, more or less directly related to the policy of effectuating the object hereinbefore recited, namely:

Statutes of Alberta

1936 (1st Sess.)

Chapter 5, entitled "An Act Respecting Social Credit Measures," assented to April 3, 1936.

Chapter 6 entitled "An Act Respecting the Refunding of the Bonded Indebtedness of the Province," assented to April 7, 1936.

Chapter 66 entitled "An Act to Amend the Department of Trade and Industry Act," assented to April 7, 1936 (2nd Sess.)

Chapter 1 entitled "An Act to Provide the People of Alberta with Additional Credit," assented to September 1, 1936.

Chapter 2 entitled "An Act to Provide for the Reduction and Settlement of Certain Indebtedness," assented to September 1, 1936.

Chapter 3 entitled "An Act to Amend and Consolidate the Debt Adjustment Act, 1933," assented to September 1, 1936.

Chapter 4 entitled "An Act Respecting Prosperity Certificates," assented to September 1, 1936.

Chapter 9 entitled "An Act to Amend the Department of Trade and Industry Act," assented to September 1, 1936.

Chapter 11 entitled "An Act Respecting the Interest Payable on Debentures and Other Securities of the Province," assented to September 1, 1936.

Chapter 12 entitled "An Act Respecting the Interest Payable on the Securities of Municipalities," assented to September 1, 1936.

Chapter 16 entitled "An Act to Amend the Judicature Act," assented to September 1, 1936.

1937 (1st Sess.)

Chapter 9 entitled "An Act to Amend and Consolidate the Debt Adjustment Act, 1936," assented to June 17, 1937.

Chapter 10 entitled "An Act Respecting the Issuance and Use of Alberta Social Credit," assented to April 14, 1937.

Chapter 11 entitled "An Act Respecting Proceedings in Respect of Debentures Guaranteed by the Province," assented to April 14, 1937.

Chapter 12 entitled "An Act Respecting the Interest Payable on Debentures or Other Securities Guaranteed by the Province," assented to April 14, 1937.

Chapter 13 entitled "An Act Respecting the Interest Payable on Debentures and Other Securities of the Province," assented to April 14, 1937.

Chapter 30 entitled "An Act to Provide for the Postponement of the Payment of Certain Indebtedness," assented to April 14, 1937.

Chapter 83 entitled "An Act to Amend the Prosperity Certificates Act," assented to June 17, 1937.

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Chapter 1 entitled "An Act to Provide for the Regulation of the Credit of the Province of Alberta," assented to August 6, 1937.

Chapter 2 entitled "An Act to Provide for the Restriction of the Civil Rights of Certain Persons," assented to August 6, 1937.

Chapter 5 entitled "An Act to Amend the Judicature Act," assented to August 6, 1937.

1937 (3rd Sess.)

"An Act to Amend the Debt Adjustment Act, 1937," assented to October 5, 1937.

"An Act to Amend and Consolidate the Licensing of Trades and Businesses Act," assented to October 5, 1937.

3. That by Order in Council, dated August 17, 1937 (P.C. 1985), passed on the recommendation and for the reasons set out in the annexed report of the Minister of Justice, it was ordered that the following Acts of the legislature of the province of Alberta, intituled respectively:—

"An Act to Provide for the Regulation of the Credit of Alberta";

"An Act to Provide for the Restriction of Civil Rights of Certain Persons"; and

"An Act to Amend the Judicature Act";

being chapters one, two and five, respectively, of the statutes of the said province, 1937, assented to on the 6th day of August, 1937, and received by the Secretary of State of Canada on the 10th day of August, 1937, be disallowed; that upon the same date, the Deputy of the Governor General did certify under his sign manual and seal that the said Acts were received by him on the 10th day of August, 1937; and that by proclamation of His Honour the Lieutenant-Governor of the province of Alberta, dated August 27, 1937, published in the issue of the *Canada Gazette* of September 11, 1937 (at page 686), reciting the tenor of the said Order in Council and Certificate, the disallowance of the said Acts was duly signified.

4. That following upon the disallowance of the Acts aforementioned, the following Bills, namely:

Bill No. 1 "An Act Respecting the Taxation of Banks";

Bill No. 8 "An Act to Amend and Consolidate the Credit of Alberta Regulation Act"; and

Bill No. 9 "An Act to ensure the Publication of Accurate News and Information,"

passed by the Legislative Assembly of the province of Alberta at the 1937 (Third Session) thereof, were by His Honour the Lieutenant-Governor of Alberta, on the 5th October, 1937, reserved for the signification of the Governor General's pleasure; and that authentic copies of the Bills so reserved were received by the Secretary of State of Canada on the 12th October, 1937;

6. That in a submission set forth in a letter of October 12th, 1937, to the Right Honourable the Prime Minister of Canada, the Honourable William Aberhart, Premier of the Government of the province of Alberta, stated, with reference to said Bill No. 8: "Should there be any doubt as to the constitutional validity of the press bill, we have no objection whatever to having it referred to the courts along with the question of disallowance," and, after making certain observations with particular reference to said Bills Nos. 1 and 8, concluded: "For all these reasons we contend that the question of disallowance and the press bill might well be referred to the courts for a decision."

And whereas the Minister of Justice reports that doubts exist or are entertained as to whether the legislature of the province of Alberta has legislative jurisdiction to enact the provisions of said Bills Nos. 1, 8 and 9 (authentic copies whereof are hereto annexed); and, reserving for the time being the consideration of what advice ought to be tendered to the Governor General as to the propriety of signifying, or of withholding signification of, the royal assent to the said Bills, he is of opinion that it is expedient that the question aforementioned should be referred to the Supreme Court of Canada for judicial determination.

Now, therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Justice and pursuant to the provisions of section 55 of the *Supreme Court Act*, is pleased to refer and doth hereby refer the following questions to the Supreme Court of Canada for hearing and consideration:

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1. Is Bill No. 1, entitled "An Act Respecting the Taxation of Banks" or any of the provisions thereof and in what particular or particulars or to what extent *intra vires* of the legislature of the province of Alberta?

2. Is Bill No. 8, entitled "An Act to amend and Consolidate the Credit of Alberta Regulation Act" or any of the provisions thereof and in what particular or particulars or to what extent *intra vires* of the legislature of the province of Alberta?

3. Is Bill No. 9, entitled "An Act to ensure the Publication of Accurate News and Information" or any of the provisions thereof and in what particular or particulars or to what extent *intra vires* of the legislature of the province of Alberta?

E. J. LEMAIRE,
Clerk of the Privy Council.

Aimé Geoffrion K.C., J. Boyd McBride K.C. and *C. P. Plaxton K.C.* for the Attorney-General of Canada.

O. M. Biggar K.C., W. S. Gray K.C. and *J. J. Frawley K.C.* for the Attorney-General for Alberta.

W. N. Tilley K.C., R. C. McMichael K.C., W. F. Chipman K.C. and *A. W. Rogers K.C.* for the Chartered Banks.

W. N. Tilley K.C. and *H. P. Duchemin K.C.* for the Canadian Press.

J. L. Ralston K.C., S. W. Field K.C. and *R. de W. MacKay K.C.* for the Alberta newspapers.

The judgment of Duff C.J. and Davis J. was delivered by

THE CHIEF JUSTICE.—The three Bills referred to us are part of a general scheme of legislation and in order to ascertain the object and effect of them it is proper to look at the history of the legislation passed in furtherance of the general design.

It is no part of our duty (it is, perhaps, needless to say) to consider the wisdom of these measures. We have only to ascertain whether or not they come within the ambit of the authority entrusted by the constitutional statutes (the

British North America Act and the Alberta Act) to the legislature of Alberta and our responsibility is rigorously confined to the determination of that issue. As judges, we do not and cannot intimate any opinion upon the merits of the legislative proposals embodied in them, as to their practicability or in any other respect.

It will be necessary, first of all, to examine with some care the central measure, which is *The Alberta Social Credit Act,* and to arrive at a proper conception of its character from the constitutional point of view.

Various declarations throughout the enacting provisions of this statute, as well as in the preamble, leave no room for doubt as to its objects. We cite verbatim some of these declarations because we think it is important to have before us the language selected by the Legislature itself to describe the purpose of the legislation and the general nature and functions of the machinery which is to be put into operation.

To appreciate the significance of these declarations, however, it is necessary to advert to the constitution and nature of the three bodies set up by the statute for the administration of the Act as well as to the statutory definition of "Alberta Credit."

There is, first, a Board which is designated simply as "The Board"; the first members of which are named by the statute, their successors being appointed by the Legislature. Then there is the Provincial Credit Commission which is to be appointed by the Board; and here it is convenient to mention the duties of the Commission in determining the value of "Alberta Credit." "Alberta Credit" is defined by section 2 (*a*) as,

> the unused capacity of the industries and people of the province of Alberta to produce wanted goods and services.

By section 5 (1) there is to be an account in the treasury of the province known as the Provincial Credit Account. The Commission is to determine, in the manner prescribed by the Act, the value for each year of the

> unused capacity of the industries and people of the province of Alberta to produce wanted goods and services;

in other words, the value in money (section 2 (*k*)) of "Alberta Credit." This amount is to be credited to the Provincial Credit Account and "at the end of each year the amount" in this account "which shall not have been

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drawn upon in that year shall be written off." The decisions of the Board and of the Commission in the determination of the annual money value of this "unused capacity" are to be final and are to govern the Provincial Treasurer in the establishment and maintenance of the "Provincial Credit Account." It is this "Alberta Credit" annually determined and credited to the Provincial Credit Account which constitutes, according to the plan of the statute, a fund of credit that is to be employed and put into circulation through the machinery set up by the Act in order to facilitate the exchange of goods and services and generally to effectuate the purposes of the Act.

Then, there is the Alberta Credit House which is a department of the provincial administration, constituted by the Commission and a body corporate; and which is to maintain branches throughout the province.

A reference is also necessary to Treasury Credit Certificates. These are issued by the Provincial Treasurer against the Provincial Credit Account from time to time through the Credit House system.

Among the declarations expounding the purpose of the statute we refer to these:—

By the preamble it is affirmed:

> the people of Alberta, rich in natural wealth and resources both actual and potential, are yet heavily in debt and have been unable to acquire and maintain a standard of living such as is considered by them to be both desirable and possible; and
> * * * the existing means or system of distribution and exchange of wealth is considered to be inadequate, unjust and not suited to the welfare, prosperity and happiness of the people of Alberta.

Section 7 provides:

> It is the intent and purpose of this Act to provide for the issue of Treasury Credit Certificates to such extent as may be requisite for the purpose of increasing the purchasing power of the consumers of Alberta as to make such purchasing power conform to the productive capacity of the people of the province for the production and delivery of wanted goods and services, which capacity is declared to be the measure of Alberta Credit.

Section 31 declares:

> The Commission shall so function and administer this Act for the purpose and to the intent that the Treasury Credit Certificate Account in all branches shall be maintained in balance at all times. It is the intent of this Act to control the volume of the means of payment for goods and services in harmony with the ability of the whole province to produce and consume them on a rising standard of living, so that excess expansion of credit and a consequent undue advance in the price level

shall not occur, and that the present system of issuing credit through private initiative for profit, resulting in recurrent deflations and inflations shall cease.

With this section, section 33 should be read. It is in the following words:

In order to establish a system of circulating credit which shall at all times conform to the capacity of the industries and people of Alberta for the production of wanted goods and services; it is hereby declared to be the policy of the Legislative Assembly of Alberta to prevent the undue expansion of credit as well as to eliminate the contraction of credit in time of slackening trade. It is the true meaning and intent of this Act, whenever deemed necessary by the Commission, that the controls over supply of credit through open market operations and the discount rate shall be employed as heretofore to maintain a balanced credit structure.

To these should be added the following statements in the *Social Credit Measures Act* (1936) which has been repealed:

* * * the existence of indigence and unemployment throughout a large portion of the population demonstrates the fact that the present monetary system is obsolete and a hindrance to the efficient production and distribution of goods; and

* * * the electors of the province are favourable to the adoption in the province of a measure based on what are generally known as Social Credit principles, their general objects being to bring about the equation of consumption to production, and to afford to each person a fair share in the cultural heritage of the people in the province;

and this statement from the *Credit House Act* (1936) also repealed:

2 (*a*) "Alberta Credit" means the credit provided by the Credit House for facilitating the exchange of goods and services within the province.

Section 36 (*b*) should also be noticed:

36. In addition to the specific powers conferred by this Act, the Commission shall be empowered,—

(*b*) to examine into, consider, investigate and formulate proposals having for their object the increase of the purchasing power of the consumer by means of social dividends, compensating discounts or by any other means and the payment to the producer of any commodity of a just price and the allowance to any dealer in a commodity of a fair commission on turnover, and for such purposes to ascertain all necessary facts relating thereto, and to report to the Board as to the feasibility of applying any such proposal or any modification thereof having regard to the economic circumstances of the province and of the various businesses, industries, trades and vocations of the people of the Province.

By section 42, the substance of which is given below, the Lieutenant-Governor in Council has full power to give effect to any report of the Commission in so far as its recommendations are not contrary to the policy of the statute, even to the extent of altering and supplementing the provisions of the statute itself.

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These declarations enable us to affirm with certainty (1) that the evil as the Legislature conceives it with which the statute is intended to grapple is the inability of the people of Alberta to attain to a proper standard of living by reason of the inadequate supply or the unfair distribution of purchasing power; and (2) that, broadly speaking, the enactments in the statute are designed, to employ the phraseology of the authors of the legislation, to equate purchasing power or effective demand with productive capacity; and, moreover, it is easily susceptible of demonstration by reference to the provisions of this statute in detail and to those of the cognate legislation that these measures proceed upon this fundamental postulate, viz., that the economic ills which they aim at curing arise primarily from financial causes and, particularly, from the circumstance that bank credit, which constitutes in the main, in point of volume, the circulating medium of payment and exchange in this country, is issued through private initiative for private profit. And, speaking in general terms, the statute sets up the machinery of a financial system which is to be administered by statutory authority and the predominant function of which is to provide a form of credit designated as "Alberta Credit" which is to be made accessible to consumers and others through the channels created by the Act, and which is to circulate as a medium of exchange and payment.

Alberta credit (the nature of which is described as explained above) is distributed by the Provincial Treasurer by means of Treasury Credit Certificates; and it is his duty to issue through the Credit House system Treasury Credit Certificates in such amounts and at such times as may be required for the purposes of the statute. In particular, it is his duty to issue such certificates to the branches or other agencies for the purpose of providing the credits established pursuant to the requirements of section 13 for, that is to say,

(*a*) a discount on prices to consumers at retail;
(*b*) government services;
(*c*) interest free loans;
(*d*) debt payments;
(*e*) export subsidies;
(*f*) provincial consumers' dividends;
(*g*) such other purposes as the Lieutenant-Governor in Council at the request of the Board may by order so declare.

As to the purposes mentioned in section 13 (*g*), it should be noticed that, by section 36 (*a*), in addition to the other powers conferred by the Act, the Commission is empowered to transfer Treasury Credit Certificates in any manner consistent with the purpose of this Act.

The Commission is, moreover, specifically authorized by section 5 (3) to advance Alberta credit to persons engaged in

> agriculture or manufacturing or industry * * * and * * * to defray the costs of the building of a home or for establishing or maintaining any business, vocation, calling or for public service.

It is also authorized to negotiate any transfer of Alberta credit with any person, firm or corporate body "entitled to Alberta credit."

Then the Lieutenant-Governor in Council is authorized (section 10),

> on the advice of the Board * * * (to) declare that all claims against the province for the payment of any money out of any appropriation of public money made by the Legislative Assembly * * * shall be satisfied by the transfer to such person of an amount of Alberta Credit.

equivalent to the amount of such claim, with a proviso that, in the case of contractual obligations, all parties must agree.

Municipal corporations (by s. 12) are authorized to accept transfers of Alberta credit in satisfaction of any claim and to transfer such Alberta credit to persons who are willing to accept the same in satisfaction or partial satisfaction of their claims for the carrying out of any public work.

Two principal methods are provided for securing access to Alberta Credit by the population generally as individuals. One of the means adopted for this purpose is designated the "Consumers' Dividend,"—a monthly grant of Alberta credit to everybody falling within the designation of "persons entitled to Alberta credit," which includes virtually everybody who is twenty-one years of age, a British subject, resident and domiciled in Alberta, the amount of which is determined by the Commission. The payment of these dividends is provided by Treasury Certificates issued to each branch for the amount that branch has to disburse and the branch issues credit vouchers to the recipients of the dividend in payment thereof.

The second method is by use of the retail discount rate, which constitutes, perhaps, the cardinal feature of the

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statutory plan. This is a rebate by which purchasers of goods and services are subsidized through a reduction of price compensated by a corresponding credit to the retailer. It is applicable to sales of goods and services to ultimate consumers by persons qualified to " dispense " the discount. In order to qualify for this purpose, a retailer must enter into an agreement with the Commission, one term of which, if the Commission so requires, is that he will deal only with wholesalers and primary producers who have entered into agreements with the Commission pursuant to the provisions of the statute. The discount rate is fixed by the Commission and is determined by the ratio of the money value of the " unused productive capacity " of Alberta to the value of the total capacity.

For augmenting purchasing power, the principal agency appears to be this retail discount rate. A subsidy in this form, by way of reduction of price, it is, perhaps, assumed, will not be attended with the same risk of consequential inflation as a direct subsidy to consumers; especially as the rate, being fixed by reference to the ratio between the value of unusued capacity for production and the value of total capacity may be supposed to diminish with augmentation of production. A condition of the operation of this device is, of course, the provision of some means for compensating the seller for the reduction in price and, since the province of Alberta has no legislative control over the creation of currency or legal tender or bank credits, compensation in any of these forms would ordinarily be supplied by means of taxation, or in other words, ultimately from the pockets of people living in Alberta or owning property there. Such difficulties the statutory plan proposes to avoid by the establishment of Alberta credit as a fund of credit for employment, as we have seen, as a means of exchange and payment.

The statute recognizes that extra-provincial debts will in most cases have to be paid in currency and declares that they shall be so paid when desired by the " other party"; and certain enactments of the statute appear to be intended to make provision for this. It is recognized, in other words, that it would not be practicable for Alberta to establish a system under which legal tender is wholly dispensed with.

As regards intra-provincial transactions, authority is given to everybody to receive Alberta credit in payment of

goods and services, but here again the Legislature has obviously recognized its lack of authority to make such acceptance compulsory by direct legislative enactment. Nevertheless, it is clear from the declarations above quoted, as well as from the statute as a whole that the substitution generally in internal commerce of Alberta credit for bank credit and legal tender as the circulating medium is of the very essence of the plan.

The object being to provide increased purchasing power, it is, as explained, of the essence of the scheme that this shall be brought about, not by subsidizing consumers directly, but, mainly by a rebate in prices through the application of the retail discount rate. As that necessarily involves the provision of some means for compensating the seller, and since the compensation provided is compensation out of Alberta credit, it is clear enough that this device could only be made practicable in connection with transactions where the price is paid in Alberta credit, and the discount rate will itself, of course, be paid in the same way.

The practicability of the scheme, the feasibility of it as a means of accomplishing the declared purpose of the legislation, postulates, therefore, a willingness on the part of sellers of goods and services, in Alberta transactions, to accept Alberta credit in payment; in other words, acceptance generally in Alberta of Alberta credit as the circulating medium.

The Credit House is, as already observed, the agent of the Provincial Treasurer through which Alberta credit circulates. The Credit House is to accept deposits of currency and securities, to transfer credit, to receive deposits of credit vouchers and of transfers of Alberta credit. It can convert currency and negotiable instruments on demand into Alberta credit. It is to issue credit vouchers in payment of the consumers' dividend. It is probably intended to issue discount vouchers. Alberta credit on deposit with a branch may be drawn against by a customer by means of any instrument in the form prescribed by the Commission. The forms of credit vouchers and discount vouchers and of transfers are to be settled by regulation by the Commission.

It is expressly provided that a transfer of credit becomes effective on delivery; that is to say, on presentment to a

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branch of the Credit House. In other words, it is equivalent to an order which is to be honoured on demand. Bankers' credit may be described as the "right to draw cheques on a bank"; and the practical exercise of this right involves either the transfer of credit to another on the books of the same bank, or on the books of another bank, or payment to the payee in legal tender at his discretion. A customer of the Credit House has no right to require payment of legal tender at his discretion, unless his deposit is a currency deposit, and cannot transfer such a right to another, but, save in that respect, he is, and must necessarily be, if the system is really to be operative, in relation to his account in the Credit House, in the same position as the customer of a bank.

The question arises: Is legislation of this type competent to a province as within the ambit of Property and Civil Rights within the Province (no. 13) or Matters merely local or private within the Province (no. 16); or does the subject matter of it fall within the categories of matters set apart by section 91 under the enumerated heads of that section to be exclusively regulated and controlled by the central legislative authority acting in behalf of the people of Canada as a whole?

The question thus stated puts a dilemma which is not strictly complete because, of course, a subject matter of legislation, though not within any of the enumerated heads of section 91, may still be outside the ambit of section 92.

The whole of the two sections must be considered; and, of course, in light of the judicial interpretation of them. The second of the enumerated categories of section 91 is defined by the words "The Regulation of Trade and Commerce." The same section comprises a number of other categories of subjects which in great part, at least, would, if full scope were given to the words "Regulation of Trade and Commerce" in their ordinary sense, fall under head no. 2. Among them are Currency and Coinage (no. 14); Incorporation of Banks, Banking and the Issue of Paper Money (no. 15) and Legal Tender (no. 20).

In respect of "any matter coming within any" of these "classes of subjects" the authority of the Parliament of Canada is "exclusive"; and "legislation falling strictly

within any of the classes" so enumerated "is not within the legislative competence of the provincial legislatures under section 92" (The *Fisheries* case) (1).

Indeed, by the explicit words of the concluding paragraph of section 91, "any matter coming within any of" these "classes of subjects shall not be deemed to come within the class of matters of a local and private nature" assigned exclusively to the provinces. It is settled by the decision of the Privy Council in *A.G. for Ontario* v. *A.G. for Canada* (2) (as interpreted in the *Great West Saddlery Co.* v. *The King* (3)) that if a given subject-matter falls within any class of subjects enumerated in section 91, "it cannot be treated as covered by any of those within section 92."

The general character of the classes of subjects enumerated in section 91, especially of those mentioned above (Trade and Commerce, Currency and Coinage, Banks and Banking, Legal Tender), is important. A comparison of the nature of these subjects with the subjects included in section 92 seems to suggest that credit (including credit in this novel form) as a medium for effecting the exchange of goods and services, and the machinery for issuing and circulating it, are among the matters assigned to the Dominion under section 91 and not among those intended to be assigned to the provinces under any of the categories of section 92.

The categories (of s. 91) mentioned having been committed for legislative action to Parliament, which represents the people of Canada as a whole, we find it difficult to suppose that it could have been intended, under the general headings Property and Civil Rights, Matters merely local or private, that a single province might direct its powers of legislation under section 92 to the introduction, maintenance and regulation of this novel apparatus for all commercial, industrial and trading operations.

For our present purpose, we are, once again, not in the least concerned with any question of the practicability of the scheme; which will necessarily depend, as we have seen, upon the general acceptance, by the people of Alberta, of

(1) [1898] A.C. 700, at 715. (2) [1896] A.C. 348, at 359.
(3) [1921] 2 A.C. 91, at 99.

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Alberta credit as a medium of payment in intra-provincial transactions. In order to test the validity of the legislation we must, we think, envisage the plan in practice as the statute contemplates it.

Our conclusion is that it is not within the power of the province to establish statutory machinery with the functions for which this machinery is designed and to regulate the operation of it. Weighty reasons could be urged for the conclusion that, as subject matter of legislation, in part at least, it comes within the field designated by "Currency" (no. 14 of section 91). We think the machinery in its essential components and features comes under head no. 15, Banks and Banking; and if the legislation is not strictly within the ambit of no. 14 or no. 15, or partly in one and partly in the other, then we are satisfied that its subject matter is embraced within category no. 2, Trade and Commerce, and that it does not come within section 92.

First, as to banking. A banker has been defined as "a dealer in credit." True, in ordinary speech, bank credit implies a credit which is convertible into money. But money as commonly understood is not necessarily legal tender. Any medium which by practice fulfils the function of money and which everybody will accept in payment of a debt is money in the ordinary sense of the words even although it may not be legal tender; and this statute envisages a form of credit which will ultimately, in Alberta, acquire such a degree of confidence as to be generally acceptable, in the sense that bank credit is now acceptable; and will serve as a substitute therefor.

Sections 31 and 33, which have been quoted above, are most important in this connection.

Furthermore, sections 32, 34 and 35 (1) all contemplate the maintenance and control of credit by operations which would appear to be substantially banking operations.

It will be observed that full powers are vested in the Commission to give effect to the general provisions of the Act by regulation; and that, moreover, the Board is invested with authority to assist any proposal calculated to "equate" consumption with production; and, furthermore, that the Lieutenant-Governor in Council, by section 42, is authorized, for the purpose of giving effect to

the intent and purpose of the statute, upon the request of the Board, to alter or supplement the provisions of the Act for the purpose of providing for matters arising out of the operation of the Act for which no provision is made, provided that such change is not contrary to the policy of the Act. The "policy" of the Act, "the intent and purpose" of the Act, are sufficiently stated in the declarations quoted above.

Since the operation of the scheme will necessarily depend upon the general employment of Alberta credit as a means of exchange and payment, we think the argument advanced in Mr. Geoffrion's factum is a sound one, that, as regards the forms of credit vouchers and discount vouchers and transfers, and the administration of the Credit House and the transaction of business as between the Credit House and its customers, provision will presumably be made in exercise of these powers for facilitating in as high degree as possible the use of Alberta credit for all the purposes of trade and commerce within Alberta; and that the forms of dealing in credit, which by long experience have commended themselves to the banking, financial and commercial community as the most convenient, will be followed as far as practicable. It is fair to infer, we think, that this is what the statute contemplates.

In substance, we repeat, this system of administration, management and circulation of credit (if, and in so far as it does not fall under the denomination "Currency") constitutes in our view a system of "banking" within the intendment of section 91; and the statute in our opinion is concerned with "banking" in that sense.

There is, if the subject matter of the statute is not strictly "currency" or "banking," or both, an alternative view of the character of it. Employing the words in their ordinary sense and detached from their context in the *British North America Act*, nobody would hesitate to say that *The Alberta Social Credit Act* is concerned with "trade and commerce." It provides the machinery for a novel system of credit and contemplates the separation of intra-provincial industry, commerce and trade from the existing system of finance (in which bank credit and legal tender constitute the media of payment); and the conduct of industrial, commercial and trading activities by the instru-

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mentality of this new system of credit through this statutory machinery; and this would appear to involve profound and far-reaching changes in the operations of commerce and trade. In this connection the comprehensive terms of section 36 (b) should be recalled. Any proposal reported to the Board by the Commission pursuant to that section can, under the powers of section 42, be given the force of statute by the Lieutenant-Governor in Council, even though that should involve an amendment of the Act. These two sections afford striking evidence of the penetrating and far-reaching character of the activities of the Board and the Commission in relation to commerce, industry and trade which the authors of the legislation had in view.

Such legislation, if not legislation in respect of banking or currency, would appear to be concerned with the regulation of trade and commerce, rather than with property and civil rights or matters merely local or private in the province.

This brings us to the question: Is such a classification forbidden by the context, or by any restriction imposed in consequence of considerations derived from the enactments and the declarations of the B.N.A. Act as a whole?

In deciding this question, we must, of course, consult the pronouncements of the Courts. It has been settled in a series of decisions that the literal meaning of the words "Regulation of Trade and Commerce" must be restricted in order to afford scope for powers which have been given exclusively to the provincial legislatures (*Bank of Toronto* v. *Lambe* (1).

It will not be necessary to review these decisions at length. The concrete questions there brought into controversy can be briefly stated. They concerned the authority of the Dominion under section 91(2) to legislate in relation to local railways and undertakings, which are specifically dealt with in section 91(29) and section 92(10) (*Montreal Street Railway* case) (2); in relation to the regulation of a particular business (*Insurance Reference*) (3); in relation to a commission appointed by the Government of Canada and empowered to make orders directed to particular traders in a given town controlling them in respect of the prices of commodities offered by them for sale in such

(1) (1887) 12 App. Cas. 575, at 587.

(2) [1912] A.C. 333.

(3) [1916] 1 A.C. 588.

town (In *re Board of Commerce Act*) (1); in relation to the public investigation of disputes between individual employers and their workers and the prohibition of strikes and lockouts pending such investigation (*Toronto Electric Commissioners* v. *Snider*) (2).

These comprise the principal relevant decisions prior to the judgment of the Privy Council in 1937 in re *Natural Products Marketing Act* (3) to which we are about to refer; and if attention be directed to the thing which was the actual subject of decision, rather than to what was said, it will be found that they are completely and accurately summed up in the observation of Lord Atkin in *A.-G. for B.C.* v. *A.-G. for Canada* (4) in these words:

> the regulation of trade and commerce does not permit the regulation of individual forms of trade or commerce confined to the province.

In our opinion, there is no kind of analogy between the legislation under review in any of these cases and *The Social Credit Act*. Neither the object of that Act, as stated in the explicit declarations quoted, nor the effect of it, if it be operative, is the regulation of any particular form of business, unless it is legislation on the subject of banking. Nor does the statute attempt the regulation of particular trades or of forms of trade or commerce through a general authority committed to a single regulating body, as in the *Board of Commerce* case (5) and in the *Reference re the Natural Products Marketing Act* (5). Nor is it a statute, such as the *Sales of Goods Act*, declaring the legal rights of parties in relation to trading or commercial transactions. It attempts, as we have said, to effect a radical reorganization of the whole system of trade and commerce within the province by the substitution of a novel system of credit for the present financial system under which the operations of trade, industry and commerce are now conducted.

Can it be said that this view ascribes to the Regulation of Trade and Commerce a meaning and effect which unduly restricts the ambit of the powers given under section 92—which fails, in the words quoted above from the judgment in *Bank of Toronto* v. *Lambe* (6), to

> afford scope for powers which are given exclusively to the provincial legislatures?

(1) [1922] 1 A.C. 191.
(2) [1925] A.C. 396.
(3) [1937] A.C. 327.
(4) [1937] A.C. 377, at 387.
(5) [1937] A.C. 327.
(6) (1887) 12 App. Cas. 575.

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The conclusion, we have already indicated, that the subject matter of this legislation would appear more naturally to fall within category no. 2 of section 91 than within section 92 under either Property and Civil Rights or Matters merely local and private, is fortified by reference to the general nature of other classes of subjects assigned to the Dominion. Assuming that the subject-matter does not fall within the more specific categories mentioned (Banking and Currency), it is closely allied to such matters. We can see, we repeat, no reason for ascribing it to nos. 13 and 16 of section 92. Where you have in the enumerated subdivisions of section 91 language which is apt for the designation of a particular matter, then you are not entitled to exclude that matter from the category so defined in the absence of some very cogent reason. The reason indicated above (the risk of unduly restricting the scope of powers intended to be vested in the provinces) which led to the exclusion from this category of the regulation of individual forms of trade and commerce, and of contracts in particular trades, and the regulation of the relations of masters and servants, have no application here; because an inspection of the structure and language of sections 91 and 92, and a comparison of the subjects of the two sections, reveals no justification for the assumption that the subject matter of this legislation belongs to any type of matters which it could have been intended to commit to the legislative jurisdiction of a single province.

We have discussed the principal decisions upon the scope of head no. 2 of section 91. It remains to consider some observations contained in the judgments in three of those cases,—the *Montreal Street Railway* case (1), the *Board of Commerce* case (2) and *Toronto Electric Commissioners* v. *Snider* (3). In the judgments in the two last-mentioned cases a view was expressed which had been adumbrated in the first of them and which can be given in a sentence from the judgment in *Toronto Electric Commissioners* v. *Snider* (4). It is to this effect:

> It is in their Lordships' opinion now clear that excepting so far as the power can be invoked in aid of capacity conferred independently under other words in s. 91, the power to regulate trade and commerce

(1) [1912] A.C. 333.
(2) [1922] 1 A.C. 191.
(3) [1925] A.C. 396.
(4) [1925] A.C. 396, at 410.

cannot be relied on as enabling the Dominion Parliament to regulate civil rights in the provinces.

It is difficult, no doubt, to reconcile this view with the concluding paragraph of section 91 already discussed; nevertheless, in a judgment delivered in *Re the Natural Products Marketing Act* (1) we unanimously expressed the opinion, and our judgment proceeded in part, at least, upon the hypothesis, that we were bound by this pronouncement in the judgment in *Snider's* case (2) and by similar pronouncements in the *Board of Commerce* case (3), as expressing the *ratio decidendi* of those decisions. It is clear now, however, from the reasons for judgment in *A.-G. for Ontario* v. *A.-G. for Canada* (4) that the Regulation of Trade and Commerce must be treated as having full independent status as one of the enumerated heads of section 91. The judgment states, referring to the former *Trade Mark Act* of 1927, that it gave.

> to the proprietor of a registered trade mark the exclusive right to use the trade mark to designate articles manufactured or sold by him. It creates, therefore, a form of property in each province and the rights that flow therefrom. * * * If challenged one obvious source of authority would appear to be the class of subjects enumerated in s. 91 (2), the Regulation of Trade and Commerce, referred to by the Chief Justice. There could hardly be a more appropriate form of the exercise of this power than the creation and regulation of a uniform law of trade marks.

This judgment recognizes the necessity of keeping the actual language of sections 91 and 92 constantly in view in applying the enactments of those sections. Paraphrases of the words of head no. 2 of section 91 have been found useful in particular cases for assigning to that head a function in the scheme of these sections which would not result in defeating one main purpose of the B.N.A. Act by substantially impairing the autonomy of the provinces in respect of matters of purely provincial concern. But such paraphrases were not framed in light of the possibility of such legislation as that now before us. Such legislation was not in the minds of the great judges who adopted them. And since in none of the cases was it strictly necessary to draw an abstract line fixing the limits of the category in question, these formulae ought not to be treated as substitutes for the words of section 91, when, as now, a totally new type of legislation has to be con-

(1) [1927] A.C. 327.
(2) [1925] A.C. 396.
(3) [1922] 1 A.C. 191.
(4) [1896] A.C. 348, at 359.

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sidered; in relation to which it would be extravagant to suggest that any question of impairment of such autonomy arises.

It remains to add that the circumstance that the statute operates only within the boundaries of the province is, in the view expressed above, immaterial.

This Act, in common with *The Credit of Alberta Regulation Act,* contains a section which it will be convenient to discuss here. It is section 50 and is in these words:

> No provision of this Act shall be so construed as to authorize the doing of any act or thing which is not within the legislative competence of the Legislative Assembly.

Speaking of similar provisions in *Rex* v. *Nat Bell Liquors, Ltd.* (1), Lord Sumner said:

> In their Lordships' opinion the real question is whether the Legislature has actually interfered with interprovincial or with foreign trade. The presence or absence of an express disclaimer of any such interference may greatly assist where the language of the Provincial Legislature does not in itself determine the question and define its effect. If, however, it is otherwise clear that there is such an interference, or that there is none and the language actually used sufficiently decides that question, there is no such sovereign efficacy in such a clause as s. 72 as to make its presence or absence in an enactment crucial.

Since, in our opinion, the substantive enactments of the statute are *ultra vires* and the statute as a whole is void as constituting an attempt to set up and provide for the regulation of the machinery for a system of credit in the sense explained, s. 50 would appear, in the view expressed by the Judicial Committee, to be of no significance, as having nothing to operate upon.

Section 50 is of an entirely different character from that in question in *A.G. for Manitoba* v. *Manitoba Licenseholders Ass'n* (2).

* * *

We come now to the bills submitted. The first to be considered is Bill no. 8, "*The Credit of Alberta Regulation Act, 1937.*"

In view of what has already been said, this statute is *ultra vires* on a narrow ground. It is a licensing statute, not in the sense that it imposes taxation by way of licence, but in the sense that the licensing authority is used for the purpose of regulating the institutions to which the statute relates; that is the pith of it, and the licensing

(1) [1922] 2 A.C. 128, at 136. (2) [1902] A.C. 73.

authorities are the Provincial Credit Commission and the Social Credit Board, the commission and the board constituted under *The Alberta Social Credit Act;* and the narrow point is this: In the view already expressed, *The Alberta Social Credit Act* is *ultra vires.* The machinery it professes to constitute cannot, therefore, come into operation. Consequently, *The Credit of Alberta Regulation Act* which can only take effect through that machinery must necessarily be inoperative. Furthermore, it is quite plain, not only from the preamble of *The Credit of Alberta Regulation Act,* but also from its enacting provisions, that it is a part of the general scheme of legislation of which *The Alberta Social Credit Act* is really the basis; and that statute being *ultra vires,* ancillary and dependent legislation falls with it.

The broader ground upon which we think this legislation is *ultra vires* is this: First, it is legislation in relation to Banking. In the alternative, it is legislation in relation to the Regulaton of Trade and Commerce within the meaning of section 91 (2) of *The British North America Act.*

The statute contains no express definition of "credit." Nevertheless, the language itself in which the enactments of the statute are expressed appears to afford indicia from which it is not difficult to ascertain the kind of credit the statute contemplates. First, we have the declaration that a "credit institution" is a person or corporation whose business or any part of whose business is the business of dealing in credit. The credit we are concerned with, therefore, is something which is dealt with as part of a business.

Then, by clause (*b*), a business of this kind consists in transactions whereby such "credit is created, issued, lent * * * provided * * * by means of book-keeping entries" or "dealt in" by such means. Further, the credit is of such a character that these transactions occur in relation to it: "the payment of cheques (which have been) made, drawn or paid in by customers," the payment of other negotiable instruments which have been similarly dealt with by customers and "the making of advances and the granting of overdrafts."

We are concerned, for the present, with ascertaining the effect of clause (*a*) and of clause (*b*) minus the last member.

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Perhaps it is convenient at the outset to refer to the recital which is in these words:

> Whereas the extent to which property and civil rights in the province may be enjoyed depends upon the principles governing the monetization of credit and the means whereby such credit is made available to the province and to the People collectively and individually of the province.

"Monetization of credit" does not seem to be a very precise expression, but it does point to the conclusion that the credit with which the statute is concerned is credit in a form in which it can be employed for the purposes of money.

Now, the language of clause (*b*), excluding, of course, the last member, is perfectly sensible as applied to bank credit. A banker is a dealer in credit. Bank credit has, in ordinary usage, the meaning which is ascribed to it in the following paragraph in the chapter on the Creation of Credit in the late Mr. Walter Leaf's volume on Banking in the Home University Library, a chapter added in the last edition by Mr. Ernest Sykes, secretary to the Institute of Bankers:

> The word credit is used in a variety of meanings between which it is not at the moment necessary to distinguish. Suffice it to say that when the creation of credit is discussed there is general agreement that by credit is meant banker's credit, that is to say, the right to draw cheques on a bank. The exercise of this right involves either the withdrawal from the bank of legal tender, in the shape of bank notes or silver and bronze coin, or the transfer of such a right to some other person in the books of the same or another bank.

In a well-known book, published in 1890 (Macleod, Theory of Credit, p. 368-9), it is said:

> When a customer pays in money into his account in the usual way of business, he sells it to the banker. * * *
>
> In exchange for the money the banker makes an entry of an equal sum in credit in favour of his customer. And it is the entry to the credit of the customer which, in the technical language of modern banking is termed a deposit * * *
>
> So when a banker discounts a bill for a customer he buys it exactly in the same way as he bought money from his customer. He creates a credit in his books in favour of his customer. And this credit created to purchase the bill is termed a deposit equally as the credit created to purchase the money * * * A deposit is simply a credit in the banker's books. It is the evidence of the right of action which a customer has to demand a sum of money from the banker. As soon as the banker has created a credit, or deposit, in his books in favour of a customer he has issued to him a right of action against himself.

It is needless to say, perhaps, that we are not in the least concerned here with controversies about the creation

of credit by bankers, touching the limits of the power of bankers in this respect, and the conditions to which the power is subject. Everybody concedes that bankers do create credit in the sense of the paragraphs just quoted. Moreover, it is not in conflict with usage to speak of such credit being "credit created, issued, lent, provided or dealt in by means of book-keeping entries."

Such language, properly understood, not incorrectly describes the practice followed in banking transactions. Speaking generally, bank credit transferable on demand and so available for commercial purposes is evidenced by book-keeping entries, and it is upon the evidence and authority of such entries that the banker and his employees daily and hourly act in the business of the bank. Such entries are for practical purposes the record as well as the evidence of the creation of bank credit and it is by means of them that such credit as a medium of payment and exchange is transferred, disbursed and dealt in.

Then, the transactions enumerated in the second member of the clause are all defined as transactions relating to "credit created, issued, lent, provided or dealt in by means of book-keeping entries" in course of the business of dealing in credit. In this country, the functions of temporary lending and the provision of transferable credits as a means of payment are performed together as a matter of course.

But it is important to emphasize that, while the payment of customers' cheques and other negotiable instruments and the making of advances and the granting of overdrafts are enumerated in the second member of the clause, they are all transactions having relation to some "credit created * * * or dealt in by means of book-keeping entries."

The essential feature of the business of dealing in credit, therefore, is, by this definition, the creation of credits and the dealing in credits by means of book-keeping entries and these related transactions. It should be noted also that, from the persons carrying on the business of dealing in credits so defined is excepted the Bank of Canada; and clause (*b*), with the last member left out of consideration, has unquestionably the effect of designating transactions which are the transactions of somebody who is carrying

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on business in banking. We are unable to read this language as extending to transactions which are not of that character. It was suggested that the transactions of a bill broker or a person engaged in discounting bills or making advances on the credit of bills or promissory notes would fall within it, but this leaves entirely out of account the all important limitation that the business of dealing in credit, by definition, is the business of somebody who is engaged in transactions of the kind specified but with the qualification that such transactions are effectuated by means of "book-keeping entries." Such language, properly understood, finds, as we have seen, a reasonable application in designating the transactions of a banker but, so far as we are aware, it has no application to the business of a bill broker or to that of a money lender who is not a banker.

It should be observed that the statute applies only to credit institutions which are carrying on business when the Act comes into force, that is, when assented to.

We come now to the final member expressed in these words:

> but does not include transactions which are banking within the meaning of the word "banking" as used in subhead 15 of section 91 of *The British North America Act*, 1867.

We repeat, clause (*b*) consists of a single sentence containing what professes to be a definition of "business of dealing in credit" as employed in the statute. The words just quoted are part of that definition. If effect is given to them, they completely destroy everything which precedes them in that definition. They reduce the definition to the single proposition that the "business of dealing in credit" in the Act "does not include transactions which are banking within the meaning of the word 'banking' as used in subhead 15 of section 91 of *The British North America Act, 1867*."

We have come to the conclusion that we have here one of those cases in which there is a repugnancy of such a character that the last words, if any effect is to be given them, really empty the clause of all meaning as a definition and the statute of its intended effect and must be disregarded. (*The Case of Alton Woods* (1); *Clelland* v. *Ker* (2), and *Drury* 227).

(1) (1600) 1 Co. Rep. 40b, at 47b. (2) (1843) 6 Ir. Eq. 35.

If we should be wrong in this view of the construction of section 2(b), in other words, if, giving full effect to the last sentence, there is still some content left in the phrase "business of dealing in credit" then the subject-matter of the statute would appear to be within the category Regulation of Trade and Commerce within the meaning of section 91(2). We think it plain that "credit" (if not strictly confined to bank credit) here means credit which is dealt in as bank credit is dealt in, not such a credit, for example, as is created by a purchase of goods on credit in the ordinary course of business, but credit which is created, issued and so forth for the purpose of being dealt with as such.

In our opinion, legislation regulating credit from the aspect and with the purpose disclosed by the provisions of the statute as a whole, read in light of the preamble and of the cognate statutes and bills, (if it is not banking legislation) is legislation respecting matters which fall strictly within Trade and Commerce and not within any of the matters contemplated as subjects of provincial legislation within the meaning of section 92.

Section 7 of the statute is, in terms, identical with section 50 of the Social Credit Act and the observations with regard to that section apply equally to section 7.

The answer, therefore, to the question concerning this Bill is that it is *ultra vires*.

* * *

The next Bill to be considered is that respecting the Taxation of Banks: The question to be determined in relation to this Bill is this: Is it an enactment in exercise of the provincial power to raise a revenue for provincial purposes by direct taxation, or is it legislation which, in its true character, relates to Incorporation of Banks and Banking.

The judgment of the Judicial Committee in *Union Colliery Co. of B.C., Ltd.* v. *Bryden* (1) is sufficient authority for the proposition that the answer to this question is to be found by ascertaining the effect of the legislation in the known circumstances to which it is to be applied.

The rate of taxation is an annual rate of one-half of one per cent on the paid-up capital and one per cent upon the amount of the reserves as well as upon the amount of the

(1) [1899] A.C. 580.

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undivided profits. It is proper, we think, to test the effect of the legislation by considering the case of a bank—the Bank of Montreal, for example—which carries on business in every province of Canada as well as in many other places in North America and elsewhere.

The population of Alberta, in round numbers, is 800,000 and that of the Dominion, in round numbers, 10,000,000. The ratio of the first figure to the second is expressed by the fraction two twenty-fifths. It is not, we think, for our present purposes an inaccurate assumption that the volume of business carried on by such a bank in Alberta would bear a ratio to the total business of the bank in Canada not materially greater than the ratio of the Alberta population to the population of the Dominion. The annual tax, therefore, in the case of such a bank of one-half of one per cent upon the paid-up capital may be regarded as a charge upon two twenty-fifths of its total business; and, in respect of its reserves and undivided profits, one per cent, borne by the same part of its business. Indeed, it is pretty obvious that the fraction two twenty-fifths expresses a considerably higher ratio than a figure strictly in accord with the facts. This would appear to give a fair and reasonable point of view for obtaining a just idea of the practical effect of such taxation.

It is plain, of course, that if such a bank were subjected to such a levy in each of the provinces but on a scale varying with the business done in the province, or the population of the province, the total levy charged upon its business throughout the Dominion would amount to an annual impost of six and one-quarter per cent upon its paid-up capital and twelve and one-half per cent upon each of the other funds—the reserves and the undivided profits.

In our opinion, it requires no demonstration to show that such a rate of taxation must be prohibitive in fact and must be known to the Alberta legislature to be prohibitive. It is our duty, as judges, to take judicial notice of facts which are known to intelligent persons generally; and any suggestion that the profits of banking as carried on in Canada could be such as to enable banks to pay taxes to the provinces of such magnitude, having regard to the other burdens, such as municipal rates, which are levied

upon them in Canada, as well as the taxes paid in foreign countries, would be incontinently rejected by anybody possessing the most rudimentary acquaintance with affairs.

Now, this tax upon banks is of proportions which have no parallel in the Alberta system of taxation. In the same year there was a substantial increase in the taxes levied upon corporations generally, including banks. This levy now in question which was imposed later is directed exclusively against banks.

Such legislation, in effect prohibitive, although in form relating to taxation is, in truth, legislation "directed to," to quote the phrase of Lord Haldane in *Wharton's* case (1), controlling the banks in the conduct of their business, by forcing upon them a discontinuance of business, or otherwise. Such legislation, notwithstanding its form, is not within the powers of the provinces under section 92 because its subject-matter in truth is the Incorporation of Banks and Banking, one of the enumerated heads of section 91 (no. 15). The concluding paragraph of section 91 is explicit.

Their Lordships made reference to the circumstance that the concluding words of s. 91 of *The British North America Act*, "Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," render it necessary to do more than ascertain whether the subject-matter in question apparently falls within any of the heads of s. 92. As is now well settled the words quoted apply, not only to the merely local or private matters in the province referred to in head 16 of s. 92, but to the whole of the sixteen heads in that section: *A.-G. for Ontario* v. *A.-G. for Canada* (2).

This is the language of the Judicial Committee in *Great West Saddlery Co.* v. *The King* (3).

The chartered banks in Alberta exercise their powers under the authority of a Dominion statute, the *Bank Act*. By that statute, a system of banking is set up by the Parliament of Canada and provision is made for the incorporation of individual banks which, on compliance with the statutory conditions, are entitled to carry on business subject to the provisions of the statute. This system of banking has been created by the Parliament of Canada in exer-

(1) [1915] A.C. 343. (2) [1896] A.C. 348.
(3) [1921] 2 A.C. 99.

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cise of its plenary and exclusive authority in relation to that subject, and any legislation by a province which, to quote again the phrase of Lord Haldane, is "so directed by the provincial legislatures" as either directly or indirectly to frustrate the intention of the *Bank Act* by preventing banks carrying on their business or controlling them in the exercise of their powers must be invalid (*G. W. Saddlery* v. *The King* (1)).

This view of the effect of the legislation is greatly strengthened by the obvious relation of the Bill to the scheme of legislation to which the other Bills already discussed belong. This relation between the Bill in question and the Social Credit legislation as a whole enables us in some degree to understand a measure which would otherwise be simply incomprehensible.

There are two other points to which we think it advisable to refer briefly. As regards the excessive magnitude of the tax, the question may be asked: Where are you to draw the line? The answer to that is, any attempt to draw an abstract line is difficult and, in dealing with questions of the kind before us, it is inadvisable to attempt it unless it be absolutely necessary. This case presents no such necessity. It is plain on the face of the Bill that the purpose of it is not to raise a revenue for provincial purposes, and equally plain that taxation of this character throughout Canada, if operative, would completely frustrate the purposes of the *Bank Act*.

The next point concerns the decision of the Judicial Committee in the *Bank of Toronto* v. *Lambe* (2). In that case counsel on behalf of the bank strongly pressed upon their Lordships the view upon which the Supreme Court of the United States acted in a series of cases (*McCulloch* v. *Maryland* (3); *Osborn* v. *United States Bank* (4); *Railroad Co.* v. *Peniston* (5)) that since, in the words of the famous dictum of Chief Justice Marshall "the power to tax involves the power to destroy," the states must be held to be deprived of the power to tax the instrumentalities of the Federal government.

(1) [1921] 2 A.C. 99, at 100.
(2) (1887) 12 A.C. 575.
(3) (1819) 4 Wheaton 436.
(4) (1824) 9 Wheaton 738.
(5) (1873) 18 Wallace 5.

Their Lordships declined to apply this principle of interpretation to *The British North America Act* partly, it would appear, on the ground that the legislation of the provinces is subject to control by the Dominion through the power of disallowance. But the tax there in question had no sort of resemblance to that we are now considering and the question now before us did not there arise. Taxation of such a magnitude as to crush banks out of existence was put as a bare possibility and their Lordships declined to hold that such a possibility was sufficient for denying the provinces the power to exercise the right of taxation in a legitimate way.

In *Caron* v. *The King* (1), Lord Phillimore, speaking on behalf of the Judicial Committee, quoted with approval a passage from the judgment of Davies C.J. (then Davies J.) in *Abbott* v. *City of Saint John* (2) in these words:

> The province does not attempt to interfere directly with the exercise of the Dominion power, but merely says that, when exercised, the recipients of the salaries shall be amenable to provincial legislation in like manner as all other residents * * * It is said the legislature might authorize an income tax denuding a Dominion official of a tenth or even a fifth of his official income, and, in this way, paralyse the Dominion service and impair the efficiency of the service. But it must be borne in mind that the law does not provide for a special tax on Dominion officials but for a general undiscriminatory tax upon the incomes of residents and that Dominion officials could only be taxed upon their incomes in the same ratio and proportion as other residents. At any rate, if, under the guise of exercising power of taxation, confiscation of a substantial part of official and other salaries were attempted, it would be then time enough to consider the question and not to assume beforehand such a suggested misuse of the power.

The judgment proceeds:

> In *Great West Saddlery Co.* v. *The King* (3) provincial legislation, which had the effect of precluding Dominion trading companies from carrying on their business in the Province unless they complied with certain special terms, was held ultra vires, as calculated to abrogate the capacity or derogate from the status which it was in the power of the Parliament of Canada to bestow; and a general principle was laid down that no provincial Legislature could use its special powers as an indirect means of destroying powers given by the Parliament of Canada.
>
> By parity of reason the Parliament of Canada could not exercise its power of taxation so as to destroy the capacity of officials lawfully appointed by the Province.

The specific ground on which, in our opinion, this legislation is invalid is: It is not competent to the provinces of Canada, by the exercise of their powers of taxation, to

(1) [1924] A.C. 999, at 1005-6.
(2) [1908] 40 Can. S.C.R. 597, at 606-7.
(3) [1921] 2 A.C. 91.

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force banks which are carrying on business under the authority of the Bank Act to discontinue business; and taxation by one province on a scale which, in a practical business sense, is manifestly prohibitive is not a valid exercise of provincial legislative authority under section 92. Such legislation, though in the form of a taxing statute, is "directed to" the frustration of the system of banking established by the Bank Act, and to the controlling of banks in the conduct of their business.

The answer, therefore, to the question concerning this Bill is that it is *ultra vires.*

* * *

We now turn to Bill No. 9.

This Bill contains two substantive provisions. Both of them impose duties upon newspapers published in Alberta which they are required to perform on the demand of "the Chairman," who is, by the interpretation clause, the Chairman of "the Board constituted by section 3 of *The Alberta Social Credit Act.*"

The Board, upon the acts of whose Chairman the operation of this statute depends, is, in point of law, a non-existent body (there is, in a word, no "board" in existence "constituted by section 3 of *The Alberta Social Credit Act*") and both of the substantive sections, sections 3 and 4, are, therefore, inoperative. The same, indeed, may be said of sections 6 and 7 which are the enactments creating sanctions. It appears to us, furthermore, that this Bill is a part of the general scheme of Social Credit legislation, the basis of which is *The Alberta Social Credit Act;* the Bill presupposes, as a condition of its operation, that *The Alberta Social Credit Act* is validly enacted; and, since that Act is *ultra vires,* the ancillary and dependent legislation must fall with it.

This is sufficient for disposing of the question referred to us but, we think, there are some further observations upon the Bill which may properly be made.

Under the constitution established by *The British North America Act,* legislative power for Canada is vested in one Parliament consisting of the Sovereign, an upper house styled the Senate, and the House of Commons. Without entering in detail upon an examination of the enactments

of the Act relating to the House of Commons, it can be said that these provisions manifestly contemplate a House of Commons which is to be, as the name itself implies, a representative body; constituted, that is to say, by members elected by such of the population of the united provinces as may be qualified to vote. The preamble of the statute, moreover, shows plainly enough that the constitution of the Dominion is to be similar in principle to that of the United Kingdom. The statute contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. This is signally true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives.

The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in *James* v. *Commonwealth* (1), "freedom governed by law."

Even within its legal limits, it is liable to abuse and grave abuse, and such abuse is constantly exemplified before our eyes; but it is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions.

We do not doubt that (in addition to the power of disallowance vested in the Governor General) the Parliament of Canada possesses authority to legislate for the protection of this right. That authority rests upon the principle that the powers requisite for the protection of the consti-

(1) [1936] A.C. 578, at 627.

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tution itself arise by necessary implication from *The British North America Act* as a whole (*Fort Frances Pulp & Power Co. Ltd.* v. *Manitoba Free Press Co. Ltd.* (1)); and since the subject-matter in relation to which the power is exercised is not exclusively a provincial matter, it is necessarily vested in Parliament.

But this by no means exhausts the matter. Any attempt to abrogate this right of public debate or to suppress the traditional forms of the exercise of the right (in public meeting and through the press) would, in our opinion, be incompetent to the legislatures of the provinces, or to the legislature of any one of the provinces, as repugnant to the provisions of *The British North America Act,* by which the Parliament of Canada is established as the legislative organ of the people of Canada under the Crown, and Dominion legislation enacted pursuant to the legislative authority given by those provisions. The subject matter of such legislation could not be described as a provincial matter purely; as in substance exclusively a matter of property and civil rights within the province, or a matter private or local within the province. It would not be, to quote the words of the judgment of the Judicial Committee in *Great West Saddlery Co.* v. *The King* (2), "legislation directed solely to the purposes specified in section 92"; and it would be invalid on the principles enunciated in that judgment and adopted in *Caron* v. *The King* (3).

The question, discussed in argument, of the validity of the legislation before us, considered as a wholly independent enactment having no relation to the *Alberta Social Credit Act,* presents no little difficulty. Some degree of regulation of newspapers everybody would concede to the provinces. Indeed, there is a very wide field in which the provinces undoubtedly are invested with legislative authority over newspapers; but the limit, in our opinion, is reached when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada as contemplated by the provisions of *The British North America Act* and the statutes of the

(1) [1923] A.C. 695. (2) [1921] 2 A.C. 91, at 122.
(3) [1924] A.C. 999, at 1005-6.

Dominion of Canada. Such a limitation is necessary, in our opinion, "in order," to adapt the words quoted above from the judgment in *Bank of Toronto* v. *Lambe* (1) "to afford scope" for the working of such parliamentary institutions. In this region of constitutional practice, it is not permitted to a provincial legislature to do indirectly what cannot be done directly (*Great West Saddlery Co.* v. *The King* (2)).

Section 129 of *The British North America Act* is in these words:

> 129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia or New Brunswick, at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

The law by which the right of public discussion is protected existed at the time of the enactment of *The British North America Act* and, as far as Alberta is concerned, at the date on which the Alberta Act came into force, the 1st of September, 1905. In our opinion (on the broad principle of the cases mentioned which has been recognized as limiting the scope of general words defining the legislative authority of the Dominion) the Legislature of Alberta has not the capacity under section 129 to alter that law by legislation obnoxious to the principle stated.

The legislation now under consideration manifestly places in the hands of the Chairman of the Social Credit Commission autocratic powers which, it may well be thought, could, if arbitrarily wielded, be employed to frustrate in Alberta these rights of the Crown and the people of Canada as a whole. We do not, however, find it necessary to express an opinion upon the concrete question whether or not this particular measure is invalid as exceeding the limits indicated above.

The answer to the question concerning this Bill is that it is *ultra vires*.

(1) (1887) 12 A.C. 575. (2) [1921] 2 A.C. 91, at 100.

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The Bank Taxation Act; The Credit of Alberta Regulation Act; and The Accurate News and Information Act.

CANNON J.—The first question referred to us by His Excellency the Governor General in Council is:

Is Bill No. 1 entitled "*An Act Respecting the Taxation of Banks*" or any of the provisions thereof and in what particular or particulars or to what extent *intra vires* of the legislature of the province of Alberta?

This bill provides that every bank which transacts business in the province of Alberta shall annually pay to His Majesty for the use of the province, in addition to any tax payable pursuant to any other Act, the following taxes, namely:

(*a*) a tax of one-half of one per centum on the paid-up capital thereof;

(*b*) a tax of one per centum on the reserve fund and undivided profits thereof.

It is claimed:

1. That the tendency of the tax is that it shall be passed on and is in reality an attempt to impose a tax on the paid up capital and reserves and profits throughout Canada and abroad and, therefore, is not "direct taxation within the province";

2. The proposed taxation would destroy or nullify the status and capacity of the banks which are Dominion corporations;

3. Taxation of the character in question, if within provincial competence and adopted by all provinces would strike at the very solvency of the banks and their ability to return moneys deposited with them.

The extraordinary expansion given to the recognized power of the provinces to levy direct tax for local purposes since the decision of the Privy Council in *Bank of Toronto* v. *Lambe* (1), notably in *Abbott* v. *City of Saint John* (2); *Caron* v. *The King* (3); *Forbes* v. *Attorney-General of Manitoba,* confirmed by Privy Council (4); and also in *Judges* v. *Attorney-General of Saskatchewan* (5) must be be reviewed in order to decide the question.

In *Bank of Toronto* v. *Lambe* (1), the Privy Council said at pp. 586-587:

> Then it is suggested that the legislature may lay on taxes so heavy as to crush a bank out of existence, and so to nullify the power

(1) (1887) 12 A.C. 575.

(2) (1908) 40 Can. S.C.R. 597.

(3) [1924] A.C. 999.

(4) [1936] S.C.R. 40; [1937] A.C. 860.

(5) [1936] 4 D.L.R. 134; [1937] 2 D.L.R. 209.

of parliament to erect banks. But their Lordships cannot conceive that when the Imperial Parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes. There are obvious reasons for confining their power to direct taxes and licences, because *the power of indirect taxation would be felt all over the Dominion.* But whatever power falls within the legitimate meaning of classes 2 and 9, is, in their Lordships' judgment, what the Imperial Parliament intended to give; and to place a limit on it because the power may be used unwisely, as all powers may, would be an error, and would lead to insuperable difficulties, in the construction of the Federation Act.

Their Lordships have been invited to take a very wide range on this part of the case, and to apply to the construction of the Federation Act the principles laid down for the United States by Chief Justice Marshall. Every one would gladly accept the guidance of that great judge in a parallel case. But he was dealing with the constitution of the United States. Under that constitution, as their Lordships understand, each state may make laws for itself, uncontrolled by the federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a constitution Chief Justice Marshall found one of those limits at the point at which the action of the state legislature came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the Federation Act must be so construed as to allow no power to the provincial legislatures under section 92, which may by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under section 91. It is quite impossible to argue from the one case to the other. Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself except under the control of the whole acting through the Governor-General. And the question they have to answer is whether the one body or the other has power to make a given law. If they find that on the due construction of the Act a legislative power falls within section 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion parliament."

In the *Forbes* case (1), I urged that the whole question should be reconsidered and I gave some reasons why provincial interference with the exclusive federal power of fixing the salaries of Dominion civil servants could not be upheld. I said, at page 75:

Can it be denied that, under existing conditions in Canada since the war, the reduction of the salaries of Dominion employees in proportion to the needs of the provinces or municipalities, which in some cases are very great and are increasing alarmingly, would, if added to

(1) [1936] S.C.R. 40, at 64 *& seq*

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the reductions imposed by the Dominion Parliament, amount to confiscation of a substantial part thereof and would as a necessary consequence seriously impair the efficiency, *morale* and economic independence of the national service? It is a patent fact to anyone conversant with Canadian conditions, and any attempt by a Province to confiscate, even in part, the stipend fixed by Parliament, whatever name may be given to the operation, under whatever disguise it may be presented, is an unauthorized assumption of a power which is essentially national in its scope and operation and is expressly denied to the Province by the last phrase of section 91. The Dominion alone can fix the salaries; and once fixed, they cannot be changed or reduced by the Province. According to elementary common sense, without the necessity of recourse to learned legal distinctions or disquisitions, a salary minus a tax of 2, 5 or 10 per cent is a reduced salary *pro tanto*. Such reduction in the case of Dominion servants can be effected by Parliament only in the exercise of its exclusive jurisdiction under head (8) of 91. Now the respondent contends that the Act contemplates and contains such an interference.

The majority of this Court and the Judicial Committee refused to reconsider the conclusions reached about this power of taxation in the cases of *Abbott* v. *City of Saint John* (1) and *Caron* v. *The King* (2). I quote the following from the judgment of My Lord the present Chief Justice (3):

> In *Abbott* v. *City of Saint John* (1), this Court had to consider the judgment of the very able judges who decided *Leprohon* v. *City of Ottawa* (4) and it may be worth while to devote a sentence or two to *Leprohon's* case (4).
>
> The trial judge was Mr. Justice Moss (4) (afterwards Chief Justice of Ontario). He proceeded upon principles which had been laid down in judgments of the Supreme Court of the United States, notably in the judgment of Marshall C.J. in *McCulloch* v. *Maryland* (5), the effect of which may be summed up in these words, quoted by Moss J. (4) from the judgment of Nelson J. in *Buffington* v. *Day*, reported *sub nom. The Collector* v. *Day* (6).
>
> * * * there is no express constitutional prohibition upon the States against taxing the means or instrumentalities of the General Government; but it was held, and we agree properly held, to be prohibited by necessary implication, otherwise States might impose taxation to an extent that would impair, if not wholly defeat, the operations of the Federal authorities when acting in their appropriate sphere.'
>
> Mr. Justice Moss himself proceeds:—
>
> In this case the central authority, in the exercise of its appropriate functions, appointed the plaintiff to a position of emolument. In the exercise of its proper powers it assigned to him a certain emolument. This emolument the plaintiff is entitled to receive for the discharge of duties for which the Central Government is bound to

(1) (1908) 40 Can. S.C.R. 597.
(2) [1924] A.C. 999.
(3) [1936] S.C.R. 40, at 44.
(4) (1878) 2 Ont. App. R. 522;
(5) (1819) 4 Wheat. 316.
(6) (1870) 11 Wallace 113, at 123-4.

provide. I do not find in the British North America Act that there is any express constitutional prohibition against the Local Legislatures taxing such a salary, but I think that upon the principles thus summarized in the case which I have just cited there is necessarily an implication that such power is not vested in the Local Legislature.

The learned judges in the Court of Appeal for Ontario base their conclusions upon the same grounds.

In *Abbott* v. *City of Saint John* (1), four of the five judges of this Court were clearly of the view that this reasoning was not admissible for the purpose of determining the limits of the powers vested in the provinces by *The British North America Act*. Davies J. said (at p. 606):—

> Time and again the Judicial Committee have declined to give effect to this anticipatory argument or to assume to refuse to declare a power existed in the legislature of the province simply because its improvident exercise might bring it into conflict with an existing power of the Dominion.

At page 618, I observed,

> * * * *Leprohon* v. *The City of Ottawa* (2) * * * was decided in 1877. Judicial opinion upon the construction of the *British North America Act* has swept a rather wide arc since that date; to mention a single instance only, it would not be a light task to reconcile the views upon which *Leprohon* v. *The City of Ottawa* (2) proceeded with the views expressed by the Judicial Committee in the later case of *The Bank of Toronto* v. *Lambe* (3). Indeed, although *Leprohon* v. *The City of Ottawa* (2) has not been expressly overruled, the grounds of it have been so thoroughly undermined by subsequent decisions of the Judicial Committee, that it can,—I speak, of course, with the highest respect for the eminent judges who took part in it,—no longer afford a guide to the interpretation of the *British North America Act*.
>
> *Abbott* v. *City of Saint John* (1) was approved in *Caron* v. *The King* (4) and both decisions are, of course, binding upon this Court.

In the same case of *Forbes* v. *Attorney-General of Manitoba* (5) Lord Macmillan, speaking for the Privy Council, answering the argument that if the provincial authorities can tax at 2 per cent the salary which a federal employee receives from the Dominion to enable him to live in the province and discharge his duties there, they can tax his salary to such an extent as to render it impossible for him to live and perform his duties, says that a similar argument in terrorem was advanced and rejected in the case of *Bank of Toronto* v. *Lambe* (6) and adopts Lord Hobhouse's dictum that self-governing provinces who are entrusted with the great power of making laws for property and civil rights may well be trusted to levy taxes.

(1) (1908) 40 Can. S.C.R. 597.
(2) (1878) 2 Ont. App. R. 522.
(3) (1887) 12 App. Cas. 575.
(4) [1924] A.C. 999.
(5) [1937] A.C. 260, at 270.
(6) (1887) 12 App. Cas. 575.

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I would also refer to the case of the *Saskatchewan Judges* v. *Attorney-General of Saskatchewan* (1), where the Privy Council reaffirmed, as applying to judges' salaries, the view already expounded in *Attorney-General of Manitoba* v. *Forbes* (2), above mentioned.

Prima facie, in view of the above decision, it would, therefore, seem that the assets of the banks cannot be protected by the courts against the alleged destroying power of provincial taxation any more than salaries of Dominion civil servants or the emoluments of His Majesty's judges.

Where the United States Supreme Court can exercise certain powers, the decisions above quoted seem to preclude this Court from doing the same, on account of the powers reserved to the central government under our constitution. The Privy Council has set no definite limit to the legislative competence of the provinces to levy direct taxation within the province in order to the raising of revenue for provincial purposes. If such power is used unwisely or extravagantly, against the best interest of the whole of Canada, the power of disallowance by the Governor-General in Council, or, as in this case, that of reservation by the Lieutenant-Governor, acting, presumably, according to his instructions from the central government, are the only means or safety valves provided in our "carefully balanced constitution," to see that "no one of the parts can pass laws for itself except under the control of the whole acting through the Governor-General."

It must be borne in mind, however, that in the two cases last cited the Attorney-General of Canada did not appear before the Court, did not interfere in any way to show that, in the opinion of the Federal Government, the interests of the Dominion as a body politic were at stake when the emoluments fixed by Parliament for the Judiciary or the civil service were reduced by provincial taxation. In the present reference, the Dominion takes a very strong stand and contends that this bill, linked with the two others, constitutes essential encroachment upon the exclusive powers of Parliament of legislating in relation to "banking, incorporation of banks and paper money" and is, therefore,

(1) [1937] 2 D.L.R. 209. (2) [1937] A.C. 260.

ultra vires. Perhaps, under these altered circumstances, the Privy Council, if this matter is brought before Their Lordships, will reopen the question and reconsider the scope to be given to the decisions above quoted. They may even distinguish this reserved bill from the Quebec Act considered in *Bank of Toronto* v. *Lambe* (1).

As to the question whether the tax is taxation within the province, "any person found within the province may legally be taxed there if taxed directly," according to *Bank of Toronto* v. *Lambe* (1), and also according to the same authority, "whether the method of assessing this tax is sound or unsound, wise or unwise, is a point on which we have no opinion, and are not called on to form one, for, if it does not carry the taxation out of the Province, it is for the legislature and not for the courts of law to judge of its expediency."

For my part, although I always believed that the efficiency of essentially federal services, like banking, cannot be impaired by provincial legislation, I, at first, felt myself bound by these concurrent and recent decisions to say that the Alberta Legislature is competent to enact a statute in the terms of this bill. But, after perusing with great advantage the reasons of my Lord the Chief Justice, I reach the conclusion that the bill, despite its form, does not seek to raise revenue for provincial purposes but, in its true character, aims, by erecting a prohibitive barrier, to prevent the banks from conducting their legitimate business in Alberta. Such purpose and effect must be declared *ultra vires* of the legislature of Alberta, which cannot use its special powers as an indirect means of destroying powers given by the Parliament of Canada.

The answer to the first question must be in the negative.

II.

The second question in the order of reference is the following:

Is Bill No. 8, entitled *An Act to Amend and Consolidate the Credit of Alberta Regulation Act,* or any of the provisions thereof and in what particular or particulars or to what extent *intra vires* of the legislature of the province of Alberta?

(1) (1887) 12 App. Cas. 575.

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The Bank Taxation Act; The Credit of Alberta Regulation Act; and The Accurate News and Information Act.

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After a full study of the matter and as I was ready to write my opinion in answer to this question, I had the advantage of reading the careful analysis of the bill prepared by my brother Kerwin and his criticism of its different clauses. I find that I could add nothing useful to his reasons. I agree with him and his conclusions; and I would, therefore, answer Question 2 in the negative. This Bill, if it became law, would constitute an invasion by the province of Alberta of the Dominion's exclusive power of regulating banks and banking.

III.

The third question put to us is the following:

Is Bill No. 9, entitled *An Act to ensure the Publication of Accurate News and Information,* or any of the provisions thereof and in what particular or particulars or to what extent *intra vires* of the legislature of the province of Alberta?

The order-in-council represents that it has been and is the avowed object of the present government of the province of Alberta to inaugurate in the said province a "new economic order" upon the principles or plan of the theory known as the "Social Credit"; and that the said government has since secured the enactment of several statutes more or less related to the policy of effectuating the said object. The preamble of the bill, which I will hereafter call the "Press bill" recites that it is

expedient and in the public interest that the newspapers published in the Province should furnish to the people of the Province statements made by the authority of the Government of the Province as to the true and exact objects of the policy of the Government and as to the hindrances to or difficulties in achieving such objects to the end that the people may be informed with respect thereto.

Section 3 provides that any proprietor, editor, publisher or manager of any newspaper published in the province shall, when required to do so by the Chairman of the Board constituted by section 3 of the *Alberta Social Credit Act,* publish in that newspaper any statement furnished by the Chairman which has for its object the correction or amplification of any statement relating to any policy or activity of the government of the province published by that newspaper within the next preceding thirty-one days.

And section 4 provides that the proprietor, etc., of any newspaper upon being required by the Chairman in writing shall within twenty-four hours after the delivery of the requirement

> make a return in writing setting out every source from which any information emanated, as to any statement contained in any issue of the newspaper published within sixty days of the making of the requirement and the names, addresses and occupations of all persons by whom such information was furnished to the newspaper and the name and address of the writer of any editorial, article or news item contained in any such issue of the newspaper.

Section 5 denies any action for libel on account of the publication of any statement pursuant to the Act.

Section 6 enacts that in the event of a proprietor, etc., of any newspaper being guilty of any contravention of any of the provisions of the Act, the Lieutenant-Governor-in-Council, upon a recommendation of the Chairman, may by order prohibit,

> (*a*) the publication of such newspaper either for a definite time or until further order;
> (*b*) the publication in any newspaper of anything written by any person specified in the order;
> (*c*) the publication of any information emanating from any person or source specified in the order.

Section 7 provides for penalties for contraventions or defaults in complying with any requirement of the Act.

The policy referred to in the preamble of the Press bill regarding which the people of the province are to be informed from the government standpoint, is undoubtedly the Social Credit policy of the government. The administration of the bill is in the hands of the Chairman of the Social Credit Board who is given complete and discretionary power by the bill. "Social Credit," according to sec. 2 (*b*) of ch. 3, 1937, second session, of *The Alberta Social Credit Amendment Act* is

> the power resulting from the belief inherent within society that its individual members in association can gain the objectives they desire;

and the objectives in which the people of Alberta must have a firm and unshaken belief are the monetization of credit and the creation of a provincial medium of exchange instead of money to be used for the purposes of distributing to Albertans loans without interest, per capita dividends and discount rates to purchase goods from retailers. This free distribution would be based on the unused capacity of the industries and people of the province of Alberta

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to produce goods and services, which capacity remains unused on account of the lack or absence of purchasing power in the consumers in the province. The purchasing power would equal or absorb this hitherto unused capacity to produce goods and services by the issue of Treasury Credit certificates against a Credit Fund or Provincial credit account established by the Commission each year representing the monetary value of this "unused capacity" —which is also called "Alberta credit."

It seems obvious that this kind of credit cannot succeed unless every one should be induced to believe in it and help it along. The word "credit" comes from the latin: *credere,* to believe. It is, therefore, essential to control the sources of information of the people of Alberta, in order to keep them immune from any vacillation in their absolute faith in the plan of the government. The Social Credit doctrine must become, for the people of Alberta, a sort of religious dogma of which a free and uncontrolled discussion is not permissible. The bill aims to control any statement relating to any policy or activity of the government of the province and declares this object to be a matter of public interest. The bill does not regulate the relations of the newspapers' owners with private individual members of the public, but deals exclusively with expressions of opinion by the newspapers concerning government policies and activities. The pith and substance of the bill is to regulate the press of Alberta from the viewpoint of public policy by preventing the public from being misled or deceived as to any policy or activity of the Social Credit Government and by reducing any opposition to silence or bring upon it ridicule and public contempt.

I agree with the submission of the Attorney-General for Canada that this bill deals with the regulation of the press of Alberta, not from the viewpoint of private wrongs or civil injuries resulting from any alleged infringement or privation of civil rights which belong to individuals, considered as individuals, but from the viewpoint of public wrongs or crimes, i.e., involving a violation of the public rights and duties to the whole community, considered as a community, in its social aggregate capacity.

Do the provisions of this bill, as alleged by the Attorney-General for Canada, invade the domain of criminal

law and trench upon the exclusive legislative jurisdiction of the Dominion in this regard?

The object of an amendment of the criminal law, as a rule, is to deprive the citizen of the right to do that, apart from the amendment, he could lawfully do. Sections 130 to 136 of the Criminal Code deal with seditious words and seditious publications; and sect. 133 (*a*) reads as follows:—

> No one shall be deemed to have a seditious intention only because he intends in good faith,—
>
> (*a*) to show that His Majesty has been misled or mistaken in his measures; or
>
> (*b*) to point out errors or defects in the *government* or constitution of the United Kingdom, or of any part of it, or of Canada or *any province thereof*, or in either House of Parliament of the United Kingdom or of Canada, or *in any legislature*, or in the administration of justice; or to excite His Majesty's subjects to attempt to procure, by lawful means, the alteration of any matter of state; or
>
> (*c*) to point out, in order to their removal, matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of His Majesty's subjects.

It appears that in England, at first, criticism of any government policy was regarded as a crime involving severe penalties and punishable as such; but since the passing of Fox's Libel Act in 1792, the considerations now found in the above article of our criminal code that it is not criminal to point out errors in the Government of the country and to urge their removal by lawful means have been admitted as a valid defence in a trial for libel.

Now, it seems to me that the Alberta legislature by this retrograde Bill is attempting to revive the old theory of the crime of seditious libel by enacting penalties, confiscation of space in newspapers and prohibitions for actions which, after due consideration by the Dominion Parliament, have been declared innocuous and which, therefore, every citizen of Canada can do lawfully and without hindrance or fear of punishment. It is an attempt by the legislature to amend the Criminal Code in this respect and to deny the advantage of sect. 133 (*a*) to the Alberta newspaper publishers.

Under the British system, which is ours, no political party can erect a prohibitory barrier to prevent the electors from getting information concerning the policy of the government. Freedom of discussion is essential to enlighten public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed

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through sources independent of the government concerning matters of public interest. There must be an untrammelled publication of the news and political opinions of the political parties contending for ascendancy. As stated in the preamble of *The British North America Act*, our constitution is and will remain, unless radically changed, "similar in principle to that of the United Kingdom." At the time of Confederation, the United Kingdom was a democracy. Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State within the limits set by the criminal code and the common law. Every inhabitant in Alberta is also a citizen of the Dominion. The province may deal with his property and civil rights of a local and private nature within the province; but the province cannot interfere with his status as a Canadian citizen and his fundamental right to express freely his untrammelled opinion about government policies and discuss matters of public concern. The mandatory and prohibitory provisions of the Press Bill are, in my opinion, *ultra vires* of the provincial legislature. They interfere with the free working of the political organization of the Dominion. They have a tendency to nullify the political rights of the inhabitants of Alberta, as citizens of Canada, and cannot be considered as dealing with matters purely private and local in that province. The federal parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press in discussing public affairs and the equal rights in that respect of all citizens throughout the Dominion. These subjects were matters of criminal law before Confederation, have been recognized by Parliament as criminal matters and have been expressly dealt with by the criminal code. No province has the power to reduce in that province the political rights of its citizens as compared with those enjoyed by the citizens of other provinces of Canada. Moreover, citizens outside the province of Alberta have a vital interest in having full information and comment, favourable and unfavourable, regarding the policy of the Alberta government and concerning events in that province which would, in the ordinary course, be the subject of Alberta newspapers' news items and articles.

I would, therefore, answer the question as to Bill No. 9 in the negative.

The judgment of Crocket and Kerwin JJ., *re* Bank taxation Act, was delivered by

KERWIN J.—In an opinion released simultaneously with this, I have expressed my views with reference to Bill no. 8 of the Legislative Assembly of Alberta being *An Act to Amend and Consolidate the Credit of Alberta Regulation Act.* The first question of the three referred to in that opinion relates to what is known as Bill no. 1, *An Act respecting the Taxation of Banks,* and it is to that Bill that I now direct my attention.

By section 2 (*a*) thereof:—

(*a*) "Bank" means a corporation or joint stock company other than the Bank of Canada wherever incorporated and which is incorporated for the purpose of doing banking business or the business of a savings bank and which transacts such business in the province whether the head office is situate in the province and elsewhere.

By section 3, every bank which transacts business in the province is required to pay annually to the Minister (the Provincial Secretary) on behalf of His Majesty for the use of the province, in addition to any tax payable pursuant to any other Act, a tax of one-half of one per centum on the paid-up capital thereof, and a tax of one per centum on the reserve fund and undivided profits thereof. The Bill provides for returns to be made by every bank according to forms to be prescribed by the Minister, and contains additional sections to ensure the filing of such returns and the payment of the taxes.

Our attention has been called to the increase in the taxation of banks that would be effected by the provisions of this Bill. As provincial legislation stood prior to the First Session of the Alberta Legislature in 1937, the tax on all banks doing business in the province amounted to $72,200 per annum. By chapter 57 of that session a tax was imposed which would increase the sum realized by $140,000 per annum. The additional tax proposed by Bill 1 amounts to $2,081,925 in each year.

It is argued that the magnitude of the tax proposed for this one province is such that if it were applied by each of the other provinces, it would have the effect of pre-

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venting banks from exercising their functions. That, of course, is not the situation confronting us. This Bill has been passed by the Legislative Assembly of one province only and, considering the enactment by itself, the amount of the impost is to be determined by the competent taxing authority. It is not for a court to say that a certain tax is exorbitant because, in addition to any expression of opinion being the particular or, it may be, the peculiar view of an individual judge, or even of a number of judges, that is not the function of the judiciary.

However, omitting any reference to other arguments which have been adduced against the power of the Alberta Legislature to enact into law such a Bill, I believe that the time has now arrived when the question left open by this Court in *Abbott* v. *City of Saint John* (1), must be considered. In that case, which concerned the validity of a tax by provincial legislation on a Dominion official, Davies J., dealing with the contention that provincial taxation might paralyze the Dominion Civil Service, stated:—

> If, under the guise of exercising power of taxation, confiscation of a substantial part of official and other salaries were attempted, it would be then time enough to consider the question and not to assume beforehand such a suggested misuse of the power.

The decision in the *Abbott* case (1) was approved by the Judicial Committee in *Caron* v. *The King* (2) and in *Forbes* v. *Attorney-General for Manitoba* (3). As pointed out at page 270 in the latter, an argument in terrorem similar to that raised in the *Abbott* case (1) had been advanced and rejected in *Bank of Toronto* v. *Lambe* (4). While Davies J. left the question open, Lord Hobhouse, speaking for the Board in the *Lambe* case (4), contented himself with stating that

> their Lordships cannot conceive that when the Imperial Parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them on the speculation that they would be used in an injurious manner.

In none of the three cases decided by the Judicial Committee, nor in the *Abbott* case (1) was it suggested that the Acts in question were not true taxing enactments but it is contended at Bar that the same cannot be said of the Bill under review and it therefore becomes necessary to investigate that submission.

(1) (1908) 40 Can. S.C.R. 597.
(2) [1924] A.C. 999.
(3) [1937] A.C. 260.
(4) (1887) 12 A.C. 575.

In that connection we have been referred to certain other enactments passed by the Alberta Assembly. The first of these is *The Alberta Social Credit Act,* chapter 10 of the First 1937 Session, an Act which is still in force. It is unnecessary to detail the provisions of that Act as that has been done in the opinion delivered by My Lord the Chief Justice on the validity of Bills 1, 8 and 9. An examination of these provisions leaves no doubt in my mind that the Act is an attempt to regulate and control banks and banking as those terms are used in head 15 of section 91 of *The British North America Act.*

In the Second 1937 Session was passed *The Credit of Alberta Regulation Act.* The recitals in that Act are as follows:—

> Whereas Bank Deposits and Bank Loans in Alberta are made possible mainly or wholly as a result of the monetization of the credit of the People of Alberta, which credit is the basis of the credit of the province of Alberta; and
>
> Whereas the extent to which property and civil rights in the province may be enjoyed depends upon the principles governing the monetization of credit and the means whereby such credit is made available to the province and to the People collectively and individually of the province; and
>
> Whereas it is expedient that the business of banking in Alberta shall be controlled with the object of attaining for the People of Alberta the full enjoyment of property and civil rights in the province.

The Act then requires, by appropriate provisions, every banker carrying on the business of banking within the province at the time of the coming into force of the Act to take out a licence, and also every employee of a bank. Except that this Act refers to banks and the business of banking, by name, and includes employees of banks, the sections are practically the same as those of Bill 8. The first and third recitals are omitted but the second is identical in each enactment. For the reasons given by me when considering Bill 8, all of which apply with even greater force to this Act, I consider the legislation would be ultra vires of the province.

Chapter 2, *An Act to provide for the Restriction of the Civil Rights of Certain Persons,* also passed in the Second 1937 Session, recites:—

> Whereas Bank Deposits and Bank Loans in Alberta are made possible mainly or wholly as a result of the monetization of the credit of the People of Alberta, which credit is the basis of the credit of the province of Alberta; and

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Whereas the extent to which property and civil rights in the province may be enjoyed depends upon the principles governing the monetization of credit and the means whereby such credit is made available to the province and to the People, collectively and individually, of the province; and

Whereas it is expedient that the business of Banking in the province shall be controlled with the object of attaining for the People of Alberta the full enjoyment of property and civil rights in the province;

Section 3 provides:—

Any person who is an employee of a banker and who is required to be licensed pursuant to any provision of "The Credit of Alberta Regulation Act" shall not while unlicensed for any reason whatsoever, be capable of bringing, maintaining or defending any action in any Court of Civil Jurisdiction in the province which has for its object the enforcement of any claim either in law or equity.

This Act would fall with the one requiring a licence to be obtained.

On August 17, 1937, the Governor General in Council ordered that these two Acts together with one amending the *Judicature Act* be disallowed, and such disallowance was duly signified by proclamation of the Lieutenant Governor of Alberta dated August 27, 1937, and published in the *Canada Gazette* on September 11, 1937. The Third 1937 Session was opened on September 24, 1937, and it was at this session that Bills nos. 1 and 8 were passed and on October 5, 1937, reserved by the Lieutenant Governor for the signification of the pleasure of the Governor General.

It would appear to be relevant at this stage to refer to *The Reciprocal Insurers* case (1) and *In Re The Insurance Act of Canada* (2). The extract from the judgment in the former case, which was quoted with approval in the latter and there paraphrased, might, I think not inappropriately, be quoted and re-paraphrased for the purposes of the present inquiry. But what is even more important in my view is the statement in the former case, at page 332 of the report, that two Dominion statutes passed on the same day, one intituled *The Insurance Act, 1917,* and the other *An Act to Amend the Criminal Code* were complementary parts of a single legislative plan and were "admittedly an attempt to produce by a different legislative procedure the results aimed at by the authors of the *Insurance Act* of 1910 which in *Attorney-General for Canada* v. *Attorney-General for Alberta* (3) was pro-

(1) [1924] A.C. 328. (2) [1932] A.C. 41.
(3) [1916] 1 A.C. 588.

nounced *ultra vires* of the Dominion Parliament." In the present reference it is not admitted by counsel for the Attorney-General of Alberta that Bill I is part of a single legislative plan but I can draw no other conclusion. It is true that none of the other legislation referred to has been previously declared beyond the competence of the provincial legislature, but I have already indicated that, in my opinion, *The Alberta Social Credit Act, The Credit of Alberta Regulation Act,* and *An Act to provide for the Restriction of the Civil Rights of Certain Persons* are of that character.

The sequence of events after the disallowance of the three Acts is so significant that I can find no escape from the conclusion that, instead of being a taxing enactment, Bill I is merely a part of a legislative plan to prevent the operation within the province of those banking institutions which have been called into existence and given the necessary powers to conduct their business by the only proper authority, the Parliament of Canada.

If this view be correct, then it follows that the Bill is not one covered by the decision of this Court in the *Abbott* case (1) nor by the decisions of the Judicial Committee in the three cases mentioned, but is governed by the *Reciprocal Insurers* case (2) and *In Re The Insurance Act of Canada* (3).

For these reasons I would answer question 1 in the negative.

The judgment of Crocket and Kerwin JJ., *re* Credit Regulation, was delivered by

KERWIN J.—On October 5, 1937, three Bills were passed by the Legislative Assembly of the province of Alberta but were reserved by the Lieutenant-Governor for the signification of the Governor General's pleasure. Pending consideration of the advice to be tendered to the Governor General as to the propriety of signifying or withholding signification of the Royal Assent to these Bills, the Governor General in Council referred to this Court three questions as to whether these Bills, or any of the provisions thereof, and in what particular or particulars, or to what

(1) [1908] 40 Can. S.C.R. 597. (2) [1924] A.C. 328.
(3) [1932] A.C. 41.

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extent, were *intra vires* of the Legislature of the Province of Alberta. The Bills are numbered and intituled as follows:—

Bill no. 1, "An Act Respecting the Taxation of Banks."

Bill no. 8, "An Act to Amend and Consolidate the Credit of Alberta Regulation Act."

Bill no. 9, "An Act to Ensure the Publication of Accurate News and Information."

I propose to consider question no. 2, referring to Bill no. 8. Counsel for the Attorney-General of Canada submit that it would be *ultra vires* of the provincial legislature to enact this legislation because the subject matter falls under one or more heads of section 91 of the *British North America Act, 1867*.

In the factum of the Attorney-General of Canada appears a great mass of material, some of which was referred to on the argument. The admissibility and relevancy of a great part of it was objected to, but the Court heard what counsel desired to say upon the subject without determining the issues raised. None of it was relied upon by counsel for the provincial Attorney-General. Some of this material is of such a character that it is clearly relevant and admissible while other parts are just as clearly irrelevant and inadmissible. However, it is unnecessary to determine the exact line that separates the one class from the other since, after a detailed examination of the provisions of the Bill itself, I have arrived at the conclusion that the Bill *in toto* is *ultra vires* of the provincial legislature.

The Bill contains the following recital:—

> Whereas the extent to which property and civil rights in the province may be enjoyed depends upon the principles governing the monetization of credit and the means whereby such credit is made available to the province and to the People collectively and individually of the province.

Section 2 is the definition section and is as follows:—

> 2. In this Act, unless the context otherwise requires,—
>
> (*a*) "Credit Institution" means a person or corporation whose business or any part of whose business is the business of dealing in credit;
>
> (*b*) "Business of dealing in credit" means all business transactions in the Province of a credit institution or any other person except The Bank of Canada, whereby credit is created, issued, lent, provided or dealt in by means of bookkeeping entries,

in any case and at any time when the aggregate amount of all credit so created, issued, lent, provided or dealt in is in excess of the total amount of legal tender in the possession of the credit institution so creating, issuing, lending, providing or dealing in such credit: and includes the following transactions relating to any credit so created, issued, lent, provided or dealt in, namely, the "payment of cheques or other negotiable instruments made, drawn or paid in by customers, the making of advances and the granting of overdrafts; but does not include transactions which are banking within the meaning of the word 'banking' as used in subhead 15 of section 91 of The British North America Act, 1867";

(c) "Local Directorate" means a local Directorate constituted pursuant to section 4 of this Act;

(d) "Provincial Credit Commission" means the Commission constituted pursuant to section 4 of The Alberta Social Credit Act;

(e) "Social Credit Board" means the Board constituted pursuant to section 3 of The Alberta Social Credit Act.

By subsection 1 of section 3 "every credit institution which at the time of the coming into force of this Act is carrying on the business of dealing in credit within the province" shall within twenty-one days thereafter apply for and obtain a licence from the Commission in respect of such business, and every application is to be accompanied by the necessary fee. By subsection 3 of section 3 every such application is also to be accompanied by an undertaking whereby the applicant undertakes to refrain from acting or assisting or encouraging any person or persons to act in a manner which restricts or interferes with the property and civil rights of any person or persons within the province. By subsection 4 of section 3 the Commission is given power at any time or from time to time and without notice, to suspend, revoke or cancel the licence of any credit institution which commits a breach of the undertaking.

Under section 5, any credit institution which carries on the business of dealing in credit in the province without having first obtained a licence, or who violates any other provisions of the Act or the regulations made thereunder, is to incur a penalty of ten thousand dollars for each day during which it carries on business without a licence, "and every such penalty may be recovered by action brought on behalf of the Crown by the Provincial Treasurer in any court of competent jurisdiction as a debt due to the Crown." I refer to section 5 at this stage because by subsection 5 of section 3 any credit institution whose licence has been sus-

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pended, revoked or cancelled by the Commission is given a right to appeal to the Board but, as I read the concluding part of this subsection, no such right of appeal extends to any credit institution against which a judgment has been entered pursuant to section 5, on the ground or for the reason that the institution had acted, or assisted, or encouraged any person to act in a manner which restricts or interferes with the property or civil rights of any person within the province. That is, under section 5, the penalty referred to may be incurred by reason of several things but, if it happens that judgment is given for such penalty by reason of the specific matters referred to in the latter part of subsection 5 of section 3, the right which an institution would otherwise have to appeal to the Board from the suspension, revocation or cancellation of its licence by the Commission no longer exists.

Reverting to section 3, provision is made by subsections 6 and 7 thereof for an annual licence fee in such amount as may be fixed by the Commissioner, not exceeding an amount equivalent to one hundred dollars in respect of every building within the province in which the business of such credit institution is conducted; but, if the licence has been suspended, revoked or cancelled, the Commission may, for renewing the licence or issuing a new one, fix a fee in excess of that mentioned, provided that such increased fee is not to exceed one thousand times the fee paid or required to be paid in respect of the licence last issued to such institution.

By section 4 "for the purpose of preventing any act by such credit institution constituting a restriction or interference, either direct or indirect, with the full enjoyment of property and civil rights by any person within the Province", one or more Local Directorates (the number of which is to be in the absolute discretion of the Board) shall be appointed to supervise, direct and control the policy of the business of dealing in credit of such institution in respect of which such Local Directorate has been appointed. Each Local Directorate is to consist of five persons, three of whom are to be appointed by the Board and two by the credit institution, and provision is made for the dismissal of any of the Board's appointees.

It will be observed that under clause A of the definition section the entire business of a "credit institution" need not

be that of dealing in credit but it is sufficient if part only falls within that category. By clause (*b*) of section 2, an institution is dealing in credit, either wholly or in part, only when *"the aggregate amount of all credit * * * is in excess of the total amount of legal tender in the possession of the credit institution."* This is important because it is only in such an event that the "business of dealing in credit" means business transactions in the province "whereby credit is created, issued, lent, provided or dealt in by means of bookkeeping entries," and the business transactions which the Bill purports to cover are only those whereby credit is created, etc., by means of bookkeeping entries.

In my opinion these transactions fall within the meaning of the term "banking" as used in head 15 of section 91 of *The British North America Act*. As pointed out by Lord Watson, speaking for the Judicial Committee, in *Tennant* v. *Union Bank of Canada* (1), the words used in head 15 of section 91, "Banking, Incorporation of Banks, and the Issue of Paper Money," are "wide enough to embrace every transaction coming within the legitimate business of a banker." The nature of such business "is a part of the law merchant and is to be judicially noticed by the Court," per Lord Campbell, during the course of the argument in *The Bank of Australasia* v. *Breillat* (2), referring to *Brandao* v. *Barnett* (3).

Accordingly, upon referring to the New English (Oxford) Dictionary we find that the word "credit," which is used in the Bill, is defined as "a sum placed at a person's disposal in the books of a bank, etc., upon which he may draw to the extent of the amount; any note, bill or other document, on security of which a person may obtain funds"; and at page 48 of the third volume of the 14th edition of the Encyclopaedia Britannica, under the title "Banking and Credit" appears the following paragraph:—

> Banks create credit. It is a mistake to suppose that bank credit is created to any important extent by the payment of money into the banks. Money is always being paid in by tradesmen and others who receive it in the course of business, and drawn out again by employers to pay wages and by depositors in general for use as pocket money. But the change of money into credit money and of credit money back

(1) [1894] A.C. 31, at 46. (2) (1847) 6 Moo. P.C. 152, at 173.
(3) (1846) 12 Cl. & F. 787.

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into money does not alter the total amount of the means of payment in the hands of the community. When a bank lends, by granting an advance or discounting a bill, the effect is different. Two debts are created; the trader who borrows becomes indebted to the bank at a future date, and the bank becomes immediately indebted to the trader. The bank's debt is a means of payment; it is credit money. It is a clear addition to the amount of the means of payment in the community. The bank does not lend money. The borrower can, if he pleases, take out the whole amount of the loan in money. He is in that respect in the same position as any other depositor. But like other depositors he is likely in practice to use credit for all major payments and only to draw out money as and when needed for minor payments.

It is not necessary to refer to the various schools of economists with their divergent views as to the extent to which banks create credit or as to the wisdom or otherwise of a state empowering such institutions to do so. It suffices that by current common understanding a business transaction whereby credit is created, issued, lent, provided or dealt in by means of bookkeeping entries is considered to be part of the business of banking as it has been practised and developed. It is well known that in addition to creating credit banks also issue, lend, provide and deal in credit by means of bookkeeping entries.

That banks are contemplated by Bill 8 as being the credit institutions to be licensed seems evident from the direction in section 3, subsection 1, that an application for a licence is to be made by "every credit institution which at the time of the coming into force of this Act is carrying on the business of dealing in credit within the province"; thus envisaging only institutions of that character which are already carrying on business; and banks are the only ones answering that description under the restrictions embodied in that part of clause (*b*) of section 2 quoted in an earlier part of these reasons and italicized. A construction might be placed upon other provisions of the Bill that would embrace such other institutions that desired to commence the defined business, but such a construction would be strained and the other is more consonant with the evident intention of the Bill as disclosed by its terms.

In addition to the terms already commented on, banks are plainly indicated by the following extract from clause (*b*) of section 2, which follows the statement of what "business of dealing in credit" means:—"and includes the following transactions relating to any credit so created, issued, lent, provided or dealt in, namely, the payment of

cheques or other negotiable instruments, made, drawn or paid in by customers, the making of advances and the granting of overdrafts." The transactions specifically mentioned form part of an ordinary banking business; and the exception of the Bank of Canada from "a credit institution or any other person," in clause (*b*) of section 2, strengthens the conclusion that banks are the institutions covered by the provisions of the Bill.

The reference in the Bill to "property and civil rights within the province" does not touch the point as almost any Act of Parliament relating to the matters assigned to its jurisdiction would affect property and civil rights, and it would still be valid. According to several decisions of the Judicial Committee, even if in some aspects the matters dealt with by this Bill could be said to fall within head 13 of section 92 (as to which I express no opinion), the final words of section 91 exclude provincial authority as the pith and substance of the Bill bring it within one of the enumerated subjects assigned to Parliament "notwithstanding anything in this Act."

The control to be exercised over credit institutions is far reaching. In addition to the undertaking required by every applicant for a licence and the provisions providing for a fee and an increased fee, and in addition to the powers conferred to suspend, revoke or cancel a licence, Local Directorates are to be appointed, a majority of whose members shall be nominees of the Board. Then, by section 8, the Commission, with the approval of the Lieutenant-Governor in Council, may make regulations: —

> (*e*) prescribing the privileges, terms, conditions, limitations and restrictions to be granted to or observed by any licensee;
>
> (*f*) prescribing the conditions upon which licences may be issued and providing for the revocation, suspension or withholding of licences;

The regulations, however, are not restricted to the matters dealt with by the Bill. While undoubtedly they could not go beyond the powers possessed by the Legislature itself, it is sufficient, according to the opening phrase of section 8, that the regulations be "not inconsistent with this Act." All these provisions are significant as indicating that the Bill is not a taxing enactment but an attempt to regulate and control every bank and the business of banking.

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There remains for consideration the effect of the concluding phrase in clause (*b*) of section 2,—

but does not include transactions which are banking within the meaning of the word "banking" as used in subhead 15 of section 91 of *The British North America Act, 1867*.

and of section 7:—

No provisions of this Act shall be so construed as to authorize the doing of any act or thing which is not within the legislative competence of the legislature of the province.

As to the former, it is contended by counsel for Alberta that, if, omitting the concluding phrase, only banks would be covered, the entire clause is not unintelligible but there might remain in fact no institutions to which the clause could apply; that it would, therefore, be nugatory and it could not be declared to be beyond the competence of the provincial legislature to enact the Bill as a law. But it is a sound principle in the construction of enactments that the Court will not presume an intention to enact a meaningless statute or section and here the correct interpretation appears to be that banks were intended to be and are covered by the definition, and that the last part of section 2, clause (*b*) was added in an effort to save legislation which on the proper construction of the other provisions of the Bill is unconstitutional. The same remarks apply to section 7.

In *The King* v. *Nat Bell Liquors Ltd.* (1), Lord Sumner, speaking for the Judicial Committee and discussing the effect of the repeal of a provision in the Alberta *Liquor Act* of 1916, which proposed to exclude from the operation of the Act "bona fide transactions in liquor between a person in the province of Alberta and a person in another province or in a foreign country," said at page 136:—

In their Lordships' opinion the real question is whether the legislature has actually interfered with inter-provincial or with foreign trade. The presence or absence of an express disclaimer of any such interference may greatly assist where the language of the provincial legislature does not in itself determine the question and define its effect. If, however, it is otherwise clear that there is such an interference, or that there is none, and the language actually used sufficiently decides that question, there is no such sovereign efficacy in such a clause as s. 72 as to make its presence or absence in an enactment crucial.

This statement would appear at first sight to be in conflict with the statement by Lord MacNaghten in *Attorney General of Manitoba v. Manitoba Licence*

(1) [1922] 2 A.C. 128.

Holders' Association (1), where, in dealing with the question as to the constitutionality of the Manitoba *Liquor Act* of 1900, His Lordship observes:—

> The *Liquor Act* proceeds upon a recital that "it is expedient to suppress the liquor traffic in Manitoba by prohibiting provincial transactions in liquor." That is the declared object of the legislature set out at the commencement of the Act. Towards the end of the Act there occurs this section:
>
> "119. While this Act is intended to prohibit and shall prohibit transactions in liquor which take place wholly within the province of Manitoba, except under a licence or as otherwise specially provided by this Act, and restrict the consumption of liquor within the limits of the province of Manitoba, it shall not affect and is not intended to affect bona fide transactions in liquor between a person in the province of Manitoba and a person in another province or in a foreign country, and the provisions of this Act shall be construed accordingly." Now that provision is as much part of the Act as any other section contained in it. It must have its full effect in exempting from the operation of the Act all bona fide transactions in liquor which come within its terms.

The principle to which Lord Sumner referred was expressed somewhat differently by Viscount Haldane in *Attorney General for Manitoba* v. *Attorney General for Canada* (2). That case had to do with the constitutionality of an Act of the Manitoba Legislature providing for the collection of a tax from persons selling grain for future delivery. At page 566 of the report Viscount Haldane refers to the principle by which the courts determine whether a tax is direct or indirect, and explains:—

> It does not exclude the operation of the principle if, as here, by s. 5, the taxing Act merely expressly declares that the tax is to be a direct one on the person entering into the contract of sale, whether as principal or as broker or agent. For the question of the nature of the tax is one of substance, and does not turn only on the language used by the local Legislature which imposes it, but on the provisions of the Imperial statute of 1867.

In *Attorney General for British Columbia* v. *Attorney General for Canada* (3), the Judicial Committee determined that the Dominion *Natural Products Marketing Act,* 1934, was *ultra vires* of the Parliament of Canada. At page 387, Lord Atkin, speaking for the Board, deals with the argument advanced that certain portions of the Act at least should be declared valid. It was urged that section 9 of the Act there under consideration was a valid exercise of the powers of the Dominion Parliament because it purported to deal only with inter-provincial or export trade; and Part 2 of the Act because it went no

(1) [1902] A.C. 73, at 79. (2) [1925] A.C. 561.
(3) [1937] A.C. 377.

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further than similar provisions in the *Combines Investigation Act* and was a genuine exercise of the Dominion legislative authority over criminal law; and stress was laid upon section 26 of the Act:—

> If it be found that Parliament has exceeded its powers in the enactment of one or more of the provisions of this Act, none of the other or remaining provisions of the Act shall therefore be held to be inoperative or ultra vires, but the latter provisions shall stand as if they had been originally enacted as separate and independent enactments and as the only provisions of the Act; the intention of Parliament being to give independent effect to the extent of its powers to every enactment and provision in this Act contained.

At the foot of page 388 of the report his Lordship deals with this argument stating:—

> There appear to be two answers. In the first place, it appears to their Lordships that the whole texture of the Act is inextricably interwoven, and that neither s. 9 nor Part II can be contemplated as existing independently of the provisions as to the creation of a Board and the regulation of products. There are no separate and independent enactments to which s. 26 could give a real existence. In the second place, both the Dominion and British Columbia in their Cases filed on this appeal assert that the sections now said to be severable are incidental and ancillary to the main legislation. Their Lordships are of opinion that this is true: and that as the main legislation is invalid as being in pith and substance an encroachment upon the Provincial rights the sections referred to must fall with it as being in part merely ancillary to it.

As applicable to the present case, the principle might be stated thus:—Unless certain provisions of the Bill are severable, such expressions as are found in the last part of clause (*b*) of section 2 and in section 7 have no effect, if upon a consideration of the entire legislation the conclusion is reached that the subject matter dealt with is beyond the powers of the enacting authority. For the reasons given above, that is the conclusion I have arrived at and I would therefore answer question 2 in the negative.

The judgment of Crocket and Kerwin JJ. *re* Press Act was delivered by

KERWIN J.—The third question submitted to the Court by the Governor General in Council asks our opinion as to whether Bill No. 9 of the Legislative Assembly of Alberta, *An Act to Ensure the Publication of Accurate News and Information,* (hereafter referred to as the Press Bill) is *intra vires* of the legislature of that province. It has already been noted that this Bill was passed at the

same time as Bills 1 and 8. After reciting that "it is expedient and in the public interest that the newspapers published in the Province should furnish to the people of the Province statements made by the authority of the Government of the Province as to the true and exact objects of the policy of the Government and as to the hindrances to or difficulties in achieving such objects, to the end that the people may be informed with respect thereto," section 2(*a*) defines the word "Chairman" as used in the Bill as "the Chairman of the Board constituted by section 3 of The Alberta Social Credit Act." By section 3 of the Press Bill "every person who is the proprietor, editor, publisher or manager of any newspaper published in the Province, shall, when required so to do by the Chairman, publish in that newspaper any statement furnished by the Chairman which has for its object the correction or amplification of any statement relating to any policy or activity of the Government of the Province published by that newspaper within the next preceding thirty-one days." The additional provisions of section 3 do not require our attention nor do the provisions of section 5, which prohibit any action for libel by reason of the publication of such statement.

Section 4 enacts that, within twenty-four hours after the delivery of a written requisition by the Chairman, every person who is the proprietor, etc., of any such newspaper shall give every source from which any information emanated, as to any statement contained in any issue of the newspaper published within sixty days of the making of the requirement. Six and seven are the penalizing sections, and whatever their effect (as to which counsel disagree) must stand or fall with the substantive sections 3 and 4.

The obligations imposed by these sections become operative only upon the requisition of the Chairman of a Board, which was to be constituted under the terms of another Bill which I have already indicated is, in my opinion, ultra vires. The peculiar situation therefore exists that, in answering the question as to one piece of legislation, it became necessary to consider the provisions of another, which was not specifically referred to the Court, and the conclusion was reached that the latter was *ultra vires* of the provincial legislature; and it is by a section of that

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Bill that the Board, by virtue of the actions of whose Chairman sections 3 and 4 of the Press Bill can have any operation, was established. However, the result appears to be that the Press Bill is part of the same legislative plan that, in my opinion, is outside the powers conferred upon the provinces, and that the part must suffer the fate of the whole.

Other objections against the validity of the Press Bill were urged but I refrain from expressing any opinion upon them. They raise important constitutional questions, the consideration of which I prefer to postpone until the need to do so arises.

For the above reasons I would answer question 3 in the negative.

HUDSON, J.—I concur in the answers proposed by the other members of the Court on the various questions submitted in this reference.

It is clear that the three bills submitted are part of one legislative scheme, the central measure of which is *The Alberta Social Credit Act*. That Act has been the subject of a searching analysis by my Lord the Chief Justice and I concur in his reasons for holding that it is beyond the powers of the legislature.

Section ninety-one of the British North America Act allots exclusive legislative authority to the Dominion in all matters coming within the following classes of subjects:

91 (2) The regulation of trade and commerce;

(14) Currency and coinage;

(15) Banking, incorporation of banks and the issue of paper money;

(16) Savings banks;

(18) Bills of exchange and promissory notes;

(19) Interest;

(20) Legal tender.

Read together these have a cumulative effect, I think, much greater than if individual headings were taken separately. This is especially so when the object of the measure under consideration is the establishment by a province of a new economic order such as *The Social Credit Act*. So read they strongly reinforce the reasons already given against the validity of this Act.

It is interesting to observe that the *Bank of Canada Act,* 1934 (Dominion), establishes a central bank "to regulate credit and currency in the best interests of the economic life of the nation, to control and protect the external value of the national monetary unit and to mitigate by its influence fluctuations in the general level of production, trade, prices and employment so far as may be possible within the scope of monetary action, and generally to promote the economic and financial welfare of the Dominion." No one doubts the constitutionality of this Act; in fact the bill entitled *An Act to amend and consolidate the Credit of Alberta Regulation Act* expressly exempts from its operations the Bank of Canada.

In essence the Alberta legislative scheme is one to set up a new form of credit and currency within a single province.

I also concur in the reasons given by my Lord the Chief Justice for holding as beyond the legislative competence of the legislature the bills entitled respectively "An Act respecting the taxation of banks", and "An Act to amend and consolidate the Credit of Alberta Regulation Act."

I concur in the views of the other members of the Court that the bill entitled "An Act to ensure the publication of accurate news and information" is ultra vires, because it is ancillary to and dependent upon the *Alberta Social Credit Act,* but refrain from expressing any views as to the boundaries of legislative authority as between the provinces and the Dominion in relation to the press. It is a problem with many facets with which I hesitate to deal until presented to us in a more concrete form.

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*Oct. 21.
*Mar. 18.

LA COMPAGNIE D'ASSURANCE SUR LA VIE "LA SAUVEGARDE" (PLAINTIFF) ..... APPELLANT;

AND

WILLIAM HARRY AYERS (DEFENDANT) ..... RESPONDENT.

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

Sale—Right of redemption—Option to take back the property or to claim the price—Pactum displicentiae—Third party in possession—Irrevocable sale—Incompatible clause—Petitory action—Articles 1025, 1549 C.C.

A deed of sale, passed on the 28th of May, 1931, stipulated that the vendor obliged himself to redeem the property on the 27th of May, 1934, reserving his right to redeem it before such date and the contract added further that the purchaser (creditor) would have the alternative right of demanding repayment of the purchase price and accessories or of assuming complete title to the property (*pactum displicentiae*) in case the vendor failed to redeem the property. The trial judge and the appellate court held that it could not be said that the parties intended that there should be an irrevocable sale once the purchase price was not reimbursed within the stipulated delay; and that the instrument was not in its true character an alienation subject to the right of redemption but a pledge of immovables.

Held, that the judgment of the appellate court (Q.R. 63 K.B. 291) should be affirmed. The fact that a lender is making use of the *vente à réméré* in order the better to secure himself is not necessarily in itself incompatible with the validity of the transaction as such a sale; and the contract may also contain stipulations for the protection of the creditor so long as they are not inconsistent with the essential nature of this particular type of contract (*Salvas* v. *Vassal,* 27 S.C.R. 68 and *The Queen* v. *Montminy* 484); but it is essential that there be alienation and that the title of the alienee be, by the true intendment of the transaction, to be absolute if the price is not reimbursed within the time stipulated therefor; and, from the instrument itself in this case, the parties to the deed had no intention of so stipulating.

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

The facts of the case are the following: On the 9th of November, 1930, one Gauthier sold certain immovables to the respondent under a notarial deed, which was not regis-

*PRESENT:—Duff C.J. and Cannon, Davis, Kerwin and Hudson JJ.

(1) (1937) Q.R. 63 K.B. 291.

tered until the 8th of May, 1933. On the 28th of May, 1931, Gauthier, by another notarial deed, sold the same property to the appellant, which deed was registered on the 1st of June, 1931, this being a sale containing a clause giving the vendor the right to exercise the *faculté de réméré*. The right to exercise this faculty was to expire on the 7th of May, 1934. The respondent took possession of the property on the 8th of May, 1933, and thereupon proceeded to collect rents. In April, 1935, the appellant took the present action to be declared the owner of the property. The question to be determined in this case is what was intended by the parties and what they in fact did. The principal clause of the deed to be interpreted is the following:—

Et, à défaut par monsieur Gauthier d'opérer son rachat de la manière convenue, notamment de rembourser à échéance la susdite somme de trois mille dollars; ou de payer au moins dans les trente jours de leur échéance respective l'un ou l'autre de ses versements d'intérêts semi-annuels; ou d'acquitter avant le premier janvier de chaque année toutes taxes quelconques pouvant affecter les susdits immeubles; ou de prendre et de toujours maintenir en force les assurances-feu dont il est question plus haut, avec production de polices d'assurance et d'un reçu de leur renouvellement au moins dans les quinze jours de leur échéance respective entre les mains de La Sauvegarde; ou de faire radier dans les trente jours de leur enregistrement tout privilège de fournisseurs de matériaux, entrepreneurs, etc., qui pourrait être enregistré sur les propriétés plus haut décrites; ou de maintenir toujours ses propriétés en bon état de réparation, tel que convenu plus haut; alors dans chacun de ces cas, La Sauvegarde pourra soit exiger de suite de monsieur Gauthier le payement de tous deniers qui pourront lui être dus pour quelque raison quelconque, soit en remboursement de la somme de trois mille dollars dont il est question ci-dessus soit pour le service de ses intérêts, le remboursement de taxes, le payement de primes d'assurance, etc., ou à son choix, garder et conserver comme propre, avec droit d'en jouir et d'en disposer comme bon lui semblera, les deux propriétés sus mentionnées, desquelles propriétés elle *sera dès lors* propriétaire incommutable, avec toutes additions et améliorations, sans retour ni indemnité, tout en ayant le droit de garder tous deniers reçus pour quelque fin quelconque, le tout devant lui appartenir comme loyer et à titre de dommages intérêts liquidés à l'avance, sans procédure ni mise en demeure.

Arthur Vallée K.C. and *A. R. Gagné* for the appellant.

J. A. Mann K.C. and *E. H. Brown* for the respondent.

The judgment of the court was delivered by

DUFF C.J.—The question in substance which we are called upon to decide is whether or not the deed of the 28th of May, 1931, was in reality a sale "sous la faculté de réméré." The learned trial judge and the majority of

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LA COMPAGNIE D'ASSURANCE SUR LA VIE "LA SAUVEGARDE" v. AYERS.

Duff C.J.

the Court of King's Bench have held that this instrument is not in its true character an alienation subject to the right of redemption but a pledge of immovables. That question, to quote the words of Strong, C.J., in *Salvas* v. *Vassal* (1)

> must in every case depend upon the interpretation of the deeds passed between the parties and a proper appreciation of the evidence.

In a passage, to which the appellant in his factum refers, Mr. Justice Girouard in the same case put the question in this form:

> Les parties n'entendaient-elles pas faire une vente irrévocable, si le prix n'était pas remboursé?

I do not find it necessary to refer to any extraneous facts. The transaction is described in the deed as a "vente sous la faculté de réméré ci-après réservée." But I find it impossible to reconcile with the terms of the deed an intention to effect an irrevocable sale if the price should not be reimbursed. On the contrary, the parties have made it very clear that, in default of reimbursement by the borrower at the date fixed, an option is vested in the appellants either to require payment of the sum lent or, at their choice, to retain the property in question as their own with full liberty to enjoy and dispose of it.

It was argued that in all material respects the deed before us does not differ from the deed in *The Queen* v. *Montminy* (2); but, as Mr. Justice Letourneau points out, there is this essential distinction: the instrument which this Court had to consider on that appeal was an instrument by which the parties in the most explicit terms provided that in the event of the failure of the borrower to repay the price on the date fixed, the right of redemption should cease to operate, and that the lender should remain "propriétaire incommutable" of the property in question.

The judgments in *Salvas* v. *Vassal* (1) and in *The Queen* v. *Montminy* (2) delivered by Mr. Justice Girouard, in each case speaking for the majority of the court, make it clear that the circumstance that a lender is making use of the *vente à réméré* in order the better to secure himself is not necessarily in itself incompatible with the validity of the transaction as such a sale. In *The Queen* v. *Montminy* (2) (p. 490) he says:

(1) (1896) 27 Can. S.C.R. 68, at 77.

(2) (1899) 29 Can. S.C.R. 484.

Il est évident que dans l'espèce qui nous occupe, comme presque toujours d'ailleurs le créancier n'a eu recours à la vente à réméré que pour éviter les longueurs et les frais d'une vente judiciaire et mieux assurer ses avances d'argent; mais, comme nous le disions dans *Salvas* v. *Vassall* (1), il n'y a aucune ici qui prohibe ces conventions.

And he observes also that the contract may contain stipulations for the protection of the creditor so long as they are not inconsistent with the essential nature of this particular type of contract.

But I agree with the majority of the Court of King's Bench that it is essential that there be alienation and that the title of the alienee is by the true intendment of the transaction, to be absolute if the price is not reimbursed within the time stipulated therefor. It is plain, from the instrument itself, that the parties to the deed before us had no intention of so stipulating.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Gagné & Nadon.*

Solicitors for the respondent: *Mann, Lafleur & Brown.*

J. H. FORTIER AND OTHERS .....APPELLANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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* Nov. 19.

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

Appeal—Leave to appeal to Supreme Court of Canada—Criminal law—Conflict of judgments—Indictment—Formal charge in writing setting forth offence—Description of offence—Insufficiency—Conspiracy—Section 1025 Cr. C.

The appellants were charged with having conspired together and with others during a certain period and at named places "par la supercherie, le mensonge et d'autres moyens frauduleux, pour frauder le public et les porteurs d'obligations de la Cie Légaré * * *"; and they were convicted. The appellate court unanimously affirmed the conviction; and the appellants seek leave to appeal to this Court under section 1025 Cr. C. on the ground that the judgment intended to be appealed from conflicts with the judgment of some other court of appeal in a like case.

Held, that the application should be refused.

The judgment intended to be appealed from does not conflict with the decision of this Court in *Brodie* v. *The King* ([1936] S.C.R. 188).

* PRESENT:—Kerwin J. in chambers.

(1) (1896) 27 Can. S.C.R. 68.

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In that case the accused were charged with having conspired together and with others, during a certain period and at a named place "thereby committing the crime of seditious conspiracy." In the present case, the accused are not charged with having committed a crime in the abstract like "murder" or "theft"; the offence is charged in such a way as to lift it from the general to the particular.

Also, the judgment intended to be appealed from does not conflict with the decision in *The King* v. *Sinclair* ((1906) 12 C.C.C. 20). In that decision, the only matter determined, relevant to this application, was that the charge, with the particulars, did not disclose any offence under section 394 Cr. C.; the charge in the present case does not allege or suggest a conspiracy to do anything of the kind referred to in the judgment in the *Sinclair* case.

MOTION under section 1025 of the Criminal Code for leave to appeal to this Court from the judgment of the Court of King's Bench, appeal side, province of Quebec, upholding the conviction of the appellants. Leave to appeal was refused by the judgment now reported.

Lucien Gendron K.C. and *Laval Fortier* for the motion.

Antoine Rivard K.C. and *Noël Dorion K.C. contra.*

KERWIN J.—The appellants were convicted after a trial before Mr. Justice Prévost and a jury on the following charge:—

Que depuis le ou vers le premier janvier mil neuf cent vingt-sept, jusqu'au ou vers le vingt-trois mars, mil neuf cent trente cinq, à Québec, dans le district de Québec, aux Trois-Rivières, dans le district des Trois-Rivières, à Montréal, dans le district de Montréal, et ailleurs dans la province de Québec,—Joseph Herman Fortier, Pierre Wilfrid Fortier, et Pierre Célestin Falardeau, tous trois de la cité de Québec, ont ensemble et avec d'autres personnes inconnues, comploté par la supercherie, le mensonge et d'autres moyens frauduleux, pour frauder le public et les porteurs d'obligations de la Compagnie P. T. Légaré Limitée, corporation légale ayant son principal siège d'affaires à Québec, et les actionnaires et créanciers de la dite compagnie, et entre autres Peter alias Pierre Légaré, dame Béatrice Légaré-Miller, Findlays Ltd, et autres, et la Cie P. T. Légaré susdite, commettant ainsi par là le crime du complot pour frauder, contre la forme du statut en tel cas fait et pourvu.

The Court of King's Bench (in appeal) unanimously affirmed the conviction, and the appellants now seek leave to appeal to the Supreme Court of Canada under section 1025 of the Criminal Code. They must show that the judgment in the Court of King's Bench conflicts with the judgment of some other court of appeal in a like case.

It is suggested that such a judgment is *Brodie* v. *The King* (1). Upon comparing that decision with that of the Court of King's Bench, it is quite apparent that there is no conflict. In the *Brodie* case the accused were charged with having conspired together and with others, during a certain period, and at a named place, "thereby committing the crime of seditious conspiracy." Here the accused are charged with having conspired together and with others, during a certain period, and at named places,

par la supercherie, le mensonge et d'autres moyens frauduleux, pour frauder le public et les porteurs d'obligations de la Compagnie P. T. Légaré Limitée, corporation légale ayant son principal siège d'affaires à Québec, et les actionnaires et créanciers de la dite compagnie, etc.

They are not charged with having committed a crime in the abstract like "murder" or "theft"; the offence is charged in such a way as to lift it from the general to the particular. It is argued that the formal charge should have alleged that the conspiracy was to defraud the public and those named of $ (naming the sum) or at least of "money." I do not agree that the judgment in the *Brodie* case says or infers that in such a charge as is here under consideration any such allegation is necessary. I think attention might very well be called to the concluding paragraph of that judgment.

It is then contended that the decision of the court below is in conflict with *The King* v. *Sinclair* (2), a judgment of the Supreme Court of the Northwest Territories. The matter there came before the court on a case stated by the trial judge and all it determined (so far as the point under consideration is concerned) was that the charge, with the particulars, did not disclose any offence under section 394 of the Criminal Code (now section 444 and the section under which the present charge is laid). At pages 23-24, Wetmore J. states:—

The conspiracy contemplated by the section is not one to defraud a candidate of his hopes or expectations of being elected, or the electors or the public of their hopes or expectations of having a certain candidate elected. The conspiracy intended is one to deprive or defraud "the public or any person" of certain substantial rights such as its or his property or means or something of a like character.

Two members of the court concurred in these reasons. Newlands J., speaking for himself and one other member

(1) [1936] S.C.R. 188. (2) (1906) 12 C.C.C. 20.

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of the court, expresses a similar view in somewhat different language.

This judgment does not conflict with that from which it is sought to appeal in the present case as the charge here does not allege or suggest a conspiracy to do anything of the kind referred to in the judgment in the *Sinclair* case. Counsel for the accused objected to the definition of a conspiracy to defraud, given by the trial judge and approved by the Court of King's Bench, but unless they are able to show that in so defining, the Court has decided contrary to a judgment of some other court of appeal in a like case, there is no jurisdiction to grant leave to appeal. The *Sinclair* case (1) was the only one to which they referred as being such a judgment, and for the reasons just stated I am of opinion that that judgment is not one in a like case.

(1) (1906) 12 C.C.C. 20.

The third ground upon which the accused sought leave to appeal was that the case for the defence was not put to the jury. I disposed of this contention at the hearing as it is obvious that the judgment in this case could not upon that point be in conflict with any other court. The position is not that there has been dissent in the court below upon a question of law; and while the principle is well established that the trial judge is to place the defence properly before the jury, and there are many cases exemplifying the rule, the Court of King's Bench, in the present case, has come to the conclusion that this was done.

The application is refused.

Motion refused.

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*Feb. 17.

OGAWA *v.* FUJIWARA

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Motor vehicles—Acts in emergencies—Negligent cutting in by defendant—Plaintiff's use of accelerator instead of brake.

APPEAL by the defendant from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, Manson J. (2), and maintain-

* PRESENT:—Duff C.J. and Rinfret, Crocket, Kerwin and Hudson JJ.

(1) [1937] 3 W.W.R. 670. (2) [1937] 1 W.W.R. 364.

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ing the plaintiffs' action for damages arising out of an automobile accident, the defendant being found negligent in cutting in sharply in front of the plaintiff's car immediately after passing it.

On the appeal to the Supreme Court of Canada, after hearing the argument of counsel for the appellant, the Court, without calling in counsel for the respondent, delivered judgment orally dismissing the appeal with costs, the Chief Justice, for the Court, stating that there was no reason to disagree with the finding of the trial judge.

Appeal dismissed with costs.

Alfred Bull K.C. for the appellant.

C. H. Locke K.C. for the respondent.

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* Feb. 16, 17.

H. R. ROSS (DEFENDANT) .....APPELLANT;

AND

THEODORE REOPEL AND LYLA REOPEL (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Motor vehicles—Running down of boy crossing street—Excessive speed—Negligence of boy—Which was ultimate negligence—Findings at trial reversed by appellate court and reinstated by Supreme Court of Canada.

APPEAL by the defendant from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, D. A. McDonald J., and maintaining the respondents' action for damages caused by an automobile accident.

The infant plaintiff, a boy ten years old, alighted from the right door of a motor car and going behind the car proceeded to cross the street, an arterial highway, and while doing so was struck by a motor car driven by defendant. The trial judge dismissed the action, finding that defendant was not travelling at an excessive speed and that the real cause of the accident was the boy's own negligence in placing the defendant in a position from

*PRESENT:—Duff C.J. and Rinfret, Crocket, Kerwin and Hudson JJ.

(1) [1937] 3 W.W.R. 471.

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which he was unable to extricate himself in time to avoid striking the boy. On appeal, this judgment was reversed and a new trial ordered, limited to the assessment of damages, the appellate court holding that the defendant was travelling at an excessive speed, and, although the boy was negligent in crossing the highway without looking, the real reason why the defendant could not avert the impending accident was his excessive speed.

On appeal to the Supreme Court of Canada, after hearing the argument of counsel for the appellant and the respondent, the Chief Justice, speaking for the Court, delivered an oral judgment, allowing the appeal with costs.

Appeal allowed with costs.

Alfred Bull K.C. for the appellant.

F. N. Donnenworth for the respondent.

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*Nov. 10, 22, 23.
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*Mar. 18.

THE SISTERS OF ST. JOSEPH OF THE DIOCESE OF LONDON IN ONTARIO (Defendants) ..... } Appellants;

AND

EDWARD FLEMING (Plaintiff) .....Respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Hospitals—Negligence—Patient in hospital burned during diathermic treatment—Negligence of nurse—Liability of hospital.

Plaintiff was admitted as a patient to defendants' hospital under a contract for board, nursing and attendance. Defendants maintained and operated for profit in the hospital an equipment for diathermic treatments. Plaintiff's physician (who had diagnosed his trouble as sciatica) ordered the nurse supervising the floor on which plaintiff was located, to see that he was given a diathermic treatment to relieve his pain; and a treatment was given. It was administered by a nurse who was a permanent member of the hospital staff and was in charge of such treatments. Plaintiff's physician had not (nor had any other physician) anything to do with the actual treatment. There was no suggestion of defect in the equipment or of lack of competence in the nurse to use it. In the treatment the plaintiff was severely burned. Plaintiff, alleging that the burn was caused by negligence of the nurse administering the treatment, sued defendants for damages. The trial judge gave judgment for plaintiff, which was affirmed by the Court of Appeal for Ontario ([1937] O.R. 512). Defendants appealed.

Held: (1) On the evidence, the finding in the courts below of negligence in the nurse must stand.

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*Present:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

(Comment, *per* Duff C.J., Davis, Kerwin and Hudson JJ., as to the proper application of the rule *res ipsa loquitur*. 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).

(2) Defendants were liable in law for damages for the nurse's negligence.

Per Duff C.J., Davis, Kerwin and Hudson JJ.: Upon the facts and circumstances of this case, the nurse was, at the time she committed the negligent act, acting as the agent or servant of the hospital within the ordinary scope of her employment. There was nothing in the evidence to take her, as between the hospital and herself, out of this relationship during the time she was administering the particular treatment to plaintiff.

Review and discussion of cases, and of the rule stated by Kennedy L.J. in *Hillyer's* case, [1909] 2 K.B. 820, at 829. However useful that rule may be in some circumstances as an element to be considered, it is a safer practice, in order to determine the character of a nurse's employment at the time of a negligent act, to focus attention upon the question whether in point of fact the nurse, during the period of time in which she was engaged on the particular work in which the negligent act occurred, was acting as an agent or servant of the hospital within the ordinary scope of her employment or was at that time outside the direction and control of the hospital and had in fact for the time being passed under the direction and control of a surgeon or physician, or even of the patient himself. It is better to approach the solution of the problem in each case by applying primarily the test of the relation of master and servant or of principal and agent to that particular work. There may be cases where the particular work upon which a nurse may for the time being be engaged is of such a highly professional and skilful nature and calling for such special training and knowledge in the treatment of disease that other considerations would arise; but the present case is not such a case.

Per Crocket J.: There was ample evidence to warrant the finding at trial that plaintiff's injuries were caused by the negligence of the nurse in administering the treatment while acting in the course of her employment as defendants' servant.

APPEAL by the defendants from the judgment of the Court of Appeal for Ontario (1) dismissing their appeal from the judgment of Hope J. at trial, holding that the defendants were liable to the plaintiff in damages (in the sum of $3,056.60) for injuries alleged by the plaintiff to have been caused to him by negligence of a nurse in her administration of a diathermic treatment to him while he was a patient in the defendants' hospital.

The material facts of the case are sufficiently stated in the judgment of Davis J. in this Court, now reported. The appeal to this Court was dismissed with costs.

A. M. LeBel K.C. and *E. A. Anglin* for the appellants.

J. R. Cartwright K.C. and *R. W. Gray K.C.* for the respondent.

(1) [1937] O.R. 512; [1937] 2 D.L.R. 121.

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The judgment of Duff C.J. and Davis, Kerwin and Hudson JJ. was delivered by

DAVIS J.—The appellants are an incorporated society which owns and operates St. Joseph's Hospital in the City of London, in the Province of Ontario. The respondent was admitted as a patient to the said hospital on the 22nd day of June, 1933, under a "contract" with the appellants "for board, nursing and attendance," to use the words of the appellants in their statement of defence to the action. The respondent alleged in his action against the appellants that he was given a diathermic treatment by one of the nurses in the hospital, that during such diathermic treatment he suffered severe and permanent burns, that the nurse was a servant of the appellants and that the burns were caused by the negligence of the nurse, and he claimed damages from the appellants. The appellants pleaded that the treatment was administered without negligence but in any case was administered in accordance with and on the instructions of the respondent's own personal physician and that the nurse who administered the treatment was acting as agent of the personal attending physician of the respondent and not as a servant of the appellants. From the evidence developed at the trial it is plain that the nurse who administered the treatment was a permanent member of the appellants' hospital staff in charge of diathermic treatments in the hospital and that neither the personal physician of the respondent nor any other physician had anything to do with the actual treatment. It is further plainly established on the evidence, in fact it is really not disputed, that the diathermic department is run by the hospital and that the handling of the machine is solely a matter belonging to the hospital. The attending physician in this case merely gave an order to one of the hospital nurses, who was the supervisor of the floor on which the patient was located, to see that the patient was given a diathermic treatment and the nurse who administered the treatment admits that the order that was given by the physician was for a diathermic treatment "for pain." The respondent's attending physician said that the patient had pain which is usually associated with sciatic involvement and that he

diagnosed the patient's trouble as sciatica. The nurse who was the supervisor of the floor says that she noticed, shortly after the treatment had been given, "a small area" upon the respondent's body "that looked just like dead flesh; it was a dead white"; that "it remained white like that until on towards evening. * * * We kept watching it and it turned dark red."

That the respondent was severely burnt and the resulting injuries of a serious nature are not in dispute. There are two questions, however, raised by the action. Firstly, Was the burn caused by the negligence of the nurse who administered the treatment? If so, secondly, Are the appellants liable in law for the result of her conduct?

The trial judge found against the nurse a specific act of negligence, that in giving the patient the treatment she turned on, by mistake, a much more powerful electrical current than she had intended to by putting the electric plug into, what we may for convenience call, the wrong one of two available sockets, and he held the hospital responsible to the patient for the damages resulting therefrom. The Court of Appeal for Ontario, for reasons to which we shall later refer, affirmed this judgment, and the hospital now appeals to this Court.

On the question of the negligence of the nurse, it is quite impossible for us on the evidence to reverse the finding against her. Counsel for the hospital, after a minute and very careful analysis of all the evidence, sought to escape from the finding upon two grounds. Firstly, he said the specific act of negligence found by the trial judge was not justified upon the evidence. Several facts, however, are not in dispute. The nurse only intended to apply 750 milliamperes and there were two sockets in the room, from one of which not more than 1,000 milliamperes could be obtained while from the other as much as 4,000 milliamperes were obtainable. The nurse says that as a matter of fact she only used 750 milliamperes in the treatment. But the needle on the dial that indicated the number of milliamperes unfortunately points to 750 and 3,000 at the same moment, the figure 750 being on an inner circle and the figure 3,000 being on an outer circle. The result would be that if the nurse had put the plug into one socket the milliamperes could run up

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to 4,000 but if she had put the plug into the other socket, the current could not run up beyond 1,000 milliamperes. In the latter case she would be entitled to rely upon the needle pointing to the figure 750 on the inner circle. Undoubtedly the nurse thought she put the plug into the socket with the lesser quantity of electrical energy and when she saw the needle on the dial pointing to 750 on the inner circle and 3,000 on the outer circle she accepted the figure 750 on the inner circle as indicating the exact quantity of current she desired to use. What is said against her, and found by the trial judge to be a fact, is that by an unfortunate act of negligence she put the plug into the wrong socket and got a quantity of 3,000 milliamperes with the disastrous results to the patient complained of.

There is no suggestion that the apparatus in use was in any way defective or that the nurse was not reasonably competent to administer heat treatments to relieve pain through the use of the apparatus. The question of fact is, Did she negligently apply an excessive quantity of heat to the patient? There is no doubt that the burns were caused by an intensive application of heat. Counsel for the hospital quarrels with the specific finding of negligence by the trial judge upon the ground that it rested upon the evidence of Dr. Mitchell that the plug was in the wrong socket. It is contended that this piece of evidence is a statement of fact by one who had no personal knowledge of the facts, that it was a mere guess on a matter of fact by an expert witness, and was something quite outside the limits of expert testimony. The exact evidence complained of is this:—

Q. The fact that he received a burn such as has been indicated, what does that indicate, in your opinion, with respect to the machine or the treatment?

A. It would look as though it were on the high instead of the low.

Even taken baldly and isolated from its context, the statement scarcely bears the interpretation put upon it, but read as part of all the evidence of Dr. Mitchell it means in effect nothing more than that the witness having, as an expert, stated that the patient could not be burnt by an application of 750 milliamperes for an indefinite period of time (the treatment here was only twenty-five minutes) and must have had, by the depth and extent of the burn,

an application of heat far in excess of 750 milliamperes, and that as neither the apparatus nor the nurse could obtain any such quantity of heat unless the plug had been put in the wrong socket, he could not find any other possible explanation for the burn. The question put to the doctor was not objected to and his answer was not such as to involve any miscarriage of justice.

Secondly, still on the question of the negligence of the nurse, counsel for the hospital says that the Court of Appeal did not affirm the trial judge's finding of the specific act of negligence but applied the *res ipsa* rule and found negligence in fact against the nurse upon the ground that there was no satisfactory explanation of the burn as something that might have happened without any lack of care on the part of the nurse. Counsel for the hospital argued that the physical condition of the patient at the time was in itself sufficient explanation to rebut the implication of negligence. But there is nothing in the evidence to show that the physical condition of the patient in any way accounted for the burn. The Court of Appeal did not reject the specific finding of fact of the learned trial judge, but, treating the case as one of *res ipsa loquitur,* concluded upon the whole evidence that the nurse had been negligent in giving the treatment. It is unfortunate that the maxim *res ipsa loquitur,* which serves satisfactorily when applied to certain cases in which the cause of the accident is known, has become a much over-worked instrument in our courts in recent years and has been extended to apply to a great many different sets of facts and circumstances to which the rule, when correctly stated and confined, has little or no application. 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. It was upon the broad doctrine, we are satisfied, that the Court of Appeal came to the conclusion upon the whole evidence that the plaintiff had made out a case of negligence against the nurse.

We should not be justified upon the evidence in interfering with the finding of negligence against the nurse.

The appeal raises, however, an important and difficult question of law, Whether the hospital is liable for the negligence of the nurse? The trial judge appears to have

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assumed that it is. He did not in his judgment discuss the matter as raising any question of law. The Court of Appeal, however, did consider the question of law and held the hospital liable upon the ground that the treatment by the nurse was a matter of routine in the hospital and that the giving of the treatment was assumed by the hospital as part of its contract to nurse the patient. Mr. Justice Masten, who wrote the unanimous judgment of the court, said that the facts of the case were

> within the category of that which formed the basis of the judgments in the *Lavere* case (1) and in the *Nyberg* case (2), that is to say, routine treatment.

The judgment, in effect, gives recognition to a different consequence in law in hospital cases between a routine or administrative act of a nurse, on the one hand, and the act of a nurse in a matter of professional care or skill, on the other hand.

The act of putting the plug in one or other of two sockets is in itself, of course, the merest sort of a routine act not to be dignified by any such words as "professional" or "skilful," but the determining fact in point of law must be the character of the employment in which the nurse was engaged at the time that the putting of the plug into the socket was a mere incident in her work. One might, without using the word in any strict sense, speak of ascertaining the status of the nurse during the period of time in which she was giving the diathermic treatment to the patient. The language of Lord Justice Kennedy in *Hillyer's* case (3) has been very frequently quoted and adopted as a rule to determine the character of the employment of a physician or nurse at any particular time:

> In my view, the duty which the law implies in the relation of the hospital authority to a patient and the corresponding liability are limited. The governors of a public hospital, by their admission of the patient to enjoy in the hospital the gratuitous benefit of its care, do, I think, undertake that the patient whilst there shall be treated only by experts, whether surgeons, physicians or nurses, of whose professional competence the governors have taken reasonable care to assure themselves; and, further, that those experts shall have at their disposal, for the care and treatment of the patient, fit and proper apparatus and appliances. But I see no ground for holding it to be a right legal inference from the cir-

(1) (1915) 35 Ont. L.R. 98. (2) [1927] S.C.R. 226.
(3) *Hillyer* v. *Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820, at 829.

cumstances of the relation of hospital and patient that the hospital authority makes itself liable in damages, if members of its professional staff, of whose competence there is no question, act negligently towards the patient in some matter of professional care or skill, or neglect to use, or use negligently, in his treatment the apparatus or appliances which are at their disposal. It must be understood that I am speaking only of the conduct of the hospital staff in matters of professional skill, in which the governors of the hospital neither do nor could properly interfere either by rule or by supervision. It may well be, and for my part I should, as at present advised, be prepared to hold, that the hospital authority is legally responsible to the patients for the due performance of their servants within the hospital of their purely ministerial or administrative duties, such as, for example, attendances of nurses in the wards, the summoning of medical aid in cases of emergency, the supply of proper food, and the like. The management of a hospital ought to make and does make its own regulations in respect of such matters of routine, and it is, in my judgment, legally responsible to the patients for their sufficiency, their propriety, and observance of them by the servants.

That such a rule of difference between matters of professional care and skill and matters purely ministerial and administrative is most difficult of practical application to the varying facts of particular cases is very plain from a consideration of the judgments in the intervening years in the English, Scottish, New Zealand and Canadian courts. Some of these judgments were recently discussed and reviewed by Dr. C. A. Wright, the Editor of the Canadian Bar Review, in Vol. 14 (1936), pp. 699-708. Professor P. H. Winfield, in his valuable new work on the "Law of Tort" (1937), refers to Dr. Wright's article in a foot-note at p. 127 as pointing to "the curiously diverse results which the courts have reached on this matter."

In the case before us, there being no suggestion of any defect in the equipment used and no lack of reasonable competence in the nurse to use the equipment, we are squarely faced with the issue, What, in point of law, is the proper determining fact in arriving at the conclusion whether or not the hospital is liable to the patient for the act of negligence of the nurse? This raises pointedly the question of the correctness of the broad rule stated by Lord Justice Kennedy in *Hillyer's* case (1) or the limitations within which the scope of such a rule must be confined. The House of Lords in the *Lindsey County Council* case (2) refrained from passing upon that question and left the matter open for a case, if it ever occurs in the

(1) [1909] 2 K.B. 820, at 829.

(2) *Lindsey County Council* v. *Marshall*, [1937] A.C. 97.

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House, when that issue must necessarily be decided. In that case the plaintiff developed puerperal fever, a very dangerous and highly infectious disease, while a patient in a maternity home administered by a committee of a county council, under the provisions of the *Maternity and Child Welfare Act*, 1918, managed by a matron and advised by the medical officer and assistant medical officer of health for the county. The patients were attended by their own medical advisers. A patient in the home had become ill and was removed to a hospital where she was found to be suffering from puerperal fever. The matron and the two medical advisers of the home were informed of this and certain steps were taken to disinfect the home and the staff. The plaintiff was subsequently admitted to the home and after a few days she developed puerperal fever. She brought an action against the county council to recover damages for negligence and breach of duty on the part of the council and those for whom they were responsible. The jury found that those responsible for the administration of the home were guilty of breaches of duty in admitting new patients before having ascertained whether any of the staff were carrying infection, and without informing applicants for admission, or their medical advisers, of the case of the patient who had been suffering from puerperal fever and of the steps taken in consequence thereof to rid the home of infection. The decision of the House, as we understand it, rests upon the fact that the premises were unsafe for an invitee and that the authorities who administered the home knew or ought to have known that the premises were unsafe and should have notified the patient of the danger at the time inherent in the premises. The significance of the case to us lies in the language of the Lord Chancellor, Lord Hailsham (1), with reference to the series of cases decided upon the principle stated by Lord Justice Kennedy in *Hillyer's* case (2):—

> Reliance was placed by the appellants upon a series of cases in English and Scottish courts, in which it has been decided that where a Public Authority carries on a hospital that Authority is not responsible to patients for mistakes in medical treatment or in nursing, provided that they have taken reasonable care to appoint competent doctors and nurses. The respondent challenged the correctness of these cases and referred your Lordships to the recent case of *Powell* v. *Streatham Manor Nursing*

(1) [1937] A.C. at 107-108. (2) [1909] 2 K.B. 820, at 829.

Home (1) to show that your Lordships' House gave judgment against the proprietor of a nursing home where the nurses employed by him had been guilty of negligence. It is true that the correctness of the earlier decisions is still open to review in your Lordships' House. But that review should only take place in a case in which the point is directly raised; the question as to the correctness and as to the limits of the doctrine is obviously one of great importance, both to those who are charged with the responsibility of carrying on hospitals and nursing homes, and to the public who make use of such hospitals and homes. In my judgment, those questions are not raised by the facts in this case and nothing that I have said must be taken as throwing any doubt upon the correctness of those decisions. The principle upon which those cases were determined is well stated in *Hillyer* v. *The Governors of St. Bartholomew's Hospital* (2) in the judgment of Kennedy L.J. The learned Lord Justice expresses the opinion that the legal duty which the hospital authority undertakes towards a patient, to whom it gives the privilege of skilled surgical, medical and nursing aid within its walls, is an inference of law from the facts, and he holds that the responsibility of the hospital authorities is limited to undertaking that the patient shall be treated only by experts, whether surgeons, physicians or nurses, of whose professional competence the Governors have taken reasonable care to assure themselves, and further that those experts shall have at their disposal for the care and treatment of the patient fit and proper apparatus and appliances. It is obvious that, if that is the correct view of the relationship between the hospital authorities and their patients, there is no breach by the authorities of such duty by reason of the fact that a competent doctor or nurse is guilty of negligence or lack of due care or skill in their treatment of a patient.

The Lord Chancellor did not think that this principle had any application to the facts of the case which was then before the House. The judgments in the Court of Appeal had largely rested upon the principle stated in *Hillyer's* case (3) but all the Law Lords refrained from putting their judgments upon that ground and confined the decision to the dangerous condition of the premises. The Lord Chancellor proceeded to say:—

> The reason why the hospital authorities were held not liable in *Hillyer's* case (2) is because the doctors and nurses were held not to be acting as their agents or servants in the giving of medical treatment. There is no trace of any authority in those cases or elsewhere for the view that where a corporation acts by an agent its liability for the mistakes of that agent is any less where the agent is a medical man than where the agent belongs to any other profession or calling.

Lord Sankey in discussing *Hillyer's* case (3) as establishing the doctrine that a hospital authority is not liable for the negligence of a doctor while acting in the exercise of his professional functions and knowledge, said:—

> Indeed, Farwell L.J. puts it rhetorically as an example, that when once the doors of the operating theatre are closed upon them for an

(1) [1935] A.C. 243.
(2) [1909] 2 K.B. 820, 828, 829.
(3) [1909] 2 K.B. 820.

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operation the doctors and nurses present in the operating theatre are no longer the servants of the authority. I am far from saying that this is not the proper legal result, but I should add that it may be necessary to delimit the frontiers of liability.

Lord Sankey did not find it necessary, he said, to discuss or lay down the law on the subject, having regard to the finding of the jury.

Lord Russell of Killowen only expressed his doubts as to the jury's findings on the question of negligence.

Lord Macmillan said that, there being evidence on which the jury could find that there was negligence on the part of those for whom the appellants were responsible in not knowing, as they ought to have known, that in admitting the respondent to the home they were exposing her to the risk of infection and consequently were negligent in not giving warning of that risk, he was of opinion that the verdict of the jury, so far as upheld by the Court of Appeal, must stand. At the very beginning of his judgment, however, Lord Macmillan made this general observation:—

> The appellants are responsible in law for the due administration of the institutions which they carry on in the performance of their statutory duties or in the exercise of their statutory powers. This responsibility extends to the actings of those through whose agency they perform their duties or exercise their powers. Consequently, if the respondent's unfortunate experiences in the Cleethorpes Maternity Home were due to the negligence of the appellants' agents or servants in the conduct of the home the appellants are answerable. It must be shown that the appellants owed a duty to the respondent, that the agents whom the appellants employed to perform that duty on their behalf were negligent in the discharge of it, and that the injury suffered by the respondent was directly attributable to such negligence.

Lord Wright thought that the facts in this case before the House were to be distinguished from those in *Hillyer's* case (1). He said that not only the matron and nurses but the medical officers were, in his opinion, the servants of the appellants, and the fact that the appellants necessarily relied on their knowledge and judgment did not the less render them the appellants' agents to carry out the responsibility which rested on the appellants in operating the home.

Evans v. *Liverpool Corporation* (2) was the case where a child with scarlet fever had been sent to an infectious diseases hospital maintained by the Liverpool Corporation

(1) [1909] 2 K.B. 820. (2) [1906] 1 K.B. 160.

under the *Public Health Act*, 1875. The child was discharged by the visiting physician while he was still in an infectious condition and when he got home he gave scarlet fever to three other children of the family. The jury found that the visiting physician in discharging the child had not shown the degree of skill and care which was reasonable in the circumstances and had been negligent. The visiting physician was an officer appointed by the Liverpool Corporation to act under the general direction of the hospitals committee and the rules provided that he should be responsible for

> the treatment of the patients from the beginning to the end of their stay, and also for their freedom from infection when discharged.

Notwithstanding that the physician was apparently acting as an agent in performing a wrongful act within the scope of his employment, the court held that the Liverpool Corporation was not liable because its legal obligation extended only to providing reasonably skilled and competent medical attendance for the patients and that the Corporation had discharged that duty.

The case was followed by *Hillyer's* case (1) above mentioned. The plaintiff was a medical man who entered the hospital for a gratuitous operation. He chose the surgeon to perform the operation. His claim in the action was that while he was unconscious on the operating table his left arm had been allowed to be burned by some vessels containing hot water and that his right arm had been pressed with great force against the end of the table and badly bruised, and that traumatic neuritis set in, both arms had become paralyzed, and that he had been unable to carry on his work as a medical practitioner ever since. The Court of Appeal reaffirmed that the only duty undertaken by the governors of a public hospital towards a patient who is treated in the hospital is to use due care and skill in selecting their medical staff; that the relation of master and servant does not exist between the governors and the physicians and surgeons who give their services at the hospital, and the nurses and other attendants assisting at an operation cease for the time being to be the servants of the governing body; further, that an operation creates

(1) [1909] 2 K.B. 820.

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a special set of circumstances. Farwell, L.J., said, in part, at p. 826:—

> If and so long as they are bound to obey the orders of the defendants [the governors of the hospital] it may well be that they are their servants, but as soon as the door of the theatre or operating room has closed on them for the purposes of an operation (in which term I include examination by the surgeon) they cease to be under the orders of the defendants, and are at the disposal and under the sole orders of the operating surgeon until the whole operation has been completely finished; the surgeon is for the time being supreme, and the defendants cannot interfere with or gainsay his orders. This is well understood, and is indeed essential to the success of operations; no surgeon would undertake the responsibility of operations if his orders and directions were subject to the control of or interference by the governing body. The nurses and carriers, therefore, assisting at an operation cease for the time being to be the servants of the defendants, inasmuch as they take their orders during that period from the operating surgeon alone, and not from the hospital authorities.

It is the dicta of Lord Justice Kennedy in that case that have been so much discussed in the subsequent cases.

Anderson or *Lavelle* v. *Glasgow Royal Infirmary* (1) was somewhat similar in its facts to the case now before us.

That was an action in the Sheriff Court at Glasgow against an infirmary for damages for personal injuries. The plaintiff alleged that she attended the infirmary for ultra-violet ray treatment; that the nurse in charge, who was in the employment of the infirmary, allowed her to be exposed to the rays for too long a period; that she thereby sustained injury; and that the injury was due solely to the negligence of the nurse, for whom she sought to hold the infirmary responsible. She further alleged that she had relied on the knowledge and skill of the nurse in applying the treatment. She did not allege, however, that the infirmary had acted negligently in the selection of their medical or nursing staffs or of the apparatus employed. The infirmary, on the other hand, alleged, and the plaintiff did not deny, that their electrical department was in charge of, and was superintended by, a doctor, and that the treatment received by the plaintiff was administered by the nurse upon his instructions.

The Second Division of the Court of Session (2) dismissed the action on the pleadings, holding as a matter of law that the allegations of the plaintiff in her pleading were insufficient to support her action, in the absence of

(1) 1932 S.C. 245. (2) 1930 S.C. 123.

any averment that the nurse or the doctor was professionally incompetent or that the apparatus was defective. The judgments in the Court of Session rested largely upon the law as stated in the *Evans* (1) and *Hillyer* (2) cases. The case went to the House of Lords (3), and in the course of the argument for the plaintiff their Lordships asked counsel whether they would agree to the case being remitted to the Court of Session for a proof before answer in that Court and counsel agreed to the proposal. The House thereupon reversed the decision of the Court of Session and remitted the case for proof.

Viscount Dunedin, who delivered the judgment in the House of Lords and with whom Lord Buckmaster, Lord Warrington, Lord Thankerton and Lord Russell of Killowen agreed, said in part:—

In this case the issue craved has been disallowed, and the action dismissed, upon the ground that the statements of the pursuer, taken along with the explanations of the defenders, disclose no cause of action. The decision is admittedly based on the case of *Hillyer* v. *The Governors of St. Bartholomew's Hospital* (2), which was approved in the Second Division of the Court of Session in *Foote* v. *Directors of Greenock Hospital* (4).

Now, it is clear that the actual facts in both these cases were not the same as the facts in this case, because in both cases what was complained of was the alleged negligence of a doctor in conducting an operation. But there is undoubtedly a dictum of Lord Justice Kennedy (5), not in any way disapproved of by his colleagues, which covers a much wider field, and would include certain cases of negligence on the part of a nurse. At the same time he indicates that, in certain other cases of negligence by a nurse, there would be liability on the ordinary ground of an employer's liability for his servants for a wrong to another person committed in the carrying out of the employer's business.

The present case therefore becomes very important, not alone to the parties, but as giving rise to an exposition of the law in your Lordships' House. I have felt from the first that it was very unsatisfactory, if not indeed impossible, to come to a proper decision without knowing precisely what the facts of the case were. Undoubtedly the parties are not absolutely agreed as to them.

The case came again before the Court of Session (6). All the Judges held on the facts as then proved that no negligence on the part of the nurse had been established. The members of the Court, however, expressed their views on what Lord Hunter said was "the difficult and delicate question" which had been fully debated as to the defenders'

(1) [1906] 1 K.B. 160.
(2) [1909] 2 K.B. 820.
(3) 1931 S.C. (H.L.) 34.
(4) 1912 S.C. 69.
(5) [1909] 2 K.B. 820 at 828.
(6) 1932 S.C. 245.

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liability to a patient for injury suffered in consequence of the negligence of a nurse attached to the infirmary. Three of the four Judges who sat upon the case remained of the opinion which they had formerly expressed when the case had been before them on the pleadings (1), that is, that the infirmary could not be held responsible for the negligence of a nurse in the course of an electrical treatment given to a patient upon the facts and circumstances of that case. But it is the judgment of Lord Alness, who took a contrary view of the law, to which I desire to particularly refer.

Lord Alness said he knew of no express decision in England or in Scotland which affirmed or negatived the liability of such an institution as the Glasgow Royal Infirmary for the negligence of one of their nurses, and he treated the question of law, therefore, as far as authority went, as open.

> Unless the House of Lords had thought it was, the reason for an inquiry into the facts is not obvious to me. In other words, if an infirmary, having regard to its constitution and profession, may not be responsible for its nurses, then an inquiry into the facts would be superfluous and futile.

After mentioning the *Evans* (2) and the *Hillyer* (3) and other cases, Lord Alness pauses to observe that in none of these cases is there any statement or suggestion—apart from a view expressed by Lord Justice Kennedy in *Hillyer's* case (3)—to the effect that a hospital is not, under ordinary conditions, liable for the negligence of a nurse in the discharge of her professional duties. As to the *obiter* of Lord Justice Kennedy in *Hillyer's* case (3) it would, said Lord Alness, exempt a hospital from liability for the negligence of any member of its staff while performing professional duties, including, he presumed, nurses. From that view he said he respectfully dissented. Proceeding to draw a distinction between the position of a physician and that of a nurse when the physician exercises an uncontrolled direction in the treatment of his patient, and where the nurse is controlled by the superintendent, by the matron, by the doctors, and by the residents, he said,

> That she is a servant and has a master seems to me indubitable. The problem is to find him.

(1) 1930 S.C. 123.
(2) [1906] 1 K.B. 160.
(3) [1909] 2 K.B. 820.

Lord Alness with that preamble sought to ascertain the legal principles upon which the solution of the problem depends. He said that the liability of the infirmary for the nurse, if it existed, depended on the principle of *respondeat superior,* and the onus, he thought, was on the infirmary to show that that principle did not apply. The maxim, said Lord Alness, gives rise to many problems, but the only problem with which the case before him was concerned was, Who is the superior?

> In other words, What constitutes the relationship in law of master and servant?

After taking the definition of Lord Justice Bowen in *Moore* v. *Palmer* (1),

> The tests were, Who had the power of selecting, of controlling, and of dismissing?

Lord Alness said that while there may be no difficulty in the ordinary case in determining who selects, who pays, and who dismisses a servant, one must, he thought, be careful in interpreting the requirement of "control," which does not

> necessarily connote control, at the moment of the negligence, of the operation then being conducted.

Keeping in mind " these *indicia* of employment, if they are no more," Lord Alness found that the nurses of the infirmary were selected, were paid, and were subject to dismissal by the institution or its officers.

> As regards control, it is no doubt true that the nurses are not controlled in the actual discharge of their executive duties—which, in light of what I have said, is immaterial—but that in every other sense they are controlled by the defenders and their officers. Why then, I ask, should the defenders not be liable for the negligence of their nurses?

Answering his own question, Lord Alness said in part:

> I cannot, with respect, assent to the view of Lord Justice Kennedy in *Hillyer* (2) that the staff of a hospital are in a different position while performing their professional duties from that in which they are while performing their ministerial and administrative duties. * * * I confess that I cannot find any principle or authority which warrants the distinction which the learned Lord Justice sought to draw.

Lord Alness then dealt with the final argument presented by the defenders that, in any event, treatment by ultra-violet rays may be equiparated to an operation, and that the principle of *Hillyer's* case (2) applies. Lord Alness had no hesitation in rejecting that contention.

(1) (1886) 2 T.L.R. 781. (2) [1909] 2 K.B. 820.

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The basis of the decision in *Hillyer* (1) was that there was a surgeon in supreme control of the operating theatre, and that the nurse was merely his auxiliary. The facts in this case exclude that view. On the occasion of the pursuer's treatment there was no doctor on the scene. There was no supervisor under whose control the nurse was. What happened was that a doctor prescribed the treatment, but that the sole responsibility for administering it rested on the nurse. Moreover, to assimilate treatment by means of ultra-violet rays to what happens in an operating theatre seems to me a violent and illogical example of assimilation. Had a doctor been present and in command while the ultra-violet rays were being applied, a different question would have arisen for decision.

During the argument we were referred to three recent decisions of single judges in the English courts: *James* v. *Probyn* (2), Swift, J.; *Strangeways-Lesmere* v. *Clayton* (3), Horridge, J.; and *Dryden* v. *Surrey County Council* (4), Finlay, J. The judgment of Swift J. in the first case was adopted and followed in the two later cases. But if the remarks of Swift J. in *James* v. *Probyn* (2) are accurately stated in the *British Medical Journal*, 1935, Vol. I, p. 1245, that learned Judge said that while the principle in the *Evans* (5) and the *Hillyer* (1) cases was binding upon him and he must find that the hospital was not in law responsible, he was much attracted by the reasoning of Lord Alness in the *Glasgow Royal Infirmary* case (6) and if he were deciding the matter for the first time in any court he might possibly follow this opinion rather than that expressed in *Hillyer's* case (1).

The statement of Lord Justice Kennedy in *Hillyer's* case (1) as to the difference between ministerial or administrative duties, on the one hand, and matters of professional care or skill, on the other hand, is entitled to great weight and respect, but even the decision in the case is not binding upon this Court. In fact, the only decision at all applicable to the facts of this case that is binding upon us is the judgment of our own Court in the *Nyberg* case (7). In that case the patient's leg had been burnt by a hot water bottle which had been placed in the patient's bed following upon an operation. The trial judge had found that the proximate cause of the burn was in the first place the filling of the bottle with water that was

(1) [1909] 2 K.B. 820.
(2) (1935) (Unreported). *The Times*, May 29, 1935.
(3) [1936] 1 All E.R. 484.
(4) 82 Law Journal 1936, p. 9.
(5) [1906] 1 K.B. 160.
(6) 1932 S.C. 245.
(7) *Nyberg* v. *Provost Municipal Hospital Board*, [1927] S.C.R. 226.

much too hot without any testing of it and then the failure to investigate and see if any adjustment was necessary. This Court held that the evidence fully justified these findings of the trial judge and also the finding that the latter fact—the failure to investigate—was attributable to the nurse. Upon the question whether for that neglect and its consequences the hospital was legally responsible, this Court, after discussing the propositions laid down in *Hillyer's* case (1), held that that case had no application because the burning of the plaintiff's leg had occurred after the operation had been completed and the patient had been removed from the operating room to his bed in the ward. The duty of the nurse to see that hot water bottles were safely placed in the patients' beds was regarded not as a matter of special instructions for the occasion but as a matter of routine duty under a standing order of the hospital, and the failure of the nurse, after the appearance of the skin of the patient's chest had aroused her suspicion, to make sure that the hot water bottle at his leg was not a source of danger, was inexcusable and negligence in her capacity as a servant of the hospital in a matter of ministerial ward duty, if not of mere routine, which entailed responsibility on the hospital for its consequences. The negligence of the nurse was treated as the negligence of a servant of the hospital in the discharge of contractual obligations.

While nothing was said by the majority of the judges in this Court in the *Nyberg* case (2) in adopting the ratio of the Ontario decision in *Lavere* v. *Smith's Falls Public Hospital* (3), to cast doubt upon the rule of Lord Justice Kennedy in *Hillyer's* case (1), the rule did not require, in either of the cases, in the opinion of the Court, any minute analysis or examination. In the *Lavere* case (3) the plaintiff had been burnt by an overheated brick being placed against her foot in her bed while she was still unconscious following upon an operation that had been performed upon her. It was held that the nurse in placing, as she did, the overheated brick to the foot of the patient was not following the doctor's orders but was merely carrying out a standing order of the hospital to warm the bed. The decision

(1) [1909] 2 K.B. 820. (2) [1927] S.C.R. 226.
(3) (1915) 35 Ont. L.R. 98.

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rested upon the fact that the hospital had contracted to nurse the plaintiff and that the duties of the nurse, when the default occurred, were not to assist the surgeon in matters of professional skill but to perform domestic duties in the way of seeing that the bed was right. As to *Hillyer's* case (1), Mr. Justice Riddell said that certain expressions which were used in that case had been strongly pressed upon the Court, "but all these must be read in connection with the facts of the case" and further, "the expressions so made use of were not intended to be an exposition of the whole law, and are not to be taken literally in a case wholly different in its facts."

Any broadly stated rule that necessarily raises on special facts the manifold difficulties which the rule stated by Lord Justice Kennedy in *Hillyer's* case (1) has presented in so many subsequent cases is not a very practical rule of law. Lord Wright in the *Lindsey County Council* case (2) said:

> In my judgment the facts in this case are to be distinguished from those in *Hillyer's* case (1). It is not necessary to express here any opinion one way or the other about the correctness of that decision. That can be reserved until it comes, if it ever does, before this House: and the same may be said of *Evans* v. *Liverpool Corporation* (3), which presents some differences from *Hillyer's* case (1). Nor is it necessary to consider what difficulties may arise in delimiting the respective frontiers of ministerial or administrative duties on the one hand and matters of professional care or skill on the other hand, if it ever becomes necessary to apply the distinction which Kennedy L.J. draws.

After the most anxious consideration we have concluded that, however useful the rule stated by Lord Justice Kennedy may be in some circumstances as an element to be considered, it is a safer practice, in order to determine the character of a nurse's employment at the time of a negligent act, to focus attention upon the question whether or not in point of fact the nurse during the period of time in which she was engaged on the particular work in which the negligent act occurred was acting as an agent or servant of the hospital within the ordinary scope of her employment or was at that time outside the direction and control of the hospital and had in fact for the time being passed under the direction and control of a surgeon or physician, or even of the patient himself. It is better, we think, to approach the solution of the problem in each case by applying primarily the test of the relation of master and servant

(1) [1909] 2 K.B. 820. (2) [1937] A.C. 97, at 124.
(3) [1906] 1 K.B. 160.

or of principal and agent to the particular work in which the nurse was engaged at the moment when the act of negligence occurred. In the light of that test, if it be the correct and sufficient test, it is not difficult to determine liability in this case. The hospital itself installed, maintained and operated, for profit, the equipment or apparatus that was used. The hospital made a special charge of $1 against the patient for the treatment. The patient's private physician in attendance upon him had nothing to do with the actual treatment. He says that, while he knew such treatment was recommended to relieve pain, he did not himself know anything about the treatment. The nurse says she knew nothing of the patient's disease or condition; all she knew was that the patient was to be given a treatment in an effort to relieve pain. She does not suggest that she thought the treatment was for any curative properties. Nor does the evidence indicate that the working of the apparatus entailed any special professional care or skill or that the treatment had any curative properties for any disease of the body. The physician merely told the floor nurse to see that the patient was given a diathermic treatment; she passed the word on to the nurse who had charge of that part of the hospital work. The treatment was not intended by the physician to be, and was not understood by the nurse herself to be, anything other than a treatment of heat to relieve pain. There was no special training or scientific knowledge required, or at least thought to be required by the hospital or by the nurse, to safely use the apparatus in administering the treatment. It is plain from the evidence of the nurse herself that she went to Toronto some years ago and took for "about one week" what she called "an educational course put on by the manufacturers of the machine" and that following this course in Toronto she had "a practical course" by one of the manufacturers' representatives who came to the hospital "part of a day" to demonstrate the machine. The nurse states in her evidence that she gives as many as 1,600 of these treatments in a year.

Upon the facts and circumstances of this particular case we must conclude that the nurse was, at the time she committed the negligent act, acting as the agent or servant of the hospital within the ordinary scope of her employ-

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ment. There is nothing in the evidence to take her, as between the hospital and herself, out of this relationship during the time she was administering the particular treatment to the patient. She had not passed from the direction and control of the hospital and become for the time being under the direction and control of any surgeon, physician, superior nurse or of the patient himself. The hospital cannot, therefore, escape from the consequences in law of the relationship and must be held liable for the damages which flowed from the negligent act of the nurse. There may be cases, we can readily conceive that there may be, where the particular work upon which a nurse may for the time being be engaged is of such a highly professional and skilful nature and calling for such special training and knowledge in the treatment of disease that other considerations would arise; but that is a totally different case from the one before us.

The appeal must be dismissed with costs.

CROCKET J.—I think this appeal should be dismissed with costs for the reason that there was ample evidence to warrant the finding of the learned trial Judge that the plaintiff's injuries were caused by the negligence of the nurse in administering the diathermic treatment while acting in the course of her employment as a servant of the defendant corporation.

Appeal dismissed with costs.

Solicitors for the appellants: *Murphy, LeBel & Durdin.*
Solicitors for the respondent: *Cowan, Gray & Millman.*

IN THE MATTER OF THE BANKRUPTCY OF STOBIE, FORLONG AND COMPANY;
AND IN THE MATTER OF THE CLAIM OF F. J. COLWELL.

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* Nov. 4, 5.
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* Mar. 18.

THE TRUSTEE OF THE PROPERTY OF STOBIE, FORLONG & COMPANY, A BANKRUPT, AND THE TRUSTEE OF THE PROPERTY OF STOBIE, FORLONG ASSETS LTD., A BANKRUPT ..... APPELLANTS;

AND

F. J. COLWELL ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Bankruptcy—Bankruptcy of firm of stock brokers—Customers' securities not identifiable or not in brokers' hands at date of bankruptcy—Ascertainment and proof of customers' claims on basis of brokers' conversion of securities as at date of bankruptcy—A customer subsequently asking to substitute claim on basis of conversion at dates of actual sales of securities by brokers—Question of allowance of such amendment—Bankruptcy Act (R.S.C., 1927, c. 11), ss. 76, 163 (4)—Discretionary power in the court—Circumstances of the case—Delay in making substituted claim—Customer's conduct—Customer's knowledge or lack of knowledge of facts—Change of position in course of administration of estate

Respondent had been a customer of a firm of stock brokers, who made an assignment in bankruptcy to M. on January 30, 1930. The brokers' books indicated that they carried for the accounts of their numerous customers many securities, but only a small proportion thereof were held by them at the date of bankruptcy. It was difficult, if not impossible, except in a few cases, to identify securities on hand as those of any particular customer or to ascertain from the brokers' books and records when or how the securities indicated in the respective customers' accounts as being carried, but not in fact on hand, had, if ever, been bought or disposed of. In these circumstances, in order to have an equitable basis of distribution among the creditors, M. (the trustee) wrote up each customer's account by crediting him with the value, at market price on date of bankruptcy, of the securities indicated by the books as being carried for him, and then, by charging him with the amount, if any, of his indebtedness to the brokers, the customer's equity or surplus was arrived at. A statement of his account, so worked out, as of January 30, 1930, was sent by M. to each customer, concluding with the words: "The Jan. 30th credits or debits above given show the market values of the stocks carried for your account, long or short, as of that date." The statement sent to respondent shewed a credit balance in his favour of $76,295.91. On February 26, 1930, respondent filed with M. a proof of claim as an ordinary unsecured creditor in that amount. His

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

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claim was admitted as proved. The creditors generally proved their claims, for the purpose of ranking on the estate, on the same basis; and the administration of the estate proceeded upon that basis. But before any distribution among ordinary creditors had been made, a scheme of arrangement was submitted and approved, under which a new company was to be incorporated, to which all the assets vested in M. were to be transferred, the new company to assume all debts provable in the bankruptcy and to issue its debentures in a sum sufficient to cover all claims proved as certified by M., the debentures to be delivered to M. and by him "to creditors who have proved their claims, as in satisfaction thereof." Many creditors had not yet proved their claims. By the court order approving the scheme, the debts provable in bankruptcy to be assumed by the new company and the amounts thereof were required to be "ascertained by [M.] in accordance with the provisions of the Bankruptcy Act relating to the proof of debts and all the said provisions, including the provisions relating to appeals from disallowance by the trustee shall apply to the proof of such debts, and [M.] shall certify the debts so proved for the purpose of the issue of debentures under" the scheme. The new company was incorporated in August, 1930, it acquired the assets vested in M., issued its debentures, proceeded to realize upon the assets, made certain payments on the debentures, but not sufficient to meet requirements under the terms thereof, became in default, and was, in December, 1932, declared bankrupt. Its creditors proved their claims upon the debentures, and its trustee, on a realization of assets, paid certain dividends (in August, 1933, June, December, 1934, October, 1936).

Respondent voted (in May, 1930, upon his claim as proved) for approval of the scheme, his claim (according to his proof of claim filed) was certified by M., the new company issued debentures for the amount thereof, which were delivered to respondent in settlement thereof and accepted by him, he filed his claim against the new company's estate in bankruptcy, basing it upon the amount of said debentures, he was made an inspector of that estate, attended 23 inspectors' meetings, and accepted the aforesaid dividends from that estate without protest. According to his evidence, he had at first assumed or believed that his securities were still on hand at the date of the brokers' bankruptcy, but learned to the contrary about the beginning of 1933. In November, 1936, he forwarded to M. an amended or additional claim in which there was substituted for the market value of some of his securities at the date of bankruptcy the market value thereof on the respective dates on which, according to respondent, they had been disposed of by the brokers prior to their bankruptcy, the respondent thus increasing his claim by $73,486.61. M. replied, in effect, that he had no power to entertain the amended claim. Treating this reply as the disallowance of a claim under s. 127 of the *Bankruptcy Act*, respondent appealed to the bankruptcy Judge, who dismissed his appeal ([1937] O.R. 559, at 559-561). On appeal, the Court of Appeal for Ontario ([1937] O.R. 559) held that he was entitled to rank as a creditor in respect of his amended claim (subject to settlement of its amount) and that debentures be issued for the additional amount thereof (subject to s. 76 of the *Bankruptcy Act*). From this judgment the present appeal was taken (by special leave under the *Bankruptcy Act*) to this Court.

Held (Kerwin J. dissenting): The appeal should be allowed and the order of the Judge in Bankruptcy (declining to give effect to the amended claim) restored.

Sec. 76 of the *Bankruptcy Act* does not apply to a case such as this, where a creditor, having proved his claim in conversion on one basis of calculation (conversion at the date of bankruptcy), seeks in effect to withdraw his original proof and to substitute a proof for the same claim but on a different basis of calculation (conversion at the date of actual sales).

It is doubtful if the discretionary power in the court under s. 163 (4) of said Act applies to the filing or amending of claims with the trustee. But the court has in bankruptcy an equitable jurisdiction to deal with matters of this sort.

It could not be said that respondent was barred from his desired amendment on the ground of the doctrine of election. The evidence did not disclose that he had such knowledge of the facts when he filed his original claim as would put him to an election.

But, in view of there having been so much delay and so much change of position in the course of administration of the brokers' estate between the date of bankruptcy and the date of filing the amended claim (nearly seven years); in view of circumstances which should have enabled respondent to obtain much earlier the information (as to the sales of his securities) which he had when he filed his amended claim; in view of the situation with regard to the new company (which after its bankruptcy could not properly issue more debentures, and, moreover, was not, as such company, before the court) and with regard to other creditors in similar position to respondent; and in view of all the facts and circumstances of the case, and bearing in mind that the allowance, under such or like facts and circumstances, of such amendments as that now sought might lead, in this case and in similar cases, to endless delays and confusion in the administration and distribution of stock brokerage brankruptcies, it must be said that the Judge in Bankruptcy had exercised a sound discretion in declining to give effect to the amended claim, and an appellate court was not justified (in the circumstances of the case) in interfering with his exercise of that discretion.

Per Kerwin J. (dissenting): Sec. 76 of the *Bankruptcy Act* cannot be construed to prohibit under all circumstances a creditor who has filed a claim with a trustee in bankruptcy from withdrawing it and filing a new one or an amended one. Respondent was misled by the wording of M.'s statement aforesaid to such an extent that he filed a claim believing his securities were available; and this misunderstanding continued (justifiably, under the circumstances) until he ascertained the true facts about the beginning of 1933. Nothing that he did or omitted to do should debar him from making a new claim or filing an amended claim. His delay from the beginning of 1933 (when he ascertained that his securities were not on hand at the date of bankruptcy) to the date of filing his amended claim (during which period or part thereof he was considering his position, watching certain proceedings, and tracing sales of his securities) should not be held to debar him from amending, as the position of the trustee of the brokers' estate and that of the trustee of the new company's estate have not altered nor has either trustee been prejudiced in any way. It has been held in the Bankruptcy Court in Ontario (*In re Stobie, Forlong & Co.; ex parte Meyer Brenner*, 14 C.B.R. 405) that the

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bankruptcy of the new company did not prevent M. from certifying to a debt against the brokers when proved; and the trustee of the new company's estate still has assets on hand. The circumstance that there may be other creditors in a position similar to that of respondent cannot affect his rights. (*In re Safety Explosives Ltd.*, [1904] 1 Ch. 226, discussed. That case is not an authority applicable to the present question).

APPEAL by the trustee of the property of Stobie, Forlong & Company and by the trustee of the property of Stobie, Forlong Assets Ltd. from the judgment of the Court of Appeal for Ontario (1) which allowed the claimant Colwell's appeal from the judgment of McEvoy J. (2), sitting as Judge in Bankruptcy, dismissing the claimant's appeal from the refusal of the trustee in bankruptcy of Stobie, Forlong and Company to take cognizance of an amended claim of the said claimant.

Stobie, Forlong & Company, a firm of stock brokers, made an authorized assignment in bankruptcy on January 30, 1930. The claimant (the present respondent), a customer of the brokers, was one of their creditors, and filed a claim with the trustee in bankruptcy for $76,295.91, being the amount of the balance to his credit according to a statement (made out, along with statements for other creditors, on the basis and under the circumstances explained in the judgments now reported) sent him by the trustee.

A scheme of arrangement was proposed and was accepted by the necessary majority of the creditors and was approved by an order of the court. Pursuant to this scheme of arrangement, Stobie, Forlong Assets Ltd. was incorporated, in August, 1930, and the assets of the brokers' estate were transferred to it and debentures of Stobie, Forlong Assets Ltd. were issued to those creditors of the brokers whose claims were duly proved and allowed by the trustee of the brokers' estate. Stobie, Forlong Assets Ltd., operating as a holding and realizing company for said creditors, made certain payments to its debenture holders. It was subsequently (in December, 1932) adjudged bankrupt. Its creditors proved their claims upon the debentures, and its trustee, on a realization of assets, paid certain dividends.

(1) [1937] O.R. 559; 18 C.B.R. 409; [1937] 3 D.L.R. 380.

(2) [1937] O.R. 559, at 559-561; 18 C.B.R. 342.

In November, 1936, the claimant (the present respondent), alleging that he had ascertained that Stobie, Forlong & Company had, prior to their authorized assignment in bankruptcy, sold shares and securities belonging to the claimant without disclosing that fact to him and without giving him credit for the amounts received on such sales, made an additional claim for $73,486.61, the claim as amended by such addition being based on the market value of his securities on the respective dates on which, according to the claimant, they had been disposed of by the brokers, instead of the market value thereof on the date of the brokers' bankruptcy, the latter basis having been that adopted (as explained in the judgments now reported and for reasons there set out) in the statement sent to the claimant (as well as in the statements to other creditors) by the trustee, and according to which the claimant had filed his original claim. The claimant's right to allowance of his additional claim was the issue now in question.

The material facts and circumstances are more fully and particularly set out in the judgments now reported, and are indicated in the above head-note.

The order of the Court of Appeal declared that the claimant was entitled to rank as a creditor of the estate of Stobie, Forlong & Company for the additional amount of his amended claim, ordered that the trustee of said estate certify to the trustee of the estate of Stobie, Forlong Assets Ltd. the amount of the amended claim, and that the trustee in bankruptcy of Stobie, Forlong Assets Ltd. do issue debentures of Stobie, Forlong Assets Ltd. to the claimant for the additional amount of his amended claim, subject to the provisions of s. 76 of the *Bankruptcy Act*. Provision was made for, if necessary, the determination of the amount of the amended claim.

Leave to appeal to the Supreme Court of Canada was granted by an order of a Judge of this Court. By the judgment of this Court, now reported, the appeal was allowed and the judgment of McEvoy J. restored (Kerwin J. dissenting).

R. S. Robertson K.C. for the Trustee of the property of Stobie, Forlong & Company, appellant.

E. R. Read K.C. for the Trustee of the property of Stobie Forlong Assets Ltd., appellant.

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A. W. Roebuck K.C. and *G. B. Bagwell* for the respondent.

The judgment of the majority of the Court (The Chief Justice, and Crocket, Davis and Hudson JJ.) was delivered by

DAVIS J.—This is an appeal by special leave under the *Bankruptcy Act* to this Court from the judgment of the Court of Appeal for Ontario (1). The appeal arises out of a demand made by the respondent on November 13th, 1936, that he be permitted, in effect, to amend his proof of claim as an unsecured creditor in bankruptcy, filed February 26th, 1930, in the amount of $76,295.91 by increasing the amount of the said claim by the additional sum of $73,486.61.

Stobie, Forlong & Company were stock brokers carrying on business in partnership in Toronto. They made an assignment in bankruptcy on January 30th, 1930, to Martin, one of the appellants. The respondent had been a customer of Stobie, Forlong & Company with substantial transactions between September, 1929, and January, 1930. More than 4,000 claimants proved in the bankruptcy and their claims in the aggregate amounted to $3,835,794.12. The brokers' books of account indicated that they carried for the accounts of their numerous customers many securities, but as a matter of fact a very small proportion of these securities were held by them at the date of bankruptcy. The trustee in bankruptcy found it difficult, if not impossible, except in a few cases, to identify such securities as were on hand as the securities of any particular customer or to ascertain from the books and records of the brokers when or how the securities which were indicated in the respective customers' accounts as being carried, but which were not in fact on hand, had, if ever, been bought or disposed of. In these circumstances, in order to have an equitable basis of distribution among the creditors, the trustee, according to what is now a common and convenient method in stock-brokerage bankruptcies, wrote up each account by making an entry in it crediting the account with the value at the market price prevailing on the date

(1) [1937] O.R. 559; 18 C.B.R. 409; [1937] 3 D.L.R. 380.

of bankruptcy of the securities indicated by the books as being carried for the customer, and then, by charging the customer with the amount, if any, of his indebtedness to the brokers, the customer's equity or surplus in his account was arrived at. A statement of his account worked out in this way was sent by the trustee to each of the several customers, including the respondent.

The statement of account sent by the trustee to the respondent showed a credit balance in his favour of $76,295.91. On February 26th, 1930, the respondent filed with the trustee a proof of claim as an ordinary unsecured creditor in this exact amount. His claim was admitted as proved, and he did not ask to amend or to substitute any other proof of claim until November 13th, 1936.

The creditors generally proved their claims, for the purpose of ranking on the estate, on the same basis as the respondent and the administration of the estate proceeded upon that basis. But before any distribution among ordinary creditors had been made, a scheme for the arrangement of the brokers' affairs was submitted to a meeting of creditors on May 12th, 1930. The respondent voted, upon his claim as proved, in favour of the approval of the scheme. It may be significant that his voting letter was signed on May 10th, the day he wrote Martin, the trustee, the letter to which we shall refer later, though he had on May 5th signed a similar voting letter against the scheme. Under the scheme of arrangement a new company was to be incorporated and organized and all the assets vested in the trustee in bankruptcy were to be transferred to the new company. The new company was to assume all debts provable in the bankruptcy and to issue its debentures in a sum sufficient to cover all claims proved as certified by the trustee in bankruptcy, the appellant Martin. These debentures were to be delivered to the trustee and by him "to creditors who have proved their claims, as in satisfaction thereof" on the basis of par as against the amount of each claim. It is common ground that at that time many creditors had not yet proved their claims. By the terms of the order of Mr. Justice Orde in Bankruptcy approving the scheme, the debts provable in bankruptcy to be assumed by the new company as men-

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tioned in the scheme of arrangement and the amounts thereof respectively were required to be ascertained by the trustee in accordance with the provisions of the *Bankruptcy Act* relating to the proof of debts and all the said provisions, including the provisions relating to appeals from disallowance by the trustee shall apply to the proof of such debts, and the trustee shall certify the debts so proved for the purpose of the issue of debentures under the provisions of the annexed scheme of arrangement.

The name of the new company, incorporated August, 1930, pursuant to the scheme of arrangement, was "Stobie, Forlong Assets, Limited" and it acquired the assets vested in Martin as trustee. A certificate was duly issued by the trustee certifying the respondent's claim in accordance with his proof of claim filed. Thereupon the new company issued its debentures for the amount of this claim, and the debentures were duly delivered to the respondent in settlement of his claim and were accepted by him. The creditors generally were dealt with in the same manner. Stobie, Forlong Assets, Limited, under the management of a board of directors (five of the seven being required to be debenture holders), proceeded with the business of realizing upon the assets which had been vested in it under the scheme of arrangement. The company paid to debenture holders on November 1st, 1931, three per centum, and on May 1st, 1932, two per centum, of the amount of each debenture. These payments were not equal to the amounts required to be paid under the terms of the debentures; the company became in default; and on December 13th, 1932, was declared bankrupt. The appellant Higgins became trustee in bankruptcy of the company.

Again it became necessary for creditors to prove their claims, and the respondent duly filed with the appellant, Higgins, his claim against the company's estate, basing it upon the amount of the debentures he had received. The respondent was made an inspector of the company's estate in bankruptcy and during the course of the liquidation has attended twenty-three meetings of inspectors. The trustee of the company, on a realization of assets, has paid four dividends to creditors, including the respondent, as follows: August 2nd, 1933, three per centum; June 1st, 1934, two per centum; December 20th, 1934, three per centum; and October 2nd, 1936, three per centum. The respondent accepted all these dividends without protest and took no step to amend his claim until November, 1936.

The claim of the respondent as originally filed was a claim for the balance of the equity in his account after deducting the amount he owed from the market value of the securities as of the date of bankruptcy. It is perfectly plain that the respondent had no credit balance upon any other possible basis than that of treating his securities as converted. He was indebted to the brokers in a sum in excess of $180,000 and only on the basis of a conversion of his securities could he rid himself of that indebtedness and turn it into a credit balance of $76,000 for which he filed his claim. In March, 1930, a month after he had proved his claim, the respondent says he was told by a relative, Midwood, who had been an employee of the brokers, that his securities were still on hand. Obviously it would have been to his advantage to obtain the securities and to pay what he owed against them rather than to rank as an ordinary unsecured creditor. The respondent accordingly wrote Martin, the trustee, on May 10th, 1930, demanding the return of the securities in his account. He admits now that the trustee did not in fact have any of his securities but he says he did not know that at the time. In any event, on May 12th of the same year, 1930, he attended a meeting of creditors and voted on his filed proof of debt in favour of the proposed scheme of arrangement. He now says he assumed, if he was not told by Martin, that the securities were in the trustee's hands and the trustee would not release them. A few months later, "about the end of 1930 or the beginning of 1931," he went to Mr. G. T. Clarkson, who had been made one of the directors of the new company, and asked him to investigate his claim to specific securities, giving him a list of some of the securities with the certificate numbers. Mr. Clarkson investigated and told him the securities were not on hand. The respondent now says that he assumed at that time that the bank had disposed of them. Subsequently the respondent obtained information while acting as an inspector of the new company's bankrupt estate, that his securities had been sold prior to the bankruptcy. He puts the date of this information not later than "about the beginning of 1933." And yet for nearly four years thereafter the respondent acted as one of the inspectors of the company's estate in bankruptcy and accepted the four

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dividends paid by the company's trustee and took no step to amend his claim as proved or to file another until, in November, 1936, he forwarded to Martin, the trustee of the brokers' original estate, an amended or additional claim in which there was substituted for the market value of some of his securities at the date of the bankruptcy the market value of these several securities on the respective dates on which, according to the respondent, they had been disposed of by the brokers prior to their bankruptcy. Upon this basis the credit to the respondent is increased by the sum of $73,486.61 above mentioned. No admission has been made by the appellants of the accuracy of this statement and the appellants say that they have no means at hand of verifying the dates on which the respondent alleges his securities were disposed of.

On December 15th, 1936, the trustee Martin wrote the respondent's solicitors with regard to the amended claim, stating briefly in effect that he had no power to entertain it. The respondent treated this letter as the disallowance of a claim under sec. 127 of the *Bankruptcy Act*, and appealed to the Bankruptcy Judge. Mr. Justice McEvoy, the Judge in Bankruptcy, did not regard the matter as the disallowance of a new claim under sec. 127 of the Act, but rather as an attempt by the respondent to amend a claim that had already been allowed. Whether sec. 163 (4) of the Act has any application to the proof of claims or whether it relates only to proceedings in the Court itself, the learned judge was of opinion that in the circumstances of this case no amendment of the claim should be allowed. Although the respondent's notice of motion by way of appeal was directed only to Martin, the trustee of the brokers, counsel for the trustee of the new company appeared on the motion and was heard in opposition to the granting of the relief sought.

The respondent appealed to the Court of Appeal. Counsel for both trustees again appeared and the matter was dealt with in the Court of Appeal broadly as an appeal from the disallowance of the claim. The learned judges in the Court of Appeal appear to have been in error in assuming that the respondent's first proof of claim was made after the approval of the scheme of arrangement; it was, of course, made before it. This understanding involved an

omission to consider, if it is of any consequence, the position of the respondent as one who had proved his claim prior to the scheme of arrangement and who by virtue of that proof had voted for approval of the scheme. The Court of Appeal further appear to treat the case as if the respondent, in proving his original claim, did so on the assumption that his securities were then on hand and that he was claiming for the amount of his equity in these securities so on hand. If by this was meant that the respondent assumed that his securities were actually available to him, it is difficult to reconcile such an assumption with the claim as then filed. The respondent proved only for a sum of money as an ordinary unsecured creditor. It was for the equity in his account, not for an equity in securities, that he claimed. He did not claim any securities or any interest in them. The only difference between his first claim and the claim now in question is that an increase in amount is arrived at by taking the market values of some of the securities at the dates of their alleged sale by the brokers prior to bankruptcy instead of the market values of these securities prevailing at the date of bankruptcy.

The Court of Appeal was of opinion that, under sec. 76 of the *Bankruptcy Act,* the respondent is entitled to be considered, in respect of the additional amount, as a creditor who had not proved his debt, and who now comes in before final distribution of the bankrupt estate and asks to be allowed to participate. As an alternative ground, the Court was of the opinion that under sec. 163(4) there is power to make any necessary amendment to the claim as originally filed. The Court therefore held that the respondent is entitled to rank as a creditor of Stobie, Forlong & Company for the additional amount of his amended claim and to receive further debentures to make up the amount of his claim as amended, and ordered that the trustee of Stobie, Forlong & Company should certify the amount of the amended claim, and that debentures of Stobie, Forlong Assets, Limited, should thereupon be issued for the additional amount. A reservation for settling the accuracy of the new statement was part of the order.

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Counsel for the respondent contends that his client is entitled as of right to amend his claim and invokes sec. 76 of the *Bankruptcy Act*. That section reads as follows:

> 76. Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled upon proof of such debt to be paid out of any money for the time being in the hands of the trustee any dividend or dividends he may have failed to receive, before that money is applied to the payment of any future dividend or dividends but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein.

But this statutory provision does not apply to a case such as this where a creditor, having proved his claim in conversion on one basis of calculation, seeks in effect to withdraw his original proof and to substitute a proof for the same claim but on a different basis of calculation. The respondent's original claim was founded on a conversion at the date of bankruptcy; the new or amended claim is founded on a conversion at the date of actual sales in so far as they can be traced.

In the alternative, counsel for the respondent invokes sec. 163 (4) of the *Bankruptcy Act*. That subsection reads as follows:

> 163. (4) The court may at any time amend any written process or proceedings under this Act upon such terms, if any, as it may think fit to impose.

It is doubtful if this discretionary power applies to the filing or amending of claims with the trustee. But the court in any event has in bankruptcy an equitable jurisdiction to deal with matters of this sort. Counsel for the appellants, however, contend that the respondent must fail on the doctrine of election, a doctrine which some historians think sprang from the jurisdiction of equity over bankruptcy and the administration of estates of deceased persons. But it is not established that the respondent, at the time he filed his original claim, was confronted by an option and put to his election. The trustee's statement to him carried an unfortunate, if not a misleading, footnote that the debits and credits showed the market value as of the date of bankruptcy "of the stocks carried for your account, long or short." If the respondent thought that his securities were actually in the hands of the brokers at the date of the bankruptcy, it is obvious that he would not have filed a claim at that time as an ordinary unse-

cured creditor in what must have appeared to be an almost hopeless situation, but would have taken up his securities and realized in cash the equity of some $76,000 at the then prevailing market prices of the securities or would have arranged to hold and carry the securities through some other agency. But the material before us does not make it at all plain what the respondent really did think or believe when he received the trustee's statement of "the stocks carried for your account." He says that when he found out at the end of 1930 or about the beginning of 1931 from Mr. Clarkson that his securities were not on hand, he assumed that the bank had disposed of them. It is not unreasonable to suppose that he may have thought, when he filed his original claim, that his securities had been either impounded by the trustee or had before the bankruptcy been pledged in mass by the brokers to their bankers and could not be released as individual transactions. It was not, he said, until the beginning of 1933 that he learned that the securities had not been on hand at the date of bankruptcy. The evidence does not disclose that he was in possession of such knowledge of the facts at the time he filed his original claim as would put him to an election.

Where, however, there has been so much delay and so much change of position in the course of the administration of the estate of the brokers during the period commencing with the date of bankruptcy, January 30th, 1930, to the date of the filing of the amended claim, November 16th, 1936 (close on to seven years), the question is whether the Court should lend itself under all the facts and circumstances of this case to the aid of the respondent.

The information the respondent acquired at the time he filed his amended claim in November, 1936, as to actual sales of his securities by the brokers before bankruptcy, was just as easily obtainable by him at the date of the bankruptcy or at the beginning of 1933 when, at latest, he learned, he says for the first time, that his securities were not on hand at the date of bankruptcy. It was only about three months before the bankruptcy, on October 29th, 1929, that he had transferred to Stobie, Forlong & Company a large trading account that he had been carrying with another firm of Toronto brokers. All that he had to do, and

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what in fact he subsequently did, was to ask these brokers for the numbers of the share certificates which they had delivered to Stobie, Forlong & Company when he closed and transferred his account with them, and then enquire from the transfer agents of the several companies as to the records on their books of the transfer of these particular shares. The date of registration of a transfer of a certificate is not, of course, evidence of the date of the sale by any particular holder of the certificate in question and if the amended claim were allowed it would necessitate further investigation to ascertain, if possible, the actual sale prices obtained by the brokers from the sale of the several securities.

The Assets Company went into bankruptcy in December, 1932, and, while it may be a subsisting company entitled to function within the circumscribed ambit of its curtailed powers (all its assets having become vested in its trustee in bankruptcy), it cannot after its bankruptcy properly issue more debentures. In any event, the company as such is not before the Court. Further, the debentures were transferable and the outstanding debenture holders are not before the Court except in so far as those of them who have filed claims with the company's trustee in respect of their debentures may be said to be represented by the company's trustee. The decision in this case will, no doubt, apply not only to other creditors of the same estate but will have a general application to similar cases that may arise in other bankruptcies. The allowance of such amendments may well lead to endless delays and confusion in the administration and distribution of stock-brokerage bankruptcies if, seven years after bankruptcy, the courts are to re-open the door to creditors with such amended claims as the respondent in these proceedings seeks to have admitted. The conduct of the stock brokerage business in Canada necessarily follows very closely, if indeed it does not precisely conform with, the practice in New York which seems to be the common practice throughout the United States, and in the case of a bankruptcy some plan of distribution or scheme of arrangement, as a practical matter, is usually accepted by the creditors, as it was in this case, to avoid endless litigation and delay in the distribution of the bankrupt estate.

The learned Judge in Bankruptcy in the exercise of his discretion declined to give effect to the amended claim and referred to the language of Stirling, L.J., in *In re Safety Explosives, Ltd.* (1):

> But I prefer to rest my decision on the ground that the granting of leave to amend or to withdraw a proof is not a matter of right, but is subject to the control of the court, and leave ought not to be given in a case in which in the interval between the carrying in of the proof and the application for leave to amend the position of all parties, and of the liquidator in particular, has been altered.

We are of opinion that the Judge in Bankruptcy exercised a sound discretion in declining to give effect to the amended claim, and that an appellate court is not justified in the circumstances of this case in interfering with the exercise of that discretion.

The appeal should be allowed and the order of McEvoy J. restored. The appellants (trustees) should have their costs, as between solicitor and client, in the Court of Appeal and in this Court out of the estate of Stobie, Forlong Assets, Limited. There will be no order as to costs against the respondent, Colwell.

KERWIN J. (dissenting).—Section 76 of the *Bankruptcy Act*, R.S.C., 1927, chapter 11, enacts:—

> Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled upon proof of such debt to be paid out of any money for the time being in the hands of the trustee any dividend or dividends he may have failed to receive, before that money is applied to the payment of any future dividend or dividends but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein.

In my view this provision cannot be construed to prohibit, under all circumstances, a creditor who has filed a claim with a trustee in bankruptcy from withdrawing it and filing a new one or an amended one. I agree with the Court of Appeal that so to do would be placing too narrow a construction on the section.

It was then urged that under the circumstances here existing, the respondent should not be permitted to do either of these things, and it therefore becomes necessary to investigate what exactly did occur.

It appears that while respondent was a customer of the debtor brokers, Stobie, Forlong & Company, the latter sent statements to the former showing, as in exhibit 5, that the

(1) [1904] 1 Ch. 226, at 236.

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respondent owed the brokers a considerable sum of money, for which they held certain securities. This particular exhibit is dated January 11th, 1930. The debtors made an authorized assignment on January 30th, 1930, and a statement bearing that date was sent by the trustee, Martin, to the respondent. This statement shows a credit balance in favour of the respondent of over $76,000 and reads, at the bottom, in red ink:—

> The Jan. 30th Credits or Debits above given show the market value of the stocks carried for your account, long or short, as of that date.

The respondent argues that he relied on that statement and, believing it to be correct, filed his proof of debt. The declaration proving the debt is dated February 26th, 1930, and on the assumption that respondent's argument is correct, the statement in clause 3 of the declaration, that the creditor has no security for his claim, is true. That is, the respondent relied on the representation of Martin that the latter had in his possession or under his control the shares in question, and the respondent was satisfied to accept the valuation put upon those shares by Martin as of the date of the authorized assignment. It is not suggested that this valuation was not in fact correct.

It is true that the respondent voted for a scheme of arrangement under which a new company was formed; that he received debentures issued by the new company in pursuance of the arrangement, of the face value of his claim as proved; that he received dividends on these debentures and that he acted as an inspector of the estate of the new company as it, in turn, had become bankrupt; but can it be denied that he did all these things in ignorance of the true position? Attention should be directed to his letter of May 10th, 1930, in which he asked Martin for his securities. So far as the material indicates, he did not speak to Martin about the securities until some time in June, 1930, although he had received no reply to his letter. According to the evidence given by the respondent on his cross-examination on his affidavit, all that Martin said on that occasion was that if Colwell were given his securities, he (Martin) would be compelled to deal similiarly with the other creditors. It is significant that in his affidavit, sworn to after the completion of Colwell's cross-examination, Martin does not deny this.

The next step is that Colwell asked Mr. G. T. Clarkson to investigate to ascertain if the securities were on hand. It should be recollected that this could not be until after the new company had been formed, because it was only after Clarkson had been appointed a director of the new company that he was approached by Colwell. Clarkson was given a list by Colwell but after investigation he reported, according to Colwell, that he could not find the securities. Colwell explains that he thought this might mean that, if the securities had been pledged to a bank, the latter might still have them or might have disposed of them. It is not unreasonable that Colwell should be under this impression, because, when he had had his account transferred from other brokers to Stobie, Forlong and Company, the securities which Colwell had pledged with the former were actually transferred by the bank with whom the earlier brokers had done business.

As an inspector of the estate of the new company, Colwell discovered that his securities were not on hand at the date of the assignment in bankruptcy of the old company. The date of this discovery he places "about the beginning of 1933." He did not do anything immediately thereafter. From time to time other customers, (he states), were sued for their debit balances but escaped liability by showing that the securities they had instructed the brokers to purchase either had not been purchased or had not been carried for them by the brokers. It was only considerably later, after pondering over the matter from time to time, that Colwell obtained back from Clarkson the list and then made attempts of his own to find out what had happened to the securities; and it was in September, 1936, that he received a letter from National Trust Company showing the dates of transfer of various shares. Within two months after the receipt of that letter, Colwell filed a new claim, stating that Stobie, Forlong and Company had sold these shares without his knowledge or instructions and that he took the price which they had received as the basis of his new claim.

The order of the Bankruptcy Court, approving of the sale by the trustee of Stobie, Forlong and Company to the new company, provides that the debts of the bankrupt shall be assumed by the new company

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and the amounts thereof respectively shall be ascertained by the trustee in accordance with the provisions of the *Bankruptcy Act* relating to the proof of debts and all the said provisions, including the provisions relating to appeals from disallowance from the trustee shall apply to the proof of such debts, and the trustee shall certify the debts so proved for the purpose of the issue of debentures under the provisions of the annexed scheme of arrangement.

It has already been held in the Bankruptcy Court in Ontario that the mere fact that the new company had been declared bankrupt did not prevent Martin, as trustee, from certifying to a debt against the old company when proved; *In re Stobie, Forlong & Co., ex parte Meyer Brenner* (1). This judgment was given on an application made by Martin for the Court's advice and direction. At page 407 the Judge in Bankruptcy states:—

> In my opinion the scheme of arrangement endures, notwithstanding the bankruptcy of Stobie, Forlong Assets Limited, and I direct the trustee to certify and deliver debentures for the sum of $100,000 to Meyer Brenner, in accordance with the scheme of arrangement hereinbefore mentioned, and the same procedure will be adopted with respect to other creditors as and when the amounts of their respective claims are determined or settled by agreement, notwithstanding the bankruptcy of Stobie, Forlong Assets Limited.

In my opinion, the respondent, Colwell, was misled by the representation made by Martin to such an extent that he filed a claim believing his securities were available, and that nothing he has done or omitted to do should debar him from making a new claim or filing an amended claim. Whether the claim now filed by him be treated as a new one or whether he be given liberty to withdraw his first proof of debt and to file a new one, is immaterial.

The only difficulty I have ever felt was caused by the fact that Colwell discovered in the early part of 1933 that his securities were not on hand at the time of the assignment in bankruptcy. But can he be blamed for taking some time to consider his position and in watching the proceedings taken by the trustee against certain alleged debtors, and in finally securing from Mr. Clarkson the list or memorandum he had left with the latter and then in tracing, through the transfer agents, the sales of his securities? I would say that if he had commenced the tracing process and had instituted these proceedings in 1933, there could be but one answer to that question. Should the answer be otherwise because of the delay that occurred?

(1) (1933) 14 C.B.R 405.

I conceive it should not, as the position of the trustee of Stobie, Forlong and Company and the position of the trustee of the new company have not altered nor has either trustee been prejudiced in any way. As I have already indicated, it has been held in the Bankruptcy Court in Ontario that the bankruptcy of the new company did not prevent Martin from certifying to a debt against the old company. The trustee of the new company still has assets on hand, according to his own affidavit. Colwell brings into account the dividends he has received, and in accordance with section 76 of the Act does not attempt "to disturb the distribution of any dividend declared before his debt was proved." The circumstance that there may be other creditors in a position similar to that of the respondent cannot affect his rights.

When Colwell had been misled by Martin's written statement of January 30th, 1930, by Martin's neglect to answer his letter of May 10th, 1930, and by Martin's equivocal statement to him when he personally demanded the return of his securities, why should a delay during which he endeavoured to make sure of his facts be held to debar him from amending his claim when no prejudice has been suffered by the trustee of either company? The case of *In re Safety Explosives, Limited* (1), referred to by the judge of first instance, does not appear to me to be of any assistance.

In that case, solicitors who had a lien for costs upon title-deeds of a company, which were in their possession, proved their debt in the winding-up of the company, stating in the proof that they held no security for the debt and voted at a meeting of creditors in respect of the whole debt. Subsequently, while acting for the liquidator in completing the sale of the company's property, they handed over the title-deeds to a purchaser upon receiving the purchase price, without any express bargain with the liquidator that their lien should not be prejudiced. They claimed to retain their debt out of the purchase money, and applied for leave to amend their proof by stating in it their security and the estimated value of it, or, in the alternative, to withdraw their proof and rely on their security for payment.

(1) [1904] 1 Ch. 226.

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In re BANKRUPTCY OF STOBIE, FORLONG & COMPANY.

In re COLWELL'S CLAIM.

Kerwin J.

Clause 8 of Schedule I of the *Companies (Winding up) Act, 1890,* governed the matter, which clause is as follows:—

> For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him, after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security, unless the court on application is satisfied that the omission to value the security has arisen from inadvertence.

The point for determination was whether what had been done constituted "inadvertence" within this clause. Vaughan Williams, L.J., was of opinion that the onus of showing that the proof was sworn by inadvertence had not been satisfied. While Stirling, L.J., was not prepared to say that inadvertence had not been made out, he preferred to rest his decision on the ground that the granting of leave to amend or withdraw a proof is not a matter of right

> but is subject to the control of the court and leave ought not to be given in a case in which in the interval between the carrying in of the proof and the application for leave to amend the position of all parties, and of the liquidator in particular, has been altered.

As has already been mentioned, the title-deeds were in the hands of a third party and it is quite evident, as Vaughan Williams, L.J., points out in supplemental reasons, at page 238, "that an order giving leave to amend or withdraw the proof would under the circumstances be illusory."

I must confess my inability to see how that decision can in any way be relied on as an authority governing this case.

So far no issue has been raised as to the correctness of the amount because the appellants took the position throughout that the respondent was not entitled to file any claim. Clause 4 of the order of the Court of Appeal provides:—

> that if the Trustee in bankruptcy of the Debtor Stobie, Forlong & Company herein is not satisfied that the amount of the amended claim is correct, and if the parties herein are unable to agree as to the proper amount of the amended claim, the amount shall be determined by the Registrar in Bankruptcy.

This affords the trustee of Stobie, Forlong and Company an opportunity of investigating the correctness of the amended claim and disputing it, if so instructed.

I would dismiss the appeal with costs.

Appeal allowed.

Solicitors for the appellant, Trustee of the property of Stobie, Forlong & Company: *Fasken, Robertson, Aitchison, Pickup & Calvin.*

Solicitor for the appellant, Trustee of the property of Stobie, Forlong Assets Ltd.: *E. R. Read.*

Solicitors for the respondent: *Roebuck & Bagwell.*

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

C. J. G. MOLSON AND THE NATIONAL TRUST COMPANY, LTD., EXECUTORS OF THE ESTATE OF KENNETH MOLSON, DECEASED ..... RESPONDENTS.

1937
* Nov. 18.
* Dec. 1.
1938
* Mar. 18.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Liability for—Transfer of property in 1925 by husband to wife in fulfilment of ante-nuptial marriage contract made in 1913—Assessment of husband for income tax in respect of income received by wife in 1930 from said property—Right to such assessment—Income War Tax Act, 1917 (Dom.), c. 28, as amended—Amending Act, 1926, c. 10, ss. 7, 12—R.S.C., 1927, c. 97 (Income War Tax Act), s. 32—Act respecting the Revised Statutes, 1924, c. 65, and Schedule A to the Commissioners' Roll—Statutes—Construction—Application—Effect of repeal.

By a contract of marriage made in 1913, M. donated $20,000 to his future wife, to be paid at any time he might elect after solemnization of the marriage, in one sum or by instalments or (if accepted by her) by investments in her name. Both parties lived in the province of Quebec. The marriage was solemnized in 1913. On March 23, 1925, M. by deed transferred to his wife certain securities in fulfilment of said obligation (his wife accepting them in full payment and satisfaction thereof); and thereafter all dividends and revenues therefrom were received by her and used as her absolute property. M. died in 1932, and in 1933 his estate was assessed for Dominion income tax in respect of income from said securities since their said transfer in 1925. The right to such assessment was disputed. It was agreed that

* PRESENT:—Duff C.J. and Cannon, Davis, Kerwin and Hudson JJ.

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the question of liability should be determined solely by reference to the assessment for income received in 1930. Angers J. in the Exchequer Court ([1937] Ex. C.R. 55) set aside the assessments. The Minister of National Revenue appealed.

The *Income War Tax Act* (Dom.) was first enacted in 1917 (c. 28). By s. 7 of c. 10, 1926, subs. 4 of s. 4 of the original Act was repealed and new subs. 4 substituted as follows: "* * * (*b*) Where a husband transfers property to his wife, or *vice versa,* the husband or the wife, as the case may be, shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made." S. 12 of the 1926 Act made s. 7 thereof (enacting said substituted subs. 4) applicable "to the year 1925 * * * and to all subsequent years * * * and to the income thereof." In the R.S.C., 1927, c. 97 (*Income War Tax Act*), said subs. 4 (as enacted in 1926) appears as s. 32 (and under the caption—not in the 1926 Act—"Transfers to Evade Taxation"). The R.S.C., 1927, came into effect on February 1, 1928, by proclamation pursuant to "An Act respecting the Revised Statutes of Canada," c. 65, 1924. By force of s. 5 of that Act, and the proclamation thereunder, s. 12 of the 1926 Act stood repealed (on February 1, 1928), and it does not reappear in R.S.C., 1927.

Held: The appeal should be dismissed.

Per Duff C.J., Davis and Hudson JJ.: Sec. 32 of c. 97, R.S.C., 1927, had not the effect of making M. liable to be taxed on the income derived in 1930 from the property transferred by him to his wife in 1925, in the circumstances mentioned, because s. 32, as it stands in the Revised Statutes, can have no application to properties transferred prior to the original enactment of it in 1926. The reproduction (as s. 32 of c. 97) in the R.S.C. of that original enactment of 1926 preserved that original enactment "in unbroken continuity" (passage in *Licence Commissioners of Frontenac* v. *County of Frontenac,* 14 Ont. R. 741, at 745, approved). But s. 12 of the Act of 1926 (making said original enactment applicable to 1925 and subsequent years) stood repealed and disappeared on February 1, 1928, and therefore ceased to have effect, unless its effect was preserved by s. 7 or s. 8 of c. 65, 1924 (Act respecting the Revised Statutes) or s. 19 of the *Interpretation Act* (R.S.C., 1927, c. 1). It could not be said that, on February 1, 1928, within the meaning of any of those last mentioned statutory provisions, any "liability" had been "incurred" by M. to be taxed (or any correlative "right" of the Crown "acquired") under the Act of 1926 in respect of income not derived from the transferred property until 1930—the conditions of any such liability had not come into being (the "liability" preserved by s. 19 of the *Interpretation Act* is not the "abstract" liability imposed by the repealed enactment) (*Hamilton Gell* v. *White,* [1922] 2 K.B. 422, at 431); nor could the transfer of 1925 be relied upon, as a "transaction, matter or thing" anterior to February 1, 1928, within s. 8 (2) of c. 65, 1924, as constituting a liability to be taxed in respect of income derived from the property in 1930; nor, on February 1, 1928, had any right to receive taxes in respect of the income of 1930 "accrued," nor was any such right "accruing," to the Crown.

Per Cannon J.: Under the law of Quebec (arts. 1265, 1257, 778, *C.C.*), the transfer made in 1925, in order to be valid and binding, must necessarily be related and linked to the ante-nuptial contract of 1913; they must form one complete non-severable transaction. In order to

transfer validly the securities to his wife, M. had to act by force of and under the exceptional authority of the contract of 1913, which clearly, under the provisions of the *Income War Tax Act* which originated in 1917, is not governed thereby.

Per Kerwin J.: At the time of the repeal, on February 1, 1928, of s. 12 of c. 10, 1926, no liability to the taxation in question (within the meaning of "liability" in s. 7 (1) of c. 65, 1924) had been incurred, since the only assessment period in question (1930) had not arrived. (*Heston and Isleworth Urban District Council* v. *Grout*, [1897] 2 Ch. 306; *Abbott* v. *The Minister for Lands*, [1895] A.C. 425; *In re The Tithe Act, Roberts* v. *Potts*, [1893] 2 Q.B. 33, at 37; *Starey* v. *Graham*, [1899] 1 Q.B. 406; *Hamilton Gell* v. *White*, [1922] 2 K.B. 422; and principles enunciated in those cases, reviewed). Nor was any such liability "accruing" within the meaning of s. 19 (*c*) of the *Interpretation Act* (R.S.C., 1927, c. 1). Moreover, even if there were such an accruing liability, it is shown by statements in Schedule A to the Commissioners' Roll, provided for in c. 65, 1924 (Act respecting the Revised Statutes) and having statutory force, that the preservation of such accruing liability was inconsistent with the object and intent of said c. 65, 1924, and therefore did not apply (*Interpretation Act*, s. 2).

APPEAL by the Minister of National Revenue from the judgment of Angers J. in the Exchequer Court of Canada (1) allowing the appeal of the Executors of the estate of Kenneth Molson, late of the City of Montreal, in the Province of Quebec, deceased, against certain assessments, affirmed by the Minister of National Revenue, against the said estate under the *Income War Tax Act* (Dom.) for income tax alleged to have been payable in respect of income on certain property which had been transferred by the deceased to his wife in settlement of an obligation under an ante-nuptial contract of marriage.

The ante-nuptial contract of marriage was made in the Province of Quebec (where the parties resided) and was dated March 28, 1913. The marriage was duly solemnized two months later. The deed of transfer (of certain shares of the capital stock of certain corporations) in fulfilment of said contract was dated March 23, 1925. From that date all dividends or revenues from the transferred property were received by Mrs. Molson and used by her as her absolute property.

Mr. Molson died on April 9, 1932, at Montreal, Province of Quebec.

In assessing the deceased's estate for income tax, there was added to the income disclosed in the returns for the

(1) [1937] Ex. C.R. 55; [1937] 3 D.L.R. 789.

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years 1925 to 1931, both inclusive, the income derived from the property transferred to his wife as aforesaid, and a tax was assessed by notices of assessment dated April 11, 1933. The additional assessment was, on appeal by the executors of the deceased's estate, affirmed by the Minister of National Revenue. In the litigation which ensued, it was agreed that the question of liability to the assessment in question should be determined solely by reference to the assessment for income received in 1930. The disputed assessment was set aside by the said judgment of Angers J. now appealed from.

C. P. Plaxton K.C. and *W. S. Fisher* for the appellant.

Hugh O'Donnell for the respondent.

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

THE CHIEF JUSTICE.—The consideration of this appeal is much simplified by the agreement between counsel for the Minister, who appeals, and counsel for the Molson estate that the question of liability is to be determined solely by reference to the assessment for income received in the year 1930; and the question is whether or not, in respect of that assessment for the taxation period 1930, the reciprocal rights of the Crown and the respondent estate are governed by section 12 of chapter 10 of the statutes of Canada of 1926 which came into force on the 15th of June of that year.

By section 7 of the statute, subsection 4 of section 4 of the *Income War Tax Act* (chapter 28 of 1917) was repealed and for that subsection a new subsection was substituted in these terms:

(4) For the purposes of this Act,—

(*a*) Where a person transfers property to his children such person shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made, unless the Minister is satisfied that such transfer was not made for the purpose of evading the taxes imposed under this Act.

(*b*) Where a husband transfers property to his wife, or *vice versa*, the husband or the wife, as the case may be, shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made.

It is not necessary to consider the subsection thus repealed, since, in the view we take, it has no relevancy to the question before us.

By section 12 of this statute of 1926 (chapter 10), it was provided that section 7, which brought into force the substituted subsection (and, consequently, the substituted subsection itself),

shall apply to the year 1925 or fiscal periods ending therein and to all subsequent years or fiscal periods, and to the income thereof.

The Revised Statutes of Canada of 1927 came into effect on the 1st of February, 1928, in virtue of a proclamation of the Governor in Council made pursuant to section 4 of 14 & 15 Geo. V, chapter 65, entitled "An Act respecting the Revised Statutes of Canada," which was assented to on the 19th of July, 1924. In the Revised Statutes of 1927 the *Income War Tax Act* is chapter 97, and subsection 4 of section 4, chapter 28, Statutes of 1917, as introduced (by way of amendment) into that Act by section 7 of the statute of 1926, appears in chapter 97 as section 32, and under the caption "Transfers to evade taxation." Section 12, however, of this statute of 1926, which made subsection 4 applicable to the year 1925 and subsequent years and to the income thereof, stood repealed (on the date on which the Revised Statutes came into effect, February 1, 1928) by force of section 5 of the statute (of 1924), already mentioned, (the Act respecting the Revised Statutes), and the proclamation thereunder; and that section (s. 12) does not reappear in chapter 97 or elsewhere in the Revised Statutes.

The question before us concerns the effect of this repeal in the circumstances we now proceed to state.

On the 28th of March, 1913, Kenneth Molson, now deceased, entered into a contract of marriage with his future wife, Miss Isabel Graves Meredith. That marriage was duly solemnized two months later. By clause 7 of the contract, he donated the sum of $20,000 to his future wife to be paid in one sum or by instalments or by investments in the name of his said future wife as he might see fit. On the 23rd of March, 1925, Kenneth Molson, by deed executed before a notary, transferred to his wife certain securities therein specified in fulfilment of this obligation under his marriage contract; and these securities were accepted by his wife in full payment and satisfaction of the obligation. It is not disputed that after this transfer all dividends and revenues accruing from the securities were received by Mrs. Molson and used by her as her

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absolute property and that her husband had no interest in them or in the corpus.

Mr. Molson died on the 9th of April, 1932; and by notice of assessment dated April 11th, 1933, the Molson estate was called upon to pay an additional income tax for the period of 1930, amounting to $302, on the ground that the income received by Mrs. Molson from the securities mentioned should have been included in her husband's income for purposes of taxation in virtue of subsection 2 of section 32 of chapter 97 of the Revised Statutes of Canada, 1927, which, as explained above, was originally enacted (by way of amendment) as subsection 4 of section 4 of the *Income War Tax Act* on the 15th of June, 1926.

Since by the law of the Province of Quebec the transfer of 1925 would (in the absence of the antecedent marriage contract of 1913) have been incompetent as between spouses, it is contended on behalf of the respondent estate that this transfer is entirely outside the purview of section 32 of the *Income War Tax Act*. It is also contended, and the learned trial judge has acted upon this contention, that the heading "Transfers to evade taxation," which did not appear in the statute of 1926, but appeared for the first time in the Revised Statutes, manifests an intention that section 32 should have no application except to transfers made with such intent; and that in this case such intent is conclusively negatived by the fact that the transfer was executed pursuant to an ante-nuptial contract.

We do not think it necessary to consider either of these questions. We express no opinion upon them. In our opinion, section 32 of chapter 97 of the Revised Statutes of Canada, 1927, had not the effect of making the late Kenneth Molson liable to be taxed on the income derived in 1930 from the property transferred by him to his wife in 1925, in the circumstances mentioned, because that section, as it stands in the Revised Statutes, can have no application to properties transferred prior to the original enactment of it on the 15th of June, 1926.

The general effect of the Revision of 1927 is accurately stated (*mutatis mutandis*) in the following passage in the judgment of the late Chancellor Boyd in *Licence Com-*

missioners of Frontenac v. *County of Frontenac* (1), in which he discusses the revision of 1886:

> The purpose of the revision was to revise, classify, and consolidate the public general statutes of the Dominion, and the repeal of the old statutes incorporated in the revision was rather for convenience of citation and reference by giving a new starting point than with a view of abrogating the former law. That is manifest from a study of the scope of 49 Vic., ch. 4 (D), respecting the Revised Statutes of Canada. Sec. 5, subsec. 2, provides for the repeal of the Acts mentioned in Schedule A above mentioned. But this repeal is not to affect any matter pending at the time of repeal (sec. 7). By sec. 8 the Revised Statutes are not to be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law in the Acts repealed for which the Revised Statutes are substituted; but if on any point the provisions of the revision are not in effect the same as the earlier Acts, then the revision shall prevail as to all matters subsequent to their taking effect, and as to all prior matters the provisions of the repealed Acts remain in force. See also Interpretation Act, R.S.C., ch. 1, sec. 7 (51). The effect of the revision, though in form repealing the Acts consolidated, is really to preserve them in unbroken continuity.

As regards the enactments reproduced in the Revised Statutes, there is unbroken continuity. As regards enactments repealed by virtue of section 5 of the Act respecting the Revised Statutes (cap. 65 of 1924) and not re-enacted in the Revised Statutes, the effect of the revision is to be ascertained from sections 7 and 8 of this statute of 1924 and from section 19 of the *Interpretation Act*.

In the case before us, subsection 4, as introduced by the statute of 1926, though repealed, was *uno flatu* re-enacted as section 32 of chapter 97 of the Revised Statutes of 1927 and is, therefore, preserved in unbroken continuity; while section 12 of the statute of 1926 is repealed and disappears. Subsection 4 (which has become section 32 of chapter 97 in the Revised Statutes) applies only to the income of property transferred after the day on which it was originally enacted, June 15th, 1926.

The result would appear to be the same, for our present purpose, as if the revision had not taken place (that is to say, as if subsection 4 had not been repealed and re-enacted but had remained in force continuously in form as well as in substance), while section 12 had been repealed on the 1st of February, 1928. It is, as Boyd C. says, "the Acts consolidated" which "are preserved in unbroken continuity." As to enactments repealed and not re-enacted in

(1) (1887) 14 Ont. R. 741, at 745.

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the Revised Statutes, they disappear and cease to have effect except as regards matters in respect of which their effect is preserved by the statutes mentioned: sections 7 and 8 of the statute of 1924 and section 19 of the *Interpretation Act*.

It is argued that, by force of the second subsection of section 8, section 12 of the Statutes of 1926 continues to govern the rights of the Crown and the liability of the taxpayer because, by that subsection,

> as respects all transactions, matters and things anterior to the said time [the 1st of February, 1928], the provisions of the said repealed Acts and parts of Acts shall prevail.

The deed of the year 1925 is said to be a "transaction, matter or thing" within the meaning of this provision. It is further argued that, by force of section 19 (1) (*c*), the liability of the taxpayer is preserved. That section declares:

> 19. Where any Act or enactment is repealed, or where any regulation is revoked, then, unless the contrary intention appears, such repeal or revocation shall not, save as in this section otherwise provided,
>
> * * *
>
> (*c*) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, enactment or regulation so repealed or revoked.

The liability in question in these proceedings is a liability alleged to have arisen in respect of income derived in the taxing period 1930, that is to say, in the year ending December 31st, 1930, from the securities transferred to Mrs. Molson by the deed of 1925.

The first point concerns the contention of the Crown that this was a liability *in esse* on the 1st of February, 1928, when the repeal of section 12 of the Act of 1926 took effect.

We are unable to perceive the existence of any liability in respect of the income in question on that date except in the sense that, if the law remained unrepealed and the conditions of statutory liability came into being, the taxpayer could be called on to pay. We do not think that "liability" in this sense is what is meant. The observations of Atkin L.J. in *Hamilton Gell* v. *White* (1) seem to be apposite:

> It is obvious that that provision was not intended to preserve the abstract rights conferred by the repealed Act, * * * It only applies to the specific rights given to an individual upon the happening of one or

(1) [1922] 2 K.B. 422 at 431.

other of the events specified in the statute. Here the necessary event has happened, because the landlord has, in view of a sale of the property, given the tenant notice to quit. Under those circumstances the tenant has "acquired a right," which would "accrue" when he has quitted his holding, to receive compensation.

So also "liability" in section 19 of the *Interpretation Act* is not the "abstract" liability to taxation under the statute of all persons to whose circumstances the terms and conditions of the statute apply. It would be a distortion of language to say that on the 1st of February, 1928, a liability had been "incurred" by Mr. Molson to be taxed under the statute of 1926 in respect of income not derived from the transferred property until 1930. The like considerations apply to sections 7 and 8 of the Statute of 1924 respecting the Revised Statutes. The only "matter or thing" within section 7 (*f*), and the only "transactions, matters and things" within section 8, that are pertinent at the moment are those which are relied upon as constituting the liability now in question, the liability to be taxed in respect of the income derived during the taxation period 1930 from the property transferred in 1925. It is perfectly true that the transfer of 1925 was a condition *sine qua non* of the liability of Kenneth Molson in respect of any taxing period anterior to the 1st of February, 1928; and it is also true that, as regards income derived from that property prior to that date, he had incurred a liability to taxation, and the Crown had acquired a correlative right (s. 10, cap. 28, *Income War Tax Act, 1917;* s. 55, cap. 97, R.S.C., 1927); but, no such liability was "incurred" (within the meaning of s. 7 (*a*)) and no such correlative right was "acquired" in respect of the income of 1930 before that year.

Nor can it be said that any right to receive taxes in respect of the income of that year was on the 1st of February, 1928, "accruing" to the Crown. It is not suggested that even the income of that year, which is the basis of the assessment, was "accruing" on that date.

Once income was received, the liability to taxation was "incurred" and the right of the Crown was "acquired"; but the right would not strictly accrue before, at least, the day fixed by the statute for the taxpayer's return although, in the meantime, it might very well be said to

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be "accruing." But that could not be affirmed of the right before the income was received.

The appeal will be dismissed with costs.

CANNON J.—The Minister of National Revenue appeals from the judgment of the Honourable Mr. Justice Angers, rendered on the 9th January, 1937, allowing the respondents' appeal from a decision of the appellant affirming an assessment for additional income taxes. The additional taxes assessed against the respondents' estate are in respect of income received between the 23rd March, 1925, and the 31st December, 1931, by Mrs. Isabel Graves Molson on some stocks which she received on or before the 23rd day of March, 1925, and accepted in payment or execution of a donation *inter vivos* of $20,000 which her deceased husband made to her, as his future wife, by their ante-nuptial contract of marriage before Mtre. Charles Delagrave, Notary, at the City of Quebec on the 28th day of March, 1913.

The trial Judge maintained the appeal and found:

1. That the gift of $20,000 made by the deceased to his future wife in the said ante-nuptial contract of marriage was a valid gift under the law of Quebec and was irrevocable;

2. It was made before the *Income War Tax Act* came into force;

3. The delivery of these stocks to Mrs. Molson by the deceased on or before the 23rd day of March, 1925, was in payment and in satisfaction of the obligation he had undertaken in his ante-nuptial contract of marriage, and the acceptance of the said stocks by Mrs. Molson in satisfaction of the said gift was not a "transfer of property" to evade taxation within the meaning of the *Income War Tax Act* of 1917 and amendments thereto.

The clause of the ante-nuptial contract, which was duly registered in the registry office of Montreal West on the 28th day of May, 1913, reads as follows:

Seventh

In view of there being no Community and no Dower and of the love and affection of said future husband for his said future wife, he the said future husband, doth by these presents give and grant by way of donation *inter vivos* and irrevocably unto his said future wife, thereof accepting:

1. The sum of Twenty Thousand Dollars, which the said future husband promises and obliges himself to pay to the said future wife at any time he may elect after the solemnization of said intended marriage, either in one sum or by instalments or by investments or investment in the name of the said future wife, and in such securities as he may see fit. Any investment so made shall operate as payment however, only in so far as the same may be accepted by the future wife, and any payment made by the said future husband to the said future wife on account of the said sum of Twenty Thousand Dollars, or any investment made by the said future husband in the name of the said future wife on account of the said sum of Twenty Thousand Dollars, shall be evidenced by a Declaration to that effect made and signed by the said future husband and the said future wife before a Notary Public and recorded in the office of such Notary. Should the death of the future husband occur before the said sum has been fully paid, the unpaid balance shall become due and exigible at his death, should the said future wife be then living, and it is also further agreed between the parties that should the said future husband during the existence of said intended marriage become Insolvent, without having first paid the sum of Twenty Thousand Dollars, in its entirety, then in such case the said future wife shall have the right to claim and demand the same or any part thereof then unpaid.

To have and to hold the said sum of Twenty Thousand Dollars unto the said future wife as her absolute property, but it is specially stipulated and agreed that in the event of her predeceasing her said future husband without having received payment in full of the said sum, the balance of the said sum of Twenty Thousand Dollars which shall not have been paid by the said future husband to the said future wife during her lifetime shall belong to the child or children issue of the said intended marriage, and in default of such child or children the said unpaid balance of the said sum of Twenty Thousand shall revert to the said future husband or his heirs.

The *Income War Tax Act* was first enacted by chapter 28 of the Statutes of 1917. Subsection 4 of section 4 of said chapter reads as follows:

Transfer of property to evade taxation.

(4) A person who, after the first day of August, 1917, has reduced his income by the transfer or assignment of any real or personal, movable or immovable property, to such person's wife or husband, as the case may be, or to any member of the family of such person, shall, nevertheless, be liable to be taxed as if such transfer or assignment had not been made, unless the Minister is satisfied that such transfer or assignment was not made for the purpose of evading the taxes imposed under this Act or any part thereof.

While this provision was in force, and pursuant to the provisions of the marriage contract, Kenneth Molson appeared before Marchessault, Notary Public, on the 23rd day of March, 1925, and declared that, to fulfill the conditions of the said contract in so far as the sum of $20,000 was concerned, he transferred to his wife, duly accepting, certain shares of capital stock of different corporations

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therein enumerated in full payment and satisfaction of his pre-nuptial donation.

From the date of the execution of the deed of the 23rd of March, 1925, all dividends or revenues accruing from these securities were received by the wife and used as her absolute property, Molson having no interest whatever in said dividends or revenues.

The original subsection 4 of section 4 of c. 28 of the statutes of 1917, concerning transfer of property to evade taxation, was repealed on the 15th June, 1926, by sec. 7 of c. 10 of the statutes of that year, and the following subsection was substituted therefor:

Transfer of property.

(4) For the purposes of this Act,—

(*a*) Where a person transfers property to his children such person shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made, unless the Minister is satisfied that such transfer was not made for the purpose of evading the taxes imposed under this Act.

(*b*) Where a husband transfers property to his wife, or *vice versa*, the husband or the wife, as the case may be, shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made.

By section 12 of said chapter 10 of 1926, it was provided that section 7 of the said Act:—

shall apply to the year 1925 or fiscal periods ending therein and to all subsequent years or fiscal periods, and to the income thereof.

When the Revised Statutes of Canada of 1927 were brought into force on the 1st February, 1928, the above enactments were consolidated and the statutes repealed and were replaced by the following section 32, where they appear as follows:—

Transfers to Evade Taxation.

Transfer of property.

32. Where a person transfers property to his children such person shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made, unless the Minister is satisfied that such transfer was not made for the purpose of evading the taxes imposed under this Act.

2. Where a husband transfers property to his wife, or *vice versa*, the husband or the wife, as the case may be, shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made.

Prior to the institution of the appeal, it was agreed between the parties that the decision of the Exchequer Court with reference to the notice of assessment no. 88893

for the taxation period for 1930 shall apply to and include six similar notices of assessment, all bearing date the 11th April, 1933, and covering the other taxation periods included from the 23rd March, 1925, to the 31st December, 1931.

For that period of 1930, we must apply to the above facts parag. 2 of sec. 32, R.S.C., 1927, c. 97, which says:

Where a husband transfers property to his wife, or *vice versa*, the husband or the wife, as the case may be, shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made.

I take it that the "transfer of property" means and contemplates a valid and real transfer. This section, when property is transferred gratuitously between husband and wife or *vice versa*, cannot apply to consorts governed by the Quebec law, because, under section 1265 of the *Civil Code*,

After marriage, the marriage covenants contained in the contract cannot be altered (even by the donation of usufruct, which is abolished), *nor can the consorts in any other manner confer benefits into vivos upon each other*, except in conformity with the provisions of the law, under which a husband may, subject to certain conditions and restrictions, insure his life for his wife and children.

In order to favour and encourage marriages, article 1257 of the *Code* says:

All kinds of agreements may be lawfully made in contracts of marriage, even those which, in any other act *inter vivos*, would be void; such as the renunciation of successions which have not yet devolved, the *gift of future property*, the conventional appointment of an heir, and other dispositions in contemplation of death.

Article 778 reads as follows:

Present property only can be given by acts *inter vivos*. All gifts of future property by such acts are void, as made in contemplation of death. Gifts comprising both present and future property are void as to the latter, but the cumulation does not render void the gift of the present property.

The prohibition contained in this article does not extend to gifts made in a contract of marriage.

Both litigants have considered the transfer as valid and binding on the parties. It appears from the above quotations that, in order to be valid and binding, the transfer made in 1925 must necessarily be related and linked to the ante-nuptial contract of March, 1913, whereby was created the obligation and indebtedness of the future husband to his future wife, and the deed of conveyance of the 28th March, 1925, which evidences the payments, satisfaction and discharge of this pre-nuptial obligation cannot be con-

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sidered apart from the other, as they must, to be valid and legal under the law of Quebec, form but one complete non-severable transaction. The legislation which is now sought to be applied originated in 1917, years after the ante-nuptial contract; and subsection 4 of section 4 of 7 & 8 Geo. V, c. 28, applied only to a person who, "after the first day of August, 1917, has reduced his income" by the transfer of any movable or immovable property to such person's wife or husband, as the case may be, if the Minister was satisfied that such transfer or assignment was made for the purpose of evading the taxes imposed under the Act.

In order to transfer validly the securities to his wife, Molson had to act by force and under the exceptional authority of the deed of 1913, which clearly is not governed by the provisions of the Act of 1917 and amendments thereto.

I would, therefore, dismiss the appeal with costs.

KERWIN J.—On March 28th, 1913, Kenneth Molson and his future wife, Isabel Graves Meredith, entered into an ante-nuptial contract by which Mr. Molson "doth by these presents give and grant by way of donation *inter vivos* and irrevocably unto his said future wife, thereof accepting," the sum of twenty thousand dollars, which the future husband promised and obliged himself to pay to the future wife at any time he might elect after the solemnization of the intended marriage, either in one sum or by instalments, or by investments or investment in the name of the future wife, and in such securities as he might see fit. Any investment was to operate as payment only in so far as the same might be accepted by his future wife.

Some time after the marriage of these parties, viz., on March 23rd, 1925, certain securities of a total market value of approximately twenty thousand dollars were transferred by deed of conveyance by Mr. Molson to his wife. He had previously included the income on these investments in his income tax returns but after the transfer made no further reference to it. Mr. Molson died on April 9th, 1932, and in April, 1933, assessments for income were made against the executors of his estate, including therein as income of the deceased the income from the securities transferred by

him to his wife by the conveyance of March 23, 1925. One assessment notice stated that, under the provisions of the *Income War Tax Act* and amendments, notice was given that for the 1930 taxation period the amount of tax assessed and levied upon Mr. Molson's income for that period was as indicated. There was a similar notice with reference to each of the other taxation periods of 1925 to 1931 inclusive.

Believing that the estate was not subject to taxation in respect of the income from the securities, the executors appealed to the Minister of National Revenue, and, upon the latter affirming the assessments, required their appeal to be set down for trial by the Exchequer Court. It is alleged in the statement of claim, which deals only with the assessment for the year 1930, and admitted in the statement of defence, that the parties had agreed that the decision of the court with reference to that assessment would apply to the assessments for the other years. The appeal was allowed, the assessments set aside, and the Minister now appeals to this court. In accordance with the agreement *inter partes,* we confine our consideration of respondents' liability to the year 1930.

That question depends upon the construction of several statutory enactments. At the time the notice of assessment was given, subsection 2 of section 32 of a consolidating statute, the *Income War Tax Act,* R.S.C., 1927, chap. 97, provided:—

> 2. Where a husband transfers property to his wife, or *vice versa,* the husband or the wife, as the case may be, shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made.

The Revised Statutes of 1927 were brought into force on February 1st, 1928, by proclamation of the Governor General in Council, and as the transfer of securities occurred before that date it is apparent that the income on the securities would not be taxable by this subsection. However, chapter 65 of the 1924 Statutes intituled "An Act respecting the Revised Statutes of Canada" (hereinafter referred to as the Revised Statutes Act),—after providing by section 5 that from and after the date of the coming into force of the Revised Statutes the enactments in schedule A to the Roll of the Commissioners appointed to revise the statutes should stand and be re-

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pealed to the extent mentioned in the third column of schedule A,—further provided by subsection 1 of section 7:—

> The repeal of the said Acts and parts of Acts shall not defeat, disturb, invalidate nor affect any * * * liability * * * incurred before the time of such repeal;

and by subsection 2 thereof, that every such liability

> may and shall remain and continue as if no such repeal had taken place, and, so far as necessary, may and shall be continued, prosecuted, enforced and proceeded with under the said Revised Statutes, and other the statutes and laws having force in Canada, and subject to the provisions of the said several statutes and laws, as if no such repeal had taken place.

Fortified with this enactment, the appellant accordingly rests his claim upon the provisions of subsection 4 of section 4 of the *Income War Tax Act* as enacted by section 7 of chapter 10 of the 1926 statutes and upon section 12 of the last mentioned Act. So far as material, subsection 4 of section 4 as so enacted is as follows:—

> (4) For the purposes of this Act,—
>
> (*b*) Where a husband transfers property to his wife, or *vice versa*, the husband or the wife, as the case may be, shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made.

Section 12 of the 1926 Act provides that section 7 thereof

> shall apply to the year 1925 or fiscal periods ending therein and to all subsequent years or fiscal periods, and to the income thereof.

The contention of the appellant is that these sections, 7 and 12, by their terms embrace the transfer of March 23rd, 1925, and that a liability to taxation had been incurred within the meaning of section 7 of the Revised Statutes Act which was preserved by its provisions.

This argument requires the consideration of other matters. Schedule A to the Commissioners' Roll already mentioned appears at the end of Volume IV of the Revised Statutes of 1927, and under the heading "1926" in the three columns headed respectively "Chap.", "Title of Act" and "Extent of Repeal," appear the following:—

10.	An Act to amend The Income War Tax Act, 1917.	The whole, except s. 2, the first sentence of par. (*f*) of s. 3, the last eighteen words of ss. 11 of s. 3, and s. 6.

By force of subsection 2 of section 5 of the Revised Statutes Act, both section 7 and section 12 of chapter 10

of the 1926 Act stand repealed. While not having similar statutory force, Appendix 1, printed at the commencement of Volume V of the Revised Statutes of 1927, contains a table of Acts of R.S.C., 1906, and Acts passed thereafter, showing how each has been dealt with; and at page 50 under the year 1926, with reference to chapter 10 under the heading "Disposal," is the following:—

Consolidated, except s. 2, the first sentence of para. (*f*) of s. 3 "10," the last eighteen words of s. 3, "11," not repealed nor consolidated; s. 4, "(1A) (*c*)," repealed 1927, c. 31, s. 3; ss. 2 of s. 4, spent; s. 6, not repealed nor consolidated; s. 12, spent.

From this it is evident that, in the opinion of the Commissioners, the effect of section 12 of the 1926 Act was exhausted.

The first point to be determined is as to whether, at the time of the coming into force of the Revised Statutes of 1927, any liability had been incurred within the meaning of section 7 of the Act respecting the Revised Statutes. I know of no decision in our own courts in which the meaning of these words as so used has been determined, but in *Heston and Isleworth Urban District Council* v. *Grout* (1) the Court of Appeal in England dealt with the effect of an identical expression as used in paragraph (*c*) of subsection 2 of section 38 of the 1889 *Interpretation Act*. The decision there was that a certain statute of 1892 did not affect the validity or effect of a notice given by the plaintiff, while section 150 of the *Public Health Act*, 1875, was in force in the district, although after the adoption of the 1892 Act no fresh notice could be given under section 150; and that, if there would otherwise have been any doubt on the point, it was removed by section 38, subsection 2, of the 1889 *Interpretation Act*, which saves everything duly done, etc., and every right, obligation or liability acquired, accrued, or incurred under it before the repeal, etc., and that the subsequent proceedings of the local authority under the notice were sufficient. North, J., before whom the matter came in the first instance, states at page 309:—

the matter stands in this way—proceedings had been taken long before the adoption of the Act under s. 150 of the Act of 1875; those proceedings were in active progress at the time when the Act was adopted.

In the Court of Appeal, Lindley, L.J., with whom Lopes, L.J., and Rigby, L.J., agreed, was of opinion that the

(1) [1897] 2 Ch. 306.

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plaintiffs were entitled to succeed without the aid of the *Interpretation Act*. He thought, however, that that Act applied,—referring as well to clause (*b*) as to clause (*c*) of subsection 2 of section 38. As this subsection has already been mentioned and will be referred to again, it is, perhaps, advisable to reproduce it so far as material:—

(2) Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not * * *

(*b*) affect the previous operation of any enactment so repealed, or anything duly done or suffered under any enactment so repealed; or

(*c*) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed.

The position here is quite different. At the time of the repeal, by the Revised Statutes (February 1st, 1928), of the only enactments by virtue of which it is suggested the respondents could possibly be assessed for the income on the transferred securities, no liability to taxation had been incurred, since the only assessment period in question had not arrived. This proposition appears so obvious that no authority would, I apprehend, be required to substantiate it. *Saunders* v. *Newbold* (1), cited by Mr. Plaxton, does not assist the appellant. At page 277 of the report appears a discussion of the meaning of the word "liable" in a section of a statute which provided:—

Any court * * * may, at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised under this section, where proceedings are taken for the recovery of money lent.

The legislation there referred to is so different in form and intent that no analogy exists between it and the section at present under review.

The expression "right accrued" or "right acquired" in paragraph (*c*) of subsection 2 of section 38 of the English *Interpretation Act* has been considered in several cases, some of which are reviewed in *Hosie* v. *County Council of Kildare and Athy* (2). Although decided on the provisions of a special statute, *Abbott* v. *The Minister for Lands* (3) is cited in this connection as the leading authority. There, a statute repealing an earlier one contained the following saving proviso:—

Provided always that notwithstanding such repeal—

(*b*) All rights accrued and obligations incurred or imposed under or by virtue of any of the said repealed enactments shall subject to any

(1) [1905] 1 Ch. 260. (2) [1928] Ir. R. 47.
(3) [1895] A.C. 425.

express provisions of this Act in relation thereto remain unaffected by such repeal.

It was held that the mere right, existing at the date of the repealing statute, to take advantage of the provisions repealed was not a "right accrued."

In *In re The Tithe Act, 1891, Roberts* v. *Potts* (1), it is stated, at page 37, that the court doubted whether the general provisions of the *Interpretation Act* could, consistently with the context of the Act of 1891, be read into it so as to override the special provisions therein contained, but that even if the *Interpretation Act* was to be taken as modifying the Act of 1891, the provisions of the former would not seem to cover the case. The judgment continues:—

> In the present case, until the notices were given or some steps taken to enforce payment of the rates by the occupiers, there could not be even an inchoate right on the part of the occupiers to deduct the rates they had not paid from payments due to the landlord or to anyone else. As no notice was given nor steps taken to demand the rates from the occupiers until long after the passing of the Act of 1891, there were no existing rights to be preserved by the saving clause in the *Interpretation Act*.

Starey v. *Graham* (2) decided that a patent agent who had been *bona fide* in practice prior to the passing of the *Patents, Designs, and Trade-Marks Act,* 1888, and who was consequently entitled under section 1, subsection 3, of that Act to be registered as a patent agent, must pay before registration the fee prescribed by The Register of Patents Agents Rules, 1889; and that the right which a person had prior to the passing of the 1888 Act, to practise as a patent agent and describe himself as such, was not a "right acquired" which was saved from the operation of the Act by section 27 thereof which provided:—

> Nothing in this Act shall affect the validity of any act done, right acquired or liability incurred before the commencement of this Act.

In *Hamilton Gell* v. *White* (3), the landlord of an agricultural holding, being desirous of selling, had given his tenant notice to quit. By an Act of 1914, when a tenancy was determined by a notice to quit, given in view of a sale, the notice was treated as an unreasonable disturbance within an Act of 1908, and the tenant was entitled to compensation upon the terms and subject to the conditions of that Act. One of the conditions of the tenant's right

(1) [1893] 2 Q.B. 33. (2) [1899] 1 Q.B. 406.
(3) [1922] 2 K.B. 422.

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to compensation thereunder was that he should within two months after the receipt of the notice to quit give the landlord notice of his intention to claim compensation; and another condition was that he should make his claim for compensation within three months after quitting the holding. The tenant duly gave notice of his intention to claim compensation, but before the tenancy had expired and, therefore, before he could satisfy the second condition, the relevant provisions of the 1908 Act were repealed. He subsequently made his claim within the three months limited thereby and it was held that notwithstanding the repeal he was entitled to claim compensation under section 38 of the *Interpretation Act* because, as soon as the landlord had given the tenant notice, the latter "acquired a right" to compensation for disturbance, subject to his satisfying the conditions of the repealed provisions. In the Court of Appeal, Lord Justice Bankes distinguished *Abbott* v. *The Minister for Lands* (1), pointing out that there the tenant's right depended upon some act of his own, while in the *Gell* case (2) it depended upon the act of the landlord. Lord Justice Scrutton stated that, as soon as the tenant had given notice of his intention to claim compensation, he was entitled to have that claim investigated by an arbitrator, although in the course of the arbitration he would have to prove that that right in fact existed, i.e., that the notice to quit was given in view of a sale. Lord Justice Atkin stated that section 38 of the *Interpretation Act* was not intended to preserve the abstract rights conferred by the repealed Act but that it applied only to the specific rights given to an individual upon the happening of one or other of the events specified in the statute; that the necessary event had happened and, therefore, the tenant had acquired a right, which would accrue when he had quitted his holding, to receive compensation. He referred to the *Abbott* case (3), pointing out that the Privy Council there determined that

> the mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed to be a "right accrued" within the meaning of the enactment.

(1) [1895] A.C. 425. (2) [1922] 2 K.B. 422.
(3) [1895] A.C. 425.

None of these decisions is precisely in point but a review of the principles enunciated in them rather strengthens than otherwise the conclusion at which I have arrived that no liability to taxation had been incurred.

In view of the statement in section 13 of the Revised Statutes Act that

> This Act * * * shall be subject to the same rules of construction as the said Revised Statutes,

reliance was also placed on section 19 of the *Interpretation Act*, R.S.C., 1927, chapter 1, by which the repeal of any Act shall not

> (c) affect any * * * liability * * * accruing * * * under the Act * * * so repealed.

In my opinion no liability was accruing. Not merely had the time for Mr. Molson to make a return not arrived nor the time for the Government officials to make an assessment, but the value of the securities might depreciate or vanish before 1930. The remarks of Lord Tomlin, speaking for the Judicial Committee, in *Dominion Building Corporation Limited* v. *The King* (1), are, I think, apposite. After referring, at page 549, to the provisions of the Ontario *Interpretation Act*, R.S.O., 1927, c. 1, s. 10, whereby it was provided that no Act should affect the rights of His Majesty, his heirs or successors, unless it was expressly stated therein that His Majesty should be bound thereby, his Lordship declared that the expression "the rights of His Majesty" in the context meant the accrued rights, and did not cover mere possibilities, such as rights which, but for the alterations made in the general law by the enactment under consideration, might have thereafter accrued to His Majesty under some future contract.

There is another obstacle in the way of applying section 19 of the *Interpretation Act* to the case at Bar. By section 2 of the same statute section 19, in common with the other provisions of the Act, extends and applies to the Revised Statutes Act "except in so far as any such provision (1) is inconsistent with the intent or object of such Act." It appears to me that, even if there were an accruing liability, the object and intent of the Revised Statutes Act are inconsistent with a determination that the statute meant to preserve it. And for this reason. Section 3 of chapter 10 of the 1926 Act, amending the *Income War*

(1) [1933] A.C. 533.

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Tax Act by adding subsection 10 and other subsections to section 3 of the main Act, dealt with what were known as "personal corporations," and the first sentence of paragraph (*f*) of that section provides:

> This subsection shall be applicable to income of the year 1925 and fiscal periods ending therein and to each year or period thereafter.

This sentence is not repealed according to the note under "extent of repeal," which statement, as has already been shown, has the sanction of Parliament. Applying the maxim *expressio unius est exclusio alterius,* the conclusion seems inescapable that it was not the intention of Parliament to preserve the suggested accruing liability.

For these reasons, I am of opinion that the respondents are not liable to assessment on the specified income for the year 1930, and by reason of the consent between the litigants the same result follows with respect to the income for the other years. In this view of appeal, it is unnecessary to deal with the other points mentioned in the argument.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. S. Fisher.*

Solicitors for the respondents: *Magee, Nicholson & O'Donnell.*

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ALICE MAUD PRICE (PLAINTIFF) .....APPELLANT;

AND

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY (DEFENDANT) ..... RESPONDENT.

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

Insurance (Accident)—Death of insured—Suit by beneficiary to recover under policy—Proximate cause of death—Taking of insulin (for diabetic condition) in too large a dose, alleged as cause—Accident Insurance Act, R.S.N.B., 1927, c. 85, s. 5—Age of insured—Construction of policy—Evidence—Admissibility of statements of deceased persons.

Plaintiff sued to recover, as beneficiary, upon an accident insurance policy upon the life of her deceased husband. The basis of her claim was that his death was caused by his having taken insulin (for his diabetic

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

condition) on the occasion in question in too large a dose. The policy by its terms insured against (*inter alia*) death resulting from "bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means." S. 5 (in force at the time of deceased's death) of the New Brunswick *Accident Insurance Act* provided that "in every contract of accident insurance, the event insured against shall include any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or as the indirect result of his intentional act * * *." At the trial the following (amongst other) questions were submitted to and answered by the jury: "Did the insured accidentally, and by mistake, take an overdose of insulin?" A. "Yes." "Was [his] death caused solely by taking, accidentally, and by mistake, an overdose of insulin?" A. "Yes, indirectly." "Was [his] death caused by, or contributed to, by diabetes, Bright's disease, hardening of the arteries, or any other diseases?" A. "Diabetes indirectly." "If you answer 'yes' to question [last above preceding], in what way was [his] death so caused or contributed to?" A. "Insulin reaction."

The trial Judge dismissed the action, holding "that, upon the facts as proven and upon the law applicable to the questions at issue, notwithstanding the findings of the jury, the plaintiff is not entitled to recover." The dismissal of the action was affirmed (by a majority) by the Appeal Division of the Supreme Court of New Brunswick (11 M.P.R. 490). Plaintiff appealed.

Held: There should be a new trial. (Crocket J., dissenting, would dismiss the appeal).

In applying said s. 5 of the *Accident Insurance Act* to the case, the essential point was that in law (and upon the proper construction of s. 5) the external force or agency which occasions the bodily injury must be the proximate cause of death. The jury's answers had not determined the vital issue whether or not the taking of the insulin on the occasion in question was the proximate cause of the insured's death.

Two incidental issues were decided (and therefore excepted from the new trial) as follows: (1) As to the allegation of non-disclosure of material facts at the time the last certificate for renewal of the policy was delivered: The New Brunswick statutory law requires, in order to avoid a contract of insurance on the ground of non-disclosure, that there be a "conscious concealment"; and such a concealment was not established by the evidence. (2) As to a provision in the policy that it should "not cover for injuries or be in force upon any person over the age of 65 years"—deceased being under 65 at the date of delivery of the last renewal certificate, but reaching 65 years of age before the date of the alleged taking of the dose of insulin in question: The words in the policy were not sufficiently precise and definite to make the policy inoperative when the insured reached 65 years of age, the last renewal receipt having been issued when he was under that age.

Certain cautionary remarks made with regard to admissibility in evidence of statements of deceased persons.

Per Crocket J., dissenting: The appeal should be dismissed. There was no evidence that the insured's death was caused by accident within the meaning of the policy or of said s. 5 of the Act. There could be no recovery without proof that his death resulted from bodily injury

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alone (effected as stipulated in the policy). Plaintiff's allegation, upon which her whole case rested, that deceased "accidentally and by mistake" took an overdose of insulin, "as a result whereof and not otherwise" he came to his death, constituted the decisive issue at the trial, and the questions aforesaid left to the jury covered that issue. A fair summary of their answers was that they thought that, but for the diabetes, deceased would not have died. Whether or not they intended so to find, it was the clear effect of the whole evidence. Therefore plaintiff was disentitled to recover, under the explicit terms of the policy and upon a proper construction of said s. 5 of the *Accident Insurance Act*. S. 5 does not exclude the maxim *causa proxima*. There can be no recovery under a contract of accident insurance, for bodily injury or death resulting therefrom, unless external force or agency was the proximate cause of that injury. The admission, against objection, of evidence of a statement by deceased to plaintiff that he had taken too much insulin was improper as contravening the rule against hearsay evidence; in any event the statement could add nothing to plaintiff's case, it being as consistent with deceased having intentionally taken more insulin than he usually took as with his having taken it accidentally and by mistake; in no case, in view of the fact that he took it in the course of his treatment for his disease, as he had been regularly doing, could the objectionable evidence have any bearing upon the issue as to whether his death was directly caused by external force or agency within the meaning either of the policy or of said s. 5 of the Act.

APPEAL by the plaintiff from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), dismissing (Harrison J. dissenting) her appeal from the judgment of Barry, C.J., K.B.D., dismissing her action.

Plaintiff sued to recover, as beneficiary, upon an accident insurance policy by which the defendant insured the plaintiff's husband against (*inter alia*) loss of life resulting ("from such injuries alone within 90 days from the date of accident") from "bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means," for 12 months from March 1, 1924. The policy was renewed from year to year, the last renewal certificate being dated March 1, 1932, and renewing the policy up to noon of March 1, 1933. The insured became very ill in the afternoon of February 26, 1933, and died on March 1, 1933. The basis of the plaintiff's claim under the policy was that the insured's death was caused by his having taken (at a time during the morning of February 26, 1933) insulin for his diabetic condition in too large a dose.

(1) 11 M.P.R. 490; [1937] 2 D.L.R. 369.

Section 5 of the *Accident Insurance Act*, R.S.N.B., 1927, c. 85 (which section was in force at the time of deceased's death, but has since been repealed) read as follows:

In every contract of accident insurance, the event insured against shall include any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or as the indirect result of his intentional act, and no term, condition, stipulation, warranty or proviso of the contract, varying the obligation or liability of the insurer shall, as against the insured, have any force or validity, but the contract may provide for the exclusion from the risks insured against of accidents arising from any hazard or class of hazard expressly stated in the policy.

The policy provided that it

shall not cover for injuries or be in force upon any person over the age of 65 years, or cover for sickness or be in force upon any person over the age of 60 years, and shall not be renewed after the insured has reached the specified ages. Any premiums paid for any person over the specified ages shall be returned upon request.

The insured (according to a finding at the trial) reached the age of 65 years on February 14, 1933.

The case was tried by Barry, C.J., K.B.D., with a jury. Questions were submitted to and answered by the jury. Entry of verdict was reserved until after argument of questions involved. The argument was later heard, and subsequently the trial Judge delivered reasons, concluding as follows:

After a careful consideration of the evidence in the case, I have come to the conclusion, that upon the facts as proven and upon the law applicable to the questions at issue, notwithstanding the findings of the jury, the plaintiff is not entitled to recover in the action. A verdict is therefore entered for the defendant: the plaintiff's action is dismissed with costs.

An appeal by the plaintiff to the Appeal Division of the Supreme Court of New Brunswick was dismissed with costs (Harrison J. dissenting) (1). The plaintiff appealed to this Court.

O. M. Biggar K.C. and *J. F. H. Teed K.C.* for the appellant.

P. J. Hughes K.C. and *J. E. Friel* for the respondent.

The judgment of the majority of the Court (The Chief Justice and Davis, Kerwin and Hudson JJ.) was delivered by

DAVIS J.—The appellant seeks in this action to recover against the respondent as the beneficiary of an accident insurance policy upon the life of her deceased husband.

(1) 11 M.P.R. 490; [1937] 2 D.L.R. 369.

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The real question in issue, broadly speaking, is whether or not her husband's death was caused by accident. The deceased husband was a medical practitioner, sixty-five years of age at the time of his death, and the basis of the claim under the policy is that his death was caused by his having taken insulin for his diabetic condition on the morning in question in too large a dose. There is no direct evidence that he took any insulin the morning in question but it is a fair inference, and really not in dispute, that he had taken insulin that morning, as he had been accustomed to do for several months each morning and each evening. Whether on the particular occasion the quantity he took was in excess of the quantity that had been prescribed for him and which he had been taking regularly for some months or whether he took the usual quantity that morning but it was too much for his system at that particular time is not made plain because, of course, no one knows the exact amount he did take. There is no suggestion that, whatever the amount was, there was any indication of suicide.

A real difficulty in the case arises out of a section in the New Brunswick *Accident Insurance Act,* which, while since repealed (as a similar provision in other provincial statutes has been repealed), was in force at the time of the deceased's death and governs the case. The section is as follows:

> 5. In every contract of accident insurance, the event insured against shall include any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or as the indirect result of his intentional act, and no term, condition, stipulation, warranty or proviso of the contract, varying the obligation or liability of the insurer shall, as against the insured, have any force or validity, but the contract may provide for the exclusion from the risks insured against of accidents arising from any hazard or class of hazard expressly stated in the policy.

The section was obviously intended to put an end to defences by accident insurance companies which had raised technical and confusing issues and the statute therefore created liability in the companies whether the event insured against (i.e., the accident) happened "without the direct intent of the person injured" or "as the indirect result of his intentional act." In applying the section to the circumstances of this case the essential point is that

in law the external force or agency which occasions the bodily injury must be the proximate cause of the death.

Scrutton, J. (as he then was) in *Coxe* v. *Employers' Liability Assurance Corporation, Limited* (1), in construing a condition in an accident insurance policy, said:

> The construction of this condition is not very easy, and it is clear that several questions might arise upon it; but, dealing with the particular matter which is before me, namely, whether I ought to uphold the finding of the arbitrator that the death of the deceased was indirectly traceable to war, I start with the consideration that to all policies of insurance, whether marine or accident, the maxim *causa proxima non remota spectatur* is to be applied if possible. The immediate cause must be looked at, and not one or more of the variety of causes which if traced without limit might be said to go back to the birth of the assured. For that reason, when there are words which at first sight go a little further they are still construed in accordance with that universal maxim. Thus it has been held upon the words "from all consequences of hostilities" that the proximate and direct consequences of hostilities are alone to be looked at: *Ionides* v. *Universal Marine Insurance Co.* (2). Where the words were "damage consequent on collision" it was decided that only the immediate and necessary consequences of the collision were to be looked at, and not what happened at the port of refuge in consequence of the collision: *Pink* v. *Fleming* (3). In *Lawrence* v. *Accidental Insurance Co.* (4), where the assured was killed by a train and was on the line because, just previous to the train passing, he had had a fit, and there was an exception that the policy did not insure in case of death arising from fits or any disease whatsoever arising before or at the time or following such accidental injury, the immediate cause was again looked at, and it was held that the assured's representatives could recover although a fit placed him on the line where the railway engine killed him. I have therefore to ascertain whether the language of this policy goes beyond and excludes the maxim.

The condition to which the policy was subject in that case was that the policy did not insure against death "directly or indirectly caused by, arising from, or traceable to * * * war." Scrutton J. proceeded to say that the words in the condition "caused by" and "arising from" did not give rise to any difficulty. "They are words which always have been construed as relating to the proximate cause. * * *" "But," he went on to say,

> the words which I find it impossible to escape from are "directly or indirectly." There does not appear to be any authority in which those words have been considered, and I find it impossible to reconcile them with the maxim *causa proxima non remota spectatur.*

The learned judge in that case concluded that the only possible effect which could be given to the words "directly

(1) [1916] 2 K.B. 629, at 633.
(2) (1863) 14 C.B. (N.S.) 259.
(3) (1890) 25 Q.B.D. 396.
(4) (1881) 7 Q.B.D. 216.

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or indirectly" was that the maxim *causa proxima* was excluded.

In the section of the statute which governs the case before us, the words are "any bodily injury occasioned by external force or agency"—not, occasioned "directly or indirectly" by external force or agency. That being so, upon the proper construction of the section the external force or agency must be the proximate cause of the bodily injury insured against.

The case was tried with a jury and the real question for the jury was whether or not the taking of the insulin on the morning in question directly resulted in the death of the insured. There were twenty-one questions submitted to the jury and it is not at all surprising that their answers present a good deal of difficulty to us in ascertaining what their conclusion really was on the vital fact whether or not the insulin was the proximate cause of death. Four questions and answers may be mentioned:

1. Q. Did the insured accidentally, and by mistake, take an overdose of insulin?

A. Yes.

2. Q. Was the insured's death caused solely by taking, accidentally, and by mistake, an overdose of insulin?

A. Yes, indirectly.

8. Q. Was the insured's death caused by, or contributed to, by diabetes, Bright's disease, hardening of the arteries, or any other diseases?

A. Diabetes indirectly.

11. Q. If you answer "yes" to question No. 8 by the Court, in what way was the death of the insured so caused or contributed to?

A. Insulin reaction.

It is plain that the jury have not determined the vital issue as to whether or not the taking of the insulin on the morning in question was the proximate cause of death.

It is unfortunate that the case has to go back for a new trial but it seems to be inevitable. Two incidental issues must therefore be disposed of.

First, the allegation of non-disclosure of material facts at the time the last renewal receipt was delivered. The New Brunswick statute requires, in order to avoid a contract of insurance upon the ground of non-disclosure, that there should be a "conscious concealment." The evidence does not establish that there was any such concealment. The very serious change in the deceased's physical condition occurred after, and not before, the time of the delivery of the renewal receipt.

Then there is the question of age. The deceased was under sixty-five at the date of the delivery of the renewal receipt but was sixty-five before his death. The words in the policy are not sufficiently precise and definite to make the policy inoperative when the insured reaches sixty-five years of age, the last renewal receipt having been issued to the insured when he was under that age.

In the event of a new trial being had, it may be necessary for the trial judge to deal specifically with the question of the admissibility of an alleged statement of the deceased that he had "taken too much of the damn stuff." It is inadvisable that we should discuss the matter other than to observe that statements of a deceased person should never be admitted except where their admissibility as a matter of law has been clearly established. The person who is said to have spoken is dead; he cannot be put on oath nor can he be cross-examined as to the exact words of his statement. There is always the danger of mistake that cannot be corrected; and there is inherent frailty in the repetition of such statements, however much good faith there may be. The rules of law as to the admissibility of statements of deceased persons are now well settled and it will be for the trial judge, if the question is raised, to apply whatever may be the proper rule to the given facts. Reference might be had to *Garner* v. *Township of Stamford* (1) and *Amys* v. *Barton* (2).

We would allow the appeal and direct a new trial except on the incidental issues of non-disclosure and of age. The respondent should pay the costs of this appeal and of the appeal to the Court of Appeal of New Brunswick. The costs of the abortive trial shall abide the event of the new trial.

CROCKET J. (dissenting).—I think this appeal should be dismissed with costs for the reason that the record discloses no evidence that the death of the insured was caused by accident within the meaning either of the policy sued on or of s. 5 of the New Brunswick *Accident Insurance Act* which, though since repealed, was in force at the time of the insured's death. The policy itself insured the deceased against death resulting from "bodily injuries, effected

(1) (1903) 7 Ont. L.R. 50. (2) [1912] 1 K.B. 40.

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directly and independently of all other causes, through external, violent and accidental means" within 90 days from the date of accident. That there could be no recovery thereon without proof that the insured's death resulted from such a bodily injury alone is, I think, too clear for argument. The appellant's whole case rested upon the allegation that her husband "accidentally and by mistake took an overdose of insulin, as a result whereof and not otherwise [he] came to his death." This allegation constituted the decisive issue on the trial before Barry, C.J., K.B.D., and a jury, and His Lordship left to the jury two questions bearing upon and completely, as I think, covering that issue, i.e.,

1. Did the insured accidentally, and by mistake, take an overdose of insulin?

2. Was the insured's death caused solely by taking, accidentally, and by mistake, an overdose of insulin?

To the first of these questions the jury answered "Yes" and to the second "Yes, indirectly." His Lordship, however, also left to the jury another question, No. 8, bearing upon the same issue, "Was the insured's death caused by, or contributed to, by diabetes, Bright's disease, hardening of the arteries, or any other diseases?" to which the jury answered "Diabetes, indirectly." To still another question, which was placed before the jury at the request of the plaintiff's counsel, as required by the *Judicature Act*, viz.: "If you answer 'yes' to question No. 8 by the court, in what way was the death of the insured so caused or contributed to?" the jury answered "Insulin reaction."

Notwithstanding these answers, the learned trial Judge, after hearing argument upon a motion for the entry of judgment, dismissed the action, holding that there was not to be found in the whole record a particle of evidence to justify the jury's finding that the insured accidentally and by mistake took an overdose of insulin and that the answer to question No. 2 (which was really not responsive to the question put) was erroneous, and should have been "no" instead of "yes, indirectly."

I fully concur in the view expressed by the learned Chief Justice of New Brunswick in the majority judgment in the Appeal Court that a fair summary of the jury's answers to questions 2 and 8 by the court and question 11 by the plaintiff's counsel is that the jury thought that, but for the

diabetes, the man would not have died. Whether or not, however, that is what the jury really intended to find, that, in my judgment, is the clear and indisputable effect of the whole evidence and disentitles the plaintiff to recover under the explicit terms of the policy and upon a proper construction of the now repealed section of the New Brunswick *Accident Insurance Act* relied on.

I agree with my brother Davis that this section did not exclude the maxim *causa proxima* and that it follows that there can be no recovery under any contract of accident insurance, whether for a bodily injury, or for death directly resulting from a bodily injury, unless such bodily injury was directly caused by external force or agency, or, in other words, unless external force or agency was the proximate cause of such bodily injury. This is precisely the construction which the learned Chief Justice of New Brunswick and Grimmer, J., placed on the section in their majority judgment in the Appeal Court and upon which their decision affirming the dismissal of the action by the trial Judge was manifestly based. I should add, I also agree with Baxter, C.J.N.B., that the admission, against objection, of the testimony of the conversation between the appellant and the insured as to his having taken too much insulin was improper as contravening the rule against hearsay evidence, and that, in any event, the statement attributed by the appellant to her husband subsequently to the taking of the insulin, could add nothing to the appellant's case, as it is quite as consistent with his having intentionally taken more insulin than it was usual for him to take as with his having taken it accidentally and by mistake. In no case, in view of the undisputed fact that the insured had for many months previously been suffering from the disease of diabetes and took the insulin in the course of his treatment for that long pre-existing disease, as he had been doing twice a day regularly during that period for the purpose of reducing his blood sugar by its action, could the objectionable evidence have any bearing upon the issue as to whether his death was directly caused by external force or agency within the meaning, either of the policy or of s. 5 of the New Brunswick *Accident Insurance Act*.

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I can see, therefore, no justifiable ground upon which the case should be sent back for a new trial.

Appeal allowed with costs; new trial ordered.

Solicitor for the appellant: *E. Albert Reilly.*

Solicitors for the respondent: *Friel & Friel.*

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* Feb. 22.
* Mar. 25.

HERBERT DALLAS AND MABEL DALLAS (PLAINTIFFS) ..... } APPELLANTS;

AND

LORNE G. HINTON ..... DEFENDANT;

AND

HOME OIL DISTRIBUTORS LTD. (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Master and servant—Liability of master for servant's negligence—Accident through alleged negligent driving of motor car by company's salesman on his way home from evening lecture arranged by company for its salesmen—Question whether salesman was at the time acting in the course of his employment.

The action was for damages by reason of injuries suffered in an accident caused by alleged negligent driving of a motor car by H., and the question on the appeal was whether or not at the time of the accident H. was acting in the course of his employment by the defendant company, against whom liability was claimed.

H. was employed by defendant company as a salesman, on salary, to sell oil, gasoline and other products in the district of New Westminster. The company's office was in Vancouver. In the first few months of his employment H. had resided in Vancouver, but had later moved to New Westminster, as being more convenient for his work. His place of residence was no part of his contract and the company had nothing to say about his moving. In selling the company's products, H. drove a motor car owned by himself, but the company supplied the oil and gasoline used, paid for the car licence and for repairs. H.'s normal working day was from 8.30 a.m. to 5 p.m. He had no office of his own but used a telephone at a filling station in New Westminster for messages sent or received. He reported to the company's office several times a week and generally telephoned to it daily. At the company's office in Vancouver a pigeon hole was provided for the salesmen in which messages were left. H. received a notice there of four evening lectures to be given, and stating that he was "expected to attend." On the evening in question, H., whose own car was away for repairs, borrowed a car and drove to one of these lectures

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* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

in Vancouver. He left it about 9 p.m. to go home and on the way the accident occurred.

Held: At the time of the accident H. was not under any control of the defendant company so as to render it liable for his negligence.

Judgment of the Court of Appeal for British Columbia, 52 B.C.R. 106, in setting aside the judgment at trial against the defendant company, affirmed.

Bain v. *Central Vermont Ry. Co.*, [1921] 2 A.C. 412; *St. Helens Colliery Co. Ltd.* v. *Hewitson*, [1924] A.C. 59; *Alderman* v. *Great Western Ry. Co.*, [1937] A.C. 454, and *Blee* v. *London & North Eastern Ry. Co.*, [1938] A.C. 126, referred to.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for British Columbia (1) in so far as it allowed the appeal of the defendant Home Oil Distributors Ltd. from the judgment of Manson J. (2).

The action was for damages by reason of injuries suffered by the plaintiff Mabel Dallas (wife of her co-plaintiff) when she was struck by a motor car driven by the defendant Hinton. The plaintiffs alleged that the accident occurred by reason of negligence on the part of the defendant Hinton in the operation of the motor car, which, it was alleged, was being driven by him in the course and within the scope of his employment as a servant of the defendant Home Oil Distributors Ltd., against which company also the damages were claimed.

The trial Judge, Manson J., gave judgment against both defendants (2). The Court of Appeal for British Columbia upheld the judgment against Hinton but (McPhillips J.A. dissenting) allowed the appeal of Home Oil Distributors Ltd. and set aside the judgment against it (1). From the said allowance of the company's appeal, the plaintiffs brought the present appeal to this Court; and the question in issue on this appeal was whether or not at the time of the accident Hinton was acting in the course of his employment by the company.

The material facts and circumstances of the case, so far as the question in issue in this appeal is concerned, are sufficiently stated in the judgment of this Court, now reported. The appeal to this Court was dismissed with costs.

J. de B. Farris K.C. for the appellants.

C. H. Locke K.C. for the respondent.

(1) 52 B.C.R. 106; [1937] 3 W.W.R. 145; [1937] 4 D.L.R. 260.
(2) 51 B.C.R. 327; [1937] 1 W.W.R. 350.

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The judgment of the court was delivered by

HUDSON J.—This is an action for damages by a husband and wife for injuries sustained by the wife in the collision of an automobile negligently driven by the defendant Hinton, who was at the time of the accident a salesman in the employ of the co-defendant, the Home Oil Distributors Limited.

The action was tried at Vancouver before Mr. Justice Manson and judgment was given by him against both defendants (1). On appeal to the Court of Appeal of British Columbia the judgment of the trial judge against Hinton was sustained but the majority of the court held that at the time of the accident Hinton was not acting in the course of his employment and that, therefore, the defendant company was not liable (2).

On appeal to this Court the sole question submitted is whether or not the accident happened while Hinton was acting in the course of his employment.

There is little or no dispute about the facts bearing on this issue. Hinton was employed by the defendant company as a salesman working on a salary and selling oil, gasoline and other products in the district of New Westminster, which adjoins the city of Vancouver to the east. In the first few months of his employment he resided in the city of Vancouver but later on moved to New Westminster as being more convenient for his work. His place of residence was no part of his contract and his employers had nothing to say about his removal from Vancouver to New Westminster. In selling defendant's products Hinton drove an automobile owned by himself, but the defendant company supplied him with oil and gasoline and paid for the automobile licence and for necessary repairs to his car. His normal working day was from 8.30 a.m. until 5 p.m., and the company's sales manager said, on enquiry as to whether salesmen worked after those hours, that they did from time to time, that they might do the odd job if something of an emergency should arise, but that they were not asked to work after that time. Hinton had no office of his own but used the telephone at a filling station

(1) 51 B.C.R. 327; [1937] 1 W.W.R. 350.
(2) 52 B.C.R. 106; [1937] 3 W.W.R. 145; [1937] 4 D.L.R. 260.

in New Westminster, from where he sent and at which he received messages. The office of the defendant company was in Vancouver and Hinton reported there several times during the week and generally communicated therewith by telephone daily. At this office a pigeon-hole was provided for the salesmen in which messages were left from time to time. On or about 14th May, 1935, a notice was put in Hinton's pigeon-hole at the Vancouver office, stating that four lectures would be given in the evening on certain dates mentioned and "that you are expected to attend." Martin, the sales manager, said that attendance was not compulsory but desirable in the company's interests. At any rate, in the evening in question Hinton, whose own car was away for repairs, borrowed another car for the occasion and drove to the meeting at Vancouver. About 9 p.m. he left the meeting to go home in this car and shortly thereafter the accident took place.

The learned trial Judge held on these facts that the accident took place while Hinton was engaged in the course of his employment and, as above stated, the majority of the Court of Appeal took the opposite view. Before us it was argued on behalf of the plaintiffs that Hinton's attendance was in accordance with a special order arising out of his general employment, that he used a car in the performance of his duty that evening in the same way as when normally doing his daily work, that the special work took its colour from the general nature of his services, that he was engaged in his master's business in going to, attending and returning from the lecture, that in returning he was in fact returning to his business headquarters from where he would make his start on the following morning to perform his regular duties.

On behalf of the respondent it was argued that it was not part of Hinton's contract to attend the meeting in question, that in any event, as soon as he left there, he was a free agent to do as he pleased, that his employers had no control over him, that he could return to his home by any mode of transportation that he chose, that in returning to New Westminster he was, as he said, going home, that there was no evidence that he had other duties to perform for his employers that evening, that the situa-

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tion did not differ from what existed prior to removing his residence from Vancouver to New Westminster.

The question of when a servant can be held to be acting in the course of his employment has been the subject of numerous decisions in the courts and I shall refer to only a few of the more important.

In the case of *Bain* v. *Central Vermont Railway Company* (1), the appellant's husband was killed owing to the negligence of the respondent company's engine driver in disregarding the signals of another company upon whose line he was driving the engine under an agreement between the companies for joint working; each company paid the drivers employed in the joint service for the service on its own line. The appellant sued the respondents for damages. It was held that the respondent company was not liable, since at the moment of the accident the engine driver was under the control of the other company. Lord Dunedin in delivering the judgment of the Judicial Committee, at page 416, quotes with approval a statement of Bowen L.J. in *Donovan* v. *Laing Syndicate* (2), as follows:

> We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act.

St. Helens Colliery Co. v. *Hewitson* (3): A workman employed at a colliery was injured in a railway accident while travelling in a special colliers' train from his work to his home at M. By an agreement between the colliery company and the railway company the railway company agreed to provide special trains for the conveyance of the colliery company's workmen to and from the colliery and M., and the colliery company agreed to indemnify the railway company against claims by the workmen in respect of accident, injury or loss while using the trains. Any workman who desired to travel by these trains signed an agreement with the railway company releasing them from all claims in case of accident, and the colliery company then provided him with a pass and charged him a sum representing less than the full amount of the agreed fare, and this sum was deducted week by week from his

(1) [1921] 2 A.C. 412. (2) [1893] 1 Q.B. 629, 633, 634.
(3) [1924] A.C. 59.

wages:—*Held* (by Lord Buckmaster, Lord Atkinson, Lord Wrenbury and Lord Carson; Lord Shaw of Dunfermline dissenting), that, there being no obligation on the workman to use the train, the injury did not arise in the course of the employment within the meaning of the *Workmen's Compensation Act, 1906*. Lord Buckmaster states at p. 67:—

> The workman was under no control in the present case, nor bound in any way either to use the train or, when he left, to obey directions; though he was where he was in consequence of his employment, I do not think it was in its course that the accident occurred.

Lord Atkinson, at p. 81:

> In my opinion, the evidence does not establish that the workmen of the appellants in travelling to or from the appellants' colliery in these provided trains were discharging any duty to their employers which their contracts of service bound them to discharge.

Lord Wrenbury, at p. 95:

> The man is not in the course of his employment unless the facts are such that it is in the course of his employment, and in performance of a duty under his contract of service that he is found in the place where the accident occurs. If there is only a right and there is no obligation binding on the man in the matter of his employment there is no liability.

And again at p. 96:

> If I apply the other test which I have suggested, the workman when in the train owed no duty to obey an order the employers might there give him.

In *Alderman* v. *Great Western Railway* (1), the applicant was a travelling ticket collector in the employment of the respondent railway company, and had in the course of his duty to travel from Oxford, where his home was, to Swansea, where he had to stay overnight, returning thence on the following day to Oxford. Being also qualified as a guard and, as such, liable to be called upon in an emergency, he was required by the railway company to leave, and he in fact left with them, the address of his Swansea lodgings. Apart from this obligation he had an unfettered right as to how he spent his time at Swansea between signing off and signing on, and he could reach the station by any route or by any method he chose. In proceeding one morning from his lodgings to Swansea station to perform his usual duty, he fell in the street and sustained an injury in respect of which he claimed compensation. It was held by the House of Lords that while in the street proceeding from his lodgings to the station, the

(1) [1937] A.C. 454.

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applicant was not performing any duty under his contract of service and that, therefore, the accident did not arise in the course of his employment and that consequently he was not entitled to compensation. Lord Russell of Killowen, at p. 460, said:—

> As I have already indicated there is no evidence of any contractual limitation at all of the man's choice of abode either at Swansea or Oxford. But even if there had been some term of the contract, which ensured that his lodging should not be unreasonably far from the Swansea station, it would still have been impossible to say that his contract of employment necessitated his presence on the spot where the accident occurred. He was there only because it lay on the route between the station and the particular house which he himself had happened to select. The case would still have failed to contain the element of fact which was the essential ground of the decision in the case of *London & North Eastern Ry. Co.* v. *Brentnall* (1), namely, the contractual obligation to go to the particular place where the accident happened.

and again at p. 462:—

> He was * * * subject to no control and he was for all purposes in the same position as an ordinary member of the public, using the streets in transit to his employer's premises.

In *Blee* v. *London and North Eastern Railway Company* (2), a ganger in the service of a railway company was, by the terms of his contract of service, liable to be called upon in case of emergency to go to the place where the emergency had arisen, notwithstanding that he might have finished his normal day's work, and when so called upon after his normal day's work he was entitled to be paid overtime from the hour he left his home in order to proceed to the place where the emergency had arisen. One night, after he had completed his day's work and after he had gone to bed, he received a message requiring him to go to a certain siding to assist in replacing a derailed truck, and in compliance with that order he rose and was proceeding to the siding when he was knocked down in the street by a motor car and sustained injuries from the effects of which he died. On a claim for compensation by his widow:—

Held, by the House of Lords, that as the deceased man was obliged by the terms of his contract to obey an emergency call at any hour, as he was paid from the time he left his home in obedience to the call, and as he was obliged to proceed with reasonable despatch to the place where his services were required, there was evidence to

(1) [1933] A.C. 489. (2) [1938] A.C. 126.

support the finding of the county court judge that the accident arose out of and in the course of the deceased man's employment, and, therefore, that his widow was entitled to compensation.

In the course of his judgment, Lord Atkin states:—

> There can be no question that had the workman been going to his ordinary work in the morning he would not have been entitled to compensation for injury suffered from street risks incurred in transit. His time in such a case is his own; he arrives at the scene of his labours as he pleases; and though it is his duty to present himself at the appointed time yet his "employment" does not in ordinary circumstances begin for the purposes of the Act until he reaches the place where he is employed.

and he quotes from the words of Lord Russell of Killowen in *Alderman's* case (1):—

> The cases in which men are employed to work at a distance from their homes and have to find lodgings for themselves must be innumerable. Yet there is no case in the books, or at all events none was cited, in which such an one meeting with an accident when merely on his way to or from his work has been held entitled to compensation. In order to entitle him to compensation in such a case some other element must be present (involving the discharge of a contractual duty to the employer) which in law extends the course of his employment so as to include the moment of time when the accident occurred.

The learned Lord expressed some doubt but in the end arrived at the conclusion that on the special facts there was in that case a special duty to obey the emergency call, that he was paid from the time he left the house so that that time was his master's time and that he was under an obligation to proceed with reasonable despatch by the reasonably shortest route, which afforded evidence from which the judge could infer that from the time the workman started from his house he was actually engaged in the performance of his contract of service.

Lord Maugham concurred in the opinion of Lord Atkin and at p. 134 said:—

> We can test the view of the arbitrator by supposing that a superior officer of the company happened to meet the workman loitering on his way to the place or diverging from the proper route. Could not the officer properly have ordered the workman to proceed direct to the place to which he has been called? The circumstance as to payment affords, I think, a decisive answer in the affirmative.

Lord Roche, in concurring, at p. 134, stated:—

> A workman may be acting in the course of his employment or, put more shortly, he may be on duty, when in a public street. Ordinarily he is not so acting when proceeding to the place where his work proper begins. But he may be so if he is proceeding to that place by a pre-

(1) [1937] A.C. 454, at 461.

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Hudson J.

scribed route or by a prescribed means of conveyance. The circumstances here are different in that neither route nor conveyance were prescribed.

The question whether a given act of an employee is within the scope of his employment, in the sense in which that phrase is used for the purpose of determining the employer's liability to third persons, is, strictly, not the same question as the question whether an injury received by an employee at a given moment in given circumstances was an injury received in the course of his employment for the purposes of applying the *Workmen's Compensation Act*. Nevertheless, judicial reasoning in respect of the latter class of questions may be, and in the circumstances of this case is, valuable and illuminating.

In our opinion, the question we have to consider is whether or not Hinton was on his master's business at the moment of the accident.

He had gone to the lecture on his master's invitation and, at least to some extent, for his master's benefit. The area of his business was some miles away and he had to return there in order to resume his work, but his home was also in the area of his business. It was a place of residence of his own choice, not that of his master. After leaving the meeting his day's work was done; he was free to do as he pleased and free to go home without any further control or direction from his master as to the route, mode of transportation or otherwise. His only obligation was to be at work in New Westminster the next morning at 8.30 a.m.

Under these circumstances, we cannot hold that Hinton was under any control of his masters so as to render them liable for his negligence and would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *W. H. Campbell.*

Solicitor for the respondent: *W. S. Lane.*

STRATHEARN BOYD THOMSON (DEFENDANT) ..... APPELLANT;

AND

LEON LAMBERT AND MARY LAMBERT (PLAINTIFFS) ..... RESPONDENTS.

1937
* Nov. 9.
1938
* Mar. 25.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Libel—Publications—Action for damages against managing editor of newspaper—Previous judgments against others for damages for the same libel—Question as to right to maintain present action—Question whether present defendant and defendants in previous actions were joint tortfeasors—Remedies open in previous action.

Appellant (defendant) was managing editor of a weekly newspaper published in Toronto, Ontario. An issue of its western edition contained a libel on respondents (plaintiffs). The Imperial News Co. Ltd. (hereinafter called the I.N. Co.) was the sole distributor for Manitoba of said western edition, and distributed copies to retail newsdealers, who in turn sold to the public. Respondents sued the I.N. Co. in Manitoba and recovered judgment for damages for the libel. They also sued in Manitoba a number of retail newsdealers, one of which suits went to judgment and the others were settled by payments. Respondents then sued in Ontario the appellant and one L. (the general distributor) for damages for the alleged publication of the libel to the I.N. Co. and to S. (its manager) and other of its employees, in sending in bundles the issue containing the libel to the I.N. Co. At the trial, respondents were non-suited on the ground that the defendants were joint tortfeasors with those against whom judgment had been recovered in Manitoba and therefore respondents were precluded from recovering in the present action; but the Court of Appeal for Ontario ([1937] O.R. 341) held that the publication by defendants to the I.N. Co. and its employees complained of in the present action constituted a separate tort for which defendants were liable and that it was an entirely different cause of action from those sued on in the Manitoba courts, and gave judgment in favour of the present respondents, and directed a new trial, limited to assessment of damages. On appeal to this Court:

Held (Kerwin J. dissenting): The appeal should be allowed and the action dismissed as against appellant.

Per Duff C.J. (who also agreed in substance with the reasoning of Cannon, Crocket and Davis JJ. as applied to the facts of this case): The I.N. Co. received delivery of the newspapers pursuant to its agreement with the publishers and was a party directly concerned in the shipping of the papers to itself, in the receipt of them by its employees, in the distribution to the newsdealers and in the latters' sales to their customers. It was engaged along with the publishers and appellant and L. in a joint commercial enterprise, the publication and distribution and ultimate sale of the newspapers. The aim of the whole enterprise was the purchase of the paper by the public; the shipments to the I.N. Co. were only one step in carrying this out. Publication to it, if there was such, consisted in the incidental publication to

*PRESENT:—Duff C.J. and Cannon, Crocket, Davis and Kerwin JJ.

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its servants as the paper passed through their hands on its way to the public through the newsdealers. It was a participant jointly with appellant and others in the shipment to itself, in the distribution to newsdealers and in the sale to the public. This was really, in said action against it, the plaintiffs' case on the pleadings and the questions put in issue in that action. The I.N. Co. was liable, and jointly liable, for every publication ensuing upon its act—the joint act of itself and appellant and others—in causing to be brought the newspaper to itself for distribution. A cause of action arising out of the delivery to the newsdealers in carrying out the business so jointly engaged in could not be substantially separated from the cause of action alleged in the present action, which, therefore, was one in respect of which the I.N. Co. was liable at suit of the plaintiffs. It would be an abuse of substantial justice to permit plaintiffs to proceed against the I.N. Co. in another action in respect of the publication now sued upon; and, since that company was jointly liable with appellant and others for that publication, proceedings against appellant must also fail.

Per Cannon, Crocket and Davis JJ.: There was a complete remedy for respondents in the court in which the action against the I.N. Co. was started. Respondents should not be permitted to go on suing one person after another *ad infinitum* where a complete remedy was available in one action. (*Williams* v. *Hunt,* [1905] 1 K.B. 512, at 514, *Macdougall* v. *Knight,* 25 Q.B.D. 1, at 10, and others cases, cited). The jurisdiction to dismiss such an action as the present one exists as part of the inherent power of the court over its own process.

Per Kerwin J. (dissenting): While appellant was responsible for the publications effected by the defendants in the Manitoba actions, there was no connection between the acts of those defendants and the acts of appellant. The publication set forth in the present action occurred without any of those defendants taking part in it. The pleading here avers a cause of action different from any set forth in the Manitoba actions, and evidence was led by respondents to substantiate the allegation. Therefore the judgments and settlements in Manitoba are not bars to the present action. (*The Koursk,* [1924] P. 140, particularly at 151, 157, 159-160; *Brunsden* v. *Humphrey,* 14 Q.B.D. 141; *Bulmer Rayon Co. Ltd.* v. *Freshwater,* [1933] A.C. 661, cited). The fact that the paper was sent to the I.N. Co. and received by certain of its employees who opened and read it, was sufficient to establish the allegation of publication by appellant to the "I.N. Co. and/or [its] employees." In the circumstances of this case the respondents, residents of Manitoba, should not be held to have been obliged to join appellant, a resident of Ontario, as a defendant in any of the Manitoba actions and add a claim against him based on an entirely different cause of action, at the risk (in failing to do so) of ascertaining, when they bring an action on such separate cause of action in the jurisdiction where appellant resides, that their rights have been lost. This point (last mentioned) was not raised at trial and presumably was not argued before the Court of Appeal.

APPEAL by the defendant Thomson from the judgment of the Court of Appeal for Ontario (1).

(1) [1937] O.R. 341; [1937] 2 D.L.R. 662.

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The respondents, who reside in Winnipeg, sued the appellant, as managing editor, and another defendant (Lichtman) as distributor, of a newspaper called *Hush*, published weekly in Toronto, for damages for libel by reason of a certain article contained in an issue of the western edition of said newspaper. The Imperial News Company, Limited, hereinafter mentioned, was the sole distributor for Manitoba of said western edition, and distributed copies to retail newsdealers in Manitoba (and also to some in Saskatchewan and Alberta), who in turn sold to the public. The respondents had sued the Imperial News Company, Limited, in Manitoba and recovered judgment against it for damages for the libel. They also had sued in Manitoba a number of retail newsdealers, one of which suits went to judgment, and others were settled by payments. Respondents then brought the present action in Ontario. They alleged in paragraph 10 of the statement of claim:—

10. The said defendants published the said article directly to the Imperial News Company Limited, which company is a wholesale vendor of newspapers throughout Western Canada, and to the servants and/or employees of the said Imperial News Company Limited * * * The said defendants further delivered the said article to the above mentioned company and persons well knowing and intending that the above mentioned company and persons would and should re-deliver the said article to several hundred retail dealers, and well knowing and intending that such retail dealers would and should publish the said article to their individual customers. The natural and ordinary result of so delivering the said article was the re-delivery and sale of the said article. The said Imperial News Company Limited and/or its servants and/or employees did in fact re-deliver the said article to several hundred retail dealers and the said retail dealers did in fact sell and publish the said article to many thousand individuals * * *

At the trial, before McFarland J. and a jury, the trial Judge at the close of the plaintiffs' case gave effect to the defendants' motion for a non-suit and dismissed the action with costs, on the ground that the defendants in this action were joint tortfeasors with the defendants against whom judgments had been recovered in the Manitoba courts, and were therefore precluded from recovering in the present action.

On appeal by the plaintiffs (the present respondents), the Court of Appeal for Ontario gave judgment in their favour and directed a new trial limited to the assessment of damages (1). The following extracts from the reasons

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of Rowell, C.J.O., indicate the ground for the decision of that Court as to the cause of action against the present appellant:—

> An examination of these records [in the actions in Manitoba] shows that in none of the actions was any claim made for publication by the defendants to the Imperial News Company Limited, and therefore the publication complained of in paragraph 10 of the plaintiffs' statement of claim is not the same publication as is complained of in any of the other actions.
>
> Counsel for the defendants contend that the defendants in the case at bar, the Imperial News Company Limited, and the other defendants sued in Manitoba, were all joint tortfeasors, and that as the plaintiffs have chosen to sue certain of these joint tortfeasors and take judgment against them, they cannot now sue the defendants.
>
> * * *
>
> It is clear that the defendants in this action were joint tortfeasors with the Imperial News Company Limited in respect of the publication complained of in the action against the said company, and the plaintiffs, having sued and recovered judgment against the said company, cannot now claim damages against the defendants in respect of such publication. It is also clear that the defendants were joint tortfeasors with the Imperial News Company Limited and the United Cigar Stores Ltd. in respect of the publication complained of in that action [an action against the United Cigar Stores Ltd., in which the publication complained of was the sale by it of copies of the newspaper to individual customers], and that action having been settled, the plaintiffs cannot now claim damages from the defendants in respect of such publication. This principle applies to all other claims made and disposed of by action, or otherwise settled in the province of Manitoba or elsewhere.
>
> The plaintiffs, however, contend that the publication by the defendants to the Imperial News Company Limited and its employees, complained of in paragraph 10 of the statement of claim in the present action, constitutes a separate tort for which the defendants are liable, and that it is an entirely different cause of action from those sued on in the Manitoba courts.
>
> I am of the opinion that the plaintiffs' contention is correct. Neither the Imperial News Company Limited nor any of the other parties sued in Manitoba is a party to the publication now complained of, and they are not joint tortfeasors with the defendants in respect of such publication. I am, therefore, of the opinion that the learned trial Judge was in error in non-suiting the plaintiffs, and that they are entitled to have the issue raised by paragraph 10 of their statement of claim tried.

Special leave to appeal to the Supreme Court of Canada was granted to the present appellant by the Court of Appeal for Ontario (1).

By the judgment of this Court, now reported, the appeal was allowed and the action dismissed as against the appellant with costs throughout. Kerwin J. dissented.

R. H. Greer K.C. and *J. R. Cartwright K.C.* for the appellant.

J. M. Bullen K.C. and *R. M. Fowler* for the respondents.

(1) [1937] 2 D.L.R. 673.

THE CHIEF JUSTICE.—This appeal arises out of an action for damages for libel against the appellant and his co-defendant Lichtman who are respectively described in the proceedings as the managing editor and the distributor of a newspaper called *Hush* which, it is shewn and admitted by everybody including the appellant, is (and has in Manitoba and elsewhere the reputation of being) a journal whose principal rôle is the publication of items of scandal, frequently *prima facie* libellous,—the appellant himself asseverating that the publication of these items is in the interests of public morality.

The particulars of the libel, which was a peculiarly gross one, do not really concern us. At the material times, the paper was published weekly by the National Publishing Co., Ltd., of which the appellant says, in his examination for discovery that was put in evidence by the respondents, "It is my company." Lichtman was the general distributor,—on what particular footing it does not appear. There is no evidence that he was, in point of law, the agent either of the appellant or of the publishing company.

There were two editions, a western and an eastern edition. The whole of the printing of both editions apparently "went to" Lichtman as general distributor. As the libel appeared only in the western edition we are concerned with that edition alone.

The Imperial News Company at Winnipeg (of whom we shall speak as the Winnipeg distributors) were the sole distributors for Manitoba under an agreement with the publishers.

Lichtman shipped each week part of the issue destined for distribution in Winnipeg and its vicinity (greater Winnipeg) to the Winnipeg distributors direct and the residue for that province he shipped on behalf of the distributors to their retailer customers in the country, that is to say, outside of greater Winnipeg. The distributors settled with Lichtman, and the country retailers who received their shipments from Lichtman direct settled with the distributors, the unsold copies being returned or accounted for. We are solely concerned in this appeal with newspapers shipped by Lichtman to the distributors direct in Winnipeg.

In respect of the same libel, the respondents had brought actions and obtained judgments against the Winnipeg dis-

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tributors and against certain of their customers in Manitoba; and at the trial, a non-suit was granted on the ground that, by reason of these judgments, the respondents were precluded from recovering from the defendants in respect of the publications upon which the present action is based and which were established at the trial.

I have had the advantage of reading and considering the judgment of Mr. Justice Davis and I agree with his conclusion and, in substance, with his reasoning as applied to the facts of this case; but there is a point of view from which the case before us may be regarded which I think it is not unimportant should be explained. From that point of view, it is essential to consider with some care the pleadings in the former action, the facts established in the record now before us, as well as what occurred at the trial and in the Court of Appeal.

Paragraph 10 of the statement of claim is in these words:—

10. The said defendants published the said article directly to the Imperial News Company Limited, which company is a wholesale vendor of newspapers throughout Western Canada, and to the servants and/or employees of the said Imperial News Company Limited, namely, among others, R. J. Palmer, R. Halliley, M. McIntyre and W. J. Sinnot. The said defendants further delivered the said article to the above mentioned company and persons well knowing and intending that the above mentioned company and persons would and should re-deliver the said article to several hundred retail dealers, and well knowing and intending that such retail dealers would and should publish the said article to their individual customers. The natural and ordinary result of so delivering the said article was the re-delivery and sale of the said article. The said Imperial News Company Limited and/or its servants and/or employees did in fact re-deliver the said article to several hundred retail dealers and the said retail dealers did in fact sell and publish the said article to many thousand individuals throughout Ontario, Western Canada and British Columbia.

At the trial, counsel for the respondents principally relied upon the publication or publications alleged in the first sentence of this paragraph. It was contended that the respondents had proved publication of the libel to the Winnipeg distributors and to certain employees of the distributors and that this was a distinct publication in respect of which their right to recover was not affected by the judgment in the earlier proceedings because neither the Winnipeg distributors nor their employees could be held liable in respect of such publication. This, I repeat, was the main position upon which counsel for the plaintiffs at the trial

rested as sustaining their right to sue, notwithstanding the previous judgments. Over and over again this is emphasized; for example:—

I do not think I can add anything other than to repeat that we are suing for something that could not have been the subject of a claim against the Imperial News Company. You cannot sue the recipient of a libel. We have a distinct publication here from the defendants to the Imperial News Company and that is a distinct publication from the publication from the Imperial News Company to the retailers. As Gatley says, they are separate libels, and give a separate cause of action.

The point is that the publication with which the action is concerned is a publication in respect of which the Imperial News Company could not have been sued. It seems to be clear from the judgments delivered in the Court of Appeal that this was the ground upon which the respondents' appeal to that court was based and upon which, as regards the appellant, the Court proceeded in granting a new trial. The learned Chief Justice of Ontario said:—

The plaintiffs, however, contend that the publication by the defendants to the Imperial News Company, Limited, and its employees, complained of in paragraph 10 of the statement of claim in the present action, constitutes a *separate tort* for which the defendants are liable, and that it is an entirely different cause of action *from those sued on in the Manitoba courts.*

I am of the opinion that the plaintiffs' contention is correct. Neither the Imperial News Company, Limited, nor any of the other parties sued in Manitoba *is a party to the publication now complained of, and they are not joint tortfeasors with the defendants in respect of such publication.* I am, therefore, of the opinion that the learned trial judge was in error in non-suiting the plaintiffs, and that they are entitled to have the issue raised by paragraph 10 of their statement of claim tried.

The learned Chief Justice then proceeds to discuss paragraph 9, but only as affecting the respondents' right to recover as against Lichtman. On this appeal we need not consider that, as Lichtman does not appeal.

In this Court the respondents took a broader ground and contended as follows:—

It is submitted further, that the defendants are liable for the publication of the libel alleged in paragraph 10 of the statement of claim by individual news vendors in Manitoba, Saskatchewan and Alberta, who purchased copies of the issue of *Hush* dated December 17, 1931, from the Imperial News Company Limited, except in so far as such publications were the subject of claim in any actions in Manitoba against individual retail news vendors. The cause of action for such publications is not barred by the Manitoba actions.

No doubt (as respects news vendors in Manitoba) evidence was given in support of this claim at the trial and, no doubt also, it was put forth at the trial as a sort of

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addendum to the principal claim as already stated. It seems clear that the Court of Appeal did not regard this claim as open to the respondents as a separate claim. The learned Chief Justice of Ontario in his reasons for judgment treats the respondents' case against the appellant as resting solely upon a separate publication to Imperial News Company and their employees.

The respondents further contended in this Court that they are entitled to recover damages against the appellant in respect of publication by Lichtman to vendors having no connection with the Imperial News Company. This will be discussed later. At the trial, there was no suggestion of any right to recover in respect of any cause of action not set forth in paragraph 10 of the statement of claim, which is strictly limited to a claim in respect of newspapers delivered to Imperial News Company; nor does this argument appear to have been advanced in the Court of Appeal, although the learned Chief Justice of Ontario held the respondents were entitled to advance such a claim as against the defendant Lichtman under paragraph 9.

Before proceeding further, it is important to recall the relations between the publishers, the appellant and the Imperial News Company. The appellant was the owner, in the language of business, of the company publishing the newspaper, as well as the managing editor. With the publishers, the Winnipeg distributors had an agreement, in operation since 1930, under which they, as wholesalers, were the sole distributors in Manitoba, of the newspaper. They received weekly shipments from Lichtman, the general distributor, pursuant to this agreement and, in turn, sold to news vendors in greater Winnipeg, while Lichtman, on their behalf, shipped the newspapers direct to vendors in other places in the province. The publishers, the appellant and Lichtman were engaged in a joint commercial enterprise, the publication and distribution and ultimate sale of the newspaper. All their activities were designed for the sale of the newspaper to the public and the condition and aim of the whole enterprise was the purchase of the paper by the public. The shipments to the Winnipeg distributors were only one step in carrying out this business.

The Winnipeg distributors, on the other hand, received delivery of newspapers from Lichtman pursuant to the agreement with the publishers and were parties directly concerned in the shipping of the papers to them, in the receipt of them by their employees, and in the distribution to the news vendors and in the sale of the papers to their customers.

Thomson, as managing editor, and Lichtman, as general distributor, knowing, as they did, the character of the paper, were responsible for the publication of any libel it might contain to the public as well as for any incidental publication of the libel which might occur in the ordinary course in the passage of the newspaper through the regular channels of distribution from the printer to the ultimate purchaser from the news vendor.

As regards the Winnipeg distributors, the plaintiffs in their statement of claim in their action against that company (paragraph 10) allege that

> the defendant [the Imperial News Company] caused to be brought in to the city of Winnipeg many thousands of copies of the said publication, dated and designated "Vol. 4, No. 50, Toronto, December 17th, 1931," and thereupon on the 18th day of December, A.D. 1931, falsely and maliciously and with gross negligence and utterly careless and reckless as to the truth or falsehood of the article hereinafter set forth, published, sold and distributed many thousands of said copies to several scores of retail news vendors in the cities of Winnipeg and St. Boniface, and the municipalities adjacent thereto.

These newspapers, which the Imperial News Company "caused to be brought" to themselves in Winnipeg and which they sold and distributed amongst the retail news vendors of greater Winnipeg, were brought to Winnipeg and distributed pursuant to the arrangement and with the object already mentioned; and pursuant also to an established course of business that had been proceeding for at least a year when the publication occurred which is complained of in this action. The Winnipeg distributors, it is admitted, were fully aware of the character of the paper, that it contained items *prima facie* libellous, and it was not the practice to take any measures to verify the facts stated. They were, in a word, participants jointly with the publishers and with the appellant and Lichtman in the shipments to themselves, in the distribution to the news vendors and in the sale to the public. They were, consequently, responsible for any publication which ensued in

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the ordinary course from their co-operation in this enterprise; in having the papers delivered to themselves as well as in the further distribution of them. They were, of course, (apart from their participation in the enterprise as a whole) in view of their knowledge, responsible for every publication of the libel to their employees as well as to others occurring in the ordinary course after these papers came into their possession. And, of course, since such publication was the direct result of the co-operative acts of the publishers, the appellant and themselves, they were responsible jointly with the appellant.

It is necessary to consider now with a little more particularity the pleadings in the respondents' action against the Imperial News Company. By the statement of claim it is alleged that the defendants in that action have been for several years the sole and exclusive wholesale agent and wholesale vendor for Ontario, Quebec, Manitoba and Western Canada for a publication called *Hush;* and that, as such wholesale agent and vendor, they have distributed and published weekly for over two years hundreds of thousands of copies of *Hush* each week, selling them to a large number of retail news vendors; that the defendants well knew that *Hush* was likely to contain grossly defamatory matter and that it was the duty of the defendants to take great care in verifying the truthfulness of the "personal news and statements" therein contained; that

the defendant caused to be brought in to the city of Winnipeg many thousands of copies of the said publication, dated and designated "Vol. 4, No. 50, Toronto, December 17th, 1931," and thereupon on the 18th day of December, A.D. 1931, falsely and maliciously and with gross negligence and utterly careless and reckless as to the truth or falsehood of the article hereinafter set forth, published, sold and distributed many thousands of said copies to several scores of retail news vendors in the cities of Winnipeg and St. Boniface, and the municipalities adjacent thereto.

* * *

12. The said article was falsely, maliciously, recklessly, carelessly, shamelessly and wantonly published as aforesaid of and concerning the plaintiffs by the defendant, who was callously indifferent and reckless as to whether said article was true or not, and who took no care or caution as to whether said article was true or not.

By their defence the Imperial News Company denied all these allegations (par. 1) and alleged as follows:—

5. In the alternative, and by way of defence to the whole of the plaintiffs' claim, the defendant says that it is a wholesale bookseller and news vendor carrying on business as such on a very extensive scale in the province of Manitoba, and in many other cities throughout the

Dominion of Canada. The defendant's servants in the course of their employment in the defendant's service received the newspaper containing the words complained of in the amended statement of claim from the owners and publishers thereof, the said National Publishing Company Limited, 52 McCaul street, Toronto, as referred to in paragraph 6 of the amended statement of claim and it was thereupon sold by the said defendant *in the ordinary course of the defendant's business* and *without any knowledge of its contents including the libel complained of innocently and without intent to defame. Neither the defendant nor any of its servants or agents knew at the time when they sold the said newspaper that it contained, or was likely to contain, any libel on the plaintiffs, or either of them.* It was not by negligence on the part of the defendant or any of its servants or agents that they did not know that there was any libel in the said newspaper nor did the defendant nor any of its servants or agents know that said newspaper was of such a character that it was likely to contain any libellous matter, nor ought the defendant or any of its servants or agents to have known it, wherefore the defendant says that it never published the said libel.

6. In the alternative, and by way of defence to the whole of the plaintiffs' claim, the defendant says that if it sold any copies of the newspaper containing the libel complained of, which is not admitted but denied, it did so without negligence on the part of itself or any of its servants or agents and in the ordinary course of its business as a wholesale news vendor handling and distributing many hundreds of different newspapers and periodicals. The *defendant did not know and had no ground for suspecting that the newspaper complained of was likely to contain libellous matter.*

Immediately upon receiving notice from the plaintiffs that the said newspaper in question contained the matter complained of the defendant withdrew the said newspaper from sale. Under the circumstances above set out the defendant contends that it did not publish the said libel.

* * *

8. In the further alternative, and by way of defence to the whole of the plaintiffs' claim, the defendant alleges that it was innocent of any knowledge of the libel contained in the newspaper complained of, that there was nothing in the said newspaper or the circumstances under which it came to the defendant or was sold by it which ought to have led the defendant to suppose that it contained the libel and that when the said newspaper was disseminated by the defendant it was not by any negligence on the part of the defendant that it did not know that the said paper contained a libel, wherefore the defendant says that it did not publish the said libel.

The respondents' allegations of fact having been denied by the defendant Imperial News Company, it was not only material, but necessary, in support of those allegations to prove the course of business as between the publishers and the appellant on the one hand and the defendants in that action on the other. In support of the allegation that the defendants had "caused to be brought" the issue of the 17th of December to them at Winnipeg to be distributed by them, it would be material to present to the jury the history of the relations between the Toronto

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people and the Winnipeg people, including the agreement by which the defendants had been for more than a year prior to the publication of the libel the sole and exclusive distributors of the newspaper for Manitoba and the nature of the arrangements, as indicating that the profits of all would depend upon the volume of purchases by the public.

The defence by its allegations, which were put in issue by the respondents, of ignorance of the general character of the paper, of ignorance in particular of the presence of the libel in the issue of December 17th, and of innocence generally, made it not only material for the respondents, as plaintiffs, but most important for their case, to establish the fact proved in the present litigation that actual knowledge of the presence of the libel in that issue had been gained by employees of the Winnipeg distributors, including Sinnott, who was the general manager as well as the statutory attorney, in course of the distribution of the paper. Moreover, it was part of the respondents' case against the defendants that they continued the publication of the libel after the presence of it had come to Sinnott's knowledge. In these circumstances, it is proper to presume that evidence of Sinnott's knowledge was put before the jury in that action. It will be observed also that the respondents' case presented on these pleadings was that the defendants, in their capacity as the Winnipeg distributors, pursuant to the established course of business between them and the publishers of the newspaper, "caused to be brought" to themselves in Winnipeg the copies destined for distribution among the news vendors in Winnipeg, that they did this with full knowledge of the character of the newspaper and that they sold and distributed thousands of copies of it to news vendors. It is perfectly true they allege that the libel was published to the news vendors, but they allege also that, with full knowledge of the character of the paper, the defendants, in their character as the Winnipeg distributors, sold and delivered many thousands of copies to such news vendors; and the defendants, having denied their knowledge of the presence of the libel, and this denial having been put in issue by the plaintiffs, the case, taken as a whole as presented to the jury, was not merely a publication of the libel to the news vendors, it was the sale and delivery to

some scores of news vendors of many thousands of copies of the newspaper with full knowledge of its character and with knowledge of the presence of the libel in it.

Paragraph 10 of the statement of claim in this action alleges publication to the distributors and their servants, but the libel could only be published to the distributors in the strict sense by being brought to the knowledge of somebody whose knowledge was theirs. No doubt Sinnott, who was the attorney for the Company in Manitoba, stood in such a relation to the distributors that his knowledge was their knowledge and in that sense there was publication to the distributors; but the wrongful act was publication to Sinnott; and in respect of that the publishers and the appellant became joint tortfeasors for the reasons which sufficiently appear from what has already been said.

If publication to Sinnott constituted in any relevant sense publication to the Imperial News Company, there are not two separate publications. They are one and the same fact and, in respect of publication to Sinnott, the distributors were responsible for all the damages. If the respondents cannot maintain an action for the publication to Sinnott they are not helped, I think, by describing the same fact as publication to the Imperial News Company.

The parties must be taken to have contemplated the ordinary course of business. The bundles received by the Winnipeg distributors in Winnipeg would be opened and, to employ the phrase used by the witnesses, "parcelled out" for distribution to the retail news vendors. In course of this operation, the contents of the paper would naturally become known to servants of the company and for that, and for all other similar incidental publications, as well as for the ultimate publication to the public, all parties were jointly responsible. If the whole consignment to the Winnipeg distributors had been destroyed before any copy saw the light of day, there would, of course, have been no publication in respect of that consignment; but the proper conclusion from the facts proved is that the papers were distributed and reached the public in the ordinary course as expected and intended. I am unable, therefore, with respect, to agree with the Court of Appeal that the cause of action alleged in paragraph 10 is not one in respect of which the Imperial News Company

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were liable at the suit of the respondent. They were liable for every publication ensuing upon their act, which was the joint act of themselves and the publishers and the appellant in bringing the newspapers to themselves at Winnipeg, and jointly liable; and this applies to every act of delivery and publication alleged in paragraph 10.

Paragraph 10, in addition to the allegation of publication of the libel to the Imperial News Company and their servants, alleges delivery of it to them with knowledge and intention that it would be redelivered to retail news vendors and by them published to their customers and that it was so published. As already observed, the Chief Justice of Ontario, in his reasons delivered on behalf of the majority of the Court, implies that a separate and distinct cause of action founded on these allegations is not open to the respondents; and it should be stated that the evidence is that a consignment of the issue of December 17th containing the article was "caused to be brought" to them at Winnipeg by the Imperial News Company, as the exclusive distributors in Winnipeg, pursuant to previous arrangements with the publishers, the appellant and an established course of business; and that, pursuant to those arrangements and that course of business, this consignment was distributed to the news vendor customers and by them sold to the public; unsold copies being returned. Publication to the Imperial News Company, if there was such, consisted in the incidental publication to the servants of that company as the paper passed through their hands on its way to the public through the news vendors. That is the case established at the trial and no refinement of pleading can give it a different character. I agree with the majority of the Court of Appeal that no separate cause of action is available in respect of any publications resulting from the sale and delivery of the newspapers by the Imperial News Company to the news vendors for the reasons I am about to mention.

The respondents' case in their action against the Imperial News Company having been such as has already been stated, and the Imperial News Company having been jointly responsible with the appellant and the publishers for bringing into Winnipeg and having in their possession there thousands of copies of the issue of Decem-

ber 17th containing the libel complained of and for distribution and delivery of those copies with knowledge of the general character of the publication and of the presence of the libel to their customers, the news vendors, the facts which must be presumed to have been established in that case (since they were not only material to the plaintiffs' case but necessary to enable the plaintiffs to succeed in the issues presented upon the pleadings) constituted a sufficient foundation for recovery by the respondents of damages in respect of all publications which followed in the normal course as the direct or ordinarily incidental result of all those acts which they did in co-operation with the publishers and with the appellant. In these circumstances, I cannot think the respondents would have been permitted to proceed with a second action against the Imperial News Company to recover damages for the publication alleged in paragraph 10 although that paragraph, as we have seen, alleges publication and delivery in respect of which that company would have been jointly liable with the publishers and the appellant.

The parties were jointly concerned in a common enterprise, beginning with the bringing of the newspapers to Winnipeg and ending with the sale of them to the public. All these publications were involved in the execution of the business in which they were jointly engaged. I do not think that a cause of action arising out of the delivery of the papers to the news vendors in carrying out that business can be substantially separated from the cause of action alleged in paragraph 10.

The analogy between the delivery of a consignment of newspapers to the Imperial News Company for distribution among news vendors, or of a parcel of newspapers to a news vendor, and the delivery of an article by an author to an editor, is a wholly false one. The editor exercises an independent judgment determined by the character of the article. We are here in the presence of a wholly different situation, where a consignment of newspapers is dealt with as a commercial commodity and not otherwise. The analogy might be closer if a case could be adduced in which there was an arrangement between a writer of scurrilous articles and a publisher by which the publisher became the sole and exclusive publisher and

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distributor of such articles; but we have been referred to no such case.

It would, in my opinion, be an abuse of substantial justice to permit the respondents to proceed against the Imperial News Company in another action in respect of the publication now sued upon. And since the Imperial News Company were jointly liable with the publishers and the appellant for these publications, it follows, I think, that proceedings against the appellant must also fail.

As to the contention that the respondents are entitled to recover as against the appellant under paragraph 9 as amended in accordance with the judgment of the Court of Appeal. First of all, it seems to me clear that the learned Chief Justice of Ontario had no intention of authorizing an amendment except for the purpose of enabling the respondents to advance a claim against the defendant Lichtman, with whom we are not concerned on this appeal. Second, the amendment is only incidental to the judgment ordering a new trial on the ground that, at the trial and under the pleadings as they stood, the plaintiffs had established a cause of action against the defendants. As that judgment is to be reversed as respects the appellant, the ancillary order cannot affect him. The Court of Appeal had no intention of ordering a new trial solely for the purpose of enabling the plaintiffs to recover on a fresh cause of action.

The Court of Appeal acted upon a rule of practice, the effect of which appears to be that, when a defendant obtains in the case of a trial with a jury a judgment which is in effect a judgment of nonsuit, the defendant must abide by the evidence given as if it were the only evidence available. Under that rule I should have thought the plaintiff must be similarly bound, and, on the new trial for the assessment of damages alone, I cannot quite understand how under such a rule the plaintiff could justly be permitted to advance a wholly new cause of action not put forward at the first trial and not open to him on the pleadings. The limitation, I should have thought, must bind both the plaintiff and defendant.

However that may be, I desire to say that I express no opinion on the question whether such a rule of practice could properly prevail against a statutory enactment re-

quiring (in the absence of consent to the contrary) actions for libel to be tried by a jury. The observations of Lord Esher in *Attorney-General* v. *Emerson* (1) are not without pertinency.

As to whether this question could be debated in this Court, the rule was laid down by the Court thirty years ago in *Lamb* v. *Kincaid* (2) in these words:—

> A court of appeal * * * should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.

The distinction is a familiar one between failure to take a point and failure to adduce all the arguments in support of a point when taken, even when it is only foreshadowed. Among the authorities in which this distinction is noticed, the judgment of Lord Bramwell in *Borrowman* v. *Free* (3), cited in *Lamb* v. *Kincaid* (2), may be referred to.

I have treated the question of the effect of the evidence in determining the existence or non-existence of a cause of action as a question of fact for the Court of Appeal under the rule there followed; as the Court of Appeal itself did.

The judgment of Cannon, Crocket and Davis JJ. was delivered by

DAVIS J.—The appellant was the managing editor of *Hush,* a weekly newspaper published in Toronto by a joint stock company, The National Publishing Company, Limited, in two editions, one for Ontario and eastern Canada and the other for Manitoba and western Canada. The western edition of December 17th, 1931, contained a false defamatory statement of the respondents (husband and wife) who resided at St. Boniface, in the province of Manitoba. It was a case of mistaken identity, but, none the less, a reckless and cruel libel against two perfectly innocent persons.

Liability for libel does not depend on the intention of the defamer; but on the fact of defamation.

(1) (1889) 24 Q.B.D. 56, at 58. (2) (1907) 38 Can. S.C.R. 516, at 539.
(3) 48 L.J. Q.B. 65, at 68.

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as said by Russell, L.J., (as he then was) in *Cassidy* v. *Daily Mirror Newspapers Ltd.* (1).

Samuel Lichtman of Toronto, who was one of the defendants in this action, was the general distributor of the western edition and the Imperial News Company, Limited, of Winnipeg, was the sole distributor for Manitoba and also distributed copies to retail news dealers in Saskatchewan and Alberta. That company distributed about 11,000 copies of the issue of December 17th, 1931, to some 350 or 400 retail news dealers who in turn sold to the public.

The respondents commenced an action in the Manitoba courts against the Imperial News Company, Limited, for damages for the libel and carried the action down to judgment. While the evidence in that case is not before us or the addresses to the jury or the Judge's charge, it is not unreasonable to assume that the case was developed at the trial at least as widely as set up in the pleadings, which were filed as an exhibit in this action. The following extracts are taken from the statement of claim in that action:

3. * * * The plaintiff, Leon Lambert, * * * is widely known and has a large circle of friends and acquaintances throughout Manitoba, British Columbia, Alberta and Ontario, and is particularly well known in the city of Winnipeg, which adjoins the said city of St. Boniface, and in the said city of St. Boniface.

4. * * * The plaintiff, Mary Lambert, has a large number of friends and acquaintances throughout Western Canada and is also well known in the city of Toronto, in the province of Ontario, where a number of her relatives reside.

6. The defendant is and has been for several years the sole and exclusive wholesale agent and wholesale vendor for Ontario, Quebec, Manitoba and Western Canada for a publication called *Hush*, * * * issued every Thursday by the National Publishing Company, Limited, 52 McCaul street, Toronto. As such wholesale agents and vendors the defendant distributes and publishes and has distributed and published weekly, for over two years, hundreds of thousands of copies of said *Hush* each week, selling them to a large number of retail news vendors throughout all the principal cities of Canada, particularly in Montreal, Toronto, Winnipeg and Vancouver.

10. Under the conditions and circumstances set forth in paragraphs 5 to 9, both inclusive, next preceding, the defendant caused to be brought in to the city of Winnipeg many thousands of copies of the said publication, dated and designated "Vol. 4, No. 50, Toronto, December 17th, 1931," and thereupon on the 18th day of December, A.D. 1931, falsely and maliciously and with gross negligence and utterly careless and reckless as to the truth or falsehood of the article hereinafter set forth, published, sold and distributed many thousands of said copies to several

(1) [1929] 2 K.B. 331, at 354.

scores of retail news vendors in the cities of Winnipeg and St. Boniface, and the municipalities adjacent thereto, the names of many of which retail news vendors the plaintiffs are ready, willing and able to furnish to the defendant on request, three of said retail news vendors being United Cigar Stores Ltd., Western News Agency Limited and Service Drug Store.

24. In consequence of the said article and the words and language thereof and the publication thereof by the defendant as aforesaid the plaintiffs and each of them have been greatly injured in character and reputation and have been brought into public scandal, hatred, contempt, ridicule and odium.

25. Each of the plaintiffs therefore by reason of the matters set forth claims damages to the extent of $10,000.

The jury found for the respondents and awarded to each of them $1,500 damages. These amounts, together with costs taxed and allowed at $508.05, were duly paid.

Shortly after the institution of that action, the respondents commenced a second action in Manitoba against United Cigar Stores, Limited, in respect of the sales of the paper in the several stores of that company. The claim was set out in somewhat similar language to that in the first action. This case was settled by payment by the defendant to the respondents of $2,000 damages and costs of $700.

A third action was instituted in Manitoba by the respondents against the Roberts Drug Store, Limited, and Arthur John Roberts in respect of the sales of the paper in their stores. This action was taken to trial and the respondents obtained a judgment for $100 and $50 respectively, but, because of a larger payment into court with the defence and the disposition of costs, no actual recovery resulted.

The respondents commenced ten or twelve further actions in Manitoba against different store proprietors or news agencies and subsequently made settlements and gave releases on payment of sums running from $25 to $200 each, apparently depending on what the traffic would bear. When the husband respondent was asked how many actions he had brought altogether, he said:—

twelve or thirteen, something like that. * * * I can't tell exactly, there is so many. * * * I can't tell to-day. It was my lawyer, I didn't bother with it.

The respondents then came into Ontario and brought to trial in May, 1936, this action which they had commenced in Ontario by a writ issued in March, 1932. The basis of this action was what was regarded as a sort of residuum

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from the litigation in the West, treating the sending of the western edition (of the particular date in question) in bundles by the publishing company, or its distributor, Lichtman, from Toronto to the said Imperial News Company, Limited, in Winnipeg, as a separate and independent cause of action in respect of which an additional amount of damages could be recovered over and above the recoveries that had been made in the several western actions. There is no evidence that anyone within Ontario saw the article. The basis of the claim, as put in the respondents' factum, is that the article was published

> to the Imperial News Company Limited of Winnipeg and to William James Sinnott, the manager of that company, and to various employees of that company including one Richard Halliley.

The action was originally brought against the publishing company as well as against the appellant Thomson and Samuel Lichtman. For some reason the action, before the delivery of the statement of claim, was formally discontinued by the respondents against the publishing company. At the trial the respondents were non-suited upon the ground that the defendants Thomson and Lichtman had been joint tortfeasors with the parties who had been sued in Manitoba. Upon appeal, the Court of Appeal for Ontario gave judgment against the two defendants Thomson and Lichtman and directed a new trial limited to the assessment of damages. Lichtman did not appeal, but Thomson did.

I would allow the appeal of Thomson upon the ground that there was a complete remedy for the respondents in the court in which the first action was started. Collins, M.R. (with whom Stirling, L.J., concurred) in *Williams* v. *Hunt* (1), said:—

> Where proceedings have been started, it is an abuse of the process of the court to divide the remedy where there is a complete remedy in the court in which the suit was first started.

It may be observed that in a very recent case in England, *Marchant* v. *Ford and others* (2), the plaintiff brought an action for libel against the defendant Ford, the author of a novel which the plaintiff alleged was a libel upon him, and in the same action he joined as defendants the printers and the publishers of the novel and also the printers of an illustrated advertising wrapper in which the book was sold.

(1) [1905] 1 K.B. 512 at 514. (2) [1936] 2 All E.R. 1510.

In *Barber* v. *Pidgen* (1), it was said that each publication of the same slander constituted a separate cause of action, but that was said in relation to the argument that the jury's verdict was not a valid one because separate damages were not awarded in respect of each publication complained of in the statement of claim; but, the jury having been asked, without objection, to give one verdict in respect of all the occasions on which the defamatory words were spoken, the defendants were disentitled to take the point that the jury should have been asked for a separate award of damages in respect of each publication.

No one would deny the respondents their remedy to repair the injury done to their rights of reputation by the publication of false and defamatory statements concerning them. But, as Maugham, L.J., (as he then was) recently said in the Court of Appeal in *Ley* v. *Hamilton* (2):—

> It would, indeed, be an ill day for the public and the courts if a libel action came to be looked upon in the light of a gold-digging operation.

The respondents should not be permitted to go on suing one person after another *ad infinitum* where a complete remedy was available in one action. The law is well employed when it puts an end to just such actions as this.

Fry, L.J., in *Macdougall* v. *Knight* (3) said:—

> The injustice of allowing a litigant to select one portion of a libel as the ground for one action and another as the ground for a second action, and so on indefinitely, is obvious. The whole publication would be before the jury in each case, and it would be quite impossible for the jury in each case to separate the damages due to the particular part of the libel relied on in that case from the damages arising from other parts of the libel. I think, therefore, that a plea of *res judicata* would succeed, and that we are bound to stay the action. Suppose, however, this to be otherwise, still, in such a case, I do not hesitate to say that such successive actions in respect of the same libel would be an abuse of the process of the court, and so, *quâcunque viâ*, the application should succeed, and the action be stayed.

In the United States the law appears to be the same, that successive actions for the same libel would be an abuse of the process of the court. *Galligan* v. *Sun Printing & Publishing Ass'n.* (4).

In *Brunsden* v. *Humphrey* (5), Lord Justice Bowen referred to what Lord Coke had said in a note to *Ferrer's* case (6):

(1) [1937] 1 K.B. 664.
(2) (1934) 151 L.T. Rep. 360, at 374.
(3) (1890) 25 Q.B.D. 1, at 10.
(4) (1898) 54 N.Y. Supp. 471.
(5) (1884) 14 Q.B.D. 141.
(6) 6 Coke, 9a.

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It has been well said, *interest republicae ut sit finis litium,* otherwise great oppression might be done under colour and pretence of law. The jurisdiction to dismiss such an action as this exists as part of the inherent power of the court over its own process.

It is contended that, as the question of libel or no libel is for a jury, the court cannot, except by consent of the parties, determine that question. But the defamatory matter complained of in this action is the same article in the same issue of the same newspaper that formed the basis of the Manitoba actions. The question of libel or no libel went to the jury in at least the first of those actions, that against Imperial News Company, Limited, above mentioned. But there was never any real question that there had not been a libel; it was sought to be excused upon the ground of a mistaken identity and a retraction.

The appeal should be allowed and the judgment at the trial dismissing the action against the appellant should be restored, with costs to the appellant throughout.

KERWIN J. (dissenting).—At the trial of this action for damages for libel brought by the respondents against Thomson as editor and Lichtman as distributor of a weekly newspaper known as *Hush,* a motion for nonsuit was made at the close of the plaintiffs' case by counsel for each defendant and was granted.

The Court of Appeal for Ontario allowed the plaintiffs' appeal and ordered a new trial, confined to the question of damages against the defendants, with liberty to the plaintiffs to amend paragraph 9 of their statement of claim, which paragraph contained an averment against Lichtman only. The defendant, Thomson, now appeals to this Court.

The libel complained of appeared in the issue of *Hush* dated December 17th, 1931, and the respondents secured judgments or settlements in certain actions in the courts of Manitoba for damages for libel based upon the same article in the same issue. The appellant contends that he was a joint tortfeasor with the defendants in the Manitoba actions, and it was upon this ground that the nonsuit was granted.

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In the first action brought by the respondents in Manitoba, the defendant was Imperial News Company, Limited, and the publication complained of consisted of the sale and distribution of the newspaper by the defendant to various retail news dealers in Winnipeg and adjoining territory. Judgment was entered for each respondent for $1,500 damages and costs, which were paid. In the second action, the respondents sued United Cigar Stores, Limited, and the publication there alleged was the sale by the defendant to members of the public. The action was settled by the payment of $2,000 and $700 costs, and a release was given to the defendant. The defendant in the third action in Manitoba was Roberts Drug Stores, Limited, and the publication alleged was the sale of the newspaper by the defendant to members of the public. It appears that because the defendant had paid into court more than the amount of damages awarded, the defendant's costs were set off against the damages. Various other actions were commenced by the respondents against other retail vendors, and these actions were settled or abandoned.

In the present litigation, the respondents, by their statement of claim, allege publication by appellant to "Imperial News Company Limited * * * and to the servants and/or employees of the said Imperial News Company Limited"; and that is the only publication alleged against appellant. The distinction in fact between a publication *by* Imperial News Company, Limited, or retail news vendors and a publication by the appellant *to* Imperial News Company, Limited, and the servants and/or employees of that company, is obvious, but it is argued that that distinction cannot avail in an action based on a libel in a newspaper. In such a case, appellant contends, there can be in law but one publication, since, so far as the appearance of the libel in the newspaper is concerned, the writer of it, the editor, the printer, the distributor, and the retail vendors are all engaged in the common purpose of producing an article and distributing it to the public.

The fallacy in that argument is that it overlooks the foundation of the action for damages for libel. The material part of the cause of action is not the writing but the publication of the libel, and for the definition of

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"publication" the words of Lord Esher in *Pullman et al.* v. *Hill and Co.* (1) have always been relied on:—

> The making known the defamatory matter after it has been written to some person other than the person of whom it is written.

If one suppose a case where two people collaborate to write a libelous statement and go together, and deliver it, to a third person,—that might be taken to be the combined, the joint action, of the two so as to give the libelled party an action for one publication only. But there may be distinct publications of the same libel by two individuals and for each publication the aggrieved party has a separate cause of action against each individual. The question then remains, was the appellant a joint tortfeasor with the defendants in the Manitoba actions?

The difficulty of defining the expression "joint tortfeasors" is shown in the judgments in *The Koursk* (2). That was an admiralty case, but the common law as to what constituted a joint tortfeasor was considered, and the prior decisions wherein the point is referred to are set out and examined and they need not here be repeated. At page 151 Lord Justice Bankes states the result to be:—

> That in order to constitute a joint tort there must be some connection between the act of the one alleged tortfeasor and that of the other.

At page 157 Lord Justice Scrutton concludes:—

> To make the tort, you want a wrongful act causing damage; and to make the tort the same cause of action, both elements must be the same.

And at pages 159-160 Lord Justice Sargant puts it thus:—

> There must be a concurrence in the act or acts causing damage, not merely a coincidence of separate acts which by their conjoined effect cause damage.

Applying these principles to the present case, it is evident that with reference to this newspaper the appellant was responsible for the publications effected by the defendants in the Manitoba actions, but there was no connection between the acts of those defendants and the acts of the appellant. The publication set forth in this action occurred without any of those defendants taking part in it. The pleading here avers a cause of action different from any set forth in the proceedings in the Manitoba courts, and evidence was led by the respondents to substantiate the allegation. This being so, the judgments and settlements in Manitoba are not bars to the present action.

(1) [1891] 1 Q.B. 524, at 527. (2) [1924] P. 140.

Brunsden v. *Humphrey* (1); *Bulmer Rayon Company Limited* v. *Freshwater* (2).

It was objected that there can be no publication to Imperial News Company Limited, a corporation, but no difficulty is raised, in my opinion, by this objection, as the evidence discloses publication to employees of the corporation and it is merely a convenient method of alleging publication, when a letter is addressed to a corporation or, as in the case at bar, a newspaper is sent to it, and opened and read by its employees. Nor is there any substance in the contention that, what was proved being a publication in Manitoba, it is necessarily a publication *by* the company to its own employees. The receipt of the paper by the company is proved by the receipt of it by the company's employees. There was no evidence, it is true, of any publication to Palmer and MacIntyre, two of the company's employees mentioned in paragraph 10 of the statement of claim, but evidence was given of the reading of the article complained of by, and hence the publication to, the other two employees mentioned, and that is all we are concerned with.

The only remaining point raised was that any publication proved occurred in Manitoba, and it was argued that there was no evidence that such a publication would be wrongful according to the laws of that province. It was long ago settled that in the absence of proof to the contrary, general foreign law is presumed to be the same as the common law of England. *Smith* v. *Gould* (3), and that principle has been applied in many cases in this Court.

If these conclusions were concurred in by the other members of the Court, they would be sufficient to confirm the order of the Court of Appeal setting aside the nonsuit as regards the appellant and directing a new trial, and it would then be necessary to consider the appellant's contention that the new trial should not be restricted, so far as he is concerned, to an assessment of damages. In view of the fact that I am alone in my views as to the main question, I refrain from investigating the subsidiary one.

However, I desire to express, with deference, my dissent from the opinion that, in the circumstances of this case,

(1) (1884) 14 Q.B.D. 141. (2) [1933] A.C. 661.
(3) (1842) 4 Moo. P.C. 21, at 26.

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the respondents, residents of Manitoba, were obliged to join the appellant, a resident of Ontario, as a defendant in any of the Manitoba actions and add a claim against him based on an entirely different cause of action, at the risk (in failing to do so) of ascertaining when they bring an action on such separate cause of action in the jurisdiction where the appellant does reside, that their rights have been lost. We have not had the advantage of the views of the Courts below on the point. A perusal of the record shows that it was not raised before the trial judge and from the fact that it is not mentioned in the judgments in the Court of Appeal, I presume that it was not argued there.

Appeal allowed with costs.

Solicitors for the appellant: *Smith, Rae, Greer & Cartwright.*

Solicitors for the respondents: *McMaster, Montgomery, Fleury & Co.*

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* Oct. 6, 7.
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* April 26.

THE GOVERNOR AND COMPANY OF ADVENTURERS OF ENGLAND TRADING INTO HUDSON'S BAY (DEFENDANT) ..... APPELLANT;

AND

CONRAD LESLIE WYRZYKOWSKI, AN INFANT UNDER THE AGE OF 21 YEARS, SUING BY HIS FATHER AND NEXT FRIEND, CASIMIR T. WYRZYKOWSKI, AND THE SAID CASIMIR T. WYRZYKOWSKI (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Negligence—Evidence—Injury to young child on escalator in defendant's store—Claim for damages—Alleged negligence in construction and maintenance of escalator—Questions for jury—Application of Elevator and Hoist Act, Man., 1919, c. 31—Admissibility in evidence of Government permits and Government inspector's report—Evidence Act, Man., 1933, c. 11, s. 31—Manitoba Factories Act, R.S.M., 1913, c. 70 (as amended), ss. 5 (a), 50A—Misdirection in charge to jury.

The action was for damages by reason of injuries suffered by the infant plaintiff, a boy four years of age, while descending (along with his mother and infant brother) in an escalator in defendant's depart-

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

mental store in Winnipeg, Manitoba. During the descent, the infant plaintiff fell and caught his hand between the side of the moving steps and the unmoving side wall of the escalator, the hand remaining caught while he was carried to the bottom of the escalator and until after the escalator was stopped. Plaintiffs alleged (*inter alia*) that the escalator was negligently constructed and maintained.

Evidence was given at the trial of inspections of the escalator by Government inspectors and of the granting of permits to operate it, under the provisions of the *Elevator and Hoist Act,* Man., 1919, c. 31, and regulations thereunder. Certain permits issued, with certificates thereon of re-inspection, were, against objection by plaintiffs' counsel, admitted in evidence. It was further shown that on the morning after the accident a government inspector had made a further inspection, and a statement in his report thereon, that "the escalator was in good order and in perfect control" was, against objection by plaintiffs' counsel, read to the jury. After the evidence at the trial had been completed, the judge and jury went to the store and took a view of the escalator both at rest and in operation. It was admitted that it was then in the same condition as at the time of the accident. Following the Judge's charge the jury brought in a verdict denying negligence in defendant, and the action was dismissed. On appeal, the Court of Appeal for Manitoba (44 Man. R. 256) ordered a new trial, on the ground that the permits, and the inspector's report after the accident, had been improperly admitted in evidence, and further that part of the Judge's charge to the jury amounted to misdirection in law. Defendant appealed to this Court.

Held (Crocket J. dissenting): The appeal should be dismissed.

Per curiam: The escalator was within the provisions of said *Elevator and Hoist Act,* and the said permits put in evidence were relevant and admissible.

Per Duff C.J., Davis, Kerwin and Hudson JJ.: The statement read to the jury from the inspector's report after the accident was not admissible; its use was not justified under s. 31 of the *Manitoba Evidence Act* (Man., 1933, c. 11). Further, there was misdirection in the trial Judge's charge to the jury, in that he did not sufficiently differentiate the defendant's duty to a small child from its duty towards an adult, and, on the contrary, led the jury to believe that there was some duty to take care incumbent upon the child.

Per Duff C.J. and Davis J.: Having regard to the facts that, upon the evidence and the law, the child was not a trespasser, he was permitted to use the escalator, and on account of his age was incapable of negligence, the trial Judge's charge to the jury beclouded the child's legal position. Further, there should have been put clearly and fully to the jury the question as to the defendant's reasonable care, in permitting the child to use the escalator, in permitting such use without an attendant of defendant being present and without some means of immediately stopping the escalator when the child fell and got his hand caught. The real problem in the case was not put to the jury.

Per Duff C.J.: On the issue raised by the allegation of negligence in construction and maintenance of the escalator, defendant was entitled to show compliance with the government regulations; and it is impossible to say that the facts of inspection and the issue of permits in the usual way had not some relevancy to that issue; further, even if the government department charged with the administration of the

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Elevator and Hoist Act had been in error in proceeding upon the footing that escalators are within the contemplation of the Act, nevertheless the facts of inspection and issue of permits by the department, in accordance with the duty imposed upon it under the departmental construction of the Act, would be equally relevant to the said issue. As to the inspector's report on inspection after the accident: It is plainly not a public document within Lord Blackburn's exposition in *Sturla* v. *Freccia*, 5 App. Cas. 623; and it is not made evidence by s. 31 of the *Manitoba Evidence Act*. No copy of entry should be received in evidence under s. 31 unless the proof offered identifies the book or other record in which the entry appears in such a manner as to enable the court to see clearly that the entry is one within the purview of the enactment. Further, only by a forced and non-natural reading of s. 31 can it be made to comprehend such a document as that in question; to admit the document as evidence of the facts of which it speaks, would give to s. 31 such a scope as to accomplish, in respect of documents on file in offices connected with any of the public services of the country, a fundamental change in the rules and principles of evidence. Enactments of the character of s. 31, which introduce a general exception to the rules of evidence, depriving the parties to legal proceedings of the usual safeguards in respect of evidence, should be strictly limited in their application to cases which are unmistakeably within their real intendment as well as within the literal meaning of the words employed.

Per Crocket J. (dissenting): From the evidence, the only possible ground upon which the jury could have attributed the child's injury to negligence charged against defendant was that the clearance between its moving steps and its stationary skirting was too wide. The crucial issue for decision, as the case was tried, was whether or not that clearance created a danger for young children of which defendant knew or ought to have known and have guarded against. The trial Judge made this issue clear to the jury. The jury having, after hearing the evidence, inspected the escalator and seen it in operation—it being then in the same condition as at the time of the accident—and having specifically found defendant not guilty of any negligence which caused the injury, it cannot be said that in the circumstances any substantial wrong or miscarriage was or could have been occasioned by any of the grounds complained of by respondents. Though, in view of the provisions of ss. 5 (*a*) and 50A of the *Manitoba Factories Act* (R.S.M., 1913, c. 70, as amended), the extract from the inspector's report made after the accident might not be competent, it could not be said that its admission could have occasioned any substantial wrong or miscarriage within the meaning of s. 28 (1) of the *Court of Appeal Act* (Man., 1933, c. 6). As to the complaint that the trial Judge did not sufficiently differentiate defendant's duty to a small child from its duty towards an adult, the trial Judge made it clear to the jury that no negligence on the part of the mother could affect the child's right of recovery, and nothing that he said in reference to the child's own conduct, independently of his mother, could have had any influence upon the jury in relation to the crucial issue for decision above mentioned. Therefore a new trial on the alleged ground of misdirection would be barred by said s. 28 (1) of the *Court of Appeal Act*. The judgment at trial should be restored.

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APPEAL by the defendant from the judgment of the Court of Appeal for Manitoba (1), which allowed the plaintiffs' appeal from and against the jury's verdict at trial (which denied negligence in defendant) and the judgment directed to be entered pursuant thereto by the trial Judge (Dysart J.), and set aside the said judgment at trial and ordered a new trial.

The action was to recover damages because of injuries suffered by the infant plaintiff (then four years and one month old) on April 19, 1933, when, along with his mother and a younger brother, he was on an escalator proceeding from the main floor to the basement floor of the defendant's departmental store in Winnipeg, Manitoba. The infant plaintiff fell and his hand got caught in the narrow space between the moving steps or treads of the escalator and its stationary side wall, and in that situation he was carried on down to the foot of the structure where the hand came in contact with the floor, and before he was released he was severely injured. The plaintiffs alleged that the injuries were caused as a result of the negligence of the defendant in (*inter alia*) the escalator being negligently constructed and maintained, and, as stated in the judgments now reported, the real question for decision at the trial, upon the pleadings and as the evidence developed, was whether or not the space between the wall and the moving part of the escalator created a danger for young children, of which danger the defendant either knew or ought to have known and have guarded against more effectively.

The grounds for the said judgment of the Court of Appeal (ordering a new trial) were, that there was improper admission in evidence of certain government permits, and certificates indorsed thereon, with respect to the escalator, based upon government inspection, and of a report made upon inspection by a government inspector on the morning of the next day after the day of the accident; and that there was misdirection in the trial Judge's charge to the jury.

By the judgment now reported, the appeal to this Court was dismissed with costs, Crocket J. dissenting.

T. N. Phelan K.C. and *B. O'Brien* for the appellant.

E. K. Williams K.C. for the respondent.

(1) 44 Man. R. 256; [1936] 2 W.W.R. 650; [1936] 4 D.L.R. 208.

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THE CHIEF JUSTICE.—I concur in the conclusion as well as in the reasoning of my brother Hudson as well as those of my brother Davis, but I desire to add one or two observations upon the points raised as to the admissibility of the permits and of the report of the inspector of the 24th of April, 1933.

First then, as to the admissibility of the permits. Agreeing, as I do, with the views of my brother Hudson, that the provisions of the statute include within their purview hoisting apparatus of the type (escalator) that was in question here, nevertheless, I think the admissibility of the permits does not necessarily depend upon that.

On the strictly limited issue raised by the statement of claim that the escalator was negligently constructed and maintained; in other words, that the appellants failed to use reasonable care in respect of the construction and maintenance of it, the defendants were entitled to show that they had complied with the Government Regulations. It is impossible to say that the facts of inspection and the issue of permits in the usual way had not some relevancy to that issue. It appears to me, however, that if the Government department charged with the administration of the statute had been in error in proceeding upon the footing that escalators are within the contemplation of the statute, nevertheless, the facts of inspection and issue of permits by the department, in accordance with the duty imposed upon it under the departmental construction of the statute, would be equally relevant to this issue of reasonable care.

Then, as to the inspector's report. It is plainly not a public document within Lord Blackburn's exposition in *Sturla* v. *Freccia* (1) and its admissibility could only be sustained on the ground that it is made evidence by section 31 of the *Manitoba Evidence Act* (Stats. of Man. 1933, ch. 11). By that statute a copy of any entry in any book, record, document or writing kept in any department of the Government of Canada or of the Province of Manitoba, or any other province of Canada, or in the office of any commission, board or other branch of the public service of Canada, or any such province, is receivable as evidence, not only of the entry itself, but

(1) (1880) 5 App. Cas. 623.

also of the matters, transactions and accounts therein recorded, upon condition of proof (*inter alia*) that, at the time of the making of the entry, such book, record, document or writing in which the entry was made was one of the ordinary books, documents or records kept in such department or office. It is quite obvious from inspection that the affidavit does not comply with the statutory requirements; and in my opinion no such copy should be received in evidence unless the proof offered identifies the book or other record in which the entry appears in such a manner as to enable the court to see clearly that the entry is one within the purview of the enactment.

Since there is to be a new trial, however, it is necessary to decide upon the admissibility of this copy of the inspector's report. It professes to give an account of the accident and of the condition of the escalator on the day on which the accident occurred. Obviously, the inspector is not speaking of matters within his own knowledge. The safeguards by which the law protects litigants in respect of evidence adduced in legal proceedings, the oath or its equivalent with the attendant criminal sanctions, the rule against hearsay evidence, the right of cross-examination, are all absent when a document such as this is admitted as evidence of the facts of which it speaks. Moreover, if this report is receivable as evidence of such facts under the statute, then the statute is obviously of such a scope as to accomplish, in respect of documents on file in offices connected with any of the public services of the country, a fundamental change in the rules and principles of evidence. A report by a provincial constable to his superior officer, for example, preserved on file in some office where such documents are kept would appear to be admissible as evidence of the facts stated in any action between private individuals. Even a letter on file written by some official giving an account of some matter of departmental interest could be adduced as proof of the statements it contained in any civil proceeding between any parties.

Such, in my opinion, is not the proper view of the effect of the statute. Only by a forced and non-natural reading can it be made to comprehend such documents. Enactments of this character which introduce a general exception to the rules of evidence, depriving the parties to legal

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proceedings of the usual safeguards in respect of evidence, should be strictly limited in their application to cases which are unmistakably within their real intendment as well as within the literal meaning of the words employed.

CROCKET J. (dissenting).—There is no doubt, I think, from the evidence that the only possible ground upon which the jury could have attributed the infant plaintiff's injury to the negligence of the defendant on account of the construction and maintenance of the escalator—the principal negligence charged in the action—was that the clearance between its moving steps or treads and its stationary skirting was too wide. No guard or attendant and no such stop buttons as were suggested, whereby the motion of the escalator might have been more speedily stopped, would have prevented the unfortunate accident to the child. The learned trial Judge pointed this out clearly and, I think, quite correctly to the jury.

The crucial issue for decision as the case was tried, therefore, was, as pointed out by my brother Hudson, whether or not the clearance between the skirting and the moving steps created a danger for young children, of which the defendant either knew or ought to have known and have guarded against. In my opinion, the learned trial Judge made this issue clear to the jury. The jury, after hearing the evidence, themselves inspected the escalator and saw it in operation. There seems to be no question but that at the time the jury inspected it the escalator was in precisely the same condition as at the time of the accident. A specific question having been left to the jury by the learned trial Judge as to whether the defendant was guilty of any negligence which caused the injury to the infant plaintiff, and the jury having answered it "not guilty," I am not at all satisfied, in such circumstances, that any substantial wrong or miscarriage was or could have been occasioned by any of the grounds complained of in behalf of the respondent.

I agree with my brother Hudson that the escalator in question falls within the provisions of the Manitoba *Elevator and Hoist Act,* and that the permits which were admitted in evidence in relation to its inspection under the provisions of that Act up to the time of the occurrence of the accident were relevant and admissible.

As to the extract from the report made by the government inspector after the occurrence of the accident, I am inclined to think that in view of the provisions of ss. 5 (*a*) and 50A of the *Manitoba Factories Act,* R.S.M., 1913, ch. 70 (as amended—see Consolidated Amendments, 1924), this report was not competent, but, as I have already indicated, I am not satisfied that its admission could have occasioned any substantial wrong or miscarriage within the meaning of s. 28 (1) of the Manitoba *Court of Appeal Act,* 1933, ch. 6. All the extract complained of stated was that the escalator was in good order and in perfect control, which the jury on their own examination and test apparently saw for themselves.

With regard to the complaint that the learned trial Judge did not sufficiently differentiate the defendant's duty to a small child from their duty towards an adult, it seems to me that His Lordship made it perfectly clear that no negligence on the part of the mother could affect the infant plaintiff's right of recovery, and that nothing that he said in reference to the infant's own conduct, independently of his mother, could have had any influence upon the jury in relation to the crucial issue as to whether the child's injuries were caused by any negligence on the part of the defendant in relation to the construction and maintenence of the escalator. For this reason I think that a new trial would be barred on the alleged ground of misdirection by the said s. 28 (1) of the *Court of Appeal Act.*

In my opinion, the finding of the jury is unexceptionable, and the learned trial Judge had no other recourse than to enter a verdict for the defendant on the finding or to dismiss the action.

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

DAVIS J.—I agree with the judgment of my brother Hudson, but I would add a few observations of my own upon the question of the sufficiency of the learned trial Judge's charge to the jury.

That the staircase was in good working condition was only one of the essential facts in issue. That being proved, the question was then whether or not the defendant company had exercised reasonable care in relation to the infant

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plaintiff. The child of four years of age was not a trespasser—that is important—but was permitted to use the moving stairs, made on the endless chain principle, to go from one floor of the building to another. Was that a reasonable thing for the defendant to permit? The child, on account of its age, was incapable of negligence on its part. That was the position of the child in the problem for the jury. Instead of so directing the jury, the trial Judge, I fear, beclouded the child's legal position by telling the jury:—

> The mother was not holding the child. The child was not holding on to the mother. Those appliances are expected even for adults to require a little steadying at times, so they have a moving rail that adults rest on and therefore steady themselves. But you cannot have a moving rail for infants too small to reach up to it, and a child probably ought to hold on to its mother's skirts or have been guided or supported by the mother.

And further in the charge:—

> Supposing this child had fallen forward and tumbled down the escalator, head over heels to the bottom, and bumped its head, would there have been any action? There could not be. A child is supposed to walk standing up going down stairs. If he had bumped his head on some projection which was necessary there, there could be no action.

The jury would undoubtedly be led to believe that there was some degree of care incumbent upon the child when, as a matter of law, there was none. It is clear to me that the position of the child was not put to the jury.

Then the position of the defendant as occupier of the premises, permitting a child of four years lawfully upon the premises to use the moving staircase, ought to have been put clearly and fully to the jury. What is a reasonable amount of care in one set of circumstances may not be so in another set of circumstances and reasonable care is the sole test of negligence. Professor Winfield in his new text-book on the Law of Torts (1937) says at pp. 581-582:—

> Very few people who enter a shop, ship, factory, house or vehicle, or who go upon appliances connected with them, like a lift or gangway, have or can have full knowledge or control of the possible dangers that lurk in them. They must trust themselves mainly to the occupier even when they exercise reasonable care on their own behalf. Modern civilization has greatly increased the risks they run. Indeed this accounts, to some extent, for the comparatively recent evolution of the law on this subject, although another equally important factor has been the inroad made by the development of the law of negligence on the older idea that an owner can do what he likes with his land so far as visitors to it are concerned. (cf. Bohlen, Studies in the Law of Torts (1926) 162-163.) Machinery and appliances which are the commonplace fittings

of modern dwelling-houses, to say nothing of factories and railways, were unknown little more than a century ago. The Common Law has rightly taken account of the increased perils which have resulted from this and has screwed the duty of the occupier to a proportionately higher pitch. The escalator was maintained and operated by the defendants upon the premises for the use of the public. What may be reasonably safe for an adult may not be reasonably safe for a child of four years. Was it a structure of such a kind that the occupiers reasonably permitted a little child to make use of it? That was a question for the jury. Should the defendants have had an attendant present? So far as an attendant is concerned, the jury might conclude that the presence of the mother with the child removed the storekeeper from such duty; on the other hand, the jury might recognize what must be a fact that many parents shopping in the big cities are not really responsible persons having regard to the protection even of their own little children. Should there have been some means capable of stopping the moving stairs when the child fell and got his little hand caught in the narrow space between the stairs and the wall? Did the defendants act reasonably in permitting the child to use this apparatus in the absence of some such safeguard for the child's protection? That is a real problem that should have been put squarely before the jury. The presence of the mother would have nothing to do with the absence of some automatic means to bring the moving structure to a sudden stop when such an accident occurs. The moving staircase was likened, during the argument, to an elevator, but an elevator is in charge of a competent person who can bring it to a stop in a moment. The serious injury to the child does not appear to have been due to the fact that his little hand got caught in the apparatus but to the fact that the child was thereafter carried on down the staircase to the foot of the structure where the hand came in contact with the floor, almost pulling the hand off the child. The crying of the child arrested the attention of those present but no one was there to stop the motion. Was that negligence on the part of the defendants to the little child? Or was that something beyond the field of reasonable care? Or was the accident the sort of accident that a storekeeper operating these moving stairs would not be expected reasonably

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to foresee as likely to happen to a little child? Was it the consequence of an extremely rare and obscure accident which the jury think a storekeeper cannot, in a business sense, be reasonably expected to anticipate? All those questions were matters for the jury to consider. The real problem in the case was not put to the jury.

Accordingly I would dismiss with costs the appeal from the judgment of the Court of Appeal that directed a new trial.

The judgment of Kerwin and Hudson JJ. was delivered by

HUDSON, J.—The infant plaintiff, a boy of four years of age, was seriously injured while descending in an escalator in the defendant's departmental store in Winnipeg. This action was brought for damages in respect of such injuries.

The statement of claim alleges:—

5. The defendant maintains in the said store and invites persons in the said store to use a moving staircase or escalator operated by electrical power and furnishing a means of proceeding from the main floor to the basement floor of the said store, which will hereinafter be referred to as "the escalator," and the said Wilhelmina Wyrzykowski with the infant plaintiff and her other infant son got on to the said escalator and were proceeding from the main floor to the basement when the said infant plaintiff on account of the construction and operation of said escalator fell or was knocked or thrown so that he fell on the platform or steps of the said escalator, which was so negligently constructed and maintained that his right hand and lower arm was caught between the side of the moving steps or treads or platform of the escalator and the unmoving side of the said escalator and/or caught in the machinery of the same and/or pulled into the said machinery where it was held and he was carried to the bottom of the said escalator with his said hand and arm so caught and held, and so remained until the said escalator was stopped and until the same was dismantled in part so as to release the hand and arm.

and sets out particulars of negligence.

The statement of defence denied all the charges of negligence and set up:—

16. The defendant says further that in the said escalator it maintains the most modern and up to date equipment obtainable, in perfect condition and regularly inspected, and that the same was in good working condition and order and is so constructed that it is impossible for the said escalator to jerk in its operation and to throw anyone off their balance, and that the defendant has thereby discharged its duty, if any, to the plaintiff or plaintiffs or anyone in charge of the infant plaintiff.

It was further alleged that the infant plaintiff was in charge of its mother, that she was familiar with the esca-

lator and the use thereof and herself responsible for his falling.

At the opening of the trial, the defendants were permitted to amend by setting up as a further defence that they had been authorized to operate the escalator under the provisions of the *Elevator and Hoist Act* (Manitoba), and that pursuant to such Act the same had been inspected from time to time and all requirements thereunder fulfilled.

The action was tried before Mr. Justice Dysart and a jury. Evidence was given of the accident and the injuries to the infant plaintiff, the character, condition and operation of the escalator, the inspection of same from time to time by employees of the defendants and by governmental inspectors under the provisions of the above Act. Some of the permits to operate were admitted in evidence, notwithstanding objections by the plaintiff's counsel. It was further shown that on the morning after the accident a government inspector had made a further inspection and report. Over objections by plaintiff's counsel, there was read to the jury a portion of this report as follows:—

> The escalator was in good order and in perfect control.

After the oral and documentary evidence had been completed, the trial Judge and jury went to the store and took a view of the escalator, both at rest and in operation. It was admitted that the escalator was then in the same condition as at the time of the accident.

Following the judge's charge to the jury, a verdict was brought in exonerating the company from any charge of negligence and, on this, judgment was entered for them.

From this judgment, the plaintiffs appealed to the Court of Appeal on the ground of improper admission of evidence and misdirection.

The Court of Appeal allowed the appeal and ordered a new trial, upon the ground that the report of the inspector and the permits had been improperly admitted, and, further, that a portion of the judge's charge to the jury amounted to misdirection in law.

The defendants now appeal to this Court on the ground that the documents referred to were properly admitted, that in any event they did not occasion any substantial wrong or miscarriage and that there was no misdirection.

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The respondents here relied on the reasons given by the Court of Appeal and further submitted that the charge to the jury, when read as a whole, did not present the real points of the respondents' case, that the learned trial Judge had misdirected the jury in regard to the negligence, if any, of the mother of the infant respondent, that he had wrongfully refused to charge the jury that the infant respondent was an invitee and that the appellant owed the highest duty to him, and that he had erred in refusing to direct the jury that the principle of *res ipsa loquitur* applied.

The *Court of Appeal Act*, 1933, ch. 6, sec. 28 (1), provides:—

> A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, or of the omission to take the verdict of the jury upon a question which the judge at the trial was not asked to leave to the jury, or of any omission or irregularity in the course of the trial, unless some substantial wrong or miscarriage has been thereby occasioned.

Dealing first with the admissibility of the documents, these consisted of: (1) a form of permit which read as follows:—

> IMPORTANT—Must be posted in elevator.
>
> Duplicates will be charged for.
>
> MANITOBA ELEVATOR PERMIT No. /1121 861
>
> In accordance with The Elevator and Hoist Act elevator located .....Hudson's Bay Company, ...Portage Avenue, ... Winnipeg, has been inspected and may be used until ..... December 1st, ... 1934, provided this permit is endorsed quarterly by an Inspector of the Bureau of Labor.
>
> I certify that re-inspection has been made and elevator passed. #2 Escalator
>
> | | | |
> |---|---|---|
> | Thos. Horn
Inspector | Feb. 3, 1934
Date | W. R. CLUBB,
Minister of Public Works |
> | Thos. Horn
Inspector | May 22, 1934
Date | Countersigned:
E. McGRATH |
> | Thos. Horn
Inspector | Oct. 13, 1934
Date | Secretary, Bureau of Labour |

Evidence was given that a similar form had been obtained in preceding years but had been lost; (2) an inspector's report relating to the same matter, the material part of which read:—

Dear Sir(s):

As a result of Inspection of your premises as above the following improvements are recommended. Please have effected and advise so that re-inspection may be made.

Remarks: ..... # 2 Escalator.....
..... Permit # 1121 .....
..... O.K. for renewal .....
..... of permit .....
Signature of Inspector.....Thos. Horn.....

The third document was a report made by the inspector as to a visit by him on the morning after the accident, only a portion of which was read to the jury. That portion was, after referring to the date:—

The escalator was in good order and in perfect control.

Thos. Horn, Inspector.

It was first objected by counsel for the respondents that the Manitoba *Elevator and Hoist Act* did not apply to the escalator in question. Section 2 of the Act provides for the appointment of a board, and section 3 provides that the Board shall have power to adopt rules and regulations respecting the construction, operation, maintenance and carrying capacity of elevators, hoists, dumb-waiters and all other hoisting appliances installed in buildings in Manitoba.

Although the word "escalator" is not specifically mentioned, it seems to me that it is an appliance of the character covered by this Act. The Act itself is part of a group of Acts such as *The Manitoba Factories Act, The Shops Regulation Act* and *The Public Buildings Act,* making general provision for the safety of persons rightly resorting to places where large numbers of the public are likely to be, and I think that, as such, the Act in question is entitled to a liberal construction. For this reason, in my opinion, the escalator in question does fall within the provisions of the Act, and it was competent for the Board to make regulations thereunder.

Pursuant to the provisions of the Act, the Board made regulations, Rule No. 3 being:—

No elevator * * * shall be operated until a certificate of permit therefor has been issued by the Bureau of Labor and operation may be continued only as long as such certificate of permit remains in force. * * *

Rule 15 provides:—

Before new elevators, escalators, or other hoisting apparatus are installed, or extensive alterations made, plans and detailed information shall be submitted to the Bureau of Labor.

The Rules also made general provision as to inspection and enforcement.

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The respondents, in their statement of claim, alleged that the escalator was negligently constructed and maintained. The defendants pleaded that the escalator had been subjected to governmental inspection and that authority had been duly given to operate the same.

Moreover, the fact that these permits had been granted was established by oral evidence without objection before the permits themselves were put in. In my opinion, these permits were relevant and admissible.

With regard to the third document, however, which is an extract from a report made as to a visit on the day after the accident, the situation is somewhat different. The inspection leading up to this report was not of a routine character but was doubtless made in consequence of the accident and the jury must have known this. The inspector who made the report was not available for cross-examination because of the provision in the *Manitoba Factories Act* applicable to this inspector, providing that such inspector shall during his tenure of office not be competent to give testimony in any civil case with regard to anything which he has seen or done, or with regard to any information he has obtained, opinion he has formed (*The Manitoba Factories Act,* R.S.M., 1913, chapter 70, as amended, sections 5 (*a*) and 50A). While section 31 of the *Manitoba Evidence Act* provides that a copy of any entry or statement in any book, record, etc., kept in any department of the Government, shall be received as evidence, etc., it does not justify the use of a report under the circumstances existing here and, in my opinion, neither report nor the extract therefrom read to the jury was admissible.

Before dealing with the question of misdirection in this case, it might be well to set out the general principles which should guide a judge in charging a jury, and reference may be made to two cases in the House of Lords. The first is *Jones* v. *Spencer* (1). Lord Herschell at p. 538:—

> My Lords: I am of the same opinion. I think that the hesitation of a court to set aside the verdict of a jury is very natural, and that it is expedient that verdicts of juries, when that is the tribunal to determine the question between the parties, should not be set aside, except where one is satisfied that there has been a miscarriage, because a verdict has been found that could not reasonably have been found if the attention

(1) (1897) 77 Law Times, 536.

of the jury had been directed to the whole of the facts of the case, and to the question in issue which they had to determine. But it seems to me to be a condition of any such rule that the question which had to be determined should have been so left to them that one is satisfied that it was before their minds, that their minds were applied to it, and that they did really on the determination of that question give their verdict. If we think the verdict wrong in this sense, that one would not have given the verdict one's self, still if one sees that the question was properly submitted to the jury, that is not enough ground for granting a new trial. But if one comes to the conclusion that the verdict is not one which one would have given, and is wrong in that sense, I think that one is perfectly justified in saying that there shall be a new trial if one sees that the real question that had to be determined was not so put before the jury as to reasonably satisfy the tribunal that has to determine the question whether there shall be a new trial or not that the mind of the jury was so applied to the question to be determined that they did determine the case upon the answer to that question.

In *Swadling* v. *Cooper* (1), Viscount Hailsham said:—

These plain principles have been discussed and elaborated in a long series of cases, but I do not think that those discussions have in any way qualified or lessened the authority of the earlier decisions. It is manifest that a full discussion of these cases and of the judgments delivered in them would be wholly inappropriate in a summing up and would inevitably tend to confuse and bewilder the jury. In a summing up it is essential that the law should be correctly and fully stated; but it is hardly of less importance that it should be stated in simple and plain terms so that a jury unskilled in the niceties of legal phraseology may appreciate the direction which is being given to them. Such direction should be adapted to the special circumstances of the case. It is not the whole law of negligence that needs exposition in every case, but only that part of it which is essential to a clear understanding of the issue which the jury has to determine. The question here is whether having regard to the facts of this case the law was sufficiently stated to the jury.

The general principles applicable to the issues in this case are fairly well settled, and in the case of *Indermaur* v. *Dames* (2), Mr. Justice Willes made what has become the classical statement:—

The common case is that of a customer in a shop: but it is obvious that this is only one of a class; for, whether the customer is actually chaffering at the time, or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know, such as a trap-door left open, unfenced, and unlighted * * * This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns himself. And, if a customer were, after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to protection during this accessory visit,

(1) [1931] A.C. 4, at 10. (2) (1866) 1 C.P. 274, at 287.

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though it might not be for the shopkeeper's benefit, as during the principal visit, which was. And if, instead of going himself, the customer were to send his servant, the servant would be entitled to the same consideration as the master.

The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied.

And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.

In the case of *T. Eaton Co.* v. *Sangster* (1), the principles above stated were held to apply to the case of a small child accompanying its mother in a departmental store.

It must be kept in mind further that a child of four years of age could not be held guilty of contributory negligence: *Gardner* v. *Grace* (2), and further, that if the mother in charge of the child is herself guilty of negligence this would provide no defence once it was established that there was negligence on the part of the defendants contributing to the accident—see *Oliver* v. *Birmingham and Midland Motor Omnibus Co. Ltd.* (3).

The real question for decision upon the pleadings here and as the evidence developed was whether or not the space between the wall and the moving part of the escalator created a danger for young children, of which danger the defendant either knew or ought to have known and have guarded against in some more effective way, as, for example, by a lower railing or some other device for the protection of such small children. The statements of the learned trial Judge bearing on this question here were as follows:—

The first aspect of that duty is, did the infant plaintiff in this case exercise reasonable care on its own part for its own safety? That applies of course generally to adults. Children are not expected to take and do not take the same degree of care, but I will touch upon that later.

(1) (1895) 24 S.C.R. 708. (2) (1858) 1 F. & F. 359.
(3) [1933] 1 K.B. 35.

Then later on:—

The mother was not holding the child. The child was not holding on to the mother. Those appliances are expected even for adults to require a little steadying at times, so they have a moving rail that adults rest on and therefore steady themselves. But you cannot have a moving rail for infants too small to reach up to it, and a child probably ought to hold on to its mother's skirts or have been guided or supported by the mother. While I do not say it is a fact, apparently the child, with very little physical provocation, fell, and it was of such an age that a little assistance might have been required there.

Further:—

The duty is on the storekeeper to keep his premises reasonably safe. What is "safe"? That step was safe for those who would stand on it. The stairway is safe for those who walk on it. Sleeping car berths are perfectly safe, but people fall out of them and sometimes injure themselves, and actions are brought as to why they are not better guarded. These things are measured by the use to which they are put. Supposing this child had fallen forward and tumbled down the escalator, head over heels to the bottom, and bumped its head, would there have been any action? There could not be. A child is supposed to walk standing up going down stairs. If he had bumped his head on some projection which was necessary there, there could be no action. Outside of the extra clearance and the insufficient skirting the thing was as safe as human ingenuity could make it.

* * *

I also want to refer to the child being attended by its mother and the possible effect upon an attendant at the stairway. You should not assume that the child is to be confined to the mother's conduct. Even though the mother was neglectful in her care of the child, that does not affect the right of the child. The child is not restricted by the want of due care on the part of its mother, but it has this effect, that the defendant or its attendant would not be expected to give the same degree of care or watchfulness of the child going down the escalator in the company of its mother that it would of a child going down alone.

This, I think, covers all the references to the fact of the special duty arising by reason of the tender years of the infant plaintiff. With respect, I am of the opinion that the learned judge did not sufficiently differentiate the defendants' duty to a small child from their duty towards an adult, and, on the contrary, led the jury to believe that there was some duty to take care incumbent upon the child.

It is with reluctance that I have felt that a new trial should be granted, because of the fact that the jury had made a personal inspection of the escalator at rest and in motion, and because the facts of the case were of such a character as to arouse the strongest sympathies of a jury in favour of the person against whom they finally felt obliged to decide.

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HUDSON'S BAY COMPANY v. WYRZYKOWSKI.

Hudson J.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Guy, Chappell, DuVal & McCrea.*

Solicitors for the respondents: *Aikins, Loftus & Company.*

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* Oct. 19, 20.
* Dec. 1.

ODESSA JARRY AND ALBERT JARRY (DEFENDANTS) ..... } APPELLANTS;

AND

GEORGES PELLETIER (PLAINTIFF) ..... RESPONDENT.

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

Master and servant—Automobile dealers—Sales agent—Motor car given possession to employee by owner for purpose of his work—Employee invested by employer with full discretion as to the use of the car—Sale by agent of a car not belonging to employer—Accident when employee driving employer's car during working hours for purpose of obtaining licence for car sold—Whether employee acted as agent and servant of the owners—Employer's liability—Art. 1054 C.C.

The appellants are automobile dealers in both new and second-hand cars, and, some time prior to the accident, employed by verbal contract one Beauchamp on commission as salesman. In order to facilitate the execution of his work, the appellants allowed Beauchamp to have possession of one of their cars, with full discretion as to its use, though the latter was to pay for the gas and oil. Some time prior to the date of the accident, Beauchamp caused an announcement to be inscribed in a newspaper advertising a motor car for sale, and, in answer to this, one Théberge communicated with Beauchamp. The latter tried to interest Théberge in the purchase of one of the cars belonging to his employers, the appellants, but Théberge refused to buy, expressing his desire to have a car from a private individual. Then Beauchamp remembered that one Désormeaux had a second-hand car for sale; and, after some negotiations, that car was sold through Beauchmap to Théberge. The morning following the sale Beauchamp drove Théberge in the appellants' car to the provincial licence bureau in order to obtain a licence for the operation of the car; and they were driving back to Désormeaux's house to put on the new plates on the car when the accident occurred. Beauchamp had to apply the brakes of the car to reduce its speed; the street was slippery, and this caused the car to skid up over the sidewalk and to strike the respondent, thus causing him serious injuries. The appellants' ground of appeal was that their employee at the time of the accident was not acting in the performance of the work for which he had been employed by them.

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* PRESENT:—Duff C.J. and Cannon, Crocket, Davis and Kerwin JJ.

Held that, according to the facts and the circumstances of the case, the appellants are liable. The appellants' car was, for the purposes of their business, entrusted by the appellants, owners of the car, to their employee Beauchamp as their servant; but the latter was invested with full discretion as to the use of it. In the exercise of that discretion, Beauchamp acted as agent and servant of the owners, the appellants. In other words, Beauchamp was in the exercise of his functions as servant.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Chase-Casgrain J., and maintaining the respondent's action in damages for the sum of $12,200.50 as a result of an automobile accident.

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

F. P. Brais K.C. and *A. J. Campbell* for the appellants.

M. Dugas K.C. and *H. Perrier K.C.* for the respondent.

The judgment of the Court was delivered by

CANNON J.—Les appelants se sont pourvus devant nous en appel d'un jugement de la Cour du Banc du Roi confirmant unanimement celui de la Cour Supérieure les condamnant à payer $12,200.50 à l'intimé, conjointement et solidairement avec leur co-défendeur Beauchamp. Ce dernier était à leur emploi et conduisait l'automobile lors de l'accident qui a causé les dommages. Il ne s'est pas pourvu en appel et—quant à lui—le jugement de la Cour Supérieure constitue chose jugée.

Mais les appelants ont prétendu qu'ils ne sont pas responsables de la faute de Beauchamp, vu qu'ils ne sont pas couverts par les termes de l'article 1054 du code civil qui détermine les cas où l'on est civilement responsable de la faute d'autrui. Le paragraphe qui nous concerne est le suivant:

> Les maîtres et commettants sont responsables du dommage causé par leurs domestiques et ouvriers, dans l'exécution des fonctions auxquelles ces derniers sont employés.

Dans *Moreau* v. *Labelle* (1), cette cour, par la voix de mon collègue l'honorable juge Rinfret, a revu toute la jurisprudence concernant cet article 1054 et en a expliqué

(1) [1933] S.C.R. 201.

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l'application. Inutile d'y revenir. Je me contenterai de citer ce que cette cour disait à la page 215:

> Un employé qui n'exécute pas les ordres de son maître ne cesse pas pour cela d'être son employé; mais il ne manque pas de cas où un simple préposé, investi d'un mandat spécial, qui n'exécute pas les ordres qu'il a reçus, cesse par le fait même d'être un préposé. Cela va de soi: les fonctions d'un préposé spécial sont beaucoup plus restreintes que les fonctions d'un employé régulier.

Notre juge-en-chef actuel, dans la cause de *The Governor and Company of Gentlemen Adventurers of England* v. *Vaillancourt* (1), en commentant cet article disait:

> I doubt myself if exposition could make the meaning of the language used in either text plainer than it is. *Le fait dommageable* must be something done in the execution of the servant's functions as servant or in the performance of his work as servant. If the thing done belongs to the kind of work which the servant is employed to perform or the class of things falling within *l'exécution des fonctions*, then by the plain words of the text responsibility rests upon the employer. Whether that is so or not in a particular case must, I think, always be in substance a question of fact.

Et à la page 417:

> But in substance the solution of the point involves nothing more than an accurate appreciation of the facts in their relation to the rule.

Tous les juges qui ont entendu cette cause, en appréciant les faits, ont conclu que l'accident avait été causé par Beauchamp dans l'exécution de ses fonctions comme employé des appelants. Il nous reste à étudier le dossier pour déterminer s'il y a, dans ces jugements des cours inférieures, erreur tellement évidente que nous devions intervenir pour mettre de côté ces opinions, bien qu'elles soient concordantes sur une question de fait.

Il nous faut donc définir exactement quelles étaient les fonctions de Beauchamp. Il est admis que Beauchamp était à l'emploi des appelants comme vendeur d'automobiles à commission et qu'au moment de l'accident il conduisait un char mis à sa disposition par les appelants comme nécessaire à l'exécution de son contrat d'engagement qui était verbal.

L'accident a eu lieu vers onze heures du matin, pendant ses heures de travail qui, d'ailleurs, n'étaient pas limitées mais laissées à sa discrétion. Etait-il, à ce moment, en possession légale de l'automobile? S'en servait-il avec l'autorisation du maître? ou s'en était-il emparé pour ses propres fins?

(1) [1923] S.C.R. 414, at 416.

On a beaucoup discuté devant nous le fait que, la veille de l'accident, Beauchamp s'est occupé de la vente à un nommé Théberge d'un automobile appartenant non pas aux appelants, mais à un nommé Désormeaux. Mais, comme le dit Beauchamp, au moment de l'accident, le char était vendu de la veille et il conduisait simplement Théberge chez Désormeaux pour poser les plaques que l'on venait de se procurer au bureau du gouvernement. A ce moment-là, la possession de l'automobile mis à sa disposition par ses maîtres était-elle illégale? Même en admettant qu'il s'agissait à ce moment-là de parfaire la vente de Désormeaux à Théberge, peut-on dire qu'il y avait prise de possession illégale pour ses propres fins?

Voici ce que nous révèle la preuve: Albert Hodge, gérant des appelants, qui a engagé Beauchamp, nous dit que Beauchamp avait droit d'avoir une automobile selon l'habitude:

On engage un homme, un vendeur, on lui fournit une automobile, parce qu'il ne peut pas vendre d'automobiles sans en avoir. Naturellement ils vont chercher les gens, surtout dans les chars usagés, pour donner des démonstrations. Il leur faut absolument un char pour être capable de vendre.

D. C'est un démonstrateur que vous leur mettez entre les mains?

R. Oui, je lui ai donné un char usagé parce qu'il s'occupait des usagés.

D. Est-ce que le char que vous leur donnez ils doivent le vendre, celui dont ils doivent se servir?

R. Dont ils doivent se servir et qu'ils doivent vendre.

* * *

D. Maintenant, quant à ces chars-là, quand ils étaient entre les mains des vendeurs, qui voyait aux réparations?

R. C'est nous autres, la maison.

D. Donniez-vous des instructions à vos vendeurs à ce sujet?

R. Absolument point. Un char ne devait pas sortir en mauvais ordre.

D. Pourquoi ces chars ne devaient-ils pas sortir en mauvais ordre?

R. Il y a plusieurs raisons. La première, c'est qu'un char doit être en bon ordre pour marcher et deuxièmement, c'est qu'un homme ne peut pas faire une vente d'un char avec un char en mauvais ordre. Sans cela ils perdent leurs prospects. Si un char sonne ou qu'il fait du bruit ou qu'il est en mauvais ordre, cela empêche la vente. C'est dommageable pour eux, les vendeurs.

Beauchamp était sous le contrôle des appelants et Hodge assemblait les vendeurs trois ou quatre fois par semaine pour leur donner des instructions et des recommandations:

D. Voulez-vous dire de quelle façon vous faites savoir vos désirs à ce sujet-là?

R. D'abord, moi, je fais des assemblées trois ou quatre fois par semaine, des assemblées de vendeurs ou d'agents, et souvent, très souvent, aux assemblées je recommendais aux hommes de toujours sortir un char en bon ordre, parce que cela devenait difficle de vendre un char en mauvais

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ordre. Je recommandais toujours de tenir un char propre et en bon ordre. Au garage ils avaient l'autorisation de réparer les chars. Aussitôt qu'un vendeur demandait une réparation, ils avaient l'ordre de le réparer.

D. Est-ce qu'il fallait une formalité particulière?

R. Non.

D. Avez-vous un établissement pour la réparation dans votre garage?

R. Ah oui.

D. Est-ce qu'il y a des ordres de donnés à cet établissement-là d'accepter les ordres des vendeurs?

R. Absolument.

D. Ces hommes qui travaillent pour vous, ces vendeurs, ils étaient engagés pour vendre, quoi?

R. Pour vendre de l'automobile.

D. Pour qui?

R. Pour Jarry & Frère.

D. Est-ce qu'ils avaient la permission de vendre à quelqu'un d'autre?

R. Non, pas en dehors de Jarry & Frère. Il y a Jarry & Frère et Jarry Automobile.

Et,

D. Maintenant, monsieur Hodge, vos vendeurs je comprends que vous leur confiez une automobile et qu'ils en font ce qu'ils veulent?

R. Oui. Bien, ils en font ce qu'ils veulent pour travailler.

D. Vous n'exercez aucun contrôle?

R. Ah bien, on ne peut pas les suivre, mais quand on s'aperçoit qu'ils font quelque chose de mal * * *

Par Me Philippe Brais C.R., avocat de Jarry & Frère:

D. Qu'est-ce que vous faites, alors?

R. On les avertit, et, s'ils ne font pas mieux on ôte le char.

Par Me Maurice Dugas C.R., avocat du demandeur:

D. Ce sont les vendeurs qui paient la gazoline?

R. Oui.

D. Alors, vous savez, comme question de fait, que vos vendeurs se servent des automobiles que vous mettez à leur disposition pour leurs affaires personnelles?

R. Bien, probablement, ils doivent, en faire au travers.

Henri Beauchamp:

D. Est-ce que la maison Jarry et Frère mettait ses automobiles à votre disposition pour faire de la sollicitation?

R. Ils me prêtaient la machine.

D. Etait-ce toujours la même machine que l'on vous prêtait?

R. Pas toujours. Cela dépendait des démonstrations que j'avais à faire.

D. Au moment de l'accident, quelle sorte d'automobile aviez-vous?

R. J'avais une petite Ford Coupé.

D. Etait-ce une automobile qui appartenait à Jarry et Frère?

R. C'était une automobile qui appartenait à Jarry et Frère.

* * *

D. L'automobile que vous aviez à ce moment-là est-ce que c'était une automobile que vous offriez en vente, est-ce que c'était une automobile que l'on offrait en vente? Comprenez-vous ce que je veux dire? Est-ce que c'était une automobile que vous essayiez de vendre ou si c'était une automobile dont vous vous serviez pour aller voir vos clients?

R. J'essayais à vendre celle-là en essayant à en vendre d'autres. S'ils ne voulaient pas de celle-là, j'essayais d'en vendre d'autres.

* * *

D. J'ai compris que vous étiez en possession de l'automobile que vous conduisiez au moment de l'accident depuis quelques jours.

R. Oui, j'étais en possession de la machine depuis quelque jours.

D. Vous avez dit aussi que vous n'aviez pas l'habitude de reporter l'automobile tous les soirs au garage ou sur le terrain de Jarry & Frère, mais qu'il vous arrivait de garder l'automobile à la porte de chez vous, c'est exact?

R. Je veux dire qu'il y des soirs que je la mettais sur le terrain, d'autres soirs je l'amenais chez moi. Des fois c'était sur le terrain, des fois chez nous.

D. Je suppose que tous les vendeurs d'automobiles avaient une automobile à leur disposition, j'entends les vendeurs de Jarry & Frère?

R. Oui.

D. Quand vous gardiez l'automobile comme cela chez vous, à la porte de chez vous, d'après ce que vous avez dit antérieurement, vous ne considériez pas que c'était une désobéissance aux ordres que vous aviez reçus?

R. Je ne la laissais pas à la porte chez nous, j'avais un garage.

D. Vous la gardiez dans un garage?

R. Dans un garage, oui.

D. Mais c'était permis, cela, vous aviez la permission de garder l'automobile chez vous comme cela la nuit?

R. Tous les vendeurs en partie gardaient leurs machines avec eux?

D. Et vous vous serviez de cette automobile-là pour vos affaires?

R. Bien, pour vendre de la machine.

Par la Cour:

D. Pour vendre de la machine?

R. Pour vendre la machine de Jarry, pour vendre les machines qui appartenaient à Jarry?

D. A part celle dans laquelle vous vous promeniez?

R. Celle-là, si je trouvais à la vendre je la vendais. Si j'arrivais à la porte de chez un client qui me disait: "Combien demandes-tu pour ce char-là?" Je lui offrais la machine que j'avais en mains. Si celle-là ne faisait pas son affaire, je le ramenais au terrain, j'essayais de lui en vendre un autre.

Par Me Maurice Dugas C.R., avocat du demandeur:

D. Quand vous aviez une course à faire, je comprends que vous n'étiez pas tenu de demander la permission à M. Hodge ou à M. Jarry?

R. Non. Moi, je partais avec mon char, j'allais voir les clients que j'avais à voir.

D. Sans demander de permission à personne?

R. Sans demander de permission à personne.

D. Le matin de l'accident vous êtes parti avec votre automobile et je comprends que vous êtes allé voir des clients ce jour-là?

R. Je me suis rendu chez M. Théberge à neuf heures et demie.

D. Avant cela vous êtes allé voir des clients, si vous vous rappelez bien la déclaration que vous avez faite sous serment?

R. Oui, quelques clients ce matin-là?

D. Et vous êtes parti à quelle heure de chez vous, à peu près?

R. Je suis parti de chez nous entre huit heures et huit heures et demie.

D. Et l'accident est arrivé à onze heures, je comprends?

R. Oui.

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Il appert aux extraits du témoignage de Hodge que ce dernier prétend avoir défendu aux vendeurs, et à Beauchamp en particulier, de vendre des automobiles autres que ceux des appelants. Le juge de première instance, sur ce point, n'a pas cru le témoignage de Hodge et en est venu à la conclusion qu'il n'y avait pas de prohibition à ce sujet. D'ailleurs, Beauchamp, interrogé sur ce point, dit qu'il n'en a jamais été question.

Mais même si cette défense avait été faite, il faudrait faire la distinction marquée par Lord Dunedin et citée par l'honorable juge Rinfret, dans la cause de *Moreau* v. *Labelle* (1). Le noble lord s'exprimait comme suit dans la cause de *Plump* v. *Cobden Flour Mills Company* (2):

There are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery and compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere.

Je crois, en présence de la preuve, que, vu la nature de son mandat, Beauchamp était en tout temps en possession légale de l'automobile mise à sa disposition par les appelants. Il pouvait s'en servir pour circuler pendant ses heures de travail; et rien ne l'empêchait de rendre service à un ami ou à un client en perspective, en le conduisant au bureau du gouvernement pour prendre sa licence, obtenir ses plaques et conduire ensuite cette personne pour poser les plaques sur l'automobile qu'elle aurait achetée. Il ne s'agit pas de l'abus de ses fonctions; mais il se servait de l'auto, cherchant à ce moment-là comme à tout autre instant, suivant le témoignage de Hodge, un acheteur possible de la voiture qu'il conduisait. Les appelants avaient engagé Beauchamp et les autres vendeurs pour parcourir, pratiquement jour et nuit, Montréal et ses environs pour démontrer les qualités des chars usagés que les appelants tenaient en bon état de réparations, afin de les faire voir, de les faire essayer et tâcher d'en disposer aux personnes qui, au cours de ces courses, pourraient s'y intéresser et devenir des clients ou des acheteurs en perspective.

Il est en preuve que Théberge s'était d'abord rendu chez Jarry dans l'intention d'acheter un de leurs chars. Il est aussi en preuve que Beauchamp s'est présenté chez Désormeaux comme l'agent de Jarry Frères.

(1) [1933] S.C.R. 201, at 211. (2) [1914] A.C. 62.

Je ne vois aucune raison de modifier en quoi que ce soit la décision des cours inférieures à l'effet que Beauchamp, lors de l'accident, était bel et bien le préposé des appelants, dont il conduisait l'automobile, dans l'exercice de ses fonctions. On ne peut dire qu'il s'en servait exclusivement pour ses propres fins; et, d'ailleurs, il semble évident que les appelants lui laissaient la discrétion la plus absolue quant à l'usage qu'il pouvait faire de l'automobile. Rien ne l'empêchait certainement de s'en servir pour ses besoins personnels. Si le maître donne au serviteur l'usage à son gré d'une chose, par exemple, d'une automobile, cet usage fait partie du louage des services au point que si le maître avait supprimé cette faveur, le serviteur pourrait se plaindre d'être privé des moyens de remplir son engagement (1). Le serviteur dans ces conditions se sert de la chose du maître en sa qualité et à titre de serviteur ou d'employé, et non pas d'emprunteur; et si, au cours de l'usage de la chose, le serviteur commet avec cette chose un délit, s'il cause des dommages, le propriétaire est responsable de ces dommages en tant que maître et patron. Dans l'espèce, le dommage a été causé par la chose et l'employé des appelants, maîtres et propriétaires, alors que Beauchamp, leur serviteur, se servait de cette chose avec leur consentement.

L'appel doit être renvoyé avec dépens.

Appeal dismissed with costs.

Solicitors for the appellants: *Brais & Campbell.*

Solicitors for the respondent: *David & Perrin.*

(1) (1931) Q.R. 69 S.C. 397, at 400.

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* Feb. 18, 21.
* April 26.

DAVID REESE DAVIS (DEFENDANT).....APPELLANT;

AND

ELLA W. AULD AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

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

Executors and Administrators—Action against administrator of deceased's estate for loss alleged to have been caused by failure to realize upon assets within reasonable time—Long delay, through settling amount of succession duties, between date of fiat for grant and actual issue, of letters of administration—Depreciation in value of assets—Liability of administrator.

The appeal was from the judgment of the Appellate Division of the Supreme Court of Alberta, [1937] 3 W.W.R. 368, which, by a majority, reversing the judgment of Ives J., held the defendant (the present appellant), to whom had been granted letters of administration of a deceased's estate, liable, in an action brought by certain of deceased's next of kin to recover for loss alleged to have been caused by defendant's failure to realize within a reasonable time upon assets of the estate.

The deceased died, intestate, on June 15, 1929. Defendant applied for letters of administration on November 28, 1929. The judge's fiat for issue of grant was made on January 30, 1930. A lengthy delay occurred in settling the amount of succession duties, and, in consequence (by reason of the Rules of Court and the *Succession Duties Act,* Alta.), letters of administration (which recited the date of grant as of January 30, 1930) were not issued until November 6, 1931. The case was dealt with throughout on the assumption that the loss complained of could not be said to have been attributable to acts or omissions of defendant after the last mentioned date.

Held, that defendant's appeal be allowed and the judgment at trial (dismissing the action) be restored.

Per Duff C.J., Davis and Hudson JJ.: The fiat for the issue of grant of administration did not constitute the grant; defendant did not become an administrator until the actual issue of letters of administration on November 6, 1931; and he was not chargeable as administrator for anything that occurred prior to that date. It was difficult to find any principle on which he could be charged with liability as a trustee prior to that date (moreover, it appeared that plaintiffs were aware of the situation; also under the *Judicature Act,* Alta., plaintiffs had a right to have a public administrator appointed if they so desired); at any rate, that issue was not open under the pleadings, nor was it a case in which a court of appeal should now order an amendment.

Duff C.J. further pointed out obstacles or difficulties which stood in the way of earlier realization, as going to show that the loss complained of was not due to any neglect of defendant. He agreed with the trial Judge's finding that, in all the circumstances, no lack of due diligence could be ascribed to defendant in respect of the delay in the payment of succession duties.

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

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Per Crocket and Kerwin JJ.: The plaintiffs' claim, as set forth in their pleadings and as developed at the trial, was against defendant as administrator and in no other capacity and on no other basis. Even assuming that the assets in question were vested in defendant by virtue of the fiat, he could not, in view of the terms of the *Succession Duties Act*, deal with those assets until the succession duties were arranged. There was (agreeing with the trial Judge's finding) no reason to attach any censure for the delay between the application for letters of administration on November 28, 1929, and the issue thereof on November 6, 1931.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Alberta (1), which, by a majority, reversing the judgment of Ives J. at trial, held that the plaintiffs were entitled to recover against the defendant for loss alleged to have been caused by defendant's failure to realize within a reasonable time upon assets of the estate in question.

The estate was that of John Davis, deceased, who died, intestate, on June 15, 1929, at Vegreville, in the Province of Alberta, which was his fixed place of abode at the time of his death. The defendant was a brother of the deceased. The deceased and defendant had large holdings in a grain company which they conducted, the defendant being the largest shareholder in the company. The chief assets of the deceased's estate, and about which the present litigation was mainly concerned, were 98 shares in the said company and a debt owing to deceased by that company.

Defendant applied for letters of administration to the said estate on November 28, 1929. The judge's fiat for issue of the grant was made on January 30, 1930. A lengthy delay occurred in settling the amount of succession duties, and, in consequence (by reason of the Rules of Court and the *Succession Duties Act*, Alta.), letters of administration (which recited the date of grant as of January 30, 1930) were not issued until November 6, 1931. In the meantime there had been a depreciation in the value of the estate's assets. The plaintiffs, who were entitled as next of kin to share in the estate, brought the action (which was begun in September, 1934) to recover for the loss, alleging that it was caused by defendant's failure to realize upon the assets of the estate within a reasonable time.

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The trial Judge, Ives J., dismissed the action. (His judgment provided for relieving defendant as administrator and appointing another administrator, if desired, owing to clash of interests).

On appeal, the Appellate Division of the Supreme Court of Alberta (McGillivray J.A. dissenting) (1) gave judgment for the plaintiffs, holding that defendant should be personally liable for the amount of the debt (from said company to deceased) at the time of deceased's death, with interest, (credit being given for the amounts paid on account), and that plaintiffs recover from him their share thereof, and that plaintiffs recover from defendant their share of the value of the 98 shares held by deceased in the said company, such value to be ascertained as of June 15, 1930, being one year after the deceased's death.

The defendant appealed to this Court. By the judgment now reported, the appeal was allowed and the judgment of the trial Judge restored, the respondents to pay to the appellant the costs of the appeals to the Appellate Division and to this Court.

C. H. Locke K.C. for the appellant.

G. D. Noble for the respondent.

THE CHIEF JUSTICE.—I agree with the conclusion as well as with the reasoning of my brother Hudson, but I desire to emphasize two findings of the learned trial Judge.

First, he found in fact, as I understand his judgment, that any attempt to collect the claim of the estate against the Company before the sale of the Company's assets in the summer of 1930 would have been defeated by the assertion of the prior claim of the Bank and, consequently, that no loss accrued to the estate in consequence of the alleged neglect of duty under this head. I should add that, in my view, the probability is very high that any such attempt would have precipitated a liquidation and, among other undesirable results, would have extinguished the Company's shares as an asset of the estate.

Second, the learned trial Judge, in effect, found that in all the circumstances no lack of due diligence could be ascribed to the appellant in respect of the delay in the payment of succession duties. I agree with this finding.

(1) [1937] 3 W.W.R. 368; [1937] 4 D.L.R. 439.

As regards the complaint respecting the failure to sell the shares, it should be remembered that the Company was a family company and it is altogether improbable, in view of rules 965 and 969 and section 15 of the *Succession Duties Act*, that any purchaser would have accepted a transfer of the shares before the issue of letters of administration. The circumstance that the *Succession Duties Act* was afterwards held to be *ultra vires* is really beside the point.

I have read with great care the very able judgment of the Chief Justice of Alberta, if I may without offence so describe it, but, with all the respect which every view of the Chief Justice commands, I have been forced to a different conclusion.

CROCKET J.—I am of opinion that this appeal should be allowed and the trial judgment restored with costs throughout for the reasons given by my brother Kerwin.

The judgment of Davis and Hudson JJ. was delivered by

HUDSON J.—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta (1) which, by a majority, reversed the judgment delivered at the trial by Mr. Justice Ives in the trial division of the Supreme Court.

The respondents are next of kin of the late John Davis, deceased, and as such are entitled to a one-half interest in his estate. They brought this action against the appellant, alleging in their statement of claim, that by letters of administration dated 30th January, 1930, and issued out of the District Court of the District of Edmonton, the defendant was appointed administrator of the estate and effects of John Davis, deceased, who died intestate on or about the 15th May [June], 1929, that they had repeatedly requested the defendant to realize on certain assets of the said estate but defendant had refused and neglected to do so, and that he had failed and neglected to take reasonable and proper measures to obtain possession of outstanding estate property and to realize on same,

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and that meanwhile, by reason of such failure, the assets had seriously depreciated in value and the estate had suffered heavy loss; further, that the appellant's personal interests were inconsistent and conflicted with his duty as administrator; and claimed an accounting and the removal of the appellant from his administration.

The appellant in his statement of defence, besides making denials of charges in the statement of claim, set up that the letters of administration were not issued to him until the 6th of November, 1931.

Subsequently to the commencement of the action, the appellant's accounts were passed by the proper court.

At the trial it was shown that the defendant had applied for letters of administration on the 28th of November, 1929, that on the 30th of January, 1930, the judge of the District Court had written on the application the words "Let administration issue as prayed" and signed the same, and that on the following day a letter was sent by the Acting Deputy Clerk of the Court to the defendant's solicitor in the following terms:

Re: Estate of John Davis, Deceased.

I beg to advise you that Fiat has been granted in this matter. I am now waiting for advice from the Collector of Succession Duties as to payment of his fees and when that arrives Letters will issue. The fees required by this Office will be $155 in addition to $2 each for any certified copies which you may require.

Following this, there was a lengthy delay in settling the amount of succession duties and these were not finally paid until the autumn of 1931, and the letters were not actually issued, i.e., delivered out as an operative instrument, until the 6th of November, 1931. When issued they recited:—

Be it known that on the 30th day of January, A.D. 1930, Letters of Administration of all and singular the property of John Davis, * * * were granted by the District Court of the District of Edmonton, * * * to David Reese Davis.

It was further proved that in the interval between the application for letters of administration and the actual issue there was a great depreciation in the value of the assets of the estate. Such assets as might come under consideration here consisted only of shares which the deceased had owned in a grain company and of a debt of some $14,910.35 owing to him by such company. It was also proved that the appellant in his own right was the

largest shareholder and in effective control of the company during the interval referred to.

It was claimed on behalf of the respondents that the appellant could, by the exercise of diligence and acting with sole regard to the interests of the estate, have obtained payment of the debt referred to at an early date, and could have settled the succession duties and divided up the shares in the company among the beneficiaries at a time when they could have been disposed of to advantage.

Mr. Justice Ives, in giving judgment at the trial, stated:

> I think that the whole difficulty perhaps might have been avoided if the defendant had realized at the time that he applied for administration, that the fact that all the assets of the estate were within the affairs or the property of the Grain Company, the Limited Company, and the future of the Limited Company was in any way uncertain, that it would have been very much better if he had not applied and had let someone else do so, because there has been no doubt about the clash of interests. On the other hand I cannot see from the evidence where one can reasonably say that with any other Administrator, or that by the conduct of this Administrator, any loss has been occasioned which would not have occurred inevitably at the time that he applied for Administration, and continuously thereafter until he put up his own money together with the proceeds of the sale of the elevators. The Bank of Montreal had a prior claim against the assets of this Company that would have defeated any pressure brought to bear by the Administrator to collect the $14,000 odd.

In consequence, he dismissed the action but directed that a new administrator should be appointed in the place of the appellant.

In the Court of Appeal, Chief Justice Harvey held: (1) that, in his opinion, there was no doubt that the appellant's duties arose at latest at the date of the grant, namely, the 30th of January, 1930; (2) that in any event the application for administration, not having been withdrawn but pursued to a grant, was sufficient to impose upon the appellant the obligation to use due diligence to acquire full status as administrator, that he had failed in this and that he had really constituted himself a trustee for the beneficiaries and had failed in his duties in that respect; (3) that the appellant was not entitled to any relief under the *Trustee Act*.

Mr. Justice Ford concurred generally in the reasons of the Chief Justice, taking the view, however, that it was unnecessary to express an opinion as to when the grant of letters of administration was made, because in his view

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of the facts the defendant assumed the trust of administering the estate on behalf of himself and the other next of kin.

Neither of these members of the court held that there was any liability on the appellant as an executor *de son tort*.

Mr. Justice McGillivray dissented from the opinion of the other members of the court and held that: (1) the respondents in their pleadings had sought to charge the appellant only as an administrator; (2) the appellant did not become an administrator until the letters of administration had actually been issued to him; (3) any possible liability of the appellant as an executor *de son tort* was not open to be considered under the pleadings; (4) the position taken by the majority of the court that the appellant had put himself in the place of a trustee was equally untenable, inasmuch as he was not so charged under the pleadings; moreover, that the beneficiaries must be presumed to have known that they could have had a public administrator appointed at any time on showing that the appellant's delay was to the disadvantage of those interested in the estate; and concluded that, in his opinion, the appeal should be dismissed with costs.

Nowhere is it charged that the appellant had been guilty of any fraud or malfeasance in connection with the estate.

The formal judgment of the Court of Appeal awarded the respondents a judgment for $5,318 and one-half of the value of the 98 shares in the grain company which had been owned by the deceased, such value to be determined as of the 15th June, 1930.

It was assumed below, and from what was said before us I assume, that the loss and damage complained of cannot be said to have been attributable to the acts or omissions of the administrator after the date on which the letters of administration were delivered to him.

I agree with Mr. Justice McGillivray in his view that the appellant did not become an administrator until the actual issue to him of the letters of administration, on the 6th of November, 1931.

An administrator derives his authority entirely from the appointment of the court. Williams on Executors, page 272:—

> With respect to an administrator, the general rule is, that a party entitled to administration can do nothing as administrator before letters of administration are granted to him; inasmuch as he derives his authority entirely from the appointment of the Court.

And also see 14 Halsbury, page 175.

In my opinion, the act of the judge of the district court in granting his fiat for the issue of the grant does not constitute the grant. That is something which is not complete until the letters have been signed and sealed by the clerk of the court and are capable of delivery. This is something which the clerk of the court had no right to do until he had, first, the fiat of the judge, and secondly, the certificate as required by the statute from the Provincial Treasurer fixing the amount of succession duties and that such succession duties have been paid or security furnished. The relevant statutes and rules are set out in the judgment of Mr. Justice McGillivray and need not now be repeated. I would, however, refer to Rule of Court 965 which provides:—

> * * * No grant of probate or administration shall issue, nor shall any grant be resealed, until after the receipt by the clerk of a certificate from the Provincial Treasurer fixing the amount of duty to be paid in respect of the estate, if any, nor until such duty is paid or security furnished as required by law.

The letter of the clerk of the court to the appellant's solicitor, quoted above, states the position which was taken and which is in accord with the rules.

Until the letters had actually been issued, the appellant had no right, (1) to get from a bank any moneys which might have stood to the credit of the deceased; (2) to sue and get judgment against any debtor of the estate; (3) to sell and transfer any land of the deceased; (4) to legally get a company to transfer any shares or securities of such company to himself or to any beneficiary of the estate; (5) to legally divide any of the assets of the estate among beneficiaries.

For these reasons, it seems to me quite clear that the appellant was not chargeable as administrator for anything that occurred prior to the actual issue to him of the letters of administration.

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The appellant is not charged in the pleadings as an executor *de son tort,* and, indeed, such an allegation would have been inconsistent with the respondents' demand therein. What they charge the appellant with is failing to get in assets and account for them, not with having wrongfully got possession of assets.

An administrator, unlike an executor, cannot be sued for failing to take out letters of administration. In Williams on Executors, at page 275, it is stated:—

> Though a next of kin may have intermeddled with the effects, and made himself liable as executor *de son tort,* he cannot be compelled by the Court to take upon himself the office of administrator.

This statement is fully borne out by the decision of the court in the case of *Ackerley* v. *Oldham* (1).

There is difficulty in finding any principle on which the appellant could be charged with liability as a trustee prior to his appointment as administrator. Moreover, it appears that the respondents were aware of the situation and, on the 13th of November, 1930, wrote a joint letter to the solicitor for the appellant in regard to the estate. On December 2nd following, the appellant, in person, replied to this letter, stating the general position, and further said:—

> You must understand that I have not yet been formally appointed Administrator—as this could not be done until the amount of the Succession Duties was settled and that amount paid. When my appointment is made I will proceed to administer the estate in the manner required by law and then will be ready to consider any suggestions you or any of the heirs have to make regarding the administration.

Under the *Judicature Act,* R.S.A., 1922, chapter 72, sections 48 and 50, the respondents had a right to have a public administrator appointed if they so desired.

At any rate, this issue is not open under the pleadings, nor is it a case in which a court of appeal should now order an amendment. For these reasons, it is not necessary to consider whether or not the trial Judge was correct in his view that there was no loss attributable to the acts or omissions of the appellant, or whether or not the explanations of the appellant for the delay in securing the letters of administration were sufficient, and it is also unnecessary to consider whether or not it is a case in

(1) (1811) 1 Phill. 248; 161 English Reports at 974.

which the appellant should be relieved under the provisions of the *Trustee Act*.

The appeal should be allowed and the judgment at the trial restored, with costs of the appeals to the Appellate Division and to this Court.

KERWIN J.—This is an appeal from a decision of the Appellate Division of the Supreme Court of Alberta (1) granting relief to the plaintiffs as next of kin of the late John Davis and thereby reversing the judgment at the trial, which had dismissed the action. The Chief Justice of Alberta states that "the claim is against the defendant as administrator," and Mr. Justice McGillivray, who dissented, agreed with this. Mr. Justice Ford concurred in the result arrived at by the Chief Justice "and, speaking generally, with his reasons therefor." But Mr. Justice Ford continued:—

> In the view I take of the case it is unnecessary to express an opinion as to when the "grant" of letters of administration was made, because in my view of the facts the defendant at a time anterior to his application for letters of administration, and certainly by the time he so applied, assumed the trust of administering the estate of the deceased on behalf of himself and the other next of kin. He did not become simply an executor *de son tort* with the coincident limited liability attachable thereto.

In my view, the claim of the plaintiffs, set forth in their statement of claim and as developed at the trial, is against the defendant as administrator and in no other capacity and on no other basis. John Davis died June 15, 1929. The defendant, who was a brother and the one best entitled to administer, applied to the proper District Court for a grant on November 28th, 1929. On January 30th, 1930, the Judge of the District Court endorsed the following fiat on the application:—

> January 30, 1930.
>
> Let administration issue as prayed,
>
> Lucien Dubuc J.

We are not concerned with the power of the defendant after the granting of this fiat to bring an action with respect to the assets of the estate and as to whether it would be sufficient for him to produce at the trial of such an action the letters of administration issued after the

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commencement of the proceedings, but it is important to refer to no. 965 of the Rules of Court, which provides:—

* * * No grant of probate or administration shall issue, nor shall any grant be resealed, until after the receipt by the clerk of a certificate from the Provincial Treasurer fixing the amount of duty to be paid in respect of the estate, if any, nor until such duty is paid or security furnished as required by law.

It is shown in the evidence that considerable delay occurred in arranging the amount of the succession duties and that, as a result of this delay, letters of administration were not delivered until November 6th, 1931.

While the section of the *Succession Duties Act* in force at the time the application for administration was made was ultimately declared *ultra vires* by the Privy Council, the Appellate Division of the Supreme Court of Alberta had declared it *intra vires*.

Restricting, therefore, the claim of the plaintiffs to a claim for loss and damage by reason of the failure of the defendant as an administrator to realize upon the debt owing by the D. R. Davis Grain Co. Ltd. to the deceased, and upon the deceased's shares in the capital stock of that company, it is apparent that no matter what the force and effect of the District Court Judge's fiat may be, the defendant could not, in view of the terms of the *Succession Duties Act,* deal with either of these assets, even if it be assumed that they were vested in him by virtue of the fiat, and on that short ground I would allow the appeal and dismiss the action.

It so happened that the defendant was also President and sole Manager of the D. R. Davis Grain Co. Ltd., but no claim is made against him in that capacity, and it cannot be said that any damage or loss ensued from the failure of the defendant as administrator to realize upon the assets mentioned when, until the succession duties were arranged, he was never in a position to do anything in connection with such assets.

Complaint was made of the long delay that occurred between the date of filing the application for a grant of administration and the actual delivery of the letters of administration to the defendant; but I agree with the finding of the trial Judge and "see no reason to attach any censure for the delay between the end of 1929 and November, 1931." It was admitted by counsel for the respond-

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ents that the District Court had power to make an order in a proper case, expediting the application for administration and directing that, in default of that order being obeyed, administration issue to someone else, and it is common ground that no such steps were taken.

It is unnecessary to consider whether the appellant could be held liable as a trustee from the time he filed his application for administration, as no such claim was made in the pleadings or advanced at the trial. I would allow the appeal and restore the judgment at the trial with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Wood, Buchanan Macdonald & Campbell.*

Solicitor for the respondents: *George Noble.*

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* April 29.
* May 2.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Negligence—Motor vehicles—Appeal—Motor car accident—Action by passenger against driver and owner of the car for damages for injuries—Appeal by owner to Supreme Court of Canada from judgment of Court of Appeal which had reversed judgment of trial Judge dismissing action—Restoration of judgment of trial Judge on ground that there were no adequate grounds for reversing his finding that there was no "gross negligence or wilful and wanton misconduct" by driver (The Vehicles Act, Sask., 1934-35, c. 68, s. 85, as amended) —Respondent's contention for confinement of appeal to point mentioned in reasons for granting leave to appeal (as to whether owner's car was "wrongfully taken out of his possession," within s. 85 of said Act).

APPEAL by the defendant Derkson from the judgment of the Court of Appeal for Saskatchewan (1) allowing the plaintiff's appeal from the judgment of Maclean J. (on motion for non-suit) dismissing the plaintiff's action, which was brought to recover damages for injuries alleged to have been sustained by her in a motor car accident while she was a passenger in the motor car, which was driven by the defendant Milton and was owned by the defendant (appellant) Derkson. The Court of Appeal gave judgment to the plaintiff against the defendants for $1,393.40 and costs.

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

(1) [1937] 3 W.W.R. 504.

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Special leave was given by the Court of Appeal to the defendant Derkson to appeal to the Supreme Court of Canada (1).

Section 85 of *The Vehicles Act, 1935,* Sask., (1934-35, c. 68), provided that:—

> In all cases when any loss, damage or injury is caused to any person by a motor vehicle, the person operating it at the time shall be liable for the loss, damage or injury, if it was caused by his negligence or improper conduct, and the owner thereof shall also be liable to the same extent as the operator unless at the time of the injury the motor vehicle had been stolen from him or otherwise wrongfully taken out of his possession or out of the possession of any person entrusted by him with the care thereof.

Subsection 2 of that section, added by c. 106 of the statutes of 1936, provided that:—

> (2) Except only in the case of motor vehicles which are ordinarily used for carrying passengers for hire or gain, no action shall lie against either the owner or the driver of a motor vehicle by a person who is, after the date on which this subsection comes into force, carried as a passenger in that motor vehicle or by his personal representative or next-of-kin for any injury, loss or damage sustained by such person by reason of the operation of that motor vehicle by the driver thereof, unless there has been gross negligence or wilful and wanton misconduct on the part of the driver of the vehicle and unless such gross negligence or wilful and wanton misconduct contributed to the injury, loss or damage in respect of which the action is brought.

On the hearing of the appeal to the Supreme Court of Canada, on Friday, April 29, 1938, at the conclusion of the argument of counsel for the respondent, the members of the Court retired for consultation, and, on their returning to the Bench, the Chief Justice announced as follows:—

"We have come to the conclusion that in this case there are really no adequate grounds for reversing the finding of the learned trial Judge that there was no gross negligence or wilful and wanton misconduct. On that ground, the appeal must be allowed."

As to the contention by counsel for the respondent that the appeal should have been confined to the point mentioned in the reasons given by the Court of Appeal as warranting its granting leave to appeal, namely, whether or not, on the facts and circumstances in evidence, the appellant's motor car was wrongfully taken out of his possession within the meaning of s. 85 of *The Vehicles Act,* Sask., 1934-35, c. 68—the Court held that the juris-

(1) [1938] 1 W.W.R. 95.

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diction is not so limited; while there was no reported decision, the practice was decisive upon the point.

On Monday, May 2, 1938, the following judgment was announced: This appeal is allowed and the judgment of the trial Judge restored with costs throughout; and the cross-appeal [which asked for increase of damages] dismissed without costs.

Appeal allowed with costs.

T. N. Phelan K.C. for the appellant.

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

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* March 1.
* June 23.

EFFIE WILSON (SUPPLIANT) .....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Contract—Crown—Lunatics—Agency—Purchase of government life annuity by person of unsound mind and in poor health—His condition not known to government administering officials, but known to local postmaster through whom purchase price of annuity paid—Annuity paid to time of purchaser's death—Suit, after his death, to recover from the Crown the purchase price (less amount of annuity payments made)—Unfairness of the contract in purchaser's state of health—Imputability of postmaster's knowledge to the Crown—Government Annuities Act, R.S.C., 1927, c. 7, and regulations thereunder.

W. (the suppliant's husband) purchased from the Government of Canada a life annuity, paying therefor $10,000, the major portion of his assets. He was then 73 years old, in very poor health and of unsound mind, having fixed delusions against his wife and son, in pursuance of which delusions his purchase was made. His condition of health and mind was known by the local postmaster through whom said $10,000 was paid (who did not encourage W., rather, perhaps, tried to discourage him from his course), but was not known or suspected by the administering officers of the Crown. The contract was in the Government's usual terms and made on its behalf in the ordinary course of business. After seven monthly annuity payments, aggregating $882.49, had been paid to W., he died. The action was to recover the sum paid to the Crown.

Held (Kerwin J. dissenting): The suppliant was entitled to recover $9,117.51 (the $10,000 less annuity payments made) with interest from date of the petition of right. Judgment of Maclean J., President of the Exchequer Court of Canada, [1937] Ex. C.R. 186, reversed.

Per Duff C.J.: The contract, obviously improvident on W.'s part in his state of health, and made in his said mental condition, was one

* PRESENT at the hearing:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ. Rinfret J. took no part in the decision.

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which a court of equity would not allow to stand if entered into between W. and any private person (e.g., an insurance company) having knowledge of the facts—the latter would be chargeable on equitable principles with fraud in the sense of taking an unconscientious advantage. The government officers would not be performing their duty to the Crown if they concluded a contract with an applicant for an annuity in circumstances which were such that, if they were acting in a private capacity, a court of equity would set aside the contract as one obtained by taking a fraudulent advantage of the purchaser's mental and physical weakness; and it would be their duty to the Crown not to retain the money paid for an annuity if before the execution of the contract it came to their knowledge that the intending purchaser had paid it in circumstances such as existed in this case. Having regard to the provisions of the *Government Annuities Act,* the regulations made thereunder, and the practice (as shewn in evidence) of the Government department administering the Act, the postmaster was an agent of the Crown in such a way that his knowledge of the facts should be imputed to the Crown (otherwise, *semble,* the suppliant would have been without a remedy); it was his duty to communicate to his superior officer, the Superintendent of Annuities, facts coming to his knowledge which would render it the duty of the Crown officers, as between them and the Crown, not to conclude the contract. The fact that the consideration, for which W. paid the sum sought to be recovered, had been fully enjoyed, did not, in the circumstances, bar the obtaining of restitution. The circumstance that a contract has been executed on both sides is not in itself a bar to relief in the case of fraud. Though the benefit of the chances of a long life for W. could not strictly be restored, yet that always was obviously illusory; complete restitution could be made as to the property which actually passed; and there was no obstacle in the way of effecting practical justice. The case comes within the principle of the judgments of Buckley L.J. and Bray J. in *Kettlewell* v. *Refuge Assce. Co.,* [1908] 1 K.B. 545, at 552; [1907] 2 K.B. 242, at 247, which seems to have been approved by the Lord Chancellor, [1909] A.C. 243, at 244, 245. The Crown cannot lawfully retain the money paid to its agent in the circumstances.

Per Davis J.: Whether or not the local postmaster's knowledge could be imputed to the Crown, and assuming that the Crown had no knowledge of W.'s incapacity, yet on the facts of this case—an extraordinary one—the court is not powerless to give relief according to the manifest justice of the case. The contract was an unfair bargain —in the sense that no man with normal mentality, in W.'s physical condition, would have purchased the annuity, and no one, if he knew W.'s physical and mental condition, would honestly have entertained his application. No injustice would be done to the Crown if the moneys ($9,117.50) were returned. Though strictly the parties could not be placed *in statu quo,* yet the limitation in that regard as to the court's interference can have no practical application where the court is dealing only with a sum of money. It is not a case where disturbance of conditions following upon an executed contract would be highly inconvenient or unjust. (Story's Equity Jurisprudence, 13th ed., p. 242; *Daily Telegraph Newspaper Co. Ltd.* v. *McLaughlin,* [1904] A.C. 776; 1 C.L.R. 243, at 280, 281; *Niell* v. *Morley,* 9 Ves. 478, at 481; *York Glass Co. Ltd.* v. *Jubb,* 134 L.T.R. 36, at 43; and other cases, referred to).

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Per Kerwin J. (dissenting): *Molton* v. *Camroux*, 2 Ex. 487, affirmed 4 Ex. 17, may be taken to have firmly established the modern rule as to commercial contracts by a lunatic to this extent: that even if the lunatic was incapable of understanding what he was doing in the particular transaction, he will be bound by his undertaking where no advantage was taken of him and where the contract has been executed in whole or in part so that the parties cannot be restored to their original position, unless he can also prove that the other party knew of his state of mind or wilfully shut his eyes to means of knowledge thereof. *Daily Telegraph Newspaper Co. Ltd.* v. *McLaughlin*, [1904] A.C. 776, and *Molyneux* v. *Natal Land & Colonization Co. Ltd.*, [1905] A.C. 555, have no bearing upon the rule to be applied here and are not in conflict with it. In the present case, while it was objected that W.'s purchase was unwise, no objection was raised as to the consideration for the contract; nor was it suggested that there was practised any fraud or imposition by any one; furthermore, the annuity contract was delivered to him and he received the specified monthly payments to the time of his death. Under these circumstances the suppliant is prohibited from setting up W.'s incapacity unless she can show that the other party to the contract was aware of W.'s condition. As to that, the intervention of the postmaster, under the Act and regulations, in the manner established by the evidence, cannot assist her. Even if the postmaster could be termed an agent in any sense of the word, authority was not conferred upon him of such a nature as to impute to the Minister any knowledge he may have had of W.'s condition. (*Blackburn, Low & Co.* v. *Vigors*, 12 App. Cas. 531, at 537-538, cited).

APPEAL by the suppliant from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that the suppliant was not entitled to the relief sought by her petition of right, which asked that the Crown be condemned to repay the sum paid to the Crown by the suppliant's husband, now deceased, for the purchase of an annuity. The suppliant was the sole beneficiary and executrix of the will of said deceased. The material facts of the case are sufficiently stated in the reasons for judgment now reported and are indicated in the above head-note. By the judgment now reported the appeal to this Court was allowed and it was declared that the suppliant is entitled to the sum of $9,117.51 (being the sum, $10,000, paid for the annuity less the aggregate amount of the seven monthly annuity payments made to the said deceased before his death), with interest from the date of the petition of right, with costs throughout. Kerwin J. dissented.

J. J. Bench K.C. and *H. P. Cavers* for the appellant.

F. E. Hetherington for the respondent.

(1) [1937] Ex. C.R. 186.

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THE CHIEF JUSTICE.—The appellant and suppliant in the petition of right before us is the widow, sole beneficiary and executrix of the last will and testament of George S. Wilson, late of Merritton, deceased.

On the 30th of November, 1928, George S. Wilson, deceased, formally applied to the Government of Canada for the purchase of an annuity of $1,512.86 payable in monthly instalments, having previously paid therefor on the 24th of November, 1928, the sum of $10,000. A contract was, accordingly, entered into dated the 11th of December, 1928, in the terms of the application. Wilson died in the following July, some seven months after the date of this contract, having received seven monthly instalments of the annuity.

The appellant claims a return of the sum of $10,000 on the ground that, at the date of the application for the contract, the deceased George S. Wilson was, to the knowledge of the Crown, of unsound mind and incapable of managing his affairs.

It is not seriously open to dispute that Wilson was of unsound mind. It is established by the evidence, and the learned trial Judge has so found, that he was under the influence of fixed delusions with regard to his wife and his son and had been so for some years, which delusions led him to believe that they had designs against his life, and, moreover, that the purchase of the annuity was the direct result of them. The evidence seems to be conclusive that in spite of the remonstrances of all his friends and advisers he acted on the determination to invest practically the whole of his assets in the purchase of an annuity which would come to an end with his life, partly with the direct object of gratifying his desire that his wife and son should derive no benefit from his estate on his death and partly with the purpose of removing the pecuniary motive which he believed was prompting them to make such attempts.

Nor does there appear to be room for dispute that the postmaster through whom the price of $10,000 was paid was fully aware of these facts. It would be difficult indeed to separate his personal knowledge from his knowledge as postmaster. Wilson's plan of procuring an annuity had been the subject of discussion between them some years before the date of the contract and it is, I think, estab-

lished that in his capacity as postmaster, as well as personally, he was aware of Wilson's mental derangement and that his determination to purchase an annuity was the direct consequence of that derangement. Furthermore, it is a necessary inference, I think, that he knew Wilson's physical condition and knew that no person of Wilson's advanced age and in his precarious state of health and capable of any reasonable appreciation of his own interests could have thought of entering into such a transaction involving the payment over of nearly the whole of his assets in return for an annuity terminable with his life.

There can be no doubt that if the postmaster, Schooley, had been acting in his own behalf the transaction would have been impeachable on equitable principles on the ground that advantage had been taken of Wilson's weakness. Nor can there be any doubt, I think, that if the facts known to Schooley had been in the possession of the Superintendent of Annuities, the transaction would have been impeachable on the same ground by Wilson in his life time or by a representative, as for example, a committee.

We have not before us a simple case of a contract with a person of unsound mind. The contract, improvident as it was from the point of view of Wilson, to the knowledge of Schooley, in his known mental and physical condition, was one which a court of equity would not allow to stand if entered into between Wilson and any private person, such, for example, as an insurance company, having knowledge of the facts. The necessary inference from the established facts would be that such a person contracting with Wilson in such circumstances was taking advantage of Wilson's weakness to Wilson's detriment and to his own benefit, and such a transaction would be set aside by a court of equity on the well settled principles which protect people in Wilson's condition from being victimized for the benefit of others (*Allcard* v. *Skinner* (1)).

Schooley's own personal conduct except in one point may well not have been blameworthy. There is no suggestion in the evidence that he encouraged Wilson in the course he had decided upon and, indeed, the facts, apart from some evidence not admissible against the Crown, would point to the contrary. In so far as the circumstance is

(1) (1887) 36 Ch. Div. 145, at 182.

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favourable to the Crown, the Crown is entitled to say there is evidence that Schooley endeavoured to prevent Wilson proceeding with his design. He ought, however, to have communicated the facts to his superior officers.

In this case it cannot be said that there was any unfairness in the actual terms of the contract. As regards the Department the contract was one made in the ordinary course and the terms were the usual terms of a contract made with a person of Wilson's age.

Unfair, the contract unquestionably was from Wilson's point of view because of the obvious improvidence of it in the precarious state of his health. It is not necessary for the purposes of this case to go so far as to say that every person dealing with a lunatic, knowing his incapacity, is presumed to perpetrate a meditated fraud upon him and his rights, which appeared to be the view of Wigram V.-C. in *Price* v. *Berrington* (1).

It is undisputed that the Superintendent of Annuities had no knowledge in fact of the condition of Wilson either physical or mental. A correspondence passed between them both before and after the granting of the annuity and nothing in that correspondence was calculated in the slightest degree to arouse any suspicion on the part of the Superintendent as to the capacity of Wilson to manage his own affairs. Nor is there any suggestion whatever that the Superintendent of Annuities had any knowledge or suspicion of the state of Wilson's health which made the purchase by Wilson so improvident on his part.

The contract as it presented itself to the Superintendent of Annuities was a perfectly fair contract. That is to say, it was fair in its terms. On the other hand, having regard to the condition of Wilson's health, it was, as already observed, a most improvident arrangement. If the Superintendent of Annuities, having no knowledge in fact, is not to be regarded as having constructive notice of the state of Wilson's mental and physical health, then I think on the authorities the appellant is without a remedy. If the contract had been unfair in its terms, not, that is to say, a contract in the usual terms of the departmental contracts and not made in the ordinary course of business, another

(1) (1849) 7 Hare 394, at 402.

question might have arisen which it is unnecessary to consider.

The real question for decision before us is whether, having regard to the ignorance of the Minister and the Superintendent of the cardinal facts, the representatives of Wilson are entitled to restitution, especially in view of the fact that the consideration, for which the sum they now seek to recover was paid, has been fully enjoyed. The phase of that question which it will be convenient first to consider is whether Schooley's knowledge is imputable to the Crown.

By section 4 of the *Government Annuities Act,* authority is given to His Majesty, represented and acting by the Minister appointed by the Governor in Council to administer the Act, to contract with any person, subject to the provisions of the Act and of any order in council made under the authority of it, for the sale of annuities.

By section 5, the purchaser may, by payment of any sum not less than ten dollars, or by payment of a stipulated sum periodically at fixed and definite intervals "to any agent of the Minister appointed under the provisions of this Act," purchase an annuity under the provisions thereof.

It is provided by section 14 that all moneys received under the provisions of the Act shall form part of the Consolidated Revenue Fund; and, by section 9, that the Minister may refuse to contract for an annuity in any case where he is of opinion that there are sufficient grounds for refusing to do so. By section 13, the Governor in Council is authorized to make regulations not inconsistent with the Act, *inter alia,*

> (*d*) as to the selection of agents of the Minister to assist in executing the provisions of this Act, and the remuneration, if any, to such agents therefor;

and,

> (*h*) for the doing of anything incidental to the foregoing matters, or necessary for the effectual execution and working of this Act and the attainment of the intention and objects thereof.

At the period with which we are concerned, the Act was administered by the Minister of Labour who was the Minister appointed by the Governor in Council in that behalf. Regulations were made under the authority of

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section 13 and, by section 7 of the Regulations, it is provided as follows:—

7. Payments on account of the purchase of Canadian Government Annuities may be made at any Post Office or Sub-Post Office in the Dominion of Canada where a Money Order Office is established, during the hours at which the office is required to be open for the transaction of Post Office business, and the Postmaster or Acting Postmaster of such office is hereby authorized and required to receive such payments, and to remit the same in manner instructed by the Superintendent of Annuities; or the purchaser may, if he prefers, send his payments direct to the Superintendent of Annuities by registered letter; or payments may be made in person at the Annuities Department, Ottawa. Where payment is made by cheque, bank draft, money order, or postal note, it should be drawn to the order of the Receiver General of Canada.

(*a*) Every Postmaster or Acting Postmaster of any Post Office or sub-post office in the Dominion of Canada where Money Order business is transacted, other than those whose salaries are paid on a city office basis, shall be allowed a commission of five per cent. on all moneys remitted by him for the purchase of deferred annuities.

(*b*) A commission of one per cent. shall be allowed to any Postmaster or Acting Postmaster as aforesaid on all moneys remitted by him for the purchase of Immediate Annuities.

(*c*) The said rates of commission shall be allowed the Postmaster or Acting Postmaster not only on all moneys remitted by him, but also on all moneys remitted to the Department direct by or on behalf of a purchaser where it can be shown to the satisfaction of the Department that the Postmaster or Acting Postmaster was instrumental in inducing the said purchaser to purchase.

(*d*) The said rates of commission shall be payable on moneys remitted before as well as since the passing of the Order.

The practical operation of this section of the Regulations at the time with which we are concerned is explained by Mr. Blackadar, the Superintendent of Annuities, in his evidence. In the case of post offices in the smaller places where the postmaster as such was paid by commission, and not by salary as in the larger towns and cities, such postmasters were encouraged to press the sale of annuities. Section 4 of the Regulations makes provision with respect to agents "permanently appointed to assist in executing the provisions of this Act" and for their remuneration. Such agents and the provision for their remuneration are to be approved by the Governor in Council on recommendation of the Minister of Labour.

Appointment of such agents began in 1927, but, in 1928, there were, as Mr. Blackadar explains, very few and none in Merritton. Mr. Blackadar said that the real agent for the sale of annuities in Merritton would be Mr. Schooley, the postmaster. At that time the Department was by advertisement inviting the public to make application to the

local postmaster in respect of contracts of annuities. A circular letter is produced which it is convenient to reproduce in full:—

Department of Labour
Government Annuities Branch,
Ottawa

Dear Sir:

I am forwarding to you under separate cover all supplies necessary for the transaction of Government Annuities business.

I am also sending to you herewith a copy of Instructions to Postmasters as to the proper method of handling payments received for the purchase of annuities.

The posters should be placed in a conspicuous position in your office where they may be seen by the public. The descriptive booklets are, of course, for distribution to persons who make enquiry, or to those persons who you feel might be interested in the purchase of Government Annuities.

Postmasters who are on a commission basis are allowed a commission of eleven-fortieths of one per cent. on applications secured or payments received for the purchase of immediate annuities and one per cent. on deferred annuities.

Many postmasters throughout Canada who devote a portion of their time towards the sale of Government Annuities receive a considerable proportion of their income from this source. I would, therefore, suggest that you familiarize yourself with the various plans of annuity available in order that you may be in a position to intelligently deal with persons making enquiry.

The Department of Labour is actively promoting the sale of these annuities and it would be to your personal advantage to do what you can to increase the number of applications being received from your vicinity.

If there should be any further information or supplies desired at any time, I shall be glad to hear from you again.

Yours truly,

E. G. Blackadar,
Superintendent.

This letter is undated but, admittedly, it was circulated some time prior to November, 1928. The rate of remuneration mentioned was subsequently changed and, in 1928, was that prescribed by section 7 of the Regulations. Mr. Blackadar, on his examination, agreed that the Department was anxious that postmasters should take an active interest in the sale of Government Annuities as the letter, indeed, sufficiently shews.

It is not very difficult, I think, to understand the nature of the functions of agents, including postmasters, appointed under the authority of the Act. They had no authority to conclude contracts for the sale of annuities. That is sufficiently clear from the provisions of the statute and

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section 10 of the Regulations, which provides that all contracts shall be signed by the Actuary and Deputy Minister or Superintendent holding office under the Act for the time being.

The postmaster was the agent of the Crown for the purpose of receiving, pursuant to section 5 of the statute, payments for the purchase of annuities which he received for the Annuities Branch of the Labour Department and for which he was required to account to the Superintendent of Annuities.

It is true that section 5 speaks of "agent of the Minister" and subsection (*d*) of section 13 uses the same phrase. But postmasters, at all events, who are already officers of the Crown and authorized as such to receive payments by section 7 of the Regulations, as well as by section 5 of the statute, would appear (inasmuch as moneys received under the provisions of the Act become by section 14, already referred to, part of the Consolidated Revenue Fund), in the receipt of such moneys, to be acting as agents of the Crown.

By the provisions of section 7 of the Regulations a postmaster not receiving a salary, such as the postmaster at Merritton, is paid a commission on moneys transmitted by him for the purchase of annuities and on moneys transmitted direct to the Department where the application had been brought about by his efforts.

In view of the terms of section 7, the practice of the Department, as illustrated by the circular already reproduced, and as explained by Mr. Blackadar in his evidence, in regarding and treating postmasters within the contemplation of subsections (*a*), (*b*) and (*c*) of section 7, as the postmaster at Merritton, as the "real" agents of the Department would appear to be justified. As such, it would be within the scope of their functions and it would be their duty to give all suitable explanations and proper assistance to persons contemplating the purchase of Government Annuities under this statute. They would also be acting within the scope of their functions under the Regulations in inducing people to become purchasers. Section 7 constitutes a formal representation by the Crown, acting through the Governor in Council, to that effect. These Regulations, it should be noticed, are, by section 16,

to be laid before Parliament and are, therefore, public documents intended for the information, not only of all persons who are expected to act under them, but also of the public generally.

The difficult question is thus presented: can the knowledge which Schooley possessed, as already explained, of Wilson's mental and physical weakness and of the obvious improvidence of a purchase by Wilson in the circumstances existing of an annuity terminating with his life, properly be imputed to the Crown? My conclusion is that the question should be answered in the affirmative, although, in expressing that conclusion, I do so with the greatest respect for the President of the Exchequer Court and those who take another view because I fully agree that weighty considerations can be urged against it.

The foundation upon which my view rests is this: While full discretion is vested in the Minister in respect of the circumstances in which applications for grants of annuities are to be accepted or rejected; and while, as between the Crown and third parties, the authority of the Minister is co-extensive with this discretion, I nevertheless think that as between the Crown and its officers, who are nominated by Order in Council to execute contracts under the statute, it would be the duty of such officers not to retain the purchase money paid for an annuity if before the execution of the contract it came to their knowledge that the purchase money had been paid by the intending purchaser in circumstances such as have been established as existing in this case.

As I have already observed, a private individual entering into such a contract with Wilson with full knowledge of the circumstances would be chargeable on equitable principles with fraud in the sense of taking an unconscientious advantage of the weakness, mental and physical, of the party with whom he was dealing. In my opinion, the departmental officers would not be performing the duty they owe to the Crown if they concluded a contract with an applicant for an annuity in circumstances which were of such a character that, if they were acting in a private capacity, a court of equity would set aside the contract as one obtained by taking a fraudulent advantage of the purchaser's incapacity to understand and protect his interests.

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And in speaking of duty, I am speaking of legal duty, not the moral duty which a high minded official recognizes as owing to himself as well as to the public service in which he is employed.

It would, moreover, I think, be the plain duty of Schooley—and, once again, I mean by that his legal duty—to communicate to his superior officer, the Superintendent of Annuities, facts coming to his knowledge which would render it the duty of the officers concerned, as between those officers and the Crown, not to conclude the contract for which the application was being made.

There still remains the question whether Wilson, having fully enjoyed the consideration, is on that account disabled from obtaining restitution.

There is nothing in the judgment in *Molton* v. *Camroux* (1), either in the Exchequer Court or in the Exchequer Chamber, to justify the inference that, if advantage had been taken of the lunatic in the bargain there complained of, his representatives would have been without a remedy. Nor is there anything in Lord Cranworth's judgment in *Elliott* v. *Ince* (2) to suggest such an inference. The circumstance that a contract has been executed on both sides is not in itself a bar to relief in the case of fraud. In the present case complete restitution can be made in so far as concerns the property which actually passed. The benefit of the chances of a long life for Wilson cannot, of course, strictly be restored, but in the circumstances of the case that is, and always was, obviously, illusory and there seems to be no obstacle in the way of effecting practical justice.

My conclusion is that this case comes within the principle of the judgments of Buckley L.J. and Bray J. in *Kettlewell* v. *Refuge Assurance Co.* (3) which seem to have met with the approval of the Lord Chancellor (4); and that the Crown cannot lawfully retain the money paid to its agent in the circumstances.

I concur with the disposition of the appeal proposed by Mr. Justice Davis.

(1) (1848) 2 Ex. 487; (1849) 4 Ex. 17.
(2) (1857) 7 DeG.M. & G. 475, at 487.
(3) [1908] 1 K.B. 545, at 552; [1907] 2 K.B. 242, at 247.
(4) [1909] A.C. 243, at 244, 245.

CROCKET, J.—I agree that this appeal should be allowed with costs throughout and that it should be declared that the suppliant was entitled to receive $9,117.51 with interest from the date of the petition of right.

DAVIS, J.—The facts of this case are very exceptional. The deceased, Wilson, on November 30th, 1928, made application to the Government of Canada for the purchase of an annuity which provided monthly payments to him of $126.07, commencing on December 24th, 1928. He paid the local postmaster in the town of Merritton, in the county of Lincoln, in the province of Ontario, which was his place of residence, the sum of $10,000 in cash for the purchase of this annuity. He died on July 24th, 1929, having received pursuant to the provisions of the contract for annuity the total amount of $882.49. The deceased was, at the date of the application for the annuity, in his seventy-fourth year of age. His widow, as executrix of his last will and sole beneficiary, claimed in this action by way of petition of right against the Crown that she was entitled to repayment of the moneys (her counsel admitting that the $882.49 actually received by the deceased should be deducted) upon the ground that her husband was insane at the time he purchased the annuity.

The deceased was plainly insane at the time he paid the $10,000 to the Government and remained insane until his death a few months later. The learned trial Judge was satisfied on that point; the conclusion was irresistible upon the evidence. The peculiarity of the case lies in the fact that the deceased's insanity manifested itself in the most insane delusions as to his wife and son. He was married to his wife in 1884 and they lived together until the time of his death. She had assisted him very materially in the conduct of the small fire insurance business which he carried on in Merritton. The $10,000 had been invested in government bonds prior to the purchase of the annuity and was the major portion of his assets. In fact, he had nothing else but two small dwelling houses, appraised for probate purposes at $4,500, and three bonds of $100 each. His purpose in purchasing the government annuity with the $10,000 was directly in pursuance of his insane delusions against his wife and son. His insane desire was to

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cheat them out of this money. The learned trial Judge has found, and the evidence fully supports the finding, if I may say so with respect, that the deceased when he entered into the contract to purchase the annuity was incapable of knowing what he was doing except, perhaps, the mechanical act of signing his name to some letters and other documents referable to the contract. But the trial judge, although he found that the local postmaster well knew the physical and mental condition of the man, did not think he was able to give relief to the widow because, in his view, the postmaster's knowledge could not be imputed to the Crown. The claim was rejected upon the basis of the decision in *Molton* v. *Camroux* (1), where Chief Baron Pollock, at pp. 502-503, stated this conclusion:—

> We are not disposed to lay down so general a proposition, as that all executed contracts *bonâ fide* entered into must be taken as valid, though one of the parties be of unsound mind; we think, however, that we may safely conclude, that when a person, apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property which is fair and *bonâ fide*, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties *in statu quo*, such contract cannot afterwards be set aside, either by the alleged lunatic, or those who represent him. And this is the present case, for it is the purchase of an annuity which has ceased.

While I readily accept and apply that statement of the law to the case of a contract with a lunatic, I would not, without the most careful further consideration (unless the decisions were binding upon this Court), be prepared to accept and apply some of the subsequent decisions which have extended the rule.

Chief Baron Pollock, it is to be observed, presupposed for the purpose of his rule "a contract for the purchase of property which is fair." No question of the unfairness of the contract in question was raised in the *Molton* case (2). A special verdict had been agreed upon in the case which embodied, amongst other findings of fact, the following:—

> The purchases of the annuities by Thomas Lee were transactions in the ordinary course of the affairs of human life, and the granting of the annuities to him in the manner and upon the terms before mentioned, were fair transactions, * * * * *

(1) (1848) 2 Exch. 487 (affirmed on appeal, (1849) 4 Exch. 17).
(2) (1848) 2 Ex. 487; (1849) 4 Ex. 17.

When the case went to appeal in the Exchequer Chamber before eight Judges (1), the unanimous judgment of that Court, delivered by Patteson, J., referred to the findings of the special verdict and said:—

> This does not shew such a state of mind in the grantee as to render him necessarily incapable of knowing the nature of his act, and it negatives all knowledge by the Society of his state of mind, and any suspicion whatever of fraud or unfairness of any kind.

The judgment continued:—

> The question, therefore, is broadly raised, whether the mere fact of unsoundness of mind, which was not apparent, is sufficient to vacate a fair contract executed by the grantee, by payment of the consideration money, and intended *bonâ fide* to be executed by the grantor, by payment of the annuity.

The judgment concluded:—

> * * * according to the facts stated in this special verdict, the contract in question was not void at law, so as to enable the representatives of the grantee to maintain this action for money had and received.

Story in his Equity Jurisprudence, 13th ed., Vol. 1, at p. 242, after dealing with fraud as the ground upon which courts of equity interfere to set aside contracts and other acts, however solemn, of persons who are idiots, lunatics and otherwise *non compotes mentis,* proceeds to say in the next paragraph:—

> But Courts of Equity deal with the subject upon the most enlightened principles, and watch with the most jealous care every attempt to deal with persons *non compotes mentis.* Wherever * * * the contract or other act is not seen to be just in itself or for the benefit of these persons, Courts of Equity will set it aside or make it subservient to their just rights and interests. Where indeed a contract is entered into with good faith and is for the benefit of such persons, such as for necessaries, there Courts of Equity will uphold it as well as Courts of Law. And so if a purchase is made in good faith without any knowledge of the incapacity, and no advantage has been taken of the party, Courts of Equity will not interfere to set aside the contract if injustice will thereby be done to the other side, and the parties cannot be placed *in statu quo,* or in the state in which they were before the purchase.

For the purpose of determining this appeal I have considered the case upon the assumption that the Crown had no knowledge of the incapacity of the deceased, and have asked myself the question whether or not the contract can be said to have been a fair bargain in the sense that it was one with which the court should not interfere. The emphasis at the trial, and in fact upon the appeal as well, was put upon the question whether the knowledge of the local postmaster could be imputed to the Crown. The other issue, as to whether or not the contract was in any

(1) (1849) 4 Exch. 17.

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event a fair bargain, was not stressed. The pleadings very definitely raised the issue. The appellant as suppliant alleged that the annuity was not for the deceased's benefit nor was it a fair bargain and the Crown pleaded that the purchase of the annuity was for the benefit of the deceased and was a fair bargain. It is somewhat difficult to separate the mental from the physical condition of the deceased for the purpose of determining the rights of the parties, but it is perfectly plain that no man in the physical condition the deceased was in at the time he purchased the annuity would in his right mind have done so. Dr. Chapman, who had treated the deceased off and on quite frequently during the three or four years before the deceased died, said that in November, 1928, when the annuity was purchased, the deceased "was in a very weakened condition" and that

> you would not expect him to live a very long period of time. It is a matter of months. The man had had high blood pressure, he was suffering from marked arteriosclerosis for some time previously, he had some kidney trouble and he had a chronic heart that goes along with that picture. Those cases may live a few months or they may pass out in a few weeks.

In July, 1929, the deceased attempted to commit suicide by cutting his throat and was examined by Dr. Currey, the local Medical Officer of Health, at the request of a Dr. Ludwig who was of the opinion that Wilson should be sent to the Ontario Hospital for the Insane at Hamilton. Dr. Currey refused to sign the necessary certificate for that purpose. He said at the trial that it would not have been humane to send the man to the institution. "He was insane but he was so weak that I realized it was only a matter of hours or days at the outside that he would live." Dr. Currey considered Wilson to be suffering from senile dementia. This type of case, the doctor said, was of very long standing. He did not think he had ever seen a case that took less than two years, at least, to come on, of the type that Wilson had. Another local physician, Dr. Poirier, had been called in in May, 1929, to see Wilson. Dr. Poirier said that Wilson had been sick a long time; he had a very high blood pressure and thickened arteries; he was suffering from what was evidently a progressive deterioration, beginning as a circulatory thing, he judged, and a kidney condition, that was affecting his mental condition, "and that was the progressive affair that evidently had been in progress for some time, a long time."

No one in his senses, in the physical condition this man was in, would have considered handing over to the Government $10,000 for an annuity of $126 a month. It is absurd to think that men dealing at arm's length and dealing fairly and honestly in terms of an annuity for a man in Wilson's physical and mental condition would consider a payment of $10,000 for monthly payments of $126 during lifetime as a fair bargain. It would be regarded as an unconscionable thing. Dr. Chapman said he advised the deceased against buying the annuity because he did not think it was wise for a man in his condition. The deceased then told him that several lawyers in St. Catharines had told him the same thing but the deceased said they were "all in a ring" and they all said the same. The deceased told him that he considered it good business to save his life and not have others poison him for the sake of getting his money. The deceased's common expression appears to have been that he would buy this annuity to cheat his wife out of the money.

It is contended by counsel for the Crown that, assuming knowledge cannot in this case be imputed to the Crown, the Court is powerless upon the authorities to give any relief and therefore the Crown is entitled to retain the $9,117.51 which remains of the $10,000. I cannot bring myself to the conclusion that on the facts of a case such as this the Court is helpless to do the manifest justice of the case. It is quite true that government annuities are worked out on an actuarial basis solely with reference to age and that it would be a very serious matter in every case in which the annuitant lives but a short time to permit an inquiry into the wisdom of the annuitant in having entered into a contract with the Government. The whole system of government annuities, and a most beneficial system it is to the people of this country, is based upon the natural uncertainty of life. But the case we are dealing with is an extraordinary case. No one would suggest that, if the Government had known the facts, they would for a moment have entertained the application. The Superintendent of Annuities, the officer of the Crown charged with the administration of that branch of the government business, said that the Department does not at any time inquire into the physical condition of appli-

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cants for annuities unless representation is made by some interested person who thinks that the party making the application is making an improvident arrangement, and that in such a case, as a matter of practice, the case is taken into consideration and the application may be refused.

The contract here in question was made by an insane person and was plainly not a fair bargain, having regard to his physical and mental condition. The contract "is not seen to be just in itself," to adopt the words of the great Story above quoted. But Story goes further and says that if a purchase is made in good faith without any knowledge of the incapacity and no advantage has been taken of the party (which for my purpose I am assuming to be so in this case) the courts of equity will not interfere to set aside the contract

if injustice will thereby be done to the other side, and the parties cannot be placed *in statu quo,* or in the state in which they were before the purchase.

No injustice will be done to the Crown in this case if the $10,000 less the $882.49 is returned. Strictly the parties cannot be placed *in statu quo,* but that limitation can have no practical application where we are dealing only with dollars and cents. One can quite understand the application of that limitation to cases such as *Price* v. *Berrington* (1), where the conveyance of the property sought to be set aside had been long executed, with the knowledge of the family, and the purchaser had acted *bona fide* and had dealt with the estate believing it to be his own and had made important family arrangements upon that footing, the disturbance of which would have been not only highly inconvenient, but unjust. In many cases where contracts with lunatics have been executed, the consequences of setting them aside would be so extensive and so inconvenient that the court ought not to interfere. In the case of *Elliott* v. *Ince* (2), Lord Cranworth considered the law on this subject and referred with approbation to the case of *Molton* v. *Camroux* (3), stating the principle of that case to be very sound—namely, that an executed contract, where parties have been dealing fairly, and in ignorance of the lunacy, should not afterwards be

(1) (1851) 3 Mac. & G. 486. (2) (1857) 7 De G.M. & G. 475.
(3) (1848) 2 Exch. 487; (1849) 4 Exch. 17.

set aside. He added: "That was a decision of necessity, and a contrary doctrine would render all ordinary dealings between man and man unsafe."

The case in this appeal was not an ordinary dealing between man and man, and, while in one sense the parties may be said to have been dealing fairly, that is, without any fraud, or imposition or undue influence, the contract was not a fair bargain in the sense that no man with normal mentality would have purchased the annuity in the physical condition Wilson was in at the time of the purchase and no one if he knew the physical and mental condition of Wilson would honestly have entertained the application.

There is no difficulty in the limitation against interference where the parties cannot be placed *in statu quo*. Here it is purely a money matter. The Judicial Committee in *Daily Telegraph Newspaper Company Ltd.* v. *McLaughlin* (1), in refusing leave to appeal from the High Court of Australia, after having had the advantage of hearing argument on both sides, said that they saw no reason to doubt that the judgment of the High Court was right. In the High Court it had been said (2):—

> It would, however, be an eminently unsatisfactory result of this litigation if he [the plaintiff] were able to recover the shares themselves and also to retain the benefits which were conferred on him, although without his consent or knowledge, by the application of the proceeds of the shares. His counsel have expressly offered to give the defendants the benefits of these proceeds.

And the Court directed that there should be embodied in the decree:—

> the plaintiff's submission to indemnify the defendants to the extent of all moneys received by his pretended attorney as the proceeds of the shares in question, against any loss which they may sustain, or any liability which they may incur to other persons by reason of obedience to the decree (3).

That was part of the judgment which their Lordships in the Privy Council said they saw no reason to doubt was right.

In *Neill* v. *Morley* (4), the court refused to set aside a contract of a lunatic, where it appeared to be fair and without notice; especially where the parties could not be

(1) [1904] A.C. 776.
(2) (1904) 1 C.L.R. 243, at 280.
(3) 1 C.L.R. at 281.
(4) (1804) 9 Vesey, 478.

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reinstated. But Sir William Grant, the Master of the Rolls, at p. 481 said this:—

> Then it comes to the mere fact, that he was a lunatic. The question with reference to that is, how far, under all the circumstances, this Court will interfere to set aside the whole of the lunatic's transactions; supposing them void at law. That will depend very much upon the circumstances; and no general rule can be laid down upon it.

In *York Glass Co. Ltd.* v. *Jubb* (1), Lord Justice Sargant at p. 43 reserved a difficulty which a strict application of the decision in *Imperial Loan Co.* v. *Stone* (2) might lead to in the future, in that he had not found a single case in which a contract of a lunatic had been binding except where the contract was an ordinary reasonable contract, and declared:—

> I mention that because Warrington, L.J., in his judgment, cited a passage from the judgment of Lord Esher in *Imperial Loan Co.* v. *Stone* (2) in which he says nothing at all about fairness. On the other hand, Lopes, L.J., deals with it in this way: "In order to avoid a fair contract on the ground of insanity, the mental incapacity of the one must be known to the other of the contracting parties." It is possible a question may arise in some future case, with which we have not to deal at present, whether, in the case of a contract which is not a reasonable one and which is made by an insane person that contract can be enforced, the other person not knowing of the insanity. I have looked through a number of cases and I have not found a single case in which a contract has in fact been binding except where the contract was an ordinary reasonable contract. I do not in any way want to attempt to express my own view on that point because the point has not been argued before us. It has not been argued before us because the finding of the learned judge is such as to render the point unnecessary for argument and because he has found, and I agree with his finding, that the contract here was a fair one for a fair and reasonable price. I only want to guard myself by saying that my mind is entirely open on the question whether the fairness of the bargain is an essential element to the enforceability of the bargain against a person who was in fact a lunatic although not known to be such by the other contracting party.

Though the prayer of the suppliant, strictly read, was to have the contract declared void and the Crown condemned to repay the sum of $10,000, counsel for the appellant never sought to recover more than the amount which remained in the Government's hands, $9,117.51.

I would allow the appeal and declare that the suppliant was entitled to the said sum of $9,117.51 with interest from the date of the petition of right, and her costs throughout.

(1) (1925) 134 L.T. Rep. 36. (2) [1892] 1 Q.B. 599.

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KERWIN, J. (dissenting).—Accepting the finding of the President of the Exchequer Court in appellant's favour that her husband, George S. Wilson, at the time he purchased the annuity was insane so as not to be capable of understanding what he was about, and accepting the finding that Schooley, the postmaster at Merritton, was aware of Wilson's condition, it is impossible to hold that that knowledge is sufficient to impose liability upon the respondent.

It was argued by counsel for appellant that there was in fact no contract, since one of the parties was insane, and reliance was placed upon *Daily Telegraph Newspaper Company, Limited* v. *McLaughlin* (1) and *Molyneux* v. *Natal Land and Colonization Company, Limited* (2). In the first of these cases leave was refused to appeal from a judgment of the High Court of Australia (3), and, at pages 779 and 780, Lord Macnaghten, speaking for their Lordships, states that they, "having had the advantage of hearing argument on both sides, see no reason to doubt that the judgment of the High Court is right." The question there was as to a power of attorney executed by a man who to the knowledge of the attorney was insane and under which the attorney transferred certain shares of a joint stock company. It was admitted that the company knew nothing of the insanity of the principal. The High Court of Australia held that, having registered the principal as a holder of its shares, the company could not be relieved of its liability to the shareholder by showing that it had transferred the shares on the strength of a document executed by a person who to the knowledge of the appointee did not know what he was doing; that the ordinary rule applied, whereby a party alleging agency is bound to prove it; and that upon the facts as found the company could do this no more than if the power of attorney had been a forgery.

The determination of the issues in the *Molyneux* case (2) depended upon the Roman-Dutch law which prevailed in Natal but Sir Henry De Villiers, in delivering the judgment of the Privy Council, at page 563, stated:—

> Even if the law of England had been applicable to the present case, their Lordships are unable to agree with the majority of the Natal Court that the bond sued upon would have been enforceable.

(1) [1904] A.C. 776. (2) [1905] A.C. 555.
(3) (1904) 1 C.L.R. 243.

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The bond referred to was a mortgage bond which had been passed by virtue of a power of attorney executed by an insane person, and it was held to be legally unenforceable where it appeared that the mortgagor derived no benefit from the bond even though the mortgagee had no knowledge of the insanity.

These two cases have no bearing upon the rule to be applied here and are not in conflict with it. In *Bawlf Grain Co.* v. *Ross* (1), Mr. Justice Davies, as he then was, points out, at page 234, that a contract such as the one there in question, i.e., a contract entered into by a man whilst in a state of drunkenness,

> is on the same footing as a contract made by a person of unsound mind, whose mental incapacity, in order to avoid the contract, must be known to the other of the contracting parties.

In the same case the present Chief Justice of this Court, at page 241, states:—

> The course of development in the English law of the rule governing the rights of a person entering into a contract or going through the form of entering into a contract while insane is very clearly traced in the judgment of Fry, L.J., in *The Imperial Loan Co.* v. *Stone* (2). Under the old rule the incapable person was by law precluded from setting up his incapacity in answer to an action on the so-called contract. Under the modern rule this disability is removed where it is shewn that the other party had at the time of the transaction knowledge of the incapacity of the other.

Molton v. *Camroux* (3) may be taken to have firmly established the modern rule as to commercial contracts by a lunatic to this extent: That even if the lunatic was incapable of understanding what he was doing in the particular transaction, he will be bound by his undertaking where no advantage was taken of him and where the contract has been executed in whole or in part so that the parties cannot be restored to their original position, unless he can also prove that the other party knew of his state of mind or wilfully shut his eyes to means of knowledge of such infirmity. The rule has been extended by the Court of Appeal in *Imperial Loan Company* v. *Stone* (2) and in *York Glass Co. Ltd.* v. *Jubb* (4), but with such amplications we are not concerned.

(1) (1917) 55 Can. S.C.R. 232.
(2) [1892] 1 Q.B. 599.
(3) (1848) 2 Ex. 487; affirmed by the Court of Exchequer Chamber, (1849) 4 Ex. 17.
(4) (1925) 134 L.T.R. 36.

In the present case, while it was objected that the purchase of the immediate annuity by Wilson, a man in the seventy-fourth year of his age, for the sum of ten thousand dollars, which formed the greater part of his assets, was an unwise transaction for a man of his age and general health, no objection was raised as to the consideration for the contract. Nor was it suggested that there was any fraud or imposition practised by anyone upon Wilson in connection with the purchase. Furthermore, the annuity contract was delivered to him upon payment of the money and he received the specified monthly instalments down to the time of his death.

Under these circumstances we are bound to hold that the appellant is prohibited from setting up her husband's incapacity to enter into the annuity contract unless she is able to show that the other party to the contract was aware of Wilson's condition. The trial judge has found that Schooley was aware of that condition and it therefore becomes necessary to determine the position he occupied and his authority under the *Government Annuities Act*, R.S.C., 1927, chapter 7, and the relevant regulations.

By section 3 of the statute, the Act is to be administered by the Minister of Labour. By section 4, His Majesty, represented and acting by the Minister, may contract with any person for the sale of an immediate annuity to any person resident or domiciled in Canada, for the life of the annuitant. By section 7, all contracts for the purchase of annuities are to be entered into in accordance with the values stated in tables prepared under regulations made pursuant to section 13 and for the time being in use. By section 9 the Minister may refuse to contract for an annuity in any case where he is of opinion that there are sufficient grounds for refusing so to do. By section 13 the Governor in Council may make regulations,

(*b*) as to the preparation and use of tables for determining the value of annuities; and the revocation of all or any such tables and the preparation and use of other tables;

(*c*) as to the mode of making, and the forms of, contracts for annuities, including all requirements as to applications therefor;

(*d*) as to the selection of agents of the Minister to assist in executing the provisions of this Act, and the remuneration, if any, to such agents therefor;

(*h*) for the doing of anything incidental to the foregoing matters, or necessary for the effectual execution and working of this Act and the attainment of the intention and objects thereof.

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Number 1 of the Regulations adopts certain tables thereto annexed as the tables to be used for determining the cost and value of an annuity, and Regulation 4 provides:—

> That the agents permanently appointed to assist in executing the provisions of this Act, and their remuneration, shall be such as may be recommended by the Minister of Labour and approved by the Governor in Council; but the Minister may from time to time employ such temporary assistance as in his opinion is required, and upon such terms as may be agreed upon.

Regulation 7 (*a*), (*b*) and (*c*) and extracts from a sample of a circular letter forwarded by the Government Annuities Branch to Postmasters are set forth in the reasons for judgment of the learned President and need not be repeated.

We were told that annuity contracts are not preceded by an examination of the applicant and that the tables are based upon age only. Schooley was not an agent of the Minister of Labour, selected to assist in executing the provisions of the Act under Regulation 4, issued by virtue of section 13 (*d*) of the statute. He had no authority to enter into a contract on behalf of the Minister nor had he the power to refuse to contract for an annuity, as such power is conferred by section 9 of the Act upon the Minister only. As a matter of convenience to the public, he was authorized to receive the purchase price of an annuity and was then required to remit it to the Superintendent of Annuities; and that is all he did, with the exception of writing on Wilson's behalf certain letters, mentioned in the judgment of the President, requesting information with respect to the purchase of an annuity. He received a commission of one per cent. on the basis of the purchase price received and remitted by him and not on the footing that he was "instrumental in inducing the said purchaser to purchase."

If the annuity had been purchased by direct correspondence between Wilson and the Superintendent of Annuities, in the absence of knowledge by the latter of the former's infirmity, it could not be contended that the contract was voidable. The intervention of Schooley, under the Act and Regulations, in the manner established by the evidence cannot assist the appellant. Even if Schooley might be termed an agent in any sense of the word, authority was not conferred upon him of such a nature as to impute

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to the Minister any knowledge he may have had of Wilson's condition. As stated by Lord Halsbury in *Blackburn, Low and Co.* v. *Vigors* (1):—

> I cannot but think that the somewhat vague use of the word "agent" leads to confusion. Some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts, intentions, and knowledge of the principal. Other agents may have so limited and narrow an authority both in fact and in the common understanding of their form of employment that it would be quite inaccurate to say that such an agent's knowledge or intentions are the knowledge or intentions of his principal; and whether his acts are the acts of his principal depends upon the specific authority he has received.

The appeal fails and should be dismissed, but, under the circumstances, without costs.

Appeal allowed with costs.

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

Solicitor for the respondent: *F. E. Hetherington.*

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* June 13, 14.
* June 23.

WILLIAM MANCHUK .....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Appeal—Trial on charge of murder—Misdirection to jury—Provocation—Onus in general—Power of court on appeal—Substitution of verdict of manslaughter for jury's verdict of murder—Cr. Code, ss. 1016, 1024; Supreme Court Act, R.S.C., 1927, c. 35.

On the occasion of a quarrel between appellant and S., appellant killed S., and then killed S.'s wife who had not been present at the quarrel or the killing of S. but on hearing shouts had appeared at her house door a few feet away. Appellant was tried on the charge of murder of S. and was found guilty of manslaughter and sentenced to 20 years penal servitude. He was later tried on the charge of murder of Mrs. S. and was convicted of the crime charged. This conviction was set aside and a new trial ordered on the ground that the trial Judge had misdirected the jury on the question of provocation ([1937] O.R. 693; [1938] S.C.R. 18). Appellant was then tried again on the charge of murder of Mrs. S. and convicted of the crime charged. An appeal to the Court of Appeal for Ontario was dismissed ([1938] O.R. 385), but two Judges dissented, holding that there was error in certain respects in the trial Judge's charge to the jury and there should be a new trial. Appellant appealed to this Court.

Held (allowing the appeal): There was a mistrial. The conviction should be set aside.

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* PRESENT:—Duff C.J. and Cannon, Crocket, Davis, Kerwin and Hudson JJ.

(1) (1887) 12 App. Cas. 531, at 537-538.

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The putting before the jury, in the trial Judge's charge, of a sentence, taken from the judgment of one of the Judges of the Court of Appeal on the appeal from the first conviction of appellant of murder of Mrs. S., that the said Judge in Appeal was "far from suggesting that the conduct of the accused would not justify a verdict of wilful murder," constituted, in the circumstances, error of such gravity as to vitiate the verdict. While the trial Judge was entitled, if so advised, to express his own opinion as to the effect of the evidence actually before the jury, it was inadmissible to present to them the opinion of any one that on the former trial the evidence was sufficient to justify a conviction for murder. Moreover, the effect of this was probably accentuated by the record of appellant's conviction of the murder of Mrs. S. endorsed on the indictment which was put in the jury's hands, said record being "Guilty—Sentenced to be hanged, May 31, 1937." In the circumstances of the case, said record should have been withheld from them; a copy of the indictment with the endorsement omitted would have served every legitimate purpose.

Another serious objection was that the trial Judge, in answering a question from the jury with regard to provocation, did not direct them in the precise and unambiguous terms in which they ought to have been instructed. Moreover, the terms in which the jury's question was expressed manifested an erroneous impression that, in proving the killing, the Crown had disposed of the presumption of accused's innocence and that they must find him guilty of murder unless he affirmatively established to their satisfaction provocation in the pertinent sense; and their question should have been answered in such a manner as to remove this error from their minds; it ought to have been made clear to them that in the last resort the accused could not properly be convicted of murder if, as the result of the evidence as a whole, they were in reasonable doubt whether or not he was guilty of that crime.

As to an objection taken by the dissenting Judges in the Court of Appeal to the effect that the trial Judge erred in instructing the jury that they were not concerned with the fact that appellant had been acquitted of the charge of murder of S. and found guilty of the less grave offence of manslaughter:

Held per Duff C.J., Cannon, Davis, Kerwin and Hudson JJ.: (1) Plainly, the trial Judge would have committed an error in law if he had told the jury that a finding of provocation in appellant's trial for murder of S. was conclusive upon the issue of provocation then before them; the issue of provocation was not the same in the two cases. (Opinion expressed that said dissenting Judges had not meant to suggest otherwise on this point).

2. As to the suggestion that the trial Judge ought to have told the jury that they must take it as an established fact that the acts of S. constituted sufficient provocation to reduce the homicide committed upon him to manslaughter, and, starting from that point, consider the issue of provocation in its bearing upon the charge against appellant of murder of Mrs. S.: Such a direction would probably be calculated to confuse and mislead the jury in respect of the actual issue upon which it was their duty then and there to pass. Moreover, such a direction would have been wrong; the evidence given at the earlier trial (for the killing of S.) was not placed fully before the court nor was the trial Judge's charge; nor, with such material before him, could the trial Judge (on the trial for the kill-

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ing of Mrs. S.) have been warranted in directing the jury that at said earlier trial any issue of provocation had been decided; the jury may on that (earlier) trial have thought, without passing upon any such issue, that the evidence raised a sufficient doubt as to accused's guilt in respect of the charge of murder to require an acquittal on that charge.

Crocket J., in view of the principle as to the question of provocation which he took to be clearly deducible from this Court's decision in *The King* v. *Manchuk,* [1938] S.C.R. 18, in view of the established fact that appellant, on his trial for murder of S., had been found guilty of manslaughter only, and in view of the circumstances attending the killing of S. and Mrs. S., and it being quite apparent (as he held) that appellant in attacking Mrs. S. was acting upon the same impulse as that which caused him to attack S., was strongly inclined to agree with the reasoning of the dissenting Judges in the Court of Appeal on the applicability of the principles of *res judicata.*

As to the order that ought to be made by this Court:

Per Duff C.J., Cannon, Davis, Kerwin and Hudson JJ.: It was clear that the jury must have been satisfied of the facts necessary to constitute manslaughter; and the Court of Appeal would have authority under s. 1016, *Cr. Code,* to substitute a verdict of manslaughter for the verdict of the jury and to pronounce sentence upon appellant (*Rex* v. *Hopper,* [1915] 2 K.B. 431). By force of s. 1024 *Cr. Code,* coupled with the enactments of the *Supreme Court Act* (R.S.C., 1927, c. 35), this Court has authority, not only to order a new trial, or to quash the conviction and direct the prisoner's discharge, but also to give the judgment which the Court of Appeal was empowered to give in virtue of s. 1016 (2), *Cr. Code.* Under the exceptional circumstances of the case the last mentioned course is the proper one. The conviction should be set aside, a verdict of manslaughter substituted for the jury's verdict and appellant sentenced to imprisonment for life.

Per Crocket J. (dissenting on this point): Considering the proceedings already undergone and in the anomalous circumstances of the case, justice would best be served by quashing the present conviction absolutely. Further, there is no doubt as to this Court's right to quash the conviction; there may be some doubt as to its right to enter a judgment which necessarily involves its rendering a verdict in a criminal case and itself passing sentence upon it; the wisdom of the latter course is very doubtful; it would signalize an entirely new departure in the exercise of the jurisdiction of this Court in criminal cases.

APPEAL by the accused from the judgment of the Court of Appeal for Ontario (1) sustaining (Middleton and Gillanders JJ.A. dissenting) his conviction, on trial before Hope J. and a jury, of the murder of Amy Seabright at St. Catharines, Ontario, on June 8, 1936.

Just before the accused killed Amy Seabright, he had killed her husband, John Seabright, in a quarrel. Accused was tried on the charge of murder of John Seabright and was found guilty of manslaughter and sentenced to 20 years

(1) [1938] O.R. 385.

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penal servitude. He was later tried on the charge of murder of Amy Seabright and was convicted of the crime charged. This conviction was set aside and a new trial ordered on the ground that the trial judge had misdirected the jury on the question of provocation (1). Accused was tried again on the charge of murder of Amy Seabright and convicted of the crime charged. An appeal by the accused to the Court of Appeal for Ontario was dismissed (Middleton and Gillanders JJ.A. dissenting) (2). From that dismissal the present appeal to this Court was brought. The dissent in the Court of Appeal was, as expressed in the formal judgment of that Court, on the question as to whether there was error in the charge of the learned trial judge, and whether such error amounted to a substantial wrong or miscarriage of justice. The dissenting judges held that there should be a new trial.

By the judgment now reported, the appeal to this Court was allowed; the judgment of the Court of Appeal was set aside; the Court directed that the verdict of murder be quashed and a verdict of manslaughter be entered. Crocket J., dissenting, would quash the conviction absolutely. The appellant was sentenced to imprisonment for life.

J. C. McRuer K.C. and *J. J. Bench K.C.* for the appellant.

W. B. Common K.C. and *C. P. Hope K.C.* for the respondent.

The judgment of the majority of the Court (The Chief Justice and Cannon, Davis, Kerwin and Hudson JJ.) was delivered by

THE CHIEF JUSTICE.—On the 8th of June, 1936, the appellant William Manchuk killed, first, John Seabright, and, shortly afterwards, his wife, Amy Seabright. Evidence was given by Mrs. Lewis, the daughter of John and Amy Seabright, that, after killing her father, and before the attack upon her mother, Manchuk attempted an attack upon her with the axe with which he killed her parents, but she succeeded in escaping.

(1) [1937] O.R. 693; [1938] S.C.R. 18.
(2) [1938] O.R. 385.

These tragic events were the culmination of a dispute about the location of a line fence between the properties respectively occupied by the Seabrights and the Manchuks. On the day on which the homicides occurred, John Seabright was engaged in excavating post holes and setting up posts for a fence which would encroach upon property that Manchuk believed to be exclusively his. Manchuk and his wife protested against these proceedings in violent and threatening language and, eventually, Manchuk who, as the evidence shows, notwithstanding his wife's incitements to violence, had for a time succeeded in keeping himself under control, yielded to a passion of rage and committed the fatal assault on John Seabright, killing him by blows delivered with an axe.

The scene of the killing of John Seabright is only a few feet from the porch of the Seabrights' house. Mrs. Seabright had been within the house during the occurrences just described and had no visible connection with them. She appeared at the door on hearing the shouts of her daughter and was immediately attacked by Manchuk who, with the same weapon, inflicted upon her wounds from which she died shortly afterwards.

Manchuk was tried for the murder of John Seabright, and John Seabright's acts, already mentioned, were relied upon as constituting provocation. The jury found Manchuk guilty of manslaughter and he was accordingly sentenced to twenty years penal servitude. Manchuk was then tried under an indictment charging him with the murder of Amy Seabright and was convicted of the crime charged. This conviction was set aside and a new trial ordered (1). The learned trial judge had (it was held by this Court (2), confirming a judgment of the majority of the Ontario Court of Appeal) erroneously directed the jury that there was no evidence upon which they could properly find the attack upon Amy Seabright to have been delivered under such provocation as to justify a finding of manslaughter.

In the judgment of this Court, the law concerning the nature of provocation in the relevant sense and its effect in justifying a verdict of manslaughter, when in its absence

(1) [1937] O.R. 693; [1938] S.C.R. 18.
(2) [1938] S.C.R. 18.

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the proper verdict would be one of murder, was in its application to the circumstances of this case explained for the guidance of the trial judge at the new trial. In effect it was stated that, on the issue of provocation, the jury ought to be directed to consider, first, whether the acts of provocation, which proceeded immediately from John Seabright, were of such a character as to deprive a normal person of his self-control to such a degree as might lead such a person to commit an attack upon Mrs. Seabright of the character of that of which Manchuk was guilty; and, second, whether Manchuk in fact did act under such provocation while still under the dominion of the passion excited thereby and under the belief that she was concerned in the acts of provocation relied upon. But the judgment proceeded to say that the learned trial judge would, of course, warn the jury that, on the ultimate issue (raised by the charge of murder), unless they were satisfied beyond reasonable doubt that Manchuk was guilty of the more heinous crime, it would be their duty not to convict him upon that charge.

At the new trial, the accused was found guilty of the murder of Amy Seabright and convicted and sentenced accordingly. An appeal to the Ontario Court of Appeal was dismissed (Mr. Justice Middleton and Mr. Justice Gillanders dissenting) (1) and the case now comes before this Court on appeal from that judgment.

The appeal is by law necessarily limited to the grounds upon which those learned judges dissented. Those grounds are three in number. First, the learned judge erred (the learned dissenting judges held) in instructing the jury that they were not concerned with the fact that Manchuk had been acquitted of the charge of murder of John Seabright and had found him guilty of the less grave offence of manslaughter. If we read the judgment of the learned judges rightly, it seems to say that the learned trial judge ought to have told the jury that they must take it as an established fact that the acts of John Seabright constituted sufficient provocation to reduce the homicide committed upon him to manslaughter; and, starting from that point, consider the issue of provocation in its bearing upon the charge against the accused of the murder of Amy Seabright. It sufficiently appears from what has already been said that

(1) [1938] O.R. 385.

the issue of provocation was not the same in the two cases, and, plainly, the trial judge would have committed an error in law if he had told them that a finding of provocation in the trial of Manchuk for the murder of John Seabright was conclusive upon the issue of provocation then before them, and we do not think the learned dissenting judges meant to suggest this.

Putting other considerations aside for the moment, we should have been disposed to think that such a direction as that suggested would be calculated to confuse and mislead the jury in respect of the actual issue upon which it was their duty then and there to pass; it would, as we are inclined to think, demand from the jury the application of a degree of critical acumen which they could hardly be expected to exercise; and would probably have nullified the judgment of this Court as applicable to this case.

Moreover, such a direction would, in our opinion, have been wrong. The evidence given at the earlier trial was not placed fully before the court nor was the charge of the learned trial judge. Nor, with such material before him could Mr. Justice Hope have been warranted in directing the jury that at the first trial any issue of provocation had been decided. The jury may on that trial have thought, without passing upon any such issue, that the evidence raised a sufficient doubt as to the guilt of the prisoner in respect of the charge of murder to require an acquittal on that charge.

We think, however, that the two other grounds of dissent are well taken and, accordingly, that there was a mistrial.

The first of these arises in this way: The learned trial judge put before the jury the following sentence taken from the judgment delivered by Mr. Justice Middleton on the last occasion when the case was before the Court of Appeal for Ontario:—

> In the case in hand I am far from suggesting that the conduct of the accused would not justify a verdict of wilful murder.

This, we think, constituted in the circumstances error of such gravity as to vitiate the verdict.

While the learned trial judge was entitled, if he had been so advised, to express his own opinion as to the effect of the evidence actually before the jury, we can have no doubt that it was inadmissible to present to the jury the

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opinion of any one that on the former trial the evidence was sufficient to justify a conviction of the accused of the murder of Amy Seabright. The mischief was enhanced by the circumstance that this opinion was ascribed to an eminent judge whose authority would naturally carry great weight with the jury. We think nothing said in the charge, either before or later, had or could have the effect of neutralizing this statement of the learned trial judge and rendering it innocuous.

We think, moreover, that the effect of it was probably accentuated by the record of the conviction of Manchuk of the murder of Amy Seabright endorsed on the indictment which was put in the hands of the jury. The record was in these words, "Guilty—Sentenced to be hanged, May 31, 1937." We agree with the dissenting judges that, in the circumstances of the case, this record should have been withheld from them. A copy of the indictment with the endorsement omitted would have served every legitimate purpose.

We attach even greater importance to another ground upon which the learned dissenting judges proceeded. The jury, having had the case under consideration for some time, requested the assistance of the learned trial judge upon a difficulty which they explained in the following question:—

> In order to reduce a murder charge to a manslaughter charge, is it necessary to establish the fact that the person killed committed the act of provocation?

In the opinion of the dissenting judges, the jury were not given a direction in the precise and unambiguous terms in which they ought have been instructed in answer to their request; and we find ourselves in agreement with them. The learned trial judge appears to have read, interlarded with comments of his own, nearly the whole of the judgment of this Court, but with the significant exception presently to be noted, on the appeal already mentioned. The judgment contained a considerable amount of discussion of principle and authority as touching the point on which we found ourselves unable to accept the view of the majority of the Court of Appeal for Ontario. In the earlier part of his charge the learned trial judge had discussed the subject of provocation in a manner calculated to convey an impression that there were differences of

opinion among Canadian judges upon the very question which the jury had addressed to him. We are not satisfied that the lengthy answer of the learned trial judge, expressed as it was in general terms, was calculated to convey to the jury a right conception of what might constitute provocation under the law.

The dissent of the learned dissenting judges, moreover, embraces another objection to this part of the charge, which, in our opinion, is, perhaps, still more serious. The terms in which the question is expressed manifest plainly that (notwithstanding some observations in the earlier part of the charge as to the burden resting upon the Crown up to the end of the case of establishing guilt beyond a reasonable doubt) they had fallen into the very natural error of thinking that, in proving the killing, the Crown had disposed of the presumption of the prisoner's innocence and that they must find the prisoner guilty of murder unless he affirmatively established to their satisfaction provocation in the pertinent sense. The interrogatory of the jury ought to have been answered in such a manner as to remove this error from their minds. It ought to have been made clear to them that in the last resort the prisoner could not properly be convicted of murder if, as the result of the evidence as a whole, they were in reasonable doubt whether or not he was guilty of that crime. The last sentence of the judgment of this Court which was put before the jury almost in its entirety, deals with this point and that sentence was not even read to them (*Woolmington* v. *Director of Public Prosecutions* (1)).

There remains for consideration the grave question as to the order that ought to be made by this Court. We have concluded, after full consideration, that, by force of section 1024, coupled with the enactments of the *Supreme Court Act*, this Court has authority, not only to order a new trial, or to quash the conviction and direct the discharge of the prisoner, but also to give the judgment which the Court of Appeal for Ontario was empowered to give in virtue of s. 1016 (2); and we have no doubt that this last mentioned course is the proper one in the very exceptional circumstances of this case.

(1) [1935] A.C. 462.

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The accused has been tried three times under charges of murder arising out of a succession of occurrences which occupied in time not more than a few minutes. The last two convictions have both been set aside by reason of the irregular conduct of the trials leading to those convictions; the first by a judgment of the Court of Appeal for Ontario affirmed by this Court; and, now, the second, by the judgment of this Court. We cannot think that to order a fourth trial would be entirely consonant with the spirit of our criminal procedure; and we think the ends of justice will be met by the judgment we now pronounce.

The finding makes it clear that the jury must have been satisfied of the facts necessary to constitute manslaughter, and we are, consequently, of opinion that the Court of Appeal would have authority under s. 1016 to substitute a verdict of manslaughter for the verdict of the jury and to pronounce sentence upon the prisoner (*Rex* v. *Hopper* (1)).

The conviction should be set aside, a verdict of manslaughter should be substituted for the verdict of the jury and the accused sentenced to imprisonment for life.

CROCKET J. (dissenting as to the order to be made)—In December last this Court on an appeal by the Crown affirmed a judgment of the Ontario Court of Appeal setting aside a conviction of Manchuk for the murder of one, Amy Seabright, and ordering a new trial on the ground that the trial judge by instructing the jury that there must be provocation by the victim had withdrawn from their consideration the question of provocation (2). The clear implication of this decision, as I view it, is that, notwithstanding there was no evidence of any provocation whatever on the part of the victim herself, there nevertheless was evidence upon which the jury might reasonably have found that in attacking her as he did he did so in the heat of passion caused by sudden provocation within the meaning of s. 261 of the *Criminal Code*, that is to say, caused by any wrongful act or insult of such a nature as to deprive an ordinary person of the power of self-control, if the offender acts upon it on the sudden and before there has been time for his passion to cool. No other principle, to

(1) [1915] 2 K.B. 431.

(2) See [1938] S.C.R. 18.

my mind, is fairly deducible from that decision as regards the question of provocation than that it is not always necessary to constitute provocation under s. 261 of the *Criminal Code* that it should proceed immediately and directly from the victim herself, but that, on the contrary, a wrongful act or insult, committed or given by a third person under such circumstances as the evidence in this case disclosed, may constitute such provocation if the offender in his attack upon the victim acted upon it on a sudden and before his passion had time to cool and under the belief that the victim was a party to any such act, although not implicated in it in fact.

It was admitted by counsel for the Crown and for the appellant that the evidence on the second trial, bearing on the crucial issue of provocation, was to all intents and purposes the same as that on the first trial.

This shews that Manchuk had been previously tried on an indictment charging him and his wife jointly with the murder of John Seabright on June 8th, 1936, upon which he was found guilty of manslaughter only; that during the forenoon of that day, while John Seabright was attempting against the protests of both Mr. and Mrs. Manchuk to replace a post of a board fence, which a sworn surveyor had found to encroach between one and two feet on Manchuk's home property and which as a consequence had recently been removed, the accused, after having succeeded in restraining his wife from attacking Seabright with a stone and later with an axe which he took away from her, and after having himself requested Seabright to desist and go home, finally became so enraged at Seabright's determined defiance of his property rights, that, while the latter's daughter (Mrs. Lewis) was standing by the post hole with a hammer in her hand, he struck him three times in rapid succession with the axe he still had in his hand, and killed him; and that within the course of a moment or two at the most, after first attempting an attack upon Mrs. Lewis, who yelled and ran away, he rushed across the driveway to the back porch of the Seabright house, in which Mrs. Seabright had suddenly appeared, and there on or in front of the steps at a distance of but 11 feet from the spot where he had killed her husband, struck her with the same axe and caused her death.

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There is absolutely nothing to shew that Mrs. Seabright said or did anything before Manchuk saw her that morning, and it is quite apparent that in attacking her he was acting upon the same impulse as that which caused him to attack her husband at the post hole. This obviously is the view of Mr. Justice Middleton, and the basis on which he has so interestingly dealt with the question of the applicability of the principles of *res judicata*. While I am strongly inclined to agree with his reasoning in this regard, it does not seem to be necessary to consider it beyond its possible bearing on the question of the final disposition of this appeal. If it were recognized in this case that the rule that a question of fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent proceeding between the same parties or their privies was as applicable to criminal as well as to civil proceedings, it would have the merit, at least, of rendering impossible the repetition of such an extraordinary and anomalous development as that which this unfortunate and tragic case illustrates.

With great respect, I should be disposed to think that a person who has been tried on an indictment charging him with murder in the killing of S. and found guilty, not of murder but of manslaughter only—clearly on the ground of provocation—and sentenced therefor to 20 years penal servitude; has subsequently undergone a trial on another murder indictment for the killing of S.'s wife practically at the same time and within but a few feet of the spot where he slew her husband, and apparently acting upon the same provocation, and nevertheless been convicted on that indictment for murder and undergone the ordeal of waiting for the infliction of the necessary death penalty; and then, in consequence of this conviction having been set aside on the ground that the all important question of provocation was improperly withdrawn from the jury, having undergone a second trial on the same indictment, and been again erroneously convicted and sentenced to death while still serving a sentence of 20 years imprisonment for killing Seabright in the heat of passion caused by sudden provocation—has surely suffered adequate punishment for the crime to which he was provoked under such circumstances and which in those circumstances can be

treated as two separate and distinct offences only by the application of the strictest rules of law.

In my opinion, as this Court has unanimously decided that there was such error in the conduct of the second trial as to vitiate the verdict for the reasons stated in the judgment of my Lord the Chief Justice, justice will best be served in the anomalous circumstances of this case by quashing the present conviction. To send the accused back on what will really be his fourth trial for murder is so repellent that it ought to be avoided, if at all possible. I confess that I have great doubt as to the wisdom of this Court entering a judgment which necessarily involves our rendering a verdict in a criminal case and ourselves passing sentence upon it. There may possibly be some doubt as to our right to do so. There can be none as to our right to quash the conviction.

If a new conviction is now found by us, it can only be for manslaughter in causing the death of Mrs. Seabright by reason of the accused having attacked her while still in the heat of passion caused by the same provocation under which he slew her husband. The infliction upon him now of any further term of imprisonment to run concurrently with that of the 20-year sentence he is now serving would really add nothing to his punishment, while it would signalize an entirely new departure in the exercise of the jurisdiction of this court in criminal cases.

Appeal allowed; the 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 life.

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

Solicitor for the respondent: *I. A. Humphries.*

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* Oct. 25, 26, 27.
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* June 23.

GEORGE WASHINGTON STEPHENS (DEFENDANT) ..... APPELLANT;

AND

LUIGINO GASPERO GUISEPPE FALCHI (PLAINTIFF) ..... RESPONDENT.

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

Marriage — Foreign divorce — Invalidity — Subsequent re-marriage — Good faith—Putative marriage—Civil effects—Succession rights—Italian law —Arts. 6, 163, 164, 183, 207 C.C.—Art. 548 C.C.P.

In 1904, dame Marguerite C. Stephens married Colonel Hamilton Gault at Montreal where they were both domiciled. They lived together in matrimony until 1914, when Colonel Gault went to France in command of a Canadian regiment and remained a member of the Canadian Expeditionary Force in France and in England until the end of the war. In the years 1916 and 1917 difficulties arose between Gault and his wife. In 1917 cross actions for separation from bed and board were commenced and subsequently abandoned; and petition and cross-petition for divorce were lodged and also subsequently withdrawn. About November, 1917, dame Stephens went to London, then to Paris, where she carried on works of charity in aid of victims of the war. In the fall of 1918, Colonel Gault and his wife, being both in France, engaged in their respective duties, because of the war, the latter instituted an action for divorce against her husband before the Civil Tribunal of First Instance of the Department of the Seine, Paris, which action was maintained by a judgment of that Tribunal, on the 20th of December, 1918. On the 14th of October, 1919, the respondent went through a form of marriage in Paris with dame Stephens, in compliance with all the formalities required by French law, the marriage having been preceded by an execution of a marriage contract, whereby *inter alia* the parties to it purported to submit their matrimonial affairs to the laws of Italy. They lived together as man and wife until the end of July, 1925, when they executed a separation agreement in Rome by which *inter alia* the respondent acknowledged payment of $5,000 in consideration of which he waived all present or future claim for aliment. At that time dame Stephens ceased to cohabit with the respondent and shortly afterwards returned to the province of Quebec where she continued to live until her death in 1930. An action was brought in May, 1931, by the respondent against the appellant as executor of the last will and testatment of the late dame Stephens; and the respondent's claim was that, as the husband or the putative husband of the late dame Stephens, he was entitled, in virtue of Italian law, to the usufruct of one-third of the estate of the latter. The trial judge and the appellate court held the respondent was entitled to succeed; and accordingly an accounting was directed.

Held, that the Court in France had no jurisdiction to pronounce a decree of divorce and to dissolve the marriage tie, such judgment not being recognizable in the courts of Quebec where the domicile of both

* PRESENT:—Duff C.J. and Cannon, Crocket, Davis and Hudson JJ.

spouses was situated at the date of the judgment; and that therefore the marriage between the respondent and dame Stephens was null *ab initio;* but

Held, Cannon J. dissenting, that, the good faith of the respondent not being disputed, the marriage was a putative marriage in the sense of the Italian law as well as of the law of Quebec and that the status of dame Stephens and the respondent was during her lifetime that of putative spouses within the intendment of articles 163 and 164 of the Civil Code. Thus the marriage settlement and the putative marriage itself produced their "civil effects" *quoad* property as if the putative marriage had been a real one; and, both by the law of Quebec and that of Italy, among these "civil effects" would be included any share of the husband or wife in good faith in the succession of his or her consort. Therefore, the respondent, his nationality having remained unchanged, has the right, among the rights flowing from the putative marriage, to demand the share in the succession of his putative wife to which he would have been entitled by Italian law, had the marriage been valid (1).

Per Cannon J. dissenting.—The courts of the province of Quebec should merely declare, in deciding the issues raised by the respondent's action, that the marriage invoked by the latter and the marriage settlement preceding it should receive no effect before these courts, and no declaration should be made as to their validity, as such a decision would not be within the scope of their jurisdiction. Even assuming such jurisdiction, the first husband not having been made a party to the respondent's action, no judgment concerning the validity of the divorce granted in Paris would be binding on him—Moreover, the respondent cannot claim the advantages resulting from the provisions of article 163 C.C. Even assuming good faith, the respondent cannot include among the "civil effects" of the putative marriage a change of nationality for dame Stephens from British to Italian; and the respondent has not established otherwise that dame Stephens had acquired Italian nationality through a marriage recognized as valid by the courts of Quebec and that she had retained such nationality at the time of her death. Therefore the respondent's action should be dismissed.

Berthiaume v. *Dastous* ([1930] A.C. 79) disc.

Judgment of the Court of King's Bench ([1937] 3 D.L.R. 605) affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (2), affirming the judgment of the Superior Court, Demers P.J., which maintained the respondent's action, and ordered the appellant to render to the respondent an accounting of the estate and succession of the late dame Marguerite C. Stephens.

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

(1) Reporter's note.—Petition for special leave to appeal to the Judicial Committee of the Privy Council dismissed with costs, July 25th, 1938.

(2) [1937] 3 D.L.R. 605.

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Aimé Geoffrion K.C., Geo. H. Montgomery K.C. and *L. H. Ballantyne K.C.* for the appellant.

John T. Hackett K.C. and *J. E. Mitchell* for the respondent.

The judgment of the Chief Justice and of Crocket, Davis and Hudson JJ. was delivered by

THE CHIEF JUSTICE.—The action out of which this appeal arises was brought by the respondent Falchi against the appellant as executor of the last will and testament of the late Marguerite Claire Stephens. The respondent's claim in brief was that, as the husband or the putative husband of the deceased Marguerite Claire Stephens, he was entitled, in virtue of Italian law, by which he alleged the determination of the issue is governed, to the usufruct of one-third of the estate of the appellant's *de cujus*.

The trial judge, Mr. Justice Philippe Demers, and the judges of the Court of King's Bench unanimously held the respondent entitled to succeed and, accordingly, an accounting was directed, further adjudications being reserved.

A brief statement of the facts is unavoidable. The late Marguerite Claire Stephens and Colonel Hamilton Gault were married in Montreal on the 16th of March, 1904, both being British subjects and domiciled in the province of Quebec. They lived together in matrimony until 1914 when Colonel Gault went to France in command of a Canadian regiment; he remained a member of the Canadian Expeditionary Force in France and in England until the end of the war, returned to Canada for demobilization and was struck off the strength of the Expeditionary Force on the 21st of December, 1919.

Difficulties arose between Colonel Gault and his wife in the years 1916 and 1917, cross actions for separation were commenced, and on the 30th of March, 1917, a judgment of separation was given in the wife's action against her husband. There was an appeal but the judgment was desisted from and proceedings on both sides were abandoned.

A little earlier, petition and cross-petition for divorce had been lodged with the Senate of Canada and, subsequently, withdrawn. On the 20th of December, 1918, a judgment of divorce was pronounced between them at the

instance of the wife by the Civil Tribunal of First Instance of the Department of the Seine, Paris.

It is not seriously open to dispute that at the date of this judgment the domicile of both spouses was in Quebec. The French tribunal had, therefore, no authority recognizable by the courts of Quebec to pronounce a decree dissolving the marriage tie. By the law of Quebec, marriage is dissoluble only by Act of Parliament or by the death of one of the spouses. By article 6 of the Civil Code, status is determined by the law of the domicile.

The facts resemble those under examination in the case of *Stevens* v. *Fisk* (1). The husband was domiciled in Quebec and there also, since they were not judicially separated, by the law of Quebec, was the domicile of the wife. The wife having complied with the conditions of residence necessary to enable her under the law of New York to sue for divorce in that state and, under those laws, to endow the courts of the State with jurisdiction to grant her such relief, obtained there a judgment for divorce *a vinculo;* the husband having appeared in the proceedings and taken no exception to the jurisdiction. It is not quite clear that the wife, had she been free to acquire a separate domicile, would not have been held to have done so; here there is no room for dispute that Mrs. Gault never acquired a French domicile in fact.

In both cases, therefore, the domicile of both consorts was in Quebec; in the one, in fact; in the other, in case of the wife, by force of law. It may at this point be recalled that, by the law of Quebec (Art. 207 C.C.) the wife acquires, as one of the consequences of separation from bed and board, the capacity to choose for herself a domicile other than that of her husband. The critical issue in *Stevens* v. *Fisk* (1) was whether in these circumstances the Quebec courts should recognize the New York divorce. The Court of Queen's Bench by a majority (of whom Dorion C.J. was one) held the divorce invalid in Quebec. This judgment was reversed in this Court (2) but Mr. Justice Strong dissented, explicitly agreeing with the conclusion as well as the reasoning of the majority of the Queen's Bench. The *considérants* I am about to quote express the grounds of the judgment in the Queen's Bench

(1) (1883) 6 L.N. 329, at 333. (2) (1885) 8 L.N. 42.

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and, as we shall see, are entirely in accord with the principles now established by judgments of the Privy Council. At the time, it had the weighty support of the two great judges whose names I have specified.

The *considérants* are these:—

Considering that the parties in this cause were married in the year 1871 in the state of New York, one of the United States of America, where they were then domiciled;

Considering that shortly after, to wit, about the year 1872, they removed to the city of Montreal, in the province of Quebec, with the intention of fixing their residence permanently in the said province;

And considering that the said appellant has been engaged in business and has constantly resided at the said city of Montreal since his arrival in 1872, and that he has acquired a domicile in the province of Quebec;

And considering that the female respondent has only left the domicile of her husband at the city of Montreal in 1876, and obtained her divorce from the appellant in the state of New York, in the year 1880, while they both had their legal domicile in the province of Quebec;

And considering that under article 6 of the Civil Code of Lower Canada, parties who have their domicile in the province of Quebec are governed even when absent from the province by its laws respecting the status and capacity of such parties;

And considering that according to the laws of the province of Quebec marriage is indissoluble, and that divorce is not recognized by said laws, nor are the courts of justice of the said province authorized to pronounce for any cause whatsoever a divorce between parties duly married;

And considering that the decree of divorce obtained by the female respondent in the state of New York has no binding effect in the province of Quebec, and that notwithstanding such decree, according to the laws of the said province the female respondent is still the lawful wife of the appellant, and could not sue the said appellant for the restitution of her property without being duly authorized thereto.

These *considérants* rest upon the principles of law applicable to the question now before us. The governing principle is explained in the judgment delivered by Lord Watson, speaking for the Privy Council in *Le Mesurier* v. *Le Mesurier* (1) as follows:—

Their Lordships have in these circumstances, and upon these considerations, come to the conclusion that, according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. They concur, without reservation, in the views expressed by Lord Penzance in *Wilson* v. *Wilson* (2) which were obviously meant to refer, not to questions arising in regard to the mutual rights of married persons, but to jurisdiction in the matter of divorce;

It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the Courts

(1) [1895] A.C. 517, at 540.

(2) (1872) L.R. 2 P. & D. 435, at 442.

of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another.

This principle has since been applied in *Lord Advocate* v. *Jaffrey* (1) and *Attorney-General for Alberta* v. *Cook* (2).

The principle of this judgment is, in my opinion, applicable to the circumstances of this case. The rule laid down by article 185 of the Civil Code is in itself unequivocal. "Marriage," it says,

can only be dissolved by the natural death of one of the parties; while both live, it is indissoluble.

So long as both the spouses have their domicile in Quebec, dissolution of marriage can, as already observed, only be affected by an enactment of a competent legislature. The wife, it is true, has capacity to acquire a domicile separate from her husband where a judicial separation has been pronounced and is in force; and, by article 6, the laws of Lower Canada

do not apply to persons domiciled out of Lower Canada, who, as to their status and capacity, remain subject to the laws of their country.

Difficult questions may arise in the application of these rules and principles of the Code in respect of jurisdiction in matrimonial proceedings where a decree of judicial separation having been pronounced the husband remains domiciled in Quebec while the wife has acquired for herself a domicile elsewhere. It is unnecessary to enter upon a discussion of this subject. One conceivable view is that in such a case no court has jurisdiction to pronounce a decree of divorce between the parties recognizable by the law of Quebec.

As regards the divorce proceedings to which reference has just been made, I can see no reason for refusing to apply the principle of the judgments of the Privy Council in view of the fact that both parties were at the time domiciled in Quebec.

On the 14th of October, 1919, the respondent went through a form of marriage in Paris with Mrs. Gault (the late Marguerite Claire Stephens), the marriage having

(1) [1921] 1 A.C. 146. (2) [1926] A.C. 444.

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been preceded by the execution of a marriage contract on the 3rd of October, 1919, whereby *inter alia* the parties to it purported to submit their matrimonial affairs to the laws of Italy. They lived together as man and wife in Italy, France and the province of Quebec until the 2nd of July, 1925, when they executed a separation agreement in Rome by which *inter alia* the respondent acknowledged payment of the sum of $5,000 in consideration of which he waived all present or future claim for aliment and declared:—

> I approve the above payment and declare that I renounce every other payment that my wife might be obliged to make after her death.

Of this agreement the respondent undertook to obtain confirmation by the proper tribunal but failed to do so; there is unanimity of opinion in the courts below that this document could not operate as a valid renunciation of rights in an unopened succession. At this time the late Marguerite Claire Stephens ceased to cohabit with the respondent, and shortly afterwards returned to the province of Quebec where she continued to live until her death.

The learned trial judge and three of the judges of the Court of King's Bench came to the conclusion that this marriage was null *ab initio*,—and with this I agree. It is not, I think, without relevancy that Marguerite Claire Stephens was a British subject and, as regards her, therefore, this marriage was under the ban of the Statute of James, (*Earl Russell's* case (1)).

Before proceeding further, I ought to notice an argument to the effect that Colonel Gault, having appeared in the divorce proceedings in Paris instituted by the late Marguerite Claire Stephens, the judgment in those proceedings must be taken as valid as against the appellant, on the ground that she in her lifetime was estopped from disputing the jurisdiction of the Paris court and that he is in no better position; and, again, that the Paris divorce stands as a valid judgment until it is competently set aside. This view was accepted by the majority of the judges of this Court in *Stevens* v. *Fisk* (2). It will not be necessary to examine those judgments. It results from *Le Mesurier* v. *Le Mesurier* (3) and the decisions based

(1) [1901] A.C. 446.
(2) (1885) 8 L.N. 42; Cassel's Digest, 1875-93.
(3) [1895] A.C. 517.

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upon it that, the court having no jurisdiction to dissolve the marriage tie, the judgment cannot be recognized in the courts of Quebec. It follows also from the principles laid down in those judgments that consent on the part of the spouses to the exercise of jurisdiction is of no significance.

I have come to the conclusion that the good faith of the respondent not being disputed, the marriage was a putative marriage in the relevant sense. It is, nevertheless, important, as Mr. Geoffrion contended, in considering the "civil effects" to be ascribed to that marriage for the benefit of the respondent, to bear in mind that it was in the strict sense a bigamous marriage, a marriage which could not deprive the putative wife of her British nationality because her nationality remained that of her lawful husband. It could not, moreover, as I humbly think, confer upon the respondent any rights incompatible with the recognition of the status of the lawful husband as bound to Marguerite Claire Stephens as such, or of the status of Marguerite Claire Stephens as bound to him as his lawful wife.

So long as the *vinculum* of the real marriage subsisted, no act, as I humbly think, of either of the spouses, no form of marriage in which either of them might participate could deprive her of the legal status of his wife or him of the legal status of her husband.

The status of Marguerite Claire Stephens and the respondent was during her lifetime that of putative spouses within the intendment of articles 163 and 164. As I venture to think, the true position is stated by Pothier in the following passage. (Pothier, Vol. 6, 197, nos. 437 and 438):—

le cas auquel un mariage, quoique nul, a des effets civils, est lorsque les parties qui l'ont contracté, étaient dans la bonne foi, et avaient une juste cause d'ignorance d'un empêchement dirimant qui le rendait nul.

On peut apporter pour exemple le cas auquel la femme d'un soldat qu'on avait vu, le jour d'un combat, couché parmi les morts sur le champ de bataille, et qu'on avait en conséquence cru mort, quoiqu'il ne le fut pas, se serait mariée à un autre homme, sur la foi d'un certificat de mort de son mari, en bonne forme, qu'elle aurait du major du régiment. Si longtemps et depuis qu'elle a eu des enfants de ce second mariage, son premier mari, qu'on croyait mort, vient à reparaître, il n'est pas douteux que le second mariage que cette femme a contracté, est nul; qu'elle doit quitter son second mari, et retourner avec le premier; son premier mariage qui a toujours subsisté, ayant été un empêchement dirimant du second; mais

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quoique ce second mariage soit nul, la bonne foi des parties qui l'ont contracté lui donne, par rapport aux enfants qui en sont nés, les effets civils que produisent les mariages, en donnant aux enfants les droits de famille, et tous les autres droits qu'ont les enfants nés d'un légitime mariage. En conséquence les enfants nés de ce second mariage viendront aux successions de leurs père et mère, et même concourrent à celle de leur mère avec les enfants qu'elle a eus de son premier mariage.

Comment, direz-vous, ce mariage qui est nul peut-il donner ces droits aux enfants qui en sont nés? car, *quod nullum est, nullum producit effectum.* La réponse est que si ce mariage, en tant qu'il est considéré comme nul, ne peut pas les leur donner, la bonne foi des parties qui l'ont contracté les leur donne, en suppléant à cet égard au vice du mariage.

438. La bonne foi des parties qui ont contracté un mariage nul, donne-t-elle pareillement à ce mariage les effets civils, à l'effet de confirmer entre elles leurs conventions matrimoniales, et de donner à la femme un douaire? Il y a même raison.

On opposera que les conventions matrimoniales dépendent de la condition, *si nuptias sequantur,* laquelle n'a pas été accomplie, puisqu'on ne peut pas dire qu'elles ont été suivies d'un mariage entres les parties; celui qui a suivi n'étant pas un véritable mariage, puisqu'il est nul. La réponse est, que la bonne foi des parties qui l'ont contracté, supplée à la nullité de ce mariage, et fait regarder la condition comme accomplie, de même qu'elle fait regarder comme légitimes les enfants qui en sont nés.

It will be observed that Pothier says not a word to sanction the view that the solemnization of the second marriage affects the status of the parties to the lawful marriage. He is very careful to make it clear that the rights which that solemnization engenders are rights springing from the good faith by which the parties were actuated; rights which would have been "civil effects" of the ceremony if the former husband, erroneously supposed to be dead, had been dead in truth.

I shall have to revert to this topic.

Before proceeding further, it is necessary to consider the question of the domicile of Marguerite Claire Stephens at the time of her death.

Mr. Geoffrion earnestly pressed upon us the contention that, since the decree of separation pronounced in 1917 was desisted from with the consent of the husband, the cause was thereby by force of section 548 of the Code of Civil Procedure, put in the same position "as it was in before the judgment." I should have been disposed to think, were it not for the views expressed in the Quebec courts, that since the law favours the removal of obstacles to the reunion of separated spouses, and since the *désistement* from the judgment in due form with the common consent of both parties would be one step on the way,

effect ought to be given in the case of a judgment of separation to this article of the Code of Civil Procedure as in the case of other judgments. On this point, however, I defer to the views of the Quebec judges. Mr. Justice Demers appears to entertain no doubt that the only way in which the separation decree could be abrogated would be by actual reunion of the husband and wife as contemplated by article 130; and the majority of the judges of the Court of King's Bench appear to agree with him.

The question whether or not the putative wife did acquire a domicile separate from that of her lawful husband by reason of the putative marriage is a question to be settled by the law of Quebec. The courts of Quebec administer the law of Quebec and no other law. If they apply the rules of the law of another country, it is because the law of Quebec commands them to do so in the circumstances. Whether or not the conditions are such as to require the application of the rules of law of another country is a question they must decide under their own law as to what constitutes domicile and what are the conditions under which a change of domicile takes place.

If, at the date of the putative marriage, the judicial separation was not still in force, the Quebec domicile of the putative wife was not, I think, lost in consequence of that marriage because she could not acquire another domicile consistently with due recognition of the existing lawful marriage; as such recognition imports identity of domicile of the spouses.

If the judicial separation was still in force (and I am accepting that view) there are great difficulties, as I see it, in holding that *ipso jure* her domicile became the domicile for the time being of the putative husband.

These alternatives, however, do not exhaust the possible situations. Since, on the last mentioned hypothesis, by the law of Quebec, she was free to acquire another domicile in fact, it is, on that hypothesis, a question of fact whether or not a change of domicile did take place. In my view of the facts, the marriage contract, the putative marriage, the residence in Italy, constitute evidence from which the inference ought to be drawn that she acquired an Italian domicile in fact. I think, nevertheless, that in point of fact she reverted to her domicile of origin when

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she ascertained the invalidity of the putative marriage and returned to reside in Quebec. Before she had ascertained the true legal position she was living separately from her putative husband by agreement, and, once she ascertained the truth, it was, as Pothier points out, her duty no longer to cohabit with him. The evidence, it appears to me, points conclusively to an intention on her part to establish herself permanently in Quebec.

This brings us to the precise question raised by the appeal: Has the respondent the right, among the rights flowing from the putative marriage, to demand the share in the succession of the putative wife to which he would have been entitled by Italian law had the marriage been valid and the nationality of the husband remained (as it has remained) unchanged?

Since the litigation is in the courts of Quebec and the domicile of the *de cujus* was, at her death, in the province of Quebec, this question must be determined by the law of Quebec, regard being had, of course, to the Italian law to the extent to which, for this purpose, the law of Quebec recognizes and applies it in the circumstances. As regards the "civil effects" of putative marriage, there appears to be no pertinent difference between the law of Italy and that of Quebec.

The claim of the respondent, accordingly, rests upon the principle of articles 163 and 164 of the Civil Code which are in these terms:—

163. A marriage although declared null, produces civil effects, as well with regard to the husband and wife as with regard to the children, if contracted in good faith.

164. If good faith exist on the part of one of the parties only, the marriage produces civil effects in favour of the children issue of the marriage.

Now, the first thing to be observed is that these articles are not limited in their operation to marriages in Quebec. In *Berthiaume* v. *Dastous* (1) the marriage had been celebrated in France; although by French law in point of form radically null, "void," as the judgment of the Privy Council says, *"ab initio,"* and consequently (as the cause of nullity concerned solemnization) null by the law of Quebec on the principle *locus regit actum.* The right which was there affirmed (right to alimony after a declaration of

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nullity) was recognized as one of the "civil effects" of this marriage solemnized in France. Here, the personal law of each of the spouses at the critical moment, the death of Marguerite Claire Stephens, recognizes the "civil effects" produced by putative marriages; and in their application to the circumstances of this case according to the same principles.

My conclusion is that, both by the law of Quebec and that of Italy, among the "civil effects" would be included any share of the husband or wife in good faith, as the case might be, in the succession of his or her consort. I am now considering the scope of "civil effects" in the general sense, and I think the proper conclusion is that it includes any share in the inheritance to which the putative consort in good faith would be entitled in the events which have actually happened if the marriage had been a real one; subject, in the case of a bigamous marriage, to full recognition of the lawful marriage and the rights arising out of it. In this case, there is no suggestion that the rights of the real husband come into competition. That, as I understand it, is in substance the view of Mr. Justice Demers.

Lord Dunedin points out, if I may say so, with great force, that the children are linked with husband and wife in these articles. Pothier, it will be noticed, in the passage quoted above, expressly includes hereditary rights among the "civil effects" of which the children take the benefit. Hereditary rights are included under Scotch law (Fraser, Husband and Wife, Vol. I, 152) and, as regards Italian law, there is no serious dispute.

Laurent (2 Br. Civ., nos. 510 and 511, pp. 646-648) says:—

510. Si les deux époux sont de bonne foi, dit l'article 201, le mariage annulé produit les effets civils à leur égard. Ils ont donc tous les droits qui naissent d'un mariage légal, d'abord sur la personne et les biens de leurs enfants; ils exercent la puissance paternelle et l'usufruit qui y est attaché. Voilà un effet qui se prolonge au delà du jugement qui prononce la nullité, et par la force des choses. Il en est de même des conventions matrimoniales des époux, des donations qu'ils se sont faites. Tous ces effets sont incontestables. Mais que faut-il dire des effets que le mariage produit entre les époux? Il est certain qu'il ne peut plus être question du devoir de fidélité, ni de la protection que le mari doit à sa femme, ni de l'obéissance que la femme doit à son mari. Mais si l'un des époux était sans fortune, ne pourrait-il pas demander une pension alimentaire de son conjoint? Le code donne ce droit au conjoint qui a obtenu le divorce (art. 301). Il nous semble que cette disposition doit recevoir son

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application, par analogie, au mariage putatif. Il y a, en effet, même raison de décider. L'époux sans fortune doit compter sur la subsistance que le mariage lui assure; combien d'unions sont contractées dans cette vue! Ce serait donc tromper l'attente des contractants que de les priver de cet avantage.

511. * * * La vraie difficulté est donc celle-ci: la fiction s'étend-elle au droit héréditaire? La loi maintient le droit d'hérédité au profit des enfants, des père et mère, et même des parents; pourquoi ne maintiendrait-elle pas le droit de succession au profit du conjoint? N'est-ce pas là un des effets civils du mariage? Dès lors ne faut-il pas dire que cet effet est produit par le mariage putatif? La seule objection sérieuse que l'on puisse faire au conjoint, c'est que le mariage annulé ne peut plus produire de nouveaux effets à partir du jugement qui a prononcé la nullité; or, le droit de succession est un nouvel effet. Mais cet argument ne peut pas être opposé aux enfants; pourquoi donc l'opposerait-on à l'époux?

In *Berthiaume* v. *Dastous* (1), the Privy Council had to consider a case in which they held the marriage to be null and it was so declared. The principal question was whether the right to alimony is one of the "civil effects" subsisting after nullity has been decreed. An imposing array of French authorities was cited to the effect that since the duty of cohabitation was gone, the duty of maintenance had disappeared with it. This view was rejected by the judgment of the Privy Council which applies the test stated thus: "Those rights subsist which are consistent with a real marriage not existing." And again, as already observed, the judgment emphasizes the circumstance that the spouses and the children are linked together in articles 163 and 164 C.C.

The authorities cited before the Privy Council put alimony and hereditary rights on the same footing and exclude them from the "civil effects" for the same reason. The view of Laurent as touching hereditary rights would appear to be more consistent with the judgment than the opposite view.

As against all this, Mr. Geoffrion takes his stand on two propositions. First, as regards Italian law, the right of the husband is necessarily conditioned upon the Italian nationality of the putative wife because, admittedly, the Italian law of succession in terms regulates only the successions of Italian nationals; second, given domicile in Quebec, the Quebec courts must apply the Quebec law of succession, including the right of testamentary disposition.

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After a good deal of reflection, I have been forced to the conclusion that the putative marriage in question here being a marriage in contemplation of articles 163 and 164 C.C., and a putative marriage within the meaning of Italian law, the marriage settlement and the putative marriage itself produced their "civil effects" *quoad* property as if the putative marriage had been a real one in accord with the law as explained by Pothier and Laurent, subject, of course, to the rights of the lawful husband, and that, in the events that happened, the "civil effects" of the contract and the putative marriage *quoad* property include the right now in question here.

Since (as the judgment in *Berthiaume* v. *Dastous* (1) lays down) "all civil rights appendant to real marriage" which are consistent with the non-existence of real marriage are "produced by a putative marriage," I cannot agree that the *jus mariti* in relation to succession is excluded because the domicile and nationality of the putative wife were not in the circumstances those of the putative husband. Disunity of nationality was the necessary correlative of the bigamous character of the marriage and the invalidity of the marriage was a necessary condition of the acquisition by Marguerite Claire Stephens of a Quebec domicile. These legal results or incidents of nullity cannot really affect the question of the admission of this particular *jus mariti* as one of the "civil effects" since, *ex hypothesi*, the inclusion of it within that category is not incompatible with the recognition of the non-existence of a real marriage between the respondent and the putative wife. The obligations of the marriage contract subsist, as Pothier says, although the contract was entered into in contemplation of marriage and if there had been no marriage in fact would fail of effect. The good faith of the parties in the putative marriage is recognized by the law as fulfilment of the condition. Effect ought to be given to the stipulation that the parties are to be governed by Italian law so far as that can be done consistently with recognition of the non-existence of a real marriage between the respondent and Marguerite Claire Stephens and of the continued existence of the actual, legal marriage between her and her real husband, Colonel Gault.

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My view summarized in a word is that the marriage between the respondent and the putative wife, having been a marriage in good faith, a putative marriage in the sense of the Italian law as well as of the law of Quebec, the civil effects of which the putative husband is entitled to the benefit do not necessarily rest upon the hypothesis that he acquired the status of husband of Marguerite Claire Stephens, or that she acquired his nationality or his domicile, but simply upon the fact that the marriage was entered into in good faith a fact which has certain juridical consequences. These consequences would appear (*Berthiaume* v. *Dastous*) (1), to include *quoad* property such consequences of a real marriage as are consistent with the non-existence of a real marriage and, in the case of a bigamous marriage, such as are consistent with the continued existence and recognition of the status and rights of the lawful husband arising out of the lawful marriage.

There remains a point taken on the argument, viz., that judgment for the appellant could not be given in the absence of Colonel Gault as a party on the record. It may be noted that it is stated in the respondent's factum as an undoubted fact that Colonel Gault is domiciled in England. Such being the case, the Quebec courts are not competent to pronounce against him or in his favour a judgment *in rem* affecting his marital status or his status in any respect. The Quebec courts have, however, complete jurisdiction to deal with suits concerning questions of property and, incidentally, to decide *inter partes* questions touching the validity of divorces in so far as they are relevant to the determination of the issues directly involved.

The appeal is dismissed with costs.

CANNON, J. (dissenting).—L'intimé, sujet italien, poursuit en reddition de compte l'appelant, exécuteur testamentaire et légataire universel en usufruit de sa sœur Marguerite Stephens, demandant l'application en sa faveur d'une disposition de la loi italienne qui lui assurerait l'usufruit du tiers des biens laissés par Dame Stephens comme époux survivant de sa femme morte à Montréal le 27 mars 1930 sans laisser d'ascendant ni de descendant.

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Il allègue un mariage célébré à Paris le 14 octobre 1919, suivant la loi française, et un contrat de mariage antérieur par lequel les futurs époux soumirent leur mariage aux lois italiennes, qui auraient, en conséquence, régi leurs domicile et status matrimoniaux.

L'appelant, par sa défense, allègue un mariage antérieur de sa sœur, le 16 mars 1904, à Montréal, à Andrew Hamilton Gault, comme elle, sujet britannique de naissance et tous deux domiciliés depuis leur naissance et lors du mariage dans la province de Québec; que ce mariage, sujet aux lois de leur domicile, dans la province de Québec, où le divorce n'est pas reconnu, est indissoluble du vivant des époux et constitue un empêchement absolu à la validité de l'union alléguée, vu que Gault était encore vivant lors du prétendu mariage et vit encore; que le divorce entre Gault et Marguerite Stephens obtenu à Paris, alors que tous deux étaient légalement domiciliés au Canada et régis, suivant l'article 6 du Code civil, par les lois qui règlent dans la province de Québec l'état, i.e. la condition juridique, de chaque personne, et sa capacité de jouir des droits que confère l'état civil, est nul et de nul effet; que l'union alléguée par le demandeur est entachée de bigamié et doit être considérée comme nulle et contre l'ordre public par le tribunal de la province de Québec auquel il est soumis comme base de la réclamation de l'intimé.

La plaidoyer mentionne aussi un paiement de $5,000 fait par feu Marguerite Stephens à l'intimé en vertu d'une convention faite à Rome le 2 juillet 1925, pour obtenir sa renonciation à toute réclamation contre elle ou sa succession. L'on allègue aussi que de 1925 à sa mort Marguerite Stephens a conservé sa résidence et son domicile à Montréal et a vécu séparée de l'intimé; elle a même, en 1928, demandé à la Cour Supérieure de Montréal de constater la nullité de la cérémonie et du contrat de mariage allégués par l'intimé, mais aurait discontinué son action le ou vers le 27 février 1929.

La réponse au plaidoyer mentionne des actions pour séparation de corps et des demandes de divorce intentées en Canada réciproquement sans résultat l'un contre l'autre par les époux Gault, allègue la bonne foi de l'intimé et réclame, en cas de nullité de son union, en sa faveur les effets civils d'un mariage putatif, vu qu'il croyait de bonne foi les

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représentations à lui faites que feu Dame Marguerite Claire Stephens était "légalement capable de contracter un mariage valide". Enfin, l'intimé nie à l'appelant, légataire universel de sa sœur, le droit d'attaquer le divorce parisien, même si les Gault l'avaient obtenu collusoirement en fraude de la loi de leur domicile.

Après enquête et examens de témoins à l'étranger, le premier juge considère que le mariage du demandeur et de défunte Marguerite Claire Stephens était nul mais contracté de bonne foi; qu'à la mort de cette dernière, le mariage, n'ayant pas encore été déclaré nul, les lois d'Italie s'appliquaient; et que l'un des effets civils de ce mariage putatif est le droit du demandeur à un tiers de l'usufruit des biens de sa femme. Le savant juge Demers dit qu'il constate comme certain que ni la femme ni le mari n'étaient domiciliés à Paris lors du jugement de divorce du tribunal de la Seine; et il trouve que, d'après les principes de droit international reproduits à l'article 6 C.C. ces deux époux étant domiciliés dans la province de Québec lors du divorce, il faut décider que ce divorce est nul et, en conséquence, le mariage du demandeur nul. Le premier juge ajoute que la loi italienne s'applique et qu'en conséquence, comme en France, le mariage entaché de bigamie doit être attaqué et déclaré nul; autrement il produit ses effets civils jusqu'à l'annulation, si les époux sont de bonne foi.

Cette question de bonne foi est résolue en faveur de l'intimé par le premier juge; et il conclut que, le mariage du demandeur n'ayant pas été déclaré nul, Dame Stephens est réputée sa femme et, en conséquence, réputée italienne. Il conclut que cette question est discutée en Italie et en France; mais cela lui semble la solution la plus logique.

En appel, le juge-en-chef de la province ne croit pas nécessaire ni opportun de décider de la validité du divorce des époux Gault; il se contente, vu la bonne foi du demandeur-intimé, de lui donner le bénéfice découlant d'un mariage putatif. Le jugement de la cour d'appel modifie sur ce point de nullité le jugement de la Cour Supérieure et fait disparaître des considérants la déclaration de nullité du second mariage basée sur l'existence du premier, mais, chose étrange, applique à l'intimé les dispositions de l'article 163 C.C., comme si la cour avait déclaré nul le second mariage; ce que, précisément, elle a refusé de faire.

I

Pour établir qu'au moment de sa mort Marguerite Stephens était de nationalité italienne, l'intimé allègue d'abord son mariage célébré à Paris et produit le certificat suivant:

Le quatorze octobre mil neuf cent dix-neuf, dix heures quarante-cinq minutes, devant nous, Clément Legoueix, adjoint au maire du seizième arrondissement de Paris, ont comparu publiquement en la maison commune Luigino Gaspero Guiseppe Falchi, commandant dans l'aviation italienne, né à Montopoli (Italie) le onze décembre mil huit cent soixante-dix-neuf, domicilié à Montopoli, et résidant à Paris, avenue Henri Martin 67, fils de Isidore Falchi, et de Céline Mainardi, époux décédés; d'une part, /- Et Marguerite Claire Stephens, propriétaire, né à Montréal (Canada) le vingt six août mil huit cent quatre-vingt-trois, *domiciliée à Montréal,* et résidant à Paris, rue Pierre Charron 54, fille de George Washington Stephens, et de Frances Ramsay McIntosh, époux décédés; divorcée de Andrew Hamilton Gault, d'autre part;—sans opposition, un contrat de mariage a été reçu le trois octobre courant, par Maître Durant des Aulnois, notaire à Paris. Luigino Gaspero Guiseppe Falchi et Marguerite Claire Stephens ont déclaré l'un après l'autre vouloir se prendre pour époux et nous avons prononcé au nom de la loi, qu'ils sont unis par le mariage.

L'appelant a nié que cette union pût avoir aucun effet dans la province de Québec, vu que le premier époux de Marguerite Stephens était encore vivant lors de cette comparution devant le maire, à Paris; le divorce allégué par l'intimé ne pouvait être reconnu dans la province de Québec, vu que les deux conjoints, Gault et Dame Stephens avaient, de propos délibéré et dans le but de se libérer des obligations de la loi de leur domicile, demandé à un tribunal étranger de dissoudre leur lien conjugal, ce qu'ils n'avaient pu obtenir au Canada, ni devant les tribunaux de la province de Québec, ni devant le parlement du Canada.

Une étude attentive du dossier m'a convaincu qu'en effet les époux Gault, après avoir renoncé à obtenir un divorce au Canada, ont profité de leur séjour en France pour recouvrer leur liberté de tenter, chacun de son côté, une nouvelle aventure matrimoniale. La jurisprudence a toujours refusé de donner effet à toute tentative de secouer le joug des obligations imposées pour des raisons d'ordre public, par le code civil à toutes personnes dont le domicile légal, lors de leur mariage, était dans la province de Québec. Je citerai, entre autres, la cause de *Gregory* v. *Odell* (1), où les juges Malouin, McCorkill et Letellier, siégeant en revision, confirmant Langelier A.C.J., jugent que

(1) (1911) Q.R. 39 S.C. 291.

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A decree of divorce by a foreign court purporting to dissolve a marriage contracted in this province, and made while the consorts still had their domicile herein, is without effect and cannot be set up by one of them as a plea by the other to enforce obligations arising out of the marriage.

Dans *Monette* v. *Larivière* (1), la Cour du Banc du Roi a décidé que le décret de divorce prononcé aux Etats-Unis et déclarant dissous le mariage de deux époux, mariés dans la province de Québec, où tous deux étaient domicilés au moment de leur mariage, et dont l'un y est encore domicilé, est sans effet à leur égard, parce que seules les lois de cette province leur sont applicables. Le juge en chef Tellier, à la page 354, disait que l'on ne peut contraindre la défenderesse en cette cause, dont le domicile lors du mariage et depuis était à Montréal à se soumettre à la loi d'un pays étranger et faire dépendre ses droits matrimoniaux d'une loi que ne la concerne pas. Il ajoutait qu'aucune décision d'un tribunal étranger—dans l'espèce, celui des Etats-Unis—ne peut, dans ces circonstances, affecter soit son mariage, soit ses droits matrimoniaux.

Le juge Rivard dit: p. 352:—

D'après la loi de la province de Québec, le mariage est indissoluble; il ne se dissout que par la mort naturelle de l'un des conjoints (art. 185 C.C.). De cette loi d'un ordre supérieur on peut rapprocher ce principe généralement accepté: le droit des gens n'oblige pas un Etat à reconnaître une loi étrangère, lorsque cette loi étrangère n'a pas de droit naturel (sic), que son élément essentiel n'est pas la conservation des bonnes mœurs, et qu'elle est contraire à l'économie générale du système juridique de cet Etat. * * * Il n'est donc pas étonnant qu'on puisse soutenir que chez nous les divorces obtenus devant les tribunaux étrangers ne devraient pas être reconnus.

Et à la page 360:

Il n'y a pas de doute que les lois du mariage et du divorce forment un statut personnel (5 Laurent, Nos 119 et 122). Le divorce est en effet relatif à l'état des époux, puisqu'il change cet état. La loi personnelle dont les parties relèvent a donc seule compétence en cette matière (Weiss, Manuel de droit international privé, 7è. éd. p. 505; Foelix, Dr. int. pr., pp. 53 et 112; Surville, Dr. Int. pr. 7è. éd. No 300).

Enfin, je citerai une décision décente, *Stern* v. *Stern* (2), où Désaulniers J., a décidé:—

Est sans effet dans la province de Québec un divorce obtenu dans l'un des Etats-Unis d'Amérique par des personnes qui ont contracté mariage dans cette province.

Le juge pose d'abord en principle que la Cour Supérieure n'a pas juridiction pour annuler un divorce prononcé par un tribunal américain; et je suis aussi d'avis que la Cour Supérieure n'a pas juridiction pour annuler un divorce

(1) (1926) Q.R. 40 K.B. 350. (2) (1932) Q.R. 70 S.C. 549.

obtenu à Paris par les époux Gault et que seuls les tribunaux français auraient juridiction en cette matière.

Mais j'adopte le déclaration du juge Désaulniers que, d'après les lois de notre province, un divorce obtenu aux Etats-Unis, entre des citoyens de Québec qui se sont mariés dans ses limites, n'a aucun effet chez nous. L'article 185 du code civil nous dit que le mariage est indissoluble et qu'il ne peut être dissous que par le mort de l'un des conjoints. Ce principle domine la matière et est, chez nous, un élément essentiel du consentement au mariage; or le consentement et ses suites sont régis par la loi nationale. Il serait vraiment singulier que les tribunaux étrangers eussent plus de pouvoir et d'autorité que les nôtres. Ce que les citoyens de cette province ne peuvent obtenir ici, ils pourraient l'obtenir ailleurs. Ce serait un non-sens. La seule autorité compétente pour annuler un mariage validement célébré dans la province de Québec par deux non-catholiques qui y sont domicilés est la parlement du Canada.

Je suis donc disposé à déclarer que le divorce obtenu par les époux Gault à Paris n'a aucun effet dans cette province et ne saurait y légitimer le second mariage de Marguerite Stephens du vivant de Gault; nous pouvons donc considérer, pour les fins du présent litige, lors de sa mort, Marguerite Stephens, comme justiciable de la province de Québec, toujours l'épouse de Hamilton Gault.

Voir sur tous ces points les autorités citées par Johnson, *Conflict of Laws,* vol. 2, pp. 132 à 170.

Il est important de remarquer une divergence entre le droit et la jurisprudence de la province de Québec et le droit anglais, comme Johnson, à son deuxième volume, pp. 74 et 152, le souligne:

> In English law * * * the motive of a change of domicile will not be investigated, provided there is an actual change. That the new domicile is taken because a divorce can there be more readily obtained, does not, in the eyes of English courts, invalidate the divorce.
>
> In Quebec, a change of domicile *ad nutum,* so far as its effect upon status at least, would be deemed no change at all. We apply this principle in matters of separation from bed and board and marriage. What might be a "genuine" domicile in the English view, because actual, might in the Quebec view be neither *bona fide* nor genuine, because it is in fraud of our law.

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Et j'adopte cette conclusion:

But the case where consorts were married domiciled in Quebec, and there has been no change of domicile by either, is clear. A decree of divorce by a foreign court is without effect.

Je suis d'avis que notre Cour, dont les pouvoirs sont aussi restreints que ceux des cours de la province de Québec quand il s'agit de déclarer la nullité d'un mariage ou d'un divorce, célébré ou obtenu à l'étranger, doit se contenter, comme la Cour Supérieure aurait dû le faire, de déclarer, pour les fins de la présente cause, que le mariage invoqué par l'intimé et le contrat qui l'a précédé entre lui et Dame Stephens, épouse de Hamilton Gault, ne doivent recevoir aucun effet devant les tribunaux de la province de Québec qui sont chargés de faire respecter l'indissolubilité du mariage unissant des personnes domiciliées dans Québec et y ayant conservé leur domicile. Mais nous devons aussi refuser de donner un effet extra-territorial au décret de divorce, quand le tribunal français a dépassé les limites de sa juridiction en statuant de manière à affecter l'état et la capacité de Marguerite Stephens, alors, ainsi que son mari, domiciliée non en France, mais à Montréal.

Si, pour les raisons ci-contre, le mariage en question n'est pas annulé ou déclaré nul, peut-on, comme l'ont fait les deux cours inférieures, accorder à l'intimé le bénéfice des articles 163 et 164 du code civil qui disent:

163. Le mariage *qui a été déclaré nul* produit néanmoins les effets civils, tant à l'égard des époux qu'à l'égard des enfants lorsqu'il est contracté de bonne foi.

164. Si la bonne foi n'existe que de la part de l'un des époux, le mariage ne produit les effets civils qu'en faveur de cet époux et des enfants nés du mariage.

Le demandeur-intimé s'est adressé aux tribunaux de la province de Québec pour leur demander de donner effet à l'union qu'il prétend avoir existé entre lui et feu Marguerite Stephens, au moment du décès de cette dernière et de l'ouverture de sa succession; et il réclame sa part des droits que la prétendue nationalité italienne de cette dame résultant du mariage invoqué lui assurait en vertu de la loi italienne sur les biens laissés dans la province de Québec par Marguerite Stephens.

Pour les raisons que j'ai exposées plus haut, les tribunaux de la province de Québec doivent refuser de donner effet à ce mariage, sans cependant le déclarer nul, pour la raison que sa validité échappe à leur juridiction. Par ailleurs,

M. Hamilton Gault n'a pas été mis en cause et aucun jugement affectant définitivement quant à lui la validité du divorce accordé à Paris ne saurait être rendu, même si la Cour Supérieure de Québec avait juridiction, sans qu'il ait été assigné et ait eu l'occasion de se faire entendre.

Bien que, d'après les termes exprès de l'article 163 C.C., il n'y aurait pas lieu, dans l'espèce, de faire jouer, comme l'a fait la cour d'appel, en faveur de l'intimé la fiction du mariage putatif, il est bon, je crois, vu que les jugements des cours inférieures sont basés sur cette fiction, d'en dire quelques mots. La condition essentielle pour que l'intimé puisse jouir des avantages que lui conférerait notre article 163 C.C., c'est la bonne foi. Peut-on dire qu'il ignorait, lors du mariage dont il se prévaut, le fait que les époux Gault s'étaient rencontrés à Paris dans le but exprès de se soustraire à l'indissolubilité de leur union, qui les empêchait de divorcer et de contracter un nouveau mariage tant et aussi longtemps qu'ils conservaient leur domicile dans la province de Québec? Sur ce point de fait, il ne saurait faire de doute que le domicile conjugal n'avait pas été changé et que Hamilton Gault avait, lors du divorce, son principal établissement à Montreal, où il est revenu pour être démobilisé, avant son départ pour l'angleterre où il a vécu depuis 1919 environ. L'intimé admet que Marguerite Stephens lui aurait dit, avant leur mariage, qu'elle se proposait de divorcer pour pouvoir l'épouser.

Quoi qu'il en soit, même s'il faut, comme les juges de première instance et ceux de la Cour du Banc du Roi conclure à la bonne foi de l'intimé, peut-on compter parmi les effets civils du mariage putatif invoqué comme dernière ressource par l'intimé pour maintenir son action, un changement de nationalité de Marguerite Stephens? Peut-on aller à l'encontre du droit public de la province de Québec et du Canada et sanctionner, en vertu d'une fiction légale, un changement de nationalité fictif, quant à nos tribunaux, dans les circonstances de la cause, pour permettre à un aubain de jouir des droits que Marguerite Stephens a légués par testament à l'appelant?

Bien qu'une décision récente de la Cour de cassation, en France, *re Edwards* (1), semble affirmer que le changement de nationalité peut être considéré comme un effet civil dé-

(1) [1936] Dalloz, Jur. Gén. 2e pt. 70.

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coulant d'un mariage putatif, il y a lieu de se demander si cette jurisprudence peut s'appliquer dans la province de Québec. En effet, chez nous, le droit civil a été conservé par l'Acte de Québec, 14 Geo. III (1774) ch. 83, toujours en vigueur sur ce point; et la section 8, en substance décrète ce qui suit:

> His Majesty's Canadian subjects may hold and enjoy their property and possessions, together with all customs and usages relative thereto with all other their civil rights. * * * *as may consist with their allegiance to His Majesty and subjection to the Crown and Parliament of Great Britain;* and that in all matters of controversy relative to property and civil rights resort shall be had to the laws of Canada as the rule for the decision of the same; all causes * * * in courts, shall, with respect to such property or rights be determined agreeably to the said laws and customs of Canada, until this shall be varied or altered by competent authority.

Et la section 10 introduit chez nous la liberté de tester, nonobstant toute loi à ce contraire. Il semble donc que toute question d'allégeance au souverain et de nationalité ait été expressément réservée comme n'étant pas matière de droit civil, mais de droit public. Or, la loi anglaise, qui aurait été la loi du domicile conjugal des Gault, à la mort de l'épouse de ce dernier alors établi en Angleterre, et notre loi fédérale concernant la naturalisation et la nationalité canadienne ignorent ce qu'on est convenu d'appeler mariage putatif; et la question à résoudre est de savoir si, dans les circonstances, dans la province de Québec, on peut conclure, comme les juges des cours inférieures, que, parmi les effets civils d'un mariage putatif en faveur du conjoint étranger de bonne foi, il y aurait, comme on le prétend en cette cause, eu un changement de nationalité de sa femme canadienne, et ce mariage putatif, fiction de la loi, aurait-il eu pour effet de faire perdre à la défunte son allégeance à la Couronne britannique, sa nationalité canadienne et son droit illimité de tester?

Tous s'accordent à dire que, pour réussir, Falchi doit prouver qu'au moment de sa mort, Marguerite Stephens était de nationalité italienne, afin de la soumettre à l'opération des lois d'Italie qu'invoque le demandeur. En vertu de l'article 6 du Code civil italien,

> L'état et la capacité des personnes et les rapports de famille sont réglés par la loi de la nation à laquelle les personnes appartiennent;

et, d'après l'article 8,

> Les successions légitimes et testamentaires en ce qui concerne l'ordre de succéder, la mesure des droits héréditaires et la validité intrinsèque

des dispositions, sont réglées par la loi *nationale* du de cujus, quelle que soit le nature des biens et dans n'importe quel pays ils se trouvent.

Je trouve aux Rapports des Codificateurs (Vol. 1er, p. 186) ce qui suit :

La disposition qui oblige la femme à suivre son mari partout où il veut résider, et par implication, même en pays étranger, conforme à l'article 214 du Code Napoléon, avait d'abord été adoptée comme amendement à la loi actuelle; mais sur considération ultérieure, l'on s'est convaincu que cette règle, d'après le droit civil, est générale et absolue; que l'exception quant au pays étranger que l'on faisait autrefois, si elle existe réellement, est fondée sur le droit public et ne soulève qu'une question d'allégeance, savoir: si le mari peut forcer sa femme à la changer et à abdiquer sa patrie; question étrangère au droit civil, et par conséquent à notre code, et dont la solution, ainsi qu'il fut dit dans les discussions au conseil d'Etat "doit être abandonnée aux mœurs et aux circonstances." C'est pour ces raisons que l'article est proposé comme conforme à la loi actuelle.

Il est vrai que, d'après la Loi de Naturalisation (R.S.C. 1927, c. 138, sec. 13), l'épouse d'un aubain est censée être un aubain. Mais ceci n'est pas en vertu des dispositions de notre code civil mais bien en vertu des pouvoirs exclusifs confiés par la constitution au parlement du Canada de légiférer en tout ce qui concerne la naturalisation et l'acquisition ou la perte de la qualité de citoyen canadien. Quelle que soit la doctrine adoptée en France ou dans d'autres pays où le pouvoir législatif est confié en entier à un organisme unique, nous ne pouvons ignorer chez nous que certaines matières—et pour ce qui concerne cette cause, les effets civils du mariage putatif—sont, quant à la naturalisation et au changement d'allégeance au Souverain, de par les dispositions expresses de l'Acte de Québec (1774) et de l'Acte de l'Amérique Britannique du Nord, en dehors de la compétence de la législature de la province de Québec. Comme les codificateurs l'ont fait remarquer, c'est là une question de droit public concernant les droits et les obligations politiques des sujets canadiens, comme citoyens, non d'une province, mais de la Confédération. Sur ce point, nous avons uniformité de législation, laquelle ne saurait varier d'une province à l'autre, comme en matière de droit purement civil ou privé.

Je suis donc d'avis que, même si nous pouvions appliquer à cette cause, en faveur de l'intimé, la fiction du mariage putatif, nous ne pourrions aller jusqu'au point de concéder en sa faveur comme un de ses effets civils le prétendu changement de nationalité de Marguerite Stephens. Pour étayer sa thèse et sa cause, l'intimé admet qu'il lui faut

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établir: 1° que la défunte était devenue italienne par un mariage valide aux yeux de la loi de la province de Québec; et 2° qu'au moment de sa mort la *testatrice* avait conservé cette nationalité italienne. Il n'a pas établi à ma satisfaction ces points primordiaux et essentiels pour lui donner le droit de recueillir une partie des biens laissés par Dame Stephens.

Pour ces raisons, avec beaucoup de respect pour la décision des savants juges des cours provinciales—devant lesquels certains des points de droit plaidés devant nous ne semblent pas avoir été soulevés—je maintiendrais l'appel et débouterais l'intimé de son action avec dépens de toutes les cours contre lui.

Appeal dismissed with costs.

Solicitors for the appellant: *Brown, Montgomery & McMichael.*

Solicitors for the respondent: *Hackett, Mulvena, Foster, Hackett* and *Haimen.*

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* April 26.
* June 23.

SHIN SHIM ..... APPELLANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Immigration Act—Chinese landing in Canada—Examination by Controller of Immigration as to right to enter Canada—Report ordering deportation—Habeas Corpus—Right of a judge to review finding of Controller and to receive new evidence as to British citizenship of the applicant—Chinese Immigration Act, R.S.C., 1927, c. 95, sections 5, 8, 11, 37.

The appellant, a Chinese woman, arrived in Vancouver on the 9th of September, 1936, and claimed she was a Canadian citizen, having been born in the city of Victoria and being the wife of a Chinaman then residing in Vancouver. The Controller of Chinese Immigration, acting in pursuance of the powers set out in the *Chinese Immigration Act,* examined the appellant as to her right to enter Canada, and, on the 23rd of September, 1936, found that the appellant was not in fact the person she was represented to be and that she had not been born in Victoria; and therefore he ordered her deportation. An application was then brought for a writ of *Habeas Corpus;* and, on the hearing, new evidence was adduced by and on behalf of the

* PRESENT:—Duff C.J. and Cannon, Crocket, Davis and Hudson JJ.

appellant. The trial Judge found that the appellant was in fact a Canadian citizen born in Victoria and issued an order discharging the appellant from the custody of the Controller. These findings were not disputed before the appellate court, the only question there raised was as to whether or not the trial Judge had the right under the *Chinese Immigration Act* to review the decision of the Controller and to receive additional evidence, the appellate court holding that the trial Judge had no such jurisdiction.

Held, reversing the judgment of the Court of Appeal, that the order of the trial Judge, discharging the appellant from the custody of the Controller, should be restored.

Per The Chief Justice and Cannon, Davis and Hudson JJ.—It was not the intention of the Parliament of Canada, in enacting the *Chinese Immigration Act,* to prevent Canadian citizens of Chinese origin or descent generally from entering Canada. In view of sections 8 and 11 of that Act, the provisions of section 5 of that Act cannot be interpreted as exacting that the only Canadian citizens permitted to enter Canada are such as fall within section 5, subsection (*b*). The proper construction of section 5 is that the classes of persons enumerated in subsections (*a*), (*b*) and (*c*), and they alone, are permitted to enter and land in Canada without regard to any question of allegiance or citizenship; and the effect of that section is not to take away the right of Canadian citizens to enter or land in Canada. Therefore the return of the Controller was insufficient to establish conclusively that his detention of the appellant was a lawful one and to preclude inquiry into the issue of citizenship, such return being virtually limited to setting forth his decision that the appellant did not fall within any of the classes enumerated in section 5.

Per Crocket J.—Upon its true construction, section 37 of the *Chinese Immigration Act* does not preclude a judge of a provincial court of first instance from hearing an application under the *Habeas Corpus Act* for the purpose of proving that, notwithstanding the contrary opinion of the Chinese Immigration Controller, the applicant was in fact born in Canada and as a Canadian citizen was entitled to be discharged from that officer's custody.

APPEAL from the judgment of the Court of Appeal for British Columbia, reversing the judgment of the trial judge, McDonald J., whereby the latter ordered, upon an application for *Habeas Corpus,* that the appellant be set free from the custody of the Controller of Chinese Immigration.

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

Denis Murphy for the appellant.

Elmore Meredith for the respondent.

The judgment of the Chief Justice and Cannon, Davis and Hudson JJ. was delivered by

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THE CHIEF JUSTICE.—I have read the *Chinese Immigration Act* many times and am still in real doubt as to the precise meaning of some of its cardinal provisions. I do not think I am justified in concluding that it was the intention of Parliament to prevent Canadian citizens of Chinese origin or descent generally from entering Canada.

Section 8 prohibits certain classes of persons of Chinese origin and descent from entering Canada, including idiots and insane persons, persons afflicted with a loathsome disease, criminals, prostitutes, procurers, professional beggars and vagrants, persons who are likely to become a public charge, members of unlawful organizations, persons who are certified as mentally or physically defective, persons who are utterly illiterate. But even as respects these classes, section 8 has no application to a person who is a Canadian citizen within the meaning of the *Chinese Immigration Act*.

Section 11 contains a proviso that Canadian citizens shall be permitted to land in Canada.

Now, in view of these provisions, it would be an extraordinary thing if it were enacted in section 5 that the only Canadian citizens permitted to enter Canada are such as fall within section 5, subsection (*b*). I am by no means satisfied that such is the proper construction of that section. I am disposed to think it means that the classes of persons enumerated in subsections (*a*), (*b*) and (*c*), and they alone, are permitted to enter or land in Canada without regard to any question of allegiance or citizenship; and that the effect of the section is not to take away the right of Canadian citizens (British subjects domiciled in Canada or persons born in Canada who have not become aliens) to enter or land in Canada.

The question is, no doubt, a debatable one, but the construction adopted by the Controller and contended for by the Crown ought, I think, not to be accepted in the absence of plain language. This view I think is strengthened by reference to section 37 which, inferentially, appears to recognize the right of persons who are Canadian citizens or persons who have acquired a Canadian domicile to invoke the jurisdiction of the courts to review the decision or order of the Minister or Controller relating to "status, condition, origin, descent, detention or deportation."

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One naturally differs from the Court of Appeal for British Columbia on such a point with very considerable hesitation. The subject has been frequently before that Court, and, although there are no reported reasons of the Court of Appeal before us, we have been given to understand that, in arriving at their decision the Court of Appeal followed the observations of Mr. Justice Martin in *Re Low Hong Hing* (1) in delivering the judgment of the Court.

Especially, however, in dealing with a statute of the Parliament of Canada affecting the fundamental rights of Canadian citizens, it is our duty to give effect to the views concerning the construction of the statute at which, after due consideration, we ourselves have arrived.

A number of authorities have been cited which appear to show that the view of the statute indicated in this judgment has been acted upon more than once in British Columbia. I refer to *In Re Lee Chow Ying* (2) (Hunter C.J.); *Rex* v. *Jung Suey Mee* (3) (Macdonald C.J. and McPhillips J.A.); *The King* v. *Lim Cooie Foo* (4) (Macdonald C.J.); *Re Munshi Singh* (5) (Irving J. A. and Martin J.A.).

Such being our opinion as to the effect of the statute, it follows that the return of the Controller was insufficient to establish conclusively that his detention of the applicant was a lawful one, and to preclude inquiry into the issue of citizenship, for it is virtually limited to setting forth his decision that the applicant did not fall within any of the classes enumerated in section 5.

I am not insensible to the difficulties attending the administration of the *Chinese Immigration Act*. If, however, it was the intention of Parliament to pass an enactment taking effect conformably to the argument of the Crown presented in this case, that intention could and ought to have been expressed in words of unmistakeable meaning.

The appeal is allowed and the order of McDonald J. restored with costs throughout.

(1) (1926) 37 B.C.R. 295, at 300, 301.
(2) (1929) 39 B.C.R. 322.
(3) (1933) 46 B.C.R. 535.
(4) (1931) 43 B.C.R. 56.
(5) (1914) 20 B.C.R. 243, at 263, 270.

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CROCKET J.—This is an appeal from the judgment of the Court of Appeal for British Columbia allowing an appeal from the decision of Honourable Mr. Justice McDonald on the return of an order *nisi* for a writ of *Habeas Corpus* and *Certiorari* in aid, ordering the discharge of the applicant out of the custody of the Controller of Chinese Immigration of the city of Vancouver.

The judgment of the Court of Appeal merely states that upon hearing counsel for the parties and upon reading the appeal book the judgment of Mr. Justice McDonald is set aside, with costs to be paid by the respondent to the appellant forthwith after taxation thereof, and does not disclose the particular ground or grounds upon which the judgment proceeded.

It is stated, however, in the appellant's factum in this court that the evidence taken before the trial judge was not introduced into the appeal book on the appeal to the British Columbia Court of Appeal; that the learned trial judge's finding on the hearing before him that the applicant was in fact a Canadian citizen and was born in the city of Victoria was not disputed on the appeal; that the only question that arose was as to whether or not the learned judge had the right under the *Chinese Immigration Act* to review the decision of the Controller; and that the Court of Appeal without itself reviewing the evidence substantiating the Controller's finding held that the learned trial judge had no jurisdiction to do so.

This statement is not disputed and seems to be borne out by the notice of appeal to the Court of Appeal, so that I think it must be taken that the judgment of the Court of Appeal proceeded wholly on the ground that Mr. Justice McDonald had no jurisdiction to review the finding of the Controller on the *Habeas Corpus* application.

The Crown contends that His Lordship was precluded from doing so by s. 37 of the *Chinese Immigration Act*, R.S.C., c. 95, which reads as follows:—

> No court and no judge or officer thereof shall have jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Minister or of any controller relating to the status, condition, origin, descent, detention or deportation of any immigrant, passenger or other person upon any ground whatsoever, unless such person is a Canadian citizen, or has acquired Canadian domicile.

There seems to be no doubt that the intention of this section is to restrain the courts of justice throughout the

country from determining the validity of any proceeding, decision or order of the Minister of Immigration, or any Controller of Chinese Immigration, under which any immigrant, passenger or other person may be detained in custody, upon any ground whatsoever, if the person affected is not a Canadian citizen or has not acquired Canadian domicile. No exception is made in favour of British subjects, who are not Canadian citizens or have not acquired Canadian domicile. The concluding words "unless such person is a Canadian citizen or has acquired Canadian domicile" are the only reservation in the otherwise all embracing enactment.

The learned counsel for the Crown contends that the question as to whether the person affected by the proceeding, decision or order of the Minister or of the Controller of Chinese Immigration, is or is not a Canadian citizen or one who has acquired Canadian domicile, is a question for the determination of the Controller only, subject to appeal to the Minister. If this contention were upheld it is self-evident that the prohibition, which is so expressly directed against all courts of justice throughout Canada, would be absolute so far as any proceeding, decision or order in relation to the administration of the *Chinese Immigration Act* is concerned. Under no circumstances, once a Controller of Chinese Immigration had, rightly or wrongly, found that a person seeking entry into Canada was not a Canadian citizen or one who had acquired Canadian domicile, and had taken such person into his custody, would any court have any power to entertain an application for a writ or order in the nature of a writ of *Habeas Corpus* for the purpose of obtaining his discharge from the Controller's custody on any ground whatever.

The question of the constitutionality of an enactment of the Parliament of Canada to prohibit provincial courts from judicially investigating the validity of the detention of British subjects in connection with the administration of the *Chinese Immigration Act* does not arise on this appeal. The only question with which we are concerned is whether upon its true construction s. 37 precludes a judge of a provincial Supreme Court from hearing an application under the *Habeas Corpus Act* for the purpose of proving that, notwithstanding the contrary opinion of the

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Chinese Immigration Controller, the applicant was in fact born in Canada and as a Canadian citizen was entitled to her discharge from that officer's custody.

With great respect I am of opinion that it does not do so. Reading the whole section it seems to me that its clear intendment is that where the applicant for discharge from the Controller's custody is in fact a Canadian citizen or one who has acquired Canadian domicile, the prohibition against the courts has no application at all. The words "upon any ground whatever" manifestly apply to the intended prohibition against the courts. I think it is equally clear that the words "unless such person is a Canadian citizen," etc., which immediately follow, do the same, so that their collocation would seem necessarily to imply that the fact of the applicant being a Canadian citizen or a person who has acquired Canadian domicile, is for the determination of the court or judge, to whom the application for discharge is made, and not for that of the Immigration Controller who is himself responsible for the alleged illegal custody.

If the section were open to any other possible construction, I should have no hesitation in accepting that one which does least violence to the long recognized right of the judges of the Supreme Courts of the provinces, in the matter of *Habeas Corpus,* to protect, by means of this time-honoured writ or by an order in the nature thereof, the personal liberty of any Canadian citizen, or indeed of any other person, by investigating the legality of the warrant, process or order under which anyone has been arrested and is detained in custody within their territorial jurisdiction.

It is now the settled law of England that nothing short of express language, or language which admits of no other possible construction, can avail to defeat the object of the *Habeas Corpus Act* and also that, once a writ of *Habeas Corpus* has been directed to issue by a competent court and the discharge of a prisoner has been ordered, no appeal lies from such order to any Superior Court. See judgment of the House of Lords in *The Secretary of State for Home Affairs* v. *O'Brien* (1), and the authorities there discussed

(1) [1923] A.C. 603.

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in the reasons of Lords Birkenhead, Dunedin, Finlay and Shaw. The ground of the decision in that case was that the essential feature of the procedure under the *Habeas Corpus Act*, as stated by Lord Birkenhead, was to provide a swift and imperative remedy in all cases of illegal restraint and confinement. It is interesting to note in this connection that the Supreme Court of New Brunswick, a court of five judges, sitting *en banc,* in the case of *Ex parte Byrne* (1), unanimously refused in 1883 to rescind an order of Mr. Justice Weldon for the discharge of a prisoner from a county gaol upon precisely the same grounds as those set forth in the *O'Brien* case (2) in the House of Lords forty years later. The grounds of this New Brunswick decision were recognized by the judges of the Appeal Division of that Court in 1921, after the coming into force of the *Judicature Act,* in the case of *The King* v. *Lantalum, ex parte Offman* (3), in which it was held that, although the language of the appeal provisions of the *Judicature Act* could not be relied upon to provide an appeal from an order of discharge made under the *Habeas Corpus Act* for the reasons given in *Ex parte Byrne* (1), those reasons did not apply to the case of an order *refusing* an application for discharge and that an appeal, therefore, does lie from an order refusing to discharge a prisoner from custody.

In 1932 this Court considered an appeal from the Appeal Court of British Columbia, which on an equal division sustained a judgment of Mr. Justice Murphy refusing the application of a Japanese subject, one Samajima, under a writ of *Habeas Corpus* for his discharge from custody on a complaint for violation of the provisions of the general *Immigration Act.* The *British Columbia Court of Appeal Act,* it should be said, expressly provides for an appeal to that Court from any judgment or order of a judge of the Supreme Court in any and every matter, and specifically names *Habeas Corpus* so that, notwithstanding the settled law of England, and of other provinces of Canada, an appeal from an order of discharge would appear to lie in that province from an order of discharge granted on a writ of *Habeas Corpus* as well as from an order refusing a discharge. In the *Samajima* case (3), this Court

(1) (1883) 22 N.B. Rep. 427.
(2) [1923] A.C. 603.
(3) (1921) 48 N.B. Rep. 448.
(4) [1932] S.C.R. 640.

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allowed the appeal, and directed the discharge of the applicant *per* Duff, Lamont and Cannon JJ., Anglin C.J. and Smith J. dissenting, on the ground that the original complaint on which the applicant was detained for deportation was not an order made in accordance with the provisions of the Act and was, therefore, void. It seems that Mr. Justice Fisher on a previous application had ordered the discharge of the applicant on the ground that the complaint against him was defective, and that the applicant had been rearrested on an amended warrant. This Court held that the first warrant, being void, could not be amended. The case involved the consideration of s. 23 of the general *Immigration Act,* as the *Lantalum* case (1) in New Brunswick did in 1921. In delivering judgment, Duff J., as our present Chief Justice then was, said:—

> I gravely fear that too often the fact that these enactments are, in practice, most frequently brought to bear upon Orientals of a certain class, has led to the generation of an atmosphere which has obscured their true effect. They are, it is needless to say, equally applicable to Scotsmen. I admit I am horrified at the thought that the personal liberty of a British subject should be exposed to the hugger-nugger which, under the name of legal proceedings, is exemplified by some of the records that have incidentally been brought to our attention. Courts, of course, must often draw the distinction between what is merely irregular and what is of such a character that the law does not permit it in substance. I have no difficulty in giving a construction to section 23, which does not deprive British subjects who are not Canadians, of all redress, in respect of arbitrary and unauthorized acts committed under the pretence of exercising the powers of the Act.

I refer to these cases merely for the purpose of exemplifying the reverence with which the law of England regards the ancient writ of *Habeas Corpus* and the strictness with which the courts, not only of the Mother Country, but of Canada, scrutinize all enactments affecting the liberty of the subject.

Quite independently, however, of these cases I think the clear intendment of s. 37 of the *Chinese Immigration Act* is, as I have already said, that the prohibition against the courts has no application to any case where the applicant is a Canadian citizen or a person who has acquired Canadian domicile, and that this is always a question for the decision of the judge to whom the application is made.

(1) (1921) 48 N.B. Rep. 448.

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Crocket J.

I think the appeal must be allowed and the applicant discharged.

Appeal allowed with costs.

Solicitor for the appellant: *Harold Freeman.*

Solicitor for the respondent: *Elmore Meredith.*

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* Feb. 17, 18.
* May 17.

ROSE ELLEN STALEY (PLAINTIFF) .....APPELLANT;

AND

BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Electric railways—Motor car stalling between rails at crossing under repair—Findings of jury—Whether perverse—Whether tacit invitation to cross—New trial ordered by appellate court.

A railway repair gang had removed a couple of planks at a road crossing a few minutes before one of respondent's cars was expected, when the appellant's automobile arrived at the crossing. The workmen removed their tools to one side and stood to one side themselves. Appellant's son, who was driving the car, although he knew the time at which the respondent's car was expected, attempted to drive across the rails at spot where the planks were still in place. The car skidded and stalled and was hit by the incoming train. Appellant's husband, who was in the car, was killed and the automobile demolished. The jury in answer to questions found that the workmen were negligent in "removing planks * * * too close to train time" and in "failing to replace temporarily same on approach of auto." The jury also found that the driver of the car was not negligent. On appeal, a new trial was ordered.

Held, reversing the judgment of the Court of Appeal ([1937] 2 W.W.R. 282), that the judgment of the trial judge should be restored: the answers to the questions by the jury were justified by the evidence and the jury's finding that the driver of the automobile was not negligent, was not perverse.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of Morrison, C.J.S.C., on the verdict of a jury and ordering a new trial.

H. J. Sullivan K.C. for appellant.

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

* PRESENT:—Duff C.J. and Rinfret, Crocket, Kerwin and Hudson JJ.

(1) [1937] 2 W.W.R. 282; [1937] 3 D.L.R. 578.

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Duff C.J.

The material facts of the case are stated in the above head-note and in the judgments now reported.

THE CHIEF JUSTICE.—In my view the respondent by removal of the planks created a situation which, the jury might reasonably find, had the effect of attaching a wholly unnecessary risk to the exercise by the deceased Charles Joseph Staley of his rights in the use of the highway; and that, accordingly, they were justly chargeable with negligence. At the same time, the jury might quite consistently take the view that the risk was not in all the circumstances, and particularly in view of the conduct and attitude of the track men present, so obvious to the driver of the automobile as to render his act in attempting to cross the railway a negligent one. They might not unreasonably think that, at the highest, he was chargeable with nothing graver than mistake of judgment, both natural and excusable.

I have read with care the judgments delivered in the Court of Appeal and, with the greatest respect, I feel constrained to say that, in the reasons given by Mr. Justice M. A. Macdonald, the case is put in a way that appears to me to be unanswerable.

As to the effect of the jury's answers, I concur with my brother Kerwin.

The judgment of Rinfret, Crocket, Kerwin and Hudson JJ. was delivered by

KERWIN J.—I agree with Mr. Justice M. A. Macdonald that the answers of the jury to the first two questions are sufficient to impose liability upon the respondent. These questions with their answers are:—

(1) Q. Was there any negligence on the part of the defendants' servants which caused the accident?

A. Yes.

Q. If so, in what did such negligence consist?

A. Removing planks at crossing too close to train time and failing to replace temporarily same on approach of auto.

These answers are justified by the evidence. It was shown that the foreman of the work crew knew the time at which the car of the respondents would reach the station to the east of the railway crossing in question and that, although the men arrived at the crossing but a few minutes before the car was expected, they proceeded with their work and removed two planks. It was also open to the

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Kerwin J.

jury to consider that the actions of the workmen amounted to an invitation to the driver of the automobile to proceed over the crossing. While the latter also knew the time at which the respondent's car was expected, he stated that he did not have that information in mind at the relevant time, and although, when he stopped twenty-five or thirty feet from the crossing, he saw that the two planks had been removed, the jury must have determined that it was not negligence on his part in thinking that he could safely cross at the spot where the planks were still in place. It is impossible to say that it was not open to the jury to find that the acts of the respondent's employees were the cause of the accident.

It was argued that the jury's finding, that the driver of the automobile was not negligent, was perverse. It is not necessary to repeat the considerations that apply in determining this question as they have been discussed in several recent cases in this Court, the latest of which is *Warren* v. *Gray Goose* (1). I agree with Mr. Justice Martin (now Chief Justice of British Columbia) that there is nothing in this case to indicate that the jury failed to perform their duty.

Having negatived any negligence on the part of the driver of the automobile, the jury answered question 9 as follows:—

(9) In what degree of fault was either party liable?

Q. (*a*) The defendants' servants?

A. We consider that the speed of the tram car was excessive, especially in view of the fact that two crossings had to be negotiated and we refer as well to our answer to question no. 2.

Q. (*b*) The driver of the auto?

A. None.

The answer to 9 (*a*) is really not responsive but there is nothing to show that the jury were in any way departing from their answer to the crucial question, no. 1, as to negligence *which caused the accident*. In fact, the words "and we refer as well to our answer of question no. 2" really reiterates and emphasizes the earlier answer. Even without applying the admonition in *Pronek* v. *Winnipeg, Selkirk and Lake Winnipeg Railway Co.* (2), that "the language of a jury in explaining the reasons for their verdict ought not to be construed too narrowly," it is plain,

(1) [1938] S.C.R. 52. (2) [1933] A.C. 61, at 66.

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I think, that the appellant is entitled to judgment on the answers to questions 1 and 2, and that nothing in the answer to question 9 (*a*) can derogate from that right. The effect of the original negligence of the respondent's employees continued down to the time of the impact. The jury being justified in finding no negligence on the part of the driver of the motor car either in the first instance or after he found his automobile had straddled the north rail of the respondent's tracks, it is unnecessary to consider the other questions discussed at bar. I would allow the appeal and restore the judgment of the trial judge with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *Harry J. Sullivan.*

Solicitor for the respondent: *V. Laursen.*

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* May 31.

DUVAL AND OTHERS .....APPELLANTS;

AND

HIS MAJESTY THE KING .....RESPONDENT.

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

Appeal—Application to Judge of Supreme Court of Canada for special leave to appeal under section 1025 Criminal Code—Dismissal of motion—Appeal to the Court from decision of judge in chambers on such application.

There is no appeal before this Court from an order made by one of its judges in chambers dismissing an application for leave to appeal under the provisions of section 1025 of the Criminal Code.

Smith v. *Hogan* ([1931] S.C.R. 652) disc.

MOTION by way of appeal to the Court from an order of Hudson J. in chambers dismissing an application for leave to appeal under section 1025 of the Criminal Code.

R. L. Calder K.C. for motion.

A. Drolet contra.

The judgment of the Court was delivered orally by

THE CHIEF JUSTICE.—It will not be necessary to call on the other side.

* PRESENT:—Duff C.J. and Cannon, Crocket, Davis and Kerwin JJ.

We have considered the argument addressed to us by Mr. Calder. The power of the Court in respect of orders made by a Judge in Chambers is discussed at large in *Re Smith* v. *Hogan* (1).

In that case an application for leave to appeal under the *Bankruptcy Act* was dismissed by the judge who heard it on the ground of lack of jurisdiction because the period for making such application fixed by rule 72 of the *Bankruptcy Act* had expired. This Court held that the time having been competently extended by an order of Chief Justice Barry of the Court of King's Bench, sitting as a bankruptcy judge, the applicant had a legal right to have his application heard on the merits and that he was entitled to proceed with his application. The decision proceeded upon the ground that the dismissal of the application constituted a refusal to entertain an application which the applicant was legally entitled to have heard and decided on the merits.

There is nothing in that judgment, or in any of the previous judgments there referred to, which suggests that, consistently with the intendment of the provisions of the *Railway Act,* or the provisions of the *Bankruptcy Act,* for example, this Court could, after an application for leave to appeal has been fully heard on the merits and dismissed by the judge to whom the application was made, review the decision on the merits and allow the application; and we think that applies with equal force to applications under the provisions of article 1025 of the Criminal Code.

Here the application was made to Mr. Justice Hudson, was fully heard by him and dismissed, and we think that must be final.

Motion dismissed.

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(1) [1931] S.C.R. 652.

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* March 18.
* May 17.

L. H. BALLANTYNE (DEFENDANT) .....APPELLANT;

AND

DAME C. S. EDWARDS (PLAINTIFF)....RESPONDENT.

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

Appeal—Jurisdiction—Action in damages by wife against husband—Inscription in law alleging prescription of the action—Judgment appealed from dismissing inscription in law—Whether "final judgment"—Section 2 (b) Supreme Court Act.

In an action for damages by the respondent against her husband, the appellant, the latter inscribed in law on the ground that the action when instituted was prescribed. The judgment of the trial judge, maintaining the inscription in law and dismissing the action, was reversed by the appellate court, which held that under art. 2233 C.C. husband and wife cannot prescribe against one another. Upon a motion by the respondent to quash an appeal to this Court for want of jurisdiction,

Held, that jurisdiction lies in this Court to entertain the appeal. The judgment appealed from is a "final judgment" within the meaning of section 2 (*b*) of the *Supreme Court Act;* the right in controversy under the inscription in law (i.e., the respondent's right to institute the action notwithstanding the lapse of time) is a "substantive right * * * in controversy" in a "judicial proceeding" and, unless reversed on appeal, the decision of the appellate court will be binding on the parties throughout all stages of the litigation and thus finally determines the issue in respect of that right.

MOTION by the respondent to quash an appeal to this Court for want of jurisdiction from a judgment of the Court of King's Bench, appeal side, province of Quebec (1), dismissing an inscription in law by the appellant.

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

Victor Lynch-Staunton K.C. for motion.

L. H. Ballantyne, (the appellant) *contra.*

The judgment of the Chief Justice and Crocket, Davis and Hudson JJ. was delivered by

THE CHIEF JUSTICE.—By the judgment of the Court of King's Bench (1), now under appeal to this Court, the defendant's inscription in law was dismissed. By that

* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket, Davis, Kerwin and Hudson JJ.

(1) (1937) Q.R. 64 K.B. 27.

judgment it was decided that the defendant's objection in point of law to the action, on the ground that the action when instituted was prescribed, was incompetent because, under article 2233 C.C., husband and wife cannot prescribe against one another.

The right in controversy under the inscription in law (the right, that is to say, of the plaintiff to institute the action notwithstanding the lapse of time) is a "substantive right * * * in controversy" in a "judicial proceeding" within the meaning of section 2 (*b*) of the *Supreme Court Act*.

Unless reversed on appeal, the decision of the Court of King's Bench (1) will be binding on the parties throughout all stages of the litigation and thus finally determines the issue in respect of that right. The judgment is, therefore, a final judgment within the definition of our statute.

The motion to quash consequently fails and should be dismissed with costs.

The judgment of Rinfret, Cannon and Kerwin JJ. was delivered by

CANNON J.—This is a motion by the respondent to quash an appeal to this Court for want of jurisdiction.

Catherine Sophie Edwards, wife separated from her husband, Linton H. Ballantyne, brought an action against him, claiming damages in the sum of $22,799.28, made up of $2,799.28, said to be costs incurred by her to fight a petition for divorce before the Senate of Canada and $20,000 for libel and slander committed by her husband and his agents concerning the life and habits of the respondent. The defendant inscribed in law against the whole of the action.

Mr. Justice Surveyer, on the 10th June, 1937, dismissed the action on the ground that the right of action was prescribed at the time of the action, under 2267 C.C.

On appeal to the Court of King's Bench (1), the appeal was allowed and the defendant's inscription in law dismissed, Mr. Justice Galipeault and Mr. Justice Saint-Germain dissenting. The Court of King's Bench (1) held that, under art. 2233 of the Civil Code, husband and wife cannot prescribe against each other.

(1) [1937] Q.R. 64 K.B. 27.

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BALLANTYNE v. EDWARDS.

Cannon J

Is this judgment appealable as final under section 2 (*b*) of our Act, or, in other words, is it a judgment, rule, order or decision which determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding?

I am of opinion that, as far as the provincial courts are concerned, the question raised by the inscription in law is finally determined. When the case comes back before the Superior Court, if the facts were proven as alleged, the trial judge would be bound in law by the decision of the Court of King's Bench that, under 2233 C.C., prescription could not run against the plaintiff in favour of the defendant.

In *Shaw* v. *St. Louis* (1), Taschereau, J., said:—

The judgment of the Superior Court * * * was undoubtedly right. As it holds in one of its *considérants*, its hands were tied by the previous judgment of the Court of Queen's Bench.

Though the Roman law says that:—

"it often happens that the appeal court's judgment is the wrong one, and that he who judges the last does not always judge the best."

still it must be conceded that the relative functions of courts of first instance and of appeal cannot be so inverted as to have authorized the Superior Court, in this instance, to reverse the judgment of the Court of Queen's Bench. It had to, unreservedly, submit to it, as it did * * *

It had no alternative.

The maxim "l'interlocutoire ne lie pas le juge" cannot have any application to an interlocutory judgment given by an appeal court and transmitted to the Superior Court for execution. This maxim applies to the very tribunal that rendered the interlocutory judgment, that is to say, if the Superior Court, for instance, renders a purely interlocutory judgment, it may, in certain cases, at the final judgment, not be bound by this interlocutory.

But to extend this doctrine to the judgment of a court of appeal, and make it say "l'interlocutoire de la cour d'appel ne lie pas le tribunal de première instance" seems to me untenable.

At p. 405 of the report, I find the following quotations:—

Cette maxime, que "l'interlocutoire ne lie pas le juge", qu'il peut toujours s'en écarter, *judex ab interlocutoris discedere potest*, n'est vraie qu'à l'égard des simples jugements interlocutoires qui se bornent à ordonner une mesure d'instruction préjugeant le fond, et qui ne contiennent aucune décision définitive sur tous ou quelques-uns des chefs du débat. Ce sont les seuls qui ne soient pas susceptibles de passer en force de chose jugée. Il convient donc de distinguer entre les divers jugements interlocutoires, et même dans chaque jugement interlocutoire proprement dit, les décisions qui n'ont pour objet qu'une simple mesure d'instruction, et celles au contraire par lesquelles il est statué à certains égards d'une manière définitive. Les décisions de cette dernière espèce

(1) (1883) 8 Can. S.C.R. 385, at 399.

passant, à raison de leur caractère définitif, en force de chose jugée, aussi bien que les jugements ordinaires, qui n'ont aucun caractère interlocutoire. (Larombière, 5 vol., page 212).

Tout jugement n'a pas l'autorité de chose jugée. La présomption de vérité, qui est attachée aux jugéments, implique qu'ils décident une contestation. * * * De là la conséquence que la chose jugée ne résulte que des jugements qui statuent définitivement sur la contestation. Il ne faut pas entendre le principe en ce sens que l'autorité de chose jugée ne soit attribuée qu'au jugement qui met fin au procès. Il peut, dans une même affaire, intervenir *plusieurs jugements définitifs, en ce sens, qu'ils décident définitivement certains points débattus entre les parties.* Tous ces jugements ont l'autorité de chose jugée. * * *

Quand un jugement, interlocutoire en apparence, décide réellement un point contesté entre les parties, il est définitif, et il a, par conséquent, l'autorité de chose jugée. (20 Laurent, Nos. 22, 25 et seq.)

Pigeau says (vol. 1, p. 390):—

Quelquefois le jugement est interlocutoire et définitif en même temps, c'est lorsque les juges se trouvent en état de statuer définitivement sur un chef et ont besoin d'éclaircissement sur un autre.

I, therefore, reach the conclusion that we have before us a "jugement définitif" determining the merits in law of the plea of prescription raised by the defendant. It may also be mentioned that a similar judgment of the Court of King's Bench was appealed to this Court in *Rattray* v. *Larue* (1), under exactly the same circumstances. The judgment of the Court of King's Bench dismissing the "défense en droit" was treated as a final judgment, and this Court took and exercised jurisdiction. It must be said, however, that, there, the question of jurisdiction was not raised by a motion to quash; but this Court could not acquire jurisdiction by the consent of the parties.

I also refer to the authorities quoted in *Ville de St. Jean* v. *Molleur* (2) by Fitzpatrick C.J.

I would, therefore, dismiss the motion with costs.

Motion dismissed with costs.

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(1) (1887) 15 Can. S.C.R. 102, at 106.

(2) (1908) 40 Can. S.C.R. 139, at 153 to 157.

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* June 6, 7.
* June 23.

HIS MAJESTY THE KING.....APPELLANT;

AND

JOHN A. COMBA.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Evidence—Conviction at trial for murder—Verdict resting solely on circumstantial evidence—The facts not inconsistent with rational finding of accused's innocence—Common law rule—On appeal, conviction quashed and acquittal ordered.

By the long settled rule of the common law—a rule by which courts in Canada are governed and which they are bound to apply—where a jury's verdict rests solely upon a basis of circumstantial evidence, the jury, before finding an accused guilty, must be satisfied not only that the circumstances are consistent with a conclusion that the criminal act was committed by the accused, but also that the facts are such as to be inconsistent with any other rational conclusion than that the accused is the guilty person.

Held, in the present case (where the jury found accused guilty upon an indictment for murder), that the facts adduced had not the degree of probative force that is required to satisfy the test formulated by said rule; and the trial Judge, on the application made by accused's counsel, should have told the jury that in view of the dubious nature of the evidence it would be unsafe to find the accused guilty, and have directed them to return a verdict of acquittal.

Judgment of the Court of Appeal for Ontario, [1938] O.R. 200, quashing conviction and ordering accused's acquittal, affirmed.

APPEAL by the Attorney-General for Ontario from the judgment of the Court of Appeal for Ontario (1), which (Latchford C.J.A. dissenting), on appeal by the accused from his conviction at trial before Chevrier J. and a jury on a charge of murder, quashed the conviction and ordered the accused's acquittal.

By the judgment now reported, the appeal to this Court was dismissed.

C. L. Snyder K.C., C. P. Hope K.C. and *H. B. Johnson K.C.* for the appellant.

R. H. Greer K.C. and *James A. Maloney* for the respondent.

The judgment of the court was delivered by

* PRESENT:—Duff C.J. and Cannon, Crocket, Davis, Kerwin and Hudson JJ.

(1) [1938] O.R. 200.

THE CHIEF JUSTICE.—This is an appeal by the Crown against a judgment of the Court of Appeal for Ontario (1) by which that court quashed a conviction of the respondent, John A. Comba, after a verdict of guilty upon an indictment for murder, Latchford C.J.A. dissenting.

It was stated before us by counsel for the Crown that the Attorney-General, after reviewing the proceedings at the trial, had, because of certain rulings of the trial judge, decided that the verdict of the jury could not be allowed to stand and that a new trial would be necessary. The difference of opinion between the majority of the court and Latchford C.J.A. concerned solely the question whether there should be a further trial or, as the four judges who constituted the majority of the court unanimously held, the conviction should be quashed and the prisoner discharged on the ground that the proof adduced did not establish a case sufficiently free from doubt to justify a finding that the crime charged was committed by him.

Having examined the evidence minutely and weighed with care the argument addressed to us on behalf of the Crown, we think our judgment should be pronounced without further delay.

It is admitted by the Crown, as the fact is, that the verdict rests solely upon a basis of circumstantial evidence. In such cases, by the long settled rule of the common law, which is the rule of law in Canada, the jury, before finding a prisoner guilty upon such evidence, must be satisfied not only that the circumstances are consistent with a conclusion that the criminal act was committed by the accused, but also that the facts are such as to be inconsistent with any other rational conclusion than that the accused is the guilty person.

We have no doubt that the facts adduced have not the degree of probative force that is required in order to satisfy the test formulated by this rule; which is one that courts of justice in Canada are governed by and are bound to apply.

We agree with the majority of the Court of Appeal, whose reasons for their judgment we find convincing and conclusive, that the learned trial judge ought, on the application made by counsel for the prisoner at the close of

(1) [1938] O.R. 200.

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THE KING v. COMBA.

Duff C.J.

the evidence for the Crown, to have told the jury that, in view of the dubious nature of the evidence, it would be unsafe to find the prisoner guilty, and to have directed them to return a verdict of acquittal accordingly. It is not, and could not, with any plausibility, be suggested that the case for the Crown was in any way strengthened or improved by the evidence put before the jury on behalf of the defence.

The appeal is dismissed.

Appeal dismissed.

Solicitor for the appellant: *I. A. Humphries.*

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

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* March 8, 9.
* June 23.

IN THE MATTER of a Reference Concerning the Authority of Judges and Junior and Acting Judges of the County and District Courts; Police Magistrates, Justices of the Peace and Judges of Juvenile Courts, to Perform the Functions Vested in Them Respectively by the Legislature of the Province of Ontario Pursuant to the Provisions of the Adoption Act; the Children's Protection Act; the Children of Unmarried Parents Act, and the Deserted Wives' and Children's Maintenance Act; being Chapters 218, 312, 217 and 211 Respectively of the Revised Statutes of Ontario, 1937.

Constitutional Law—Administration of justice, constitution of provincial courts, appointment of judges, judicial officers, magistrates, justices of the peace—B.N.A. Act, ss. 92 (14), 96—Provincial powers as to appointments, investment of jurisdiction—Authority of the judicial officers to perform functions vested in them respectively pursuant to provisions of the Adoption Act, the Children's Protection Act, the Children of Unmarried Parents Act, and the Deserted Wives' and Children's Maintenance Act, Ont., chapters 218, 312, 217, and 211, respectively, of R.S.O., 1937.

Each of the following judicial officers has authority to perform the functions which the Ontario legislature has purported to vest in him by the provisions of the following Acts respectively:

With reference to the *Adoption Act*, R.S.O., 1937, c. 218: the judge or junior or acting judge of the county or district court; a judge of the juvenile court designated a judge by the Lieutenant-Governor in Council pursuant to said Act.

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* PRESENT AT THE HEARING:—Duff C.J. and Rinfret, Cannon, Crocket, Davis, Kerwin and Hudson JJ. Rinfret J. took no part in the decision.

With reference to the *Children's Protection Act,* R.S.O., 1937, c. 312: the judge or junior or acting judge of the county or district court; a police magistrate or judge of the juvenile court designated a judge by the Lieutenant-Governor in Council pursuant to said Act.

With reference to the *Children of Unmarried Parents Act,* R.S.O., 1937, c. 217: the judge or junior or acting judge of a county or district court; a police magistrate or judge of the juvenile court designated a judge by the Lieutenant-Governor in Council pursuant to said Act.

With reference to the *Deserted Wives' and Children's Maintenance Act,* R.S.O., 1937, c. 211: a justice of the peace; a magistrate; a judge of the juvenile court.

In point of substantive law, the matters which are the subjects of the aforesaid legislation are entirely within the control of the legislatures of the provinces; the legislature of Ontario has for that province legislative authority in respect of them just as unqualified, subject to the powers of reservation and disallowance, as that of the Imperial Parliament.

To invest the judicial officers aforesaid with authority to perform their functions as provided under said Acts, respectively, is within the competence of the provincial legislature; it is not contrary to s. 96 of the *B.N.A. Act* (requiring appointment by the Governor General of judges of superior, district and county courts); the said functions are not within the intendment of said s. 96.

The jurisdiction of inferior courts, whether within or without the ambit of said s. 96, was not by the *B.N.A. Act* fixed forever as it stood at the date of Confederation.

The legal history, in the way of legislation and of decided cases, as to jurisdiction and exercise of jurisdiction, under provincial authority, of courts of summary jurisdiction, reviewed. The *B.N.A. Act,* ss. 92 (14), 96, 97, 99, 129, considered. *Regina* v. *Coote,* L.R. 4 P.C. 599; *Maritime Bank's* case, [1892] A.C. 437; *Martineau* v. *Montreal City,* [1932] A.C. 113; *Toronto* v. *York,* [1938] A.C. 415; *Ganong* v. *Bayley,* 2 Cart. 509; *Burk* v. *Tunstall,* 2 B.C.R. 12; *Regina* v. *Bush,* 15 Ont. R. 398; *In re Small Debts Act,* 5 B.C.R. 246; *French* v. *McKendrick,* 66 Ont. L.R. 306, and other cases, discussed or referred to. The decisions in *Clubine* v. *Clubine,* [1937] Ont. R. 636, and *Kazakewich* v. *Kazakewich,* [1936] 3 W.W.R. 699, disapproved.

REFERENCE by Order of His Excellency the Governor General in Council (P.C. 111, dated January 12, 1938, as amended by P.C. 191, dated January 26, 1938) of the important questions of law hereinafter set out to the Supreme Court of Canada, for hearing and consideration, pursuant to s. 55 of the *Supreme Court Act,* R.S.C., 1927, c. 35.

The order of reference recited:

Whereas there has been laid before His Excellency the Governor General in Council, a report from the Right Honourable the Prime Minister, for the Minister of Justice, dated January 7th, 1938, representing as follows:—

In several of the provinces of Canada in the case of certain social legislation, the legislatures have purported to confer extensive judicial

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powers upon officials appointed by the Lieutenant-Governor in Council to be members of tribunals constituted under the said legislation.

Questions have been raised whether these judicial powers are such as were theretofore exercised only by the Superior and District and County Courts of the provinces, in which event doubt arises as to whether the said judicial powers have been validly conferred. It has been held by the Courts of Appeal of Alberta and Ontario in two recently decided cases that only persons appointed by the Governor General were capable of exercising the powers so conferred (*Kazakewich* v. *Kazakewich*, 1936, 3 W.W.R. 699; *Clubine* v. *Clubine*, 1937, O.R. 636). In one of these cases, the Honourable the Chief Justice of Ontario described the question of jurisdiction as being of great public interest and importance and stated that it was desirable that it should be settled by the Court of final resort.

The Attorney-General of Ontario has represented to the Minister of Justice that there are four Ontario Statutes of widespread application in relation to which this question arises, namely—the *Adoption Act;* the *Children's Protection Act;* the *Children of Unmarried Parents Act,* and the *Deserted Wives' and Children's Maintenance Act,* and that judicial powers under these Acts are exercisable by Justices of the Peace, Magistrates and Juvenile Court Judges, and, in some cases concurrently with these officials, County or District Court Judges.

The Attorney-General of Ontario further represents that the effective administration of the aforesaid statutes has been greatly impeded by the doubt that has been raised as to the validity of their provisions relating to the exercise of judicial powers and has requested that the same be referred to the Supreme Court of Canada in order that the doubt may be set at rest.

And whereas for the aforesaid reasons and having in view the importance of the questions involved, it is deemed desirable to obtain the opinion of the Supreme Court of Canada.

The questions referred to the Court were as follows:

1. With reference to the *Adoption Act,* R.S.O. 1937, c. 218, has—

(*a*) the Judge or Junior or Acting Judge of County or District Court;

(*b*) a Judge of the Juvenile Court designated a Judge by the Lieutenant-Governor in Council pursuant to the aforesaid Act

authority to perform the functions which the legislature has purported to vest in him by the provisions of the said Act, and, if not, in what particular or particulars or to what extent does he lack such authority?

2. With reference to the *Children's Protection Act,* R.S.O. 1937, c. 312, has—

(*a*) the Judge or Junior or Acting Judge of the County or District Court; or

(*b*) a Police Magistrate or Judge of the Juvenile Court designated a Judge by the Lieutenant-Governor in Council pursuant to the aforesaid Act; or

(*c*) a Justice of the Peace

authority to perform the functions which the legislature has purported to vest in him by the provisions of the said Act, and, if not, in what particular or particulars or to what extent does he lack such authority?

3. With reference to the *Children of Unmarried Parents Act,* R.S.O. 1937, c. 217, has—

(*a*) the Judge or Junior or Acting Judge of a County or District Court; or

(*b*) a Police Magistrate or Judge of the Juvenile Court designated a Judge by the Lieutenant-Governor in Council pursuant to the aforesaid Act

authority to perform the functions which the legislature has purported to vest in him by the provisions of the said Act, and, if not, in what particular or particulars or to what extent does he lack such authority?

4. With reference to the *Deserted Wives' and Children's Maintenance Act,* R.S.O. 1937, c. 211, has—

(*a*) a Justice of the Peace; or

(*b*) a Magistrate; or

(*c*) a Judge of the Juvenile Court

authority to perform the functions which the legislature has purported to vest in him by the provisions of the said Act, and, if not, in what particular or particulars or to what extent does he lack such authority?

The answers of the Court to all the said questions were in the affirmative.

Due notice (pursuant to order of the Court) of the hearing of the said Reference was given to the respective Attorneys-General of the several Provinces of Canada.

J. C. McRuer K.C. and *F. A. Brewin* for the Attorney-General of Canada.

W. B. Common K.C., C. R. Magone and *J. J. Robinette* for the Attorney-General of Ontario.

P. H. Chrysler for the Attorney-General of Manitoba.

G. G. McGeer K.C. for the Attorney-General of British Columbia.

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L. C. Moyer K.C. for the Attorneys-General of Prince Edward Island and Saskatchewan.

G. B. Henwood K.C. for the Attorney-General of Alberta.

W. L. Scott K.C. for the Canadian Welfare Council.

The reasons for the answers aforesaid were delivered by

THE CHIEF JUSTICE: The starting point for the consideration of the statutes referred to us is this: In point of substantive law it is not disputed that the matters which are the subjects of this legislation are entirely within the control of the legislatures of the provinces. We are not concerned with any ancillary jurisdiction in respect of children which the Dominion may possess in virtue of the assignment to the Dominion Parliament by section 91 of the subject Marriage and Divorce. Whatever may be the extent of that jurisdiction, we are not concerned with it here and I mention it only to put it aside.

The control by the legislatures over these subjects is supreme in this sense, that the Legislature of Ontario, for example, has for that province legislative authority in respect of them just as unqualified, subject to the powers of reservation and disallowance, as that of the Imperial Parliament. It is well not to forget, in examining the constitutionality of enactments of the character of those before us, that by section 93 (subject to provisions having for their purpose the protection of religious minorities) education is committed exclusively to the responsibility of the legislatures; and that, as regards that subject, the powers of the legislatures are not affected by the clause at the end of section 91. We should perhaps also recall that section 93 (as is well known) embodies one of the cardinal terms of the Confederation arrangement. Education, I may add, is, as I conceive it, employed in this section in its most comprehensive sense.

It is pertinent also to observe that the subject of relief, relief of persons in circumstances in which the aid of the State is required to supplement private charity in order to provide the necessaries of life, has become one of enormous importance; and that, primarily, responsibility for this rests upon the provinces; the direct intervention of the Dominion in such matters being exceedingly difficult, by reason of constitutional restrictions.

The responsibility of the state for the care of people in distress (including neglected children and deserted wives) and for the proper education and training of youth, rests upon the province; in all the provinces the annual public expenditure for education and the care of indigent people is of great magnitude, a magnitude which attests in a conclusive manner the deep, active, vigilant concern of the people of this country in these matters. Moreover, while, as subject matter of legislation, the criminal law is entrusted to the Dominion Parliament, responsibility for the administration of justice and, broadly speaking, for the policing of the country, the execution of the criminal law, the suppression of crime and disorder, has from the beginning of Confederation been recognized as the responsibility of the provinces and has been discharged at great cost to the people; so also, the provinces, sometimes acting directly, sometimes through the municipalities, have assumed responsibility for controlling social conditions having a tendency to encourage vice and crime.

The statutes before us constitute a part of the legislative measures in Ontario directed to these various ends. It would be competent to the Province of Ontario to put in effect a Poor Law system modelled upon that which prevails in England to-day. The province has not seen fit to do that but in some important respects the statutes that we have to consider embody features of the Poor Law system.

Perhaps the most important of these enactments now before us is the *Children's Protection Act*. The plan to which it gives effect is aimed at producing effective co-operation between organized voluntary services and public authorities, police officers, probation officers, justices of the peace, police magistrates, and a special tribunal known as the Juvenile or Family Court. The statute, as well as similar statutes in other provinces, has proved an admirable agency for the purpose for which it was designed. The practical problem raised by this reference is whether or not it is competent to the province to invest the officers presiding over these special tribunals, as well as justices of the peace and police magistrates, with the powers of summary adjudication conferred upon them by the statute, or whether, on the other hand, as is contended by those who attack the legislation, they are disabled in some important

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respects by Section 96 of the *B.N.A. Act* from taking advantage of this convenient summary procedure which has proved so efficacious.

Now, it seems to be indisputable that sections 96 and 97 of the *British North America Act* contemplate the existence of provincial courts and judges other than those within the ambit of section 96. Indeed, it would be a non-natural reading of those sections to construe them as applying to such courts of summary jurisdiction as magistrates and justices of the peace. Besides, such a construction, having regard to the circumstances, even if the language in its ordinary sense extended to such judicial officers, would seem to be excluded by the fact that all judges appointed by the Governor General are to be selected from the bars of the respective provinces. That the statesmen responsible for Confederation could in fact have contemplated such a restriction upon the appointment of magistrates and justices of the peace would be a supposition that nobody having any knowledge of the circumstances of the country could countenance.

Nor so far as I know, has it been contended since 1892 that magistrates and justices of the peace and courts presided over by them at the time of Confederation fell within the intendment of section 96. Nevertheless, the argument before us in support of the attack on the constitutionality of the legislation based upon some dicta and decisions of the last few years appears logically to involve the conclusion that magistrates and justices of the peace exercising civil jurisdiction are within the purview of sections 96 and 97 and it is necessary to examine the validity of this position.

In the early years of Confederation, the view was advanced and found vigorous support for nearly a quarter of a century that, since the appointment of all judges, including technically magistrates and justices of the peace, was matter of prerogative (and since, as was contended, every prerogative had been vested exclusively in the Governor General as the sole representative of the Sovereign in the Dominion), the Lieutenant-Governors possessed strictly in point of law no authority to appoint such functionaries and the legislatures none to legislate with regard to such appointments.

Shortly after the *B.N.A. Act* came into force, the view was put forward by the Department of Justice in reporting on provincial legislation that no prerogative rights of property and no prerogative power passed to the provinces and that the provinces had no legislative jurisdiction in respect of such rights or powers. Notwithstanding the convincing argument set forth in a memorable state paper by Mr. Mowat, in which he expounded the views of the government of Ontario touching the relation of the provincial executive to the Crown; notwithstanding the decision in *Regina* v. *Coote* (1) affirming the unanimous judgment of the Court of Queen's Bench for Quebec; notwithstanding the decisions of the Ontario judges supporting the doctrine advocated by Mr. Mowat on which the Ontario legislation was based (*Regina* v. *Wason* (2); *A.-G. for Canada* v. *A.-G. for Ontario* (3)), the Department of Justice did not yield the ground it had taken up in this controversy until the decision of the Privy Council in the *Maritime Bank's* case (4). That decision gave final judicial sanction to the views of Ontario as expounded by Mr. Mowat nearly twenty years before. In the meantime, the authority of the provinces in respect of the appointment of justices of the peace and other judicial officers of summary jurisdiction had come before the courts. In 1877, the Supreme Court of New Brunswick (in *Ganong* v. *Bayley* (5)) had to consider the validity of provincial legislation constituting a small debts court with limited jurisdiction in contract and in tort presided over by judicial officers designated as commissioners. The legislation was sustained by the majority of the court; but the minority, the Chief Justice and Duff J., held it unconstitutional upon the ground that it dealt with matter of prerogative over which the province had no jurisdiction, and declared at the same time that another statute of that province, passed in 1873, dealing with the appointment of justices of the peace, was *ultra vires* because that matter, the appointment of justices of the peace, being likewise matter of prerogative, was also beyond the powers of provincial legislatures under

(1) (1873) L.R. 4 P.C. 599.
(2) (1890) 17 Ont. A.R. 221.
(3) (1890) 20 Ont. R. 222; (1892) 19 Ont. A.R. 31.
(4) *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A.C. 437.
(5) 2 Cart. 509.

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the subject, the administration of justice and constitution of courts.

This view expressed by the minority of the Supreme Court of New Brunswick met with no concurrence in the Canadian courts until, in the year 1890, Drake J., of the Supreme Court of British Columbia, pronounced a decision in *Burk* v. *Tunstall* (1) based in part at least upon the same grounds, a decision which has assumed a great importance in the discussion of these matters and to which particular reference will be made later.

In the meantime, in Ontario, judicial authority and opinion had pronounced themselves finally against this view of the minority of the New Brunswick court. The subject of the authority of the provinces in relation to the appointment of justices of the peace came before a Divisional Court in Ontario in 1888 (Armour C.J., Street J. and Falconbridge J.) in *Regina* v. *Bush* (2). Street J., a judge of exceptional experience in such matters, reviewed the subject in an admirable judgment in the course of which he said that, subject to sections 96, 100 and 101, the words of paragraph 14 of section 92

> confer upon the Provincial Legislatures the right to regulate and provide for the whole machinery connected with the administration of justice in the Provinces, including the appointment of all the judges and officers requisite for the proper administration of justice in its widest sense, reserving only the procedure in criminal matters.
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> * * * * * * * * * *
>
> It is clearly the intention of the Act that the Provincial Legislatures shall be responsible for the administration of justice within their respective Provinces, excepting in so far as the duty was cast upon the Dominion Parliament. The only duty cast upon the Dominion Parliament in the matter is contained in the clauses to which I have referred, by which the appointment of the judges of certain courts is reserved to it. The administration of justice could not be carried on in the Provinces effectually without the appointment of justices of the peace and police magistrates, and the conclusion seems to me to be irresistible that it was intended that the appointment of these and other officers, whose duty it should be to aid in the administration of justice, should be left in the hands of the Provincial Legislatures. (pp. 403-405.)

In 1896, *In re Small Debts Act* (3), the full court of the Supreme Court of British Columbia had to pass upon a controversy touching the validity of a statute investing justices of the peace with small debts jurisdiction up to $100. The argument based upon the absence of author-

(1) 2 B.C.R. 12. (2) 15 Ont. R. 398.
(3) 5 B.C.R. 246.

ity in the provinces to legislate touching the prerogative was rejected on the authority of the *Maritime Bank's* case (1), which had, in the meantime, been decided. I do not dwell upon the able judgments delivered by McCreight and Walkem JJ. but it is necessary to take note of that of Drake J., in view of the importance that has been attached to some language of his in the earlier judgment, already mentioned, delivered some six years before in 1890 and before the decision in the *Maritime Bank's* case (1). In his judgment in 1896, Mr. Justice Drake makes it plain that in his view sections 96 and 97 of the *British North America Act* recognize provincial courts and judges other than those enumerated in section 96; and at the conclusion of his judgment he uses these words:

> In holding this particular Act *intra vires*, I do not intend to lay down any strict line of demarcation between the courts over which the Dominion Government have the power of appointing and paying the judges, and those other smaller and inferior courts which the Provincial Legislature may establish. No line can be drawn; every case must depend on the particular circumstances, and will be dealt with when the necessity to do so arises.

I consider it important to call attention to these words because a construction has been put upon a passage which has been cited and relied upon in his earlier judgment in *Burk* v. *Tunstall* (2) which would give to section 96 a wider scope and make it applicable to all provincial courts. The discrepancy is easily understood when the judgment in *Burk* v. *Tunstall* (2) is read as a whole. In that case, which was an application for a writ of prohibition, nobody appeared in opposition to the application and there was no argument in support of the validity of the impugned legislation. The controversy concerned the Mining Court of British Columbia, a court established prior to Confederation. After Confederation the jurisdiction of this Court had been increased by successive increments until the jurisdiction exercised by the Mining Court was vastly more important than that exercised by any County Court in Canada. In British Columbia from the beginning there were officials styled Gold Commissioners who within their respective districts were charged with very important administrative functions under the *Mineral Act*, under other statutes and in still other respects. By the Act constitut-

(1) [1892] A.C. 437. (2) (1890) 2 B.C.R. 12.

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ing the Mining Court, the Gold Commissioner of the District was made the judge of that Court. Mr. Justice Drake undoubtedly held the view that the Mining Court, as constituted in 1890, was a court within the contemplation of s. 96; but it is right to point out that there is no sort of resemblance between the jurisdiction and powers of the Mining Court of British Columbia at that date and the jurisdiction of the tribunals we have now to consider. The Mining Court was a court of record and was in explicit words invested with the authority of a court of law and equity to deal with all manner of disputes concerning mining lands, mining property, mining rights, and in respect of claims for supplies against free miners (who would virtually constitute every corporation and individual of the population of a mining district) without restriction as to amount or value, with authority to issue writs of *ca. sa. ne exeat* and so on. I do not doubt that the actual decision of Mr. Justice Drake in that case was right.

A passage from his judgment expressing certain views as to the construction of section 96 is quoted with approval in the judgment of the Judicial Committee of the Privy Council in *Martineau* v. *Montreal City* (1). Their Lordships' observations are in these words:

> But by s. 92, head 13, of the Act, as is well remembered, there is conferred upon the Provincial legislature the exclusive right of making laws in relation to property and civil rights in the Province and (by head 14) in relation to the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in these Courts. These exclusive Provincial powers have made it extremely difficult in many cases to draw the line between legislation which is within the competence of the Province under s. 92 of the Act, and legislation which is beyond its competence by reason of s. 96. This observation may be illustrated by two instances, neither of them remote from the present case, the first on the one side of the line and the second on the other. In *Regina* v. *Coote* (2) it was held by this Board, in an appeal upon which, it must be noticed, the respondent was not represented, that certain statutes of Quebec appointing officers named "fire marshals," with power to examine witnesses under oath and to inquire into the cause and origin of fires and to arrest and commit for trial in the same manner as a justice of the peace, was within the competence of the Provincial legislature. On the other hand, in a British Columbia case in 1890—*Burk* v. *Tunstall* (3)—it was held by Drake J. that while it was within the competence of the Province to create mining courts and to fix their jurisdiction, it was not within its competence to

(1) [1932] A.C. 113, at 121-122. (2) (1873) L.R. 4 P.C. 599.
(3) (1890) 2 B.C.R. 12.

appoint any officers thereof with other than ministerial powers. The learned judge, in the course of his judgment, referring to s. 96 of the Act, observes, as their Lordships think with reason:

> It is true that the language used in that section is limited to the judges of the superior, district and county courts in each Province, and it might be contended that these Courts having been expressly named, all other Courts were excluded. If this were so the Provincial legislature would only have to constitute a Court by a special name to enable them to avoid this clause. But in the section itself, after the special Courts thus named, the Courts of probate in Nova Scotia and New Brunswick are excepted from the operation of the clause, thus showing that s. 96 was intended to be general in its operation.

This passage in their Lordships' judgment is the basis on which the argument directed against the jurisdiction of courts of summary jurisdiction in this and in other cases of recent years, has mainly rested. It has, I venture to think, been misunderstood but it has been cited again and again as authority for the proposition that it is incompetent to the provincial legislatures to legislate for the appointment of any officer of any provincial court exercising other than ministerial functions, and for the proposition that s. 96 is general in its character in the sense that all provincial courts come within its scope, including courts of summary jurisdiction such as justices of the peace, and that, as regards all such courts exercising, at all events, civil jurisdiction, the appointment of judges and officers presiding over them is vested exclusively in the Dominion.

It is quite clear, I think, that this is a wholly unwarranted view of *Martineau's* case (1) and I shall revert to the judgment of their Lordships a little later. It is necessary, I think, before doing so, to consider a little further the judgment of Mr. Justice Drake in *Burk* v. *Tunstall* (2).

That judgment is based on two grounds. One ground is that the appointment of all judges, without distinction, being matter of prerogative right, is, conformably to the view of the minority of the judges of the Supreme Court of New Brunswick in *Ganong* v. *Bayley* (3) (which in 1890 was still the view of the Department of Justice), entirely outside the ambit of provincial jurisdiction in relation to the administration of justice and the constitution of courts. The judgment is also put on the ground indicated in the passage quoted above from the Judicial Com-

(1) [1932] A.C. 113. (2) (1890) 2 B.C.R. 12.
(3) (1877) 2 Cart. 509.

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mittee in *Martineau's* case (1) that the Mining Court was a court within the purview of section 96. Mr. Justice Drake did, I am convinced, intend to say that, under its powers in relation to the administration of justice and of constitution of courts of the province, a province has no power to appoint any officer of any such court other than officers charged with strictly ministerial functions. The view he then held touching the prerogative necessarily excluded from the authority of the provinces power to appoint judges of provincial courts, including judicial officers such as magistrates and justices of the peace, which he considered was vested exclusively in the Governor General; and he intended to say that this exclusive authority was in no way restricted by section 96. He would not have taken this view had his attention been called to *Regina* v. *Coote* (2); but, as mentioned above, he had not the benefit of any argument in support of the legislation.

As I have already observed, his views had changed in 1896 and his judgment of that year gives the simple explanation, viz., that he loyally accepted, as, of course, it was his duty to do, the judgment of the Judicial Committee in the *Maritime Bank's* case (3) as negativing the views he had formerly held with regard to the prerogative. He points out in the later judgment that the views of the Chief Justice and of Duff J., in the New Brunswick case (4), touching the prerogative had necessarily been displaced by the *Maritime Bank's* case (3). Therefore, he definitely recognized, as appears from the passage I have quoted, the authority of the Province to constitute courts to which section 96 has no application and to appoint the judges or judicial officers to preside over them.

After the decision in the *Maritime Bank's* case (3) down to the judgment of the Judicial Committee in *Martineau's* case in 1932 (5), the view, to which effect was given in *Regina* v. *Bush* in 1888 (6), and in the British Columbia case, *In re Small Debts Act,* in 1896 (7), was generally accepted in Canada; the view, that is to say, that it is competent to the provinces to legislate for the appointment of

(1) [1932] A.C. 113, at 121-122.
(2) (1873) L.R. 4 P.C. 599.
(3) [1892] A.C. 437.
(4) *Ganong* v. *Bayley,* (1877) 2 Cart. 509.
(5) [1932] A.C. 113.
(6) 15 Ont. R. 398.
(7) 5 B.C.R. 246.

justices of the peace and invest them as well as other courts of summary jurisdiction with civil and criminal jurisdiction. Even the Department of Justice accepted this view, as appears from the report of Mr. Fitzpatrick, as Minister of Justice, of December 31st, 1901, where, in referring to the district courts of the Province of New Brunswick invested with a jurisdiction to deal with claims on contract up to $80 and in tort up to $40, he says:

> These courts appear, however, to be intended to take the place of the parish courts and magistrates' courts, having limited civil jurisdiction, heretofore established, and they are not courts in the opinion of the undersigned having the dignity of the district courts intended by the British North America Act.

In 1917 there was a reference by the Lieutenant-Governor in Council of Alberta touching the validity of the *Small Debts Recovery Act* of that province (1). The question was fully discussed in the judgments of Harvey C.J. and Beck J. and determined in the sense of the British Columbia decision of 1896.

The attack on the validity of such provincial legislation based upon the argument drawn from the Justice Department's theory as to prerogative powers having received its quietus from the decision in the *Maritime Bank's* case (2), justices of the peace of almost every province of Canada, along with other courts of summary jurisdiction, exercised without question civil jurisdiction in the character of small debts courts and otherwise until the judgment of the Privy Council in *Martineau's* case (3) which seemed to start a fresh series of attacks upon the provincial jurisdiction in relation to the administration of justice.

Now, I think the observations of the Judicial Committee in *Martineau's* case (3) were not directed to magistrates' courts and courts of justices of the peace or, indeed, to courts of summary jurisdiction of any kind; and, when the whole of the passage in Lord Blanesburgh's judgment on pages 121 and 122 is read, this seems to be clear. It is quite true it is observed that the respondent was not represented in *Regina* v. *Coote* (4), but it must be noticed that in that case the Court of Queen's Bench in Quebec had unanimously held the legislation in question there,

(1) *In re Small Debts Recovery Act*, [1917] 3 W.W.R. 698.
(2) [1892] A.C. 437.
(3) [1932] A.C. 113.
(4) (1873) L.R. 4 P.C. 599.

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which provided for the appointment of fire marshals, with the powers of justices of the peace, and with authority to investigate and report on the origin of fires and to commit persons for trial if the facts should warrant that course, to be within the competence of the provincial legislature and this their Lordships appear to have considered, as did the Court of Queen's Bench, a question upon which it was necessary to pass; and they did so by expressly approving the decision of the Court of Queen's Bench.

But their Lordships' judgment in *Martineau's* case (1) does not profess to overrule the previous decision in *Regina* v. *Coote* (2) which, it may be observed, was decided by a board that included Sir Montague Smith.

I have already said that, in my view, Drake J. in the earlier case did mean to say that section 96 applies to all provincial courts of every description because his view as touching the prerogative necessarily excluded the authority of the province; but it is equally clear to me that their Lordships in the Privy Council, had not their attention called to this aspect of the subject and are not giving their sanction to the words of Drake J. in the extended sense in which I think he intended to employ them. Indeed, it is quite plain that they could not do so consistently with the previous decision in *Regina* v. *Coote* (2) which explicitly recognized the authority of the provinces to legislate for the appointment of judicial officers with the powers of justices of the peace; and, as I humbly think, it cannot be supposed that their Lordships could have given their adherence to a pronouncement at variance with all Canadian decisions and all Canadian practice since 1892 without some reference to such decisions and practice.

It cannot, therefore, be seriously disputed that, on enactment of the *British North America Act*, and on the subsequent extension of the Act to the provinces of British Columbia and Prince Edward Island, magistrates and justices of the peace remained outside the scope of section 96. Some more or less obvious consequences follow from that.

At the date of the Union, in Upper Canada, justices of the peace exercised jurisdiction in civil matters; in respect notably of claims for wages and of orders for the protection of the earnings of married women. In Nova Scotia they possessed a small debts jurisdiction up to $80

(1) [1932] A.C. 113. (2) (1873) L.R. 4 P.C. 499.

in contract and to a lower limit in tort. In British Columbia, they possessed jurisdiction in respect of protection orders, in respect of claims for ferry tolls, in respect of line fences; and in disputes respecting the ownership of stolen cattle. At least in the Maritime provinces, in Quebec and British Columbia there was, under the *Seamen's Acts* and under the *Merchants Shipping Act,* jurisdiction to entertain claims for seamen's wages.

By section 129 (*B.N.A. Act*) it was enacted as follows:

> Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

The effect of this section, of course, was that the authority of magistrates and justices of the peace in these civil matters, as well as of all judicial officers not within section 96 continued after Confederation in the provinces mentioned, subject to alteration by the legislature.

As regards seamen's wages, the Dominion, no doubt, possessed some authority to deal with that subject under section 91 and the jurisdiction of magistrates under the *Merchants Shipping Act* continued unaltered; and, in the case of Inland Waters, jurisdiction was given to justices of the peace in respect of such claims by a statute of 1873.

As regards jurisdiction in all the other matters mentioned, there can be no doubt that the Dominion possesses no authority under the *B.N.A. Act* to abate it by one jot. The *B.N.A. Act,* therefore, by its express terms provided for the continuance of courts possessing civil jurisdiction which were not within the scope of section 96 and concerning the powers of which the provinces had exclusive authority in virtue of section 92 (14).

The provinces acquired plenary authority, not only to diminish the jurisdiction of such courts, but also to increase it, subject only to any qualification arising in virtue of s. 96.

(1) (1873) L.R. 4 P.C. 599.

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My view of the effect of s. 96 as regards such courts existing at the date of Confederation (that is to say, outside the scope of that section) is this: the provinces became endowed with plenary authority under s. 92 (14), but, a province is not empowered to usurp the authority vested exclusively in the Dominion in respect of the appointment of judges who, by the true intendment of the section, fall within the ambit of s. 96, or to enact legislation repugnant to that section; and it is too plain for discussion that a province is not competent to do that indirectly by altering the character of existing courts outside that section in such a manner as to bring them within the intendment of it while retaining control of the appointment of the judges presiding over such courts. That, in effect, would not be distinguishable from constituting a new court as, for example, a Superior Court, within the scope of section 96 and assuming power to appoint the judge of it. In principle, I do not think it is possible to support any stricter limitation upon the authority of the provinces, and I do not think what I am saying is in substance inconsistent with what was laid down by Lord Atkin speaking on behalf of the Judicial Committee in *Toronto* v. *York* (1).

One of the contentions of the appellants in that case was that the Ontario Municipal Board was invalidly constituted as being a Superior Court constituted in violation of sections 96, 99 and 100 of the *British North America Act*. The conclusion of their Lordships in the Privy Council on this contention was that the Municipal Board is primarily in "pith and substance," an administrative body. As to Part III of the Act (22 Geo. V, 1932, cap. 27), especially sections 41-46, 54 and 59, in which the Board

shall for all purposes of this Act have all the powers of a court of record (sec. 41),

and

shall as to all matters within its jurisdiction under this Act have authority to hear and determine all questions of law or of fact (sec. 42),

and

for the due exercise of its jurisdiction and powers and otherwise for carrying into effect the provisions of this or any other general or special Act, shall have all such powers, rights and privileges as are vested in the Supreme Court with respect to the amendment of proceedings, addition or substitution of parties, attendance and examination of witnesses, production and inspection of documents, entry on and inspection of property;

(1) [1938] A.C. 415.

enforcement of its orders and all other matters necessary or proper therefor (sec. 45),

their Lordships said it was difficult to avoid the conclusion that the sections in question purport to clothe the Board with the functions of a Court, and to vest in it judicial powers, and held that

so far, therefore, as the Act purports to constitute the Board a Court of Justice analogous to a Superior, District, or County Court it is *pro tanto* invalid.

But it is obvious that their Lordships were not considering, because there was no occasion to do so, the distinction between the courts that come within the intendment of section 96 of the *British North America Act* and other courts or tribunals.

In effect, it was argued before us that provincial legislation is repugnant to section 96 if in any particular the jurisdiction of one of these courts of summary jurisdiction existing at the date of Confederation is increased. That, in my view, is quite inadmissible in principle as it is incompatible with practice and authority since Confederation with the exception of one or two decisions in very recent years which are put upon the authority of *Martineau's* case (1).

Before proceeding further, it will be convenient to advert to some general considerations. In the argument addressed to us there is an underlying assumption that the interest of the people of this country in the independent and impartial administration of justice has its main security in sections 96, 97 and 99. Now, there were weighty reasons, no doubt, for those sections, and a strict observance of them as regards the judges of courts within their purview is essential to the due administration of justice. But throughout the whole of this country magistrates daily exercise, especially in the towns and cities, judicial powers of the highest importance in relation more particularly to the criminal law, but in relation also to a vast body of law which is contained in provincial statutes and municipal by-laws. The jurisdiction exercised by these functionaries, speaking generally, touches the great mass of the people more intimately and more extensively than do the judgments of the Superior Courts; and it would be an extraordinary supposition that a great community like the

(1) [1932] A.C. 113.

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province of Ontario is wanting, either in the will or in the capacity, to protect itself against misconduct by these officers whom it appoints for these duties; and any such suggestion would be baseless in fact and altogether fallacious as the foundation of a theory controlling the construction of the *B.N.A. Act.*

Moreover, except in the case of the Superior Court judges of the provinces, who, by force of section 99, hold office during good conduct and are removable only by the Governor General on address by the Senate and the House of Commons, the *British North America Act* provides no security of tenure for judges coming within s. 96.

It is very clear to me, therefore, that, if you were justified in holding that by force of s. 96 the provinces have been disabled since Confederation from adding to the jurisdiction of judges not within that section, there would be equally good ground for holding that by force of s. 99 the provinces are disabled from extending the jurisdiction of the County Courts and the District Courts in such a way as to embrace matters which were then exclusively within the jurisdiction of Superior Courts.

Now, the pecuniary limit of claims cognizable by County Court judges has been frequently enlarged since Confederation and nobody has ever suggested so far as I know that the result has been to transform the County Court into a Superior Court and to bring the County Court judges within s. 99. Perhaps the most striking example of these enlargements of jurisdiction was that which occurred in British Columbia when the jurisdiction of the Mining Court, after the judgment of Mr. Justice Drake referred to above, was transferred to the County Court, and the County Court in respect of mines, mining lands and so on was given a jurisdiction unrestricted as to amount or value with all the powers of a court of law or equity.

It has never been suggested, so far as I know, that the effect even of that particular enlargement of the jurisdiction of the County Courts of British Columbia was to deprive the County Court and the County Court judges of their characters as such and to transform them into Superior Courts and Superior Court judges; or that s. 99 has, since these increases took place, been applicable to

County Court judges. In point of fact, as everybody knows, the practice has been opposed to this.

If the provinces have no authority to increase the jurisdiction of the County Courts without depriving them of their character as such, then no such jurisdiction exists anywhere. As Mr. Justice Strong, speaking for this Court, said in *Re County Courts of British Columbia* (1):

> * * * The jurisdiction of parliament to legislate as regards the jurisdiction of provincial courts is, I consider, excluded by subsection 14 of s. 92, before referred to, inasmuch as the constitution, maintenance and organization of provincial courts plainly includes the power to define the jurisdiction of such courts territorially as well as in other respects. This seems to me too plain to require demonstration.

In answer to the suggestion that a territorial increase of jurisdiction ought to be followed by a fresh commission to the judge of the County Court, he observed that the suggestion was a "preposterous" one.

There is a strong current of authority against the proposition I am discussing. Small debts courts presided over by judges appointed by the provinces were established in New Brunswick in 1877, in British Columbia in 1895, in Alberta in 1917, and, no doubt, elsewhere, and the validity of this legislation has been uniformly sustained. The jurisdiction of the Nova Scotia magistrates in such matters (vested in them before Confederation) is still exercised without challenge.

In *French* v. *McKendrick* (2), the Court of Appeal in Ontario unanimously held the Division Courts, courts established before Confederation, exercising jurisdiction in contract and in tort within defined limits as to amount and value, presided over, by the statute constituting them, by a County Court judge or by a member of the bar named as deputy by one of the judges, not to be courts within the scope of s. 96. The Court of Appeal unanimously took the view that the enactment authorizing the appointment of a deputy judge from the bar by a County Judge was competent and also that legislation enlarging the pecuniary limits of jurisdiction was competent.

I agree with the view expressed by Mr. Justice Drake, in his judgment in *Re Small Debts Act* (3), that it is inadvisable to attempt to draw an abstract line for the purpose of classifying courts as falling within section 96 or

(1) (1892) 21 Can. S.C.R. 446, at 453.

(2) (1930) 66 Ont. L.R. 306.

(3) (1896) 5 B.C.R. 246.

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otherwise. I think, with respect, that this is not in the least inconsistent with Lord Atkin's observations in *Toronto* v. *York* (1).

Then, it should be observed that, if you have a provincial court outside the scope of s. 96 and the province enlarges its jurisdiction or its powers, but not in such a manner as to constitute a court of a class within the intendment of s. 96, I, as a judge, charged solely with the application of the law, have no further concern with what the legislature has done. It is no part of my function as a judge to consider whether, if the province should go on enlarging the jurisdiction and powers of the court, it might arrive at a point when the tribunal would cease to be one outside the ambit of s. 96. I have nothing to do with that. It may be a very excellent ground for disallowance of the legislation by the Governor General. Even if I am satisfied that there is something in the nature of an abuse of power, that in itself is no concern of mine. If, in its true character, the legislation is legislation concerning the administration of justice and the constitution of provincial courts and is not repugnant to the *B.N.A. Act* as a whole, that is the end of the matter. As Lord Herschell said in the first *Fisheries* case (2), the supreme legislative power is always capable of abuse, but the remedy lies with those who elect the legislature. In the case of provincial legislatures there is the additional remedy which the Imperial Parliament has committed to the Governor General and not to the courts.

I am unable to accept the view that the jurisdiction of inferior courts, whether within or without the ambit of s. 96, was by the *B.N.A. Act* fixed forever as it stood at the date of Confederation.

Coming now to the legislation before us. I do not intend to examine it in detail. Let me first observe that the jurisdiction of the Legislature to pass the *Adoption Act* appears to me too clear for discussion and I add nothing to that.

The remaining three statutes fall into two classes. As regards the *Children of Unmarried Parents Act* and the

(1) [1938] A.C. 415.
(2) *Attorney-General for Canada* v. *Attorneys-General for Ontario, Quebec and Nova Scotia,* [1898] A.C. 700, at 713.

Deserted Wives' and Children's Maintenance Act, these statutes, broadly speaking, aim at declaring and enforcing the obligations of husbands and parents to maintain their wives and children and these, self-evidently, are peculiarly matters for provincial authority. As regards the maintenance of illegitimate children and deserted wives and children, the public responsibility, as already mentioned, rests exclusively with the provinces and it is for the provincial legislatures, and for them alone, to say how the incidence of that responsibility shall be borne. The enactments are closely analogous to certain of the enactments forming part of the Poor Law system as it has developed in England since the time of Elizabeth; and the jurisdiction vested by these statutes in magistrates and judges of the Juvenile Court is not in substance dissimilar to the jurisdiction of magistrates under that system. I agree with the Supreme Court of British Columbia in *Dixon* v. *Dixon* (1) that there is no little analogy between the pre-Confederation legislation in British Columbia and in Ontario by which the earnings of the wife, which are the property of the husband, can be taken from the husband by a protection order and placed under the control of the wife. I agree with that, on the assumption upon which the argument against this legislation proceeded, that a maintenance order against a delinquent husband at the instance of a deserted wife is to be treated as on the same footing as alimony.

I think, with great respect, however, that the matter is of little importance. The subject is envisaged by these statutes from a different point of view. It is dealt with from the point of view of the obligation of the community and of the husband to the community. That is to say, it recognizes, first, the obligation of the community to protect women and children afflicted by misfortune through the default of their natural protector in the discharge of his natural obligations and, as one means of securing that end, it imposes upon the defaulting father and husband the legal duty enforceable by summary proceedings to support his children and his wife. The statute places the obligation to care for the deserted wife and children on the shoulders of that member of the community whose duty it is to the

(1) (1932) 46 B.C.R. 375.

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community as well as to his family to bear the burden. The distinction is well brought out in a passage in a judgment of Lord Atkin in *Hyman* v. *Hyman* (1), cited in Mr. Scott's factum:

> While the marriage tie exists the husband is under a legal obligation to maintain his wife. The duty can be enforced by the wife, who can pledge his credit for necessaries as an agent of necessity, if, while she lives apart from him with his consent, he either fails to pay her an agreed allowance or fails to make her any allowance at all; or, if she lives apart from him under a decree for separation, he fails to pay the alimony ordered by the Court. But the duty of the husband is also a public obligation, and can be enforced against him by the State under the Vagrancy Acts and under the Poor Relief Acts.

One further point made against this feature of the statute is that there is no pecuniary limit. This again I regard as of small importance. The jurisdiction is not without limit; it is necessarily limited by the purpose for which the order is made.

In *Clubine* v. *Clubine* (2) the Court of Appeal for Ontario, following the judgment of the Court of Appeal for Alberta in *Kazakewich* v. *Kazakewich* (3), held that section 1 (1) of the *Deserted Wives' and Children's Maintenance Act* is *ultra vires* on the ground that it is beyond the powers of a provincial legislature to invest a court of summary jurisdiction, such as a magistrate's court, with a jurisdiction theretofore exclusively exercised by a Superior Court of the province. I have given my reasons for thinking that the proposition in that sweeping form cannot be sustained and, with the greatest possible respect, I think, moreover, that the Court of Appeal for Ontario have not given due weight to the special character of the jurisdiction vested in the courts of summary jurisdiction under the *Deserted Wives' and Children's Maintenance Act,* or to the close analogy between that jurisdiction and the jurisdiction exercised for centuries by courts of summary jurisdiction in England and in Canada. With the greatest possible respect, I am unable to concur in the decisions in *Clubine* v. *Clubine* (2) and *Kazakewich* v. *Kazakewich* (3).

In *Rex* v. *Vesey* (4) the Supreme Court of New Brunswick pronounced a decision based upon the view that such legislation was not beyond the competence of a provincial legislature.

(1) [1929] A.C. 601, at 628.
(2) [1937] O.R. 636.
(3) [1936] 3 W.W.R. 699.
(4) (1937) 12 M.P.R. 307.

Looking at the question in controversy from the point of view most favourable to the attack, the question one must ask oneself is this: does the jurisdiction conferred upon magistrates under these statutes broadly conform to a type of jurisdiction generally exercisable by courts of summary jurisdiction rather than the jurisdiction exercised by courts within the purview of s. 96? There can be only one answer to that question. It is proper beyond doubt to look at the practice in England for this purpose (*Croft* v. *Dunphy*) (1). The summary of statutes in the factum for British Columbia is conclusive. Moreover, the statute referred to by Mr. Scott, and printed in full also in the factum for the Dominion, of the year 1718 (5 Geo. I, ch. 8), entitled "An Act for the more effectual relief of such wives and children, as are left by their husbands and parents, upon the charge of the parish," bears a close analogy to this feature of the legislation which is that upon which the attack is mainly based. This statute was certainly in force in British Columbia at the date of Confederation and, probably, was in force in Ontario.

Coming to the *Children's Protection Act*. Having regard to the purpose of the Act and its machinery, it appears to me to be precisely the kind of legislation which might be described as the modern counterpart of the Poor Law legislation in those features of it which are concerned with the care of neglected children. With great respect, I am unable to perceive any ground upon which it can be validly affirmed that magistrates exercising jurisdiction under this statute are entering upon a sphere which, having regard to legal history, belongs to the Superior Courts rather than to courts of summary jurisdiction; or that in exercising the functions attributed to them by this legislation they come within any fair intendment of section 96.

It is proper, perhaps, to advert particularly to the circumstance that, by section 26 of the statute, a Supreme Court judge has authority at any time to put an end to the guardianship of a Children's Aid Society and to return the child to the parents (*Re Maher* (2)).

Having given my reasons for thinking that these statutes are validly enacted in respect of the jurisdiction vested in

(1) [1933] A.C. 156. (2) (1913) 28 Ont. L.R. 419.

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the magistrates and justices of the peace as such, I come now to the Juvenile Court.

There is one general observation which must first be made. If you have a jurisdiction which can be exercised by a tribunal not within section 96, that is to say, by a tribunal presided over by a judge or officer appointed by the province, it is entirely for the province to say how the tribunal shall be constituted and by what name judicial officers presiding over it shall be called. *Regina* v. *Coote* (1) is, on this point conclusive.

Now, the Juvenile Court is recognized and, to my mind, properly beyond all doubt recognized as a properly constituted court for the purpose of dealing with offences under the Dominion *Juvenile Delinquents' Act,* 1929 (19-20 Geo. V, ch. 46) and the amendments of 1935 and 1936 (25-26 Geo. V, ch. 41, and 1 Edw. VIII, ch. 40).

Jurisdiction under the old law of the Province of Canada in respect of offences by juvenile delinquents was exercisable by two justices of the peace, by a recorder, or by a stipendiary magistrate. A Juvenile Court constituted for exercising this jurisdiction in respect of juvenile offenders is plainly to my mind a court not within s. 96 and it does not become so by virtue of the fact that the officers presiding over it are invested with further jurisdiction of the same character as is validly given to magistrates and justices of the peace.

All the Interrogatories will, therefore, be answered in the affirmative.

The questions referred, answered in the affirmative.

Solicitor for the Attorney-General of Canada: *W. Stuart Edwards.*

Solicitor for the Attorney-General of Ontario: *William B. Common.*

Attorney-General of Manitoba: *W. J. Major.*

Solicitor for the Attorney-General of British Columbia: *H. Alan MacLean.*

Solicitor for the Attorney-General of Saskatchewan: *Alex. Blackwood.*

Solicitor for the Attorney-General of Alberta: *W. S. Gray.*

Solicitors for The Canadian Welfare Council: *Ewart, Scott, Kelley, Scott & Howard.*

(1) (1873) L.R. 4 P.C. 599.

LOUIS GATTO AND ALPHONSE TONELLATTO ..... APPELLANTS;

1938

* May 16.
* June 23.

AND

HIS MAJESTY THE KING ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Criminal law—Indictment attacked as bad for multiplicity—Several matters stated in alternative—Cr. Code, s. 854—Charge under s. 193 (3) of Customs Act, R.S.C., 1927, c. 42, and amendments—Form of verdict.

Appellants were charged and convicted on an indictment that they "did * * * assist or were otherwise concerned in the importing, unshipping, landing or removing or subsequent transporting or in the harbouring of goods liable to forfeiture under the Customs Act, to wit: spirituous liquors of a value for duty of over" $200, contrary to s. 193 (3) of said Act, R.S.C., 1927, c. 42, and amendments. The indictment was attacked on the ground that it was bad for multiplicity, in that appellants were charged with several offences in the alternative in the one count.

Held: The attack on the indictment failed. Appellants were not charged with any one of the offences of "importing," "unshipping," etc. They were charged with an offence created by s. 193 of the *Customs Act,* which creates a substantive offence, and the guilt of a person charged thereunder depends in no degree whatever upon the fact or otherwise that the acts in which such person is concerned are themselves offences. S. 854 of the *Cr. Code* applies.

Held, also, that the form of the jury's verdict, finding accused "guilty of harbouring only," was unobjectionable when read in connection with the indictment and the trial Judge's charge.

Judgment of the Supreme Court of Nova Scotia *in banco,* 12 M.P.R. 483, sustaining, on equal division, the conviction of accused, affirmed.

APPEAL by the accused from the judgment of the Supreme Court of Nova Scotia *in banco* (1), which, on equal division, dismissed their appeal from their conviction, at trial before Graham J. and a jury, on an indictment that they

did * * * assist or were otherwise concerned in the importing, unshipping, landing or removing or subsequent transporting or in the harbouring of goods liable to forfeiture under the Customs Act, to wit: spirituous liquors of a value for duty of over Two Hundred Dollars,

contrary to s. 193 (3) of the *Customs Act,* R.S.C., 1927, c. 42, and amendments thereto.

At trial, before plea by the accused, their counsel objected to the indictment, claiming that it was bad for a

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

(1) 12 M.P.R. 483; [1938] 2 D.L.R. 228.

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multiplicity of charges. The trial Judge over-ruled the objection.

After the jury had been charged and had retired, they returned and asked for instruction with regard to the form of verdict. The trial Judge instructed them as follows:—

I understand you want to know whether or not you can specify on which of the matters you find the accused guilty. There are a number in the indictment—did assist or were otherwise concerned in the importing, unshipping, landing, removing, subsequent transportation of or in the harbouring—and I say to you that if you find them guilty of any of these things you may find them "guilty" and leave it at that. It is not necessary for you to pick out one of them. If you find they assisted or were otherwise concerned in the importing you may find them "guilty." If you find they assisted or were otherwise concerned in the unshipping or the landing or the removing or the subsequent transportation of the liquor, a verdict of "guilty" will cover it. I don't think it would be an error if you designated the particular thing of which you found them guilty, but it seems to me there is less likelihood of an error if you enter the general verdict of guilty.

Bring in whatever verdict you think proper, and if for any reason I think it is incomplete or not satisfactory I will tell you or send you back.

The jury found the accused "guilty of harbouring only."

The grounds of appeal specified by the accused in their notice of appeal to the Supreme Court of Nova Scotia *in banco* were:—

1. Because the indictment charged six offences and thereby prejudiced us in our defence;

2. Because the indictment is bad for multiplicity and should have been quashed when the motion was made to quash same before we pleaded;

3. Because the special verdict found by the jury does not constitute an indictable offence;

4. Because the learned trial Judge erred in instructing the jury that they could bring in a verdict of guilty of any one of the particular offences mentioned in the indictment.

The appeal to the Supreme Court of Nova Scotia *in banco* was dismissed on equal division; the judgment for dismissal of the appeal being written by Doull J., concurred in by Hall J.; and the judgment *contra* (in favour of directing a new trial) was written by Carroll J., concurred in by Archibald J. (1).

The accused appealed to this Court. By the judgment now reported, the appeal was dismissed.

J. W. Maddin K.C. for the appellants.

D. D. Finlayson for the respondent.

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The judgment of the court was delivered by

THE CHIEF JUSTICE.—This is an appeal from the Supreme Court of Nova Scotia dismissing by an equal division an appeal from the judgment of Mr. Justice Graham who, at the trial, had rejected a motion to quash the indictment. The indictment is as follows:—

Louis Gatto and Alphonse Tonellatto, of the Town of New Waterford, in the County of Cape Breton, Province of Nova Scotia, did on or about the twenty-fourth day of December, in the year of Our Lord, One Thousand Nine Hundred and Thirty-six, at or near Gabarus, in the said county and province, assist or were otherwise concerned in the importing, unshipping, landing or removing or subsequent transporting or in the harbouring of goods liable to forfeiture under the Customs Act, to wit:

spirituous liquors of a value for duty of over Two Hundred Dollars, contrary to subsection 3 of section 193 of the Customs Act, being chapter 42 of the Revised States of Canada, 1927, and amendments thereto, being the form of Statute in that behalf made and provided.

The application to quash proceeded on the ground that the indictment is bad for multiplicity, that is to say, that several offences are charged in one count.

We have carefully considered the able judgment of Mr. Justice Carroll (with whom Mr. Justice Archibald concurred) who thought the appeal should be allowed and the indictment quashed; but have come to the conclusion that the weight of argument is definitely in favour of the view expressed in the judgment of Mr. Justice Doull, who agreed with the view of the learned trial judge.

The charge is laid under subsection 3 of section 193 of the *Customs Act*. Section 193 is in these words:—

193. (1) All vessels, with the guns, tackle, apparel and furniture thereof, and all vehicles, harness, tackle, horses and cattle made use of in the importation or unshipping or landing or removal or subsequent transportation of any goods liable to forfeiture under this Act, shall be seized and forfeited.

(2) Every person who assists or is otherwise concerned in the importing, unshipping, landing or removing or subsequent transporting, or in the harbouring of such goods, or into whose control or possession the same come without lawful excuse, the proof of which shall be on the person accused, shall, in addition to any other penalty, forfeit a sum equal to the value of such goods, which may be recovered in any court of competent jurisdiction, and, where the value for duty of such goods is under two hundred dollars, shall further be liable on summary conviction before two justices of the peace to a penalty not exceeding two hundred dollars and not less than fifty dollars, or to imprisonment for a term not exceeding one month, or to both fine and imprisonment.

(3) Where the value for duty of the goods so imported, unshipped, landed, removed, subsequently transported, or harboured or found, is two hundred dollars or over, such person shall be guilty of an indictable

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offence and liable on conviction, in addition to other penalties to which he is subject for any such offence, to a penalty not exceeding one thousand dollars and not less than two hundred dollars, or to imprisonment for a term not exceeding four years and not less than one year, or to both fine and imprisonment.

The argument on behalf of the appellant is that under this section "importing" goods of the character to which it relates is one offence, "unshipping" another offence, "landing" another offence, "removing" another offence, "transporting" another and "harbouring" still another, and, accordingly, that the appellants were charged with six offences in the alternative in the one count.

Mr. Justice Doull, with whom Mr. Justice Hall concurred, says:—

> The fallacy in this argument is that the appellants were not charged with any one of the offences mentioned. They were charged with an offence created by section 193 of the Customs Act, which, leaving out irrelevant matter for the moment, provides that "Every person who assists or is otherwise concerned in the importing, unshipping, landing or removing or subsequent transportation or in the harbouring of such goods (i.e., goods liable to forfeiture under this Act), where the value of the goods so imported, &c., is Two Hundred Dollars or over, *shall be guilty of an indictable offence* and liable to a penalty not exceeding One Thousand Dollars and not less than Two Hundred Dollars or to imprisonment for a term not exceeding four years and not less than one year or to both fine and imprisonment.
>
> Section 193 creates a substantive offence, and the guilt of a person charged thereunder depends in no degree whatever upon the fact or otherwise that the acts in which such person is concerned are themselves offences.

We agree with this view and we think it is conclusive of the controversy. Section 854 of the *Code* applies. We agree also with Mr. Justice Doull and Mr. Justice Hall that the form of the verdict is unobjectionable when it is read in connection with the indictment and the charge of the learned trial judge.

Appeal dismissed.

Solicitor for the appellants: *J. W. Maddin.*

Solicitor for the respondent: *M. A. Patterson.*

FRED. BAILEY .....APPELLANT;

AND

THE KING .....RESPONDENT.

1938

*June 7.
*June 23.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Charge of keeping common gaming house—Article found on premises as constituting prima facie evidence of guilt—Cr. Code, ss. 985, 986 (2)—Nature of article—Prizes for punching in a board holes containing "winning letters" contained in correct answers to printed questions—Possibility of use of knowledge to punch with certainty correct holes—Difficult nature of questions—Probable and contemplated manner of using the board—Sufficiency of evidence to support magistrate's finding against accused.

Appellant was convicted of keeping a common gaming house contrary to s. 229 of the *Cr. Code*. Under a search warrant there was seized in appellant's drug store what was described as a "skill puzzle board" containing (*inter alia*) a list of prizes, lists of numbered questions, and rows (numbered correspondingly to the questions) of holes, the operator to win a prize if he punched a hole containing a "winning letter" (which letter would be in its proper place in the spelling of the answer, concealed under the row of holes, to the correspondingly numbered question). It was stated that if the operator knew the answer to a question he could make with certainty a winning punch. It was apparent (as found by the court) that very few persons who had not previously examined the questions and undertaken to search in books of reference, etc., would know the answers. Appellant contended that, there being only one correct answer to each question, there was no gaming or chance connected with the operation of the board. The question on this appeal was whether or not there was before the magistrate evidence sufficient in point of law to support a finding that the article was a "means or contrivance for playing any game of chance or any mixed game of chance and skill, gaming or betting" within s. 986 (2) of the *Cr. Code*.

Held: The conviction should be sustained. As applicable to this appeal, the effect of ss. 985 and 986 (2), *Cr. Code*, was to render it unnecessary for the prosecution to adduce evidence that persons had resorted to appellant's drug store for the purpose of using the board. As to its manner of use: The court must apply its knowledge of the usual everyday custom of mankind and hold that the ordinary person entering the store would pay the sum required (10 cents) for the chance of winning a prize, without critically examining the questions and returning later with a correct answer or answers. It was quite apparent that it was never intended that the board would be so used, but, on the contrary, it was expected that some persons entering the store would be inveigled to pay for punching a hole and the chance of winning a prize. This consideration sufficed to demonstrate that the board was a means or contrivance for playing a game of chance or, at any rate, a mixed game of chance and skill.

Per Duff C.J.: The magistrate was entitled to look at the character of the questions and to consider the probability that people participating in the game would seriously undergo the labour of ascertaining the

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correct answers, as well as the probability that anybody offering the game to people entering a public shop would expect that any such thing would be done. The magistrate evidently concluded that, while the game could be played as one involving research and with certain results, it would in actual practice be operated in such a manner that the result, favourable or unfavourable, would depend entirely upon luck, and that such was the shopkeeper's expectation. It could not be said that there was no evidence upon which the magistrate, employing his knowledge as a man of the world, as it was his duty to do, could take this view. It was an admissible conclusion, if the magistrate was so satisfied, that there was no other reasonable explanation of the proved facts. There was, therefore, evidence to support his finding that the article was a means or contrivance for playing a game of chance and was operated for gain by appellant.

APPEAL by the accused from the judgment of the Court of Appeal for Ontario (1) which (Masten J.A. dissenting) dismissed his appeal from his conviction by a magistrate of keeping a common gaming house, contrary to s. 229 of the *Criminal Code*. The material facts of the case are sufficiently stated in the judgments now reported. The appeal to this Court was dismissed.

L. M. Singer K.C. for the appellant.

C. L. Snyder K.C. and *C. P. Hope K.C.* for the respondent.

THE CHIEF JUSTICE.—I have had the opportunity of reading the judgment of Mr. Justice Kerwin in which I agree. I merely add that the controversy turns upon the application of sections 985 and 986, *Cr. C.* Subsection 2 of section 986 is in the following terms:—

> If any house, room or place is found fitted or provided with any means or contrivance for playing any game of chance or any mixed game of chance and skill, gaming or betting, or with any device for concealing, removing or destroying such means or contrivance it shall be *prima facie* evidence that such house, room or place is a common gaming house or common betting house as the means or contrivance may indicate;

and the question we have to determine is whether or not there was before the magistrate evidence sufficient in point of law to support a finding that the article produced is a "means or contrivance for playing any game of chance or any mixed game of chance and skill, gaming or betting."

It is not disputed that the article was not in the shop for sale. It is equally clear that it is a "means or contrivance for playing a game." On the payment of ten

(1) [1938] Ont. W.N. 81; [1938] 2 D.L.R. 762.

cents, the person desiring to participate in the game is entitled, if he succeeds in punching a hole containing one of the winning letters, to receive a prize specified as appertaining to that letter.

Mr. Singer argues that the game is not a "game of chance or a mixed game of chance and skill, gaming or betting" because each of the questions in the six columns has one and only one correct answer—which can be ascertained; and if such correct answers are ascertained each one of the winning letters will appear in one or more of them.

The magistrate was entitled to look at the character of the questions and to consider the probability that people participating in this game would seriously undergo the labour of ascertaining the correct answers to these questions, as well as the probability that anybody offering this game to people entering a public shop would expect that any such thing would be done. The magistrate evidently came to the conclusion that, while the game could be played as a game involving research and with certain results, it would, nevertheless, in actual practice, be operated in such a manner that the result, favourable or unfavourable, would depend entirely upon luck, and that such was the expectation of the shopkeeper.

I find myself unable to hold that there was no evidence upon which the magistrate, employing his knowledge as a man of the world, as it was his duty to do, could take this view. It was an admissible conclusion, if the magistrate was so satisfied, that there was no other reasonable explanation of the proved facts. There was, therefore, evidence to support his finding that the article produced was a means or contrivance for playing a game of chance and was operated for gain by the appellant.

The judgment of Crocket, Davis, Kerwin and Hudson JJ. was delivered by

KERWIN, J.—The appellant was convicted of keeping a common gaming house contrary to section 229 of the *Criminal Code*, and his conviction was affirmed by the Court of Appeal for Ontario with Mr. Justice Masten dissenting in the following words:—

My opinion in this case rests on the simple ground that there is no evidence that this game has ever been played as a game of chance. The

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accused is presumed innocent until proved guilty. So far as appeared on the presentation of this case to this Court the evidence is, that the device can be used and a successful result obtained *with certainty* as a result of research and skill, but no evidence is afforded that it was ever operated by any person as a game of chance.

For that reason I am of opinion that the prosecution fails. I think the appeal should be allowed and the conviction quashed.

By section 226 of the Code, a common gaming house is defined as

(*a*) a house, room or place kept by any person for gain, to which persons resort for the purpose of playing at any game of chance, or at any mixed game of chance and skill.

Section 985 provides as follows:—

When any cards, dice, balls, counters, tables or other instruments of gaming used in playing any game of chance or any mixed game of chance and skill are found in any house, room or place suspected to be used as a common gaming house, and entered under a warrant or order issued under this Act, or about the person of any of those who are found therein, it shall be *prima facie* evidence, on the trial of a prosecution under section two hundred and twenty-eight or section two hundred and twenty-nine, that such house, room or place is used as a common gaming house, and that the persons found in the room or place where such instruments of gaming are found were playing therein, although no play was actually going on in the presence of the officer entering the same under such warrant or order, or in the presence of the persons by whom he is accompanied.

Subsection 2 of section 986 is important but in order to understand the reference therein of the words "any house, room or place," it is necessary to quote also what is really subsection 1 although not so numbered. These two subsections are as follows:—

In any prosecution under section two hundred and twenty-eight or under section two hundred and twenty-nine it shall be *prima facie* evidence that a house, room or place is a disorderly house if any constable or officer authorized to enter any house, room or place is wilfully prevented from or obstructed or delayed in entering the same, or any part thereof.

2. If any house, room or place is found fitted or provided with any means or contrivance for playing any game of chance or any mixed game of chance and skill, gaming or betting, or with any device for concealing, removing or destroying such means or contrivance, it shall be *prima facie* evidence that such house, room or place is a common gaming house or common betting house as the means or contrivance may indicate.

In this case a search warrant was obtained under section 641 of the *Code* and in pursuance thereof a constable seized in the drug store occupied by the accused what is described as a skill puzzle board. A list of the prizes that might be won is given in large type on a piece of cardboard attached

at the top of the board itself, and on the latter appears the following:—

Read explanation on other side before punching.
WINNING LETTERS
The letter "J" wins a "Miracle Dry Shaver."
The letters W, Z and F win a Genuine Ronson Lighter.
The following letters: Q K M V win a Package (5's) of Eastman Thin Blades.
Last punch on board receives a "Miracle Dry Shaver."

The words "Read explanation on other side before punching" are in smaller type than any of the other printing. It is true that immediately above what has been extracted the same words appear in heavy blue type on the representation of the face of the board appearing in the case submitted to us, but an examination of the board itself, filed as an exhibit, shows that the list of prizes on the cardboard sheet is attached so as to cover this heavy blue type. This is really of no importance in the view I take of the matter but I think should be mentioned.

From a perusal of the explanation referred to, it appears that the operator of the board would first be required to know the answer to one of the questions contained in six columns. The answer consists of either a seven- or nine-letter word, according to the column in which the question appears. Below the lists of questions numbered from 1 to 12 is a series of holes similarly numbered and the object of the operator would be to punch, with the instrument attached to the board by a string, the particular hole which contains a strip of paper upon which is printed one of the letters of the alphabet described as "Winning Letters." It is stated that the answer to each question is the only correct, complete and precise answer to the correspondingly numbered and situated question in the question portion of the board. I do not attach any importance to the fact that the questions are printed on either a yellow or red background and are somewhat difficult to read, but it is apparent, upon reading the questions, that very few persons who had not previously examined them and undertaken to search for the answers in books of reference, etc., would know the correct response except perhaps in an isolated instance. Taking three questions at random as examples, we find the following:—

7. Column 1. Wife of King Valentinian in Fletcher's tragedy of 1612.
8. Column 5. Speaker of the House of Commons who promoted death of Mary, Queen of Scots.

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11. Column 5. Professor of comparative philology, 1868-1875, at Oxford (Full name).

As applicable to this appeal, the effect of section 985 and subsection 2 of 986 was to render it unnecessary for the prosecution to adduce evidence that persons had resorted to the appellant's drug store for the purpose of using the board. The contention of the appellant is that, there being only one correct answer to each question, there is no gaming or no chance connected with the operation of the board. I think, however, we must apply our knowledge of the usual everyday custom of mankind and hold that the ordinary person entering the drug store would pay ten cents for the chance of winning a prize, without critically examining the questions and returning later with the correct answers to one or more of them. It is quite apparent that it was never intended that the board would be so used but, on the contrary, it was expected that some members of the public entering the drug store would be inveigled to pay ten cents for the opportunity of punching a hole, and the chance of winning a prize. This consideration is sufficient, in my opinion, to demonstrate that the board is a means or contrivance for playing a game of chance or, at any rate, a mixed game of chance and skill.

The appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant: *L. M. Singer.*

Solicitor for the respondent: *A. O. Klein.*

ALBERT TOUCHETTE (DEFENDANT).....APPELLANT;

AND

THEODORO PIZZAGALLI (PLAINTIFF) RESPONDENT.

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* Oct. 22, 25.
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* March 25.

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

Sale—Automobile—Defect in the construction of the car—Latent defect—Rain leaking through side windows—Warranty—Car to be free from defects in material and workmanship—Limited to making good any defective part—Repairs unsatisfactory to buyer—Action for annulment of contract and reimbursement of purchase price—Redhibitory action—Restitutio in integrum—Car used before institution of action—Articles 1065, 1087, 1088, 1506, 1507, 1522, 1526, 1527, 1530 C.C.

The respondent purchased an automobile from the appellant, which was delivered on the 30th of May, 1934. In the early part of June, the respondent noticed while driving that the small side windows in the back of the car permitted rain to leak through into the car. The respondent advised at once the appellant of that defect and the latter undertook to put the car into good order immediately. From June to October, 1934, frequent interviews occurred and correspondence was exchanged between the parties, in consequence of which the car was, on several occasions, handed over to the appellant who attempted to remedy the condition by sealing those windows with a rubber compound, but with no satisfactory result. On the 10th of October, 1934, the respondent tendered the car back to the appellant and on the 15th of October brought the present action asking for the annulment of the contract and for the reimbursement of the purchase price. The contract between the appellant and the respondent contained the following clause: "the motor vehicle * * * is purchased * * * subject to the clause of the manufacturer's warranty endorsed in this contract * * * and this is the sole warranty, expressed or implied * * *"; and the manufacturer's guarantee was in these words: "The manufacturer warrants each new motor vehicle manufactured by it, to be free from defects in material and workmanship under normal use and service, its obligation under the warranty being limited to making good * * * any part or parts thereof * * * which have been defective; this warranty being expressly in lieu of all other warranties expressed or implied and of all other obligations or liabilities on its part * * *"

Held, Davis J. dissenting, that the respondent's action, asking for the annullment of the contract and the reimbursement of the purchase price, was well founded.

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Per The Chief Justice.—In view of the special circumstances and facts of this case, and especially of the correspondence (recited in the judgment) exchanged between the parties, the defendant's appeal to this Court should be dismissed.—As to the appellant's claim made in his plea for compensation in respect of deterioration or in respect of the use of the automobile for a certain period, such claim should not be allowed in view of the above circumstances, and more particularly of those contained in the considérant (recited in the judgment) forming part of the decision of the appellate court, which disallowed such claim.

Per Cannon and Kerwin JJ.—The respondent was entitled to claim the cancellation of the sale and the reimbursement of the purchase price, as the appellant had failed to perform his own obligation to repair the defect found in the car sold. In a bilateral contract, each party must fulfill his own obligation in order to be able to demand the integral execution of the contract by the other party (art. 1065 C.C.).

Per Cannon and Kerwin JJ.—The appellant must be presumed to have known the latent defect of the thing sold and is therefore guilty of fault from the date of the delivery of the car. It is during the time that the appellant has tried to put the car in good order that it has been used by the respondent and the appellant must suffer any loss that may have resulted from such use.

Per Davis J. dissenting.—The special warranty as stipulated in the contract was valid by force of article 1507 C.C. and it excludes the application of article 1526 C.C. which gives the buyer the option of returning the thing and recovering the price of it.—Moreover, upon the facts in this case, the respondent was not entitled to cancellation or rescission of the contract, not only because the defect in the two small rear windows is not in itself sufficient to invalidate the entire contract, but because the parties cannot now be put back into the same position in which they were before the contract was entered into. *Restitutio in integrum* can only be had where the party seeking it is able to put those against whom it is asked in the same situation in which they stood before the contract was entered into. The new motor car had been used by the purchaser (respondent) from June to September inclusive and had travelled over 7,300 miles. It was not in October the same car that had been delivered. But the appellant, in view of the concurrent findings of fact by the trial and appellate courts as to the defect complained of by the respondent, became liable to the respondent for damages, as there was a breach of the warranty to make good the defective parts of the car; and the respondent's right to make any claim for such damages should be reserved.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judg-

ment of the Superior Court, MacKinnon J. and maintaining the respondent's action asking for the annulment of a contract of sale of a motor car and for the reimbursement of its purchase price.

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

Geo. A. Campbell K.C. and *G. C. P. Couture K.C.* for the appellant.

Chs. Laurendeau K.C. and *André Demers* for the respondent.

THE CHIEF JUSTICE.—The facts, in so far as they are pertinent to the issues before the Quebec courts, are hardly, if at all, in dispute. The respondent purchased an automobile from the appellant which was delivered on the 30th of May, 1934. The car was found to have a serious defect. In the early part of June the respondent noticed while driving in the rain that water was penetrating through the rear window. At first he thought that the leak was due to the fact that he had failed to close the window properly but shortly afterwards he found this was not the case and that the invasion of rain water was such as to make it impossible to use the rear seat.

About the 18th of June, he advised the appellant who expressed his surprise and assured him the car would be put into good order immediately. Accordingly, the respondent handed the car over to the appellant and work of a temporary nature was done to stop the leak. This work consisted of applying what the appellant calls a sealing compound and the car was then returned to the respondent.

On the 25th of June the respondent addressed this letter to the appellant:

Veuillez prendre avis que le char ci-dessus que j'ai retourné à votre établissement la semaine dernière à cause du fait que la pluie s'introduisait à l'intérieur par les vitres arrière des côtés n'a pas été efficacement réparé.

Je vous donne donc avis de voir à mettre ce char en parfait ordre. Si je ne puis obtenir satisfaction, je devrai retourner ce char à votre maison et obtenir remboursement.

Veuillez également être avisé que le siège arrière et les côtés ont été mouillés par la pluie qui s'est infiltrée par les vitres ci-haut mentionnées et que je vous tiens responsable de la rouille aux ressorts et autres inconvénients qui peuvent en résulter.

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On the 26th of June the appellant replied:

En réponse à votre lettre du 25 courant, en rapport des défectuosités sur votre char, nous avons communiqué avec Just Motors qui nous a répondu que l'ouvrage a été fait temporairement en attendant d'avoir le matériel nécessaire pour faire l'ouvrage tel qu'il doit être fait. Nous avons pris appointement pour que votre char soit réparé jeudi le 28 courant. Nous vous demandons de bien vouloir le conduire à Just Motors no. 3421 Park Avenue aussi à bonne heure que possible.

Nous sommes convaincus à l'avance qu'ils feront ces réparations à votre entière satisfaction.

On the 28th of June the sealing compound was again applied and on the 11th of July the respondent addressed this letter to the appellant:

Suivant vos instructions écrites du 26 juin courant, j'ai conduit le char ci-dessus à la Cie Just Motors le 28 et il ne m'a été remis que dimanche le 1er juillet.

Quoique votre lettre mentionnait qu'en rapport avec les défectuosités énoncées dans ma communication du 25 juin, que l'ouvrage de réparation fait temporairement auparavant, serait complété à mon entière satisfaction cette fois; je dois vous dire que tel n'est pas le cas et que la réparation faite aux fenêtres des arrière côtés est absolument inacceptable.

Quant au siège d'en arrière, les ressorts sont rouillés par l'eau qui s'est introduite par les fenêtres mentionnées plus haut et je réclame que ce siège soit remplacé immédiatement.

Il est probable que les ressorts du dos et des côtés de ce siège sont également rouillés, et je demande aussi satisfaction pour ces items.

Je vous donne avis de mettre ce char en parfait ordre dans le plus court délai possible, sans quoi je devrai référer cette affaire à mes aviseurs légaux.

On the 8th of August, as the car was still leaking, the respondent again delivered it to the appellant and the two rear windows and the cushions in the rear seat were replaced. On the 13th of August further repairs were made. These having proved inefficacious, the respondent, on the 29th of August, again wrote to the appellant, by his solicitors, in these words:

Nous sommes autorisés par notre client M. Théodoro Pizzagalli, qui a acheté de vous, le 1er mars 1933, un automobile Imperial Air Flow Chrysler, huit cylindres, pour lequel il a payé $2,595, d'avoir à vous aviser qu'il n'a pas du tout satisfaction de cet automobile parce qu'à chaque orage l'eau pénètre et aussi parce que le système de freins ne fonctionne pas bien.

Comme vous le savez, cet automobile vous a été remis à deux ou trois reprises afin de réparer ces défectuosités et, malgré cela, aucun bon résultat n'a été obtenu. Pour ces raisons nous sommes autorisés à vous demander immédiatement le remboursement de la dite somme de $2,595 ou la remise à notre client d'un nouvel automobile en bon état.

Prenez avis que si cette somme n'est pas remboursée à notre client ou si un nouvel automobile en parfait ordre ne lui est pas remis d'ici à quatre jours, des procédures judiciaires seront prises contre vous, sans aucun autre avis.

In the middle of September, one Drennan, inspector for the Chrysler Corporation of Canada, saw the car and requested the respondent to leave it once more with the appellant for repair. At first, the respondent refused, but some days later he did as requested and again about the 19th or 20th of September, two new sets of rear windows were installed. Still the leakage continued and still again one of the windows was replaced. The respondent himself says that, on the occasion of the first rain after this, the leakage proved to be more copious than before.

Again, on the 2nd of October there were further repairs, which consisted in putting a string around the pivot and applying once more the sealing compound. On that day, the car having been returned to him, the respondent on discovering after examination the nature of the repairs, refused to accept it; and finally, on the 4th of October, the respondent wrote to the appellant requesting repayment of the purchase price, and on the 10th of October went to the appellant's place of business, tendered the car and again requested payment. On the 15th of October the action was instituted.

The learned trial judge finds that the defect of which the respondent complained was a latent defect (within the meaning of Art. 1522 C.C. *et seq.*) and rendered the car unfit for the use for which, as the appellant knew, it was intended; and in this finding the Court of King's Bench concurs. The contract between the appellant and the respondent contains this clause:

Il est convenu que l'automobile sus-décrite est achetée par moi comme sujette aux prévisions de la garantie du fabricant qui est imprimée au verso de ce contrat et qui fait partie de cette commande, et que c'est la seule garantie explicite ou implicite en rapport avec la dite automobile.

The manufacturer's guarantee to which reference is here made, in so far as material, is in these words:

Ceci est à l'effet de certifier que * * *
garantissons chacune de nos machines de plaisir ou de commerce contre tout défaut de matériel ou de main-d'œuvre, apparaissant sous les conditions d'un usage normal dans lesdites machines.

Notre responsabilité en vertu de la présente garantie se bornant à remplacer de chaque machine à notre manufacture, toute pièce qui, nous étant envoyée franc de port, dans la période de 90 jours après livraison au premier acquéreur, aura, après examen par nous, été jugée défectueuse. Cette garantie devant tenir lieu de toute autre garantie expresse ou tacite, de toute autre obligation et responsabilité, et nous n'assumons et n'autorisons personne à assumer pour nous aucune responsabilité découlant de la vente de nos machines.

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Nous ne garantissons pas les pneus, jantes, l'allumage, cornes ou autres signaux, le démarreur automatique, le générateur, les batteries ou autres accessoires ordinairement garantis par les manufacturiers respectifs de ces effets.

The learned trial judge took the view that the respondent's remedies for a latent defect are limited to that defined by the express terms of this guarantee and that, consequently, his sole right in the circumstances is to have repairs effected as therein agreed. The Court of King's Bench has rejected this view and held that he is entitled to annul the contract on the grounds, *inter alia,* stated in the following *considérant:*

Considérant que de fait le demandeur-appelant est fondé à prétendre que le défendeur-intimé n'a pas remédié aux défectuosités de l'automobile achetée, puisqu'après des tentatives répétées, ce dernier ne lui offrait encore comme réparation que l'emploi qu'il avait déjà fait d'un mastic ou "sealing compound" lequel, au début, avait été considéré réparation purement provisoire par le défendeur-intimé lui-même, et qui d'ailleurs n'était ni satisfaisant ni acceptable, ces prétendues réparations comportant, en outre et sous ce mastic, une petite corde enroulée au pivot des fenêtres et qui ne devait tenir là que six, huit ou tout au plus douze mois, d'après un témoin du défendeur-intimé.

By article 1507 C.C.:

Legal warranty is implied by law in the contract of sale, without stipulation. Nevertheless the parties may, by special agreement, add to the obligations of legal warranty, or diminish its effects, or exclude it altogether.

The special warranty with which we are concerned on this appeal belongs to a class of stipulation commonly found in agreements between sellers and purchasers of automobiles. The validity of such stipulations has been considered by the tribunals in France and, speaking generally, the conclusion has there been reached that they are valid in virtue of the article of the Code Napoléon which corresponds to article 1507 C.C.; subject to this reservation, that they do not operate to exonerate the seller or the constructor from the consequences of his "dol" or his "faute lourde" (Gaz. Trib. 1929, pp. 219, 220; Lalou, La Responsabilité, no. 209).

Generally speaking, where the "vice" of construction is to be attributed to "faute professionnelle," there is "faute lourde" within the meaning of this rule. It is material to observe the terms of article 1527 C.C. They are as follows:

If the seller knew the defect of the thing, he is obliged not only to restore the price of it, but to pay all damages suffered by the buyer. He

is obliged in like manner in all cases, in which he is legally presumed to know the defects.

The Civil Code of Quebec contains no provision defining the conditions under which the presumption referred to in the second sentence is constituted. The subject is discussed in 7 Mignault, at pp. 111, 112, 113. It is now settled that the seller is responsible in respect of all damages sustained by the purchaser by reason of latent defect where the seller is either a manufacturer or a person who deals in, as merchant, articles of the same kind as that which was the subject of the sale. Unless he can establish that the defect was such that it could not have been discovered by the most competent and diligent person in his position, his ignorance is no excuse, because it is conclusively presumed (in the absence of such proof) to be the result of negligence or of incompetence in the calling which he publicly practises and in respect of which he thereby professes himself to be competent. The principle is *spondet peritiam artis.*

The general principle is stated by Pothier and has been often applied by the French tribunals. For example, Sirey 1925, 1, 198. It should be observed, however, that the recourse of the purchaser in respect of damages under article 1527 C.C. is not subject to the restrictions which govern the French tribunals. The Code Napoléon contains no express provision corresponding to that embodied in the second paragraph of article 1527 C.C.

The Quebec judges have unanimously agreed that there was here latent defect within the meaning of the articles of the Code: therefore, it would appear that, applying the principles accepted in France by *la jurisprudence,* this special stipulation would afford no protection to the appellant.

But this conclusion may be based upon another ground. Manifestly this stipulation ought not to be read as contemplating such conduct as that described in the *considérant* quoted above. In other words, the appellant ought not to be permitted, under cover of the stipulation, to repudiate all responsibility in warranty, even the obligation to perform the stipulation itself: and I agree with the judges of the Court of King's Bench that by reason of this repudiation the respondent is entitled, by force of article 1065 C.C., to be relieved of his agreement to sub-

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stitute the obligations under this stipulation for the legal warranty which, in the absence of such an agreement, would bind the appellant. It follows that the respondent is entitled to invoke the provisions of articles 1522-1529 C.C. in which the reciprocal rights of seller and purchaser are stated in respect of warranty against latent defects.

In the courts below, the appellant contended that the condition of the automobile did not constitute a latent defect within the meaning of these articles, a point upon which sufficient has been said. He also contended that the action was not brought with reasonable diligence as required by article 1530 C.C. As to that, here again I agree with the unanimous opinion of the Quebec judges that, in the circumstances outlined above and summed up in the *considérant* quoted, the appelant had no ground for complaint.

There remains a question raised for the first time in this court. The respondent, it is argued, having used the automobile for several months during which it travelled some thousands of miles, was, when he commenced the proceedings, incapable of fulfilling the essential condition of the redhibitory action (viz., that he should be in a position to return the thing purchased), because of the deterioration in the vehicle consequent upon its use by reason of which its commercial character had been fundamentally altered.

There is, I think, no authority for the proposition that it is any answer to the redhibitory action under these articles to say that the thing sold has been used by the purchaser in the normal manner in which it was intended to be used and that, in consequence of such usage, it has suffered such deterioration as would normally be the result thereof. The better opinion appears to be that "la rédhibition" is not "une résolution rétroactive" (10 Planiol & Ripert, pp. 139 and 141).

La rédhibition n'anéantit pas la vente de plein droit; elle a seulement pour effet d'imposer certaines obligations au vendeur et à l'acheteur; elle doit être sans effet à l'égard des tiers (10 Planiol & Ripert, p. 138).

The essential obligation of the purchaser is the restoration of the thing with its legal status unimpaired. He must consequently procure the extinguishment of any *droits réels* to which he may have consented since the purchase; and if he has parted with the custody of it by hire or lease, he must procure the release of such rights of detention.

If the thing has perished as the result of the latent defect, the obligation becomes inoperative, the right to recover the price and damages subsists; if it perishes from some other cause, *cas fortuit* or the fault of the purchaser himself, he is entitled (article 1526 C.C.) to recover the price and damages subject to a deduction determined by the value of the thing *at the date of the loss.*

The purchaser is obliged to account for the fruits but, generally speaking, not for the deterioration of the thing between the sale and resiliation. The old French law is thus stated by Domat (1 Domat (Remy), liv. 1, tit. 2, sec. 11, no. 9):

> Tous les changements qui arrivent à la chose vendue après la vente, et avant la rédhibition, soit que la chose périsse ou se diminue, sans la faute de l'acheteur et des personnes dont il doit répondre, regardent le vendeur qui doit la reprendre, et aussi il profite des changements qui la rendent meilleure;

and the present law by Guillouard:

> De son côté l'acheteur doit restituer au vendeur la chose, ou ce qui en reste, en supposant qu'elle ait été dégradée ou amoindrie dans l'intervalle de la vente à la résiliation. (1 Guillouard, no. 461).

Different considerations apply where the deterioration arises from the fault of the vendor. Thus, Troplong (Droit Civil Expliqué, De la Vente, 2, page 37) says:

> L'acheteur est tenu de toutes les détériorations survenues par son fait depuis la vente (Ulp., 1.23, Dig. De cedit, edict., et 25, même titre), et il doit offrir au vendeur de lui faire raison de la somme jusqu'à concurrence de laquelle la chose se trouve dépréciée par son dol ou sa faute (L. 25, /5, idem, Pothier, Vente, no. 222.)

And Duvergier (Toullier, 1, Tit. VI. De la Vente, p. 511):

> L'acheteur est obligé de tenir compte des détériorations qui sont survenues par sa faute et de rendre tous les accessoires qui lui ont été livrés avec la chose, ou dont elle s'est augmentée. (Voy. Pothier, nos. 220 et 222.)

Pothier (Vol. 3, Ed. Bugnet, Vente, pp. 90, 91) says:

> * * * lorsque par sa faute il a détérioré la chose, il n'est pas pour cela exclu de l'action rédhibitoire; mais il est seulement tenu de faire raison au vendeur à qui il la rend, de ce dont elle se trouve dépréciée par sa faute. L. 24, ff. eod. tit.
>
> Ces décisions sont toutes conformes à l'équité; car il suffit que le vendeur soit indemnisé de la faute que l'acheteur a commise par rapport à la chose vendue: il ne doit pas en profiter et s'en enrichir, comme cela arriverait s'il était par là libéré de l'action rédhibitoire dont il est tenu.

The law is summed up in Fuzier-Herman (Répertoire du droit français, vol. 36, p. 897) thus:

> 1728. L'acheteur doit, en outre, restituer tous les accessoires qui lui ont été livrés avec la chose, ou dont elle s'est augmentée, ainsi que tenir compte des détériorations qui sont survenues par sa faute. Pothier n. 220 et 222; Duvergier, t. 1, no. 410; Gouillard, t. 1, no. 460 et 461; Baudry-Lacantinerie et L. Saignat, n. 435.

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And in Dalloz (Répertoire pratique, Vol. XII, p. 796):

166. L'acheteur, de son côté, doit rendre au vendeur la chose vendue ou, au moins, ce qui en reste, en supposant que cette chose ait été détériorée ou amoindrie dans l'intervalle de la vente à la résiliation.

167. L'acheteur doit rendre également, avec la chose, son augment, par exemple, le port de l'animal acheté. Toutefois, cela n'est vrai que des accroissements naturels, qui auraient pu se produire chez le vendeur comme chez l'acheteur (Troplong, t. 2, no. 571; Duvergier, t. 1, no. 410; Guillard, t. 1. no. 461); Baudry-Lacantinerie et Saignat, no. 435).

168. L'acheteur doit aussi, lorsqu'il reçoit les intérêts de son prix, rendre les fruits perçus, les loyers que la chose a produits. Si la chose n'est pas productive de fruits, mais que l'acheteur s'en soit servi suivant ses besoins, il doit un loyer, qui variera suivant les circonstances. S'il s'agit, par exemple, d'une machine s'usant promptement, le vendeur aura droit à une indemnité proportionnée au temps pendant lequel l'acheteur aura profité de cette machine (Levé, no. 344).

In the courts of Quebec, deterioration was not relied upon as an answer to the action; nor was any claim made for compensation in respect of deterioration or in respect of the use of the automobile. It is true that in the pleadings the fact that the respondent had used the automobile to the extent of seven thousand miles of travel is stated; but, reading the pleading as a whole, it seems that this is set up as constituting an acceptance of the car by the respondent; and to that I shall return. Any such defence or claim ought to have been set up at the trial where the facts could have been investigated in their bearing upon it; and it is indisputable that no such claim or defence was advanced before the learned trial Judge or in the Court of King's Bench.

Article 1530 C.C. requires that the redhibitory action must be brought with reasonable diligence and the practice of the courts in the application of this rule throws some light upon the question of the legal effect of use by the purchaser. Laurent (t. 24, no. 302) cites a case of a redhibitory action in 1865 concerning a house in Paris sold in 1839. The house had been let by the purchaser and occupied by the lessees during this period when, in course of executing repairs, the purchaser discovered that the beams of the substructure had been in a state of decay. The sale was set aside and the tenants recovered damages from the vendor. (See also Dalloz, 1853, 1, 322).

After the discovery of the defect, no doubt, different considerations apply. In the first place, as already mentioned, the action must, by the terms of article 1530 C.C., be brought with reasonable diligence and, in practice, the

point of departure is recognized by the tribunals as the date of the discovery of the defect by the purchaser; and reasonable diligence is a question of fact (Planiol & Ripert, no. 136, p. 143; Laurent, loc. cit.)

Then, after the discovery of the defect, the conduct of the purchaser may be such as to evidence conclusively the acceptance of the thing purchased in such a manner as to amount to a renunciation of his redhibitory right. This is a question of fact. It would appear that this defence, although open on the pleadings, was not raised in this form in the court below; in fact, it is quite clear from the judgment of the learned trial judge that it was not raised. The appellant's contention was that the action was not brought with due diligence. I agree with the unanimous conclusion of the judges in Quebec that, in view of the special circumstances as explained above, and particularly in the *considérant* quoted from the judgment of the Court of King's Bench, that this last mentioned defence was not well founded. It is also evident that the learned judges did not consider that the use of the car by the respondent in these circumstances was sufficient evidence of renunciation; and, indeed, the respondent, as we have seen, made it clear to the appellant that if the defects in the car were not remedied pursuant to the contract, he would return it and demand repayment of the price. On the facts it is not open, I think, to the appellant to resist the action on the ground that the respondent renounced his rights. The conduct of the appellant, in my opinion, is sufficient in respect of this defence to establish against him a *fin de non-recevoir*.

The appeal should be dismissed with costs.

The judgment of Cannon and Kerwin JJ. was delivered by

CANNON J.—Le 2 mars 1934, le demandeur-intimé s'engagea par écrit à acheter du défendeur-appelant une voiture automobile "Chrysler Imperial air flow" pour laquelle, sur livraison, il a payé $1,400.00 en argent et $1,160.00, valeur convenue de deux automobiles usagées, formant un total de $2,560.00. S'étant aperçu que l'eau s'introduisait à l'intérieur de sa machine par les deux fenêtres d'arrière des côtés, l'intimé avisa de suite l'appelant de cette defectuosité

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dans la construction de l'automobile; et ce dernier s'engagea à la faire disparaître. Depuis juin jusqu'à octobre 1934, la machine, à plusieurs reprises, fut remise à l'appelant pour trouver remède à ce défaut, mais sans succès. Le 10 octobre 1934, l'intimé remit à l'appelant l'automobile et réclama le remboursement du prix payé, parce que l'automobile était mal construit et que l'appelant n'a jamais pu remplacer ou réparer convenablement les défectuosités.

L'appelant, sur la question de fait, était devant nous dans une situation difficile, car le juge de première instance, après avoir admis les allégués de la demande, a renvoyé l'action sur une seule question de droit que nous discuterons plus loin; et la Cour du Banc du Roi, à l'unanimité, a dit que cette automobile était défectueuse, impropre à l'usage auquel elle était destinée et n'a jamais été remise en bon ordre par l'appelant. Les procureurs de ce dernier devant nous, fort habilement, ont fait valoir les raisons qui, d'après eux, militent contre ces conclusions du jugement *a quo;* mais un examen attentif du dossier ne nous fait pas découvrir d'erreur sur ce point. Il suffit des dires des témoins de la défense Drennan et Godin pour s'en convaincre. Drennan, vers le 19 ou le 20 septembre, prétend avoir remplacé les deux châssis et que, en les éprouvant avec un jet d'eau, il ne se manifesta aucun signe de coulage. Il admet, de plus, que le " compound " ou composé dont le demandeur se plaignait antérieurrement est employé " to make up any deficiency * * * that might conduce leakage." Il appert clairement à son témoignage que l'on ne se sert du " compound " qu'au cas seulement où la fermeture n'est pas étanche et que l'on ne se sert jamais de ficelle pour assurer l'étanchéité de la fenêtre. Bien que Drennan ait prétendu que les fenêtres ne faisaient pas eau après la réparation de septembre, nous voyons par le témoignage de Paul Godin que, le 1er octobre, le demandeur se plaignit de nouveau que ces fenêtres étaient défectueuses; et il admet que quelques gouttes d'eau pénétraient à l'intérieur. Il remplaça la fenêtre et l'éprouva de nouveau à forte pression d'eau en présence du défendeur. Il vit alors quelques gouttes d'eau s'introduire à l'intérieur près du pivot et il crut nécessaire de se servir du " sealing compound." Or, il ajouta de plus une ficelle enroulée autour du pivot, qu'il dissimula le mieux qu'il put en l'imbibant ou la recouvrant

de ce composé ressemblant au mastic; ce qui, d'après lui, devait durer six ou huit mois, ou peut-être un an. C'est alors que l'intimé, voyant que l'on avait encore utilisé cet expédient qu'on lui avait d'abord décrit comme une réparation temporaire, refusa de continuer à se servir du char dans ces conditions et la remit à son vendeur et réclama à ce dernier, par une action résolutoire, l'annulation de la vente et le remboursement du prix avec intérêt depuis la date de son action.

Le contrat de vente contenait la stipulation suivante:

Il est convenu que l'automobile sus-décrite est achetée par moi comme sujette aux prévisions de la garantie du fabricant qui est imprimée au verso de ce contrat et qui fait partie de cette commande, et que c'est *la seule garantie explicite ou implicite* en rapport avec ladite automobile.

Cette garantie du fabricant, pour ce qui nous intéresse, se lit comme suit:

Ceci est à l'effet de certifier que * * *
garantissons chacune de nos machines de plaisir ou de commerce contre tout défaut de matériel ou de main-d'œuvre, apparaissant sous les conditions d'un usage normal dans les dites machines.

Notre responsabilité en vertu de la présente garantie se bornant à remplacer de chaque machine à notre manufacture, toute pièce qui, nous étant envoyée franc de port, dans la période de 90 jours après livraison au premier acquéreur, aura, après examen par nous été jugée défectueuse. Cette garantie devant tenir lieu de toute autre garantie expresse ou tacite, de toute autre obligation et responsabilité, et nous n'assumons et n'autorisons personne à assumer pour nous aucune responsabilité découlant de la vente de nos machines.

La Cour Supérieure a trouvé que le demandeur avait raison de se plaindre d'un défaut qui ne pouvait être découvert que par l'usage du char, qu'il a agi avec toute la diligence voulue et que, pendant les changements ou réparations, il se servit du char à la demande et avec le consentement du vendeur; que la pluie pénétrait dans le char pendant toute cette période et que l'intimé, ayant acheté un char dispendieux pour les besoins de ses affaires pour transporter ses clients à divers endroits pour leur démontrer la qualité de l'ouvrage qu'il faisait comme marbrier, avait le droit d'exiger une machine parfaitement étanche. Mais le premier juge arrive à la conclusion que la seule obligation du vendeur était de remplacer les parties défectueuses; et qu'il était possible de fabriquer des fenêtres de ce genre parfaitement étanches et qu'en conséquence le seul recours du demandeur-intimé, vu les termes particuliers de la seule et unique garantie, était de ramener le char, en octobre, pour obtenir de nouveaux châssis; la Cour Supérieure refusa

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d'annuler la vente et d'ordonner le remboursement du prix.

La Cour du Banc du Roi unanimement, le 29 décembre 1936, a déclaré non-fondée cette conclusion quant à la garantie, pour les considérants suivants:

Considérant qu'il résulte de la preuve que, bien que mis en demeure à ce sujet, le défendeur-intimé n'a pas dans le délai qui lui était imparti satisfait aux obligations de cette garantie particulière qu'il invoque comme exclusive de toute autre garantie;

Considérant qu'au point de vue de cette garantie particulière, comme à celui de ses obligations de vendeur, le défendeur-intimé a fait défaut d'exécuter le contrat et de fournir à son acheteur la chose vendue, à savoir une automobile propre à l'usage qu'en voulait faire celui-ci, d'après l'entente;

Considérant que dans ces circonstances le demandeur-appelant a droit à la sanction que donne la loi pour le cas d'inexécution, soit à un recours en annulation;

Considérant que de fait le demandeur-appelant est fondé à prétendre que le défendeur-intimé n'a pas remédié aux défectuosités de l'automobile achetée, puisqu'après des tentatives répétées, ce dernier ne lui offrait encore comme réparation que l'emploi qu'il avait déjà fait d'un mastic ou "sealing compound" lequel, au début, avait été considéré réparation purement provisoire par le défendeur-intimé lui-même, et qui d'ailleurs n'était ni satisfaisant ni acceptable, ces prétendues réparations comportant, en outre et sous ce mastic, une petite corde enroulée au pivot des fenêtres et qui ne devait tenir là que six, huit, ou tout au plus douze mois, d'après un témoin du défendeur-intimé;

L'action fut maintenue, le contrat annulé et le défendeur-appelant condamné à payer la somme de $2,595.00, avec intérêt de la date de l'assignation, et les dépens.

L'appelant se plaint que le montant du jugement devrait être $2,560.00, étant le total payé conformément aux termes du contrat. Il a raison sur ce point et $35.00 doivent être déduits du montant accordé en appel.

L'honorable juge Dorion explique clairement pourquoi la Cour du Banc du Roi n'a pas tenu compte de la clause excluant toute garantie expresse ou tacite, à part celle de remplacer les pièces défectueuses:

Les termes de cette clause, en effet, obligent l'acheteur à exercer le recours prévu par le contrat, et nul autre. Mais, dans ce contrat, comme dans tout contrat, les obligations de l'une des parties sont la condition des obligations de l'autre partie. Ici, l'acheteur renonce à l'action rédhibitoire sous la condition tacite que le vendeur remplira une obligation de réparer l'automobile. Ce dernier ne peut pas échapper à toute responsabilité par le fait qu'il n'a pas rempli son obligation.

Le savant juge conclut que l'appelant, en prétendant que le défaut a été corrigé avant l'action, comme il l'a fait devant nous, refuse, en fait, de faire les réparations, ne laissant à l'intimé que le recours de l'action rédhibitoire; le vendeur, en effet, n'a pas rempli la condition à laquelle

était soumise la renonciation de l'acheteur à cette action, i.e., la condition que le vendeur remplirait son obligation de réparer ou remplacer toute pièce défectueuse.

Nous croyons que cette raison dispose du premier grief d'appel, savoir que la Cour du Banc du Roi aurait refusé d'appliquer, suivant ses termes, la garantie du contrat. D'après l'article 1065 du Code civil, dans un contrat bilatéral, chaque partie doit remplir sa propre obligation pour pouvoir exiger de l'autre l'exécution intégrale du contrat. Ceci se trouve en toutes lettres dans l'article 1184 du Code Napoléon:

La condition résolutoire est toujours sous-entendue dans les contrats synallagmatiques, pour le cas où l'une des deux parties ne satisfera pas à son engagement.

L'ancien juge-en-chef de la Cour du Banc du Roi, Sir Henri Taschereau, alors qu'il était juge à la Cour Supérieure, nous dit (*Valiquette* v. *Archambault* (1)) que, bien que cet article du Code Napoléon n'ait pas été reproduit en termes exprès dans notre Code civil,

nos codificateurs ont pourvu au même cas et exprimé le même principe dans l'article 1065 de notre code qui permet, même en l'absence d'une condition résolutoire expresse, de demander la résolution du contrat d'où naît l'obligation qui n'a pas été accomplie (Voir Rapport des Codificateurs, 7 DeLorimier, Bibliothèque du Code civil, pp. 626-627).

Le second grief d'appel est que nonobstant les termes de la garantie, la Cour du Banc du Roi a rendu l'appelant responsable, comme le fabricant qui, d'après l'appelant, serait le seul garant de l'acheteur. Il appert aux termes du contrat que le vendeur a fait sienne cette garantie du fabricant de remplacer les pièces défectueuses.

Comme troisième grief, on dit que le contrat ne stipulait aucun délai pendant lequel le fabricant devait faire les réparations. Ce point a déjà été discuté. Le plaidoyer et certains témoins de l'appelant ont prétendu que les réparations avaient été complétées et qu'il ne pouvait rien faire de plus pour se conformer au contrat. L'on n'a jamais remplacé le châssis par une pièce parfaitement étanche et qui n'aurait pas nécessité l'application du "compound". Il serait exorbitant de dire que l'intimé devait garder le char et, pour un temps indéfini, attendre qu'on réussisse à la rendre convenable.

Autre grief de l'appelant; dans l'espèce, la *restitutio in integrum* est impossible, et d'abord, parce qu'on ordonne

(1) (1895) Q.R. 7 S.C. 51, at. 54.

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le remboursement complet du prix de vente dont partie seulement aurait été payée argent comptant. Il suffit de lire le contrat pour conclure que le prix convenu est un prix en argent payable suivant un mode accepté par les deux parties et donnant aux automobiles usagées la valeur en argent mentionnée au contrat. Mais, ajoute l'appelant, par la résolution du contrat l'intimé s'est servi de cette automobile pendant toute une saison et aura forcé l'appelant à acheter de lui deux chars usagés. Cet usage, croyons-nous, était nécessaire pour constater si le vendeur avait rempli son obligation de réparer; et ce dernier ne s'en est jamais plaint. Nous constatons, par ailleurs, que si, d'un côté, l'acheteur a eu l'usage de l'automobile, de l'autre, le vendeur a eu l'usage du prix en argent depuis la date de la vente jusqu'à la date de l'action. Or, on ne lui réclame pas d'intérêt pour cette période, lui laissant ainsi, en compensation de l'usage de sa machine, le bénéfice qu'il a pu retirer de ces argents.

Ceci est conforme à la doctrine. Voir 3 Pothier, "De la vente", nos 217 et 219:

217. L'acheteur est en droit de demander par l'action rédhibitoire, la résolution et nullité du marché, et qu'en conséquence les choses soient remises au même état que s'il n'était pas intervenu: *Judicium redhibitoriæ actionis utrumque, id est venditorem et emptorem, quodammodo in integrum restituere debere:* L. 23, par. 7, FF. de AEdil. ed. Factâ redhibitione, omnia in integrum restituuntur, perinde as si neque emptio neque venditio interesserit; L. 60, ff. cod. tit.

En conséquence l'acheteur a droit de demander que le vendeur soit condamné à lui rendre le prix qu'il lui a payé, même les intérêts depuis le jour du paiement qu'il en a fait, jusqu'à ce qu'il lui ait été rendu (L. 29, par. 2, ff. eod. tit.), *à moins que le juge ne jugeât à propos de les compenser avec les fruits que l'acheteur doit rendre.*

* * *

219. L'acheteur, pour être reçu à cette action, doit de son côté offrir de rendre la chose, si elle existe, avec les fruits, s'il en a perçu quelques-uns; *à moins qu'il n'en consente la compensation avec les intérêts du prix.* Il doit pareillement offrir de rendre tous les accessoires de la chose qui lui ont été livrés avec la chose.

Voir aussi: 10 Planiol et Ripert, Traité de droit civil, no. 134 *in fine,* p. 142.

L'action consent à la compensation de la jouissance de la voiture avec les intérêts du prix.

L'appelant se plaint aussi d'avoir à recevoir, au lieu de la machine neuve livrée, une machine usagée ayant parcouru sept mille milles, qui désormais doit être évaluée comme de seconde main. Est-il obligé de souffrir cet ap-

pauvrissement? N'est-ce pas permettre à l'intimé de s'enrichir à ses dépens, en forçant l'appelant à reprendre l'automobile avec la détérioration soufferte durant une saison?

C'est, nous l'avons vu, par une clause résolutoire tacite que l'annulation de la vente est accordée dans l'espèce. Cette résolution, d'après l'article 1088 C.C., oblige chacune des parties à rendre ce qu'elle a reçu et remet les choses au même point que si le contrat n'avait pas existé; en observant néanmoins les règles de 1087 C.C. relatives aux choses qui ont péri ou ont été détériorées; "si la chose s'est détériorée sans la faute du débiteur, le créancier doit la recevoir dans l'état où elle se trouve, sans diminution de prix."

Appliquons ce principe à cette cause. Par la résolution du contrat, l'intimé doit rendre la machine dont, par une fiction légale, le vendeur est considéré avoir été toujours propriétaire. L'intimé en est de débiteur envers son vendeur, qui, de son côté, doit remettre le prix. Peut-on dire que la machine a subi détérioration par l'usage? Cela n'est pas prouvé; mais on peut admettre qu'après avoir fait 7,000 milles elle a perdu de sa valeur. Est-ce de la faute de l'intimé? Evidemment non. L'appelant-vendeur, commerçant d'automobiles est présumé avoir connu les défauts de la chose vendue, d'après la jurisprudence. V. 10 Planiol & Ripert, p. 141; Dalloz, 1926-I-9. V. Note de Louis Josserand. Il doit donc être présumé coupable de faute dès la livraison d'une machine défectueuse; il a admis cette défectuosité en reprenant la machine pour réparation à plusieurs reprises et en la remettant en circulation entre les mains de l'intimé pour l'essayer de nouveau. C'est donc en cherchant à corriger les conséquences de cette faute et à faire les réparations suivant la garantie spéciale du vendeur que la machine a été usagée et aurait perdu de sa valeur. L'appelant doit donc souffrir cette perte, si elle existe. Elle compensera jusqu'à un certain point les ennuis et inconvénients causés à l'intimé par cette machine défectueuse pour lesquels il aurait pu réclamer des dommages.

A l'appui de cette solution, je citerai: 4 Massé, Droit commercial, pp. 406 et suiv.:

360. Il y a deux sortes de conditions résolutoires. La condition résolutoire proprement dite qui, comme toute autre condition consiste dans la stipulation expresse ou tacite par laquelle on fait dépendre l'obligation d'un événement futur et incertain qui la résout en se réalisant; et la

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condition résolutoire connue sous le nom de *pacte commissoire,* qui consiste dans la clause expresse ou tacite par laquelle les parties qui forment un contrat synallagmatique conviennent que ce contrat sera résolu, si l'une ou l'autre d'entre elles ne satisfait point à son engagement (C. civ., art. 1184). Ces conditions produisent l'une et l'autre des effets analogues; lorsqu'il y aura des différences, j'aurai soin de les faire remarquer.

361. De ce que la résolution de l'obligation remet les choses au même état que si l'obligation n'avait pas existée, il résulte que la condition resolutoire accomplie a un effet rétroactif, non seulement au jour du contrat, mais encore à l'instant même qui a précédé le contrat, puisque le contrat se trouve effacé. Les parties sont donc réciproquement tenues de restituer ce qu'elles ont reçu, par exemple, en cas de vente, l'une la chose, si elle a été livrée, l'autre le prix, s'il a été payé.

365. Mais doit-il restituer les fruits qu'elle a produits et qu'il a perçus pendant la condition?

La question a été diversement résolue par les auteurs. M. Toullier (T. VI, n. 563) et M. Duvergier (*De la vente,* t. 1, n. 452) se prononcent pour la restitution, comme conséquence de l'effet rétroactif de la condition accomplie. Selon M. Troplong, au contraire, il faut distinguer entre l'hypothèse où la résolution est l'effet du pacte commissoire, c'est-à-dire de la condition résolutoire qui est toujours sous-entendue dans les contrats synallagmatiques pour le cas où l'une des deux parties ne satisferait pas à son engagement (C. civ., 1184), et l'hypothèse où il s'agit d'une condition résolutoire proprement dite (Voy. sup. n. 360). Dans la première hypothèse, il décide que l'acheteur qui, faute de payer le prix de son acquisition, voit résoudre le contrat, doit restituer les fruits, parce que, ne remplissant pas ses obligations, il ne peut être considéré comme possesseur de bonne foi, ni par conséquent faire les fruits siens (C. civ., 549—*De la vente,* t. II, n. 652); dans la seconde, au contraire, il décide que l'acheteur fait les fruits siens par sa bonne foi jointe à son industrie (Ibid., t. 1, n. 60). MM. Delamarre et Lepoitvin font une distinction analogue, mais moins absolue. Ils pensent, avec M. Troplong, que, dans la dernière hypothèse, l'acheteur fait les fruits siens, à moins qu'une circonstance particulière ne le constitue en état de mauvaise foi. Mais dans la première, c'est-à-dire quand la résolution procède du pacte commissoire, ils pensent que l'acheteur ne peut être considéré en état de mauvaise foi, par cela seul qu'il n'a pas payé le prix; que c'est dès lors aux juges à examiner s'il est de bonne foi ou de mauvaise foi pour lui attribuer les fruits dans le premier cas, et le condamner à les restituer dans le second. (*Du contrat de commission,* t. III, n. 644 et suiv.).

J'adopte pleinement cette dernière opinion.

Observons d'abord que l'effet rétroactif de la condition accomplie n'est d'aucune influence sur la restitution des fruits. L'effet rétroactif n'a lieu qu'en ce qui touche l'obligation de restituer la chose avec tous ses accessoires essentiels, mais il ne peut aller jusqu'à effacer des *faits accomplis et jusqu'à faire disparaître le droit que l'acheteur a eu sur la chose dans le temps intermédiaire au contrat et à l'accomplissement de la condition* (M. Toullier, t. VI, n. 548.—Voy. sup. n. 458).

* * *

373. Quant à la simple détérioration, si elle a lieu sans la faute du débiteur ou de l'acheteur, elle est au compte du vendeur, quand la condition vient à se réaliser, parce que cette détérioration n'empêche pas l'obligation de subsister de part et d'autre; que l'acheteur, en restituant la chose dans l'état où elle se trouve, exécute l'obligation autant qu'il est en lui; et que le vendeur doit dès-lors l'exécuter de son côté en restituant

le prix entier qu'il a reçu. C'est là d'ailleurs une conséquence de l'effet rétroactif de la condition accomplie qui, en faisant remonter le droit du vendeur au jour du contrat, *met à sa charge les détériorations intermédiaires* (M. Toullier, t. VI, n. 563; M. Duranton, t. XI, n. 91).

* * *

Par analogie, bien qu'il ne s'agisse pas dans l'espèce d'un cas fortuit, nous pouvons citer la cause de *Hageraats* C. *de Beaumont* (1), où il a été décidé que la détérioration survenue sans le fait de l'acheteur à la chose vendue sous une condition résolutoire est à la charge du vendeur qui ne peut se refuser à reprendre les marchandises endommagées et à en restituer le prix "attendu que le sens clair de cette disposition (1183 C. N. correspondant à notre article 1088 C.C.) est que les parties, après l'accomplissement de la condition résolutoire, sont remises au même état où elles se trouvaient l'une vis-à-vis de l'autre avant la formation du contrat; d'où il suit qu'en matière de vente et d'achat sous condition résolutoire, si la condition s'accomplit, la détérioration de la chose vendue et livrée sans la faute de l'acheteur, tombe à la charge du vendeur, qui, par la fiction de la loi, est censé n'avoir jamais aliéné la chose et en être toujours demeuré le propriétaire."

Voir aussi C. Dufnoire, *Théorie de la condition,* p. 455.

Je me réfère aussi à 3 Larombière, *Des Obligations,* p. 60, no. 61:

61. A plus forte raison doit-il réparer le dommage causé directement par son fait ou par sa faute. Il doit même une indemnité pour la diminution de valeur produite par l'usage qu'il a fait de la chose, quand bien même il n'aurait fait que s'en servir suivant sa destination habituelle. Telle serait l'hypothèse d'une vente sous condition résolutoire d'une voiture, d'une machine, d'un objet mobilier quelconque qui s'use et se détériore par le service. Si l'acquéreur, la résolution arrivée, était quitte en rendant la chose dans l'état où elle se trouve, il en retirerait un bénéfice net, puisque sa possession lui aurait procuré, sans charges qui viennent en compensation, les avantages du service et les profits de l'usage.

Mais nous devons poser plusieurs exceptions. Aucune indemnité ne sera due pour la détérioration *de la chose par son usage naturel, si cet usage a eu lieu en vertu d'une convention d'essai, ou de toute autre clause spéciale.*

Il n'y a pas de doute qu'il y a eu entre les parties en cette affaire une convention d'essai plusieurs fois renouvelée, jusqu'au refus de l'intimé de continuer ces essais indéfiniment.

L'appelant a aussi demandé l'application de l'article 1530 du Code civil qui dit que

(1) (1879) S. 81-4-23

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L'action rédhibitoire, résultant de l'obligation de garantie à raison de vices cachés, doit être intentée avec diligence raisonnable, suivant la nature du vice et suivant l'usage du lieu où la vente s'est faite.

Sur ce point, nous croyons devoir nous référer à la cause de *Bernier v. Grenier Motor Co. Ltd.* (1) confirmant le jugement de la Cour du Banc du Roi (2), où il a été décidé que

L'art. 1530 C.C., applicable au cas de demande en nullité de vente pour vices rédhibitoires, ne l'est pas au cas où il s'agit de garantie conventionnelle et formelle,—et l'action en résolution peut alors être intentée après les délais fixés par cet article surtout lorsque le demandeur allègue et prouve erreur, dol, fraude et fausses représentations.

On pourrait souligner le passage suivant des notes de l'honorable juge Greenshields, à la page 495:

Appellant désired to keep his car if it could be made perfect or as perfect as the standard of the Pierce-Arrow was considered to be, and as a matter of fact had been. For that purpose, during a period of nearly thirteen months, he returned it to respondent and repairs and changes were made. Thirty-nine parts were supplied by the manufacturer for the purpose of remedying the evils which existed. Finally, appellant, wearied of his attempt, raised the present action, tendering back the car.

I am of opinion and hold:

First: That the appellant's action was not barred or stopped by the delay, inasmuch as the delay was caused by the desire on the part of appellant to have the defects remedied and the willingness on the part of the respondent to remedy the same, if remedy was possible;

Secondly: That the respondent never delivered to appellant and never put appellant in possession of the thing which the contract of sale or exchange called for;

Je crois que ces remarques s'appliquent parfaitement à notre espèce.

Dans *The Studebaker Corporation of Canada* v. *Glackmeyer* (3), le juge Greenshields dit de nouveau:

As was held by this Court in the case of *Grenier & Bernier* (2), subsequently confirmed by the Supreme Court, where a vendor and a vendee mutually agree in an effort to repair defects, and efforts are made extending over a long time by the vendor, the vendee's rights are not thereby prejudiced, and if the efforts so made are unsuccessful, the vendee's action for relief is not thereby barred.

Quant à l'offre contenue au plaidoyer d'un autre char, nous ne croyons pas que, après l'institution de l'action, cet acte unilatéral du vendeur pût changer la position juridique des parties telle qu'elle existait à cette date. L'intimé, par son action, avait exercé le choix que lui donne l'article 1035 C.C.; il n'a pas demandé l'exécution de l'obligation

(1) [1928] S.C.R. 86. (2) (1926) Q.R. 41 K.B. 488.
(3) (1927) Q.R. 44 K.B. 216, at 227.

aux frais du débiteur, mais bien la résolution du contrat, d'où naissait l'obligation de livrer une machine convenable.

Pour toutes ces raisons, nous concluons au renvoi de l'appel avec dépens, mais le montant du jugement devrait être réduit à $2,560.00 avec intérêt depuis la date de l'institution de l'action.

Davis J. (dissenting): In this appeal we have to deal with what has become an ordinary form of commercial contract in connection with the sale of motor cars. The difficulty in the case arises in the application to the terms of the contract of the provisions of the Civil Code, the contract having been made and carried out in the province of Quebec. The decision will be of importance in that province as determining the rights and liabilities of vendors and purchasers in Quebec when a latent defect makes its appearance in a car sold under this common form of contract. I regret that I find myself unable to agree with the opinion of the other members of the Court.

The agreement for the purchase of the new motor car was in writing and expressly stipulated that

> It is agreed that the motor vehicle above described is purchased by me subject to the clause of the manufacturer's warranty endorsed on this contract and which forms part of the present order and that this is the sole warranty, expressed or implied, in connection with the said motor vehicle.

The manufacturer's warranty endorsed on the agreement and which was made a part of the contract, reads as follows:

> The manufacturer warrants each new motor vehicle manufactured by it to be free from defects in material and workmanship under normal use and service, its obligation under the warranty being limited to making good * * * any part or parts thereof * * * which have been * * * defective; this warranty being expressly in lieu of all other warranties expressed or implied and of all other obligations or liabilities on its part * * *

Now the Civil Code sets up certain legal warranties implied by law in contracts of sale, without stipulation. The general provisions of warranty are contained in articles 1506 to 1531 inclusive.

The purchaser (respondent) relies upon article 1522, which is as follows:

> 1522. The seller is obliged by law to warrant the buyer against such latent defects in the thing sold, and its accessories, as render it unfit for the use for which it was intended, or so diminish its usefulness that the buyer would not have bought it, or would not have given so large a price, if he had known them.

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and on article 1526, which provides that

1526. The buyer has the option of returning the thing and recovering the price of it, or of keeping the thing and recovering a part of the price according to an estimation of its value.

But article 1506 provides that

1506. The warranty to which the seller is obliged in favour of the buyer is either legal or conventional.

And by article 1507 it is provided that while "legal warranty is implied by law in the contract of sale, without stipulation"

Nevertheless the parties may, by special agreement, add to the obligations of legal warranty, or diminish its effects, or exclude it altogether.

In the contract that is before us in this case the parties stipulated, by the special agreement, that the vendor (appellant) should warrant the new car to be "free from defects in material and workmanship". That warranty, stipulated by the special agreement between the parties, added to the obligations of legal warranty in that it extended to defects of all kinds in the thing sold whether those defects were latent or apparent and was not limited (as the legal warranty of article 1522 C.C. is limited) to "such latent defects" as render the thing

unfit for the use for which it was intended, or so diminish its usefulness that the buyer would not have bought it, or would not have given so large a price, if he had known them.

But, on the other hand, the contractual warranty diminished the effects of the obligations of legal warranty in that, by the special agreement between the parties, the obligation of the vendor under the warranty was restricted to making good any defective part or parts of the car. This warranty was expressly stated, by the terms of the agreement between the parties, "to be in lieu of all other warranties, expressed or implied, and of all other obligations or liabilities" on the part of the vendor.

The warranty of the contract was valid by force of said article 1507 C.C. and in my view it excludes the application of article 1526 C.C. (which gives the buyer the option of returning the thing and recovering the price of it) which is a remedy for a breach of the legal warranty against latent defects provided by article 1522.

The defect complained of by the purchaser (respondent), and the defect is really not in dispute, was that the small side windows in the back of the car permitted rain, to some extent, to leak through into the car. The rear window

sections were something new at the time in motor car manufacture, the frames being made of a rubber composition and moving on a pivot through a mechanism built into the body of the car, for the purpose of better interior ventilation. The vendor (appellant) attempted on several occasions to remedy the condition by caulking or sealing these windows with a rubber compound. The purchaser (respondent) seems to have become indifferent whether these repairs kept the water out or not; he disliked the use of the rubber compound and rejected the car. I cannot bring myself on the evidence to regard the defect as anything of a serious nature but both courts below have found that the windows were in fact defective and remained defective and with that finding we cannot interfere. Counsel for the appellant argued that in any event the appellant's only responsibility under the terms of the contract was to make good the defect. But that position cannot be maintained when after three attempts over a period of some months to remedy the defect, the appellant has been found to have failed to do so.

That the appellant became liable to the respondent for damages cannot be disputed on the concurrent findings of fact. There was a breach of the warranty to make good the defective parts and for the breach of that obligation article 1065 C.C. makes the appellant liable in damages. But the respondent did not sue, even alternatively, for damages and no evidence as to damages was given. The respondent maintains that he was entitled as a matter of law to force the appellant to take back the new car, to keep the two old cars that he had turned in, and to pay him with interest not only the amount of the cash payment that he had made ($1,400) but also the amount of the credit allowance he had been given on the two old cars ($1,160). No evidence was given at the trial as to what had happened in the meantime to the two old cars. The courts below have given judgment against the appellant entitling the respondent to recover the amount of the entire purchase money in cash, with interest and costs.

If article 1526 C.C. is not available to the respondent for the reason above given, then the respondent is driven to article 1065 C.C., which not only gives the right of damages in case of the breach of any obligation but provides further that.

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1065. * * * The creditor may, in cases which admit of it, demand also a specific performance of the obligation, and that he be authorized to execute it at the debtor's expense, or that the contract from which the obligation arises be set aside; subject to the special provisions contained in this code and without prejudice, in either case, to his claim for damages.

In my view, the facts of this case do not admit of cancellation or rescission of the contract. Not only because the defect in the two small rear windows is not in itself sufficient to invalidate the entire contract, but because the parties cannot now be put back into the same position in which they were before the contract was entered into. *Restitutio in integrum* can only be had where the party seeking it is able to put those against whom it is asked in the same situation in which they stood before the contract was entered into. The new motor car had been used by the purchaser (respondent) during June, July, August and September and had travelled over 7,300 miles. It was not in October the same car that had been delivered.

This is not a case of fraud or misrepresentation on the part of the vendor of the thing sold where different considerations might prevail. *Grenier Motor Co.* v. *Bernier,* (1) was an action based upon misrepresentation. Mr. Justice Allard in that case said in the Court of King's Bench, appeal side, province of Quebec, (2):

Si elle (la défenderesse) ne lui avait pas fait les représentations qu'elle lui a faites, ou caché un fait très important, le demandeur n'aurait pas acheté. C'est ce qu'il déclare sous serment.

The appeal should in my opinion be allowed and the action dismissed with costs throughout, without prejudice to any claim the respondent may be advised to make for damages.

Hudson J.:—I concur in the result.

Appeal dismissed with costs.

Solicitors for the appellant: *Campbell, McMaster, Couture, Kerry and Bruneau.*

Solicitors for the respondent: *Gouin and Demers.*

(1) [1928] S.C.R. 86.
(2) [1926] Q.R. 41 K.B. 488, at 494.

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AND *Feb. 15, 16. *Mar. 18.

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Murder—Death from abortion—Evidence—Direction to jury—Production of articles found in home of accused—Admissibility—Pertinency—Prejudice against accused—New trial.

Upon the appellant's trial on an indictment for murder, in order to prove death from abortion, it was essential for the Crown to establish that the uterus itself of the deceased was packed with cotton batting (some of which was found in the home of the accused) and that this was done by the accused; and it was also of vital importance that, upon that point, the direction to the jury should be so clear and unequivocal as to leave no room for misapprehension. It was also irregular to permit the production before the jury of articles found in the home of the accused by the police acting under a search warrant, when these articles had no real pertinency to any issue between the Crown and the accused, and two of them specially (medical text books) were by their nature calculated to create prejudice against the accused in the eyes of the jury. A new trial was ordered.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of Fisher J. with a jury which convicted the accused (appellant) of manslaughter.

J. W. de B. Farris K.C. for the appellant.

J. A. Russell K.C. for the respondent.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—The appellant was found guilty of manslaughter after trial at Vancouver on an indictment for murder.

We agree with the Chief Justice of British Columbia that in two respects there was a mistrial. As to the first, it was not seriously disputed that it was essential for the Crown to establish that the uterus itself of the deceased Helen McDowell was packed with cotton batting and that this was done by the accused. It was, therefore, of vital importance that, upon this point, the direction to the jury

(1) [1937] 4 D.L.R. 425; 69 Can. C.C. 61.

*PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket, Davis, Kerwin and Hudson JJ.

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should be so clear and unequivocal as to leave no room for misapprehension. We think, with great respect, that the references to this issue by the learned trial judge, and the manner in which he presented the evidence to them, was likely to mislead.

We agree, moreover, with the learned Chief Justice that the production before the jury of the articles found in the residence of the accused by the police acting under a search warrant (with the exception of the "knitting needle and the bicycle spoke") ought not to have been permitted. These articles had no real pertinency to any issue between the Crown and the accused and two of them, the books, were by their nature calculated to create prejudice against her in the eyes of the jury.

On these grounds the appeal should be allowed. The majority of the Court are of the opinion that there should be a new trial and a new trial is accordingly ordered. The Chief Justice and Mr. Justice Davis think the conviction should be quashed.

Appeal allowed, new trial ordered.

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* May 30, 31.
* Oct. 21.

DOMINION DISTILLERY PRODUCTS CO. LTD. (SUPPLIANT)..... } APPELLANT;

AND

HIS MAJESTY THE KING (RESPONDENT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Petition of right—Action for recovery of money paid for sales tax and excise tax—Period of limitation—Claims barred—Section 32 of the Exchequer Court Act, R.S.C., 1927, c. 34—Section 48 of Ontario Limitations Act, R.S.O., 1927, c. 106—Sec. 117 of the Special War Revenue Act, as enacted by 23-24 Geo. V, c. 50, s. 24.

The suppliant, by its petition of right, sought recovery of moneys paid the Crown as sales taxes and excise duties upon liquors purchased by it for export and which it claimed were exported to the United States. The liquors had been manufactured by one Walker Company and were alleged by the suppliant to have been purchased by it from that company at prices that included such sales taxes and excise duties. In May, 1926, the suppliant by an agreement in writing sold and transferred to Dominion Distilleries Limited its business and undertaking as a going concern, the sale and transfer including all debts due to the suppliant in connection with the business. The terms of

* PRESENT:—Duff C.J. and Cannon, Davis, Kerwin and Hudson JJ.

the agreement were fulfilled and the suppliant had not carried on business since 1926. The transactions in liquor by the suppliant with the Walker Company took place between January 31st, 1924, and January 25th, 1926. And the petition of right was filed before the Exchequer Court of Canada on December 14th, 1934. The claim of the suppliant was to recover the sum of $1,417,958.62, being $1,296,557.01 in respect of excise duties and $121,401.61 in respect of sales taxes. The Exchequer Court of Canada dismissed the petition of right.

Held that the appeal should be dismissed with costs.

Per The Chief Justice and Davis and Hudson JJ.—Without deciding the question as to whether some one other than the manufacturer or producer, upon whom the duties and taxes were imposed and by whom they were actually paid to the Crown, could recover such payments from the Crown—assuming that the suppliant as the purchaser of the liquor could recover in its own name and assuming further that the suppliant's charter had not become forfeited for non-user and that it was an existing company entitled to maintain the petition—*held* that the claim for $1,296,557.01 in respect of the payment of excise duties was barred at the end of six years by virtue of the combined effect of section 2 of the *Exchequer Court Act* and section 48 of the Ontario *Limitations Act,* such claim not being liable to be treated as a specialty debt for which the prescriptive period is 20 years; and that the claim for $121,401.61 in respect of the payment of the sales taxes was also barred by the six-year limitation above mentioned as the suppliant has made no application for a refund within the time prescribed by the statute and did not invoke the statutory right to a refund, the whole in conformity with the provisions of section 117 of the *Special War Revenue Act.*

APPEAL from the judgment of the Exchequer Court of Canada, Maclean J. (1) dismissing the suppliant's petition of right with costs.

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

Ls. St. Laurent K.C., L. A. Landriau K.C. and *Oscar Gagnon K.C.* for the appellant.

W. N. Tilley K.C. and C. F. H. Carson K.C. for the respondent.

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

DAVIS J.—The appellant is a suppliant by petition of right whose claim against the Crown was dismissed by a judgment of the President of the Exchequer Court of Canada from which judgment this appeal was taken.

(1) [1937] Ex. C.R. 145.

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The claim of the suppliant is to recover from the Crown the sum of $1,417,958.62 paid by Hiram Walker & Sons Limited (hereinafter for convenience referred to as the Walker Company) to the Crown in respect of excise duties and sales taxes on liquor manufactured by the Walker Company and alleged by the suppliant to have been purchased by it from the Walker Company at prices that included the excise duties and sales taxes. The claim put forward by the suppliant is that it resold and exported this liquor to purchasers in the United States and that by reason of such export, the duties and taxes collected by the Crown were not payable and that the Crown is liable to repay to the suppliant the moneys paid together with interest. The sum of $1,417,958.62 is made up of $1,296,557.01 in respect of excise duties and $121,401.61 in respect of sales taxes. The transactions in question were said to have taken place beween January 31st, 1924, and January 25th, 1926.

The suppliant was a Dominion company having its office at Montreal. Although it had a distillery licence it did nothing in the way of carrying on a distillery business other than the blending of some Scotch whiskies in relatively small quantities. Commencing in January, 1924, orders for liquor were furnished in the name of the suppliant to the Walker Company. In the early part of 1924 the liquor was transferred from the Walker Distillery in Walkerville to a nearby warehouse from which it was distributed in accordance with instructions given by one Cooper, who appears to have been active in the business of the suppliant company. The orders, invoices and other documents that were made out at the time gave the transactions the appearance of sales by the Walker Company to the suppliant and of resales by the suppliant to either W. Kemp or G. Scherer. On or about April 26th, 1924, the excise officer in charge of the Walker Distillery was instructed to refuse the delivery or the issue of permits for the removal of duty paid spirits from the Walker distillery to the suppliant unless the goods were shipped to the suppliant's licensed premises in Montreal. Thereafter the liquor was shipped from the Walker Distillery to Montreal where it was at once reshipped (often without unloading) to Sandwich or one of the border points on the Detroit river, where it appears to have gone into Cooper's posses-

sion and thence was resold and distributed by him. It is claimed by the suppliant that all the liquor was exported from the border points in and about Walkerville to the United States but this claim was strenuously challenged by the Crown.

Under the *Excise Act* the liquor could not be removed from the Walker Distillery until the excise duties had been paid or secured by bond. In the case of each of the transactions in question the Walker Company made a requisition to the excise officer for a permit to remove the liquor "duty paid," paid the duties and obtained a permit for removal. Pursuant to the regulations respecting sales tax, the Walker Company paid before the end of each month the sales tax due in respect of transactions of the previous month, in accordance with returns made by it to the Department of National Revenue showing the sales for the month and the taxes payable thereon. No suggestion was made at any time that the moneys were paid under protest or subject to any reservation either on behalf of the Walker Company or the suppliant.

By agreement dated May 26th, 1926, the suppliant sold its business as a going concern to a company known as Dominion Distillers Limited. The sale and transfer included all debts due to the suppliant in connection with the business. In 1927 Dominion Distillers Limited sold its assets to Dominion Distillers Consolidated Limited. In 1930 Dominion Distillers Limited and Dominion Distillers Consolidated Limited went into liquidation. The suppliant had ceased doing business sometime in 1925 or 1926 and no meetings of its directors or shareholders were held from March 9th, 1926, until February 16th, 1935. In these circumstances the respondent launched a motion before the trial for an order dismissing the action and directing that the respondent's costs be paid by the solicitor for the suppliant upon the grounds that the action was brought without authority and that the company had before the commencement of the action sold and transferred all its assets. The motion was adjourned to the trial and the respondent gave a supplementary notice that on the return of the motion it would rely upon the additional ground that if there was any such corporation as the suppliant it had ceased to exist and its charter had become forfeited by reason of non-user under the provisions of *The Companies*

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Act, R.S.C., 1927, ch. 27, sec. 29, and amending Acts. On the second day of the trial this motion was argued before the learned judge as well as a motion to dismiss on the ground that the suppliant's cause of action, if any, was barred by the Statute of Limitations. The learned judge, however, decided that the trial should proceed to the end and adjourned the motions to the conclusion of the trial.

Judgment was reserved at the trial and was pronounced on June 12th, 1937, dismissing the petition with costs. The learned judge felt bound by the *Carling* case (1) to hold that in the main the liquor was exported. He thought the proof of export in the case (upon this point, since the appeal fails on other grounds, it is unnecessary to pronounce a decision) was equally strong as in the *Carling* case (1). He was of opinion, however, that the claim to recover in respect of sales taxes was barred by sec. 117 of the *Special War Revenue Act* (enacted by 21-22 George V, ch. 54, sec. 21, and amended by 23-24 George V, ch. 50, sec. 24) because it did not appear that any application in writing had been made for a refund within two years from the time when such refund first became payable. His judgment was also based on the conclusion that the suppliant company had ceased to exist by reason of the forfeiture of its charter for non-user and that the petition was, therefore, unauthorized and a nullity. The learned judge also held that the Ontario *Limitations Act*, R.S.O., 1927, ch. 106, sec. 48, was applicable and that the cause of action was barred because the petition was laid more than six years after the cause of action arose.

In the first place it is to be observed that all the moneys paid, either as excise duty or as sales taxes, on the liquor in question were paid by the Walker Company to the Crown, neither by compulsion nor under protest, and now form part of the Consolidated Revenue Fund of Canada, and that the Walker Company is not a party to this action to recover back these moneys. We should find it difficult to decide, if it were necessary to do so, that some one other than the manufacturer or producer, upon whom the duties and taxes were imposed and by whom they were actually paid to the Crown, could recover the payments from the Crown. But assuming that the suppliant, as the

(1) [1931] A.C. 435.

purchaser of the liquor, whose purchase moneys included these outlays by its vendor, could recover in its own name and on its own behalf, the difficulties in its way appear to be insurmountable. We shall assume, further, in the suppliant's favour, without expressing any opinion upon the point, that the suppliant's charter had not become forfeited for non-user and that it was an existing corporation entitled to maintain the action. It is, moreover, unnecessary to express any opinion upon the contention of the Crown that at the date of the petition of right the suppliant had no longer any interest in the claim upon which it sues by virtue of the fact that the claim had been transferred to the Dominion Distillers Consolidated Limited through the Dominion Distillers Limited. We have arrived at our conclusion without taking into account the difficulties which might be raised by these questions.

Two or three dates are of importance in the consideration of the appeal. The date of the filing of the petition of right was December 14th, 1934; the transactions in liquor in respect of which the Walker Company paid excise duty and sales taxes were, as already stated, between January 31st, 1924, and January 25th, 1926.

As to the claim for $1,296,557.01 in respect of the payment of excise duties. These duties were paid by the Walker Company voluntarily in the ordinary course of business before removal of the liquor. Liability for payment during the period in question was imposed by the *Excise Act,* R.S.C., 1906, ch. 51—(prior to 1921 the statute was called *The Inland Revenue Act,* 11-12 George V, ch. 26, sec. 2). Under sec. 174 the duties could not be refunded on export unless when specially permitted by some regulation made by the Governor in Council. No such regulation was made. Under *The Consolidated Revenue and Audit Act,* 1931 (21-22 George V, ch. 27, sec. 33), the Governor in Council, whenever he deems it right and conducive to the public good, may remit any duty or toll payable to His Majesty, imposed or authorized to be imposed by any Act of the Parliament of Canada. Remit, by the context, involves "the refund of any sum of money paid to the Minister for" any duty imposed or authorized to be imposed by any Act of the Parliament of Canada. No such order in council was ever passed. Treated as an action for moneys had and received, the

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claim was clearly barred at the end of six years by virtue of the combined effect of sec. 32 of the *Exchequer Court Act, R.S.C.*, 1927, ch. 34, and sec. 48 of the Ontario *Limitations Act,* R.S.O., 1927, ch. 106. The claim cannot be treated as a specialty debt for which the prescriptive period is 20 years.

As to the claim for $121,401.61 in respect of the payment of the sales tax. The following provision was added to the *Special War Revenue Act* in 1931 (21-22 George V, ch. 54, sec. 21):

> 117. No refund or deduction from any of the taxes imposed by this Act shall be paid unless application for the same is made by the person entitled thereto within two years of the time when any such refund or deduction first became payable under this Act or under any regulations made thereunder.

The above section was repealed in 1933 (23-24 George V, ch. 50, sec. 24) and the following substituted:

> 117. (1) No refund or deduction from any of the taxes imposed by this Act shall be paid unless application in writing for the same is made by the person entitled thereto within two years of the time when any such refund or deduction first became payable under this Act or under any regulations made thereunder.
>
> (2) If any person, whether by mistake of law or fact, has paid or overpaid to His Majesty, any moneys which have been taken to account, as taxes imposed by this Act, such moneys shall not be refunded unless application has been made in writing within two years after such moneys were paid or overpaid.

No application was made for a refund within the time prescribed by the statute. Moreover, the suppliant did not invoke the statutory right to a refund; the claim was not put upon that basis. Treated as an action for moneys had and received, this part of the applicant's claim also fails, being barred by the six-year limitation above mentioned.

The appeal must be dismissed with costs.

CANNON J.—This appeal should be dismissed with costs.

KERWIN J.—The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Oscar Gagnon.*

Solicitor for the respondent: *W. Stuart Edwards.*

HIS MAJESTY THE KING.....APPELLANT;

AND

ROBERT BARBOUR .....RESPONDENT.

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* Oct. 17.
* Nov. 15.

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

Criminal law—Evidence—Trial for murder—Evidence of previous quarrels between accused and deceased with accompanying assaults by accused —Admissibility.

The accused (respondent) was convicted at trial of the murder of H., a girl living near his home and with whom he had been "keeping company" for some time. On March 30, 1938, accused and H. were seen together and later on that day H. was found suffering from injuries from which she died. Evidence was given of statements by accused, after the alleged attack, that he had killed H. with a hammer, that he was "awful jealous of her," that he took her home the night previous and "afterwards she ran out with another fellow." Evidence was given, against objection, of previous quarrels between accused and H. and accompanying assaults upon H. by accused, one such incident occurring shortly before Christmas, 1937, one in January, 1938, and one about a week before said March 30, 1938. The Appeal Division of the Supreme Court of New Brunswick (Harrison J. dissenting) directed a new trial, on the ground that evidence of previous assaults by accused upon H. was improperly admitted (13 M.P.R. 203). The Crown appealed.

Held (Kerwin and Hudson JJ. dissenting): The appeal should be dismissed.

Per Duff C.J., Rinfret and Davis JJ.: The Crown's case was that accused had killed H. in a fit of jealous passion aroused by her conduct with another man. The evidence definitely negatived any connection between this other man and the earlier incidents now in question; and wholly failed to present any facts from which the jury could properly infer that there was any connection of such earlier incidents with accused's objection to H.'s associating with other men; or that such incidents were the result of enmity or ill-will on accused's part; they were transient ebullitions of annoyance and anger which immediately passed away and led to nothing; in their physical characteristics they had no real similarity to the attack of March 30. Where there are acts seriously tending, when reasonably viewed, to establish motive for a crime, evidence of such acts is admissible, not merely to prove intent, but to prove the fact as well; but it is important that courts should not slip into a habit of admitting evidence which, reasonably viewed, cannot tend to prove motive or to explain the acts charged, merely because it discloses some incident in the history of the relations of the parties. The incidents in question did not appear to be such that they could reasonably be regarded as evidencing feelings of enmity or ill-will which could have been the motive actuating the homicide charged. A quarrel might, in its incidents or circumstances or in its relation to other facts in evidence, have such a character as

* PRESENT:—Duff C.J. and Rinfret, Davis, Kerwin and Hudson JJ.

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to entitle the jury to infer motive and intention and state of mind, even in the absence of verbal declaration; while, on the other hand, such an occurrence or series of occurrences might be so insignificant as to leave nothing for the jury to interpret and to afford no reasonable basis for a relevant inference adverse to the accused. The facts in each case must be looked at, and if, reasonably viewed, they have no probative tendency favourable to the Crown or adverse to the accused in respect of the issue joined between them, the evidence should be excluded.

Rex v. *Bond*, [1906] 2 K.B. 389, at 397, 401, *Rex* v. *Ball*, [1911] A.C. 47, at 68, and other cases, referred to. *Theal* v. *The Queen*, 7 Can. S.C.R. 397, on its facts has no resemblance to the present case.

Per Kerwin J. (dissenting): The intent of accused was directly in issue (*Cr. Code*, s. 259 (*b*) referred to), and it was for the Crown to adduce evidence thereon. There was a definite connection between the accused's acts accompanying said quarrels and the issue as to accused's intent in inflicting the injuries on March 30; the evidence of those acts was relevant to that issue as indicating a jealous disposition on accused's part and as evidence of his motive. The jury was entitled to take those matters into consideration in conjunction with the other evidence, and the probative value was not so slight that the evidence as to any of the quarrels was inadmissible.

Rex v. *Bond*, [1906] 2 K.B. 389, at 397, 400, 401, *Rex* v. *Ball*, [1911] A.C. 47, at 68, *Rex* v. *Shellaker*, [1914] 1 K.B. 414, *Rex* v. *Chomatsu Yabu*, 5 West. Australian L.R. 35, and other cases, referred to.

Per Hudson J. (dissenting): The onus was on the Crown to establish that accused killed H. and that he did it with malice. To satisfy that onus, recourse to circumstantial evidence was necessary. Evidence of the previous relations of the parties, including evidence of their quarrels and how they then behaved towards each other, was relevant on the issue of malice as that issue is explained in *Woolmington* v. *The Director of Public Prosecutions*, [1935] A.C. 462, at 482. The evidence being relevant to an issue, it should not be excluded merely on the ground that it disclosed some other crime or offence of a similar nature committed by accused (*Makin* v. *Attorney-General of New South Wales*, [1894] A.C. 57; *Rex* v. *Bond*, [1906] 2 K.B. 389).

APPEAL by the Attorney-General of New Brunswick from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), allowing (Harrison J. dissenting) the accused's appeal against his conviction for murder and ordering a new trial, on the ground that evidence given at the trial of previous assaults by the accused upon the deceased was improperly admitted. The material facts of the case are sufficiently stated in the judgments now reported; the evidence is dealt with in some considerable detail in the judgment of Kerwin J. (dissenting). The appeal to this Court was dismissed, Kerwin and Hudson JJ. dissenting.

(1) (1938) 13 M.P.R. 203.

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E. B. MacLatchy for the appellant.

P. J. Hughes K.C. for the respondent.

The judgment of the majority of the Court (The Chief Justice and Rinfret and Davis JJ.) was delivered by

THE CHIEF JUSTICE.—This appeal, in my view of it, does not raise any question of general principle. As Lord Dunedin said in *Thompson* v. *The King* (1):—

> the law of evidence in criminal cases is really nothing more than a set of practical rules which experience has shown to be best fitted to elicit the truth as to guilt without causing undue prejudice to the prisoner.

It must not be forgotten that the jury are not engaged in a scientific investigation. They are trying an issue of fact between the Crown and the prisoner; and the court must see that the practical rules, the purpose of which is thus explained by Lord Dunedin, are duly observed.

Nobody disputes that it is of the utmost importance to

> a prisoner charged with an offence * * * that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment which alone he can be expected to come prepared to answer. It is, therefore, a general rule that the facts proved must be strictly relevant to the particular charge and have no reference to any conduct of the prisoner unconnected with such charge.

I am quoting from the judgment of Mr. Justice Kennedy in *Rex* v. *Bond* (2).

While, as already observed, I do not consider any question of general principle is really involved in this case, I do not suggest for a moment that assistance in applying well known principles to the facts may not be gained by consulting the authorities.

In *Rex* v. *Ball* (3) two people were indicted upon a charge of incest. At the trial, evidence was admitted of previous acts of intercourse and of the fact that they had been living in relations akin to those of husband and wife. The House of Lords held these acts were admissible as tending to establish the existence of a guilty passion at the very time the acts charged were alleged to have been committed on the ground that

> their passion for each other was as much evidence as was their presence together in bed of the fact that when there they had guilty relations with each other.

(1) [1918] A.C. 221, at 226. (2) [1906] 2 K.B. 389 at 397.
(3) [1911] A.C. 47.

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In this Court, counsel for the Crown, who had conducted the Crown's case at the trial and who presented his argument with conspicuous fairness, sustained the admissibility of the evidence objected to on the strictly narrow ground that it was relevant to the issue of intent and upon that alone. He expressly disclaimed the suggestion that the quarrels of which evidence was given proceeded from hostility or enmity, or tended to show the existence of such feelings. In his factum he contends that evidence of the relations of the parties, friendly or unfriendly, is admissible without qualification; but on the oral argument his contention was explicitly limited as above explained and, it should be noticed, that this limitation is logically inconsistent with any contention that the evidence tended to establish feelings of hostility or malignity; a contention which, as observed, he explicitly refused to adopt. The existence of such feelings would, as we shall see, be relevant not merely in respect of intent, but in respect of the fact as well. The evidence adduced by the Crown was inconsistent with the notion that anything like a feeling of ill-will or malignity actuated these quarrels; and, indeed, as the learned Chief Justice of New Brunswick intimates, they were transient ebullitions of annoyance and anger on the part of the accused which immediately passed away and led to nothing.

The Crown's case was in truth that the accused had killed the deceased in a fit of jealous passion aroused by her conduct with another man. There is nothing in the evidence to show that the accused was aware even of the existence of this man before the last of the incidents in question, although he had first become acquainted with the deceased, according to his own evidence, about two weeks before that. The evidence definitely negatives any connection between him and the earlier incidents. It seems reasonable to infer from counsel's opening that he expected to connect all the incidents now in question with the accused's objection to the victim's associating with other men; but the evidence wholly fails to present any facts from which the jury could properly infer that there was any such connection. It is true there is a general statement, elicited in re-examination from one of the witnesses by leading questions, to the effect that the accused objected

to her going with other men and that he was a little "jealous" of her. But there is no evidence which would have entitled the trial judge to instruct the jury that they might ascribe these quarrels to any such feeling. Indeed, as regards the first of the quarrels, the evidence of the witness for the Crown who related the facts is explicit that the quarrel had a totally different origin. There is no suggestion in the record, it should be added, from the beginning to the end of the trial that these incidents were the result of enmity or ill-will on the part of the accused.

If you have acts seriously tending, when reasonably viewed, to establish motive for the commission of a crime, then there can be no doubt that such evidence is admissible, not merely to prove intent, but to prove the fact as well. But I think, with the greatest possible respect, it is rather important that the courts should not slip into a habit of admitting evidence which, reasonably viewed, cannot tend to prove motive or to explain the acts charged merely because it discloses some incident in the history of the relations of the parties.

In the course of the argument in *Rex* v. *Ball* (1), Lord Atkinson said:—

> Surely in an ordinary prosecution for murder you can prove previous acts or words of the accused to shew he entertained feelings of enmity towards the deceased, and that is evidence not merely of the malicious mind with which he killed the deceased, but of the fact that he killed him. You can give in evidence the enmity of the accused towards the deceased to prove that the accused took the deceased's life. Evidence of motive necessarily goes to prove the fact of the homicide by the accused, as well as his "malice aforethought" * * *

Of course, a much wider latitude is allowed the accused, who may adduce any evidence, of good character for example, tending to show, not only that it was not likely that he committed the crime charged but that he was not the kind of person likely to do so.

In *Rex* v. *Ball* (1), Lord Loreburn quoted the following passage from the judgment of Kennedy J. in *Rex* v. *Bond* (2):—

> The relations of the murdered or injured man to his assailant, so far as they may reasonably be treated as explanatory of the conduct of the accused as charged in the indictment, are properly admitted to proof as integral parts of the history of the alleged crime for which the accused is on his trial.

It is most important to attend to the qualification "so

(1) [1911] A.C. 47, at 68. (2) [1906] 2 K.B. 389, 401.

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far as they may reasonably be treated as explanatory of the conduct of the accused as charged in the indictment." It explains, I think, why Cresswell J. and Williams J. in *Mobbs'* case (1) were not satisfied of the admissibility of evidence of conduct of the accused directed towards the deceased eleven days before the date of the alleged murder in the absence of some accompanying declaration, even as tending to prove malice.

In *Theal* v. *The Queen* (2), counsel for the Crown in opening (p. 399) stated he would prove systematic ill-treatment culminating in the final assault which was the immediate cause of the victim's death. The previous acts of violence were held admissible as tending to establish intent and as in the same category as deliberate menaces or threats tending to prove malice and intent (*per* Ritchie C.J. at p. 406). The judgment must be interpreted in light of the facts and especially of the character of the previous assaults proved and the threats accompanying them. The case has no sort of resemblance to that before us.

By way of summary, it may perhaps be added that, first of all, the incidents in question do not appear to be such that they could reasonably be regarded as evidencing feelings of enmity or ill-will which could have been the motive actuating the homicide charged. I do not doubt that a quarrel might in its incidents or circumstances, or in its relation to other facts in evidence, have such a character as to entitle the jury to infer motive and intention and state of mind, even in the absence of verbal declaration; while, on the other hand, such an occurrence or series of occurrences might be so insignificant as to leave nothing for the jury to interpret and to afford no reasonable basis for a relevant inference adverse to the accused. The facts in each case must be looked at, and if, reasonably viewed, they have no probative tendency favourable to the Crown or adverse to the prisoner in respect of the issue joined between them, it is the duty of the court to exclude the evidence. The responsibility of the judge in such cases is a grave one if there is any risk that the evidence tendered may prejudice the prisoner.

Having regard to the character of the case made at the trial, the course of the trial, and the position taken by

(1) (1853) 6 Cox C.C. 223. (2) (1882) 7 Can. S.C.R. 397.

counsel for the Crown in this court, it would be unsafe to set aside the order for a new trial pronounced by the Supreme Court of New Brunswick on any such hypothesis as to the origin and nature of these incidents.

For the same reason it would be equally unsafe to proceed upon the proposition that evidence of these incidents was admissible as relevant to the issue of intent as evidence of similar acts calculated to negative accident or mistake or tending directly to prove that the acts of the 30th of March were committed with the intent to kill. In view of the relations of the parties it is questionable if what occurred on any one of the occasions dealt with by Mr. Justice Harrison amounted even technically to an assault; in any event, the Crown, as already observed, refused to impute to the accused ill-will and there is no suggestion that there was any intention to harm; in their physical characteristics there is no real similarity between these quarrels and the murderous attack of March 30th.

Nor is there any evidence from which the jury could reasonably ascribe the conduct of the accused on these isolated occasions to the motive alleged to have prompted the acts of March 30th—resentment against the association of the deceased with other men.

The appeal should be dismissed.

KERWIN J. (dissenting)—Robert Barbour was convicted of having murdered Margaret Harris on March 30th, 1938. The Appeal Division of the Supreme Court of New Brunswick (1) directed a new trial on the ground that evidence given that the accused had previously assaulted the deceased was improperly admitted. Mr. Justice Harrison dissented and the Attorney-General now appeals to this Court upon the question of law upon which such dissent was based.

Upon an examination of the residuum of the evidence there would appear to be no dispute as to the following facts. The accused and Margaret Harris had been "keeping company" for some time. (I refer immediately to what transpired on the evening of March 29th, 1938, because while there was a suggestion that the evidence on the point is of a "previous assault," it was not so urged

(1) 13 M.P.R. 203.

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before us by counsel for the accused and in fact I do not understand how that proposition could be seriously advanced). On the evening, then, of March 29th the accused brought Margaret to her home and shoved her through the doorway, saying to her mother, "keep her home, she is running around too much." On March 30th, the accused and Margaret were seen together,—the latter sitting on the former's knee and the accused crying. Shortly thereafter the girl was discovered in the same house bleeding and suffering from injuries inflicted by a hammer. The same day the accused went to the shire gaol and gave himself into custody. Upon arrival at the buildings he met Napoleon Leger and said to him: "My name is Robert Barbour, son of John Barbour. * * * I have just killed my lady friend." After being incarcerated, he made a certain statement in the presence of two prisoners. One of them, Wilmot, gives the statement as follows: "I just committed murder about ten minutes ago. * * * Yes, that is right—I just killed my girl with a hammer." Upon Wilmot remarking: "How in the name of God did that happen?" the accused continued, according to Wilmot: "I was awful jealous of her— I took her out last night— I took her home— Afterwards she ran out with another fellow— She came over to the house to-day and I killed her." The other prisoner, Darbison, testified: "He (meaning the accused) said he had killed a girl—had hit her on the head with a hammer. * * * He said he took her home the night previous and he was terribly jealous of her." As a result of the injuries sustained on March 30th, Margaret died on April 15th.

The issues to be determined by the jury were whether the accused had inflicted the injuries from which the girl died, and under clause (*b*) of section 259 of the *Code*, whether he had meant to cause her any bodily injury which was known to him to be likely to cause death and was careless whether death ensued or not. That is, the intent of the accused was directly in issue and the responsibility devolved upon the Crown to adduce evidence on that point. Evidence as to any motive the accused might have had in inflicting the injuries spoken of in the *Code* was directly relevant to that issue of intent. While the Crown is not obliged to adduce evidence of motive, the presence

or absence of motive may be of very considerable importance. If the evidence before the jury disclosed merely that the girl had received injuries and that the accused had caused those injuries, the case would have been left in a very unsatisfactory position, and hence it was that evidence of what the accused said to Leger and to the two prisoners was tendered, not merely to indicate that the accused had inflicted the injuries but as to his motive in so doing.

How, then, does the matter stand with reference to the evidence of previous assaults which the Court of Appeal has determined was improperly admitted? In his opening address to the jury, after stating that the accused had been keeping company with Margaret Harris and after referring to one Robert MacPherson, who "comes into the scene on March 29th," and after referring to the evidence to be adduced that on the evening of that day the accused had pushed Margaret through the doorway saying something to this effect: "Keep her home. She is running around too much," Crown counsel continued, according to the transcript on page 40 of the Appeal Case, as follows:—

> Now there is evidence also to be submitted here that the accused and his girl friend, sweetheart if you like, have not been getting along very well lately. Evidence to show that there had been some quarrelling. Now what the reasons for the quarrels are you will have to have some evidence before you what was bring that about. What was the trouble. What he was crying about that day. Why his mysterious movements on the day before and why his mysterious actions in the house that afternoon of the fatal day, March 30th.

During the course of the trial this evidence as to quarrelling was adduced:—

(1) The evidence of Frances Barbour, a sister of the accused. After the objection of counsel for the accused had been over-ruled, the questions and answers proceeded:

> Q. I would ask you the question, prior to March 30th shortly prior to March 30th, did you ever see Robert Barbour, your brother, and Margaret Harris quarrelling?
> A. Yes.
> Q. About how long before March 30th?
> A. About a week.
> Q. Where was this quarrel you saw? Where did it take place?
> A. In the Barbour house.
> Q. In your own house?
> A. Yes.
> Q. In what room in your own house?
> A. In the living room.

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Q. Tell us what you saw on that occasion?

A. Margaret and Robert were sitting down, they were quarrelling. They were talking about something. I didn't hear. Robert jumped up and started hitting Margaret.

Court: He jumped up?

A. Yes.

Court: And did what?

A. Hit Margaret.

Court: He hit Margaret?

A. Yes, Margaret went into the bed room and Robert went out.

Q. Margaret went into the bed room?

A. Yes.

Q. And Robert went out doors?

A. Yes.

Q. How many times did he hit her and how did he hit her?

A. He hit her with his hand.

Q. Do you know whether it was his clenched hand or open hand?

A. I didn't take notice.

Q. What stopped the quarrel?

A. My sister-in-law stopped it.

Q. Your sister-in-law?

A. Yes.

Q. That is Mrs. Richard Barbour?

A. Yes.

Q. How did she stop them?

A. Came and parted them.

Q. What did you do yourself in that case?

A. I called for Mrs. Galley.

Q. Where is Mrs. Galley?

A. In the same building we are in.

Q. In the rear part of your house, is that right?

A. Yes.

In cross-examination the witness was asked and answered as follows:—

Q. You say your brother Robert, the accused, and Margaret Harris went out together a great deal?

A. Yes.

Q. As a matter of fact, he was very fond of her?

A. Yes.

* * *

Q. Isn't it true that Margaret Harris was inclined to tease Robert?

A. Yes.

Q. You said yes?

A. Yes.

Q. Do you know whether or not she was teasing him on the occasion you spoke of, that you were telling Mr. McLatchey of?

A. No, she was not.

(2) The evidence of Mrs. Richard Barbour, a sister of Margaret Harris, which on this point appears at pages 160 to 165 of the Case. After an objection had been overruled, this witness testified that she had seen the accused and Margaret quarreling on three occasions. The first was shortly prior to the preceding Christmas; the accused want-

ed Margaret to go to her own home and kicked her; the witness stopped this quarrel. The next occasion was about January of 1938 and while the witness could not state the reason for the quarrel, she saw the accused strike Margaret once or twice over the shoulder with his open hand; the parties to the quarrel stopped of their own accord. The third occasion was a week before March 30th and is the same one already spoken of by Frances Barbour. On cross-examination the witness admitted that the accused and Margaret had been keeping company for a long time; that they seemed to be fond of each other; that Margaret was inclined to tease the accused from time to time "for fun," and that they would have "spats"; that when they were quarrelling on the two latter occasions spoken of by this witness "it would be one of those spats"; that they would generally "make up right after and go on as they had before"; and that on the first occasion spoken of by the witness, the accused wanted Margaret to go to her own home so that he might go to bed to be rested for his work in the morning. On re-examination the following occurred, as reported on page 184 of the Case:—

Q. Was Robert jealous about Margaret?
A. He appeared to be a little.
Q. Did he object to her going around with other men?
Mr. HUGHES: Just a moment—I object.
Question allowed.
A. Yes, he did.

CROSS-EXAMINATION on these questions—Mr. HUGHES.

Q. Mrs. Barbour, you said Robert appeared to be a little jealous of Margaret?
A. Yes.
Q. He seemed, as you have already said, to be very fond of her?
A. Yes.
Q. And you thought he wanted to marry her, I take it?
Mr. MCLATCHEY: She didn't say that.
Q. That would be correct, would it not?
A. Well, I don't know.
Q. Well, that was the impression you gathered from their relationship, was it not?
A. Yes.
Q. And that if he thought he was likely to lose her he appeared to be jealous, that is what you thought?
A. Yes, sir.
Q. Did he not appear to be trying to protect her?
A. I don't know.
Q. Have you not seen indications of that?
A. No, I have not.

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Q. Did he not try to keep her from going to places that he thought she should not go to?

A. Well, I don't know anything about that.

(3) The evidence of John Harris, Margaret's father, who testified that in January of 1938 he had had a conversation with the accused and had told the accused " Margaret had two black eyes and I asked him what was the meaning of it and he did not give me any answer." The witness testified further that on March 29th "he (the accused) told me, he said 'I will never lay hands on Margaret again' and he made a promise and I took him up on it and we shook hands on it." On cross-examination the witness testified that the accused had not admitted that he (the accused) was responsible for the blackening of Margaret's eyes.

The only reference in the judge's charge to the jury as to the accused having struck or kicked Margaret is at page 450 of the Case, and it was introduced in connection with the judge's instructions on the question of the accused's insanity, which had also been raised. The learned judge had discussed this question at some length and then said:—

Let us see what turns here:

We have been told that the accused and this girl were very friendly. I do not know whether they were lovers or not, but they had been going around together for three or four years. There is evidence also that he had kicked her. There is evidence that he hit her. There is evidence that on the 29th of March he had, that before Margaret Harris was found wounded or injured in the Barbour house, that he had told Margaret's father that he wouldn't ever lay a hand on her again. So that you compare that with the situation I have given you, of a father coming in and telling you that he had killed his child.

The judge immediately continued with his instruction upon the question of insanity. At page 444 he is reported to have spoken " of the reference to the fact that Margaret was teasing the accused " and to have pointed out that it appeared to him that it was introduced for no reason except to suggest provocation, as to which the judge intimated there was no evidence.

I have mentioned in detail the only evidence of previous assaults and have shown how that evidence was introduced and led at the trial. The manner in which it was dealt with by the trial judge and Crown counsel cannot, of course, cure the defect, if in truth it was not proper to place it before the jury, as the objection is to its admissibility and not to the weight to be attached to

it. However, it is apparent that it was never suggested that such evidence was submitted for the purpose of showing the accused had committed another offence, or that he was a person who was likely to mean to cause to the deceased an injury known to the accused to be likely to cause death, or as evidence of similar acts; but on the ground that it was some evidence of a motive,—particularly when considered in conjunction with the evidence as to what transpired on the evening of March 29th and the evidence as to the statements made by the accused on March 30th to Leger and the two prisoners.

On the argument the case of *Rex* v. *Bond* (1) was relied upon by counsel for the respondent and we were particularly pressed with the applicability of the judgment of Lord Justice Kennedy. In *Rex* v. *Ball* (2), counsel for the accused, during the course of his argument before the House of Lords, referred to that part of the judgment of Lord Justice Kennedy at page 397 in the *Bond* case (1), but later the Lord Chancellor quoted another part of the same judgment at page 401:—

> The relations of the murdered or injured man to his assailant, so far as they may reasonably be treated as explanatory of the conduct of the accused as charged in the indictment, are properly admitted to proof as integral parts of the history of the alleged crime for which the accused is on his trial.

Upon counsel remarking:—

> That is because, in murder, you have the act, and then the question of what was in the mind of the assailant.

Lord Atkinson then interposed:—

> Surely in an ordinary prosecution for murder you can prove previous acts or words of the accused to shew he entertained feelings of enmity towards the deceased, and that is evidence not merely of the malicious mind with which he killed the deceased, but of the fact that he killed him. You can give in evidence the enmity of the accused towards the deceased to prove that the accused took the deceased's life. Evidence of motive necessarily goes to prove the fact of the homicide by the accused, as well as his "malice aforethought," inasmuch as it is more probable that men are killed by those who have some motive for killing them than by those who have not.

It is true that the circumstances in the *Ball* case (3) were peculiar but in *The King* v. *Shellaker* (4) Sir Rufus Isaacs, Lord Chief Justice of England, in delivering the judgment of the Court of Criminal Appeal, which included Channell,

(1) [1906] 2 K.B. 389.
(2) [1911] A.C. 47.
(3) [1911] A.C. 47.
(4) [1914] 1 K.B. 414.

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Bray, Avory and Lush, JJ., pointed out that the *Ball* case (1) followed a long line of authorities of which *Reg.* v. *Ollis* (2) was one. The rule propounded by Channell J. in the latter was adopted wherein he stated that in such cases evidence of other transactions is admitted not for the purpose of showing that the prisoner committed other offences but for the purpose of showing that the transaction in question was done with the intent to defraud or with guilty knowledge, as the case may be. The *Ollis* case (3) is again referred to, as well as the *Shellaker* case (4), in *Rex* v. *Lovegrove* (5), another judgment of the Court of Criminal Appeal (the Earl of Reading, L.C.J., Salter and Acton JJ.) delivered by the Lord Chief Justice.

These decisions show, if any authority be needed, that the *Bond* case (6), and particularly the judgment relied upon, cannot be taken as setting forth the only circumstances under which prior offences of an accused may be disclosed on his trial. In fact, Lord Justice Kennedy enunciated several general rules, i.e., (1) "evidence must be confined to the point in issue" and (2) "the facts proved must be strictly relevant to the particular charge and have no reference to any conduct of the prisoner unconnected with such charge" (page 397). As to these rules, it will be noticed that the Lord Justice refers to the "point in issue" and to "conduct of the prisoner unconnected with such charge," and later at page 400 points out that it is not easy to say whether a particular case falls within the (second) rule or within the apparent exceptions.

In *Reg.* v. *Mobbs* (7), it is reported in (1853) 6 Cox C.C. 223 and in 17 J.P. 713, that Baron Cresswell and Williams J., in a case where evidence was offered of a prior assault, felt so uncertain about the matter that they decided not to admit the evidence. These reports are very meagre but in 38 Central Criminal Court Reports, 651, which purports to give the proceedings as they occurred, no reference is made to a ruling by the judges. From this report it appears that upon counsel for the accused objecting to the question, "What did you then see the prisoner do to his wife?" and stating that such evidence did not ex-

(1) [1911] A.C. 47.
(2) [1900] 2 Q.B. 758, at 781.
(3) [1900] 2 Q.B. 758, 781.
(4) [1914] 1 K.B. 414.
(5) [1920] 3 K.B. 643.
(6) [1906] 2 K.B. 389.
(7) (1853) 6 Cox C.C. 223, 17 J.P. 713, 38 Central Cr. C.R. 651.

plain the difference between murder and manslaughter, which was the only argument open to him, Mr. Bodkin for the Crown indicated "that he did not purpose to prove any expressions accompanying the acts but only the acts themselves; that it was not consistent with his duty to omit all mention of the matter, but having done so, he would now withdraw the question."

Whichever report of *Reg.* v. *Mobbs* (1) is correct, it is apparent that the case cannot be considered a precedent to apply to other cases where, either a prior act of the accused is accompanied by a statement of his, or where there are other acts of his that a jury might consider in conjunction with such prior act. And this view was taken in *Rex* v. *Chomatsu Yabu* (2). It was there held, on an appeal from a conviction of a man for having murdered a Japanese woman, that evidence was rightly admitted that at a date some time earlier than the date of the alleged offence the accused was in a yard behind the house of the woman and in answer to her accusation admitted that he had broken up her furniture. McMillan J. stated:—

> I think if facts can be found from which the jury can properly infer what the motive and intention and state of mind of prisoner was, that those facts are as properly brought before them as any declaration on the part of the prisoner would have been.

At the famous trial of William Palmer, 1856 (3), one question was as to whether the accused administered the poison. After referring to the practice in some countries of allowing a probability to be raised that an accused has committed an offence by showing that he has committed other offences, Lord Campbell instructed the jury that by the law of England every man is presumed to be innocent and that it allowed his guilt to be established only by evidence directly connected with the charge. He then referred to circumstantial evidence leading to the conclusion of guilt, stating that with respect to the alleged motive "it is of great importance to see whether there was a motive for committing such a crime" and concluded that the adequacy of the motive was of little importance.

(1) (1853) 6 Cox C.C. 223, 17 J.P. 713, 38 Central Cr. C.R. 651.

(2) (1903) 5 West. Australian L.R. 35.

(3) Reporter's note.—See in series of "Notable British Trials," the "Trial of William Palmer" (Knott and Watson) at pp. 297, 299.

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In the case at bar, it is doubtful, in my opinion, in view of the relations between the accused and Margaret Harris, if the striking and kicking may be termed offences in any sense of the word. In any event, for the reasons already indicated, I believe there was a definite connection between those acts, accompanying, as they did, the quarrels mentioned, and the issue as to the accused's intent in inflicting the injuries on Margaret Harris on March 30th, 1938. The evidence of these acts was relevant to that issue as indicating a jealous disposition on the part of the accused and as evidence of the accused's motive.

In connection with the four episodes, it is well to bear in mind the relationship between the Harris and Barbour families and just who the witnesses were who testified. Mrs. Richard Barbour was not only the sister of Margaret Harris but was also married to a brother of the accused. Frances Barbour was a sister of the accused; and John Harris, besides being the father of Margaret Harris, was, of course, the father-in-law of his other daughter's husband. As to the first occasion, Mrs. Richard Barbour did testify on cross-examination, as has been noted, that the accused wanted Margaret to go to her home so that he might go to bed to be rested for his work. In view of the fact that this testimony was given by answering "Yes" to a series of suggestions by counsel for the accused (put by him with perfect propriety), the jury would be entitled to weigh such answers and give such effect to them, if any, as they saw fit. The jury was entitled to take all these matters into consideration in conjunction with the other evidence and I cannot agree that the probative value is so slight that the evidence as to any of the quarrels was inadmissible. The trial judge admitted the evidence and, in my opinion, should not have ruled otherwise.

Notwithstanding that the appellant is restricted upon his appeal to the question of law upon which there has been dissent in the court below, it was submitted on behalf of the accused that the latter is not to be deprived of the new trial granted him unless this Court is satisfied, in making such order "as the justice of the case requires" (section 1024, subsection 1), that no error exists in connection with any of the other grounds taken by the accused before the Court of Appeal. We accordingly heard argu-

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ment on all questions that counsel for the accused desired to raise. It is unnecessary for me to express an opinion on any of these questions or on the point of jurisdiction, since the majority of the Court have come to the conclusion that the appeal of the Attorney-General fails.

HUDSON J. (dissenting)—The only point on which there was dissent in the court below is that "there was error in admitting the evidence of previous assaults by the accused upon Margaret Harris."

The prisoner was charged with murder and pleaded not guilty. The duty of the Crown in such a case is stated by the Lord Chancellor, Lord Sankey, in the case of *Woolmington* v. *The Director of Public Prosecutions* (1), as follows:—

> When dealing with a murder case the Crown must prove (*a*) death as the result of a voluntary act of the accused and (*b*) malice of the accused. It may prove malice either expressly or by implication. For malice may be implied where death occurs as the result of a voluntary act of the accused which is (i) intentional and (ii) unprovoked. When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked.

The onus then was on the Crown to establish that the prisoner killed the deceased and that he did it with malice. To satisfy this onus, recourse to circumstantial evidence was necessary. The questions immediately arose: What were the previous relations between the parties? Were they friends or otherwise? If friends, how friendly? How did they normally behave towards each other? What were their normal acts and ordinary doings?

I am of opinion that evidence in this case of the previous relations of the parties, including evidence of their quarrels and how they then behaved towards each other, was relevant on the issue of malice as above defined by the House of Lords.

If the evidence was relevant to any issue, then I can find no authority to justify the exclusion of such evidence merely on the ground that it disclosed some other crime or offence of a similar nature committed by the accused. The decision of the Privy Council in *Makin* v. *Attorney-General for New South Wales* (2), and of the Court of *Appeal in The King* v. *Bond* (3), sufficiently establish this.

(1) [1935] A.C. 462, at 482. (2) [1894] A.C. 57.
(3) [1906] 2 K.B. 389.

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For these reasons, I agree on this point with the conclusion of Mr. Justice Harrison who dissented in the court below.

As the majority of this Court has come to the conclusion that the appeal should be dismissed, it is unnecessary for me to express an opinion on the question of jurisdiction or on the other points raised on behalf of the prisoner.

Appeal dismissed.

Solicitor for the appellant: *E. B. MacLatchy.*

Solicitor for the respondent: *G. W. MacDonald.*

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* June 10.
* Dec. 5.

PROVIDENT ASSURANCE COMPANY (THIRD PARTY)..... APPELLANT;

AND

MARK ADAMSON (DEFENDANT).....RESPONDENT;

AND

CHARLES C. MARSHALL (PLAINTIFF).

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Insurance—Motor vehicle liability policy—Claim under policy for indemnity for damages recovered against insured—Failure by insured to comply with statutory conditions requiring him to give promptly to insurer "all available particulars" of accident and to "co-operate with the insurer * * * in the defence" of the action (now 4 (1), 4 (2), under s. 188, Insurance Act, R.S.O., 1937, c. 256)—Forfeiture of right to indemnity (s. 191)—Refusal of relief (asked under s. 192).*

It was *held* that respondent, who held a motor vehicle liability policy issued by appellant insurance company, was not entitled to recover under it any indemnity against the company in respect of the judgment recovered against respondent in a certain action for damages for injuries caused by the motor vehicle (driven by respondent): on the ground that, by respondent's course of conduct (detailed in the present judgment) he had failed, in violation of his obligations under statutory conditions forming part of the policy (now numbered 4 (1), 4 (2), under s. 188 of *The Insurance Act*, R.S.O., 1937, c. 256) to give promptly to the company "all available particulars" of the accident (4 (1)) and to "co-operate with the insurer, except in a pecuniary way, in the defence" of the action against respondent (within the meaning of said statutory condition 4 (2); its meaning discussed, in reference to the facts in the present case. "The defence of the action" necessarily involves in any practical construction of the term the opportunity for an early and favourable settlement of the action). The respondent having violated a term or condition of the contract, then, by force of what is now s. 191 of *The Insurance Act* (R.S.O., 1937, c. 256), his claim was rendered invalid and his right to recover

* PRESENT:—Duff C.J. and Cannon, Crocket, Davis and Hudson JJ.

indemnity became forfeited. Relief under s. 192 of the Act was refused, the Court holding that, under all the circumstances of the case, the trial judge was amply justified, in the exercise of his discretion, in declining to relieve against the forfeiture, even if respondent's conduct could fairly be said to be merely "imperfect compliance" with the statutory conditions, which, under s. 192, is the only ground upon which the court is given power to relieve.

Judgment of the Court of Appeal for Ontario ([1937] O.R. 872) reversed; and judgment of McTague J. ([1936] O.R. 394), dismissing respondent's claim against appellant, restored.

APPEAL from the judgment of the Court of Appeal for Ontario (1) allowing (Henderson J.A. dissenting) the present respondent's appeal from the judgment of the trial judge, McTague J. (2), dismissing his claim against the appellant insurance company, under a motor vehicle liability policy issued by the company, for indemnity in respect of a judgment recovered in an action in the Supreme Court of Ontario by one Marshall (plaintiff) against the respondent (defendant) for damages for injuries suffered by Marshall (plaintiff) when a milk wagon driven by him was struck by an automobile driven by the respondent (defendant). The said insurance company was (on its application) added as a third party in the action, under subs. 7 (enacted by 25 Geo. V, c. 29, s. 36 (2)) of s. 183*h* of *The Insurance Act,* Ont. (R.S.O., 1927, c. 222) (said subs. 7 being now subs. 7 of s. 205 of *The Insurance Act,* R.S.O., 1937, c. 256). The company denied liability to indemnify the present respondent in respect of the claim in question. The material facts and circumstances of the case are set out in the judgment of Davis J. now reported. The appeal of the company to this Court was allowed and the judgment at the trial was restored with costs throughout.

G. A. Drew K.C. for the appellant.

I. F. Hellmuth K.C. and *J. R. Cartwright K.C.* for the respondent.

The judgment of the Chief Justice and Crocket, Davis and Hudson JJ. was delivered by

DAVIS J.—This is an appeal from the Court of Appeal for Ontario (1) in an automobile insurance case. The re-

(1) [1937] O.R. 872; [1937] 4 D.L.R. 292.

(2) [1936] O.R. 394; [1936] 4 D.L.R. 383.

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spondent at the time of the accident in question held an owner's motor vehicle liability policy with the appellant insurance company. The company denied liability for indemnity in respect of the particular accident and that issue falls to be determined in these somewhat novel proceedings which form part of the action in which the injured party sued the respondent for damages for the injuries received in the accident and in which action the injured party as plaintiff recovered judgment against the respondent as defendant for $6,500 and costs. The procedure for setting up and determining the issue of liability as between the defendant and the insurance company was introduced in Ontario in 1935 (25 Geo. V, ch. 29, sec. 36 (2)) when the following subsection (7) was added to sec. 183*h* of *The Insurance Act:*

(7) Where an insurer denies liability under a motor vehicle liability policy it shall have the right upon application to the court to be made a third party in any action to which the insured is a party and in which a claim is made by any party to the action for which it is or might be asserted indemnity is provided by the said policy.

That subsection is now sec. 205 (7) of *The Insurance Act,* being ch. 256 of the Revised Statutes of Ontario, 1937. The insurance policy in question was issued May 15th, 1934, and was by renewal in full force and effect at the date of the accident, October 3rd, 1935.

The facts now known are not really in dispute. The respondent Adamson, a married man, 51 years of age, was a fruit broker residing and carrying on business in Toronto. On the evening of October 2nd, 1935, he and two other men remained in Adamson's downtown office from about eleven o'clock in the evening until around two o'clock in the morning. Two young women, about 28 or 30 years of age, neither employees nor relatives, came to the office about eleven or eleven-thirty that evening and remained till around two o'clock in the morning. Adamson admitted that there were two cases of beer, though he said only half a dozen pints were consumed and that he had about two glasses—a bottle and a half—perhaps one hour apart. Adamson, some time after two o'clock, was driving his motor car up town with the two girls in the front seat with him when he struck a milk wagon crossing in his path. He heard the man on the milk wagon yell and he felt the impact but he did not stop his car. At the next

corner he let the girls out of the car and proceeded by a somewhat circuitous route to his home in the northern part of the city. The police were at his home shortly thereafter; he denied that he was in any accident but the police told him that they had witnesses of the accident. It is not necessary to follow the police court proceedings. The man on the milk wagon was very seriously injured and was removed to the hospital and in his subsequent action against Adamson recovered, as stated above, $6,500 and costs.

In what is called the third party proceedings (in the action between the injured man and Adamson) the appellant company denied liability under its policy upon the ground, speaking broadly for the moment, that Adamson did not give the insurance company "all available particulars" of the accident, as it is alleged he was by his contract bound to do, and failed to "co-operate" with the insurance company in the defence of the action, as it is further alleged he was bound by his contract to do.

What happened was this: The day of the accident, October 3rd, 1935, Adamson telephoned the insurance company that he had had an accident in the early hours of the morning. The insurance company instructed its adjuster, Bethune, to deal with the matter. Bethune tried to communicate with Adamson on October 3rd but was unable to reach him until the next day when Adamson answered Bethune's telephone message to him. Bethune asked Adamson on the telephone certain specific questions. Adamson stated that there were no witnesses to the accident and also that he had consumed no intoxicating drinks before the accident. Bethune then gave instructions to West, in his office, to investigate the claim. West had considerable difficulty in arranging an appointment with Adamson and it was not until nearly two months after the accident, in spite of numerous calls at Adamson's office and of telephone messages to communicate with him, that West procured an interview with and obtained a signed statement from Adamson in regard to the accident. In this written statement Adamson repeated that he had consumed no intoxicating drinks before the accident, but he left blank the space for the answers to the questions as to the names and addresses of the witnesses in his own car and of the

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witnesses in the other car, and of the other witnesses. Prior to signing this statement Adamson told West positively that there were no passengers in the car with him at the time of the accident. Then, in a general discussion after signing the form, Adamson told West that he had a gentleman in the automobile with him. When West questioned Adamson about not giving this information before, Adamson explained that the gentleman was a rather prominent individual and that he did not wish his name to become involved on account of the accident. West then pointed out that it was necessary that he give the name of this passenger and insisted that he do so. Adamson then said that he was in error, that he had made a mistake in regard to this gentleman, and that there were in fact no passengers in the automobile with him.

On November 27th, 1935, Marshall, the injured man, had issued a writ against Adamson. On December 5th, 1935, the solicitor for the insurance company under instructions from the company entered an appearance on behalf of Adamson. On December 11th a formal statement of defence was delivered, though the company's solicitor had never had an opportunity to see Adamson. On December 14th, 1935, the solicitor for the company wrote to Adamson, advising him of the steps which had been taken and pointing out that "we are defending this action under the provisions set forth in the policy between you and the Provident Assurance Company." On December 21st, 1935, the solicitor again wrote to Adamson, stating that he had had no communication from him. The letter proceeded:

> We would like your immediate attention to this matter and request that you get in touch with this office as soon as possible, as we require complete co-operation from you in the matter. It is our duty to point out to you now that if for lack of co-operation or any other reason that we have not yet learned, the liability as between the company and you is called into question, that anything we are now doing in defence of the action will not estop us from claiming over against you for anything we may have to pay, by reason of statutory obligation, or because of anything else affecting the contract of insurance, as between yourself and the company.
>
> Please telephone this office without delay for an appointment to go into this matter.

Notwithstanding the letter of December 21st, it was not until January 8th, 1936, that the company's solicitor saw Adamson for the first time. Adamson went into the solicitor's office that day at the exact hour fixed for Adamson's

examination for discovery as defendant in the action, although he had been asked to go half an hour earlier than the time fixed for the examination. The solicitor asked Adamson if there were any passengers in the car with him and he stated that he was alone in his car. The solicitor says that from Adamson's

> demeanour at the time, and also because I had reason to suspect that he had a man with him—that being the report I got—I warned him that it was a serious matter to go into the evidence on the examination for discovery, as he would be under oath.
>
> There was a silence followed during which he looked at me blankly. The next remark was that he would like to see his own solicitor and have him present at the examination for discovery if possible. I told him he could do that by all means and suggested that he telephone his solicitor from my office.

Adamson, after telephoning his own solicitor's office and finding his solicitor was out, then said he did not intend to go on with the examination for discovery until he had seen his own solicitor and asked him what would happen to him if he did not attend the examination after being served and paid the conduct money. Adamson refused to go on with the examination fixed for that day. Subsequently a motion to commit was launched by the solicitors for the plaintiff but this motion appears to have been adjourned from time to time, no doubt by consent of the solicitors for the parties, and the examination for discovery took place some weeks later, Adamson's own solicitor appearing with him.

On January 11th Adamson's personal solicitor called on the company's solicitor and gave the information that Adamson had had a couple of girls in the car. On January 13th Adamson, accompanied by his own solicitor, went to the office of the company's solicitor and gave a full statement. The company's solicitor immediately notified his client of these facts and, following the receipt of instructions from the company, wrote to Adamson on January 16th, 1936, denying liability under the policy of insurance and notifying Adamson that his firm would not continue the conduct of the defence.

> When we originally undertook your defence, we were unaware of the circumstances which we now propose to set up in denying our responsibility for indemnity.

The company's solicitor made inquiries regarding the two girls whose names had been given to him and found no one with the names given to him at the given addresses.

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On May 12th, 1936, Adamson's personal solicitor wrote the company's solicitor (following a telephone conversation between them) that the earlier addresses were incorrect and that the correct addresses were now being given. It was said that there was no intention on Adamson's part to mislead the company's solicitor in any way and that the wrong addresses were merely an error.

Following upon the letter of the company's solicitor to Adamson of January 16th, 1936, above referred to, the appellant company made application to the Master in Chambers to be added as a third party in the action by virtue of subsection (7) added to sec. 183*h* of *The Insurance Act* above set out; the order was refused on January 31st but that order was reversed by Middleton, J.A., on February 13th, 1936, and the appellant was added as a third party in the action. The settlement of the formal order of Mr. Justice Middleton did not take place until April 15th. Up until that time the name of the company's solicitor remained formally on the record as solicitor for Adamson.

The trial of the third party issue was a separate trial from that of the original issue in the action between the injured man, Marshall, and Adamson, though both issues were tried by the same judge, Mr. Justice McTague. The learned trial judge dismissed with costs the respondent's claim for indemnity (1). The judgment was reversed by a majority of the Court of Appeal for Ontario (2), which held that the appellant was bound to fully indemnify the respondent against the original judgment and costs.

In the meantime, as now appears to us from a reading of the appellant's factum though the matter was never mentioned to us during the argument, the appellant has paid $5,000 and costs to the plaintiff and the respondent has paid $1,500, the balance of the judgment.

The insurance company is now obviously in the position of having to claim the return of its money from the insured, Adamson, though no amendments have been made; in fact, nothing was said about this aspect of the case. The statement is only now noticed in the appellant's factum (to which no objection was taken by counsel for

(1) [1936] O.R. 394; [1936] 4 D.L.R. 383.

(2) [1937] O.R. 872; [1937] 4 D.L.R. 292.

the respondent) that the insurance company has paid to the plaintiff in the action $5,000 and costs "under the provisions of sec. 205 of *The Insurance Act.*". The question whether or not sec. 205 of *The Insurance Act,* R.S.O., 1937, chap. 256, really means that an insurance company has to pay, notwithstanding that there may be no liability to its insured, was not even mentioned by any of the counsel on the hearing of the appeal before us. That being so, for the purposes of this appeal we ought not to enter upon the rather difficult question that may be raised in some other case as to what is the proper interpretation of the section. Section 205 was the provision under which the appellant must have felt bound to pay the claimant. That section reads as follows:

205. (1) Any person having a claim against an insured, for which indemnity is provided by a motor vehicle liability policy, shall, notwithstanding that such person is not a party to the contract, be entitled, upon recovering a judgment therefor against the insured, to have the insurance money payable under the policy applied in or towards satisfaction of his judgment and of any other judgments or claims against the insured covered by the indemnity and may, on behalf of himself and all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied.

(2) No creditor of the insured shall be entitled to share in the insurance money payable under any such policy in respect of any claim for which indemnity is not provided by the policy.

(3) (i) No assignment, waiver, surrender, cancellation or discharge of the policy, or of any interest therein or of the proceeds thereof, made by the insured after the happening of the event giving rise to a claim under the policy, and

(ii) no act or default of the insured before or after such event in violation of the provisions of this Part or of the terms of the contract, and

(iii) no violation of the *Criminal Code* or of any law or statute of any province, state or country, by the owner or driver of the automobile,

shall prejudice the right of any person, entitled under subsection 1, to have the insurance money applied upon his judgment or claim, or be available to the insurer as a defence to such action.

(4) The insurer may require any other insurers liable to indemnify the insured in respect of judgments or claims referred to in subsection 1 to be made parties to the action and to contribute rateably according to their respective liabilities, and the insured shall, on demand, furnish the insurer with particulars of all other insurance covering the subject-matter of the contract.

(5) Where a policy provides for coverage in excess of the limits mentioned in section 202 or for extended coverage in pursuance of section 203, nothing in this section shall, with respect to such excess coverage or extended coverage, prevent the insurer from availing itself, as against any claimant, of any defence which the insurer is entitled to set up against the insured.

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(6) The insured shall be liable to pay or reimburse the insurer, upon demand, any amount which the insurer has paid by reason of the provisions of this section which it would not otherwise be liable to pay.

(7) Where an insurer denies liability under a motor vehicle liability policy it shall have the right upon application to the court to be made a third party in any action to which the insured is a party and in which a claim is made by any party to the action for which it is or might be asserted indemnity is provided by the said policy.

The minimum coverage provided for by sec. 202 is $5,000 for any one person but the policy in question was for an extended coverage, i.e., up to $10,000 for any one person.

For the purposes of this appeal, in view of the attitude taken by counsel for both parties, we shall assume that the real issue before us, as it was argued, is whether or not there was any liability upon the insurance company to indemnify Adamson in respect of the claim arising out of the accident, and, if there was not such liability, then order the respondent Adamson to repay to the appellant company the amount that the company paid to the plaintiff in satisfaction *pro tanto* of his judgment against Adamson.

The Court of Appeal attached considerable significance to the fact that statutory condition 11, found in R.S.O., 1927, chap. 222, sec. 175, was omitted from the statutory conditions as revised in 1932 and now appearing in R.S.O., 1937, chap. 256, sec. 188.

Statutory condition 11, which was omitted, read as follows:

Any fraud or wilfully false statement made under oath or in a declaration in relation to any of the above particulars shall vitiate the claim of the person making the declaration in any matter affected by such fraud or false statement.

But the effect of statutory condition 11 did not entirely disappear from the *Insurance Act*. A new and separate section of the Act was added in the revision of 1932 (22 Geo. V, chap. 25) and appears now in Revised Statutes of Ontario, 1937, as sec. 191. This provides:

191. (1) Where an applicant for a contract falsely describes the automobile to be insured, to the prejudice of the insurer, or knowingly misrepresents or fails to disclose in the application any fact required to be stated therein or where the insured violates any term or condition of the policy or commits any fraud, or makes any wilfully false statement with respect to a claim under the policy, any claim by the insured shall be rendered invalid and the right of the insured to recover indemnity shall be forfeited.

Two statutory conditions (sec. 188) relied upon by the appellant appear in and form part of the policy.

4. (1) The insured shall promptly give to the insurer written notice, with all available particulars, of any accident involving loss or damage to persons or property, and of any claim made on account of accident; shall verify by affidavit or statutory declaration, if required by the insurer, that the claim arises out of the operation or use of an automobile described in the policy and that the person operating or responsible for the operation of the automobile at the time of the accident is a person insured by the policy; and shall forward immediately to the insurer every writ, letter, document or advice received by him from or on behalf of the claimant.

(2) The insured shall not voluntarily assume any liability or settle any claim except at his own cost. The insured shall not interfere in any negotiations for settlement or in any legal proceeding but, whenever requested by the insurer, shall aid in securing information and evidence and the attendance of any witness, and shall co-operate with the insurer, except in a pecuniary way, in the defence of any action or proceeding or in the prosecution of any appeal.

The respondent's obligation under statutory condition 4 (1) was to give promptly to the insurance company "all available particulars" of the accident. That he did not do so is beyond question. He deliberately withheld particulars from the company for several months. I cannot imagine that any competent solicitor engaged in the practice of defending motor accident cases, given the full story and the surrounding facts and circumstances of this case as we now know them, would not at once have made every reasonable and proper effort to effect a settlement of the injured man's claim to avoid the submission of the story to a jury. It is admitted that the injured man did not know the facts until the examination of the respondent for discovery, which did not take place until several months after the accident. When the full story was known to the injured man, a settlement to the advantage of the respondent and his insurer would obviously become almost impossible in an action in which the injured man would be entitled to a jury. It is highly probable that a settlement of the claim could have been arrived at, at a moderate amount, had the claim been adjusted and settled at once, as it, no doubt, would have been had the insurance company been given promptly all available particulars.

The respondent's further obligation, under statutory condition 4 (2), was to co-operate with the insurer, except in a pecuniary way, in the defence of the action. The con-

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tention of the respondent, which was accepted by the majority of the Court of Appeal, was that there had been no failure to co-operate with the insurer in the defence of the action within the meaning of the policy. Counsel for the respondent put their submission in their factum this way:

> An admittedly false statement in a collateral matter made after the accident is retracted and corrected before the insurer had acted in any way upon it. Sufficient information had been supplied to enable the pleadings to be drawn without reference to the insured. Before the examination for discovery is held, the company is in possession of all the facts in ample time to prepare for the trial of the action. It is submitted that on any reasonable test this conduct does not constitute a "failure to co-operate in the defence of the action."

But "the defence of the action" necessarily involves in any practical construction or interpretation of the term the opportunity for an early and favourable settlement of the action. It is, in my view, far too narrow a construction to put upon this term of the policy that so long as the insured turns up at the trial, a year or so after the accident, and assists in the defence that he has fulfilled his obligation, notwithstanding such a course of conduct as the respondent adopted in this case during the first two or three months following upon the accident.

The respondent clearly violated a term or condition of the contract and by force of sec. 191 his claim was rendered invalid and his right to recover indemnity became forfeited.

The respondent, however, invokes the relieving provision, sec. 192 of *The Insurance Act*, R.S.O., 1937, ch. 256 (formerly sec. 178 as enacted 1932, ch. 25, sec. 2), which is as follows:

> Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss, and a consequent forfeiture or avoidance of the insurance in whole or in part, and the Court deems it inequitable that the insurance should be forfeited or avoided on that ground, the Court may relieve against the forfeiture or avoidance on such terms as it may deem just.

Here there was a deliberate failure on the part of the respondent to comply with the statutory conditions requiring him to give promptly all available particulars of the accident and to co-operate in the defence of the action. The learned trial judge exercised his discretion in declining to relieve against the forfeiture, and under all the circumstances of the case he was amply justified, in my view, in so doing, even if the conduct of the respondent

in this case could fairly be said to be merely "imperfect compliance" with the statutory conditions, which, under sec. 192, is the only ground upon which the court is given power to relieve.

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

CANNON J.—I would allow the appeal and restore the judgment of the trial judge with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Balfour, Drew & Taylor.*

Solicitors for the respondent: *Smith, Rae, Greer & Cartwright.*

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BANKRUPTCY—*Continued*

estate, attended 23 inspectors' meetings, and accepted the aforesaid dividends from that estate without protest. According to his evidence, he had at first assumed or believed that his securities were still on hand at the date of the brokers' bankruptcy, but learned to the contrary about the beginning of 1933. In November, 1936, he forwarded to M. an amended or additional claim in which there was substituted for the market value of some of his securities at the date of bankruptcy the market value thereof on the respective dates on which, according to respondent, they had been disposed of by the brokers prior to their bankruptcy, the respondent thus increasing his claim by $73,486.61. M. replied, in effect, that he had no power to entertain the amended claim. Treating this reply as the disallowance of a claim under s. 127 of the *Bankruptcy Act*, respondent appealed to the bankruptcy Judge, who dismissed his appeal ([1937] O.R. 559, at 559-561). On appeal, the Court of Appeal for Ontario ([1937] O.R. 559) held that he was entitled to rank as a creditor in respect of his amended claim (subject to settlement of its amount) and that debentures be issued for the additional amount thereof (subject to s. 76 of the *Bankruptcy Act*). From this judgment the present appeal was taken (by special leave under the *Bankruptcy Act*) to this Court. *Held* (Kerwin J. dissenting): The appeal should be allowed and the order of the Judge in Bankruptcy (declining to give effect to the amended claim restored. Sec. 76 of the *Bankruptcy Act* does not apply to a case such as this, where a creditor, having proved his claim in conversion on one basis of calculation (conversion at the date of bankruptcy), seeks in effect to withdraw his original proof and to substitute a proof for the same claim but on a different basis of calculation (conversion at the date of actual sales). It is doubtful if the discretionary power in the court under s. 163 (4) of said Act applies to the filing or amending of claims with the trustee. But the court has in bankruptcy an equitable jurisdiction to deal with matters of this sort. It could not be said that respondent was barred from his desired amendment on the ground of the doctrine of election. The evidence did not disclose that he had such knowledge of the facts when he filed his original claim as would put him to an election. But, in view of there having been so much delay and so much change of position in the course of administration of the brokers' estate between the date of bankruptcy and the date of filing the amended claim (nearly seven years); in view of circumstances which should have enabled respondent to obtain much earlier the information (as to the sales of his securities) which he had when he filed his amended claim; in view of the situation with regard to the new company (which after its bankruptcy could not properly issue more debentures, and, moreover, was not, as such company, before the court) and with regard to other creditors in similar position to respondent; and in view of all the facts and circumstances of the case, and bearing in mind that the allowance, under such or like facts and circumstances, of such amendments as that now sought might lead, in this case and in similar cases, to endless delays and confusion in the administration and distribution of stock brokerage bankruptcies, it must be said that the Judge in Bankruptcy had exercised a sound discretion in declining to give effect to the amended claim, and an appellate court was not justified (in the circumstances of the case) in interfering with his exercise of that discretion. *Per* Kerwin J. (dissenting): Sec. 76 of the *Bankruptcy Act* cannot be construed to prohibit under all circumstances a creditor who has filed a claim with a trustee in bankruptcy from withdrawing it and filing a new one or an amended one. Respondent was misled by the wording of M.'s statement aforesaid to such an extent that he filed a claim believing his securities were available; and this misunderstanding continued (justifiably, under the circumstances) until he ascertained the true facts about the beginning of 1933. Nothing that he did or omitted to do should debar him from making a new claim or filing an amended claim. His delay from the beginning of 1933 (when he ascertained that his securities were not on hand at the date of bankruptcy) to the date of filing his amended claim (during which period or part thereof he was considering his position, watching certain proceedings, and tracing sales of his securities) should not be held to debar him from amending, as the position of the trustee of the brokers' estate and that of the trustee of the new company's estate have not altered nor has either trustee been prejudiced in any way. It has been held in the Bankruptcy Court in Ontario (*In re Stobie, Forlong & Co.; ex parte Meyer Brenner*, 14 C.B.R. 405) that the bankruptcy of the new company did not prevent M. from certifying to a debt against the brokers when proved; and the trustee of the new company's estate still has assets on hand. The circumstance that there may be other creditors in a position similar to that of respondent cannot affect his rights. (*In re Safety Explosives Ltd.*, [1904] 1 Ch. 226, discussed. That case is not an authority applicable to the present ques-

CONTRACT — *Crown—Lunatics—Agency —Purchase of government life annuity by person of unsound mind and in poor health—His condition not known to government administering officials, but known to local postmaster through whom purchase price of annuity paid—Annuity paid to time of purchaser's death—Suit, after his death, to recover from the Crown the purchase price (less amount of annuity payments made)—Unfairness of the contract in purchaser's state of health—Imputability of postmaster's knowledge to the Crown—Government Annuities Act, R.S.C., 1927, c. 7, and regulations thereunder.*]—W. (the suppliant's husband) purchased from the Government of Canada a life annuity, paying therefor $10,000, the major portion of his assets. He was then 73 years old, in very poor health and of unsound mind, having fixed delusions against his wife and son, in pursuance of which delusions his purchase was made. His condition of health and mind was known by the local postmaster through whom said $10,000 was paid (who did not encourage W., rather, perhaps, tried to discourage him from his course), but was not known or suspected by the administering officers of the Crown. The contract was in the Government's usual terms and made on its behalf in the ordinary course of business. After seven monthly annuity payments, aggregating $882.49, had been paid to W., he died. The action was to recover the sum paid to the Crown. *Held* (Kerwin J. dissenting): The suppliant was entitled to recover $9,117.51 (the $10,000 less annuity payments made) with interest from date of the petition of right. Judgment of Maclean J., President of the Exchequer Court of Canada, [1937] Ex. C.R. 186, reversed. *Per* Duff C.J.: The contract, obviously improvident on W.'s part in his state of health, and made in his said mental condition, was one which a court of equity would not allow to stand if entered into between W. and any private person (e.g., an insurance company) having knowledge of the facts—the latter would be chargeable on equitable principles with fraud in the sense of taking an unconscientious advantage. The government officers would not be performing their duty to the Crown if they concluded a contract with an applicant for an annuity in circumstances which were such that, if they were acting in a private capacity, a court of equity would set aside the contract as one obtained by taking a fraudulent advantage of the purchaser's mental and physical weakness; and it would be their duty to the Crown not to retain the money paid for an annuity if before the execution of the contract it came to their knowledge that the intending purchaser had paid it in circumstances such as existed in this case. Having regard to the provisions of the *Government Annuities Act*, the regulations made thereunder, and the practice (as shewn in evidence) of the Government department administering the Act, the postmaster was an agent of the Crown in such a way that his knowledge of the facts should be imputed to the Crown (otherwise, *semble*, the suppliant would have been without a remedy); it was his duty to communicate to his superior officer, the Superintendent of Annuities, facts coming to his knowledge which would render it the duty of the Crown officers, as between them and the Crown, not to conclude the contract. The fact that the consideration, for which W. paid the sum sought to be recovered, had been fully enjoyed, did not, in the circumstances, bar the obtaining of restitution. The circumstance that a contract has been executed on both sides is not in itself a bar to relief in the case of fraud. Though the benefit of the chances of a long life for W. could not strictly be restored, yet that always was obviously illusory; complete restitution could be made as to the property which actually passed; and there was no obstacle in the way of effecting practical justice. The case comes within the principle of the judgments of Buckley L.J. and Bray J. in *Kettlewell* v. *Refuse Assce. Co.*, [1908] 1 K.B. 545, at 552; [1907] 2 K.B. 242, at 247, which seems to have been approved by the Lord Chancellor, [1909] A.C. 243, at 244, 245. The Crown cannot lawfully retain the money paid to its agent in the circumstances. *Per* Davis J.: Whether or not the local postmaster's knowledge could be imputed to the Crown, and assuming that the Crown had no knowledge of W.'s incapacity, yet on the facts of this case—an extraordinary one—the court is not powerless to give relief according to the manifest justice of the case. The contract was an unfair bargain—in the sense that no man with normal mentality, in W.'s physical condition, would have purchased the annuity, and no one, if he knew W.'s physical and mental condition, would honestly have entertained his application. No injustice would be done to the Crown if the moneys ($9,117.50) were returned. Though strictly the parties could not be placed *in statu quo*, yet the limitation in that regard as to the court's interference can have no practical application where the court is dealing only with a sum of money. It is not a case where

CRIMINAL LAW—*Continued*

3——*Offence of stealing a "post letter" from a "post office"—Meaning—Construction—Provincial "parliamentary post office"—Criminal Code, sections 6 and 324—Post Office Act, R.S.C., 1927, c. 161, ss. 2 (h, j, l), 4, 7, 35, 39, 101—Criminal Code, section 364.*]—The appellant was charged, under section 364 of the Criminal Code, with having stolen "une lettre dans le bureau de poste du Parlement" in the city of Quebec. He was found guilty and the conviction was affirmed by a majority of the appellate court—The appeal in this Court was as to whether the legislative post office was a "post office" within the proper construction of section 364 of the Criminal Code. *Held,* Duff C.J. and Davis J. dissenting, that the appeal should be allowed and the conviction quashed. *Per* Cannon J.—The control and responsibility of the Dominion post office authorities on the stolen letter ceased from the moment that it was delivered in the main post office to the representative of the provincial authorities.—In law, the letter was abstracted *after* it had been delivered to the duly constituted agents of the provincial authorities and it had passed out of the control of the Dominion post office: the abstraction took place when it was no more a "post letter" or "lettre confiée à la poste." *Per* Crocket J.—The parliamentary post office (bureau de poste du Parlement) was not a "bureau de poste" within the meaning of section 364 of the Criminal Code; and, also, the stolen letter was not a "lettre confiée à la poste" at the time of the theft in the sense of that expression as given in section 2 of the *Post Office Act.* The letter at that time was neither in a "post office" nor "being carried through the post," the Post Office Department's control and responsibility of and for it having ceased upon its delivery at the so-called "bureau de poste" which was officered and operated by appointees of the Provincial Government entirely at the latter's expense and over which neither the Quebec city post office nor the Post Office Department of Canada had any control. *Per* Kerwin J.—The parliamentary post office was not a "post office" within the meaning of section 2 (*l*) of the *Post Office Act.* A "post office" means any building * * * where any letter which may be sent by post is received * * * ; and it cannot have been intended that any letter which may be sent by post is *in* a post office unless it is *in* a building * * * which is under the control of the Postmaster-General as part of the postal service of Canada. Upon the evidence, the quarters in the Legislative Assembly building in Quebec, set aside by the provincial authorities cannot be said

CRIMINAL LAW—*Continued*

to be part of the postal service of Canada, even though what was done was by the consent or authority of the Postmaster-General. *Per* Duff C.J. and Davis J. (dissenting).—Upon the evidence and in view of the findings of the trial judge, the officials of the Parliamentary Post Office, in all their activities, in undertaking to receive, collect, send or deliver letters and in receiving, collecting, sending, delivering letters and having in possession letters for the purpose of so conveying and delivering them, were acting under the authority of the Postmaster-General. The Parliamentary Post Office was a post office established by the Postmaster-General in exercise of his powers (section 7) under the *Post Office Act,* and, therefore, a post office within the contemplation of section 364 of the Criminal Code. Accordingly, the letter in question in this case had not ceased to be a "post letter" within the meaning of that section when it was abstracted by the appellant. ROY *v.* THE KING..... **32**

4——*Appeal—Leave to appeal to Supreme Court of Canada—Criminal law—Conflict of judgments—Indictment—Formal charge in writing setting forth offence—Description of offence—Insufficiency—Conspiracy—Section 1025 Cr. C.*]—The appellants were charged with having conspired together and with others during a certain period and at named places "par la supercherie, le mensonge et d'autres moyens frauduleux, pour frauder le public et les porteurs d'obligations de la Cie Légaré * * *"; and they were convicted. The appellate court unanimously affirmed the conviction; and the appellants seek leave to appeal to this Court under section 1025 Cr. C. on the ground that the judgment intended to be appealed from conflicts with the judgment of some other court of appeal in a like case. *Held,* that the application should be refused. The judgment intended to be appealed from does not conflict with the decision of this Court in *Brodie* v. *The King,* ([1936] S.C.R. 188). In that case the accused were charged with having conspired together and with others, during a certain period and at a named place "thereby committing the crime of seditious conspiracy." In the present case, the accused are not charged with having committed a crime in the abstract like "murder" or "theft"; the offence is charged in such a way as to lift it from the general to the particular. Also, the judgment intended to be appealed from does not conflict with the decision in *The King* v. *Sinclair* ((1906) 12 C.C.C. 20). In that decision, the only matter determined, relevant to this application, was that the charge, with the particulars, did not disclose any offence under section

dence raised a sufficient doubt as to accused's guilt in respect of the charge of murder to require an acquittal on that charge. Crocket J., in view of the principle as to the question of provocation which he took to be clearly deducible from this Court's decision in *The King* v. *Manchuk*, [1938] S.C.R. 18, in view of the established fact that appellant, on his trial for murder of S., had been found guilty of manslaughter only, and in view of the circumstances attending the killing of S. and Mrs. S., and it being quite apparent (as he held) that appellant in attacking Mrs. S. was acting upon the same impulse as that which caused him to attack S., was strongly inclined to agree with the reasoning of the dissenting judges in the Court of Appeal on the applicability of the principles of *res judicata*. As to the order that ought to be made by this Court: *Per* Duff C.J., Cannon, Davis, Kerwin and Hudson JJ.: It was clear that the jury must have been satisfied of the facts necessary to constitute manslaughter; and the Court of Appeal would have authority under s. 1016, *Cr. Code*, to substitute a verdict of manslaughter for the verdict of the jury and to pronounce sentence upon appellant (*Rex* v. *Hopper*, [1915] 2 K.B. 431). By force of s. 1024, *Cr. Code*, coupled with the enactments of the *Supreme Court Act* (R.S.C., 1927, c. 35), this Court has authority, not only to order a new trial, or to quash the conviction and direct the prisoner's discharge, but also to give the judgment which the Court of Appeal was empowered to give in virtue of s. 1016 (2), *Cr. Code*. Under the exceptional circumstances of the case the last mentioned course is the proper one. The conviction should be set aside, a verdict of manslaughter substituted for the jury's verdict and appellant sentenced to imprisonment for life. *Per* Crocket J. (dissenting on this point): Considering the proceedings already undergone and in the anomalous circumstances of the case, justice would best be served by quashing the present conviction absolutely. Further, there is no doubt as to this Court's right to quash the conviction; there may be some doubt as to its right to enter a judgment which necessarily involves its rendering a verdict in a criminal case and passing sentence upon it; the wisdom of the latter course is very doubtful; it would signalize an entirely new departure in the exercise of the jurisdiction of this Court in criminal cases. MANCHUK *v.* THE KING..... **341**

6——*Evidence—Conviction at trial for murder—Verdict resting solely on circumstantial evidence—The facts not inconsistent with rational finding of accused's innocence—Common law rule—On appeal, conviction quashed and acquittal ordered.*] —By the long settled rule of the common law—a rule by which courts in Canada are governed and which they are bound to apply—where a jury's verdict rests solely upon a basis of circumstantial evidence, the jury, before finding an accused guilty, must be satisfied not only that the circumstances are consistent with a conclusion that the criminal act was committed by the accused, but also that the facts are such as to be inconsistent with any other rational conclusion than that the accused is the guilty person. *Held*, in the present case (where the jury found accused guilty upon an indictment for murder), that the facts adduced had not the degree of probative force that is required to satisfy the test formulated by said rule; and the trial judge, on the application made by accused's counsel, should have told the jury that in view of the dubious nature of the evidence it would be unsafe to find the accused guilty, and have directed them to return a verdict of acquittal. Judgment of the Court of Appeal for Ontario, [1938] O.R. 200, quashing conviction and ordering accused's acquittal, affirmed. THE KING *v.* COMBA..... **396**

7——*Indictment attacked as bad for multiplicity—Several matters stated in alternative—Cr. Code, s. 854—Charge under s. 193 (3) of Customs Act, R.S.C., 1927, c. 42, and amendments—Form of verdict.*] —Appellants were charged and convicted on an indictment that they "did * * * assist or were otherwise concerned in the importing, unshipping, landing or removing or subsequent transporting or in the harbouring of goods liable to forfeiture under the Customs Act, to wit: spirituous liquors of a value for duty of over" $200, contrary to s. 193 (3) of said Act, R.S.C., 1927, c. 42, and amendments. The indictment was attacked on the ground that it was bad for multiplicity, in that appellants were charged with several offences in the alternative in the one count. *Held:* The attack on the indictment failed. Appellants were not charged with any one of the offences of "importing," "unshipping," etc. They were charged with an offence created by s. 193 of the *Customs Act*, which creates a substantive offence, and the guilt of a person charged thereunder depends in no degree whatever upon the fact or otherwise that the acts in which such person is concerned are themselves offences. S. 854 of the *Cr. Code* applies. *Held*, also, that the form of the jury's verdict, finding accused "guilty of harbouring only," was unobjectionable when read in connection with the indictment and the trial judge's charge. Judgment of the Supreme Court of Nova Scotia *in banco*, 12 M.P.R. 483, sustain-

CRIMINAL LAW—*Continued*

10——*Evidence—Trial for murder—Evidence of previous quarrels between accused and deceased with accompanying assaults by accused—Admissibility.*]—The accused (respondent) was convicted at trial of the murder of H., a girl living near his home and with whom he had been "keeping company" for some time. On March 30, 1938, accused and H. were seen together and later on that day H. was found suffering from injuries from which she died. Evidence was given of statements by accused, after the alleged attack, that he had killed H. with a hammer, that he was "awful jealous of her," that he took her home the night previous and "afterwards she ran out with another fellow." Evidence was given, against objection, of previous quarrels between accused and H. and accompanying assaults upon H. by accused, one such incident occurring shortly before Christmas, 1937, one in January, 1938, and one about a week before said March 30, 1938. The Appeal Division of the Supreme Court of New Brunswick (Harrison J. dissenting) directed a new trial, on the ground that evidence of previous assaults by accused upon H. was improperly admitted (13 M.P.R. 203). The Crown appealed. *Held* (Kerwin and Hudson JJ. dissenting): The appeal should be dismissed. *Per* Duff C.J., Rinfret and Davis JJ.: The Crown's case was that accused had killed H. in a fit of jealous passion aroused by her conduct with another man. The evidence definitely negatived any connection between this other man and the earlier incidents now in question; and wholly failed to present any facts from which the jury could properly infer that there was any connection of such earlier incidents with accused's objection to H.'s associating with other men; or that such incidents were the result of enmity or ill-will on accused's part; they were transient ebullitions of annoyance and anger which immediately passed away and led to nothing; in their physical characteristics they had no real similarity to the attack of March 30. Where there are acts seriously tending, when reasonably viewed, to establish motive for a crime, evidence of such acts is admissible, not merely to prove intent, but to prove the fact as well; but it is important that courts should not slip into a habit of admitting evidence which, reasonably viewed, cannot tend to prove motive or to explain the acts charged, merely because it discloses some incident in the history of the relations of the parties. The incidents in question did not appear to be such that they could reasonably be regarded as evidencing feelings of enmity or ill-will which could have been the motive

CRIMINAL LAW—*Continued*

actuating the homicide charged. A quarrel might, in its incidents or circumstances or in its relation to other facts in evidence, have such a character as to entitle the jury to infer motive and intention and state of mind, even in the absence of verbal declaration; while, on the other hand, such an occurrence or series of occurrences might be so insignificant as to leave nothing for the jury to interpret and to afford no reasonable basis for a relevant inference adverse to the accused. The facts in each case must be looked at, and if, reasonably viewed, they have no probative tendency favourable to the Crown or adverse to the accused in respect of the issue joined between them, the evidence should be excluded. *Rex* v. *Bond,* [1906] 2 K.B. 389, at 397, 401, *Rex* v. *Ball,* [1911] A.C. 47, at 68, and other cases, referred to. *Theal* v. *The Queen,* 7 Can. S.C.R. 397, on its facts has no resemblance to the present case. *Per* Kerwin J. (dissenting): The intent of accused was directly in issue (*Cr. Code,* s. 259 (*b*) referred to), and it was for the Crown to adduce evidence thereon. There was a definite connection between the accused's acts accompanying said quarrels and the issue as to accused's intent in inflicting the injuries on March 30; the evidence of those acts was relevant to that issue as indicating a jealous disposition on accused's part and as evidence of his motive. The jury was entitled to take those matters into consideration in conjunction with the other evidence, and the probative value was not so slight that the evidence as to any of the quarrels was inadmissible. *Rex* v. *Bond,* [1906] 2 K.B. 389, at 397, 400, 401, *Rex* v. *Ball,* [1911] A.C. 47, at 68, *Rex* v. *Shellaker,* [1914] 1 K.B. 414, *Rex* v. *Chomatsu Yabu,* 5 West. Australian L.R. 35, and other cases, referred to. *Per* Hudson J. (dissenting): The onus was on the Crown to establish that accused killed H. and that he did it with malice. To satisfy that onus, recourse to circumstantial evidence was necessary. Evidence of the previous relations of the parties, including evidence of their quarrels and how they then behaved towards each other, was relevant on the issue of malice as that issue is explained in *Woolmington* v. *The Director of Public Prosecutions,* [1935] A.C. 462, at 482. The evidence being relevant to an issue, it should not be excluded merely on the ground that it disclosed some other crime or offence of a similar nature committed by accused (*Makin* v. *Attorney-General of New South Wales,* [1894] A.C. 57; *Rex* v. *Bond,* [1906] 2 K.B. 389). THE KING *v.* BARBOUR **465**

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store in Winnipeg, Manitoba. During the descent, the infant plaintiff fell and caught his hand between the side of the moving steps and the unmoving side wall of the escalator, the hand remaining caught while he was carried to the bottom of the escalator and until after the escalator was stopped. Plaintiffs alleged (*inter alia*) that the escalator was negligently constructed and maintained. Evidence was given at the trial of inspections of the escalator by Government inspectors and of the granting of permits to operate it, under the provisions of the *Elevator and Hoist Act*, Man., 1919, c. 31, and regulations thereunder. Certain permits issued, with certificates thereon of re-inspection, were, against objection by plaintiffs' counsel, admitted in evidence. It was further shown that on the morning after the accident a government inspector had made a further inspection, and a statement in his report thereon, that "the escalator was in good order and in perfect control" was, against objection by plaintiffs' counsel, read to the jury. After the evidence at the trial had been completed, the judge and jury went to the store and took a view of the escalator both at rest and in operation. It was admitted that it was then in the same condition as at the time of the accident. Following the judge's charge the jury brought in a verdict denying negligence in defendant, and the action was dismissed. On appeal, the Court of Appeal for Manitoba (44 Man. R. 256) ordered a new trial, on the ground that the permits, and the inspector's report after the accident, had been improperly admitted in evidence, and further that part of the judge's charge to the jury amounted to misdirection in law. Defendant appealed to this Court. *Held* (Crocket J. dissenting): The appeal should be dismissed. *Per curiam:* The escalator was within the provisions of said *Elevator and Hoist Act*, and the said permits put in evidence were relevant and admissible. *Per* Duff C.J., Davis, Kerwin and Hudson JJ.: The statement read to the jury from the inspector's report after the accident was not admissible; its use was not justified under s. 31 of the *Manitoba Evidence Act* (Man., 1933, c. 11). Further, there was misdirection in the trial judge's charge to the jury, in that he did not sufficiently differentiate the defendant's duty to a small child from its duty towards an adult, and, on the contrary, led the jury to believe that there was some duty to take care incumbent upon the child. *Per* Duff C.J. and Davis J.: Having regard to the facts that, upon the evidence and the law, the child was not a trespasser, he was permitted to use the escalator, and on account of his age was

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incapable of negligence, the trial judge's charge to the jury beclouded the child's legal position. Further, there should have been put clearly and fully to the jury the question as to the defendant's reasonable care, in permitting the child to use the escalator, in permitting such use without an attendant of defendant being present and without some means of immediately stopping the escalator when the child fell and got his hand caught. The real problem in the case was not put to the jury. *Per* Duff C.J.: On the issue raised by the allegation of negligence in construction and maintenance of the escalator, defendant was entitled to show compliance with the government regulations; and it is impossible to say that the facts of inspection and the issue of permits in the usual way had not some relevancy to that issue; further, even if the government department charged with the administration of the *Elevator and Hoist Act* had been in error in proceeding upon the footing that escalators are within the contemplation of the Act, nevertheless the facts of inspection and issue of permits by the department, in accordance with the duty imposed upon it under the departmental construction of the Act, would be equally relevant to the said issue. As to the inspector's report on inspection after the accident; It is plainly not a public document within Lord Blackburn's exposition in *Sturla* v. *Freccia*, 5 App. Cas. 623; and it is not made evidence by s. 31 of the *Manitoba Evidence Act*. No copy of entry should be received in evidence under s. 31 unless the proof offered identifies the book or other record in which the entry appears in such a manner as to enable the court to see clearly that the entry is one within the purview of the enactment. Further, only by a forced and non-natural reading of s. 31 can it be made to comprehend such a document as that in question; to admit the document as evidence of the facts of which it speaks, would give to s. 31 such a scope as to accomplish, in respect of documents on file in offices connected with any of the public services of the country, a fundamental change in the rules and principles of evidence. Enactments of the character of s. 31, which introduce a general exception to the rules of evidence, depriving the parties to legal proceedings of the usual safeguards in respect of evidence, should be strictly limited in their application to cases which are unmistakeably within their real intendment as well as within the literal meaning of the words employed. *Per* Crocket J. (dissenting): From the evidence, the only possible ground upon which the jury could have attributed the child's injury

erty (*pactum displicentiae*) in case the vendor failed to redeem the property. The trial judge and the appellate court held that it could not be said that the parties intended that there should be an irrevocable sale once the purchase price was not reimbursed within the stipulated delay; and that the instrument was not in its true character an alienation subject to the right of redemption but a pledge of immovables. *Held,* that the judgment of the appellate court (Q.R. 63 K.B. 291) should be affirmed. The fact that a lender is making use of the *vente à réméré* in order the better to secure himself is not necessarily in itself incompatible with the validity of the transaction as such a sale; and the contract may also contain stipulations for the protection of the creditor so long as they are not inconsistent with the essential nature of this particular type of contract (*Salvas* v. *Vassal,* 27 S.C.R. 68 and *The Queen* v. *Montminy* 484); but it is essential that there be alienation and that the title of the alienee be, by the true intendment of the transaction, to be absolute if the price is not reimbursed within the time stipulated therefor; and, from the instrument itself in this case, the parties to the deed had no intention of so stipulating. LA COMPAGNIE D'ASSURANCE SUR LA VIE "LA SAUVEGARDE" *v.* AYERS..... **164**

2—*Automobile—Defect in the construction of the car—Latent defect—Rain leaking through side windows—Warranty—Car to be free from defects in material and workmanship—Limited to making good any defective part—Repairs unsatisfactory to buyer—Action for annulment of contract and reimbursement of purchase price—Redhibitory action—Restitutio in integrum—Car used before institution of action—Articles 1065, 1087, 1088, 1506, 1507, 1522, 1526, 1527, 1530 C.C.*]—The respondent purchased an automobile from the appellant, which was delivered on the 30th of May, 1934. In the early part of June, the respondent noticed while driving that the small side windows in the back of the car permitted rain to leak through into the car. The respondent advised at once the appellant of that defect and the latter undertook to put the car into good order immediately. From June to October, 1934, frequent interviews occurred and correspondence was exchanged between the parties, in consequence of which the car was, on several occasions, handed over to the appellant who attempted to remedy the condition by sealing those windows with a rubber compound, but with no satisfactory result. On the 10th of October, 1934, the respondent tendered the car back to the appellant and on the

15th of October brought the present action asking for the annulment of the contract and for the reimbursement of the purchase price. The contract between the appellant and the respondent contained the following clause: "the motor vehicle * * * * is purchased * * * subject to the clause of the manufacturer's warranty endorsed in this contract * * * and this is the sole warranty, expressed or implied * * *"; and the manufacturer's guarantee was in these words: "The manufacturer warrants each new motor vehicle manufactured by it, to be free from defects in material and workmanship under normal use and service, its obligation under the warranty being limited to making good * * * any part or parts thereof * * * which have been defective; this warranty being expressly in lieu of all other warranties expressed or implied and of all other obligations or liabilities on its part * * *" *Held,* Davis J. dissenting, that the respondent's action, asking for the annullment of the contract and the reimbursement of the purchase price, was well founded. *Per* The Chief Justice.—In view of special circumstances and facts of this case, and especially of the correspondence (recited in the judgment) exchanged between the parties, the defendant's appeal to this Court should be dismissed.—As to the appellant's claim made in his plea for compensation in respect of deterioration or in respect of the use of the automobile for a certain period, such claim should not be allowed in view of the above circumstances, and more particularly of those contained in the considérant (recited in the judgment) forming part of the decision of the appellate court, which disallowed such claim. *Per* Cannon and Kerwin JJ.—The respondent was entitled to claim the cancellation of the sale and the reimbursement of the purchase price, as the appellant had failed to perform his own obligation to repair the defect found in the car sold. In a bilateral contract, each party must fulfil his own obligation in order to be able to demand the integral execution of the contract by the other party (art. 1065 C.C.). *Per* Cannon and Kerwin JJ.—The appellant must be presumed to have known the latent defect of the thing sold and is therefore guilty of fault from the date of the delivery of the car. It is during the time that the appellant has tried to put the car in good order that it has been used by the respondent and the appellant must suffer any loss that may have resulted from such use. *Per* Davis J. dissenting.—The special warranty as stipulated in the contract was valid by force of article 1507 C.C. and it excludes the application of article 1526

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disposition in question was void upon any particular rule or principle established by judicial decision. Therefore, taking the most liberal view of the jurisdiction of the courts, there were at least two conditions which must be fulfilled to justify refusal, on grounds of public policy, to give effect to a rule of law according to its proper application in the usual course in respect of a disposition of property. These conditions are: (1) That the "prohibition is imposed in the interest of the safety of the State, or the economic or social well-being of the State and its people as a whole. It is therefore necessary * * * to ascertain the existence and the exact limits of the principle of public policy contended for, and then to consider whether the particular contract [or disposition] falls within those limits" (*Fender* v. *Mildmay, supra,* at 414); (2) "That the doctrine should be invoked only in clear cases, in which the harm to the public substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds" (*ibid,* at 407; as to this condition, see also *Egerton* v. *Brownlow,* 4 H.L.C. 1, at 197, *Rodriguez* v. *Speyer,* [1919] A.C. 59, at 135-136, and *Fender* v. *Mildmay, supra,* at 436). In the present case it could not be affirmed that such conditions were fulfilled. It is not sufficient to say that some people may be, or probably would be, tempted by the hope of obtaining the legacy to conduct themselves in a manner injurious to wife and children. (*Egerton* v. *Brownlow, supra,* at 24-26, 85, 86, 126-128). *Per* Crocket J. (who agreed with the result in the present case): There is no generally accepted rule of law restricting the long recognized and salutary right and duty of the courts to

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refuse to enforce any and all contracts and testamentary dispositions of property regularly brought before them for adjudication, which they on sound judicial grounds find to be contrary to public policy in the sense of tending to subvert the public good. The judicial application to contracts and dispositions of property of the principle against contravention of public policy is not limited to contracts or dispositions which contravene the statute law or only those heads of public policy which are recognized by past decisions or to cases which clearly fall within the purview of those decisions. It is the courts' right and duty to bring their own judgment to bear upon the question propounded for their adjudication as to whether or not the purpose of a particular contract or disposition of property contravenes the public good. Nor is "substantial incontestability" as regards harm to the public a necessary condition of a ground of public policy for the exercise by the courts of their right to hold invalid contracts or dispositions of property on such ground. (Discussion of authorities and judicial dicta). IN THE MATTER OF THE ESTATE OF CHARLES MILLAR, DECEASED 1

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