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Supreme Court of Canada

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JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

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

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

SOLICITORS-GENERAL FOR THE DOMINION OF CANADA:
The Honourable Joseph Jean K.C.
The Honourable Hugues Lapointe.

ERRATA
in Volume 1950

Page 81, at line 28 of head note, for "s. 46" read "s. 36".

Page 103, at line 25, for "cap. 40" read "cap. 34".

Page 265, at line 41, for "206" read "294".

Page 323, at line 9, after "Revision" add "Dubeau v. Ducharme".

Page 323, at line 21, for "(1)" read "(4)".

Page 323, at line 33, for "(2)" read "(5)".

Page 323, fns. (1) and (2) on right hand side of the page should read (4) and (5) respectively.

Page 343, fn. (1) should read (2).

Page 343, fn. (2) should read (1).

Page 349, fn. (2) should read: "[1934] S.C.R. 403".

Page 430, at line 30 of head note, for "rebuttal" read "rebuttable".

Page 451, at line 21, for "A.C. Virtue" read "A. G. Virtue".

Page 474, fn. read L. R. 2 Sc. & Div. 273.

Page 675, at line 26 delete the word "ne".

NOTICE

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

Boiler Inspection and Insurance Co. v. *Sherwin-Williams Co.* [1950] S.C.R. 187. Petition for special leave to appeal granted, 24th April, 1950.

Canadian Federation of Agriculture v. *Attorney General for Quebec* [1949] S.C.R. 1. Appeal dismissed, 16th October, 1950.

Glover v. *Glover* (not reported). Appeal allowed with costs, 27th November, 1950.

K.P.V. Co. Ltd. v. *McKie and Others* [1949] S.C.R. 698. Petition for special leave to appeal dismissed with costs, 12th January, 1950.

Martin v. *Duffell* [1950] S.C.R. 737. Petition for special leave to appeal dismissed with costs, 23rd October, 1950.

McKee v. *McKee* [1950] S.C.R. 700. Leave to appeal granted, 24th July, 1950.

Minerals Separation v. *Noranda Mines* [1950] S.C.R. 36. Petition for special leave to appeal granted, 18th July, 1950.

Montreal, City of, v. *Sun Life Ass. Co.* [1950] S.C.R. 220. Petition for special leave to appeal granted, 19th June, 1950.

Necker v. *Ross* [1948] S.C.R. 526. Petition for special leave to appeal *in forma pauperis* dismissed, 16th October, 1950.

Reeder v. *Shnier & Company* (not reported). Appeal allowed with costs, 9th October, 1950.

UNREPORTED JUDGMENTS OF THE SUPREME COURT OF CANADA

In addition to the judgments reported in this volume, the Supreme Court of Canada, between the 1st of December, 1949, and the 16th of December, 1950 delivered the following judgments, which will not be reported in this publication:*

Adam v. *Campbell* (Ont.): Not reported. Appeal allowed and judgment directed to be entered for appellants against respondent for $2,850. Appellants are entitled to their costs throughout, Kerwin J. dissenting, 6th June, 1950.

*NOTE:—Some judgments delivered in October and November, 1950, will be reported in the 1951 volume of the Reports.

Belanger v. *Paquet*, Q.R. [1949] K.B. 388. Appeal dismissed with costs, 3rd March, 1950.

B.C. Electric Ry. Co. v. *Clarke* [1949] 4 D.L.R. 351. Appeal dismissed with costs, 25th April, 1950.

Chesney v. *Anderson et al* [1949] 2 W.W.R. 337; 4 D.L.R. 71. Appeal dismissed with costs, 1st June, 1950.

Dawe v. Woods [1950] O.W.N. 6. Appeal dismissed with costs, Kellock and Estey JJ. dissenting, 3rd October, 1950.

Donnelly v. *McManus Petroleum Ltd.* [1949] O.R. 374. Appeal dismissed with costs, 5th December, 1949.

Donovan v. *Toronto Transportation Commission and Hodgins* [1949] O.W.N. 723. Appeal allowed and new trial directed. Appellant entitled to her costs in this Court and in the Court of Appeal. The costs of the first trial will be disposed of by the judge presiding at the second trial, 6th June, 1950.

Fick v. *B.C. Electric Ry. Co.* [1950] 1 W.W.R. 728. Appeal allowed and cross-appeal dismissed, both with costs. Judgment directed to be entered for appellant for $13,273, with full costs of the action. Respondent entitled to its costs of the appeal to the Court of Appeal. Taschereau and Cartwright JJ. would have restored the judgment at the trial with costs throughout, 23rd June, 1950.

Gurski v. *Alder* Q.R. [1949] K.B. 767. Appeal dismissed with costs, 1st June, 1950.

Lever v. *Dawes* [1950] 1 D.L.R. 643. Appeal dismissed with costs, 1st May, 1950.

Minister of Roads for Quebec v. *C.N.R. and Price Bros. Ltd.* 62 C.R.T.C. 237. The question submitted to the Court for hearing and consideration, pursuant to leave granted by the Board of Transport Commissioners, is answered in the affirmative. By agreement there will be no costs, 25th April, 1950.

Montreal Tramways v. *Meschler* Q.R. [1948] K.B. 423. Appeal allowed and judgment of the trial judge restored with costs both here and in the Court of King's Bench (Appeal Side), 5th December, 1949.

Moodie (J. R.) Co. Ltd. v. *Minister of National Revenue* (Ex.): Not reported. Appeal dismissed with costs, 30th January, 1950.

Pannenbecker v. *Dist. of Starland No. 47* (Alta.): Not reported. Appeal dismissed with costs, 13th October, 1950.

Ratté v. *Potato Distributors Ltd.* Q.R. [1949] K.B. 75. Appeal dismissed with costs, 5th December, 1949.

Toronto Transportation Commission v. *Rosenberg* [1949] O.R. 658. Appeal allowed and judgment at the trial restored. Respondent will have his costs of the appeal to the Court of Appeal and there will be no costs of his motion before that Court to vary the judgment at the trial. Appellants are entitled to their costs of the appeal to this Court, 23rd June, 1950.

Winnipeg Electric v. *Starr* [1949] 4 D.L.R. 692. Appeal allowed and the action as against appellants dismissed. Judgment of the Court of Appeal for Manitoba set aside in so far as it directs that damages be

paid by appellants to respondent Starr. That judgment stands so far as it awards respondent $7,814.16 against the other defendants, William and Nickolos Gerelus, together with costs of and incidental to the trial of this action in the Court of King's Bench, including costs of the examination for discovery. Clause 3, apportioning liability between appellants and the two Gerelus, deleted, and clause 4 amended so as to provide that respondent recover only from the Gerulus the costs of and incidental to the appeal to the Court of Appeal. Appellants entitled to their costs throughout against respondent, those of the action in the sum of $200, the amount fixed by the trial judge. Cartwright J., dissenting, would have dismissed the appeal with costs, 30th March, 1950.

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THE SUPREME COURT OF CANADA

23rd March, 1950.

It is hereby ordered, pursuant to the powers conferred by section 104 of the Supreme Court Act (R.S.C. 1927, ch. 35, as amended by S.C. 1949, 2nd Session, ch. 37), that as of the first day of May, 1950:

1. Rule 11 is repealed and replaced by the following:—

11. The case shall be printed by the party appellant, and twenty copies thereof shall be deposited with the Registrar for the use of the judges and officers of the Court, except in the case of a Reference where thirty copies shall be provided.

2. Rule 29 is repealed and replaced by the following:—

29. At least fifteen days before the first day of the session at which the appeal is to be heard, the parties appellant and respondent shall each deposit with the Registrar, for the use of the Court and its officers, twenty copies of his factum or points for argument in appeal, except in the case of a Reference where thirty copies shall be provided.

3. Rule 54 (3) is repealed and replaced by the following:—

54. (3) When a motion is returnable before the Court, ten copies of the notice of motion and of the affidavits and material referred to in subsection 2, properly indexed, shall be filed for the use of the Court at least two clear days before the motion is heard.

4. Rule 65 is repealed and replaced by the following:—

65. Criminal appeals may be heard on a printed or typewritten case certified under the seal of the Court appealed from and in which case shall be included all judgments and opinions pronounced in the Courts below. The appellant shall also file ten typewritten or printed copies of the case, and the appellant and respondent shall each file ten copies of a memorandum of the points for argument, except in so far as dispensed with by the Registrar.

(2) In appeal in *habeas corpus* cases under section 57 of the Act, a printed or typewritten case containing the material before the Judge appealed from, and the judgment of the said Judge, together with a memorandum of the points for argument of appellant and respondent, except in so far as dispensed with by the Registrar, shall be filed, and ten copies of such case and memorandum shall be deposited with the Registrar.

5. The following Rule 142 is added to the Rules:—

142. (1) Upon a motion a judge may make an order granting an appellant leave to appeal *in forma pauperis*. Such application shall be accompanied by an affidavit from the appellant stating that he is not worth five hundred dollars in the world

excepting his wearing apparel and his interest in the subject-matter of the intended appeal and that he is unable to provide security, and also by a certificate of counsel that the appellant has reasonable grounds of appeal.

(2) Where an appellant obtains leave to appeal *in forma pauperis,* he shall not be required to give security as provided by section 70 of the Act or to pay any fees to the Registrar.

(3) Upon motion a judge may make an order granting a respondent leave to defend an appeal *in forma pauperis.* Such application shall be accompanied by an affidavit from the respondent stating that he is not worth five hundred dollars in the world excepting his wearing apparel and his interest in the subject-matter of the appeal.

(4) In taxing the bill of costs of any one in whose favour an order shall have been made under this Rule, the Registrar shall not allow any counsel fees but shall tax only out-of-pocket expenses and three-eighths of the usual professional charges under the other items of the tariff, including the application upon which leave to appeal or defend *in forma pauperis* was granted.

6. The Tariff of Fees contained in Form I set out in the Schedule to these Rules is amended by inserting after the sixth line on page twenty-six the following item:—

"Counsel fee on the cross-examination of a deponent under Rule 58, in the discretion of the Registrar up to.....$50.00

Subject to be increased in special circumstances by order of the Court or a Judge in Chambers."

(Signed) T. RINFRET, C.J.C.
" P. KERWIN, J.
" ROBERT TASCHEREAU, J.
" I. C. RAND, J.
" R. L. KELLOCK, J.
" J. W. ESTEY, J.
" C. H. LOCKE, J.
" J. R. CARTWRIGT, J.
" GÉRALD FAUTEUX, J.

COUR SUPRÊME DU CANADA

le 23 mars 1950.

En vertu des pouvoirs conférés par l'article 104 de la Loi de la Cour suprême (ch. 35 des S.R.C. de 1927, modifié par le ch. 37 des Statuts du Canada de 1949 (2e session)), il est par les présentes ordonné que les dispositions suivantes entrent en vigueur le 1er mai 1950:

1. La règle 11 est abrogée et remplacée par la suivante:

"11. L'Appelant doit faire imprimer le dossier et en déposer vingt exemplaires au bureau du registraire, à l'usage des juges et fonctionnaires de la cour, sauf dans le cas d'une référence où le nombre d'exemplaires est de trente".

2. La règle 29 est abrogée et remplacée par la suivante:

"29. Au moins quinze jours avant le premier jour de la session pendant laquelle l'appel doit être entendu, l'appelant et l'intimé doivent chacun déposer au bureau du registraire, à l'usage de la cour et de ses fonctionnaires, vingt exemplaires de leur factum ou de leurs motifs de discussion en appel, sauf dans le cas d'une référence où le nombre d'exemplaires est de trente."

3. La règle 54 (3) est abrogée et remplacée par la suivante:

"54. (3) Dans le cas d'une motion dont la connaissance est réservée à la cour, dix copies de l'avis de motion et des affidavits et pièces mentionnés au paragraphe 2, avec un index approprié, seront produites, à l'usage de la Cour, au moins deux jours francs avant l'audition de la motion".

4. La règle 65 est abrogée et remplacée par la suivante:

"65. Les appels en matière criminelle peuvent être entendus sur un dossier imprimé ou dactylographié et certifié sous le sceau de la cour dont le jugement est porté en appel, lequel dossier doit renfermer tous les jugements et opinions prononcés par les tribunaux inférieurs. L'appelant doit aussi produire dix exemplaires dactylographiés ou imprimés du dossier, et l'appelant et l'intimé doivent produire chacun dix exemplaires d'un mémoire des motifs de discussion, sauf dans la mesure où le registraire en accorde la dispense.

(2) Dans les appels en matière d'*habeas corpus* prévus à l'article 57 de la loi, il est produit un dossier imprimé ou dactylographié, renfermant les pièces qui se trouvaient devant le juge dont la décision est portée en appel, ainsi que le jugement dudit juge et un mémoire des motifs de discussion de l'appelant et de l'intimé, sauf dans la mesure où le registraire en accorde la dispense, et dix exemplaires desdits dossier et mémoire doivent être déposés au bureau du registraire."

5. Est ajoutée la règle suivante, à titre de règle 142:

"142. (1) Sur motion, un juge peut rendre une ordonnance accordant à un appelant l'autorisation d'introduire un pourvoi *in forma pauperis*. Cette requête doit être accompagnée d'un affidavit de l'appelant dans lequel celui-ci déclare qu'il ne possède pas cinq cents dollars, à l'exception de ses vêtements et de son intérêt dans l'objet de l'appel projeté, et qu'il est incapable de fournir un cautionnement, ainsi que d'un certificat d'avocat portant que l'appelant a des motifs raisonnables d'appel.

(2) Un appelant qui obtient l'autorisation d'introduire un pourvoi *in forma pauperis*, n'est pas tenu de fournir le cautionnement visé par l'article 70 de la loi ni de verser des honoraires au registraire.

(3) Sur motion, un juge peut rendre une ordonnance accordant à un intimé l'autorisation de défendre dans un appel *in forma pauperis*. Cette requête doit être accompagnée d'un affidavit de l'intimé dans lequel celui-ci déclare qu'il ne possède pas cinq cents dollars, à l'exception de ses vêtements et de son intérêt dans l'objet de l'appel.

(4) En taxant le mémoire de frais de la personne en faveur de qui une ordonnance a été rendue selon la présente règle, le registraire ne doit pas admettre d'honoraires d'avocat. En l'occurrence, il ne doit taxer que les débours et trois huitièmes des frais professionnels ordinaires qui relèvent des autres postes du tarif, y compris la requête sur laquelle on a accordé l'autorisation d'appeler ou de défendre *in forma pauperis*."

6. Le tarif d'honoraires contenu dans la formule I de l'Annexe des présentes règles est modifié par l'insertion du poste suivant, immédiatement après la trente-septième ligne de la page vingt-sept:

"Honoraires d'avocat sur le contre-interrogatoire d'un déposant visé par la règle 58, à la discrétion du registraire, jusqu'à $50.00

Sous réserve d'augmentation, dans des circonstances spéciales, par ordonnance de la cour ou d'un juge en chambre."

(Signé) T. RINFRET, juge en chef du Canada
" P. KERWIN, J.
" ROBERT TASCHEREAU, J.
" I. C. RAND, J.
" R. L. KELLOCK, J.
" J. W. ESTEY, J.
" C. H. LOCKE, J.
" J. R. CARTWRIGHT, J.
" GÉRALD FAUTEUX, J.

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA
ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

51962—1

L'HÔPITAL ST-LUC (DEFENDANT).....APPELLANT;

AND

NAPOLÉON BEAUCHAMP (PLAINTIFF)..RESPONDENT.

1949

* May 10, 11, 12
* Oct. 4
* Nov. 23
* Dec. 5

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

Architect—Fees—Appointed by resolution of hospital—Revocation and retainer of another architect—Action to recover fees or damages for plans made—Art. 1691 C.C.

By a resolution of its Board of directors, it was proposed that appellant "retienne" the respondent to prepare plans and to supervise the erection of an extension to its hospital and a nurses' residence. Respondent was to be paid pursuant to the Architects' tariff but only "pour le montant des travaux exécutés" (clause 3). Subsequently, without knowledge that respondent had in fact prepared preliminary plans, appellant revoked the earlier resolution and retained another architect. The nurses' residence having been erected, respondent brought action to recover fees for both sets of plans but the action was dismissed by the Superior Court. This judgment was reversed on appeal.

Held: that respondent, having received express instructions to proceed with the plans following his retainer, was entitled to damages under Art. 1691 C.C., such damages in respect of the plans for the nurses' residence being the amount prescribed by the tariff and in respect of the other plans for the loss of the chance that the building might have been proceeded with.

Per Taschereau J. (dissenting in part): As clause 3 of the resolution fixes only the time at which the fee will be due and is not a renunciation of payment if the works are not proceeded with, respondent is entitled either as fees or as damages under Art. 1691 C.C. to the amount provided for the preliminary studies by section 11 of the Architects' tariff.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing, Bissonnette JA. dissenting, the judgment of the Superior Court, Rhéaume J., which had dismissed the action, and awarding respondent the sum of $9,389.62.

R. Brossard, K.C., for the appellant.

G. Monette, K.C., for the respondent.

* PRESENT:—Rinfret C.J. and Taschereau, Rand, Kellock and Locke JJ. On Oct. 4, the Court ordered a rehearing which took place on Nov. 23. Judgment was delivered on Dec. 5, 1949.

(1) Q.R. [1948] K.B. 208.

51962—1½

1949

HÔPITAL ST-LUC v. BEAUCHAMP

Rinfret C.J.

The CHIEF JUSTICE: M. le Juge Kellock, dans ses notes de jugement, récite à ma satisfaction la suite des faits dans cette cause, et, comme je m'accorde en tout point avec lui, je ne crois pas devoir les répéter ici.

D'accord avec la Cour du Banc du Roi (en Appel) (1), je suis d'avis que la résolution adoptée par les membres du Bureau de direction de l'appelante, le 19 septembre 1939, constituait un contrat entre cette dernière et l'intimé. Cela appert à la fois de la lettre qui lui a été adressée par le secrétaire dès le lendemain et par celle du 21 septembre adressée par l'intimé au président et aux directeurs de l'Hôpital où il déclare accepter sa nomination comme "architecte des travaux d'agrandissement de votre hôpital ainsi que de la construction d'une maison destinée aux gardes-malades."

Plus tard, le 22 février 1940, l'appelante a adopté une nouvelle résolution par laquelle elle a rescindé celle du 19 septembre et elle a révoqué la nomination de l'intimé.

Je n'entretiens pas de doute sur le sens de la résolution du 19 septembre; l'emploi du mot "retienne" n'est pas susceptible—je le dis en tout respect—de l'interprétation que lui a donnée l'honorable juge de première instance. D'ailleurs, la meilleure preuve de l'intention du Bureau de direction de l'appelante en adoptant cette résolution du 19 septembre se trouve indiscutablement, comme le signalent tous les juges de la Cour du Banc du Roi (en Appel), dans la résolution du 22 février 1940. Le fait même de l'adoption de cette résolution en est déjà une sûre indication. Si la résolution du 19 septembre n'avait pas eu pour effet de retenir dès lors les services de l'intimé, il n'était pas nécessaire d'adopter celle du 22 février pour la rescinder. Mais, en plus, les termes mêmes employés par le Bureau de direction pour la rescision du contrat renforcissent cette interprétation, puisque la résolution du 19 septembre y est indiquée comme "retenant les services de M. Napoléon Beauchamp, architecte de Montréal" et que cette même résolution se termine en disant "que la nomination de M. Beauchamp soit en conséquence révoquée".

Le contrat entre les parties était devenu complet lorsque l'intimé a écrit à l'appelante sa lettre du 21 septembre par

(1) Q.R. [1948] K.B. 208.

laquelle il acceptait sa nomination. Par conséquent, lorsque le 22 février 1940, l'appelante a décidé de rescinder la résolution du 19 septembre par laquelle elle retenait les services de M. Beauchamp et de révoquer sa nomination, l'appelante agissait conformément au droit qui lui est reconnu par l'article 1691 du *Code civil*. Elle pouvait résilier, par sa seule volonté, le marché qu'elle avait fait avec l'intimé; il s'en suivait que ce marché était par le fait même mis de côté, mais, également, il en résultait pour l'appelante l'obligation de dédommager l'intimé "de ses dépenses actuelles et de ses travaux en lui payant des dommages-intérêts suivant les circonstances".

A partir de ce moment-là ce n'était plus le contrat qui régissait les relations des parties mais c'était la loi telle qu'elle est exprimée dans cet article 1691 (C.C.).

L'article 1691 (C.C.), qui permet au maître de résilier, par sa seule volonté, le marché qu'il a contracté pour la construction d'un édifice ou autre ouvrage, s'applique également au contrat consenti à un architecte à raison de cette construction. Les deux avocats des parties n'ont pas contesté ce principe. Dès lors, l'appelante avait le droit de résilier son contrat avec l'intimé mais seulement "en dédommageant (l'intimé) de ses dépenses actuelles et de ses travaux et en lui payant des dommages-intérêts suivant les circonstances".

Mais, si le contrat ayant cessé d'exister ne peut plus régir les relations des parties, en vertu même de l'article 1691 (C.C.), il faut quand même recourir à ce contrat pour décider quel est le montant que l'intimé peut réclamer comme conséquence de la résiliation, vu que c'est dans ce contrat que l'on doit trouver la mesure de la perte pécuniaire que l'intimé se trouve à subir. Or, le contrat, tel qu'il se lit dans la résolution du 19 septembre, c'est que l'intimé avait "droit d'être payé conformément au tarif minimum exigible par l'Association des Architectes de la Province de Québec, suivant le coût de la construction des travaux exécutés".

Mais cette résolution contenait également un troisième paragraphe qui se lit comme suit:

> Il est entendu, néanmoins, que les honoraires et déboursés de M. Beauchamp ne seront exigibles que pour le montant des travaux exécutés.

1949

HÔPITAL ST-LUC v. BEAUCHAMP

Rinfret C.J.

S'il n'y avait pas eu de résiliation, ce paragraphe devait entrer en ligne de compte dans la rémunération à laquelle aurait eu droit l'intimé dans le cas où son contrat aurait persisté.

Le mot "néanmoins" dans ce paragraphe indique l'intention des parties d'apporter une exception au paragraphe deux de la résolution en vertu duquel l'intimé devait être payé conformément au tarif des architectes.

D'après ce tarif, les services professionnels de l'intimé en rapport avec toute la bâtisse, comprenant les études préliminaires, etc., lui donnaient droit à une commission de 5 p. 100 sur le coût total des travaux (n° 8); mais les honoraires partiels, dans le cas de discontinuation des travaux, lui donnaient droit, pour les études préliminaires, à un cinquième de cette commission (n° 11).

Il n'a pas été prétendu, en l'espèce, que les parties ne pouvaient déroger à ces prescriptions du tarif.

Or, le troisième paragraphe de la résolution doit être entendu comme une dérogation au tarif exigible par l'Association des Architectes. Cela est établi tout d'abord, comme nous l'avons signalé plus haut, par l'emploi du mot "néanmoins" et, ensuite, par la stipulation que les honoraires et et déboursés de l'intimé "ne seront exigibles que pour le montant des travaux exécutés".

Je ne puis me défendre de l'impression que cette dernière partie du paragraphe est ambiguë. L'emploi des mots "travaux exécutés", en leur donnant leur sens littéral, pourrait se référer aux travaux exécutés par M. Beauchamp lui-même. Je dois avouer que ce fut là ma première impression; mais, à la réflexion, il ne paraît pas vraisemblable que ce serait là ce que les parties avaient en vue. Les mots "travaux exécutés" sont les mêmes que ceux qui sont employés dans le paragraphe deux de la résolution; or, dans ce paragraphe, il est clair qu'ils se réfèrent aux travaux exécutés par l'entrepreneur. Il est de règle d'interpréter de même façon les mêmes mots employés à deux ou trois reprises dans un document. En vertu de cette règle d'interprétation, les mots "travaux exécutés" devraient être tenus pour s'adresser au même genre de travaux à la fois dans le paragraphe deux et dans le paragraphe trois.

Le mot "pour" cause également une certaine perplexité. Dans son sens ordinaire, cela voudrait dire que M. Beauchamp pourrait exiger des honoraires et déboursés pour le montant des travaux qu'il aurait exécutés lui-même. D'autre part, ce mot "pour" peut, suivant le texte, signifier: "à raison de" ou "par rapport à".

Mais, de tout cela, si l'on applique à ce document les règles posées dans les articles 1013 et 1019 du *Code civil,* la conclusion doit être que M. Beauchamp ne pourrait exiger des honoraires et déboursés qu'à raison du montant des travaux exécutés par l'entrepreneur. En effet, le moins qu'on puisse dire c'est que la commune intention des parties est douteuse, et, dans ce cas, comme c'est M. Beauchamp qui a rédigé la résolution, le contrat doit s'interpréter contre lui et en faveur de l'Hôpital St-Luc qui a contracté l'obligation (1019 C.C.); et cette commune intention des parties doit être déterminée par interprétation plutôt que par le sens littéral des termes du contrat (1013 C.C.).

Si donc le contrat n'avait pas été résilié mais que, ou bien la construction eut été discontinuée, ou (comme c'est le cas ici) l'une des constructions seulement eut été érigée, soit l'agrandissement de l'hôpital, soit la maison destinée aux gardes-malades, M. Beauchamp avait consenti à ne recevoir d'honoraires et de déboursés que basés sur le coût ou bien des travaux exécutés jusqu'à leur discontinuation, ou bien de la construction de la maison destinée aux gardes-malades, puisque, même à l'époque du procès, seule cette construction avait été érigée et l'agrandissement de l'hôpital n'avait pas été exécuté.

Ce qu'il devait recevoir, en vertu du contrat, est nécessairement la mesure de l'indemnité que lui accorde l'article 1691 du *Code civil.*

En agissant ainsi la Cour n'applique pas le contrat aux parties, puisque ce contrat est résilié, mais elle s'en sert pour établir le montant du dédommagement ou de l'indemnité auquel l'intimé a droit en vertu de la loi, en tenant compte de ce qu'il aurait reçu si le contrat n'avait pas été mis de côté.

Sans doute, cette discussion résulte plutôt de la réaudition que la Cour a cru devoir ordonner précisément sur ce point. Et si cette question n'avait été soulevée que par la

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Rinfret C.J.

Cour elle aurait pu avoir une influence sur les frais auxquels l'appelante aurait pu prétendre, mais, lors de cette réaudition, le procureur de l'appelante a affirmé qu'il avait soulevé ce moyen tant devant la Cour de première instance que devant la Cour d'appel, et nous en trouvons la confirmation dans les notes de jugement de M. le Juge Barclay auquel se sont ralliés MM. les Juges Marchand et Errol M. McDougall.

Voici ce que dit M. le Juge Barclay:

A condition was added, presumably and apparently for the very reason that the actual building operations might be delayed or might be subject to change, whereby it was stipulated that the plaintiff could claim payment for his services only "pour le montant des travaux exécutés".

Cela indique que devant la Cour du Banc du Roi (en Appel) l'interprétation de cette phrase du contrat a été discutée.

Comme conséquence de ce qui précède, il s'en suit que l'intimé devait réussir tant devant la Cour Supérieure que devant la Cour du Banc du Roi (en Appel). Le juge de première instance avait rejeté son action. Il lui fallait donc aller devant la Cour du Banc du Roi pour obtenir l'indemnité à laquelle la résiliation du contrat par l'appelante lui donnait droit.

L'intimé doit donc recevoir ses frais tant devant la Cour Supérieure que devant la Cour du Banc du Roi (en Appel).

Mais, d'autre part, par suite du raisonnement ci-dessus, le montant que lui a accordé la Cour d'Appel est trop élevé, car il n'y est pas tenu compte de cette troisième clause de la résolution du 19 septembre 1939, laquelle, je le répète, ne peut plus régir les relations des parties mais doit quand même être utilisée pour constater la rémunération que l'intimé aurait pu réclamer s'il n'y avait pas eu de résiliation.

En appliquant ce calcul à la cause, l'intimé a droit, suivant le tarif des architectes, à cinq pour cent sur le coût total de la construction de la maison destinée aux gardes-malades, puisque ce travail a été exécuté; mais, en ce qui regarde l'agrandissement de l'hôpital qui, au moins en autant qu'il apparaît au dossier, n'a pas été exécuté, il ne peut recevoir des honoraires et déboursés calculés sur le montant ou le coût de cet agrandissement qui n'existe pas.

Cependant, d'après l'article 1691 (C.C.), il est justifiable de réclamer "des dommages-intérêts suivant les circonstances", parce qu'en vertu du contrat il était autorisé à compter que l'appelante procéderait à la construction de cet agrandissement et les études préliminaires qu'il a faites portaient également sur cet agrandissement. Il nous paraît juste et équitable de fixer le montant qu'il devrait recevoir de ce chef à la moitié de ce qu'il aurait reçu si l'agrandissement avait été construit. L'addition de ces deux sommes donne un montant de $6,000.

L'appel doit donc être rejeté mais le jugement de la Cour d'Appel doit être modifié pour les raisons ci-dessus. Le montant du jugement en faveur de l'intimé devra donc être fixé à $6,000; et comme l'appelante se trouve tout de même à réussir d'une façon assez substantielle; en plus, en tenant compte de toutes les circonstances, je crois que l'appelante devrait avoir de l'intimé la moitié de ses frais d'appel devant cette Cour.

TASCHEREAU, J. (dissenting in part):—Je partage les vues de mon collègue, M. le Juge Kellock, et comme lui je crois qu'un contrat est intervenu entre les parties, et que c'est à la demande de l'appelante que l'intimé a préparé les plans préliminaires pour l'agrandissement de l'Hôpital, et pour la construction de la maison des Gardes-Malades.

Cependant, en ce qui concerne le montant à être accordé à l'intimé, et l'interprétation qu'il faut donner à la résolution du 19 septembre 1939, j'entretiens une opinion différente. Cette résolution est ainsi rédigée:

Que la Direction de l'Hôpital Saint-Luc retienne les services de M. Napoléon Beauchamp, architecte, de Montréal, pour la préparation des plans, devis, estimés et surveillance des travaux d'agrandissement de son hôpital et de la construction d'une maison destinée aux gardes-malades.

Pour la préparation desdits plans, devis, estimés susmentionnés, M. Beauchamp aura droit d'être payé conformément au tarif minimum exigible par l'Association des Architectes de la Province de Québec, suivant le coût de la construction des travaux exécutés.

Il est entendu, néanmoins, que les honoraires et déboursés de M. Beauchamp ne seront exigibles que pour le montant des travaux exécutés.

La prétention de l'appelante est que l'intimé est privé de tout recours et ne peut réclamer ses honoraires, si les autorités de l'hôpital décident, comme elles l'ont fait d'ailleurs, de ne pas poursuivre leurs travaux.

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Taschereau J.

Une analyse attentive du texte de cette résolution ne me permet pas de partager ces vues. En vertu du premier paragraphe, les services de l'intimé sont clairement retenus pour la préparation des plans, devis, estimés et surveillance des travaux. Le second détermine quel sera le montant des honoraires de l'architecte, et il y est stipulé qu'il sera basé sur le coût de la construction des travaux exécutés, conformément au tarif des architectes. C'est-à-dire que l'intimé aura droit à un pourcentage déterminé par l'article 8 du tableau d'honoraires minimum des architectes de la Province de Québec. Cet article est ainsi rédigé:

> Pour services professionnels en rapport avec toute la bâtisse, comprenant les études préliminaires, les plans complets, les devis, les détails, et la surveillance des travaux, excepté ce qui est prévu plus loin, l'architecte aura droit à une commission de cinq pour cent (5 p. 100) sur le coût total des travaux.

La résolution ne fait donc que confirmer ce que disent les règlements.

Quant au troisième paragraphe, dont l'interprétation doit servir de détermination à cette cause, il ne fait que fixer le temps où le montant des honoraires sera exigible. C'est comme si l'on avait dit que les honoraires seront payables à mesure que les travaux seront exécutés. L'architecte évidemment n'a pas droit à un montant supérieur à celui qui est justifié par l'exécution des travaux. C'est la règle ordinaire qui a été insérée à la résolution.

En vertu de l'article 8 cité plus haut, cet honoraire est de 5 p. 100 pour les plans préliminaires, les plans complets, les devis et la surveillance des travaux, et la commission est basée sur le coût total de ces mêmes travaux. Dans le cas où seulement les plans préliminaires sont préparés par l'architecte, l'honoraire n'est que de un-cinquième de l'honoraire total. (Article 11 du tarif.)

Dans le cas qui nous occupe, l'intimé n'a préparé que les plans préliminaires, et c'est alors que l'appelante a rescindé la résolution du 19 septembre 1939, en s'autorisant, comme elle avait d'ailleurs le droit de le faire, de l'article 1691 C.C. qui dit:

> 1691. Le maître peut résilier, par sa seule volonté, le marché à forfait pour la construction d'un édifice ou autre ouvrage, quoique l'ouvrage soit déjà commencé, en dédommageant l'entrepreneur de ses dépenses actuelles et de ses travaux et lui payant des dommages-intérêts suivant les circonstances.

Quels sont alors les droits de l'intimé qui a été, par la seule volonté de l'appelante, empêché de continuer le travail pour lequel ses services professionnels avaient été requis? C'est évidemment de réclamer une indemnité, comme le lui permet l'article 1691 C.C. Il ne peut évidemment pas réclamer le 5 p. 100 prévu à l'article 8 du tarif car les travaux n'ont pas été exécutés, et il n'a ni préparé les plans définitifs ni exercé aucune surveillance. Mais je crois que l'article 11 qui lui accorde un cinquième des honoraires pour les esquisses préliminaires, et qui ne supposent aucune exécution de travaux, vient à son secours.

La preuve ne révèle pas que l'intimé ait accepté d'être payé seulement si les travaux étaient exécutés. Quant au troisième paragraphe de la résolution, rien dans sa rédaction ne me permet de conclure qu'elle comporte une semblable renonciation. Elle détermine plutôt le terme de paiement dans le cas d'exécution *complète* des travaux; elle ne pourvoit pas au paiement de l'honoraire dû à l'intimé pour la seule préparation des esquisses préliminaires. Je crois en conséquence que l'intimé peut invoquer l'article 11 du tarif, qui a force de loi, par suite de l'acceptation de ce tarif des architectes par arrêté ministériel.

Les allégations dans la déclaration du demandeur-intimé sont telles que son action peut être considérée soit comme une action pour services professionnels, soit comme une action en dommages. Quelle que soit la façon dont on l'envisage, elle doit être maintenue, car si le demandeur a institué une action pour services professionels, il a établi qu'il réclame conformément au tarif; si d'un autre côté il conclut à des dommages, le montant de ses honoraires auxquels il a droit, est la mesure qui détermine l'étendue de ses dommages.

Je rejetterais l'appel avec dépens, et confirmerais le jugement de la Cour du Banc du Roi, qui a accordé au demandeur la somme de $9,369.62 avec intérêts depuis la date de la signification de l'action.

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

KELLOCK J.:—The question in this appeal is the question of fact as to whether or not the preliminary plans prepared by the respondent were executed in pursuance of the

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contract between the parties. I do not accept the contention of Mr. Monette that, upon the basis of the resolution of the 19th of September, 1939, without more, the respondent was called upon to prepare these plans. I think the pleadings and the course of the trial indicate that the respondent himself did not take such a position, but that his case was that he had received express instructions to proceed with the preparation of the plans or, at the least, that the course of dealing between himself and Roy was on the basis that he should do so.

The respondent, for this purpose, relied upon an interview with Roy, which, at first, he placed as having taken place on the 23rd or 24th of September, 1939, two or three days after he had written the directors of the appellant on the 21st of that month accepting the retainer. That any such interview had taken place was denied by Roy, who, according to the evidence, had been in Toronto from September 20th to October 5th. At a later stage of the trial, and after the above evidence had been given, the respondent, being recalled, said that his earlier evidence as to the time had been an error and that the interview had occurred in the early part of October.

The learned trial judge said that he preferred the evidence of Roy to that of the respondent, whose evidence, he said, lost force because of the fact that three of the respondent's employees had testified that they had commenced work on the plans in question in the last days of September.

The Court of Appeal (1) reversed the finding of the learned trial judge, the view of the majority being that the finding was an inference drawn solely from the respondent's conflicting evidence as to the date of the disputed interview and that the respondent must have had instructions to proceed as it could not have been a mere coincidence that the plans prepared by the respondent bore so close a resemblance to the plans of the nurses' residence later constructed by the appellant. They also took the view that, even if the disputed interview did not take place, the respondent was entitled to proceed with the plans on the basis that the appellant expected him, as a professional man, to do so, under the terms of his employment. With this latter view I have already dealt.

(1) Q.R. [1948] K.B. 208.

Some facts are not in dispute. It is perfectly clear in the first place that at no time, and from no person, did the respondent receive any information to enable him to prepare the plans he actually did prepare apart from the disputed interview between himself and Roy. The evidence also establishes that the plans were completed by February of 1940, and that their preparation occupied a period of some months, although whether they were commenced in September, or not until October, is in question. The respondent testified that, at the disputed interview, he and Roy discussed the dimensions of the nurses' residence, the number of floors and rooms and the appropriate services and that it was to have five stories and two hundred rooms. He said he also received similar information with respect to the proposed extension to the existing hospital building. It appears that, while the extension to the hospital has not yet been built, the nurses' residence is a building of five stories with two hundred rooms and has a measurement within 37,000 cu. ft. of that shown on the respondent's plans.

If the interview in dispute did not take place, the respondent must have prepared the plans in question purely out of the air for the purpose of suggesting something to the directors. That is the appellant's contention. If that be so, it is, as the Court of Appeal (1) thought, somewhat remarkable that the respondent could produce plans bearing so close a resemblance to the building actually erected, because it is common ground that the respondent's plans were never communicated to the directors of the hospital.

It seems to me that a conclusion in accord with appellant's contention is not consistent with the evidence of the plans themselves, which I have carefully examined. In my opinion, plans prepared on the basis suggested by the appellant would not have taken the form of those actually prepared. They would have been more in the nature of sketches and would have been so marked, whereas the plans made are much more complete and exact and the interior minutiae much more extensive than would have been the case were the respondent merely suggesting something to the directors. In the case of the extension to

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the hospital itself, the plans show the extension integrated at each floor with the existing building. This required an exact knowledge of the dimensions of the existing building, inside and outside as well as its interior lay-out, and it is shown that the respondent obtained all this before proceeding. Two of his employees examined the premises on more than one occasion for the purpose of obtaining the necessary measurements. It seems to me therefore, that the only reasonable inference to be drawn from the facts, as to which there is no dispute, is that the information necessary to prepare the plans here in question, not having been obtained from Roy or anyone in the employ of the hospital at any time other than on the occasion of the disputed interview, must have been obtained as the respondent deposed, even though his statements as to the date it occurred are conflicting.

The learned trial judge was influenced in reaching his conclusion by his view that the evidence of the respondent's employees as to when they had commenced work on the plans was much more definite than it in fact was. This is illustrated by the following extracts:

Savard:

D.—Voulez-vous dire jusqu'à quand vous avez travaillé sur ces plans-là? R.—Je sais que j'ai commencé à l'automne, vers la fin de septembre, octobre, novembre, mais j'ai eu d'autre travail à faire.

* * *

D.—Voulez-vous dire à peu près quand vous y êtes allé pour la première fois? R.—C'était vers la fin de septembre ou au commencement d'octobre. Je me souviens que ce n'était pas en plein été. Ce n'était pas très chaud mais pas trop froid.

D.—Vous les avez prises à l'extérieur de la bâtisse, je comprends? R.—Oui.

D.—Pas à l'intérieur? R.—Non, pas la première fois.

D.—Etes-vous allé personnellement à l'intérieur? R.—Oui, je suis allé personnellement à l'intérieur.

D.—Plus tard? R.—Oui, à une visite subséquente.

D.—Combien plus tard? R.—Peut-être une semaine, je ne me souviens pas très bien.

D.—Quelques jours plus tard? R.—Oui.

D.—Y êtes-vous allé à la demande de monsieur Beauchamp ou y êtes-vous allé de votre propre chef? R.—A la demande de monsieur Beauchamp.

All that the other two witnesses had to say on the point is:

Jarry:

D.—Avez-vous eu l'occasion de préparer des plans pour l'agrandissement de l'hôpital Saint-Luc? R.—Il y a eu quelques travaux préliminaires pour l'hôpital Saint-Luc dans le mois de septembre.

D.—Ensuite? R.—Ensuite, évidemment, on a eu d'autres travaux extérieurs à l'hôpital Saint-Luc, mais surtout sur l'hôpital Saint-Luc j'ai travaillé du mois de novembre au mois de février assidûment.

Bigonesse:

D.—Maintenant, pour qui étiez-vous à l'emploi dans le cours du mois de septembre mil neuf cent trente-neuf (1939)? R.—Pour Beauchamp.

D.—Pourriez-vous dire à la Cour sur quel travail vous avez travaillé? R.—Sur divers travaux.

D.—Vous êtes-vous occupé des plans de l'agrandissement de l'hôpital Saint-Luc? R.—Oui.

In my opinion this evidence is not sufficiently definite to displace the conclusion upon the other facts which I have already discussed.

The other point upon which Mr. Brossard quite properly relied was that the respondent, upon completion of his plans, did not submit them to the appellant, and notwithstanding that he met Roy frequently from time to time, did not mention that the plans had been prepared until after he was made aware that the appellant was retaining the services of another architect and was proceeding with the erection of the nurses' residence. This is a circumstance which, it is admitted by Mr. Monette, is on its face extraordinary. The explanation given is that a provincial election took place in October, 1939, which resulted in a change of government and that as the hospital was dependent upon a provincial grant before it could build, it was assumed by all concerned that a grant could not be obtained from the party in power if the respondent's employment were continued. On the 22nd of February, 1940, the directors of the hospital, without any communication with the respondent, passed a resolution rescinding that of the 19th of September, 1939, under which the respondent had been employed. Article 1691 of the *Civil Code* permits such a course, subject to payment as therein mentioned. While the action of the appellant in thus rescinding the respondent's employment was not communicated to him, it is said that the resolution is cogent evidence of the recognition on the part of the hospital directors of the situation brought about by the

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change of government, and that the conduct of the respondent in standing by is equally referable to the same event. In view of the conclusion which I think should be reached, apart from this aspect of the matter, I think that this explanation, having been accepted by the Court of Appeal, this court is not in a position to say it should not have done so.

In reaching the above decision I do so, well aware of the effect normally to be given to a finding of fact by the tribunal of first instance which hears and sees the witnesses. Had I been convinced that, after a consideration of all the relevant circumstances, the learned trial judge had chosen to believe Roy and to disbelieve the respondent, I would, of course, have accepted that finding, but I do not find that the learned judge had before his mind the cogent effect of the fact of the preparation of the plans themselves, their nature, the time during which they were prepared and the other matters to which I have referred.

The question arises as to the relief to which the respondent is entitled. The resolution of the 19th of September, 1939, under which he was engaged is as follows:

> Que la Direction de l'Hôpital Saint-Luc retienne les services de M. Napoléon Beauchamp, architecte, de Montréal, pour la préparation des plans, devis, estimés et surveillance des travaux d'agrandissement de son hôpital et de la construction d'une maison destinée aux gardes-malades.
>
> Pour la préparation desdits plans, devis, estimés susmentionnés, M. Beauchamp aura droit d'être payé conformément au tarif minimum exigible par l'Association des Architectes de la Province de Québec, suivant le coût de la construction des travaux exécutés.
>
> Il est entendu, néanmoins, que les honoraires et déboursés de M. Beauchamp ne seront exigibles que pour le montant des travaux exécutés.

The effect of the last paragraph of this resolution was not the subject of argument when this appeal was first heard and for that reason we directed that this point should be the subject of re-argument. This has now taken place. Mr. Monette's contention is that the paragraph does not amount to a suspensive condition but merely fixes the time of payment. On the other hand, Mr. Brossard contends that the effect of the paragraph is that the hospital should be under no liability to the respondent unless it actually determines to build.

The background of the resolution is that both the hospital directors and the respondent knew that unless government

funds were made available the hospital would not be able to proceed. In the light of this circumstance I think it was the purpose of paragraph 3 to protect the hospital against liability to the architect in the event that a decision not to build was made. It is to be remembered, also, that the resolution itself was drafted by the respondent.

If, therefore, the hospital had intimated to the respondent before the latter's services were dispensed with, that it did not intend to proceed with the works, he would not have had any ground of complaint. That, however, was not what occurred. While the contract was in full force and effect the appellant notified the respondent that his employment was at an end and under the provisions of Article 1691 of the *Civil Code* he became entitled to damages. At the time of the trial it appeared that the nurses' residence had been proceeded with, if not entirely completed, and I think the measure of damages to be applied, insofar as the plans with relation to that building is concerned, entitles the respondent to the amount claimed, namely, $2,730.11. With respect to the addition to the hospital itself however, what the respondent has lost is the chance that the addition might be proceeded with, in which event he would have been entitled to his fees for the plans he had made. The amount has to be assessed as a jury would determine it and I think that if the respondent were given an amount, in addition to the amount mentioned above, so that his recovery would be $6,000 in all, substantial justice would be achieved.

The appeal should therefore be allowed to the extent mentioned. As the appellant succeeds in part, I think that it should have one-half of the costs in this court. I would not interfere with the order for costs below.

Appeal allowed in part and amount of recovery fixed at $6,000.

Solicitors for the appellant: *David, Brossard & Demers.*

Solicitor for the respondent: *Bernard Nantel.*

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* Nov. 22
* Dec. 22

HIS MAJESTY THE KING.....APPELLANT;

AND

J. B. MOREAU, Es-Qual.....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Negligence—Petition of right—Young boy playing with a bomb found in the ditch of a highway near an army camp was injured by its explosion—Liability of the Crown—Onus—Presumptions—Whether negligence of army personnel—Whether "acting within scope of duties or employment"—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19 (c).

On May 5th, 1944, respondent's minor son was injured by the explosion in his hands of a fuse, normally used as a detonator on a 3" mortar bomb. This fuse had been found the previous fall in a ditch along the public highway between Rimouski and an army training camp nearby. It was established that a regiment camping there in 1943 had received such bombs, with fuses attached, for training purposes; that the fuses were always attached to the bombs; that very severe rules were in force in the camp regarding the handling and disposal of these bombs and that these rules had been followed. The Exchequer Court awarded judgment in favour of respondent and held that in view of the failure of the army officers to explain the presence of the fuse in the ditch, the conclusion must be that there had been negligence on the part of a servant of the Crown while acting within the scope of his duties or employment.

Held: reversing the judgment appealed from, that the respondent had the onus, placed upon him by section 19 (c) of the *Exchequer Court Act,* of establishing that the injuries suffered by his son were the result of the negligence of a servant of the Crown acting within the scope of his duties or employment, and that he had failed to discharge it.

Held: also, that under the circumstances disclosed, the presence of the fuse in the ditch of the road was entirely left to conjecture; but that, even if they gave rise to presumptions, in order that any responsibility may be attributed to the Crown, such presumptions would have to be "graves, précises et concordantes"—which they were not in this case.

Held: further, that there was no obligation here, on the part of the servants of the Crown, to explain the presence of the fuse in the ditch, or, in other words, to exculpate themselves.

APPEAL from the judgment of the Exchequer Court of Canada, Michaud, Deputy Judge, allowing the petition of right and awarding a sum of $12,101.55.

L. A. Forsyth, K.C., W. R. Jackett, K.C., and A. Forget for the appellant.

Antoine Rivard, K.C., for the respondent.

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

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—Vers novembre 1943, deux jeunes garçons, Jean-Marie Lepage et Georges Bélanger, marchant sur le chemin public à environ un mille de la ville de Rimouski, trouvèrent dans le fossé du chemin deux objets, qui leur parurent assez étranges, et chacun d'eux en prit un. Le jeune Lepage, à son retour à la maison, le donna à son père qui, ignorant ce que c'était, le mit sur la tablette supérieure d'une garde-robe dans la maison, où il demeura jusqu'au printemps suivant.

Georges Bélanger, en arrivant chez lui, le remit à son frère Pierre, âgé de quatorze ans, et à qui un frère plus âgé, Fernando, d'environ vingt ans, conseilla de le jeter parce qu'il pouvait être dangereux. Le jeune Pierre, suivant le conseil de Fernando, le jeta en conséquence sur un amas de rebuts qui se trouvait sur la véranda en arrière de leur maison. Mais, un peu plus tard, Raymond Bélanger, âgé de neuf à dix ans, s'empara de ce curieux objet, alors que Pierre, s'en étant aperçu, l'enleva à son frère plus jeune et jeta l'objet derrière l'échoppe de son père.

Vers la fin d'avril 1944, le jeune Raymond trouva de nouveau l'objet en question; il joua avec pendant environ dix jours, l'emportant à l'école dans une des poches de son habit et se plaisant à le montrer à ses condisciples. Enfin, il l'échangea avec un de ses voisins, Jean-Guy Moreau, âgé de onze ans, pour ce qui a été appelé au cours du procès deux "boleys". Pendant une semaine, Guy Moreau garda l'objet en sa possession, s'ingéniant à découvrir ce que cela pouvait bien être. Dans l'intervalle, il le montra à son père, le demandeur actuel ès qualité, qui l'examina et même essaya de le dévisser avec des pinces, mais n'y réussit pas. Il le remit alors à son fils Guy en lui disant d'aller le jeter; mais il admet, qu'après avoir remis l'objet à son fils, il ne s'en est plus occupé.

Guy Moreau, pour le compte de qui le demandeur a intenté la présente poursuite en sa qualité de tuteur de son fils mineur, revint quelque temps après auprès de son père et lui dit: "Regarde, j'ai découpé ça". Il avait pris un clou et il avait défait le dessus. Son père regarda de nouveau l'objet, y vit une aiguille et un petit plomb rond, prit ce petit plomb et enfonça l'aiguille assez fort, mais rien ne

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se produisit. Il répéta à son fils: "Va donc jeter ça". Le jeune Guy partit, et, quelques minutes après, le père entendit un bruit; il sortit immédiatement et trouva son fils le bras en l'air et la main emportée.

Il fut alors découvert que l'objet était une fusée ordinairement attachée à une bombe, qui était employée pour des exercices de manœuvres militaires, par un régiment qui, en 1943, était alors en campement à quelques milles de la ville de Rimouski. Il est admis que cette fusée était par sa nature un dangereux explosif, dont le jeune Guy avait provoqué la détonation, après avoir déchiré l'enveloppe, en employant un marteau pour enfoncer dans la fusée une sorte de pointe qu'il avait d'abord dévissée et enlevée et qu'il ne pouvait réussir à remettre.

Guy Moreau, par suite de cette explosion, subit évidemment des blessures très graves qui nécessitèrent d'importants traitements et jusqu'à vingt pansements subséquents, y compris l'amputation du poignet gauche, la suture de douze perforations intestinales, ainsi que le débridement et le nettoyage d'une plaie à la cuisse gauche. Son père, en sa qualité de tuteur à son fils mineur, allégua que ce dernier avait subi une incapacité totale temporaire de cinq mois et une incapacité partielle permanente de soixante-dix pour cent, dont soixante pour cent pour l'amputation de l'avant-bras gauche et dix pour cent pour les blessures à l'abdomen et au membre inférieur gauche. Il réclama à Sa Majesté, représentée par l'honorable Ministre de la Défense nationale (Armée), une somme de $25,609.25, avec intérêts et dépens, en attribuant le dommage subi par son fils à la responsabilité des autorités militaires, en charge de l'administration du régiment de Montmagny en garnison au camp situé près de Rimouski, ainsi qu'il a déjà été mentionné, et pour lesquelles, d'après lui, l'appelant devait répondre. La défense de la Couronne fut d'abord que la fusée qui avait causé le dommage n'avait pas été déposée par des membres du régiment dans le fossé du chemin public où elle fut trouvée; que les autorités militaires ne pouvaient, en aucune façon, être taxées de négligence dans le contrôle des explosifs qui leur avaient été remis pour les fins des manœuvres militaires; qu'à tout événement, si négligence existait de la part d'un employé ou serviteur de la Couronne, ce n'était pas dans l'exercice de ses fonctions ou de son emploi; qu'en

réalité l'accident avait été la conséquence de la négligence du jeune Guy Moreau lui-même, ou de celle de ses parents; et que, à tout le moins, Guy Moreau et ses parents doivent être tenus pour coupables d'une négligence contributoire.

Le jugement de la Cour de l'Échiquier écarta le plaidoyer de négligence contributoire et accorda à l'intimé ès qualité une somme de $12,101.55.

Le jugement de cette Cour se base sur l'article 19 (*c*) de la Loi concernant la Cour de l'Échiquier; il déclare qu'il fut prouvé que la fusée dont il s'agit faisait bien partie des munitions fournies au régiment pour fins d'exercices. Les bombes, avec les fusées qui y étaient attachées, furent expédiées de Valcartier à Rimouski en différents temps au cours de l'année 1943, et des règles sévères avaient été édictées par les quartiers généraux de l'Armée pour la direction des officiers et des hommes dans la manipulation et l'usage de ces bombes et fusées, qui constituaient des explosifs très dangereux.

Les instructions étaient de garder les bombes et les fusées dans les magasins de l'Ordonnance, en la cité de Québec, pour l'usage du district dans lequel se trouvait le camp situé près de Rimouski. Elles ne pouvaient être expédiées au quartier-maître du régiment sans un ordre écrit du commandant. Dès qu'elles étaient arrivées aux quartiers du régiment, le quartier-maître devenait responsable de leur garde et de la façon dont il devait en être disposé. L'officier en charge des exercices militaires émettait alors des réquisitions écrites à ce quartier-maître, qui ne pouvait les remettre à qui que ce soit, autrement que conformément à ces réquisitions écrites. L'officier en charge de l'entraînement devait alors voir à ce que les bombes, avec fusées attachées, ne fussent employées que pour les fins de l'entraînement ou des exercices militaires. Celui-ci était tenu de faire rapport au quartier-maître à l'effet que toutes les bombes qui lui avaient été remises avaient été détruites au cours des exercices. A la fin de la journée, le quartier-maître recevait ce rapport et on lui retournait en même temps les bombes qui n'avaient pas été utilisées. S'il arrivait qu'une bombe, ou la fusée, refusait d'exploser, l'on provoquait son explosion au moyen de la dynamite, et, dans ce cas, ce fait devait être consigné au rapport de l'officier en charge.

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En somme, l'appréciation de la preuve faite par le juge présidant au procès l'amène à conclure que les règlements en vigueur, s'ils étaient suivis, rendaient impossible qu'une fusée, comme celle qui a causé l'accident au jeune Moreau, eut pu rester inexplosée ailleurs que dans les magasins du quartier-maître ou en la charge de l'officier qui présidait aux exercices de tir, et surtout dans un fossé le long du chemin public, à moins qu'elle n'ait été volée; et, dans ce dernier cas, l'officier en charge était tenu de noter le fait et de le rapporter au commandant, qui, à son tour, devait le rapporter aux quartiers-généraux de l'Ordonnance.

La preuve des officiers de l'Armée a démontré qu'aucune bombe, ou fusée, non explosée n'avait été rapportée comme manquant au camp de Rimouski avant le 5 mai 1944. Dès lors, comment se fait-il que des fusées détachées des bombes aient pu être trouvées dans le fossé du chemin à environ trois mille pieds du camp et à un endroit qui ne se trouvait pas sur le trajet que devaient parcourir les bombes en allant de Valcartier au camp de Rimouski?

L'honorable juge de première instance, avec raison, pose le principe que celui qui a la garde d'un objet dangereux est tenu à la plus grande précaution pour éviter le danger à la vie humaine que cet objet peut entraîner; mais il ajoute qu'en l'absence d'une explication de la part des officiers de l'Armée, qui avaient la charge de ces dangereux explosifs, il est forcé à conclure que quelqu'un, depuis les quartiers-généraux de l'Ordonnance jusqu'aux officiers qui avaient la charge des exercices militaires au camp de Rimouski, "did not keep a proper check of these bombs entrusted to his care", et que cela constituait de la part d'un officier ou d'un serviteur de la Couronne, "negligence while acting within the scope of his duties or employment"; puis, le jugement considère que rien, à raison de son âge, de ses connaissances ou de son expérience, n'est de nature à indiquer que le jeune Moreau eut pu supposer que l'objet qu'il manipulait était dangereux et que, dès lors, il ne peut admettre le plaidoyer de négligence contributoire de sa part. Il écarte toute question de prescription, parce que la pétition de droit fut produite en décembre 1944, alors que l'accident ne remontait qu'au 5 mai de la même année. Il écarte également toute preuve d'un *novus actus interveniens* comme pouvant résulter, soit de l'incident où a

figuré Fernando Bélanger, âgé de vingt ans, soit de l'autre incident, où le demandeur actuel, père du jeune Moreau, prit possession de la fusée à deux reprises et la remit à son fils en se contentant de lui dire de la jeter, sans même se préoccuper de s'assurer que son fils Guy s'en était effectivement débarrassé.

C'est comme conséquence de ces raisonnements successifs que la Cour de l'Échiquier a rendu contre la Couronne le jugement dont il y a appel.

Il me paraît que cette Cour, siégeant en appel, pourrait difficilement substituer à l'opinion du juge de première instance, qui a vu et entendu le jeune Moreau comme témoin, un avis contraire sur la capacité de ce dernier, par son âge, ses connaissances et son expérience, de se rendre compte du danger qu'il courait en manipulant, comme il l'a fait, la fusée qui l'a si gravement blessé. Mais il n'en est pas de même de la conclusion à laquelle la Cour de l'Échiquier est arrivée au sujet de l'intervention de Fernando Bélanger et de l'intimé Moreau. En plus, en tout respect, je ne puis m'accorder avec l'honorable juge à l'égard du principe qu'il pose qu'il appartient aux officiers du camp d'expliquer la présence de la fusée dans le fossé du chemin conduisant de Rimouski au camp d'entraînement et que, en l'absence de cette explication, la conséquence irrésistible était qu'il y avait eu négligence de la part des officiers en charge dans l'exercice de leurs fonctions. Je crois que par là la Cour est entrée plutôt dans le domaine des conjectures que dans celui des présomptions qu'un tribunal est justifié de tirer des faits prouvés.

La doctrine et la jurisprudence sont bien arrêtées sur ce point et ne souffrent plus de discussion. Elles exigent que les présomptions sur lesquelles peut valablement se fonder une conclusion de ce genre soient graves, précises et concordantes. Il m'est impossible de trouver ici une situation qui rencontre ces exigences.

Les précautions déterminées par les règlements en force au camp près de Rimouski ne paraissent laisser aucune ouverture à la suggestion que des mesures de prudence supplémentaires eussent pu être adoptées. La preuve, ainsi que le jugement lui-même l'a reconnu, est que ces règlements ont été scrupuleusement suivis. C'est tout ce que les officiers et les serviteurs de la Couronne pouvaient être

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tenus d'établir. Le fait est que l'honorable juge de première instance, cherchant à s'expliquer ce qui a pu se passer, a été conduit à croire qu'il pouvait s'agir d'un vol. S'il y a eu vol de la part de celui qui aurait déposé la fusée dans le fossé, la Couronne ne peut en être tenue responsable.

Mais, il y a plus. Cette fusée était normalement attachée à une bombe; elle ne pouvait être employée que pour provoquer l'explosion de la bombe. Il a été prouvé qu'elle était fermement attachée à la bombe, qu'elle ne pouvait tomber d'elle-même, et que, pour l'en détacher, il fallait employer une force assez considérable, puisque le père du jeune Guy, l'intimé, essaya sans succès de la dévisser, comme il l'admet. Il faut donc que celui qui a jeté la fusée dans le fossé ait commencé par la détacher de la bombe. Cela ne pouvait avoir rien à faire avec l'exercice des fonctions d'un militaire ou d'un serviteur de la Couronne; et il est impossible de décider en loi que celui qui a accompli cet acte agissait, suivant les termes de l'article 19 (*c*), "within the scope of his duties or employment". Or, le raisonnement du juge de première instance, en posant le principe qu'il incombait aux officiers militaires en charge de fournir une explication ou une excuse pour la présence de la fusée dans le fossé, pèche donc, à mon humble avis, par deux côtés essentiels: premièrement, il suppose que la Couronne avait le fardeau de la preuve et qu'elle devait s'exculper, alors que l'article 19 (*c*) ne permet le maintien d'une réclamation contre la Couronne, à raison de la mort ou du dommage causé à la personne ou à la propriété, que dans le cas où elle résulte de la négligence de l'officier ou du serviteur de la Couronne. Il faut évidemment, dès lors, que le pétitionnaire, ou le réclamant, prouve cette négligence. Cette preuve ne peut résulter de conjectures ou de suppositions comme celles que nous avons ici. Je ne trouve aucun fait qui puisse donner lieu à des présomptions; et, en plus, il faudrait que telles présomptions fussent graves, précises et concordantes. Il n'y a rien de tel dans l'espèce actuelle.

Deuxièmement, toujours en vertu de l'article 19 (*c*), il ne suffisait pas à l'intimé de prouver la négligence d'un officier ou d'un serviteur de la Couronne, mais il fallait, en plus, qu'il prouvât que cet officier ou ce serviteur négligent,

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agissait dans les limites de ses devoirs ou de ses fonctions. Non seulement l'intimé ne l'a pas prouvé, mais les circonstances dévoilées démontrent exactement le contraire. Je le répète: La fusée détachée de la bombe ne pouvait avoir été ainsi jetée dans cet état par un officier ou un serviteur de la Couronne "within the scope of his duties or employment."

Cela suffit pour que l'intimé ait failli dans la preuve qui lui incombait pour tenir la Couronne responsable du malheureux accident souffert par son jeune fils.

Cette raison entraîne nécessairement le maintien de l'appel et dispense d'examiner—ce qui était également un très sérieux obstacle à la réclamation de l'intimé—si l'intervention de Fernando Bélanger, et, surtout, celle du demandeur lui-même, le père du jeune Guy Moreau (responsable des actes de son fils, en vertu de l'article 1054 du *Code civil* de la province de Québec), eut pu quand même entraîner le rejet de la pétition de droit.

L'appel doit être maintenu et la pétition de droit doit être rejetée, avec dépens.

Appeal allowed and action dismissed with costs.

Solicitor for the Appellant: *Perrault Casgrain.*

Solicitors for the respondent: *Rivard, Blais & Gobeil.*

CANADIAN PACIFIC RAILWAY.....APPELLANT;

AND

THE PROVINCE OF ALBERTA ET AL..RESPONDENT.

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*Dec. 5, 6, 7, 8.

*Dec. 22

ON APPEAL FROM THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA

Railways—Freight rates—Board of Transport Commissioners—Powers and duties—Postponement of final decision—Declining of jurisdiction—Railway Act, R.S.C. 1927, c. 170, ss. 33(1) (b), 45(2), 52(3).

The Board of Transport Commissioners, being a court of record, cannot postpone determination of an application for an increase in freight rates by reason of matters entirely irrelevant to the proper discharge of its duty to decide such question. To do so would amount, in effect, to a declining of jurisdiction.

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

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APPEAL, by leave of the Board of Transport Commissioners for Canada, from a decision of that Board authorizing, upon application, an interim increase in freight rates and postponing final determination of the said application pending the General Freight Rates Inquiry, the report of the Royal Commission on Transportation and its consideration by Parliament. The appeal is on the following questions which in the opinion of the Board involved questions of law:

1. Is it the duty of the Board of Transport Commissioners under the *Railway Act,* upon application by the railway companies subject to its jurisdiction, to determine whether and to what extent an increase in freight rates should be authorized because of changing conditions or cost of transportation?

2. If so, did the Board fail to perform that duty in respect of the application of the Railway Association of Canada dated July 27, 1948, for authority to make a general advance of 20 per cent in freight rates, when by its Judgment dated September 20, 1949, it postponed the final determination of the said application until the investigations, studies and determination of the several matters referred to in the said Judgment have been completed?

C. F. H. Carson, K.C., F. C. S. Evans, K.C. and *D. K. M. Spence* for the appellant.

J. C. Osborne for Alberta.

H. E. B. Coyne, K.C. for *Board of Transport.*

W. E. McLean, K.C. and *C. D. Shepard* for Manitoba and Saskatchewan.

F. D. Smith, K.C. for Maritime Board of Trade.

C. W. Brazier for British Columbia.

The judgment of the Court was delivered by

KELLOCK J.:—This appeal comes to this court pursuant to leave granted by the Board of Transport Commissioners under section 52(3) of the *Railway Act,* upon certain questions stated by the Board as follows:

1. Is it the duty of the Board of Transport Commissioners under the Railway Act, upon application by the railway companies subject

to its jurisdiction, to determine whether and to what extent an increase in freight rates should be authorized because of changing conditions or cost of transportation?

2. If so, did the Board fail to perform that duty in respect of the application of the Railway Association of Canada dated July 27, 1948, for authority to make a general advance of 20 per cent in freight rates, when by its Judgment dated September 20, 1949, it postponed the final determination of the said application until the investigations, studies and determinations of the several matters referred to in the said Judgment have been completed?

By a judgment of the 30th of March, 1948, made upon an application by the Railway Association of Canada on behalf of the railways subject to the jurisdiction of Parliament, the Board authorized a general increase in freight rates of 21 per cent, the majority judgment expressing the view that the increased rates would give the present appellant, at the end of the fiscal year, 1948, a small surplus on its transportation operations. This view was based upon the assumption that operating results in 1948 would be approximately the same as had been experienced in 1947.

On the 27th of July, 1948, the railways, having in the meantime been called upon to pay higher wages to their employees, filed with the Board an application for authority to make a further general advance of 20 per cent in the then existing freight rates and alleged that the increase in wage rates alone would effect an increase in the annual operating expenses of the appellant of some twenty-seven million dollars. The railways also asked for authority to make an interim increase of 15 per cent pending the final determination by the Board of the application for a permanent increase, but they consented to the deferring of the final determination on the condition that the application for this interim increase should be set down for summary hearing at a date agreeable to the Board during the month of September next and that "judgment thereon shall have been given by the Board." These terms not having been met, this consent was subsequently withdrawn and the application for an interim allowance pending disposition of the main application need not be further considered.

Meantime, on the 7th of April, 1948, P.C. 1487 had been passed, directing the Board to undertake a general freight rates investigation. Meantime also, the provinces, in September 1948, had launched an appeal to the Gover-

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nor-in-Council from the judgment of the 30th of March, 1948, and applied to the Board to stay its hearing of the new application of the railways, pending the disposition of this appeal. The appeal was disposed of by Order in Council P.C. 4678 of the 12th of October, 1948, by which the Board was directed to consider the complaints which were the subject matter of the appeal, concurrently with the application of the railways.

Further, while the application of the railways was still pending, the Board, having fixed January 11, 1949, to hear it, the Governor-in-Council by P.C. 6033 of December 29, 1948, appointed a Royal Commission to inquire into and report upon all questions of economic policy within the jurisdiction of Parliament arising out of the operation and maintenance of national transportation, including such matters as guidance to the Board in general freight rates revision, competitive rates, international rates, etc., review of the Railway Act and recommendation of amendments; review of the capital structure of the Canadian National Railway Company; review of present day accounting methods and statistical procedure of railways in Canada; and review of the results achieved under the Canadian National-Canadian Pacific Act, 1933, and amendments. It was however, expressly provided:

> That the scope of this Commission shall not extend to the performance of functions which, under the Railway Act, are within the exclusive jurisdiction of the Board of Transport Commissioners.

Hearing of the review directed by P.C. 4678 and the application of the railways was concluded by the Board on the 5th of April, 1949, and judgment was delivered on the 20th of September following. The judgment of the majority delivered by the Chief Commissioner, and concurred in by Mr. Commissioner Chase, granted a general *interim* increase in freight rates of 8 per cent and increases in rates on coal and coke of 8 cents per ton. The judgment concluded as follows:

> When the investigations, studies and determinations of the several matters hereinbefore referred to have been completed the Board will notify the applicants and respondents of the date and place of hearing to consider further evidence and representations respecting this application.

As will subsequently be shown, the above paragraph amounted to a declaration that the Board declined to pass upon the application for increased rates until after the

Royal Commission had concluded its hearings and made its report and, "possibly", until any amendments to existing legislation which might be recommended had been dealt with by Parliament, and also until the general freight rates investigation, which the Board itself was directed to undertake by P.C. 1487, had been concluded. These matters might very well occupy a considerable period of time and, apart from the general freight rates investigation to be conducted by the Board itself, these matters involved investigations by bodies in no way related to the Board. Appellant contends that, while no one would argue that the Board could not properly adjourn proceedings pending before it from time to time as might be necessary in order to dispose of them properly, as indeed the Board is expressly authorized to do by section 45 (2) of the statute, it may not make an order such as that here in question amounting to a refusal to function altogether, pending the occurrence of matters which are entirely irrelevant to the discharge by the Board itself of the duty incumbent upon it under the provisions of the *Railway Act*.

On the part of the respondents, it is conceded that the first question should be answered in the affirmative and also that in so far as the postponement is conditioned upon amendment by Parliament to existing law, the judgment is in error. It is contended, however, that apart from this consideration the Board was entitled to take the other matters into consideration and base its decision to postpone thereon.

We proceed to deal with the meaning and effect of

> When the investigations, studies and determinations of the several matters hereinbefore referred to have been completed

in the concluding paragraph of the judgment.

It was made to appear before the Board that there had been an advance in wages paid by the railways since March, 1948, of 17 cents per hour. The learned Chief Commissioner said that evidence had not been furnished to show what portion, if any, of this increase in labour costs was proper and necessary. In his opinion the question of increased labour costs had been most inadequately dealt with, both in the evidence and in argument,

> and therefore before any final decision is given on this application the applicants will be afforded an opportunity to supplement the evidence and argument already before us in this regard.

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By itself this is no doubt unobjectionable. It is merely to say that when the parties are ready to deal with the point the Board would hear them. However, this does not stand by itself but must be taken with the other "matters" to which we shall refer, all of which are governed by the final paragraph of the judgment, under which, when all such matters are "completed" the Board will then proceed. In the meantime the Board will not deal with the application before it.

Another "matter" was the contention put forward on behalf of the Canadian National Railways that any increase in freight rates should substantially meet the requirements, not only of the Canadian Pacific Railway, which had been taken somewhat as the yardstick heretofore, but also of the National Railways. With respect to this the Chief Commissioner says:

> . . . I am of opinion that the final determination respecting this application *must* (the italics are mine) await the findings of the Royal Commission on Transportation, and possibly the implementation of certain of those recommendations.

With reference to the evidence directed toward establishing a rate base, the judgment says, *inter alia,*

> It may very well be that the proper basis for establishing freight rates in this country should follow a revision of the capital structure of the Canadian National Railways and the appropriate statutory direction to this Board as to freight rates based on that valuation. It is not open to the Board at present to adopt such a course. Therefore it is all the more important that no final determination be made respecting this application at the present time.

If this means (and it is open to such a construction) that in the view of the majority no decision on the pending application could, nor would, be given until Parliament should have acted with respect to these matters, this would be, in our opinion, a ground of decision entirely irrelevant. If this is not the meaning of the language, then this particular matter has no bearing on the present appeal.

The learned Chief Commissioner refers to a number of other matters as reasons why his decision "should authorize an interim increase only." In the context of the judgment this language can only mean that by reason of these considerations the majority decline to pass on the main application. The first of these matters is the ques-

tion of economy in carrying out the Canadian National-Canadian Pacific Act of 1933. As to this the judgment says:

> At the present time it is beyond the Board's jurisdiction to inquire into that question but I find again that one of the matters referred to the Royal Commission on Transportation in P.C. 6033 is that it "Review and report on the results achieved under '(the above statute)' making such recommendations as the present situation warrants."

Another matter under this head was the objection of the respondents to the principle of horizontal increases. The judgment states that the Board is not in a position to "give a final determination" with respect to the question because of the fact that it was a matter to be dealt with by the Board in conducting the general freight rates investigation directed by P.C. 1487.

The third matter under this head was the question of maintenance costs and "deferred maintenance." As to these the judgment says that—

> the question of proper maintenance costs as well as that of deferred maintenance will require further study by the Board in the light of additional information and accounting procedure which may flow from the recommendations of the Royal Commission . . .

From these references it is apparent that the postponement is until the General Freight Rates Inquiry (to be conducted by the Board itself), the report of the Royal Commission on Transportation, and probably (but perhaps not so clearly), the consideration by Parliament of that report, have all come to pass.

In our opinion if anything involved in these matters was relevant to a determination of the application of the railways and the review of the 21 per cent judgment ordered by P.C. 4678, it was for the Board itself to make its own determination and it was not competent to the Board to await the investigation of such matters by some other body or the passing by Parliament of some future legislation with respect to them. Such a decision involves, in our opinion, a declining of jurisdiction.

The Board of Transport Commissioners is not only an administrative body but a court of record and it has, in addition to any other power or authority, "full jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested,

> (*b*) requesting the Board to make any order, or give any direction, leave, sanction or approval, which by law it is authorized to make

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or give, or with respect to any matter, act or thing, which by this Act, or the Special Act, is prohibited, sanctioned or required to be done. Sec. 33(1) (*b*).

This jurisdiction the Board is bound to exercise.

In *Julius* v. *Lord Bishop of Oxford* (1), a case dealing with the nature and extent of duty imposed upon The Lord Bishop under an English statute couched in permissive terms, the Lord Chancellor, Earl Cairns, had occasion to review a number of pertinent authorities, among which was *The King* v. *Havering-atte-Bower* (2). In that case a power granted by royal charter to the steward and suitors of a manor giving them authority to hear and determine civil suits was under consideration. It was held that this was in effect the establishment of a court for the public benefit and that the stewards and suitors of the manor had no discretion but were bound to hold the court. Lord Cairns at page 225 of the Julius case expressed himself as to the principle involved as follows:

. . . where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised.

In the same case Lord Penzance said:

In all these instances the Courts decided that the power conferred was one which was intended by the Legislature to be exercised; and that although the statute in terms had only conferred a power, the circumstances were such as to create a duty. In other words, the conclusion arrived at by the Courts in these cases was this—that regard being had to the subject-matter—to the position and character of the person empowered—to the general objects of the statute—and, above all, to the position and rights of the person, or class of persons, for whose benefit the power was conferred, the exercise of any discretion by the person empowered could not have been intended.

It was the view of all the members of the House in that case that while words which are permissive do not of themselves do more than confer a faculty or power, nevertheless, to quote The Lord Chancellor at page 222:

. . . there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which

(1) (1879-80) 5 A.C. 214. (2) 5 B. & Ald. 691.

may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so.

In our opinion to postpone passing upon a matter by reason of matters which are entirely irrelevant to the proper discharge of the duty placed upon the Board under the statute to decide these matters for itself amounts in effect to a refusal to function. It is no answer to say, as the respondents did, that it was always open to the railways to make a further application. In the face of the present judgment no one can doubt what would be the answer to such an application.

The injustice to the appellants by reason of the judgment here in question can best be illustrated by a reference to the earlier judgment delivered by the learned Chief Commissioner on April 23, 1949, in *Province of British Columbia* v. *C.P.R., C.N.R., et al* (1). That was an application by the province of British Columbia for an order directing the railways to remove from the freight tolls the so-called "mountain differential." In the course of his judgment the learned Chief Commissioner, with whom Mr. Commissioner MacPherson agreed, said at 225:

> On behalf of the Provinces of Alberta, Saskatchewan and Manitoba, and on behalf of the City of Winnipeg and the Winnipeg Board of Trade it was urged that the removal of the mountain differential should not be made prior to a general freight rate inquiry and study in Canada. Such an inquiry and study is now in progress. It will take much time to complete. As a result of that inquiry and study, and that being made by the Royal Commission on Transportation, it is possible that amendments to the Railway Act will have to be considered by Parliament before results of that study and the recommendations of the Royal Commission can be made effective. I see no reason why the Province of British Columbia before receiving the relief it seeks in this application should have to await the results of the study made by this Board and the Royal Commission.
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> * * * *
>
> For the reasons already given I cannot, and do not subscribe to the doctrine which would involve perpetuating an injustice clearly established, until some date in the future when the General Freight Rates Inquiry will be concluded.

With respect, there can be no difference in principle between a refusal to postpone consideration of an application on behalf of a province to reduce railway rates and a refusal to deal with an application by the railways for increased rates, the ground of decision being in each case

(1) 63 C.R.T.C. 214.

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the same. If there is injustice in the one case (and we respectfully agree with the learned Chief Commissioner that there would have been) there is the same injustice in the other. In granting a measure of relief, as it did by its interim order of 8 per cent, the Board concedes that the railways had made out a case for relief. The error lies in failing to proceed to determine the extent to which the interim relief granted was adequate or inadequate on the basis of the case made.

We think therefore the principle of the decision in *Maxwell* v. *Keun* (1), applies and that the majority judgment was such that injustice would be done by the order here in question were it to stand. To adopt the language of Cozens-Hardy M.R., in *Sackville West* v. *Attorney-General* (2), followed in Maxwell's case, the learned Chief Commissioner "failed to see that such would be the effect of his decision."

No doubt in deciding on "adjournments" the Board may and must exercise its discretion having regard to circumstances, but the general language of section 45(2) does not permit of that discretion being exercised with regard to irrelevant matters such as formed the grounds of postponement in the case at bar. As was said by Lord Esher M.R., in the *Queen* v. *Vestry of St. Pancras* (3):

> If people who have to exercise a public duty by exercising their discretion take into account matters which the courts consider not to be proper for the guidance of their discretion, than in the eye of the law they have not exercised their discretion.

The decision in *Canadian National Railways* v. *Canada Steamship Lines Ltd.* (4), contrasted with that in *Great Western Railway* v. *Chamber of Shipping* (5), illustrates the point.

While the question before this Court is not the soundness or otherwise of any view expressed in the judgment as to the manner in which any of those matters should finally be dealt with by the Board, but merely whether the Board erred in refusing to determine those matters on the present application, counsel for the respondent asked that the court should deal with these matters, if it saw fit, to "prevent further wrangling before the Board." It may therefore

(1) [1928] 1 K.B. 645.
(2) 128 L.T. Jour. 265.
(3) 24 Q.B.D. 371 at 375.
(4) [1945] A.C. 204.
(5) [1937] 2 K.B. 30.

not be irrelevant to refer to one matter, namely, the view expressed by the learned Chief Commissioner with respect to increased labour costs. This increase in wages on the part of the appellant followed upon an advance of this amount made by Canadian National Railways. The learned Chief Commissioner in his judgment does not say what further could or should have been done by the railways to establish the "propriety and necessity" of the increase, nor can we. Although the respondent provinces on the appeal before us attempted to support the view expressed of the majority, they did not take that point before the Board and were equally at a loss to suggest before us what further could have been done by the railways. Such a stand is therefore difficult to understand. We desire to add, however, that nothing in the above must be taken as indicating that in our view, any more than in that of the learned Chief Commissioner, proof of increased wages even though "fair, reasonable and necessary" must, without more, necessarily or automatically result in the authorization of increased freight rates. While a very important element, it is only one of the relevant circumstances which would have to be considered.

We therefore certify our opinion to the Board in the affirmative in answer to each of the questions asked. While there is jurisdiction under section 52(8) to award costs, it was agreed there should be no costs of this appeal.

Questions answered in the affirmative; no costs.

Solicitor for the appellant: *K. D. M. Spence.*

Solicitor for Province of Alberta: *J. J. Frawley.*

Solicitor for Province of British Columbia: *C. W. Brazier.*

Solicitors for Province of Manitoba: *W. E. McLean and C. D. Shepard.*

Solicitor for Province of Saskatchewan: *M. A. MacPherson.*

Solicitor for Maritime Board of Trade: *F. D. Smith.*

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*Mar. 30, 31
April 1, 4,
5, 6, 7, 8, 11,
12
*Dec. 5

NORANDA MINES LIMITED (DEFENDANT) ..... APPELLANT;

AND

MINERALS SEPARATION NORTH AMERICAN CORPORATION (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Infringement—Validity of Patent—Use of xanthates in froth-flotation concentration of ores—To determine whether a patent "correctly and fully describes the invention" the specification must be read as a whole—Claims which include substances harmful to the process are invalid—The Patent Act, 1923, S. of C., c. 23, ss. 7(1), 14(1)—The Patent Act, 1935, S. of C., c. 32, s. 61(1) (a).

The respondent claimed a patent for improvements in the froth-flotation concentration of ores by the use of certain sulphur derivatives of carbonic acid and sued the appellant for infringement. The appellant contended that the patent as a whole was invalid in that it did not correctly and fully disclose the invention and that of the claims sued on, 6, 7 and 9 were too broad and 8 was not infringed. The disclosure set forth that certain sulphur derivatives of carbonic acid had been found to increase greatly the efficiency of the froth-flotation process when used with frothing agents and paragraph 4 read: "The invention is herein disclosed in some detail as carried out with salts of the sulphur derivatives of carbonic acid containing an organic radical, such as an alkyl radical and known as xanthates, as the new substance. These form anions and cations in solution."

Claim 6 read: "The process of concentrating ores which consists in agitating a suitable pulp or an ore with a mineral-frothing agent and an alkaline xanthate adapted to co-operate with the mineral-frothing agent." The improvement in the concentration as set out in claim 7 was to be "in the presence of a xanthate"; in claim 8, "in the presence of potassium xanthate"; and in claim 9, "in the presence of xanthate and a frothing agent."

Held: (Kerwin J. dissenting), that in determining whether a patent "correctly and fully describes the invention," the Specification, including the disclosures and claims, is to be read as a whole.

Held: also that claims 6, 7, 8 and 9 were invalid since they included substances i.e., xanthates, admittedly harmful to the process.

Per: Kerwin J., dissenting,—"Xanthate" as used in claim 9 must be read as limited by the definition in the disclosures, and as it is a technical word for which there is no precise meaning, the inventor supplied one in paragraph 4 of the disclosures—the term thus limited did not include cellulose xanthates and heavy metal xanthates.

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

APPEAL from a judgment of the Exchequer Court, Thorson J., President, (1) holding that claim 9 of Letters Patent No. 247,576 was valid and had been infringed by the appellant.

P. C. Finlay K.C. and *Christopher Robinson* for the appellant.

E. G. Gowling K.C. and *Cuthbert Scott* and *J. C. Osborne* for the respondent.

KERWIN J.: (dissenting) The defendant in this action, Noranda Mines Limited, appeals against a judgment of the Exchequer Court (1) declaring that claim 9 of Canadian Letters Patent of Invention dated March 10, 1925, was valid and had been infringed by the appellant and ordering the usual consequential relief. The letters patent were issued as the result of an application filed October 23, 1924, for an invention of Cornelius H. Keller relating to Froth Flotation Concentrates of Ores. The respondent is the plaintiff Minerals Separation North American Corporation to whom Keller assigned all his right, title and interest in and to the invention, and to whom the letters patent were issued. Claims 6, 7 and 8 were also in suit but the trial judge, the President of the Exchequer Court, decided that the first of these was void for avoidable obscurity and that, in view of his conclusion as to claim 9, it was unnecessary to deal with 7 and 8. The appellant admits infringement on claim 9 and as I have come to the conclusion that it is valid, no opinion is expressed as to the other three.

Froth flotation is a method of treating an ore so as to separate the gangue from the values, and which method reduces the bulk of material that has to be subsequently smelted to obtain the desired metal. The operation is accomplished by the addition of a frothing agent to the pulp to which the ore had already been reduced and by such a violent agitation of the pulp that, at the top, a voluminous froth is formed, having the property of tending to cause the values to adhere to the bubbles as they rise through the pulp. The froth is removed and, after the required number of treatments, the minerals contained therein are known as the concentrate.

(1) [1947] Ex. C.R. 306.

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For my purpose the process may be thus baldly stated because although it was fully developed in the evidence and is set forth in detail in the reasons for the judgment appealed from, there is no dispute between the parties as to its existence in that form at the earliest time of any importance in the litigation, that is March, 1915, which is relied upon by the appellant as being the time when the use of xanthates in froth flotation concentration of ores was known by one R. B. Martin. In fact the first ground of appeal of the appellant is that the President was in error in holding the contrary. Before proceeding, the other three grounds of alleged error may be stated:—

2. In holding that the specification of the patent in suit described the invention in the manner required by the statute;

3. In holding that claim 9 was limited by the disclosure to a certain kind of xanthates;

4. In holding that the disclosure was limited to a certain kind of xanthates which did not include cellulose xanthate and heavy metal xanthates.

It will be convenient to examine the last three of these allegations before turning to the first but attention should now be directed to subsection 1 of section 7 and subsection 1 of section 14, of the *Patent Act*, chapter 23 of the 1923 Canadian Statutes, which was the enactment in force at the time of the application for, and granting of, the patent in suit. These enactments are as follows:—

7. (1) Any person who has invented any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvements thereof, not known or used by others before his invention thereof and not patented or described in any printed publication in this or any foreign country more than two years prior to his application and not in public use or on sale in this country for more than two years prior to his application may, on a petition to that effect, presented to the Commissioner, and on compliance with the other requirements of this Act, obtain a patent granting to such person an exclusive property in such invention.

14. (1) The specification shall correctly and fully describe the invention and its operation or use as contemplated by the inventor. It shall set forth clearly the various steps in a process, or the method of constructing, making or compounding, a machine, manufacture, or composition of matter. It shall end with a claim or claims stating distinctly the things or combinations which the applicant regards as new and in which he claims an exclusive property and privilege.

It is upon subsection 1 of section 14 that the appellant relies in connection with its last three submissions and I therefore refer immediately to the disclosure. Paragraphs 2 to 7 inclusive thereof read:—

2. The invention relates to the froth-flotation concentration of ores, and is herein described as applied to the concentration of certain ores with mineral-frothing agents in the presence of certain organic compounds containing sulphur.

3. It has been found that certain sulphur derivatives of carbonic acid greatly increase the efficiency of the froth-flotation process when used in connection with mineral-frothing agents. The increased efficiency shows itself sometimes in markedly better recoveries, sometimes in effecting the usual recoveries with greatly reduced quantities of the usual mineral-frothing agents, and sometimes in greatly reducing the time needed for agitation to produce the desired recoveries.

4. The invention is herein disclosed in some detail as carried out with salts of the sulphur derivatives of carbonic acid containing an organic radical, such as an alkyl radical and known as xanthates, as the new substance. These form anions and cations in solution. Excellent results were also obtained by agitating ore pulps with the complex mixture produced when 33⅓ per cent of pine oil was incorporated with an alcoholic solution of potassium hydrate, and xanthates or analogous substances were produced by adding carbon disulphide to this mixture.

5. The galena-bearing froth obtained with xanthates or analogous substances used at the rate of 0·2 pounds per ton of ore had a characteristic bright sheen, like a plumbago-bearing froth, and seemed to make a more coherent froth than when other materials were used on the same ore.

6. In general the substances referred to are not mineral-frothing agents,—producing only a slight scum, and some evanescent frothy bubbles, when subjected to agitation which would produce mineral-bearing froth on an ore pulp in the presence of a mineral-frothing agent. The substances are effective in enabling a selective flotation of lead and zinc; and cause uncombined silver, if present, to tend to go into the lead concentrate rather than with the zinc, where these are separated in separate concentrates. Usually pre-agitation is unnecessary, the brightening and other effects seeming to be practically instantaneous. The pulps may be either acid, alkaline or neutral according to circumstances.

7. Two sticks of caustic potash weighing perhaps 15 grams were partly immersed in about 80 cc. of commercial carbon disulphide and kept for about ten days in a closed bottle containing some air in the warm region of the laboraotry where were the hot plates used for drying. These eventually yielded a yellow or orange salt which was used with pine oil at the rate of approximately half a pound to a ton of ore in concentrating Hibernia ore from Timber Butte Mining Company. The test was with a neutral pulp, and the concentrates were seen to be clean with brightened lead sulphide particles.

Paragraph 8 states that for laboratory purposes potassium xanthate was prepared in the manner described and

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the subsequent paragraphs set forth certain tests, and the specification ends with eleven claims, of which the ninth only need be noticed:—

> 9. The improvement in the concentration of minerals by flotation which comprises subjecting the mineral in the form of a non-acid pulp to a flotation operation in the presence of a xanthate and a frothing agent.

In its attack the appellant has sought to place each of the paragraphs of the disclosure set out above in a straight jacket and by a meticulous examination of every word has endeavoured to show that Keller never put his finger on what he had discovered. That this is not a proper way to read the specification is made clear by a number of authorities, to one only of which is it necessary to refer. In *Smith Incubator Co.* v. *Seiling* (1) Chief Justice Duff states at 255:—

> It is now settled law that, for the purpose of ascertaining the meaning of the claims, the language in which they are expressed must be read in light of the specification as a whole, but it is by the effect of the language employed in the claims themselves, interpreted with such aid as may properly be derived from the other parts of the specification, that the scope of the monopoly is to be determined.

And at page 260, the present Chief Justice notes:—

> As often observed, of course, the claims must be construed in the light of the rest of the specification; and that is to say, that the specification must be considered in order to assist in comprehending and construing the meaning—and possibly the special meaning—in which the words or the expressions contained in the claims are used.

In accordance with this principle, "xanthate" as used in claim 9, must be read as limited by the definition in the disclosure. This is not inconsistent with the decision of this Court in *B.V.D. Company Limited* v. *Canadian Celanese* (2) as xanthate is a technical chemical word for which there is no precise meaning and, therefore, the inventor supplied one in paragraph 4 of this disclosure. I agree that the words "such as" mean "of the type of". So read, Keller has made it clear to any one versed in the art that his invention consists of a new and useful improvement in froth flotation concentration of ores by the use of a mineral frothing agent with sulphur derivatives of carbonic acid containing an organic radical of the type of an alkyl radical which forms anions and cations in solution. Without detailing the evidence which appears in the President's

(1) [1937] S.C.R. 251. (2) [1937] S.C.R. 221.

reasons, I may state that I am satisfied that Keller's disclosure was limited to a certain kind of xanthates, which did not include cellulose xanthates and heavy metal xanthates.

I now turn to the first argument of the appellant that the use of xanthates in flotation was known in 1915 by Martin and that, therefore, Keller had not, in compliance with subsection 1 of section 7 of the *Patent Act*, invented any new and useful process not known by others before his invention. Martin was not called as a witness. He had been engaged by the respondent's predecessor in March, 1915, under an employment agreement, and by another agreement of the same date had given an option to a related English company for the purchase, subject to a shop right to Utah Copper Company, of all inventions previously made by him relating to the treatment of ores and to flotation concentrates and reagents. On the same day, Martin disclosed his alleged inventions to Higgins, the chief metallurgist for the respondent's predecessor. Among these was the only one requiring mention, "NATROLA", the name he had used at Utah Copper Company for a composition he later called "STANOL". At the trial, Higgins said Martin had been provided with laboratory accommodation, chemicals and ores, and that he had supervised Martin's work but that STANOL had been found by Higgins, Martin, and a third party to be of no use. Later, at Higgin's suggestion, Martin incorporated in a document dated August 15, 1915, and known as Bulletin 2, descriptions of his flotation reagents, including Stanol. Applications for patents covering other alleged inventions of Martin were prepared and according to the testimony of Mr. Williams, the respondent's patent attorney, they represented all that Martin had succeeded in demonstrating to be of any value of the inventions brought by him to his employer. Bulletin 2 was discussed between Higgins and Martin when the former found that there were so many formulae in the document that he concluded that they could not all be equally effective and he asked Martin to put the best of each one of them in a book of reference. Some time before October 21, 1915, this book was prepared and handed to Higgins and in it are set out certain notations showing what was most useful in each

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of the preparations contained in Bulletin 2. This was followed by Bulletin 3 in which STANOL is not mentioned. On October 22, 1915, Bulletin 4 was delivered by Martin to Higgins and on page 9 is mentioned "STANOL" and stated that it was not satisfactory on ore at Anaconda Mine. Bulletin 4 is the last one in which mention is made of STANOL notwithstanding that Martin prepared and delivered eighty-eight bulletins in all. Although applications were prepared for KOTRIX and certain reconstructed oils which had been disclosed by Martin, he and Higgins decided that there was nothing of value in STANOL to patent. It appears that shortly after the issue of the Keller patent in the United States, Martin resigned his position with the respondent and subsequently was instrumental in having declared an interference between the Keller United States patent and Martin's own application for a patent. This interference was dissolved without a determination of the question of priority.

Nowhere did Martin claim that STANOL was xanthate. He was thinking of STANOL only and while he theorized as to there being some xanthate in it and that it should be effective in flotations, the evidence all leads to the conclusion that he did not know the value or use of xanthate as such; that is, he did not know the invention that Keller later made. It should be added that there is no suggestion that Keller ever saw Martin's bulletins or books. This makes it unnecessary to consider the respondent's argument that even if Martin did know, section 61(1)(*a*) of the present *Patent Act*, 1935, c. 32, although enacted in 1932 by c. 21, sec. 4 (after the patent in suit was issued) applies so as to render such knowledge unavailing unless Martin had disclosed or used his process in such manner that it had become available to the public.

The appeal should be dismissed with costs.

The judgment of Rand and Locke JJ. was delivered by:—

RAND, J.:—The first objection raised by the validity of the patent is that the inventor, in the specification, has failed to satisfy the requirement of the statute that he describe his invention correctly and fully. Both at the trial and before us the defendant pressed the question, what is the invention? And to deal with that initial challenge adequately a statement of the main facts must be given.

The invention is stated to be an improvement in a process known as the froth flotation of minerals, a method of separating them which in its modern form dates from the year 1905. These minerals are chemical compounds containing metals such as gold, silver, copper, lead, etc.; and they are found generally in a mixture with other substances, chiefly silicas, called an ore body. The minerals may be thickly or thinly scattered throughout the ore; but their extraction from the mixture is a preliminary to the direct recovery of the metal from the compound in which it appears.

The flotation process consists, first of crushing and grinding the ore to varying degrees of fineness: the material is then thoroughly mixed with water into what is called a pulp: an oil or similar substance is added: air is introduced, and the whole well agitated. Masses of bubbles are formed, apparently with an oily film, which, laden with mineral particles, rise to the top in a dark scum called the concentrate. This scum is collected, the froth matter is driven off, and the residue of mineral is then ready for the smelter.

The oil or other substance added is primarily a frothing agent: but it has also more or less a collecting function, that is, it produces an attraction between the air bubbles and the mineral particles which causes the latter to cling to the former. The theory of this attraction seems not to be agreed upon, nor whether the emulsified oil in any degree films the particles. But I infer that it is a real attraction, probably of an electro-magnetic nature, and is not merely a mechanical involvement of the particles in the surface tension of the bubbles. The attraction may also be selective: that is, the copper, say, may be caught up in priority to the lead. Some agents are more effective in producing froth than collecting the mineral while others have a converse action: and a combination of two or even more may be used. So many factors of difference in the minerals and in the ores are found, that each mine tends to work out its own best method; changes in the chemical composition may take place more or less constantly, both slowly and rapidly, and local adaptation may become a factor in good operation. For instance, mineral may oxi-

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dize. Now oxide minerals, in which an oxide of the metal sought predominates, cannot directly be recovered in flotation: the bubbles do not collect the particles. In sulphide minerals, on the other hand, they do. Oxides are therefore washed or filmed with a sulphidizing agent and they then are amenable. The choice of agents to be used may thus, by similar and other conditions, be influenced.

The search then became one for more effective collector agents, including agents for sulphidizing, substances that would, at the cheapest cost, gather to the concentrate the greatest quantity of values, or minerals, and the least of the waste or gangue: and the whole field of organic and inorganic chemistry was opened to the exploration.

In this state of things, the scientists of the respondent took up the hunt. In 1922, September 19, one of them, a chemist named Keller, in search of a sulphidiser, issued a direction to his associate in metallurgy to test a salt known as potassium xanthate for that purpose. In the course of the next year a great many experiments with xanthate and similar substances were carried out in the company's laboratories at San Francisco and New York. It was discovered that certain xanthates, although not sulphidizing agents, did produce a remarkable increase in the flotation efficacy of frothing or collecting agents. They were not capable of producing froth and did not, apparently, react through coating the particles of mineral. Their property of enhancing the process was demonstrated in March, 1923; and after continuing tests and the exploration of peripheral areas throughout the summer and autumn, application for a patent was made in the U.S.A. on October 21, 1923.

Since the discovered salts have neither frothing nor sulphidizing powers, they are not directly effective on oxide ores until first sulphidized, and they must be combined with a frothing agent: their role is to influence favourably the process as it was carried on with oils and other substances at the time of the invention. They are therefore new factors whose effect is made upon the existing process, in which they appear to play a part analogous to that of a catalytic agent.

Now it is obvious that in the field of chemistry family relationship in compounds is likely to be characterized by similar significant reaction results; and that a xanthate has

such modifying powers leads at once to the notion of a chemical group which, possessing certain characteristic qualities, may be efficacious in producing the same effects. So it happened with Keller. Having made an important discovery, he set about to distribute the field of such agents not only as a contribution to the operation but also to protect his invention against encroachment. The invention became therefore the discovery of a series of modifiers and the initial question raised is whether there has been a sufficient description of that series. In such a case an inventor cannot be called on to investigate and to name every possible substance individually of the group; he may do that by a description and that description may be of attributes or by classification.

The argument tended to assume that the "correct and full" description required by section 14 of chapter 23 of the *Patent Act,* 1923 must be in what has been called the narrative portion of the specification. But the statute makes no such provision; the specification is to end with the claims, but it is in the specification that the description must be given: and to the whole of it we are entitled to look to ascertain what the invention is. The language of Duff C.J. in *Smith Incubator Co* v. *Seiling,* (1) at p. 257, in which he speaks of the specification "as a whole", seems to me to have been carefully phrased to avoid the restrictive interpretation suggested.

The specification recites that "it has been found that certain sulphur derivatives of carbonic acid" are effective for the purposes of flotation. It then proceeds to reduce this general statement to defined particulars by furnishing examples of derivatives which embody the special property, by indicating certain characteristics and lastly by delimiting, in the claims, the boundaries, within the field of the derivatives, of the group for which the inventor asserts monopoly. The introductory sentence to the claims, "Having described certain embodiments of the invention, what is claimed is", clearly, I think, relates the claims to the description as well as the delineation of the exclusive field. What the disclosure lacks to a full description is the completion of enumeration; at this point description has become enumeration, and that is furnished by the claims.

(1) [1937] S.C.R. 251.

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Rand J.

I take the disclosure to imply in fact that the invention consists of those sulphur derivatives of carbonic acid which are described or defined in the claims. So far as a claim may include, for instance, a useless or an antagonistic substance, it is, as a definition of the monopoly, defective, but its descriptive function remains. The only question then is whether when the description contains a substance of no value or use the patent *ipso facto* is invalid as not specifying the invention correctly and fully. The special circumstance here is that the invention is a distributive discovery; (*a*), (*b*), (*c*) and (*d*) are asserted individually and severally; the first three have in fact been invented and are correctly and fully described; but the inventor has also described as invention, (*d*), which he has not invented. Assuming a claim which does not include (*d*), it is as if the inventor had declared, I assert I have also invented (*d*) but I do not claim it. Only if we treat the invention as being of the group as an entirety, can it be said that the description is not correct; but that is not what the specification here intends. The substances are to be viewed as quasi-independent inventions but by the necessities of the case they can distributively be made the subject of a single patent.

The invention is therefore the use in flotation of those substances taken distributively which are sulphur derivatives and which are of such nature or characteristics, are so combined, and react in such conditions as are expressed in the specification as a whole. To require the full detailed description to be given in the so-called narrative would necessitate a virtual repetition of the claims. Taking the specification in its totality, Keller has, I think, met the requirement of the statute: no competent metallurgist would have any difficulty in grasping the discovery in all its essentials.

Against this conception, it is said that the expression "sulphur derivatives of carbonic acid" is ambiguous, on which there would be wide divergencies of opinion in metallurgists or chemists. But it is agreed by Dr. Purves, for the appellant, that a sulphur derivative is one in which the oxygen of the formula H_2CO_3 is replaced by sulphur. The initial replacements would result in H_2CO_2S, H_2COS_2 and H_2CS_3, mono-, di-, and tri-thio-carbonates. Dr.

Purves, however, in a chart of resultant combinations, in the mono- and di-groups substituted chlorine or an ammonium radical for OH: in doing that he violated, I think, the primary premise of sulphur substitution for the oxygen. In this I accept the opinion of Higgins, the chief metallurgist of the respondent, that "derivative" means exactly what it says, and that the introduction of Cl and NH_2, though it does produce a derivative containing sulphur, does not produce a sulphur derivative of carbonic acid; it would properly be called a chlorine or other derivative of a sulphur derivative; but to that the statement of the discovery does not extend.

The invention was one of great value to the mining industry and brought in a group of agents of which there had been no previous knowledge or experience. It was not only natural but legitimate that the inventor should have endeavoured to protect his discovery. Precise description in such an uncharted field is hedged with difficulty; and although overreaching must draw its penalty, we are not called upon to employ microscopic means of discovering it nor to insist upon a pedantic accuracy to satisfy a formal symmetry.

A great deal of the evidence was taken up with matter arising out of the 4th paragraph of the specification which reads:—

> The invention is herein disclosed in some detail as carried out with salts of the sulphur derivatives of carbonic acid containing an organic radical, such as an alkyl radical and known as xanthates, as the new substance. These form anions and cations in solution. Excellent results were also obtained by agitating ore pulps with the complex mixture produced when 33⅓ per cent of pine oil was incorporated with an alcoholic solution of potassium hydrate, and xanthates or analogous substances were produced by adding carbon disulphide to this mixture.

The respondent took the position that here was an exclusive description of xanthate for the purposes of the specification; that the xanthates intended to be denoted by that term were those containing an alkyl radical, which in solution formed anions and cations. These compounds, it may be stated, are salts of xanthic acid. That restrictive definition was considered necessary seemingly to support claim 9 which speaks of "a xanthate", by excluding certain xanthates which admittedly are of no value, such as cellulose and certain of the heavy metal compounds. This re-

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duction of the discovery to special xanthates and "similar substances" mentioned in paragraphs 4 and 7 appears to me to be incompatible with the plain meaning of the language of the paragraphs as well as of the specification generally. What the narrative does is to furnish the circumstances and results in tests of certain "embodiments" of the invention, or, as one might say, of certain members of the group discovered. The reference may be taken as limited to such xanthates; but they are named only as illustrative examples: they, only, are disclosed in some detail; but that the language is intended to furnish a conventional meaning of xanthate to be carried forward into the claims is a conclusion which I am quite unable to draw.

The claims which the defendant is charged with infringing are numbers 6, 7, 8 and 9. The first, 6, is as follows:—

> The process of concentrating ores which consists in agitating a suitable pulp of an ore with a mineral-frothing agent and an alkaline xanthate adapted to co-operate with the mineral-frothing agent to produce by the action of both a mineral-bearing froth containing a large proportion of a mineral of the ore, said agitation being so conducted as to form such a froth, and separating the froth.

It was attacked as ambiguous in the expression "alkaline xanthate". Admittedly xanthates are neither alkaline nor acid: they are neutral; and the adjective, as every competent metallurgist would know, cannot be taken to indicate such a characteristic of the substance. Nor do I think it can be taken to refer to the condition of the pulp. But, in some sense it does clearly qualify xanthate and I find no difficulty in satisfying myself in what that lies. Throughout the disclosure it appears that xanthates of potassium and sodium were used exclusively in the experiments. These are two alkali metals which in the standard formula for xanthate replace the hydrogen atom associated with sulphur. The disclosure also describes how these xanthates were made by the inventor, which was by first dissolving the hydrate of the one or the other in ethyl alcohol and then adding carbon disulphide. From these facts and the somewhat free and imprecisely adapted use of adjectival language by chemists, as well as the general knowledge of the chemistry of xanthates, I think it a reasonable inference that the language is intended to describe xanthates in which the metal or radical which replaces the hydrogen atom is that which comes from an alkali, those

in the making of which an alkali is used. Several alternatives were suggested. The meaning attributed by the respondent was alkali metals, which are those present in alkalies: the appellant suggested, in addition, alkaline earths which are earths, i.e. oxides, of chlorine and certain allied elements, and which exhibit properties midway between alkalies and earths: but I am unable to take the word to relate to either of these classes. Claim 5, in specifying an "alkali metal" salt, seems to conclude the question against the first; and the second falls through its own remoteness.

It was contended by Mr. Robinson that, on the respondent's interpretation, the inclusion of ammonium xanthate invalidated the claim because that substance was of no value in flotation. The evidence relied on is the report of Keller in which he describes the combination of ammonium hydrate with alcohol and carbon disulphide to produce what he took to be xanthate. But both Higgins and Dr. Purves agree that ammonium xanthate cannot be so produced and that Keller was wrong in his chemistry. Whatever the product his mixture gave him, whether good or bad for his purpose, it was not xanthate; and ammonium xanthate has not been shown to be of no utility.

But it would appear that whether we take the expression to signify alkali or alkali metal, the same objection arises. The evidence discloses that cellulose xanthate is a product from ingredients of which the alkali, sodium hydrate, is one; it is then a xanthate embraced within both meanings; and since admittedly it is harmful to the process, the claim cannot stand.

But with this, the language "with a mineral-frothing agent and an alkaline xanthate adapted to co-operate with the mineral-frothing agent to produce by the action of both a mineral-bearing froth containing a large proportion of a mineral of the ore" must be considered. At trial, the appellant challenged this language as insufficient in not specifying which xanthates were "adapted" and which not. In this interpretation "adapted" relates to the properties of the xanthate necessary to co-operative action, and its effect would be that it would restrict xanthates to those that could be successfully used. Mr. Gowling, in his factum, states that "it simply means that the purpose of mixing the two

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substances is to enable them to co-operate together to give the desired result." I must confess to a difficulty in appreciating the sense intended to be conveyed by this but, in my opinion, in any admissible sense the clause cannot be taken validly to restrict the scope of "alkaline xanthate" to those that will co-operate, and the clause does not, therefore, affect the conclusion otherwise reached.

The second claim, 7, reads:—

> The improvement in the concentration of minerals by flotation which comprises subjecting the mineral in the form of a non-acid pulp to a flotation operation in the presence of a xanthate.

This is met by the formidable objection that "a xanthate" means *any* xanthate including cellulose xanthate. It may be convenient to state here that "cellulose" xanthate is a description in terms of the organic radical used; but xanthates are also known in terms of their metal or of both the metal and radical. The only answer to this is the special interpretation given paragraph 4 with which I have already dealt. The common knowledge contained in the working chemistry dictionaries in 1923 extended to a great many xanthates besides those of soluble metals or alkyl radicals. They had become in fact known to Keller. For these as well as the reasons already given, I must give the language its ordinary meaning and hold the claim invalid.

A second objection is that the claim extends to the use of xanthate without a frothing agent. If it stood alone, I should be disposed to interpret "flotation operation" as including a frothing function. But the express mention of a "frothing agent" in claim 9 in collocation with "flotation operation" implies there either some special conjunction with the xanthate or that two frothing agents are contemplated, or that "flotation operation" is not intended to embrace frothing. The duty of an inventor is to define intelligibly and consistently the boundaries of his exclusive area, and it would be doing violence to this requirement to accept either of the first two suggested meanings; I must then take it that where a frothing agent is not mentioned it is intended to be excluded as a requirement. On this ground, also, the claim fails.

Claim 8 is as follows:—

> The improvement in the concentration of minerals by flotation which comprises subjecting the mineral in the form of a non-acid pulp to a flotation operation in the presence of potassium xanthate.

It raises the same question of frothing agent just considered and for the same reason it is defective.

It was urged that the appellant did not use potassium xanthate within six years preceding the commencement of action. The respondent's answer was both that Exhibit M2 shows that use and that sodium xanthate is a chemical equivalent. The contradiction arises from the fact that the defendant takes potassium xanthate in the claim to mean potassium ethyl xanthate and the respondent that it covers potassium xanthate with any alkyl radical. Paragraph 8 of the specification sets out the method followed by Keller to make potassium xanthate and the ingredients used show that he made potassium ethyl xanthate. But that was for laboratory purposes only and there is no implication that it is the only potassium xanthate or that for the purposes of the specification potassium xanthate means that with the ethyl radical. Both amyl and hexyl radicals are mentioned in Exhibit No. 6 listing the xanthates made before 1923. Notwithstanding the evidence of Higgins, that, in common parlance among metallurgists, in the absence of reference to the radical, ethyl is understood, I think the respondents are right in their interpretation.

This in turn raises the question of potassium cellulose xanthate. The metal used in cellulose xanthate, in the manufacture of rayon, is sodium: but the evidence of Bennett is that potassium xanthate of cellulose has the same effect on flotation as the sodium compound, a conclusion which would follow from the fact, agreed upon, that in these compounds the two metals are interchangeable.

Assuming the expression signifies ethyl xanthate, the contention that sodium is, for this purpose, an equivalent must be considered. Both sodium and potassium xanthates, presumably ethyl, are disclosed as having been made and tested and found beneficial to flotation. Potassium was evidently more fully explored than sodium although the latter would appear to be the cheaper product. Both were thought, no doubt, to be protected under claim 7: and we are entitled to ask, why, then, the special claim for the one and not the other. It may be that potassium xanthate was looked upon as the central and basic discovery which would carry with it any such equivalent. But that is a speculation which I do not feel at liberty to act upon. An

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equivalent is a known substitute means to a certain end; but here sodium xanthate is known as a modifying agent only as it has been discovered as part of the invention. To select one of two substances so discovered is impliedly to exclude the other: otherwise it would be to patent the invented substance not directly but as an equivalent; but the specification makes it quite clear that these two substances are not being dealt with in that manner.

The claim, then, is too broad and fails.

The last is 9:—

> The improvement in the concentration of minerals by flotation which comprises subjecting the mineral in the form of a non-acid pulp to a flotation operation in the presence of a xanthate and a frothing agent.

This the President held valid. He accepted the contention that paragraph 4 defines and limits xanthates for the purposes of the specification, i.e, those containing an alkyl radical and forming anions and cations in solution. With this I have already dealt. It is a matter of interest that on the original application in the United States, the words were, "as carried out with salts of the alkyl sulphur derivatives"; to change this to "salts of the sulphur derivates * * * containing an organic radical, such as an alkyl radical" is, in my opinion, to put the actual intention of the draughtsman in the Canadian document beyond controversy; and interpreting the paragraph in the context of the specification as plain and unambiguous language, I find it to carry out that intention.

On the plain language of this claim, it is bad: there were known to Keller many xanthates which were of no value to the process. In opening the case, counsel for the respondent, speaking of claim 7, stated that "a xanthate" meant "any xanthate" and that I think is precisely what it means in 9. The reconstruction of paragraph 4 now put forward appears to me as an artificial patchwork which imputes meaning beyond the capacity of the words to bear.

As is seen, the claims fail chiefly because of the inclusion of xanthates which are antagonistic or uselss to the flotation. That of cellulose is most prominent, and in this it is the radical, cellulose, that provides the destructive element. There are at least sixteen organic radicals with which before 1923 xanthate had been made; in the tests of Keller the ethyl radical was used almost exclusively: but cellulose

which had become well-known through the development of rayon was in fact tested and found hostile. In other xanthates it is the metal that is known to furnish that character.

These conclusions diverge from those of the President on the point of the interpretation of paragraphs 4 and 7; and as the language of these paragraphs is set against that of the claims, we have a good example of the sort of thing mentioned by Earl Loreburn in *Natural Colour* v. *Bioschemes* (1):—"Some of those who draft Specifications and Claims are apt to treat this industry as a trial of skill, in which the object is to make the Claim very wide upon one interpretation of it, in order to prevent as many people as possible from competing with the patentee's business and then to rely upon carefully prepared sentences in the specification which, it is hoped, will be just enough to limit the claim within safe dimensions if it is attacked in Court." As in *B.V.D.* v. *Canadian Celanese* (2) the claims are wide and general; and for the reasons there given, they cannot be restricted by the language of the disclosure.

Several other objections were raised, the most important of which was that the invention had already been known by Martin, a chemist employed by the parent company of the respondent; but in view of the conclusion reached on the claims, consideration on these grounds becomes unnecessary.

The appeal must, therefore, be allowed and the action dismissed with costs throughout.

KELLOCK J.: The specification states that one, Keller, has invented "certain" new and useful improvements in "froth-flotation concentration of ores" and he declares that what follows is a "clear, full and exact description of the same". The next paragraph reads:

> This invention relates to the froth-flotation concentration of ores, and is herein described as applied to the concentration of certain ores with mineral-frothing agents in the presence of certain organic compounds containing sulphur.

So far, it would appear that the "invention" with which the paragraph opens, is something different from the "certain organic compounds containing sulphur" with which

(1) (1915) R.P.C. 256. (2) [1937] S.C.R. 221.

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the paragraph concludes. In paragraph 3, however, the inventor states what he has found in the following language:—

> It has been found that certain sulphur derivatives of carbonic acid greatly increase the efficiency of the froth-flotation process when used in connection with mineral-frothing agents.

The paragraph then gives particulars of the respects in what this increased efficiency shows itself. Paragraph 4 then follows:—

> The invention is herein disclosed in some detail as carried out with salts of the sulphur derivatives of carbonic acid containing an organic radical, such as an alkyl radical and known as xanthates, as the new substance. These form anions and cations in solution. Excellent results were also obtained by agitating ore pulps with the complex mixture produced when 33⅓ per cent of pine oil was incorporated with an alcoholic solution of potassium hydrate, and xanthates or analogous substances were produced by adding carbon disulphide to this mixture.

In paragraph 5 the inventor says:

> The galena-bearing froth obtained with xanthates *or* analogous substances used at the rate of 0·2 pounds per ton of ore had a characteristic bright sheen, like a plumbago-bearing froth, and seemed to make a more coherent froth than when other materials were used on the same ore.

In paragraph 6 he says:

> In general the *substances* referred to are not mineral-frothing agents * * * The substances are effective in enabling a selective flotation of lead and zinc * * * Usually pre-agitation is unnecessary * * * The pulps may be either acid, alkaline or neutral according to circumstances.

In my opinion, taking the view for the moment that "the invention" is to be found in paragraph 4, such invention is really twofold—(1) the use of xanthates, and (2), the use of the "analogous substances" in flotation. I do not think either can properly be described as primary or secondary. The inventor in paragraph 5 says that either produce the results therein described, and in paragraph 6 he says that "the substances", i.e., both the xanthates and the analogous substances, are not mineral-frothing agents and may be used in acid, alkaline or neutral pulps.

As the claims here in question relate to xanthates only, I do not consider it necessary to consider further the "analogous substances" in view of the conclusion to which I have come with respect to the claims.

With respect to xanthates, the respondent contends that paragraph 4 is to be read as saying that "the invention" consists of xanthates containing an alkyl radical and a

soluble metal. This, in effect, is the view which commended itself to the learned trial judge. Appellant on the other hand, says that the paragraph does not so state and that "the invention' 'is not defined by the paragraph, but is only described as carried out with certain substances, the ambit of the invention being left vague. Appellant further says that if the paragraph is a definition, the expression "such as an alkyl radical" is used in the sense of "for example" and the organic radicals mentioned in the paragraph are not limited to alkyl but extend to all organic radicals or, alternatively, if limited by the expression, the radicals are all organic radicals of the type of alkyl. In appellant's contention these include all aliphatic radicals which react chemically in the same way as alkyl radicals. Appellant further submits that the second sentence of the paragraph is not part of the definition but even if it is properly to be so considered cellulose xanthate would be included and cellulose xanthate is not only useless but positively harmful in flotation.

The first question to be considered therefore, is the proper construction of paragraph 4. I deal first with the opening sentence of the paragraph.

According to *Murray's English Dictionary,* 1919 Edition, "such" is a demonstrative word used to indicate the quality or quantity of a thing by reference to that of another or with respect to the effect that it produces or is capable of producing. Head 9 deals wih uses of the words "such as" marked by special word-order and in sub-paragraph (*d*) which follows upon illustrations of attributive use after a substantive, the authors state that the expression such as "is used to introduce examples of a class:=for example, e.g."

Had the expression used in paragraph 4 read "such an organic radical as an alkyl radical" the situation might have been more in favour of the respondent's contention but the expression actually used "an organic radical, such as an alkyl radical" points to the construction that the patentee was using the phrase "an alkyl radical" by way of example or illustration only. If "an alkyl radical" and an alkyl radical only had been intended it would have been simple to so state, but in the absence of any context other

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than that furnished by the first sentence of the paragraph itself, the patentee appears not to be limiting himself to alkyl radicals but is including the larger field.

It is well settled that the specification is to be read as a whole and the claims, of course, are part of the specifications. In *Consolidated Pneumatic Tool Company Ld.* v. *Clark* (1) Warrington J., as he then was, said:

> * * * the Claims are to be looked at as intended to define the invention, to point out what it is that the inventor regards as new, and for which he claims protection, and the general rule in dealing with claims is to treat what is not claimed as being disclaimed.

In *Jackson* v. *Wolstenhulmes* (2), Cotton L.J. said at 108:

> The object of a claim is this, to restrict and cut down what might be suggested as the claim made by the previous part of the description, so as to show what it does consist of, and to prevent the patent from being defeated in consequence of words being used which might lead to the inference that something which was not *intended to be claimed* was claimed, and thus the patent being defeated by there being included in the previous part of the specification that which was not new but old.

Perhaps the most authoritative statement is that of Lord Russell of Killowen in *Electric and Musical Industries* v. *Lissen* (3), as follows:

> The function of the claims is to define clearly and with precision the monopoly claimed, so that others may know the exact boundaries of the area within which they will be trespassers. Their primary object is to *limit* and not to extend the monopoly. What is not claimed is disclaimed. The claims must undoubtedly be read as part of the entire document and not as a separate document; but the forbidden field must be found in the language of the claims and not elsewhere. It is not permissible, in my opinion, by reference to some language used in the earlier part of the specification to change a claim which by its own language is a claim for one subject-matter into a claim for another and a different subject-matter, which is what you do when you alter the boundaries of the forbidden territory. A patentee who describes an invention in the body of a specification obtains no monopoly unless it is claimed in the claims.

In *Smith Incubator Co.* v. *Seiling* (4), Duff C.J.C., at 256 quoted Lord Loreburn in *Ingersoll Sergeant Drill Co.* v. *Consolidated Pneumatic Tool Co. Ltd.* (5) as follows:

> We are asked to construe the claim with reference to the specification, *not in order to understand what the former says,* but to make it say things which in fact it does not say at all.

The claims then define and limit the ambit of the invention and may be read with the disclosure in the earlier part of the specification "in order to understand what the former says".

(1) (1906) 23 R.P.C. 666.
(2) (1884) 1 R.P.C. 105.
(3) (1938) 56 R.P.C. 23 at 39.
(4) [1937] S.C.R. 251.
(5) (1907) 25 R.P.C. 61 at 84.

Accordingly, one finds that claim 10 claims the use of "a sulphur derivative of carbonic acid containing an organic radical", *simpliciter*. The same is true of claim 11, the only difference being that it is "a salt of a sulphur derivative of carbonic acid containing an organic radical" which is there claimed. One contrasts with this language that which is found in claim 3 where the wording is "a salt of an *alkyl* sulphur derivative of carbonic acid". In these circumstances I do not think it open to the patentee to say that when he said in paragraph 4 "an organic radical, such an alkyl radical" he used that wording as the equivalent of "an alkyl radical" *simpliciter*. To permit this would enable the patentee to say under claim 10 or 11 as against an infringer using an organic radical in his process but not an alkyl radical, that paragraph 4 extended to all organic radicals and that the phrase "such as an alkyl radical" had been used as an illustration only. Alternatively also, it would be open to him to put forward the present argument that paragraph 4 meant "an alkyl radical" *simpliciter* and that claims 10 and 11 were obviously too wide and should not have scared off anyone from using anything except an alkyl radical. There is a well settled principle which prevents language being so used by a patentee whose obligation under section 14 of the *Patent Act* of 1923 is to "correctly and fully describe the invention as contemplated by the inventor" and to "set forth *clearly* the various steps in a process, or the method of constructing, making or compounding a machine, manufacture or composition of matter". The specification must "end with a claim or claims stating *distinctly* the things or combinations which the applicant regards as new and in which he claims an exclusive property and privilege".

In *Natural Colour Kinematograph Co. Ld.* v. *Bioschemes Ld.*, (1), at 266, Lord Loreburn said:

> Some of those who draft Specifications and Claims are apt to treat this industry as a trial of skill, in which the object is to make the Claim very wide upon one interpretation of it, in order to prevent as many people as possible from competing with the patentee's business, and then to rely upon carefully prepared sentences in the Specification which, it is hoped, will be just enough to limit the Claim within safe dimensions if it is attacked in Court. This leads to litigation as to the construction of Specifications, which could generally be avoided if at the outset a sincere attempt were made to state exactly what was meant in plain language.

(1) (1915) 32 R.P.C. 256.

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The fear of a costly lawsuit is apt to deter any but wealthy competitors from contesting a Patent. This is all wrong. It is an abuse which a Court can prevent, whether a charge of ambiguity is or is not raised on the Pleading, because it affects the public by practically enlarging the monopoly, and does so by a kind of pressure which is very objectionable. It is the duty of a patentee to state clearly and distinctly, either in direct words or by clear and distinct reference, the nature and limits of what he claims. If he uses language which, when fairly read, is avoidably obscure or ambiguous, the Patent is invalid, whether the defect be due to design, or to carelessness or to want of skill. Where the invention is difficult to explain, due allowance will, of course, be made for any resulting difficulty in the language. But nothing can excuse the use of ambiguous language when simple language can easily be employed, and the only safe way is for the patentee to do his best to be clear and intelligible. It is necessary to emphasize this warning.

In the case at bar if the present contention of the respondent as to his meaning is correct, there was no more difficulty at the date of the application than now in so expressing it, but in my view, upon the internal evidence furnished by the specification itself, that is not what the draughtsman had in mind in the preparation of the first sentence of paragraph 4.

This conclusion is confirmed by a reference to what occurred in connection with the application in the United States, which antedated the application in Canada. In the original application the wording used in paragraph 4 was "the invention is herein disclosed in some detail as carried out with salts of the *alkyl* sulphur derivatives of carbonic acid known as xanthates as the new substance". This was subsequently amended by striking out the word "alkyl" where it appeared before the word "sulphur" and by inserting after the word "said" the words "containing an organic radical, such as an alkyl radical" so as to produce the form of wording in the Canadian application. As I have already stated, I have reached my conclusion as to the construction of the Canadian patent upon the internal evidence of that patent itself. The American proceedings merely illustrate that the respondent intended the meaning that, in my opinion, the language he adopted in the Canadian patent properly bears. I think therefore that the invention described in the first sentence of paragraph 4 extends to all organic radicals.

Coming to the second sentence, "These form anions and cations in solution" the respondent says that this sentence limits the substances referred to in the first sentence and

that these substances must be soluble, as that term would be understood at the date of the patent by a skilled workman in the flotation field. Again it may be pointed out that it would have been a simple matter for the patentee to have spoken in the first sentence of paragraph 4 of "soluble salts of sulphur derivatives of carbonic acid containing an alkyl radical and known as xanthates". Appellant says that he did not do so and that the second sentence forms no part of the description of the xanthates referred to in the first sentence. That is that the second sentence cannot be read as meaning that the only substances referred to by the patentee are those which have some particular degree of solubility. The appellant contends, further, however, that even if the second sentence of the paragraph is part of the definition cellulose xanthate is included.

In 1923 the only xanthate in commercial use according to the evidence was cellulose xanthate which was used in the rayon industry. Keller himself experimented with cellulose xanthate prior to July of that year but did not find it useful and, according to the evidence of the witness, Bennett, cellulose xanthate is not only useless but absolutely harmful for flotation purposes. This is accepted by the respondent and is the subject of an express finding by the learned trial judge.

As to the word "soluble" the evidence is that it would be interpreted in accordance with the use to be made of the information. Dr. Purves said that to a practical organic chemist if a substance is soluble to the extent of a few tenths of one per cent it would satisfy his understanding of the term. There is no contradiction of this or that a metallurgist would have any different view. The witness Bennett, a practical metallurgist, used a one per cent solution of cellulose xanthate in tests performed by him. In the respondent's factum it is stated that "flotation re-agents do not necessarily have to be very soluble: 2 pounds of re-agent to one ton of ore, i.e., 4 tons of water are ordinarily used".

Respondent contends, however, that such a solution is not a true solution but a colloidal one and the respondent's witness, Higgins, said that in 1923 colloids were avoided like poison in flotation. I do not think that this evidence is sufficient to remove cellulose xanthate from the ambit of

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paragraph 4 of the specification, if it is otherwise included as I think it is. The utility of the use of any xanthate in flotation was entirely new in 1923 and I do not think it can be said that a metallurgist, on reading the specification at that time would, without test, have excluded cellulose xanthate from paragraph 4 merely because it was a colloid. He would have no experience or knowledge of xanthate and therefore the language of paragraph 4 would, in my opinion, be taken by him as including cellulose xanthate. There are two matters in evidence which confirm this view. The first has already been referred to, namely, that Keller experimented with cellulose xanthate before discarding it. In the second place, in Bennett's view a metallurgist in 1923 would have tested cellulose xanthate before he would know whether it was useful or not. I therefore think that it has been made out that cellulose xanthate comes within the meaning of paragraph 4, even taking the view that the second sentence is part of the description of xanthates covered by the paragraph.

It is contended on the part of the respondent however, that any practical metallurgist, on reading the specification, would first try potassium and sodium xanthate and would go no further and that the difficulty of storing and transporting cellulose xanthate, its cost and other considerations would exclude it in his mind.

In *Norton and Gregory Ld.* v. *Jacobs* (1) Sir Wilfred Greene, M.R., said at 276:

> The fact that a skilled chemist desiring to use the invention would reject certain reducing agents as being unsuitable is one thing; it is quite a different thing to say that a claim must in point of construction be cut down so as to exclude those reducing agents because a skilled chemist would not use them. To adopt the latter proposition would not be to construe the Specification but to amend it, * * *

As pointed out by Lord Normand in *Raleigh Cycle Co.* v. *H. Miller & Co. Ltd.* (2) at 318, the above observation, while directed to the construction of claims, applies with equal force to the disclosure. The decision of Warrington J. in *Thermit Ld.* v. *Weldite Ld.* (3), is distinguishable. See also *Vidal Dyes Syndicate Ld.* v. *Levinstein Ld.* (4) per Fletcher Moulton L.J., at page 272. In my opinion therefore the invention described in the specification extends to cellulose xanthate.

(1) (1937) 54 R.P.C. 271.
(2) [1948] 1 All E.R. 308.
(3) (1907) 34 R.P.C. 441.
(4) (1912) 29 R.P.C. 245.

Coming then to the claims, those which are in question are 6, 7, 8 and 9. With respect to claim 6, the material words are "alkaline xanthate". According to the respondent, what was intended was "alkali-metal Xanthate", and in the opinion of Mr. Higgins the term used would be so understood by a metallurgist. It is admitted that "alkaline xanthate" is a contradiction in terms, as all xanthates are neutral. According to Dr. Purves, a number of possible constructions could be given to the words. In claim 5 the phrase "alkali-metal salt" is used. It therefore seems that when the draughtsman of the specification intended "alkali-metal" he knew how to so express himself. When he used the word "alkaline" in claim 6 the presumption is that something else was intended. This is left in ambiguity. Even if the contention of the respondent be accepted that "alkaline" is to be read "alkali-metal" the latter expression would include sodium and potassium cellulose xanthate. From any point of view, therefore, the claim in my opinion is invalid.

Claims 7 and 9 may be considered together. The relevant expression is "a xanthate". The respondent seeks to read these claims as limited to the xanthates described in paragraph 4 of the disclosure. For the reasons already given in considering the proper construction to be placed upon that paragraph, these claims are invalid as extending to cellulose xanthate. Apart from this, my opinion on the authorities is that the expression "a xanthate" in the above claim is not to be so limited. In my view the case does not come within the principle applied in *Western Electric Co.* v. *Baldwin* (1), but rather within that applied in the *B.V.D. Co.* v. *Canadian Celanese Ltd.* (2).

In *Baldwin's* case the question related to the construction of claim 2, which read:

> The combination with a plurality of thermionic repeaters connected in tandem, the first repeater of the series having a high-voltage output and the last repeater of the series having a high-current output

It was held that the language of the claim was to be interpreted by the specification as a whole and that the thermionic repeaters mentioned in the claim must be taken to be thermionic repeaters having the characteristics

(1) [1934] S.C.R. 570. (2) [1937] S.C.R. 221.

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ascribed "by definition" in the specification. It will be sufficient to quote the specification itself, in part:

It has been discovered that audions of the usual type may be so constructed that, *without the use of transformers,* they will step up the input voltage of either direct current or alternating current of any frequency in one step to as much as 30 times its original value, or in two successive steps to as much as 500 times its original value The voltage amplification thus secured is entirely free from wave distortion whatever may be the initial frequency and wave form. *This type of audion will, for convenience, be hereinafter referred to as the high-voltage output audion.*

It has furthermore been discovered that audions may be constructed which will step down the input voltage, for example, to one-third of its original value. This last mentioned type of audion has a high-current and a low voltage output. Because of its low output impedance, i.e., the low impedance between its cathode and anode, such type of audion can be worked efficiently into a line of like impedance. *This new type of audion will, for convenience, hereinafter be referred to as the high-current output audion.*

* * *

It has been discovered that a combination of one or more of the *aforementioned* high voltage output type of audions working into *one of the high-current output type,* will operate, without transformers, from a line of low impedance, for example, 250 ohms, into a like line with a resultant current much greater, fifty or more times greater, than would flow in the second circuit if it were directly connected to the first circuit. The present invention is directed to such combination of two different types of repeaters, preferably, audions.

In giving the judgment of the court Sir Lyman Duff, C.J., said at page 578:

To revert to the definitions of the combination to which, as the specification says, "the invention is directed," it would be difficult to find any construction, consistent with the grammatical sense of the words, that would exclude the absence of transformers from the essential features of the combination in respect of which protection is claimed. First of all, he defines the "high-voltage output audion"; and *an element of that definition* is that "without the use of transformers" it will perform certain operations on the input current.

Then, there is a definition of the "high-current output audion," which does not explicitly make the absence of transformers *an essential element,* but which, as already indicated, appears very *clearly to do so* when it is read with the specification as a whole properly construed.

Then, after mentioning that the patentee has applied for patents in respect of these types of audions, he proceeds to describe the combination, and the combination, which is the invention for which he desires protection, is of one or more of the *aforementioned* high voltage output type of audions (a type which, by *definition,* is of such a construction that it performs the function assigned to it in this circuit arrangement *without the use of transformers*) with one of the high-current output type.

And at page 583:

I have no doubt whatever that, on a proper construction of the specifications as a whole, the combination mentioned in the second claim is the combination described in the passage just quoted; or that the

"thermionic" repeaters mentioned in the claim must be taken to be thermionic repeaters having the characteristics ascribed by *definition* to those with which the inventor has succeeded in securing the results which he says are secured by his invention. As a matter of construction, the point does not really appear to me to be open to serious argument.

In my opinion the result of the judgment is that the court found that "a high voltage output" repeater and a "high-current output" repeater, as those expressions were used in claim 2 were to be construed by the definition contained in the disclosure which, as the disclosure itself says would be the expressions "hereinafter" used as meaning the types defined.

When one turns to the *Canadian Celanese* case, the distinction between that case and *Baldwin's* case is obvious. In fact, although three of the members of the court who decided the *Celanese* case had sat on the former appeal, the *Baldwin* case was not mentioned. The disclosure in the patent, which it was claimed by the respondent had been infringed, described the invention as associating a woven, knitted or other fabric, made of *yarns* of a thermoplastic cellulose derivative, with other fabrics. The claim, however, did not mention yarns at all but merely referred to "a thermoplastic derivative of cellulose". It was held that the use of the cellulose derivative in the form of yarns, filaments or fibres was of the very essence of the invention but that the claims must be interpreted as they stood. In both the British and United States patents the claims had expressly mentioned yarns, or filaments or fibres. At page 237 Davis J., giving the judgment of the court said:

> We are invited to read through the lengthy specification and import into the wide and general language of the claims that which is said to be the real inventive step disclosed. But the claims are unequivocal and complete upon their face. It is not necessary to resort to the context and as a matter of construction the claims do not import the context. In no proper sense can it be said that though the essential feature of the invention is not mentioned in the claims the process defined in the claims necessarily possesses that essential feature. The Court cannot limit the claims by simply saying that the inventor must have meant that which he has described. The claims in fact go far beyond the invention. Upon that ground the patent in invalid.

The same result was reached by the Court of Appeal in England in a similar case, *Molins and Molins Machine Co. Ltd.* v. *Industrial Machinery Co., Ltd.* (1).

In my opinion, in the case at bar, we "cannot limit the claims by simply saying that the inventor must have meant

(1) (1937) 55 R.P.C. 31.

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that which he has described". "A xanthate" is what the patentee claims. This would include at least one xanthate which will not work. The claim is therefore invalid.

With respect to claim number 8, which is limited to "potassium xanthate", the appellant says it has not infringed this claim as it has not used potassium xanthate, although it has used sodium xanthate. The respondent contends however, that sodium xanthate is the chemical equivalent and that the appellant's use constituted an infringement. The question in my opinion resolves itself, first, into the question as to whether the respondent has, upon the true construction of the specification as a whole, excluded from claim 8 everything but the specific substance there mentioned and, in my opinion, it has. There are in all eleven claims in the specification and both potassium and sodium xanthate would be included in the general language used in everyone of them with the exception of the particular claim in question, assuming that some meaning can be given to the expression "alkaline xanthate" in claim 6. Further, one finds the general expression "a xanthate" in claims 7 and 9 and, as just mentioned, the expression "alkaline xanthate" in claim 6. I think, therefore, that it is impossible to contend that in using the expression "potassium xanthate" in claim 8, anything else but that substance was intended to be included.

In the result the respondent fails to obtain protection with respect to a very useful invention which became dominant in the art but this result comes about in my opinion from the failure to observe the requirements of the statute calling for clear expression as to the invention and the claims. There was no difficulty in the adoption of reasonably clear language in the present case.

I would allow the appeal and dismiss the action both with costs.

ESTEY J.: This is an appeal from a judgment in the Exchequer Court awarding damages against the appellant for infringement of respondent's Canadian Letters Patent No. 247,576, dated March 10, 1925. This patent was applied for by Cornelius H. Keller under date of October 23, 1924, in respect of "improvements in froth flotation concentration of ores." The improvements were effected by the introduction of "xanthates or analogous substances"

into the froth flotation process. That such improvements were effective is clearly established and infringement is admitted if the patent is valid.

The appellant's contention is that the specification does not adequately describe the invention nor set forth the claims within the meaning of sec. 14(1) of the *Patent Act*, S. of C. 1923, c. 23, and therefore the patent is invalid.

14 (1) The specification shall correctly and fully describe the invention and its operation or use as contemplated by the inventor. It shall set forth clearly the various steps in a process, or the method of constructing, making or compounding, a machine, manufacture, or composition of matter. It shall end with a claim or claims stating distinctly the things or combinations which the applicant regards as new and in which he claims stating distinctly the things or combinations which the applicant regards as new and in which he claims an exclusive property and privilege.

The purpose of this section is set forth in 22 Halsbury, p. 161, art. 388:

In order that the public may have sufficient and certain information respecting what they are prohibited from doing whilst the privilege continues, the patentee must particularly describe and ascertain the nature of his invention. In order that, after the privilege is expired, the public may be able to do what the patentee has invented, he must particularly describe and ascertain the manner in which the same is to be performed.

The appellant's first contention, therefore involves a construction of the specification. My lord the Chief Justice in commenting upon the construction of the specification in *French's Complex Ore Reduction Co.* v. *Electrolytic Zinc Process Co.*, (1) stated at p. 470:

It should not be construed astutely. The patent should be apporached, in the words of Sir George Jessel "with a judicial anxiety to support a really useful invention" (*Hinks & Son v. Safety Lighting Co.*) (2) but, on the other hand, the consideration for a valid patent is that the inventor must describe in language free from ambiguity the nature of his invention, including the manner in which it is to be performed; and he must define the precise and exact extent of the exclusive property and privilege which he claims. Otherwise the specification is insufficient and the patent is bad.

The respondent's contention is that the foregoing sec. 14(1) is complied with; that the language of paras. 2 and 3 of the disclosure portion of the specification when read together do limit the substance used to "certain sulphur derivatives of carbonic acid," and that in para. 4 the inventor sets forth his invention.

4. The invention is herein disclosed in some detail as carried out with salts of the sulphur derivatives of carbonic acid containing an organic radical, such as an alkyl radical and known as xanthates, as the new substance.

(1) [1930] S.C.R. 462. (2) (1876) 4 Ch.D. 607 at p. 612.

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These form anions and cations in solution. Excellent results were also obtained by agitating ore pulps with the complex mixture produced when 33⅓ per cent of pine oil was incorporated with an alcoholic solution of potassium hydrate, and xanthates or analogous substances were produced by adding carbon disulphide to this mixture.

It will be observed that in the foregoing para. 4 the inventor speaks of "xanthates or analogous substances." Inasmuch as the alleged infringements are restricted to the use of xanthates, we are here concerned only with xanthates.

The "certain sulphur derivatives" in para. 3 are in this paragraph restricted to "salts of the sulphur derivatives of carbonic acid containing an organic radical, such as an alkyl radical and known as xanthates, as the new substance." The parties did not agree as to the meaning of the phrase "sulphur derivatives." However, the evidence is to the effect that the more accurate construction of this phrase would restrict it to those derivatives in which the S or S's alone displace one or more O's in carbonic acid (H_2CO_3). The sulphur derivatives thus obtained are five in number and they are the only sulphur derivatives of carbonic acid.

The displacement of the oxygen by the sulphur may take place according to five different formulae and the five resulting acids are known as thiocarbonic acid (the prefix "thio" meaning "sulphur"). These five acids are known as mono-thio carbonic acid (H_2CO_2S), di-thio carbonic acid (H_2COS_2), and tri-thio carbonic acid (H_2CS_3), each of the former having two formulae.

From the di-thio carbonic acid having a central carbon with sulphur bonded by two bonds on the left, one with the SH group and one with the OH group, xanthic acid is formed when the hydrogen of the OH group is replaced by an alkyl radical. Then when the H in the SH group is replaced by a metal the result is a di-thio carbonate, or a salt properly described as a "sulphur derivative of carbonic acid." If the metal used be potassium the result is "potassium xanthate."

The next requirement of para. 4 is that these salts contain "an organic radical such as an alkyl radical." It is around the construction of this phrase "such as an alkyl radical" that much of the controversy centres. The first contention is with respect to the meaning of the word "alkyl." The parties hereto agree that all organic chemical

compounds contain carbon and that a radical is an incomplete fragment of a molecule. The respondent's witness Higgins explained that "organic alkyl radicals" are "the residue of the saturated hydro carbon groups." In these saturated hydro carbon groups if all of the C bonds are taken up the result is a product of which methane (CH_4) is one. If, however, CH_3 is formed, one C bond remains unattached and you have the methyl radical (CH_3). The ethyl radical is C_2H_5. In every radical there is at least one bond of C unattached. The other radicals of the saturated hydro carbon group are propyl, butyl, amyl and hexyl. Higgins would restrict the "alkyl radicals" to these six.

Appellant contends that Higgins' definition of "alkyl radical" is too narrow and that all "aliphatic radicals" should be included under the word "alkyl" when properly defined.

By agreement the parties filed a list of ninety-one xanthates, being the only xanthates that in 1923 could be found referred to in scientific literature and that in all of these the radicals are "aliphatic," (as distinguished from the other classification of "radicals" known as "aryl"). These were grouped under sixteen headings, according to their radicals, and six of these groups were the above mentioned "alkyl radicals." The appellant contends that all of the ninety-one xanthates should be included in the "alkyl" group. If, however, Higgins' definition is accepted, only six of the groups are classified as having "alkyl radicals." The appellant's experts admitted that the Higgins definition "is a good definition and it is the strictest, most precise, narrowest definition which is accepted in textbooks," and again, "It is clean-cut and very often quoted and very frequently used." The appellant's experts were able, however, to cite authorities which did use the word in a wider sense than that used by Higgins. The evidence of Dr. Purves is pertinent in this regard. He says that all of the radicals in the ninety-one xanthates are "aliphatic" and "all infringe that strict definition in one respect or another."

The learned President accepted the respondent's contention that the specification should be construed as not to include all "organic aliphatic radicals" and that "such as" means "of the type of" and in this I am in agreement, and the further discussion is on that basis. It is, however, of

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some significance that Keller and his associates would know of the different senses or meanings given to the phrase "alkyl radical" by the authorities when they adopted the phrase "such as an alkyl radical," and yet not only made no effort to specifically declare that they adopted the Higgins meaning but, as will immediately appear, actually added to the confusion. That the phrase "such as an alkyl radical" was deliberately chosen is apparent from an examination of the application filed for the United States patent on October 23, 1923, where as originally filed the paragraph corresponding to para. 4 under discussion read "with salts of the alkyl sulphur derivatives of carbonic acid known as xanthates," which did definitely limit the xanthate to those having an "alkyl radical." That application, however, was amended by striking out the word "alkyl" and inserting after the word "acid" the words "containing an organic radical such as an alkyl radical" and adding the sentence "These form anions and cations in solution." The language of the amendment was adopted in the Canadian application dated one year later, October 23, 1924. It is no longer "alkyl sulphur derivatives" but "sulphur derivatives containing an organic radical such as an alkyl radical." The deliberate insertion of the words "such as an alkyl radical" under these circumstances cannot be construed other than that the inventor intended to include more than "alkyl radicals," but that he did not intend to include all organic radicals.

Throughout the evidence the respondent appears to treat the words "such as" to mean not "of the type of" but rather as meaning "restricted to" or "synonymous" with "alkyl radical." This is emphasized by the evidence of Higgins, specifically referring to para. 4, where he states: "That is a more detailed description of his agent, and this introduces, in addition to the sulphur and the metal, the alkyl radical." Again, when his attention was directed to the formula of a di-thio carbonate here in question, he stated the radical "had to be an alkyl radical" in order that the xanthate here desired might be obtained.

Then again, this para. 4 must be read and construed as part of the entire specification. *French's Complex Ore Reduction Co.* v. *Electrolytic Zinc Process Co., supra.* The respondent contends that the invention is described in

paras. 2, 3 and 4 of the disclosure and that in para. 8 thereof he sets forth how he prepared potassium xanthate in the laboratory. The opening words of the first three of these paragraphs are significant: "2. This invention relates to * * *; 3. It has been found that certain sulphur derivatives * * *; 4. The invention is herein disclosed in some detail as carried out with salts * * *" In para. 8 the inventor states: "For laboratory purposes potassium xanthate was prepared as follows * * *" This language does not suggest that this was "the method" but rather that it was but "a method." Then at the conclusion of this disclosure he states: "Having thus described certain embodiments of the invention, what is claimed is * * *" All of the foregoing goes far to support the appellant's contention that the inventor never does define or describe his invention but contents himself with setting forth his findings in a series of experiments. However, approaching the case as presented by the respondent, the foregoing adds to the ambiguity and confusion and does not, nor does any other part of the specification, assist in determining the meaning of the phrase "such as an alkyl radical."

The specification must be construed as a whole, but here nothing is found in the claims portion that defines or clarifies the phrase "such as an alkyl radical." Claim No. 3 is limited to "a salt of an alkyl sulphur derivative." This again is the very language and limitation in the United States application before the amendment. Claims 4 and 5 refer to ethyl-sulphur derivatives of carbonic acid. These are the more restricted but in other claims the language is sufficiently wide and comprehensive to include xanthates with radicals other than the "alkyl." In Claims 6, 7, 8 and 9 here in issue, being the only claims in which "xanthates" are specifically mentioned, one finds in para. 6 the phrase "an alkaline xanthate." Xanthates are neutral and this phrase is admittedly contradictory and would be so recognized by one skilled in the art. It was suggested by the respondent that the phrase "alkali xanthate" was intended and the appellant admits such would be a reasonable construction. The phrase "alkali xanthate" would include the "alkali metal xanthates" which may have "alkyl" or one

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of the other radicals mentioned in the course of this litigation. It would include the "cellulose xanthate" which does not contain an "alkyl radical" but which forms a collodial solution and is admittedly harmful in the flotation process. Respondent, however, submitted that it was excluded by the draftsmen inserting the words "adapted to co-operate with the mineral-frothing agent," which in this Claim No. 6 immediately follows the words "alkaline xanthate." Then in Claims 7 and 8 the word "xanthate" is used without any limitation whatever, and here again it would include xanthates with other than "alkyl radicals."

The terms "potassium xanthate" and "sodium xanthate" are used repeatedly throughout both the disclosure and claims without any word of limitation as to their radical content. Likewise, the terms "alkaline xanthate" (construed to mean "alkali xanthate") and "xanthate" appear in the claims without limitation as to their radical content. These terms were in 1923 well known and understood by chemists and metallurgists, certainly to the extent that every one of these xanthates might have "alkyl" or practically any of the other "aliphatic radicals." Keller does not discover a new xanthate but what he discovers is a new use of xanthate by his introduction of it into the froth flotation process. Therefore those skilled in the art in reading this specification would conclude that the xanthates used were not those which had only the "alkyl radical."

A specification may be so drafted as to indicate a special or limited sense in which the terms may be used but here the inventor, so far from doing that, has first adopted clear and definite language, discarded it, and in lieu thereof has adopted terms which are ambiguous and which ambiguity, under the circumstances that here obtain, must have been then apparent. In this regard the language of Lord Parker in *Natural Colour Kinematograph Co. Ld.* v. *Bioschemes Ld.* (1) is pertinent:

> Further though it may be true that in construing an instrument *inter partes* the Court is bound to make up its mind as to the true meaning, this is far from being the case with a Specification. It is open to the Court to conclude that the terms of a Specification are so ambiguous that its proper construction must always remain a matter of doubt, and in such a case, even if the Specification had been prepared in perfect good faith, the duty of the Court would be to declare the Patent void.

(1) (1915) 32 R.P.C. 256 at p. 269.

and also the language of Earl Loreburn at p. 266:

> If he uses language which, when fairly read, is avoidably obscure or ambiguous, the Patent is invalid, whether the defect be due to design, or to carlessness or to want of skill. Where the invention is difficult to explain, due allowance will, of course, be made for any resulting difficulty in the language. But nothing can excuse the use of ambiguous language when simple language can easily be employed, and the only safe way is for the patentee to do his best to be clear and intelligible.

And in our own Courts, Mr. Justice Maclean in the Exchequer Court stated:

> If the specification uses language which when fairly read, is avoidably obscure or ambiguous, the patent is void, whether the defect be due to design, or to carlessness, or to want of skill; nothing can excuse the use of ambiguous language when simple language may easily be employed, due allowance of course, being made where the invention is difficult to explain and there is a resulting difficulty in the language. *De Forest Phonofilm of Canada Ltd.* v. *Famous Players Can. Corp. Ltd.*, (1).

The specification as phrased gives no information as to what is meant or included in the phrase "such as an alkyl radical." Keller found that xanthates with an "alkyl radical" soluble in water effected a substantial improvement in the froth flotation process and the evidence at the trial would indicate that so far as xanthates were concerned that constituted his invention. The language of the specification, however, is not so restricted. The language there adopted leads the reader into a field that was unknown to the inventor and which in the specification is not defined. In fact beginning with the phrase "sulphur derivatives" almost every important phrase, as already indicated, is so used that issues such as are here raised were almost inevitable. That in itself is indicative of ambiguity and the absence of that clarity which sec. 14(1) of the *Patent Act* contemplates.

This is not a case where the language is open to one or more constructions and the Court, in the language of Lindley L.J., in *Needham and Kite* v. *Johnson & Co.* (2): "* * * would put upon it that construction which makes it a valid patent rather than a construction which renders it invalid." The language here used is so vague and ambiguous that in order to attribute to it that clarity and certainty required by the statute we must erase or eliminate the words "such as" and therefore amend rather than con-

(1) [1931] Ex. C.R. 27 at p. 43. (2) (1884) 1 R.P.C. 49 at p. 58.

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strue the language of the specification and thereby restrict the xanthates used in the improvement to those having an "alkyl radical."

Apart from what has already been said, there is another ambiguity inherent in this phrase, and that is the test to be applied to determine what "alkyl" is "such as an alkyl radical." Should the radical be composed of the same or similar ingredients, or whether its effect in chemical reactions should be as the "alkyl radical" is left entirely to conjecture. Moreover, the evidence is to the effect that once you go beyond the "alkyl radical" as defined by Higgins, it is impossible to find a point where a line can be drawn until the xanthates containing all of the "organic aliphatic radicals" are included. The respondent in this action makes no such claim. Even if one adds the limitation in para. 4 that they form anions and cations in solution, the specification does not correctly and fully describe the invention as required by sec. 14(1) (above quoted) of the *Patent Act*.

As already indicated, the ambiguity persists throughout both the disclosure and claims portion of the specification, and in the claims 6, 7, 8 and 9 herein in question it is not stated "distinctly the things or combinations which the applicant regards as new and in which he claims an exclusive property and privilege," within the meaning of sec. 14(1).

The appeal should be allowed with costs.

Appeal allowed and action dismissed with costs throughout.

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

Solicitors for the respondent: *Ewart, Scott, Kelley and Howard.*

HIS MAJESTY THE KING (RESPONDENT) . . APPELLANT; 1949

*May 19, 20
*Dec. 5

AND

DAME JULIETTE CARROLL, ET AL (SUPPLIANTS) . . . . . } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Petition of right—Retired judge receiving a pension—Appointed Lieutenant-Governor of Quebec—Heirs claiming for salary—Whether prescription—Whether law of Quebec or of Ontario applies—If law of Quebec whether prescription is five years—Whether question of law decided at previous hearing as to the status of Lieutenant-Governor created "res judicata"—Renunciation to prescription—Judges Act, R.S.C. 1927, c. 105, s. 27—The Exchequer Court Act, R.S.C. 1927, c. 34, s. 32—Arts. 449, 1602, 2242, 2250, 2260(6), 2267 C.C.

This court answered in the affirmative (1948 S.C.R. 126) the question of law, set down for hearing before the trial of the present case, as to whether a pensioned retired judge is entitled to his pension together with the full remuneration attached to the office of Lieutenant-Governor of a Province while occupying that position. At trial before the Exchequer Court, appellant contended that respondent's claim for the part of the salary withheld by the Crown during the years 1929 to 1934 (during which period respondent was Lieutenant-Governor of Quebec), was prescribed when the petition of right was taken on 13 November 1943. The Exchequer Court held that the law of Quebec applied and that the claim was not prescribed.

Held: There is no *"res judicata"* in this case as the only issue raised and discussed at the previous hearing was the status of the Lieutenant-Governor and the Court was not empowered to and did not deal with the issue of prescription.

Held: If the law of Quebec applies here, the prescription is not of five but of thirty years as the salary of the Lieutenant-Governor is not one of the subject matters found in Article 2250 C.C., nor does it fall under 2260 (6) as this Article contemplates a contract of hire of work which presupposes a relationship of employer and employee, which relationship does not exist between His Majesty and the Lieutenant-Governor.

Held: Also, that if the law of Ontario applies, the limitation period being twenty years, the claim would not be barred either.

APPEAL from the judgment of the Exchequer Court of Canada, Angers J. (1), holding that the claim for salary

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

(1) [1949] Ex. C.R. 169.

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of the Lieutenant-Governor of Quebec, who held office from 1929 to 1934, was not prescribed on 13 November 1943 when the petition of right was taken by the respondents.

F. P. Varcoe, K.C. and *J. Desrochers* for the appellant.

Fernand Choquete, K.C. for the respondents.

The judgment of the Court was delivered by

TASCHEREAU J.:—This case now comes before this Court for the second time (1). The facts may be briefly summarized as follows:

The Honourable Mr. Justice Carroll was from 1908 until 1921 a Puisne Judge of the Court of King's Bench, and from 1929 until 1934, Lieutenant-Governor of the Province of Quebec. When he resigned from the Bench in 1921, he was entitled to a pension of $6,000, and was also entitled annually from 1929 until 1934, to an additional $10,000, being the statutory amount paid to the Lieutenant-Governor.

His Majesty however refused to pay both the pension and the salary, and based His refusal on section 27 of *The Judges' Act* (R.S.C. 1927, chap. 105), which reads as follows:—

> If any person become entitled to a pension after the first day of July one thousand nine hundred and twenty, under this Act, and become entitled to any salary in respect of any public office under His Majesty in respect of His Government of Canada, such salary shall be reduced by the amount of such pension.

On the 21st of June, 1944, the matter having been brought to the Exchequer Court by way of Petition of Right, the Honourable Mr. Justice Angers ordered that the following question of law be set down for hearing before trial:

> Assuming that the Honourable H. G. Carroll became entitled on February 18, 1921, to a pension under *The Judges' Act* at a rate of $6,000 per annum and was entitled to receive the same during and in respect of the period from April 2, 1929, to May 3, 1934, and that during the said period he occupied the office of Lieutenant-Governor of Quebec to which office there was attached the salary of $10,000 per annum, and assuming that he received payment out of the Consolidated Revenue Fund of Canada in respect of said pension and of salary as Lieutenant-Governor during the said period at the rate of $10,000 per annum, are the suppliants entitled to relief sought by the Petition of Right?

(1) [1948] S.C.R. 126.

This question was answered in the affirmative by Mr. Justice Angers (1), and that judgment was confirmed by this Court (2). It was held that the office of Lieutenant-Governor is not a public office under His Majesty in respect of His Government of Canada, but that it is a public office in respect of the Government of the Province for which he is appointed.

The matter was then referred back to the Exchequer Court, and the plea was amended in order to allow His Majesty to allege that the claim is barred and extinguished by virtue of the statute of limitations, namely, section 32 of the *Exchequer Court Act,* chap. 34, Revised Statutes of Canada, 1927, and articles 2250, 2260 para. 6, and 2267 of the *Quebec Civil Code.* Mr. Justice Angers (3) dismissed this contention and came to the conclusion that the suppliants were entitled to recover from His Majesty the King the sum of $30,500, being the amount withheld by the appellant.

The respondents claim that the present appeal should be dismissed and submit that there is *"res judicata"*, that the law of limitation of the Province of Quebec does not apply, that if it does, the prescription of five years is inapplicable, and that in any event, the appellant has renounced prescription.

Dealing with the first point, the argument raised by the respondents is that when the Exchequer Court and this Court answered the question of law in the affirmative, they also disposed of the question of prescription which is now raised. With this contention I do not agree. The original submission made to the Court was on a particular point, and the only issue raised and discussed was the status of the Lieutenant-Governor. The courts had to decide whether the Lieutenant-Governor fulfilled federal or provincial functions, and they could not go beyond answering the question put, in the affirmative or the negative; they were not empowered therefore to deal with the issue of prescription which now comes for adjudication. The two issues being entirely different, the plea of *"res judicata"* appears quite unfounded.

(1) [1947] Ex. C.R. 410.
(2) [1948] S.C.R. 126.
(3) [1949] Ex. C.R. 169.

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The second point as to prescription, offers more difficulty. Is it the law of limitation of Ontario where the appointment of the Lieutenant-Governor was made and where the remuneration is paid that applies? Or is it the law of Quebec where the functions are performed and where the payment is received? If the law of Ontario governs this case, the claim is not barred, as the limitation period is twenty years. (Halsbury, 2nd Ed., vol 20, p. 600) (Weaver, "Limitations" p. 301). If the law of Quebec applies, is it the five year or thirty year prescription term? I do not think that for the purpose of determining this case, it is necessary to examine all these questions, as I have come to the conclusion that the claim is not barred, whether the laws of Ontario or Quebec apply. The only possible limitation under the Quebec law would be the five year short prescription, but it does not stand in the respondents' way.

The appellants have invoked sections 2250, 2260 para. 6, and 2267 of the *Civil Code,* and also section 32 of the *Exchequer Court Act* (R.S.C. 1924, chap. 34). These sections read as follows:—

2250. With the exception of what is due to the Crown and interest on judgments, all arrears of rents, including life-rents, all arrears of interest, of house-rent or land-rent, and generally all fruits natural or civil are prescribed by five years.

This provision applies to claims resulting from emphyteutic leases or other real rights, even where there is privilege or hypothec.

Prescription of arrears takes place although the principal be imprescriptible by reason of precarious possession.

Prescription of the principal carries with it that of the arrears.

2260. The following actions are prescribed by five years:—

6. For hire of labour, or for the price of manual, professional or intellectual work and materials furnished, saving the exception contained in the following articles;

2267. In all the cases mentioned in articles 2250, 2260, 2261 and 2262 the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired.

Sec. 32 *Exchequer Court Act*:—

The laws relating to prescription and the limitation of actions in force in any province between subject and subject shall, subject to the provisions of any act of the Parliament of Canada, apply to any proceedings against the Crown in respect of any cause of action arising in such province.

It seems clear that the amount claimed by the respondents, which is the portion of the salary reduced by the amount of the pension, is not any of the subjects found

in section 2250 of the *Civil Code*. It is surely not a rent, and it cannot be included in the words "generally all fruits natural or civil". Natural fruits are those which are the spontaneous produce of the soil, and civil fruits are the rent of houses, interest of sums due and arrears of rents. Section 449 of the *Civil Code* also adds that the rent due for the lease of farms is also included in the class of civil fruits.

The pertinent paragraph of section 2260 of the *Civil Code* is paragraph 6 which has already been cited, and which according to appellant's submission, would bar respondents' claim. This section 2260 C.C. is not found in the *Code Napoleon*, and it is useful I think, to keep in mind that it has been enacted by the Legislature in the same form as suggested by the commissioners in their third report, section 111(*c*), page 549, where they say, that when the prescription is not otherwise provided, "the action for *hire of labour* or for *price of work* either manual, professional or intellectual, and for the materials furnished" will be five years. This section clearly contemplates the contract of *hire of work* as defined in section 1602 of the *Civil Code* and which reads as follows:—

1602. The lease or hire of work is a contract by which one of the parties, called the *lessor*, obliges himself to do certain work for the other, called the *lessee, for a price* which the latter obliges himself to pay.

The section says "for a price", and it also supposes a relationship of *master* and *servant*, of *lessee* and *lessor*, the former obliging himself to pay the price agreed upon and the latter obliging himself to do a certain work. In other words, there must be an employer and an employee.

Marcadé, *Civil Code*, vol. 6, expresses his views in the following manner:—

Le louage d'ouvrage est donc un contrat par lequel une partie, qu'on appelle *locateur*, s'oblige à faire jouir de son travail une autre partie, qui s'oblige à le payer et qu'on appelle *locataire*.

Troplong, in his book "De l'échange et du louage", vol. 2, page 222, expresses similar views:—

Le contrat de louage de services est un contrat par lequel le travailleur s'engage à faire quelque chose *pour une personne* qui s'engage de son côté à lui donner en retour un *prix convenu*.

Dealing with section 2260, Langelier, vol. 6, page 515, says:—

Le sixième cas de prescription de cinq ans mentionné par notre article est celui de l'action résultant de *louage d'ouvrage*.

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Finally, Mignault, dealing with the same paragraph 6, says at page 530, vol. 9:—

> Le sixième paragraphe de l'article 2260 formule une règle générale qui s'applique à tout *contrat de louage d'ouvrage* à moins que ce contrat ne tombe sous la disposition des articles 2260 et 2262.

Paragraph 6 does not mention only "hire of labour" but adds also "or for the price of manual, professional or intellectual work". It was essential I think, that these words should have been added, in order that the same prescription should be applied, not only to a claim where the price is stipulated, but also to a claim of an employee who sues for the *value* of services rendered, whether they be manual, professional or intellectual.

Langelier is quite clear on this point, and at page 515, vol. 6, he says:—

> Les mots *"prix du travail"* comprennent, non seulement le prix fixé expressément, mais la rémunération à laquelle celui qui a fourni son travail a droit, alors même que le prix n'en a pas été fixé.

But this distinction must not be interpreted as meaning that the essential contractual relationship is not also necessary in the latter case as it is in the former.

In drafting section 2260, the codifiers no doubt had in mind the controversy that existed in France during the past century between the most eminent writers, as to whether the words "hire of intellectual services" included notaries, lawyers, doctors and all those rendering professional services. Vide Huc, "Commentaire du Code Civil", vol. 10, p. 519; Guillouard, "Traité du contrat de louage", vol. 2, p. 251 et suiv.; Merlin, Vol. 21, "Répertoire de Jurisprudence", p. 356; Troplong, "De l'échange et du louage", vol. 2, p. 237 et suiv.; Championnière, "Traité des droits d'enregistrement", vol. 2, pp. 424 et 427.

Obviously, in order to make the law clearer and to avoid any further doubts, the Legislature enacted section 2260 in its present form, with different paragraphs dealing with professionals, and having a special paragraph for "hire of labour" as defined in section 1602 C.C. Any case not mentioned in 2260 C.C. is not covered by it. A short prescription, where the law denies the action and completely extinguishes the debt, must be found in the *Code;* otherwise, it is the thirty year prescription that applies (C.C. 2242).

In the case now before this Court, can it be said that there existed between His Majesty the King in the right of the Dominion, and the late Mr. Justice Carroll, this relationship of *employer* and *employee*, of *master* and *servant*, of *lessee* and *lessor* of services, and enabling the courts to apply the short prescription of five years, found in paragraph 6 of section 2260? In the previous judgment delivered by this Court (*The King* v. *Carroll et al* (1)), when the first appeal was disposed of, this Court, basing itself on numerous decisions of the Judicial Committee, determined the real status of a Lieutenant-Governor. It reached the conclusion that the Lieutenant-Governor did not fulfil federal functions, but that his office was exclusively of a provincial character; that he was for provincial purposes as much the direct representative of His Majesty as the Governor General is for federal purposes; and that it was the functions performed, that had to be examined in order to determine the real nature of the services rendered.

It is true that the appointment of a Lieutenant-Governor is made by the Governor General in Council and that the remuneration is paid by the Federal Government, but these are merely constitutional obligations imposed upon the Dominion, which when fulfilled do not alter the provincial character of the office of a Lieutenant-Governor. The procedure through which the appointment is made does not create any relationship of *employer* and *employee*, of *master* and *servant*, of *lessee* and *lessor* of services. It is the constitutional machinery used to determine who will in a given province represent the Sovereign.

By a fiction of the law, the Lieutenant-Governor stands in a unique position, fulfilling in the Province, for which he is appointed the duties fulfilled by the King himself in England, and which no one else can exercise. (Todd-Parliamentary Government, 2nd Ed., p. 584). And in acting in that capacity, he is not an employee of His Majesty in the right of the Dominion. I fail to see between the appellant and the respondent any of the essential contractual elements necessary to bring the claim within section 2260 C.C.

(1) [1948] S.C.R. 126.

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Having reached this conclusion, it becomes unnecessary to deal with the last point raised by the respondents that the appellant has renounced prescription.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *F. P. Varcoe and J. Desrochers.*

Solicitor for the respondent: *F. Choquette.*

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*June 6, 7
*Dec. 5

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

T. E. McCOOL LIMITED ..... RESPONDENT,

AND

T. E. McCOOL LIMITED ..... APPELLANT,

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income Tax—Timber Limits—Claim for Depletion—Discretion of Minister must be based on sufficient facts—Interest on unpaid purchase price not interest on borrowed capital—The Income War Tax Act, R.S.C., 1927, c. 97, ss. 5 (1) (a) (b), 6 (a) (b), 65—The Exchequer Court Act, R.S.C., 1927, c. 34, s. 36.

The *Income War Tax Act*, s. 5 (1) (*a*) provides that the Minister of National Revenue in determining the income derived from timber limits may make such allowance for their exhaustion as he may deem just and fair. Section 5 (1) (*b*) provides that there may be deducted from income such reasonable rate of interest on borrowed capital used in the business to earn the income as the Minister in his discretion may allow.

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

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The respondent company acquired certain timber limits and other assets from T. E. McCool under an agreement by which it assumed McCool's liabilities and gave him or his nominees, members of his family, all its issued stock, 600 shares, and its demand note for $123,097 bearing interest at five per cent. The agreement assigned no specific value to the timber limits, which McCool had bought for $35,000, but the company in filing its income tax return, claimed depletion on the basis of a valuation of $150,000, which it alleged was the price it paid for them and was less than their market value. It also claimed as a deduction the interest paid on the demand note.

The Minister ruled that the limits be valued for the purposes of the Act at the cost price to McCool and that the depletion allowable be based on that figure, and that interest be not allowed on the note in arriving at the taxable profit.

Held: (Locke J. dissenting) that the Minister having decided that an allowance for depletion should be made, there was an insufficiency of evidence before him upon which he could in the exercise of his discretion determine the amount thereof and therefore the matter should be referred back to him.

Per: Locke J., dissenting, the Minister having decided that an allowance for depletion should be made on the basis of value there was evidence before him upon which he might properly find the fair value as being $35,000. The onus was on the taxpayer to show that the Minister had been influenced by irrelevant considerations or had otherwise acted in an arbitrary or illegal manner justifying the intervention of the Court and this had not been done.

Per: Locke J. Evidence of value not having been placed in issue on the pleadings, was inadmissible. *The Exchequer Court Act*, s. 46. *Johnson* v. *Minister of National Revenue*, [1948] S.C.R., 486, applied.

Held: also, that the interest paid on the demand note was not "interest on borrowed capital used in the business to earn income" within the meaning of s. 5(1) (*b*).

APPEAL by the Crown from the judgment of the Exchequer Court, Cameron J., (1) whereby an assessment affirmed by the Minister of National Revenue relating to the amount allowable for depletion of timber limits was set aside and referred back to the Minister for adjustment, and a cross-appeal by the taxpayer from that part of the judgment which disallowed its claim for interest allowance.

F. P. Varcoe K.C. and *T. Z. Boles* for the appellant.

Lee A. Kelley K.C. and *W. R. Meredith* for the respondent.

(1) [1948] Ex. C.R. 548.

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Rand J.

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

RAND J.:—Cameron J. (1) has found the refusal of the Minister to accept the depletion allowance claimed to have been based on two grounds: that there was in fact no change of ownership of the assets; and that they had been set up in the books of the company at an appreciated value. I regret to be unable to agree with this conclusion. What the communication from the Minister, exhibit No. 2, "that the timber limits will be valued for the purposes of the Income War Tax Act" conveys to me is the intention to allow depletion on the basis of market value. To arrive at that, the Department took the nearest free transaction, the purchase by McCool from Miss Booth for $35,000, to be the most dependable fact presented. The pleadings raised the issue, not of value, but cost to the company, and evidence was adduced before Cameron J. which satisfied him that the limits, at the time of purchase, were worth between $150,000 and $200,000. Strictly that was not the fact to be found, although relevant to it; the distinction between value and cost seems to have been lost sight of. If the new matter from independent sources had been available to the Minister, it must have affected somewhat his finding of value: and assuming it to have been found by the Court that the real cost to the company was $150,000, a further fact appeared which has not been taken into account by the Minister. The Crown objected to the evidence of value but under the misconception that the right to depletion and its amount were in the uncontrolled discretion of the Minister; and it was intimated that if such a view was wrong, the matter should be returned to the Minister for further consideration of value. But as the Minister had decided for the allowance and on the basis of value, the only issue should have been that of amount. This simple situation was complicated originally by the failure of the company to bring or at least to offer to bring forward the evidence later presented, and at the trial both by the pleading and by the erroneous view of discretion. In substance, it is a case in which the Minister, in ascertaining a basic fact, has been misled by the insufficient proof offered, a proof which in the circum-

(1) [1948] Ex. C.R. 548.

stances it was on the company to furnish. In addition to the fact that the judgment purports to direct the Minister to award an allowance on the basis of cost to the company as distinguished from value, decided upon by the Minister, if what is now disclosed had been considered, can it be said that the Minister must have found the amount of $150,000 to be the value or that he must then have proceeded on the same basis of allowance? The Minister is entitled to determine the sum to be allowed on the whole of the material factors and are not the new matters adduced by the company, and the striking difference indicated between value and original cost, such factors?

I do not find it necessary to decide that question because another new fact has been introduced. McCool advised the Commissioner that the quantity of timber on the limits was twenty million feet. It now appears that it is at least twenty-five million and may run more. This is obviously relevant to the allowance for the year in question on any basis, but it has never been considered by the Minister.

The case of *Minister of National Revenue* v. *Wrights Canadian Ropes Ld.* (1) was interpreted to justify the order made, but the cases are distinguishable. There the Minister proposed under section 6(2) to exercise a discretion in reducing the amount of an admitted outlay as an expense against revenue. Only on proper and sufficient grounds could that be done, which the Court, on the matter before it, found not to be present. But the issue raised and fought out, and on which the Minister was content to stand or fall, was the sufficiency of the facts before him for the ruling he made: and it was held that he was bound by the finding of the Court.

Here there was no such clear cut issue brought to the Court: the parties were to some degree at cross purposes. And in view of the issue raised, the evidence presented, the finding made, and the error in the total quantity of timber, there were facts disclosed which through the failure of the company were not before the Minister and which I think he is entitled to consider: but in finding a basic fact the Minister must, of course, act judicially on the evidence before him.

(1) [1947] A.C. 109.

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The respondent has cross-appealed on the refusal to allow as an expense the payment of interest on that part of the consideration to McCool given by the company for the assets transferred which consisted of a promise to pay money. It is, I think, misleading to convert a transaction of this sort into what is considered to be its equivalent and then to attribute to it special incidents that belong to the latter. Whether, if the company had raised money by issuing bonds, with which McCool had been paid off, the interest on them could be deducted as an expense I do not stop to consider; that is not what we have before us. There was no borrowing and lending of money and no use of money for which interest would be the compensation. What the vendor did was to sell his property, for the consideration, in addition to the shares, of a price plus interest; that interest is part of the capital cost to the company.

The item is clearly within section 6(*a*) which prohibits deduction of "disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income"; as a capital payment, it comes within the ban of section 6(*b*); and treated as interest, it is not within section 5(1) (*b*) which allows interest on "borrowed capital used in the business to earn the income": *Inland Revenue Commissioners* v. *Rowntree, Co. Ltd.* (1).

I would, therefore, allow the appeal, dismiss the cross-appeal, and refer the matter back to the Minister to take such action in relation to an allowance for depletion as the facts disclosed or the further facts that may be disclosed may call for. There should be no costs in either court.

KELLOCK J.:—The facts are sufficiently stated by the learned trial judge and need not be here repeated. In the first appeal the question is as to depletion allowance for the period ending August 31, 1942, in respect of the "Booth" limit.

It is contended on behalf of the Crown that the Minister properly exercised his discretion under section 5(1) (*a*) of the *Income War Tax Act* on the material before him and

(1) [1948] 1 All E.R. 482.

allowed depletion on the "basis of value as shown by the only real evidence of value before him, namely, the price paid by McCool for the limit"; that the Minister did not accept the transaction between McCool and the company as determining the value; and that the Minister was entitled to proceed on this view. It is said that the learned trial judge erred in concluding that the Minister had based his decision on the ground that there had been no actual change of ownership of the assets under the transaction between McCool and the company, and erred further, in concluding that the Minister had based his decision on the ground that the limit had been set up in the books of the company at an appreciated value. The Crown also complains that the trial judge erred in having regard to evidence which was not before the Minister.

At the time the Minister made his decision under section 59 of the *Income War Tax Act,* by the terms of which he has the obligation, upon receipt of the taxpayer's notice of appeal, to "duly consider the same and affirm or amend the assessment appealed against", he had before him:

(*a*) the option agreement of March 27, 1940;
(*b*) the agreement between McCool and Ryan of August 31, 1940;
(*c*) a balance sheet purporting to be the closing balance sheet as of August 31, 1940, of T. E. McCool;
(*d*) the opening balance sheet of the respondent company as of August 31, 1940;
(*e*) the income tax return in question;
(*f*) an assessor's report showing that the company had issued 600 of its 1,000 authorized shares of which 360 had been issued to McCool personally, and the remaining 240 on his direction to members of his family and that on a value of $24,000 a gift tax of $1,000 had been paid in respect of these 240 shares.

It is important to see what was the issue, first, while the matter was before the Minister, and second, in the Exchequer Court.

In its Notice of Appeal to the Minister, the appellant included in its statement of facts the statement that the

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timber limits were transferred to it "on a valuation of $150,000", and in its reasons for appeal it claimed that it should be allowed—

> Depletion on the basis of a *valuation* of $150,000 and not $35,000, the sum of $150,000 being *the price* paid by it for the said limits when purchased from Mr. McCool and *being less than the actual market value* of the said limits at the date of acquisition by the Appellant.

It also claimed that the Minister erred in his interpretation of the Act and had not used a proper, fair and just discretion "in valuing the said limits for the purpose of depletion at the cost price to Mr. McCool of $35,000 and the said assessment is accordingly made on an improper basis".

The language last quoted has reference to a letter to the appellant from the Inspector of Income Tax which accompanied the Assessment Notice and stated that:

> It has been ruled by the Deputy Minister of National Revenue (Taxation) that the timber limits will be valued for the purpose of the Income War Tax Act and the Excess Profits Tax Act at the cost price to T. E. McCool of $35,000 * * *

In the decision in writing of the Minister upon the appeal from this assessment, the assessment was affirmed "on the ground that a just and fair allowance has been made under the provisions of paragraph (*a*) of subsection 1 of Section 5 of the *Income War Tax Act,* of the amount of $10,445.94 in respect of depletion of a timber limit".

It will be seen that the Minister does not state the ground of his decision. It is not stated that the Minister had concluded, (*a*) that on the evidence before him the value of the limits when acquired by the appellant was $35,000 rather than $150,000, nor (*b*), that the cost to the appellant was not $150,000, nor (*c*), whether it was cost to the taxpayer or market value, if there were a difference, which was the proper figure to be taken and which he had taken in arriving at his decision.

When the matter reached the Exchequer Court counsel for the Minister put the matter thus:

> I think perhaps my learned friend has in mind calling certain expert evidence as to the value of the timber limits, and as to that I would like to say this: the respondent takes the position that under the applicable section of the *Income War Tax Act,* which is 5(1) (*a*), it is entirely a matter of discretion with the Minister whether or not he shall allow depletion on timber limits * * * If the respondent is right in that, then of course the question of value would be of little moment.

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That was to say that the amount of any allowance for depletion was a matter exclusively for the Minister and the question of value did not enter. Counsel went on to say further:

> But if your Lordship should decide that the respondent is wrong in that, I would submit that then your Lordship ought to remit the case back to the Minister in order that he might exercise his discretion according to proper principles; and then it would be for the Minister to make inquiries as to the value of the timber limits. The department, rightly or wrongly, was not prepared in advance of this trial to send people out to cruise limits in order that it might meet any evidence of this kind to be given by the appellant * * *
>
> His Lordship: Are you objecting to any evidence which has to do with the actual value of the limit?
>
> Mr. Macdonald: Yes, my Lord. The exhibits already filed show that the appellant claimed that the value was $150,000, and I submit that with them in front of us we perhaps have enough on which to go and do not need to listen to a lot of evidence as to cruising the limit.

If this correctly reflects the basis of the decision of the Minister upon the appeal from the assessment, it establishes, in my opinion, that the Minister made his decision on the theory that any amount which he allowed could not be questioned by the taxpayer. At the trial his counsel took the position that if the Minister were wrong and, having determined to make an allowance for depletion, should have done so on the basis of the value of the limits, the matter must go back to him for that purpose.

In his examination for discovery Mr. Williams was referred to the recommendation of the Timber Committee, which reads as follows:

> That the depletion allowance be such as to permit the owner of timber or the holder of a right to cut timber from Crown or private lands to recover successively and rateably out of income before tax such capital sums as he may have invested in acquiring such ownership or rights, and no more.

On being asked whether or not this recommendation had been adopted by the Department, he replied in the affirmative and said:

> Q. On the basis of the adoption of that recommendation, the department then set the value of the limit at $35,000?
>
> A. Yes.

If this be correct, the Minister must have taken the position that the investment of the appellant was only $35,000. This result could only be arrived at by identifying the appellant company with Mr. McCool personally.

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In *Johnston* v. *Minister of National Revenue*, (1), Rand J. said at 489:

> Notwithstanding that it is spoken of in section 63(2) as an action ready for trial or hearing, the proceeding is an appeal from the taxation; and since the taxation is on the basis of certain facts and certain provisions of law either those facts or the application of the law is challenged. Every such fact found or assumed by the assessor or the Minister must then be accepted as it was dealt with by these persons unless questioned by the appellant. If the taxpayer here intended to contest the fact that he supported his wife within the meaning of the Rules mentioned he should have raised that issue in his pleading, and the burden would have rested on him as on any appellant to show that the conclusion below was not warranted. For that purpose he might bring evidence before the Court notwithstanding that it had not been placed before the assessor or the Minister, but the onus was his to demolish the basic fact on which the taxation rested.

In its statement of claim the appellant set out the facts, including an allegation that the limits had been acquired by it at a cost of $150,000 and alleged that it was that amount which was the proper basis on which depletion should be allowed. The appellant complained that the assessment was improper in that the Minister erred in "using the sum of $35,000 as the basis for allowing depletion and in not properly interpreting section 5, subsection (1), paragraph (*a*), of the said *Act* with respect to depletion on the ground, among others, that the Appellant on the basis of the Minister's discretion would never recover its capital investment through depletion allowance".

In his defence the Minister merely affirmed that he had properly allowed the amount of $10,445.94 in respect of depletion and that by making the said allowance he had exercised, according to the proper legal principles, the discretionary power vested in him under the subsection.

In these circumstances I do not think that whatever might have been the situation otherwise, it can be argued on behalf of the Crown, as Mr. Varcoe does, that "the Minister decided to allow depletion on the basis of value as shown by the only real evidence of value before him, namely, the price paid by McCool for the limit", or that "he did not accept the transaction between McCool and the Company as determining the value". Neither in his formal decision nor in his statement of defence, does it appear that this is what happened and it is perfectly clear that counsel for the respondent at the trial did not so

(1) [1948] S.C.R. 486.

understand the matter. I think, therefore, that it has not been shown in this court on behalf of the appellant that the Minister's decision was arrived at in accordance with proper principles.

In *Fraser* v. *Minister of National Revenue* (1), the Judicial Committee held that the Minister has a double discretion under section 5(1) (*a*) of the *Income War Tax Act*, first, to determine whether the case is one for an allowance, and second, if so, to determine how much shall be allowed. With respect to the opening words of section 5, namely:

> Income * * * shall for the purposes of this Act be subject to the following exemptions and deductions.

their Lordships held that these words merely "require the Minister to make a deduction under head (*a*) if he has decided that the case is one for a deduction". Their Lordships intimated that in exercising his discretion as to whether he should or should not make an allowance, the Minister must proceed on "just, reasonable and admissible grounds". The view of the Minister in the *Fraser* case was, in their Lordships' opinion, "an intelligible view which was both tenable and admissible, and in adopting it the Minister cannot be said to have transgressed the bounds of his discretion so as to justify any interference with his decision".

Their Lordships went on to say:

> The criteria by which the exercise of a statutory discretion must be judged have been defined in many authoritative cases, and it is well settled that if the discretion has been exercised bona fide, uninfluenced by irrelevant considerations and not arbitrarily or illegally, no court is entitled to interfere even if the court, had the discretion been theirs, might have exercised it otherwise.

In the instant case the Minister did determine that the case was one for an allowance. The question in the present appeal is therefore whether, in exercising the second branch of the statutory discretion, the Minister proceeded in accordance with the principles above laid down. As I have already said, I do not think that has been shown.

It is no doubt a prevalent practice for promoters to acquire assets with a view to turning them over to an incorporated company called into being at their instance, at a figure involving a handsome profit which may or may not have any relation to actual value, but in my opinion

(1) [1949] A.C. 24.

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there is no presumption that such is invariably the case. It seems to me that the Minister acted on some such view without any evidence to support it, such evidence as there was, being to the contrary, or else he must have disregarded the separate legal existence of the company.

On the pleadings the respondent claimed that its investment of $150,000 in the limits was the amount upon which depletion allowance should be based. The appellant denied this and did not raise any other issue, at the trial taking the stand, not that cost was improper and value or some other basis correct, but that the amount allowed could not be questioned. Cost was not necessarily the basis which the Minister was bound to apply. On the other hand the stand taken by the Minister could not be supported. I therefore think that the matter must be referred back to the Minister on the basis however, that it has already been determined that an allowance for depletion should be made. This will permit the fact of there being 25,000,000 feet on the limits instead of the amount previously thought to exist, namely, 20,000,000 to be taken into consideration.

I would therefore allow the appeal to the extent mentioned. I think the respondent should have its cost in the court below, but that there should be no costs in this court.

In the second appeal the company claims that the interest paid on the note given to McCool for the balance of the purchase price of the assets acquired by the company should be allowed as an operating expense on the ground that the note represents borrowed capital used in the business to earn the income within the meaning of section 5(1) (*b*) of the statute. This claim was disallowed by the Minister and the company's appeal was dismissed by the learned trial judge, on the ground that in order to qualify under the statute the taxpayer would have to be in the position of a borrower and some other person would have to be a lender, while in fact there was no such relationship as between the company and McCool. I agree with the learned trial judge that the company cannot bring itself within the language used in section 5(1) (*b*). To employ the language of Viscount Finlay in *Commissioners of Inland Revenue* v. *Port of London Authority* (1), in

(1) [1923] A.C. 507 at 514.

order to enable the statute to apply, "there must be a real loan and a real borrowing". Here there is nothing more than unpaid purchase money secured by a promissory note which, in my opinion, is insufficient. It is not sufficient to say that if the company had borrowed the amount of the note and paid McCool it would have been entitled to the deduction. However that may be, that was not done and the statute does not apply. This appeal should also be dismissed.

ESTEY J.:—The respondent in filing its income tax returns for the taxation year ending August 31, 1942, claimed an allowance of $51,874.36 for the exhaustion of a timber limit, and interest on $123,097.34 at the rate of 5 per cent on and after the 1st day of September 1941. The allowance was reduced to $10,445.94 and the interest entirely disallowed by the officials of the Department of National Revenue. Their decision was affirmed by the Minister, but in the Exchequer Court varied with respect to the allowance and affirmed as to the disallowance of the interest. These items constitute the subject-matter of this appeal.

An allowance with respect to a timber limit is provided for in sec. 5(1) (*a*) of the *Income War Tax Act*, R.S.C. 1927, c. 97, and amendments thereto, the material part of which reads:

> 5. (1) "Income" as hereinbefore defined shall for the purpose of this Act be subject to the following exemptions and deductions:—
>
> (*a*) The Minister in determining the income derived from * * * timber limits may make such an allowance for the exhaustion of the * * * timber limits as he may deem just and fair * * *

This section was under review in *D. R. Fraser & Co. Ltd.* v. *Minister of National Revenue* (1), where Lord Macmillan states:

> He has a double discretion, first, to determine whether the case is one for an allowance, and second, if so, to determine how much shall be allowed. The Minister "may" not "shall" make an allowance. The language is permissive, not obligatory.

And further, at p. 36:

> The criteria by which the exercise of a statutory discretion must be judged have been defined in many authoritative cases, and it is well settled that if the discretion has been exercised bona fide, uninfluenced by irrelevant considerations and not arbitrarily or illegally, no court is entitled to interfere even if the court, had the discretion been theirs, might have exercised it otherwise.

(1) [1949] A.C. 24 at p. 32.

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The Department of National Revenue on February 10, 1942, adopted and published the recommendations of the Timber Depletion Committee of the Income Tax Division. The part of the recommendations material hereto reads as follows:

> That the depletion allowance be such as to permit the owner of timber or the holder of a right to cut timber from Crown or private lands to recover successively and ratably out of income before tax such capital sums as he may have invested in acquiring such ownership or rights, and no more.

Such a recommendation though not binding upon may be followed by the Minister but in either event it must be determined whether in a particular case he has exercised a judicial discretion. *Pioneer Laundry and Dry Cleaners Ld.* v. *Minister of National Revenue* (1).

The decision of the Minister made in the exercise of his discretion should be supported unless it is "manifestly against sound and fundamental principles": per Davis J. in *Pioneer Laundry & Dry Cleaners* v. *Minister of National Revenue* (2), and quoted with approval by Lord Thankerton in *Pioneer Laundry & Dry Cleaners* v. *Minister of National Revenue supra.*

It is apparent that in this case the Minister had decided that an allowance should be made and no question has been raised with respect to that portion of his decision. The ruling of the Deputy Minister clearly made under the terms of the foregoing recommendation and affirmed by the Minister reads in part:

> It has been ruled by the Deputy Minister of National Revenue (Taxation) that the timber limits will be valued for the purpose of the Income War Tax Act and the Excess Profits Tax Act at the cost price to T. E. McCool of $35,000, that the depletion allowable will be the result of dividing $35,000 by the total cruise and multiplying by the cut during the period * * *

In considering the appeal the Minister had before him the following facts: T. E. McCool purchased the timber limit from Gertrude E. Booth for $35,000 under an option agreement dated March 27, 1940, and carried it at that amount on his personal balance sheet as of August 31, 1940. A letter written by Crandall, who was engaged in lumber operations and was familiar with and interested in purchasing the timber limit, to T. E. McCool on September 27, 1940, intimated that his company would

(1) [1940] A.C. 127. (2) [1939] S.C.R. 1 at p. 5.

have paid a substantially higher price to have obtained it. The respondent was incorporated to take over the assets of T. E. McCool and did so under an agreement setting out a list of items not separately valued. The company in consideration of the transfer of the assets agreed (*a*) to assume and pay all debts and liabilities of T. E. McCool in the sum of $37,684.20, (*b*) cash in the sum of $400 to be used in the purchase of four organization shares, (*c*) allot and issue to T. E. McCool or his nominees 596 fully paid up and non-assessable shares of capital stock at a par value of $100, and (*d*) give to the vendor a demand note for the sum of $123,097.34 with interest at 5 per cent from and after the 1st day of September, 1941. It was also stated in the material before the Minister that the timber berth here in question was valued at $150,000, and that the respondent purchased it for "less than the actual market value of the said limits at the date of the acquisition," and that the respondent carried it in its balance sheet at $150,000. It was also disclosed that T. E. McCool was the largest shareholder in the company and the other shareholders were the members of his family.

At the trial in the Exchequer Court the validity of the discretion exercised by the Minister was in issue. No evidence was adduced on behalf of the Crown but the respondent read into the record the examination for discovery of Mr. Williams, Director General of the Corporation Assessments Branch of the Taxation Division, Department of National Revenue, in which Mr. Williams deposed that "an allowance for depletion is made in order to enable the total cost of the limits to be absorbed in the production," that the $35,000 was selected "because the department felt that that was the actual cost to the taxpayer." Further, that "they had seen an option agreement and copies of other agreements between the chief shareholder of the taxpayer and the original owner of the property in which he agreed to pay $35,000 for the limits." Mr. Williams did not know whether the department had any idea of the value of the limits and deposed that he "would consider that the company was McCool's company, that he would have control as to the price to be fixed on any assets that were purchased from himself, and consequently that that was not a transaction as between strangers," and that

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here the department which "usually looks at a transaction in regard to market value, if there is not a ready market * * * at the last transaction that took place for cash, at arm's length or as between strangers."

The foregoing evidence establishes that the Minister was following the recommendation in determining the "just and fair" allowance and therefore that it should be related to the possibility of eventually returning out of income the taxpayer's investment in the timber limit. That though on behalf of the respondent it was plainly stated that $150,000 was paid for this timber limit and that it was worth more, the Minister, without any knowledge of the value of the timber limit decided that "the cost price to T. E. McCool of $35,000" in a transaction between strangers should be accepted as the investment to the taxpayer in this timber limit.

An assumption that a sale between strangers discloses the cost to or the investment of a company formed to purchase the assets of the purchaser (in the sale between strangers), including the asset then purchased in which company the controlling shareholder is that purchaser and the other shareholders members of his family, may in some circumstances be justified. Not, however, in a case such as this where apart from the agreements there is a statement from an independent prospective purchaser to the effect that the timber limit was obtained by T. E. McCool at a bargain; where the agreements evidencing these sales were by the taxpayer placed before the Minister without any request on his behalf, as well as the statement intimating that the $35,000 was a bargain; and where throughout the record there is no suggestion of wrongdoing or fraud on the part of the taxpayer.

While these agreements disclosing such a difference in the purchase price would naturally raise in the mind of the Minister questions upon which in the exercise of his discretion he had to pass, they did not provide the relevant facts upon which that discretion ought to have been exercised. The statute contemplates that these important decisions ought not to be made without at least an endeavour to obtain all the relevant facts. That was no doubt one of the reasons why secs. 41-46 were included. Under these sections the Minister may demand additional

information of the character such as would be suggested in this case, more particularly because there is nothing to suggest that the further information relative to the figures, and particularly the value of the investment as eventually adduced at the trial, would not have been produced and possibly this litigation avoided.

It would therefore appear that the Minister in determining the said sum of $35,000 acted upon insufficient facts and therefore did not exercise a judicial discretion as that term is defined in the authorities. Lord Greene in *Minister of National Revenue* v. *Wrights' Canadian Ropes Ltd.* (1), stated at p. 123:

> The court is, in their Lordships' opinion, always entitled to examine the facts which are shown by evidence to have been before the Minister when he made his determination. If those facts are in the opinion of the court insufficient in law to support it, the determination cannot stand. In such a case the determination can only have been an arbitrary one.

See also *Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue, supra,* and *D. R. Fraser & Co. Ltd.* v. *Minister of National Revenue, supra.*

I am therefore in agreement with the conclusion arrived at by the learned trial Judge that the Minister in exercising his discretion has acted upon a wrong principle.

The learned trial Judge having concluded that the Minister had exercised his judicial discretion upon a wrong principle, it would appear that the case should have been referred back to the Minister as the only party authorized under the statute to determine the "just and fair" allowance. The statute is explicit:

> 5. (1) * * *
> (*a*) The Minister * * * may make such an allowance * * * as he may deem just and fair * * *

The general language of sec. 66, conferring the exclusive jurisdiction upon the Exchequer Court, is circumscribed and limited by such phrases as "subject to the provisions of this Act * * *" and "determine all questions that may arise in connection with any assessment * * *". Apart from specific language to the contrary, it would appear that it still remains the duty of the Minister to determine under sec. 5(1) (*a*) the allowance that he may deem just and fair and a reference back to the Minister should have been directed for that purpose.

(1) [1947] A.C. 109.

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In the *Pioneer Laundry* Case, *supra*, the Minister acted upon irrelevant facts in determining under sec. 5(1) (*a*) a depreciation allowance of $255.08 as against the amount claimed by the taxpayer of $17,775.55. The Privy Council directed "that the assessment should be set aside and the matter referred back to the Minister."

The learned trial Judge followed the direction made by the Privy Council in *Wrights' Canadian Ropes* case, *supra*. That case, with respect, appears to be distinguishable. There the issue under sec. 6(2) was in respect to the disallowance of the major portions of three items of expense and was decided by the Privy Council upon a construction of certain documents. Lord Greene stated, at p. 124: "So far, therefore, as these documents are concerned their Lordships cannot find any material which could have justified any disallowance." That concluded the matter and therefore the Privy Council directed the case be remitted to the Minister "for an adjustment of the figures consequential on the allowance of the respondents' appeal." It is also significant that the *Pioneer Laundry* Case upon another point is referred to in the *Wrights' Canadian Ropes* judgment, but no suggestion that the order there directed was not appropriate to the circumstances of that case.

There would appear to be no difference in principle between a case in which the Minister proceeds upon irrelevant facts and where he proceeds upon insufficient facts and therefore under the authority of the *Pioneer Laundry* case the matter should be referred back to the Minister in order that he may determine a "just and fair" allowance within the meaning of sec. 5(1) (*a*).

The respondent in its appeal asks that interest on the demand promissory note of $123,097.34 be allowed under sec. 5(1) (*b*), the essential part of which reads as follows:

> 5. (1) "Income" as hereinbefore defined shall for the purpose of this Act be subject to the following exemptions and deductions:—
>
> * * *
>
> (*b*) Such reasonable rate of interest on borrowed capital used in the business to earn the income as the Minister in his discretion may allow * * *

Terms such as "borrowed capital", "borrowed money" in tax legislation have been interpreted to mean capital or money borrowed with a relationship of lender and borrower between the parties. *Inland Revenue Commissioners* v.

Port London Authority (1); *Inland Revenue Commissioners* v. *Rowntree & Co. Ltd.* (2); *Dupuis Frères Ltd.* v. *Minister of Customs and Excise* (3). It is necessary in determining whether that relationship exists to ascertain the true nature and character of the transaction. In this case the promissory note arises out of an exchange in which, as already detailed, the purchase price was paid by assuming outstanding obligations, a small payment of cash, allotment of captial stock and the execution and delivering of this promissory note. Under such circumstances it cannot be held that the relationship of lender and borrower in respect to this note exists between the respondent company and the payee of the note.

The appeal of the Minister of National Revenue should be allowed and the case remitted to the Minister to determine a just and fair allowance for depreciation. The appeal of T. E. McCool Limited should be dismissed. T. E. McCool Limited should have its costs in the Exchequer Court and no costs to either party in this Court.

LOCKE J.:—(dissenting in part): In the exercise of the powers vested in the Minister by subsec. (*a*) of sec. 5 of the *Income War Tax Act*, as amended by sec. 10 of cap. 34 of the Statutes of 1940, the respondent company was allowed an amount of $10,445.94 for depletion of timber limits acquired by it under the circumstances hereinafter stated. That subsection in so far as relevant provided that:—

"Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—

(*a*) the Minister in determining the income derived from mining and oil and gas wells and timber limits may make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair.

The respondent appealed from the assessment claiming to be entitled to a larger amount by way of depletion and the assessment was affirmed by the Minister but, on appeal to the Exchequer Court, Cameron J. set aside the assessment and referred the matter back to the Minister for adjustment on the footing that the value of the timber was not less than $150,000 and that depletion should be based upon this figure rather than upon $35,000, the value as found by the Minister.

(1) [1923] A.C. 507.
(2) [1948] 1 All E.R. 482.
(3) [1927] Ex. C.R. 207.

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Under the subsection the Minister has a discretion first, to determine whether any allowance is to be made for the exhaustion or depletion of timber limits and, if he determines that such an allowance should be made, then secondly, as to the amount of the allowance. By a letter accompanying the notice of assessment which was for the taxation period between October 21, 1941, and August 31, 1942, the assessor informed the respondent, *inter alia,* that:

> It has been ruled by the Deputy Minister of National Revenue (Taxation) that the timber limits will be valued for the purpose of the Income War Tax Act and the Excess Profits Tax Act at the cost price to T. E. McCool of $35,000, that the depletion allowable will be the result of dividing $35,000 by the total cruise and multiplying by the cut during the period.

Having decided that an allowance for depletion should be made, the question to be determined is whether the Minister's discretion as to what was a just and fair allowance has been properly exercised. The facts properly to be considered in deciding this question are, in my opinion, few in number.

Thomas E. McCool had been engaged for a long period of years in the logging and lumber business and by an option agreement dated March 27, 1940, acquired the right to purchase the limits in question from Gertrude R. Booth within a stipulated time for the sum of $35,000. That option was exercised by McCool within the time limited and a payment of $10,000 made on account of the option price. Having acquired the limits, they were shown on the balance sheet of McCool's business dated as of August 31, 1940, valued at the sum of $35,000. He had apparently decided to incorporate a company to take over his business and to take shares in the proposed company for a portion of the purchase price and give part of these shares to various members of his family. For some reason which is not clear to me, he decided to enter into an agreement with Lawrence S. Ryan, a chartered accountant and who had apparently acted as his auditor, whereby he agreed to sell his assets to Ryan who was designated as trustee on behalf of a company to be formed under the name of T. E. McCool Ltd., consisting of the limits in question, certain other lands and timber limits, a hotel property, certain chattels and accounts receivable and shares of stock and the amount of his cash on hand, to

the proposed company in consideration of its assuming his business liabilities in an amount stated, issuing to him or his nominees 600 fully paid up shares of the par value of $100 each, and giving a demand note in the sum of $123,097.34. This agreement was also dated August 31, 1940, and it is to be noted that no part of the stipulated consideration was allocated to any of the assets agreed to be sold. The respondent company was not incorporated until some fourteen months thereafter when, by letters patent issued under the provisions of the *Dominion Companies Act* dated October 20, 1941, it came into being. Its organization meetings were held in the following month when a further agreement dated November 28, 1941, was made between McCool, Ryan and the new company whereby McCool, with Ryan's expressed consent, agreed to sell the assets referred to and an additional piece of land to the company for the consideration mentioned. Three hundred and sixty of the shares were directed to be issued to Thomas E. McCool and on his direction the remaining 240 shares were issued to his nominees, most of whom appear to have been members of his family, and the promissory note was delivered. Neither this agreement nor the minutes of the meetings of the company authorizing its execution allocate any portion of the agreed purchase price to the timber limits in question.

While the company did not commence to carry on business until October 21, 1941, Mr. Ryan prepared what he called a balance sheet of the company as of August 31, 1940, and this was produced and filed as an exhibit at the trial, accompanied by a letter addressed by him to the shareholders dated November 10, 1941, stating that in accordance with the instructions received he had prepared the balance sheet. The minutes of the company's various meetings held at the time of the acquisition of the assets contain no reference to this letter or to the balance sheet and while Ryan gave evidence at the trial he said nothing to indicate that they had been considered or formally dealt with by either the shareholders or the directors. By a further letter addressed to the shareholders dated December 15, 1942, Ryan advised the shareholders that he had prepared a balance sheet as of August 31, 1942, and this document was filed with the Inspector of Income Tax with the

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company's return dated December 16, 1942, for the taxation period in question. In the balance sheet of August 31, 1940, the Booth limits were shown among the fixed assets of the company as an amount of $150,000: in the balance sheet as of August 31, 1942, they were shown at the sum of $150,812 and to the latter statement filed with the taxation return there was attached a statement as to the depletion claimed which read:—

> I estimate on the basis of a cruise made of this limit there would be twenty million feet of standing timber consisting of white, red and jack pine, spruce, balsam, poplar, birch, basswood, cedar at the time of purchase. The cost per one thousand feet-board measure would be $7.50 to give a total cost of $150,000—20,000,000 feet at $7.50 per thousand.

and below this there appeared the words "Certified correct —T. E. McCool Limited per T. E. McCool, President."

Since the appeal is in respect of the amount allowed in the exercise of a discretion, it is necessary to ascertain the nature of the material which was before the Minister when the amount of the allowance to be made for depletion was determined. This consisted of the option agreement, the balance sheet of T. E. McCool as of August 31, 1940, the so-called trust agreement between McCool and Ryan, the so-called opening balance sheet of T. E. McCool Ltd. as of August 31, 1940, the balance sheet for the period ending August 31, 1942, with the attached schedules and McCool's certificate as to the value upon which the company claimed depletion, and a report of the assessor showing that the shares had been issued and that McCool had paid a gift tax on the 240 shares he had given to the members of his family and others on the footing that they were of the value of $100 each. In so far as the Booth limits were concerned, the only information touching their value was accordingly the admitted fact that they had been bought in the year 1940 for $35,000 and that the purchaser T. E. McCool had shown them as of this value in his balance sheet for the period ending August 31, 1940, and his statement appended to the tax return of the company dated December 16, 1942, that he estimated that there were 20,000,000 feet b.m. on the limit and that the "cost" of 1,000 feet would be $7.50 on the basis apparently that $150,000 had been the cost to the company of the purchase of the timber limits at which amount they were

valued in the balance sheet of August 31, 1942. The Minister thus had before him evidence as to the purchase price agreed to be paid for the transaction between two parties who were at arm's length and the fact that Mr. McCool, an experienced lumberman, showed the properties in the balance sheet of his own business as being of the same value as the stipulated purchase price, and on the other hand the fact that in the balance sheet prepared after the incorporation of the company this same asset had been shown at a value of $150,000 and to a slightly increased amount as of August 31, 1942. It was undoubtedly, in my opinion, the intention of the Minister to provide for a depletion allowance on the basis of the value of the limits and not upon their cost to the company and I see nothing in this record justifying the intervention of the court when, upon the evidence before him, he found that that value was the lesser of these two figures.

In the notice of appeal from the assessment the respondent company in the statement of facts recited the agreement made by it with T. E. McCool for the purchase of the limits on November 28, 1941, and contended that the Booth timber limits were transferred to the company "on a valuation of $150,000" and claimed depletion on the basis of this valuation "being the price paid by it for the said limits when purchased from Mr. McCool and being less than the actual market value of the said limits" at the date the company acquired them. Upon the Minister rendering his decision rejecting the appeal, the notice of dissatisfaction retiterated the statement of facts contained in the notice of appeal and claimed that the discretionary power of the Minister "has not been properly exercised, is not in conformity with the provisions of the Act, has not been exercised in a reasonable manner and the facts upon which such discretion was exercised were not properly before the Minister, nor were they examined by him." It is, in my opinion, of importance that when by consent pleadings were delivered the taxpayer alleged that at the time of the transfer of the assets the Booth timber limits were transferred to the company "at a cost of $150,000." and that it was not alleged that the limits were of that value so that the question of value was not placed in issue.

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The complaint as to the exercise of the Minister's discretion was that he had erred in:—

> not exercising any discretion, or in not exercising his discretion on material sufficient in law to support his decision, and that such decision was made in a purely arbitrary manner, and that the decision of the Minister and his reply contained no grounds or reasons for his decision, nor are the facts outlined therein upon which the Minister arrived at his decision.

The statement of defence filed by the Minister after denying these allegations contended that the Minister had exercised his discretionary power in accordance with proper legal principles.

Much of the evidence admitted at the trial was, in my opinion, irrelevant: its admission appears to me to have been based on a misconception as to the issues that were to be tried. In *The Minister of National Revenue* v. *Wrights' Canadian Ropes* (1), Lord Greene, M.R., dealing with an appeal from the exercise of the Minister's discretion under sec. 6(2), pointed out that since an appeal is given by the statute this involved the consequence that the Court was entitled to examine the determination of the Minister but that the limits within which the Court is entitled to interfere are strictly circumscribed. It is for the taxpayer to show that there is ground for interference and, unless it is shown that the Minister has acted in contravention of some principle of law, the Court cannot interfere. After quoting the language of Lord Thankerton in *Pioneer Laundry and Dry Cleaners* v. *Minister of National Revenue* (2), adopting the language of Davis J. in that case in this Court (3), that the Court would not interfere with the Minister's decision unless "it was manifestly against sound fundamental principles", Lord Greene said in part:—

> The court is, in their Lordships' opinion, always entitled to examine the facts which are shown by evidence to have been before the Minister when he made his determination. If those facts are in the opinion of the Court insufficient in law to support it, the determination cannot stand. In such a case the determination can only have been an arbitrary one. If, on the other hand, there is on the facts shown to have been before the Minister sufficient material to support his determination the Court is not at liberty to overrule it merely because it would itself on those facts have come to a different conclusion.

(1) [1947] A.C. 109.
(2) [1940] A.C. 127, 136.
(3) [1939] S.C.R. 5.

In *Fraser* v. *Minister of National Revenue* (1), a case in which the exercise by the Minister of his discretion under the same subsection as is here under consideration, Lord MacMillan, in delivering the judgment of the Judicial Committee, said in part:—

> The criteria by which the exercise of a statutory discretion must be judged has been decided in many authoritative cases, and it is well settled that if the discretion has been exercised bona fide, uninfluenced by irrelevant considerations and not arbitrarily or illegally, no court is entitled to interfere even if the court, had the discretion been theirs, might have exercised it otherwise.

This was the question to be determined at the trial in the Exchequer Court. The taxpayer, however, tendered evidence to indicate that at the time of the acquisition of the timber limits by the company they were of a fair value of $150,000. It is not suggested that the value as of August 31, 1940, when McCool entered into the agreement with Ryan, differed from that of November 28, 1941. None of this evidence had been before the Minister and in effect the contention of the appellant company was that his finding should be set aside upon evidence that was not before him. The evidence as to the value was, however, in my opinion clearly inadmissible on a second ground. The court having ordered the delivery of pleadings sec. 36 of the *Exchequer Court Act*, R.S.C. 1927, cap. 40 applied and the practice and procedure in the action was to be that of similar actions in the High Court of Justice in England on the 1st day of October 1887, unless otherwise provided by the Act and general rules made in pursuance of the Act. I find nothing in either the statute or in any rules of court which alters the practice of the High Court of Justice that the issues to be determined at the trial are those disclosed by the pleadings. In *Johnston* v. *The Minister of National Revenue* (2), at 489, Rand J. in delivering the judgment of the majority of the Court said that in such an appeal the taxpayer must allege the grounds upon which he relies in support of his claim that the decision of the Minister is erroneous. Here, in spite of the fact that the question of the value of the limits was not raised in the pleadings, the evidence was received and the learned trial judge, being of the opinion that since it

(1) [1949] A.C. 24 at p. 36. (2) [1948] S.C.R. 486.

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was contended in the notice of appeal that the limits were of the value of $150,000 that question was in issue, said:

> The question of value is clearly relevant to the issue and it is not barred by the provisions of sec. 65(1) of the *Income War Tax Act*, as the appellant clearly raised that issue in its Notice of Appeal.

With great respect, I think there is nothing in sec. 65 which affects the provisions of sec. 36 of the *Exchequer Court Act*. That section is merely intended to permit the appellant to raise in his pleadings whatever issues he may wish, without being restricted by the grounds raised in the notice of appeal or notice of dissatisfaction. If the learned trial judge by the passage quoted intended to indicate that the issues to be tried in the Exchequer Court where pleadings are delivered are those raised by the notice of appeal and the notice of dissatisfaction as well as by the pleadings, I am unable to agree. That the timber limits had been acquired by the respondent company at a cost of $150,000 was, however, clearly raised by the pleadings and the learned trial judge found that this had been proven. The only evidence on this point is that of T. E. McCool and Ryan since, as has been above pointed out, nothing in the agreements or the company's records throws any light on the matter. Mr. Ryan, however, who had prepared both the financial statement of T. E. McCool as of August 31, 1940, and the so-called opening statement of the company bearing the same date, said that the limit was actually valued at $150,000 at the time that McCool agreed to sell it to the company in 1940, and the other assets acquired were of a value in round figures of $70,000. Mr. McCool said that it was valued at this amount "when it was transferred to the company", this being some fourteen months after the date referred to by Ryan. While the cost of the limits to the taxpayer had been put in issue by the pleadings, it is not suggested that when the Minister exercised his discretion he had been informed that the cost to the taxpayer was the larger amount and, even if the evidence had been relevant, I do not think the fact was established by the evidence of Ryan and McCool. It is to be borne in mind that Ryan who professed to act as trustee for a non-existent *cestui qui trust* when entering into the agreement with McCool on August 31, 1940, was simply the latter's nominee. He was not acting as trustee for the persons

who it was intended should become shareholders of the proposed company and it is clear from the terms of the instrument that he did not intend to bargain for the limit on his own behalf. Assuming, as I do, that there was a discussion between McCool and Ryan as to the value of the respective assets referred to in the agreement of August 31, 1940, that cannot establish the agreed purchase price as between the company and McCool under the agreement made fourteen months later. As to McCool's evidence, he did not explain by whom the timber limits were so valued at the time they were purchased by the company and I think the fact was not proven.

It is further said in the reasons for judgment at the trial that:—

> In this case, as in the *Pioneer Laundry* Case, the Deputy Minister has based his decision on two grounds: (*a*) that there was no actual change of ownership of the assets, and (*b*) the assets (the Booth Limits) were "set up in the books of the appellant Company at appreciated values."

and that in fixing the depletion allowance the Minister had proceeded on a wrong principle since he had based the allowance on the cost of the limits to a predecessor in title. The letter accompanying the notice of assessment does not, in my view, support this view. That letter informed the taxpayer that the Deputy Minister had ruled that the limits would be valued for the purpose of the Act at the cost price to McCool of $35,000. That was the Minister's opinion as to the value of the property and nothing more. The argument for the respondent company is really that the Minister fell into the same error as had been made in the *Pioneer Laundry* case, having declined to recognize that T. E. McCool Ltd. was a separate entity and considering it as merely the *alter ego* of McCool. The only evidence which might support such a contention is that to be found in the examination for discovery of an officer of the Taxation Division of the Department of National Revenue which was put in evidence at the trial. The witness, who had not been in the employ of the Government at the time the discretion of the Minister was exercised, was of the opinion that the decision had been made by Mr. C. F. Elliott, K.C., the Deputy Minister of National Revenue for Taxation, and was permitted to express certain opinions

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as to what he thought might have influenced Mr. Elliott in making his determination. Many of the answers which this witness was permitted to make were simply speculations on his part and were inadmissible and while they were given without objection this cannot affect the weight to be given to them. Thus the witness was permitted to say that the figure of $35,000 "was fixed by the Department" because "the Department felt that that was the actual cost to the taxpayer," the form of the answer being prompted by the form of the question. Again the witness said that "the Department usually looks at a transaction in regard to the market value if there is not a ready market —such as there is on the stock exchange, for example, or over the counter trading—as the last transaction that took place for cash, at arm's length or as between strangers." If the evidence was of any value it merely indicated that the witness thought that Mr. Elliott had considered that the price paid by McCool was evidence that he might properly consider in determining the fair value of the timber limits. The witness was further asked the following questions and made the following answers:—

Q. This statement of T. E. McCool Limited dated August 31, 1940, that you mentioned, have you any knowledge as to whether or not the division of the shares as set out in that statement had some effect on the making of the decision?—A. I would think it would.

Q. On what basis would you think it would?—A. I would consider that the company was Mr. McCool's company, that he would have control as to the price to be fixed on any assets that were purchased from himself, and consequently that that was not a transaction as between strangers.

Q. Is there any section in the Act that you have knowledge of under which that ruling would come?—A. Well, in this particular case, one that is dealing with depletion, I think it is 5(1) (*a*), where it is purely a matter of permission (sic) as to the amount of the allowance to be made.

Q. Speaking of this distribution of shares, you have stated that the fact that Mr. McCool controlled the company might have had some bearing on the decision?—A. I think it would.

These answers were on the face of them merely expressions of the witness' opinion and speculations as to what may have had "some bearing on the decision" and inadmissible as evidence. I find no support in this evidence for the view that the Deputy Minister in coming to his decision fell into the error made in the *Pioneer Laundry* case or based his decision on the ground that the assets were set

up in the books of the appellant company at appreciated values or to qualify in any way the statement made by the assessor in the letter of February 9, 1945, which accompanied the notice of assessment. Having decided in the exercise of his discretion that an allowance for depletion should be made, it was further within his discretion to determine that the value of the limits, and not their cost to the company, should be the basis of the allowance. There was evidence before him, in my opinion, upon which he might properly find that the fair value of the limits was $35,000 and I do not find any evidence that he was influenced by irrelevant considerations or otherwise acted in an arbitrary or illegal manner justifying the intervention of the Court. In the light of the evidence as to value which was admitted at the trial under the above mentioned circumstances, the amount fixed by the Minister may well have been much less than the true value but this does not, in my opinion, enable us to refer the matter back to him for further consideration. To do so involves setting the assessment aside and I am unable to see upon what ground this can be done. If the Minister should consider that under all the circumstances some relief should be given to this taxpayer, no doubt this can be done.

The appeal as to the depletion allowance should be allowed and the judgment in the Exchequer Court set aside, with costs in both Courts.

As to the claim of the respondent company to the allowance for interest on the promissory note, I agree with the learned trial judge and would dismiss the cross-appeal with costs.

Appeal allowed without costs in either Court, assessment set aside and matter referred back to the Minister to take such further action as all the facts disclosed, or to be disclosed, call for. Cross-appeal dismissed with costs.

Solicitor for the appellant: *T. Z. Boles.*

Solicitors for the respondent: *Ewart, Scott, Kelley and Howard.*

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*June 15, 16
*Dec. 5

WILLIAMINA D. LUNN, Administratrix with the Will Annexed of George Wellington Lunn, deceased (PLAINTIFF) ..... APPELLANT;

AND

SAMUEL W. BARBER (By Order to Proceed) (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Executors and Administrators—Foreign Administration—Action on Promissory Notes brought in Ontario—Plaintiff residing out of jurisdiction died before action came to trial and foreign administratrix joined as party by Court Order—Defendant satisfied to proceed—On appeal it appeared for first time notes were within jurisdiction at date of testator's death—Proceedings stayed to permit filing of ancillary Letters and an Order adding grantee as party—The Succession Duty Act, R.S.O., 1937, c. 26, s. 18(3).

The plaintiff residing in New York State, sued on two promissory notes in Ontario but died before the action came to trial. A New York Surrogate Court named his widow Administratrix with will annexed of his estate and she, as widow and sole beneficiary, was subsequently by *praecipe* order under Ontario rule of Practice 301 named as a party plaintiff. The defendant applied to the Master to rescind the order but on being refused did not appeal therefrom and at the trial upon the New York Letters of Administration with will annexed being tendered in evidence accepted the position that he was bound by the order. On argument before the Court of Appeal it appeared that the notes at the date of death were in Ontario and were subsequently transmitted to the widow in New York State.

Held: per Kerwin, Taschereau and Locke JJ., that the defendant having acquiesced in the order of the Master and the trial having proceeded upon the basis of such order being correct, the defendant should not now be allowed to change position. On the merits no ground had been shown for setting aside the trial judge's finding against the defendant and therefore since a grant in Ontario of letters of administration with the will annexed would have appointed some one who could have been added as a party to represent the Estate, an opportunity should be given the plaintiff to take such steps. Upon filing of the Ontario grant of letters of administration and an order adding the grantee as a party, judgment should go allowing the appeal and restoring the judgment at trial.

Per: Rand and Kellock JJ.: In view of the provisions of s. 18(3) of the *Succession Duty Act,* R.S.O., 1937, c. 26, the Ontario Court of Appeal, upon the true facts being made to appear, of its own motion was entitled and should have stayed the action until ancillary administration had been taken out in Ontario and such administrator made a party.

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

APPEAL from a decision of the Court of Appeal of Ontario, (1), setting aside the judgment of Wilson J., (2), after a trial without a jury, in favour of the plaintiff.

E. C. Fetzer, K.C. and *A. C. Fleming, K.C.* for the appellant.

W. J. Anderson for the respondent.

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

KERWIN J.: This action was commenced by George Wellington Lunn on September 2, 1930, against the respondent, Barber, on two promissory notes, each bearing date August 19, 1927. The statement of claim and statement of defence were delivered in May and June 1931, in the latter of which it is alleged that the plaintiff was a Canadian citizen. Nothing further was done during the lifetime of the plaintiff, who died October 28, 1934. On January 5, 1938, the Surrogate's Court of Essex County, in the State of New York, granted letters of administration with the will annexed to the deceased's widow, Williamina D. Lunn, in which grant the deceased is stated to have been a resident of Schroon Lake in the County of Essex. The next step in the action was on December 14, 1946, when, upon the application of the plaintiff's solicitor, Williamina D. Lunn, the widow and sole beneficiary of the deceased under his will was named as party plaintiff by *praecipe* order to proceed in accordance with rule 301 of the Ontario Rules of Practice. The plaintiff's reply and defence to the counter-claim was filed October 31, 1947. On February 3, 1948, the defendant applied to the Master to rescind the *praecipe* order of December 14, 1946, and at the same time, the plaintiff applied to vary such order by adding after the name or style of the plaintiff the words "and administratrix with the will annexed of the said George Wellington Lunn."

The second application was granted while the first was refused, the Master stating:—

> The evidence before the Court as to the manner in which Williamina D. Lunn now holds the notes is not conclusive but I think it is reasonable to assume and may properly be assumed for the purpose of the present

(1) [1950] 1 D.L.R. 242.

(2) [1949] 1 D.L.R. 98; [1949] O.W.N. 13.

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application that the notes came into her possession as administratrix with the Will annexed in the ordinary course of administration in the State of New York.

No appeal was taken from the order of the Master and while the defendant took the position at the trial that the plaintiff should "produce her evidence as to her right to bring this action", upon the letters of administration with the will annexed being tendered in evidence and the trial judge asking counsel for the defendant with refererence to the Master's order "Am I not bound by that?", the reply was "Well I am afraid so." The letters of administration were thereupon filed and also an authenticated copy of the will.

Upon the argument before the Court of Appeal, counsel for the plaintiff, without any question being addressed to him, volunteered the information that the notes had been in his possession at the time of the death of George Wellington Lunn and that sometime thereafter he had sent them to the widow in New York State. The Court decided that the question as to the right of the administratrix to maintain the action was not one for decision by the Master and, upon counsel's statement, allowed the appeal and dismissed the action on the basis of the decision of this Court in *Crosby* v. *Prescott* (1).

The proceedings have been set out in some detail in order to make it clear that no opinion is expressed upon the points decided by the Court of Appeal but the appeal should be allowed on the grounds that the defendant not only acquiesced in the order of the Master but that the trial proceeded upon the basis of that order being correct and that the defendant should not now be allowed to take a different position. Nor should it be presumed that the Master's order was correct in law. The ordinary rule is that the *situs* of simple contract debts is where the debtor resides. An exception has been made in the case of negotiable instruments if they were at the time of the death of the payee in the jurisdiction where the latter resides: *Crosby* v. *Prescott supra.* In *Provincial Treasurer of Manitoba* v. *Bennett* (2), the exception was declared to include a certain deposit receipt issued by a bank in the Province of Manitoba but found in the possession of the holder at the time of his death in Minnesota. This Court

(1) [1923] S.C.R. 446. (2) [1937] S.C.R. 138.

has not had occasion to consider the case where a negotiable instrument, although outside the jurisdiction of the residence of the holder at the time of his death, was later sent to the personal representative of the deceased within that jurisdiction and it is unnecessary to determine that point at the present time.

This is not like a case where an action is allowed to proceed upon an undertaking by the plaintiff that letters probate would be produced at the trial because that assumes the appointment by a deceased of an executor whose title flows from the will but who cannot prove his title except by the production of a grant. However, a grant in Ontario of letters of administration with the will annexed would have appointed someone who could have been added as a party to represent the estate of the deceased since there is no question that the cause of action survived. Even at this late date an opportunity should be given the plaintiff to take such steps. On the merits of the action, the trial judge found against the defendant and no ground has been shown for setting aside that finding.

The principal amount of each note sued upon is $1,841.96 but because of the accrued interest the judgment at the trial was for $8,283.71 and costs. As the trial judge pointed out, the defendant might have moved to dismiss the action for want of prosecution but this was not done. On the other hand, this Court did not have the benefit of any real argument on any of the points and I gather that the Court of Appeal was in the same position. For that reason and because an indulgence is being granted, the proper order appears to be that upon the filing in this Court of an Ontario grant of letters of administration with the will annexed and upon an order being made adding the grantee as a party (all at the plaintiff's expense), judgment should go allowing the appeal and restoring the judgment at the trial. The plaintiff may have her costs in the Court of Appeal but only one-third of the costs of the appeal to this Court.

RAND J.:—Under No. 300 of the rules of practice of the Supreme Court of Ontario, an action does not abate on the death of a sole plaintiff unless the cause of action is one which ceases with his death; No. 301 provides for the continuance of the action by the person to whom the

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interest or title to the matter in question has been transmitted. In the case of a transmission outside of Ontario, the principle of *Crosby* v. *Prescott* (1), would apply, and the foreign administrator would be entitled to revive the proceedings.

In this case, as a result of the order of the Master based upon a finding of fact, the defendant acquiesced in the revived proceedings as then constituted, and the trial was proceeded with on that basis. This is concluded by counsel's answer to the question of the trial judge whether he was not bound by the order of the Master, from which no appeal had been taken: "Well, I am afraid so. There is a judgment of the Supreme Court of Canada" meaning that in the *Crosby* action. From the standpoint of the parties, the defendant would not thereafter be permitted to change his position.

But the Court of Appeal of its own motion raised the question not of the jurisdictional fact in particular but of the presence in the action as plaintiff of the foreign administratrix. It then appeared by admission of counsel that at the moment of the death of the original plaintiff the promissory notes were in Toronto in the solicitor's custody. They were afterwards sent by him to the administratrix for the State of New York, the residence and place of death of the deceased and the place of the principal administration; and at some time later were returned to Toronto and made exhibits at the trial. Whether the possession of these notes in New York by the administratrix so obtained, would vest in her the contractual obligation which they embodied, and whether in the circumstances the principle of *Crosby* would apply, I do not decide; as between the parties, for the reasons stated, the question could not be raised. But if from the facts disclosed an overriding law or consideration of public policy is brought to the notice of the Court, then the matter is no longer between the parties only.

That paramount consideration is found in section 18(3) of the *Succession Duty Act* of the Province, which reads:—

> Unless the consent in writing of the Treasurer is obtained, no person (whether or not acting in any fiduciary capacity) shall deliver, transfer, assign or pay, or permit any delivery, transfer, assignment or payment of any chattel mortgages, book debts, promissory notes, moneys, shares

(1) [1923] S.C.R. 446.

of stock, bonds or other securities whatsoever (whether registered or unregistered) belonging to a deceased person, or in which such deceased person had any beneficial interest whatsoever, and which may be liable to duty in Ontario, or with respect to which there is a transmission within Ontario, whether such deceased person died domiciled in Ontario or elsewhere; provided that nothing contained in this subsection shall apply to any person when acting solely in the capacity of executor.

From this it appears that in sending the notes out of Ontario as he did, the solicitor unwittingly violated the section. If the notes had remained in Ontario, ancillary administration would have been necessary, and that result cannot be avoided by an act done contrary to the law of the province.

The Court could, then, act of its own motion, but the question arises whether what was done, i.e. the dismissal of the action, was in the circumstances the proper disposal of the appeal. The action as originally constituted remained in good standing until the death of the plaintiff and thereafter until steps had been taken either to proceed or to dismiss. The invalidity of the revivor cannot affect its standing up to that point, and the subsequent stages, including trial, cannot be challenged by the respondent. The proceedings should, therefore, have been stayed until an administrator with the will annexed for Ontario had been made a party: *Rylands* v. *Latouche* (1).

On the point of merits, the contest at the trial depended upon the credibility of the witnesses; the trial judge has found in favour of the claim and nothing has been suggested on the argument before us to call in any serious question that finding.

The appeal should be allowed and the judgment at trial restored, but, subject to the rules of the Supreme Court, all proceedings should be stayed until an administrator under ancillary letters of administration has been made plaintiff. When that is done, the present appellant may be dismissed from the action without costs. The judgment will thereupon come into full operation. The appellant should have costs as proposed by my brother Kerwin.

KELLOCK J.: The notes here in question were not in the State of New York at the time of the death of the payee but in Ontario. Assuming, without deciding, that the appellant, by the subsequent receipt of the notes, acquired a good title

(1) (1820) 4 E.R. 449.

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so as to sue the maker in any jurisdiction without taking out administration elsewhere than in New York, that result cannot obtain in this action in view of the provisions of section 18, subsection 3, of the *Succession Duty Act*, R.S.O., 1937, c. 26.

By reason of this legislation, the courts of Ontario cannot give any assistance to the appellant which would enable the latter to avoid its effect and upon the true facts being made to appear in the Court of Appeal, the court of its own motion was entitled and obliged to stay the action until ancillary administration were taken out in Ontario. I think, therefore, that such an order should now be made but, in the circumstances of this case, the judgment at the trial on the facts should stand. I therefore concur in the order proposed by my brother Kerwin.

Upon the filing in this Court of an Ontario grant of letters of Administration with the will of George Wellington Lunn annexed and upon an order being made adding the grantee as a party, all at the plaintiff's expense, judgment will go allowing the appeal and restoring the judgment at the trial. The plaintiff shall have her costs in the Court of Appeal and one third of the costs of the appeal to this Court.

Solicitor for the appellant: *Ernest C. Fetzer.*

Solicitors for the respondent: *Parkinson, Gardiner, Willis & Roberts.*

1949
*Oct. 19, 20
*Dec. 22

AMBROSE A. PAOLI (PLAINTIFF).....*Appellant;*

AND

VULCAN IRON WORKS LIMITED (DEFENDANT).....*Respondent.*

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Master and Servant—Contract—General hiring—Increase in salary—Illegality—Effects of Wartime Salaries Orders as to salary increase—P.C. 1549, 4356.

Action by appellant seeking arrears of salary for the years 1944, 1945 and part of 1946 pursuant to a contract whereby he was to receive $7,500 per annum. Up to 1942, he had been paid $400 monthly and annual

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

bonuses. A new arrangement confirmed in writing as follows was then made: "Your remuneration, including bonus, for the fiscal year 1942 will not be less than $7,500." The approval of the Salaries Controller for the increase, required by the Wartime Salaries Order P.C. 1549 amended by P.C. 4356, was sought but was obtained only as from January 1, 1943. In 1942, he received $400 a month and was given $2,700 for the year and similarly in 1943. The lump sum at the end of 1944 was only $2,000. And for 1945, he received nothing above his monthly $400 and was notified towards the end of that year that his position was abolished.

Held: That, this being a contract of general employment, the increase sum became a term of the contract and could not be altered until the contract was validly altered.

Held also: That, as there was no evidence that the contract was intended to be put into effect without the permission required by the Wartime Salaries Order, although the increase was agreed between the parties before this permission was sought, it must be assumed that the parties intended to comply with the law.

APPEAL from the decision of the Court of Appeal for Manitoba (1) affirming, Coyne and Adamson JJ. A. dissenting, the judgment of Williams C.J. K.B., dismissing an action for arrears of salary.

C. E. Finkelstein and *I. Nitikman* for the appellant.

W. P. Fillmore, K.C., for the respondent.

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

RAND J.:—The memorandum which accompanied the application by the company in April, 1943, for approval of an increased salary for the appellant confirms beyond doubt the substance of the latter's evidence. What it shows is that in order to retain his services it was willing to guarantee that his earnings would be $7,500.00 a year, a figure which he accepted, although the offer from the Rubber Company which he disclosed was for permanent employment at $8,500.00 per annum. The manner in which the $7,500.00 was to be treated in the accounts of the company appears likewise from the memorandum. In 1940 the company had, in addition to the basic wage of $4,800.00, distributed a bonus to the appellant of $1,000.00. For 1941 it had given him $1,700.00, but the Income Department, in view of the salary order effective from November 1, 1941, reduced this item to $1,00.00 as being

(1) [1948] 2 W.W.R. 495; [1948] 4 D.L.R. 361.

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Rand J.

the maximum allowable. The application specified $6,500.00 as salary but contemplated the continuance of the $1,000.00 as a guaranteed bonus. Although asked for as of January 1, 1941, the approval ran only from January 1, 1943.

The appellant's employment was general. What was sought was an increase in salary; but once the salary was increased it became a term of the contract until in a valid manner the contract in that respect was altered. It is said that because the consensus for an increase had been reached in June, 1942, and was to be retroactive to January 1 of that year, the contract was illegal. I must confess to great difficulty in appreciating the grounds for that view. It was illegal only on the assumption that it was intended to be put into effect and carried out without relation to approval. There is no evidence of this one way or another, and in its absence I assume that these parties intended to comply with the law of the country. That this is so is fully confirmed by the fact of the company's application. There was some delay, it is true, but no point is made of it and a sufficient explanation seems to appear by inference from matters which were mentioned in the evidence. The fact that the increased sum had been paid for 1942 although not authorized for that year is, apparently, thought to have invalidated everything that followed from the date of approval. But the payment of salary was here a distributive provision accompanying the employment as from month to month subject to a reasonable notice of termination. The intention of both parties was continuously and currently speaking in affirmation of its terms. When, therefore, January 1, 1943, appeared, the terms of increase became valid and the subsequent payment to the appellant for 1943, according to the approval, furnished conclusive evidence that as from the beginning of that year and thereafter until validly modified the remuneration had become $7,500.00.

It was not until January of 1945 that any intimation was given of a change in that arrangement. The employee had been paid throughout all the period in instalments of $400.00 a month and in that month the balance of $2,700.00 became payable. That amount had been paid in January, 1944, but in January, 1945, only $2,000.00 was forthcoming. It was attempted to be justified on the ground

that the entire increase over $4,800.00 was to be supplied out of bonus determinable by the company. This, of course, would have been an illegality and would have contradicted the express representation of the company and its request in its application, and, as well, the approval. Although it does not appear in evidence, its accounts for 1943 and 1944 properly prepared would show the basic rate of $6,500.00 as salary paid, and the sum of $1,000.00 in the one case and $300.00 in the other as bonus.

The appellant protested the reduction from $2,700.00 to $2,000.00, but continued to work throughout 1945 and to the middle of February, 1946. From December 1, 1945, until termination, he was paid $315.00 a month. The intimation in January, 1945, that the $2,700.00 would be reduced to $2,000.00 meant that the company would thereafter pay him at the rate of $6,800.00 a year rather than $7,500.00, and I think, in the circumstances, it must be implied that if he was not prepared to accept that reduction he could take the intimation as a notice of ending his engagement. As he kept on working, it must be presumed to have been on the footing of that reduced remuneration.

The result is that there is owing to him for 1944, $700.00, for 1945, $2,085.00, and for 1946, $377.49. He is therefore entitled to recover a total of $3,162.49.

The appeal must be allowed and judgment entered for that sum with costs in all courts.

LOCKE J.:—The appellant was employed by the defendant company in the year 1934 as manager of its Mining and Contracting Machinery Department and acted as such until the year 1938, when he was appointed sales manager, and his remuneration which had formerly been by way of a salary and commission was changed to a straight salary of $400.00 a month. After the commencement of the war in September, 1939, the defendant company undertook certain war work for the Government and for the years 1940 and 1941 the appellant was paid in addition bonuses of $1,000.00 and $1,700.00 respectively. Apparently the term of the employment was not specified between the parties. These added payments were apparently simple gratuities and were authorized by resolutions of the directors passed at meetings held on February 5, 1941, and

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Locke J.

February 6, 1942. No new arrangement was made between the parties at the end of the year 1941 but the appellant remained in the defendant's employ and was paid salary at the same rate as that paid to him in the previous year. In June 1942, according to the appellant, he received an offer of permanent employment with the Dominion Rubber Company at $700.00 a month and communicated this fact to two of the directors of the company by name Condy and Waldon. He says that Condy then offered on behalf of the defendant to pay him a fixed salary of $7,500.00 a year if he would stay with the company, this to be made retroactive to January 1, 1942, an offer which he then accepted. Condy denies making this offer and says that what he had offered was for the year 1942 only and this was "a remuneration including bonuses of not less than $7,500." At the trial the plaintiff put in evidence the minutes of a meeting of the directors held on June 30, 1942, at which Condy, Waldon and J. D. McDonald, the president, were present, when a resolution proposed by Waldon and seconded by Condy was passed to the effect that the appellant's "remuneration, including bonus for the fiscal year 1942, be not less than $7,500." and on September 5, 1942, a letter signed on behalf of the defendant by McDonald was sent to the appellant reading: "Your remuneration, including bonus for the fiscal year of 1942 will not be less than $7,500.00 and this has been confirmed by the directors."

No explanation has been advanced as to why, since the respondent had by the verbal agreement made in June obligated itself on its own showing to pay the appellant remuneration of not less than $7,500.00 for the year 1942, the expression "bonus" was used. In the ordinary sense of the word, it means a gift or gratuity. The Oxford Dictionary defines it "a boon or gift over and above what is normally due as remuneration to the receiver and which is therefore something wholly 'to the good'," which is, I think, the sense in which it is commonly used. However, apart from the question of the alleged illegality of the contract to which I will refer later, I think in the result the matter is not important since upon the respondent's own showing it was obligated by agreement to pay the appellant remuneration of $7,500.00 for the year 1942. At

the expiration of that year the respondent paid to the appellant the sum of $2,700.00 which, with the $400.00 monthly payments that had been made, brought his remuneration to the amount agreed upon, and there was no discussion between the parties as to the terms of the employment at the commencement of, or indeed at any time during, the following year. During that year the appellant received monthly cheques of $400.00 and in January 1944 was again paid a sum of $2,700.00 as the balance of his remuneration for 1943. It is to be noted that while the gratuities paid to the appellant in respect of the years 1940 and 1941 had been dealt with by resolution of the directors and the amount of his remuneration for the year 1942 approved by the resolution of June 30 in that year, no such resolution was passed in respect of any part of the $7,500.00 paid him in the year 1943. By an application dated April 14, 1943, the respondent applied to the Salaries Controller appointed under the provisions of the Wartime Salaries Order for permission to pay the appellant an increased rate of salary and in a memorandum submitted with the document the following appears: "As indicated on the W.S. 2 Form recently submitted by us, Mr. Paoli has been offered a position in the east for (sic) $8,500.00 a year and he will only agree to stay with our company provided his salary is adjusted to $7,500.00." The application was signed on behalf of the company by Harold O. Jones, the acting secretary-treasurer. According to the president of the company, he knew of the application being made, read it over before it was filed and approved of it in his capacity as president and a director. Jones says in explanation of the terms of the balance of the memorandum that as submitted by him to the Department the application was to approve an increase as from the 1st of January, 1941, and that it was for this reason that he referred to the disallowance by the Inspector of Income Tax of $700 of the bonus paid to the appellant in 1941 and to the further fact that he asked that approval be given to Paoli's salary for the year 1941 at $5,500.00 per annum and for 1942 at $6,500.00 per annum. According to Jones, the application which was approved by the Salaries Controller as from January 1, 1943, was changed in the office of the Controller so that it appears on its face

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that the respondent asked for approval as from that date. The president, however, says that he knew that they were applying to fix the appellant's salary at $7,500.00 from January 1, 1943. The proper interpretation of this document is, in my opinion, that the respondent sought and obtained the approval of the Salaries Controller to the payment of $7,500.00 as the appellant's annual remuneration for his services commencing January 1, 1943. The application was made under the provisions of the Wartime Salaries Order P.C. 1549 and P.C. 4356, the former of which by sec. 5 (*b*) provided that application for permission to pay increased salaries under the provisions of the Order should be submitted by the employer to the Minister of National Revenue on the prescribed form, setting forth the facts which, in the opinion of the employers, warranted that proposed salary adjustment.

The appellant continued in the employ of the respondent in the same capacity after the end of the year 1943 without any discussion as to the terms of his employment and it was not until either the end of December 1944, as stated by Jones, or in January of 1945, as stated by Paoli, that it was suggested that he was entitled to less than $7,500.00 for the year 1944. The appellant had been paid $400.00 monthly as in the years 1942 and 1943 and says that in January of 1945, when he expected to receive the balance of $2,700.00 he was paid only $2,000.00 by Jones. He says that he objected to the reduction claiming that he had a contract for a salary of $7,500.00 and saying that he intended to get the balance and, in addition to speaking to the secretary, also spoke to the general manager about the balance owing to him. The latter, Mr. John M. Isbister, had recently been appointed to his position and, according to the appellant, disclaimed any knowledge of a contract and said that he would take the matter up with Mr. Condy. Later, Paoli says that when he talked with the president the latter referred him to Condy since he said it was he who had made the arrangement. According to Jones, it was in the latter part of December that he told Paoli that his bonus for the year 1944 had been settled at $2,000.00 and that the latter merely said that if the "other boys" were being reduced he had no objection. The appellant says that several times during the year 1945 he brought up

the matter of the $700.00 which he claimed remained unpaid in respect of the year 1944 but got no satisfaction. In the meantime, he received monthly payments of $400.00 until November 19, 1945, when he was informed by Isbister that the position of sales manager had been abolished and that Paoli was to take over his old job as manager of the mining and contracting machinery department and when the latter asked him what about his contract Isbister replied that he did not know what arrangements had been made with Condy. For the month of November he was paid $400.00: this was reduced to $315.00 for the month of December and for January 1946. Early in February of that year he informed Isbister that he intended to leave and the latter told him he had better leave at once, which he did after receiving another half month's salary at the rate of $315.00.

The real point of difference between the evidence of the appellant and of Condy as to the arrangement made orally in June of 1942 is that the appellant claims that it was then agreed that he would receive a straight salary of $7,500.00 a year while Condy contends that the arrangement was that the company would pay him not less than $7,500.00 including bonuses for the year 1942. This, the respondent contends, meant merely that the arrangement made contemplated that at the expiration of the year 1942, if his services were retained, his remuneration would be $400.00 a month, plus such gratuity, if any, as the respondent might choose to give him. It seems to me that it is highly improbable that under the circumstances then existing Paoli would have accepted any such arrangement. He had been offered a permanent position with a large company at $8,400.00 a year and would be most unlikely, in my opinion, to accept any such arrangement as the respondent contends was made. I think the terms of the application made to the Salaries Controller on April 14, 1943, confirm the appellant's version of the arrangement. The memorandum dated and speaking as of April 14, 1943, after referring to the offer received by the appellant from Dominion Rubber Company Limited said that the appellant "*will* only agree to stay with our company provided his salary is adjusted to $7,500.00," showing beyond doubt, in my opinion, that it was the understanding of the acting

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treasurer and of the president, who saw the application before it was filed, that the then existing arrangement with Paoli was to pay him remuneration at the rate of $7,500.00 a year. The fact that the directors at the meeting held on June 30, 1942, chose to use the word "bonus" in referring to part of the appellant's promised pay and that that expression was used in the letter of September 5, 1942, does not appear to me to affect the matter. The point was that his remuneration for the year was fixed at $7,500.00. No part of the remuneration for 1942 was in any sense a gratuity since the company, assuming the agreement was enforceable, was obligated to pay it. The fact that the word "bonus" for the purposes of the War Salaries Order was defined to include such payments as a share of the profits payable pursuant to a contract appears to me to be aside from the point. If it was intended that after the expiration of the year any payment beyond $4,800.00 annually was to be made, if at all, in such amount as the respondent might decide upon, I would have expected that, in making the oral agreement with Paoli, Condy would have so stipulated and that the minutes of the directors' meeting would have so stated.

It is the remuneration to be paid to the appellant for the years 1944 and 1945 with which we are concerned. As to the year 1942, the agreement to pay him $7,500.00 whether by way of salary or partly as salary and partly a sum called a bonus, was an increase in the appellant's salary rate and subject to the approval of the Minister and that approval was not given. The respondent applied for and obtained permission to pay $7,500.00 annually commencing January 1, 1943, on the faith of the statements made in its letter to the Salaries Controller of April 14, 1943. The appellant was aware at about the time it was made of the application for this approval. It is perfectly clear, in my opinion, that both parties understood that from January 1, 1943, the respondent would pay the appellant a remuneration at the rate of $7,500.00 and while evidence as to an express agreement, apart from that made in June 1942, is lacking, such a contract should be implied from the conduct of the parties. The respondent paid the appellant on this basis for the year 1943 and continued him in its employ throughout the year 1944

and until November 19, 1945, when he was informed by Isbister that his position had been abolished, which was tantamount to a dismissal. No other notice of the termination of the contract was given. The statement made by Jones that Paoli's remuneration had been fixed at $6,800.00 for the year 1944 did not either terminate the contract or alter its terms. The statement was made in regard to the year past and was not, in my opinion, in any sense an offer in respect of the year 1945. For the appellant it was contended by Mr. Finkelstein that the hiring was a general one and that it is to be presumed accordingly that it was a yearly hiring but, since there is here no claim for damages for wrongful dismissal, I think the result is the same whether this be the true view of the position or whether the engagement was indefinite as to time and one which could have been terminated by either side on reasonable notice. In respect of the year 1944 the respondent paid the appellant a total remuneration of $6,800.00 only. Jones says that Paoli said that he had no objection to this reduction: Paoli denies this and upon this issue I think his denial is to be accepted. In my opinion, the situation on November 19, 1945, when Isbister informed the appellant that his position had been abolished was the same as had existed in the years 1943 and 1944 but, since the appellant elected to remain in a different capacity after December 1, accepting a salary of $315.00 which Isbister informed him was all the company intended to pay, in the absence of a claim for damages for wrongful dismissal, the claim should be restricted to the period terminating December 1, 1945.

The learned trial Judge was of the opinion that the agreement made between the parties in June 1942 was unenforceable on the ground of illegality, considering that it was forbidden by the Salaries Control Orders-in-Council P.C. 9298 and 1549. As to this, I think it must be assumed that the arrangement was made subject to the approval of the Minister and that it was contemplated that the employer would comply with the requirements of the Orders-in-Council and ask for the necessary approval. I see nothing unlawful in such an arrangement though, of course, no part of the increased remuneration could be lawfully paid until that permission was obtained. I do

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not, however, consider that this affects the matter to be decided here. The amounts paid in the year 1943 were lawfully paid under the contract which, in my opinion, should be implied from the conduct of the parties and as to them there is no dispute. The agreement under which the appellant was employed in 1944 and 1945 until December 1st was not that made in June of 1942 but that to be implied in respect of the year 1943 under the circumstances above referred to. That agreement required the payment of remuneration at the rate of $7,500.00 a year until it was terminated on December 1st, 1945. I agree with Adamson, J.A., that the appellant is entitled to recover the sum of $3,175.00 and would allow this appeal and direct that judgment be entered for that amount, with costs throughout.

Appeal allowed with costs.

Solicitor for the Appellant: *I. Nitikman.*

Solicitors for the Respondent: *Fillmore, Riley & Watson.*

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*Jan. 30, 31
*Feb. 1, 2
*Mar. 1

IN THE MATTER OF A REFERENCE AS TO THE VALIDITY OF THE WARTIME LEASEHOLD REGULATIONS, P.C. 9029.

Constitutional Law—Power of Parliament in National Emergency to enact legislation involving Property and Civil Rights—Whether Wartime Leasehold Regulations made under the authority of War Measures Act, continued in force under The National Emergency Transitional Powers Act, 1945, and The Continuation of Transitional Measures Act, 1947, ultra vires—War Measures Act, R.S.C., 1927, c. 206—The National Emergency Powers Act, 1945, S. of C., 1945, c. 25 and amendment, 1946, c. 60—The Continuation of Transitional Measures Act, 1947, S. of C., 1947, c. 16 and amendments, 1948, c. 5 and 1949, c. 3.

The Wartime Leasehold Regulations were made in 1941 under the authority of the *War Measures Act* and continued in force since the end of the war in all the provinces of Canada, other than Newfoundland, under the provisions of *The National Emergency Transitional Powers Act, 1945* and *The Continuation of Transitional Measures Act, 1947* and amendments thereto and certain Orders in Council authorized by those statutes.

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

The following question referred by the Governor General in Council under s. 55 of *The Supreme Court Act* to this Court: "Are the Wartime Leasehold Regulations *ultra vires* either in whole or in part and if so in what particulars and to what extent?"—was answered in the negative.

Held, that Parliament, under powers implied in the Constitution may, for the peace, order and good government of Canada as a whole, in time of national emergency, assume jurisdiction over property and civil rights which under normal conditions are matters within the exclusive jurisdiction of the provincial legislatures.

When Parliament has enacted legislation declaring that a national emergency continues to exist and that it is necessary that certain regulations be continued in force temporarily in order to ensure an orderly transition from war to peace, unless the contrary is very clear, which in this case it was not, there is nothing to justify a contrary finding by the Court.

Fort Frances Pulp & Power Co. v. *Manitoba Free Press Co.* [*1923*] A.C. 695; *Co-Operative Committee on Japanese Canadians* v. *Attorney General for Canada* [*1947*] A.C. 87, followed.

REFERENCE by His Excellency the Governor General in Council, pursuant to the authority of s. 55 of the *Supreme Court Act* R.S.C., 1927, c. 35), to the Supreme Court of Canada, for hearing and consideration of the question cited in full at the beginning of the reasons for judgment of the Chief Justice of this Court.

F. P. Varcoe, K.C., *D. W. Mundell* and *A. J. MacLeod* for the Attorney-General for Canada.

The Hon. Dana Porter, K.C., and *C. R. Magone,* K.C., for the Attorney-General for Ontario.

L. E. Beaulieu, K.C., for the Attorney-General for Quebec.

J. J. Robinette, K.C., for the Tenants within Canada.

O. F. Howe, K.C., for The Canadian Legion of the British Empire Service League.

R. M. W. Chitty, K.C., for the Canadian Federation of Property Owners Association.

M. W. Wright for the Canadian Congress of Labour.

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The CHIEF JUSTICE: The question referred by the Governor in Council to the Court is:—

Are The Wartime Leasehold Regulations *ultra vires* either in whole or in part and, if so, in what particulars or to what extent?

After having heard arguments on behalf of the Attorney-General of Canada, the Attorney-General of Ontario, the Attorney-General of Quebec, The Tenants within Canada, The Property Owners' Association, The Dominion Command of the British Empire Service League and The Canadian Congress of Labour, I am of opinion that the question should be answered in the negative.

These references, under Section 55 of *The Supreme Court Act,* merely call for the opinion of the Court on the questions of law or fact submitted by the Governor in Council and the answers given by the Court are only opinions. It has invariably been declared that they are not judgments either binding on the government, on parliament, on individuals, and even on the Court itself, although, of course, this should be qualified by saying that, in a contested case where the same questions would arise, they would no doubt be followed. But precisely on account of their character the opinions are supposed to be given on the material which appears in the Order of Reference and the Court is not expected to look to outside evidence. It is clear that the Court may take into consideration any fact which is of common, or public, knowledge, or of which it could ordinarily take judicial notice. Otherwise, however, excepting very exceptional cases, which it would be quite impossible to enumerate and in respect of which the present Reference is not concerned, the Court is limited to the statements of fact contained in the Order of Reference. I would venture to say that this has been the constant practice of this Court on References submitted under Section 55 of *The Supreme Court Act.*

As to the first proposition, it was pointed out by the Lord Chancellor, Earl Loreburn, in *Attorney-General for Ontario* v. *Attorney-General for Canada* (1), that the opinions provoked by such questions "are only advisory and would have no more effect than the opinions of the law officers", to which Duff J. (as he then was) in *Reference re Waters and Water-Powers* (2), after having quoted the statement of Earl Loreburn, observed that "when a con-

(1) [1912] A.C. 571 at 589. (2) [1929] S.C.R. 200 at 228.

crete case is presented for the practical application of the principles discussed, it may be found necessary, under the light derived from a survey of the facts, to modify the statement of such views as are herein expressed". As a matter of fact, in the *Water-Powers Reference,* following an objection raised by Mr. Tilley, K.C., representing the Attorney-General for Ontario, to certain material which had been included in the appendix of the factum of the Attorney-General for Canada, the Court ordered two hundred and forty pages stricken from the appendix and made the following observation:—

> It must be obvious that any statements of facts, upon which answers to the questions must be based, should form part of the Case submitted, and it would be highly inconvenient and most dangerous to receive documents such as these in question as part of the Case, unless with the full consent and concurrence of all parties.

In that case, Smith J., concurring with Duff J., but writing separately, at p. 233 of the Report, thought that he would explain certain references made in his judgment to a situation which did not appear in the record by saying:—

> We might, perhaps, take judicial notice of some of the facts, and might gather others from statutory enactments * * * I have gone beyond the record, not to obtain material as a basis for answering the questions, but merely to emphasize what my brother Duff has said as to the impracticability of giving full and definite answers to all the questions that would have general application, regardless of particular circumstances capable of proof but not established or admitted in the record.

No doubt anybody attacking parliament's legislation as colourable would have to introduce evidence of certain facts to support the contention, for it can hardly be expected that the Order of Reference would contain material of a nature to induce the Court to conclude as to the colourability of the legislation. It may be that it would be so apparent that the Court could come to that conclusion without extraneous evidence, and an example of that situation might be found *In the Matter of a reference as to the validity of Section 16 of The Special War Revenue Act* (1), where Sir Lyman Duff C.J., delivering the judgment of the Court, found, at p. 434, that the section was *ultra vires* in its entirety on the ground that, under the guise of legislation affecting British and Foreign Companies and extra Canadian exchanges, the enactments were really

(1) [1942] S.C.R. 429.

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adopted in relation to the business of insurance within the provinces and could not be upheld as alien legislation in the proper sense.

But it would seem that the constitutionality of legislation disputed on the ground of colourability should really be brought before the Courts not on a Reference, but in an ordinary case. It is no doubt in that sense that we must understand the dictum of Lord Maugham in *Attorney-General for Alberta* v. *Attorney-General for Canada* (1):—

> The next step in a case of difficulty will be to examine the effect of the legislation; *Union Colliery Co. of British Columbia, Ld.* v. *Bryden* (2). For that purpose the Court must take into account any public general knowledge of which the Court would take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of the legislation will be. Clearly, the Acts passed by the Provincial Legislature may be considered, for it is often impossible to determine the effect of the Act under examination without taking into account any other Act operating, or intended to operate, or recently operating in the Province.

And again at p. 131:—

> Matters of which the Court would take judicial notice must be borne in mind, and other evidence in a case which calls for it.

In these quotations the words used by the noble Lord are "in a proper case" and "in a case which calls for it". He does not say "on a Reference", and I cannot see how two *obiter dicta* of that character can be invoked as meaning that outside evidence may be called on a Reference.

The Fort Frances Pulp & Power Co. Ltd. v. *Manitoba Free Press Co. Ltd. et al* (3), was such an ordinary case between two private litigants, and in delivering the judgment of the Judicial Committee in that case Viscount Haldane, at p. 706, expressed the view:—

> No authority other than the central Government is in a position to deal with a problem which is essentially one of statesmanship. It may be that it has become clear that the crisis which arose is wholly at an end and that there is no justification for the continued exercise of an exceptional interference which becomes *ultra vires* when it is no longer called for. In such a case the law as laid down for distribution of powers in the ruling instrument would have to be invoked. But very clear evidence that the crisis had wholly passed away would be required to justify the judiciary, even when the question raised was one of *ultra vires* which it had to decide, in overruling the decision of the Government that exceptional measures were still requisite. In saying what is almost obvious, their

(1) [1939] A.C. 117 at 130.
(2) [1899] A.C. 580.
(3) [1923] A.C. 695.

Lordships observe themselves to be in accord with the view taken under analogous circumstances by the Supreme Court of the United States, and expressed in such decisions as that in October, 1919, in *Hamilton* v. *Kentucky Distilleries Co.* (1).

Some allusion was made to the same point *In the Matter of a Reference as to the jurisdiction of Parliament to regulate and control radio communication* (2). A mere glance at the Order-in-Council reproduced at that and the following pages is sufficient to show to what extent the facts in that matter were there stated. It is to be noted that the opinion of Newcombe J., p. 548, starts by saying:

> My trouble with this case is to know the facts. Although the narrative of the order of reference and the printed statement of principles were not at the hearing seriously disputed, one is apt to suspect that the knowledge of the art of radio, which we have derived from the submissions and what was said in the course of argument, is still incomplete and, perhaps, in some particulars, not free from error; that some accepted theories are still experimental or tentative, and that there may be possibilities of development and use, not only in the Dominion but also in a provincial field, which have not yet been fully ascertained or tested.

It is obvious that if Newcombe J., whose experience in these matters cannot be disputed, had thought that he was entitled to hear outside evidence on a Reference, he would have availed himself of the opportunity. It is true that in that Reference an article compiled by J. W. Bain, a radio engineer of the Marine Department, was printed in the case, but, as stated by Smith J. at p. 569:—

> This document is inserted for the convenience of the court, and it is stated that its accuracy may be verified by reference to the various standard text-books on the subject. Its general accuracy was, I think, not controverted, and I therefore resort to this document for a brief general description of how radio communication is effected.

Radio communication was, of course, of a highly technical nature and it was felt necessary that the Court should at least be informed of how it worked.

In the Matter of a Reference as to whether the term "Indians" in Head 24 of Section 91 of The British North America Act, 1867, includes Eskimo Inhabitants of the Province of Quebec (3), in the order fixing the date for hearing Sir Lyman Duff, C.J., appointed the Registrar of the Court to hear and take all evidence, oral and documentary, which the Attorney-General of Canada or any other interested parties desired to submit, or adduce, in

(1) 251 U.S. 146.
(2) [1931] S.C.R. 541.
(3) [1939] S.C.R. 104.

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relation to the question referred to the Court. He ordered further that all the evidence so adduced and submitted on behalf of each of the interested parties be included *quantum valeat* and subject to all just exceptions in the case, and printed in such groups and order as the interested parties might agree upon, subject to the approval of the Registrar. It is to be noted that all interested parties, including, of course, the Attorney-General of Canada, were given the opportunity to submit relevant evidence and particularly that such evidence was incorporated in and formed part of the case.

I must say, therefore, that, for the purpose of my answer, I am limiting myself strictly to the situation disclosed in the Order of Reference and the different declarations which appear in the successive Acts adopted by Parliament. Thus limiting my consideration of the Reference and the extent of my answer, I have very few remarks to make.

There is no doubt that under normal conditions the subject matter of rents belongs to the provincial jurisdiction under the Head of Property and Civil Rights, in Section 92 of *The British North America Act*. There is equally no doubt that under abnormal conditions, such as the existence of war, parliament may competently assume jurisdiction over rents. The fact is that, as a consequence of the last war, 1939-1945, parliament has taken over the control of rents. *The Fort Frances case supra* is authority for the proposition that, notwithstanding the cessation of hostilities, parliament is empowered to continue the control of rents for the purpose of concluding matters then pending, and of its discontinuance in an orderly manner, as the emergency permits, of measures adopted during and by reason of the emergency. It follows from the different Orders-in-Council and Acts of Parliament, recited in the Order of Reference, that the exceptional conditions brought about by war, which made The Wartime Leasehold Regulations necessary, are still continuing, that the orderly transition from war to peace has not yet been completed, and that, in such circumstances, parliament is entitled and empowered to maintain such control as it finds necessary to ensure the orderly transition from war to peace. The judgments of the Judicial Committee of the

Privy Council in the *Fort Frances Case supra* and in *Co-operative Committee on Japanese Canadians* v. *Attorney-General for Canada* (1), are conclusive on this point.

In the *Reference as to the Validity of the Regulations in relation to Chemicals* (2), Sir Lyman Duff, C.J., stated at p. 12:—

> As in respect of any other measure which the Executive Government may be called upon to consider, the duty rests upon it to decide, whether, in the conditions confronting it, it deems it necessary or advisable for the safety of the state to appoint such subordinate agencies and to determine what their powers shall be.
>
> There is always, of course, some risk of abuse when wide powers are committed in general terms to any body of men. Under the *War Measures Act* the final responsibility for the acts of the Executive rests upon Parliament. Parliament abandons none of its powers, none of its control over the Executive, legal or constitutional.
>
> The enactment is, of course, of the highest political nature. It is the attribution to the Executive Government of powers legislative in their character, described in terms implying nothing less than a plenary discretion, for securing the safety of the country in time of war. Subject only to the fundamental conditions explained above, (and the specific provisions enumerated), when Regulations have been passed by the Governor General in Council in professed fulfilment of his statutory duty, I cannot agree that it is competent to any court to canvass the considerations which have, or may have, led him to deem such Regulations necessary or advisable for the transcendent objects set forth. The authority and the duty of passing on that question are committed to those who are responsible for the security of the country—the Executive Government itself, under, I repeat, its responsibility to Parliament. The words are too plain for dispute: the measures authorized are such as the Governor General in Council (not the courts) deems necessary or advisable.

In this instance, Parliament has decided that The Wartime Leasehold Regulations should be kept in force to a limited extent and to that extent, where necessary or advisable, to ensure an orderly transition from war to peace; and that, if they were abandoned abruptly and suddenly, unnecessary disruption would result.

There is nothing in the facts in the Order of Reference which would justify this Court in deciding otherwise and thus supersede the opinion of Parliament; and, in the circumstances, this Court may not doubt that Parliament may competently maintain the Regulations it has adopted to meet the emergency and its continuance. Therefore, The Wartime Leasehold Regulations are not *ultra vires* either in whole or in part.

(1) [1947] A.C. 87. (2) [1943] S.C.R. 1.

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Kerwin J.

KERWIN J.:—The question referred by the Governor in Council to the Court for hearing and consideration is:—

Are The Wartime Leasehold Regulations *ultra vires* either in whole or in part and, if so, in what particulars or to what extent?

The Regulations were originally made by order of the Governor in Council P.C. 2029 of November 21, 1941, under the *War Measures Act,* R.S.C. 1927, c. 206, and a number of amendments to the Regulations were also made by Orders in Council under the same Act, which continued in force until December 31, 1945. By *The National Emergency Transitional Powers Act, 1945* (chapter 25 of the Statutes of 1945), which came into force on and after January 1, 1946, it was provided that "on and after that date the war against Germany and Japan shall for the purpose of the *War Measures Act* be deemed no longer to exist." The effect of this provision was to terminate the operation of the *War Measures Act.*

However, the 1945 statute also provided that the Governor in Council might order that the orders and regulations lawfully made under the *War Measures Act* or pursuant to authority granted under that Act, in force immediately before the Act of 1945 came into force should, while the latter Act was in force, continue in full force and effect, subject to amendment or revocation under the latter Act. Accordingly, by P.C. 7414, of December 28, 1945, the Governor in Council so provided. The effect of this Order in Council was to continue the Regulations in force.

The Act of 1945 provided that it should expire on December 31, 1946, if Parliament met during November or December, 1946, but, if Parliament did not so meet, that it should expire on the fifteenth day after Parliament first met during the year 1947. It was also provided that if at any time while the Act was in force, addresses were presented to the Governor General by the Senate and House of Commons, praying that it should be continued in force for a further period, not in any case exceeding one year from the time at which it would ordinarily expire, and the Governor in Council so ordered, the Act should continue in force for the further period. What has been stated in the two preceding sentences is the substance of section 6 of the Act of 1945. This section 6 was repealed and a new one enacted by chapter 60 of the 1945 Statutes

and by virtue thereof and of Order in Council P.C. 1112 of March 25, 1947, made pursuant to addresses to the Governor General by the Senate and House of Commons, the Act of 1945 was continued in force until May 15, 1947.

The Continuation of Transitional Measures Act, 1947, being chapter 16 of the Statutes of that year, came into force immediately on the expiry of the 1945 Act. The recital in the 1947 statute reads as follows:—

> Whereas Parliament, in view of the continuation of the national emergency arising out of the war, by *The National Emergency Transitional Powers Act, 1945,* conferred upon the Governor in Council certain transitional powers, pursuant to which the Governor in Council has continued in force certain orders and regulations made under the *War Measures Act* and has made other orders and regulations; And whereas the national emergency arising out of the war, in certain aspects, has continued since the unconditional surrender of Germany and Japan and is still continuing; And whereas provision is made for the expiry of *The National Emergency Transitional Powers Act, 1945;* And whereas it is necessary by reason of the existing national emergency that certain orders and regulations of the Governor in Council made under the *War Measures Act* and *The National Emergency Transitional Powers Act, 1945,* be continued in force temporarily notwithstanding the expiry of *The National Emergency Transitional Powers Act, 1945,* in order to ensure an orderly transition from war to peace:

The statute provides that the orders and regulations of the Governor in Council specified in the Schedule shall, notwithstanding the expiry of the 1945 Act, continue and be in force while the 1947 statute is in force, subject to the revocation by the Governor in Council in whole or in part of any such order or regulation. The Wartime Leasehold Regulations, that is, P.C. 2029 of 1941 and all the orders in council amending it, are listed in the schedule.

The Continuation of Transitional Measures Act, 1947, also provided in section 7 that it should expire on December 31, 1947, if Parliament met during November or December, 1947, but if Parliament did not so meet it should expire on the sixtieth day after Parliament first met during 1948 or on March 31, 1948, whichever date was earlier. If, however, while the Act was in force addresses were presented to the Governor General by the Senate and House of Commons praying that the Act should be continued in force for a further period not in any case exceeding one year from the time it would otherwise expire and the Governor in Council so ordered, the Act should continue in force for that further period. The Act was

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continued in force by Order in Council P.C. 5304 of December 13, 1947, made pursuant to a joint address. It has subsequently been continued in force by chapter 5 of the Statutes of Canada, 1948, and chapter 3 of the Statutes of Canada 1949 (Vol. 1). These statutes amended section 7 of the Act to extend its duration and that section at present reads as follows:—

> 7. Subject as hereinafter provided, this Act shall expire on the sixtieth day after Parliament first meets during the year one thousand nine hundred and fifty or on the thirty-first day of March, one thousand nine hundred and fifty, whichever date is the earlier; Provided that, if at any time while this Act is in force, Addresses are presented to the Governor General by the Senate and House of Commons, respectively, praying that this Act should be continued in force for a further period, not in any case exceeding one year, from the time at which it would otherwise expire and the Governor in Council so orders, this Act shall continue in force for that further period.

Chapter 3, Statutes of 1949, also restricted the authority of the Wartime Prices and Trade Board to the control of goods and services under control at the time of the enactment of that statute. The provisions of section 7 of the 1949 Act, set forth above, show when the regulations, if varied, may cease to operate.

It is apparent from the documents of which we are entitled to take judicial knowledge that the leasehold regulations were originally part only of various controls of enterprise and services, etc., and that this control was loosened in various respects from time to time until it now appears that very few controls are being exercised. So far as the leasehold regulations are concerned, steps were taken from time to time to limit the interference with what would otherwise be the ordinary rights of landlords and tenants until, by Order 813 of the Wartime Prices Board, dated December 15, 1949, as amended by Order 818, provision was made for increases in the maximum rental that might be charged for self-contained dwellings and lodgings and making provision for the termination of leases in certain circumstances. Board Order 814 makes further provision for the securing of possession of premises by landlords.

Notwithstanding the argument to the contrary, the answer to be given to the question submitted to the Court is indicated by the judgment of the Judicial Committee in

Fort Frances Pulp and Power Co. v. *Manitoba Free Press Co.* (1). That, it should be noted, was a decision *inter partes* and not an answer to a question submitted by the Governor in Council. Where a war emergency has existed and Parliament has enacted legislation declaring that the national emergency arising out of war, in certain aspects, has continued and is continuing, the subject matter of the legislation must be left to Parliament if it decides that the interests of the Dominion are to be protected. "No authority other than the central government is in a position to deal with the problem which is essentially one of statesmanship"; the *Fort Frances case* at page 706. Only "very clear evidence" or "clear and unmistakable evidence" that the Government is in error in thinking that the matter is of inherent national concern would justify a Court in so deciding: *idem* p. 706: *Cooperative Committee on Japanese Canadians* (2), at pp. 101 and 108. These two decisions dispose of the matter, and the answer to the question must be in the negative.

TASCHEREAU J.:—His Excellency the Governor in Council has referred to this Court the following question:—

Are The Wartime Leasehold Regulations *ultra vires* either in whole or in part and if so in what particulars or to what extent?

The *War Measures Act* (R.S.C. 1927, ch. 206) was brought into operation by a Proclamation dated September 1, 1939, and on September 11, 1940, by Order in Council P.C. 4616, The Wartime Prices and Trade Board Regulations, made under the *War Measures Act,* were extended to rentals and housing accommodation. In November, 1941, consolidated regulations respecting leasehold, and entitled *The Wartime Leasehold Regulations* were established, and on January 1, 1946, an Act of Parliament entitled *The National Emergency Transitional Powers Act* was enacted, and at the same time, all the Orders in Council respecting rentals, passed under the *War Measures Act,* were continued in force.

The preamble of this Statute recalls that during the national emergency that arose by reason of the war against Germany and Japan, measures have been adopted under the *War Measures Act* for the military requirements and the security of Canada and the maintenance of economic

(1) [1923] A.C. 695. (2) [1947] A.C. 87.

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stability; it also stated that this national emergency has continued and is still continuing, and that it is essential in the national interest that certain transitional powers continue to be exercised by the Governor General in Council during the continuation of the exceptional conditions brought about by the war, but that it is preferable that such transitional powers be exercised under specific authority conferred by Parliament, instead of being exercised under the *War Measures Act*. The preamble further says that it is necessary that certain acts and things done and authorized, and certain orders and regulations made under the *War Measures Act* be continued in force, and that the Governor General in Council be authorized to do, and authorize such further acts and things, and make such further orders and regulations deemed advisable by reason of the emergency, and also for the purpose of discontinuance in an *orderly manner,* as the *emergency permits,* of measures adopted during and by reason of the emergency.

Subsection 1 of section 2 of *The National Emergency Transitional Powers Act, 1945,* sets out the powers of the Governor General in Council in part as follows:—

> 2. (1) The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable for the purpose of
>
> (*a*) providing for and maintaining the armed forces of Canada during the occupation of enemy territory and demobilization and providing for the rehabilitation of members thereof,
>
> (*b*) facilitating the readjustment of industry and commerce to the requirements of the community in time of peace,
>
> (*c*) maintaining, controlling and regulating supplies and services, prices, transportation, use and occupation of property, rentals, employment, salaries and wages to ensure economic stability and an orderly transition to conditions of peace;
>
> (*d*) . . .
>
> (*e*) continuing or *discontinuing in an orderly manner,* as the emergency permits, measures adopted during *and by reason of the war.*

This Act was continued in force until May 15, 1947, and on that date, an Act entitled *The Continuation of Transitional Measures Act, 1947,* came into force, and the preamble of this new Act recalls that in view of the continuation of the national emergency Parliament has in 1945, conferred upon the Governor General in Council

certain transitional powers, that the Governor General in Council has continued in force certain orders and regulations made under the *War Measures Act* and has made other orders and regulations; it also states that the national emergency arising out of the war, in certain aspects, has continued since the unconditional surrender of Germany and Japan and is still continuing; that it is necessary by reason of this emergency, in order to ensure an orderly transition from war to peace, to enact *The Continuation of Transitional Measures Act,* so that certain orders or regulations of the Governor General in Council be continued in force temporarily, notwithstanding the expiry of *The National Emergency Transitional Powers Act.*

Section 2 of *The Continuation of Transitional Measures Act, 1947,* provides as follows:—

> 2. (1) Subject to section 4 of this Act the orders and regulations of the Governor in Council specified in the Schedule to this Act shall, notwithstanding the expiry of *The National Emergency Transitional Powers Act, 1945,* continue and be in force while this Act is in force.

In the Schedule of this Act is *Order in Council P.C. 9029, Wartime Leasehold Regulations,* and by section 4 of the Act, the Governor in Council is authorized to revoke in whole or in part any order or regulation continued in force by or made under the Act. The Act has been continued from year to year and will expire on the 31st of March, 1950.

It has to be decided if the Wartime Leasehold Regulations made by Orders in Council are *ultra vires* either in whole or in part and if so in what particulars or to what extent.

The Attorney General of Canada, the Attorney General for Ontario, the Canadian Legion of the British Empire Service League, and the Canadian Congress of Labour, have submitted that these regulations are valid *in toto,* but the Attorney General for the Province of Quebec and the Canadian Federation of Property Owners Associations, on behalf of itself, its member associations and all the property owners of Canada, contend that they are *ultra vires* the powers of the Dominion. The submission of the Attorney General of Canada and of the others who have supported his views, is that those regulations were valid under the *War Measures Act,* as well as under *The National Emergency Transitional Powers Act,* and that they were validly

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continued in force by *The Continuation of Transitional Measures Act of 1947*, (*a*) as legislation in relation to the emergency arising out of the war, and (*b*) as legislation providing for the withdrawal in an orderly way of measures adopted to meet the war emergency.

It is now settled law, and this question has now passed the stage of serious controversy, that regulations passed under the *War Measures Act*, in times of emergency arising out of the war, and continued in force under *The National Emergency Transitional Powers Act*, are unchallengeable. *Vide*: *Fort Frances Pulp & Power Co.* v. *Manitoba Free Press Co.* (1); *In re Gray* (2); *Reference re Chemicals* (3); *The Co-operative Committee on Japanese Canadians* v. *Attorney General of Canada* (4).

A short reference to some of these cases will conclusively show that certain matters that normally belong to the provincial domain, become of federal concern, when by reason of abnormal circumstances a national emergency arises, which in order to be adequately dealt with, requires the total efforts of the country as a whole.

In *Fort Frances Pulp & Power Co.* v. *Manitoba Free Press* (5), Viscount Haldane speaking for the Judicial Committee said at page 703:—

> It is clear that in normal circumstances the Dominion Parliament could not have so legislated as to set up the machinery of control over the paper manufacturers which is now in question. The recent decision of the Judicial Committee in the *Board of Commerce Case* (6), as well as earlier decisions, show that as the Dominion Parliament cannot ordinarily legislate so as to interfere with property and civil rights in the Provinces, it could not have done what the two statutes under consideration purport to do had the situation been normal. But it does not follow that in a very different case, such as that of sudden danger to social order arising from the outbreak of a great war, the Parliament of the Dominion cannot act under other powers which may well be implied in the constitution. The reasons given in the *Board of Commerce Case* recognize exceptional cases where such a power may be implied.
>
> In the event of war, when the national life may require for its preservation the employment of very exceptional means, the provision of peace, order and good government for the country as a whole may involve effort on behalf of the whole nation, in which the interests of individuals may have to be subordinated to that of the community in a fashion which requires s. 91 to be interpreted as providing for such an emergency. The general control of property and civil rights for normal purposes remains with the Provincial Legislatures. But questions may

(1) [1923] A.C. 695.
(2) (1918) 57 Can. S.C.R. 150.
(3) [1943] S.C.R. 1.
(4) [1947] A.C. 87.
(5) [1923] A.C. 695.
(6) [1922] 1 A.C. 191.

arise by reason of the special circumstances of the national emergency which concern nothing short of the peace, order and good government of Canada as a whole.

In the *Reference as to the Validity of the Regulations in relation to Chemicals* (1), Sir Lyman Duff said:—

The *War Measures Act* came before this Court for consideration in 1918 in *re Gray* (2), and a point of capital importance touching its effect was settled by the decision in that case. It was decided there that the authority vested in the Governor General in Council is legislative in its character and an order in council which had the effect of radically amending the *Military Service Act, 1917,* was held to be valid. The decision involved the principle, which must be taken in this Court to be settled, that an order in council in conformity with the conditions prescribed by, and the provisions of, the *War Measures Act* may have the effect of an Act of Parliament.

Not only are the regulations made under the *War Measures Act,* valid, in case of emergency, but also must be held to be within the powers of the Central Government, regulations to avoid economic and other disturbances occasioned originally by the war. In the case cited *supra,* (*Fort Frances Pulp & Power Co.* v. *Manitoba Free Press*) it was held:—

Held, accordingly, that the Canadian War Measures Act, 1914, and Orders in Council made thereunder during the war for controlling throughout Canada the supply of newsprint paper by manufacturers and its price, also a Dominion Act passed after the cessation of hostilities for continuing the control until the proclamation of peace, with power to conclude matters then pending, were *intra vires.*

Judgment of the Appellate Division affirmed on a different ground.

The more recent case of *Co-operative Committee on Japanese Canadians* v. *Attorney General for Canada* (3) is very much to the point. In that case, this Court decided that three Orders in Council passed in 1945, after the cessation of hostilities, under the authority of the *War Measures Act,* and continued in force by Order in Council pursuant to section four of *The National Emergency Transitional Powers Act,* authorizing the deportation of certain Japanese, were valid. Delivering the judgment of the Judicial Committee, which upheld this Court, Lord Wright said at page 101:—

On certain general matters of principle there is not, since the decision in *Fort Frances Pulp & Power Co.* v. *Manitoba Free Press Co.* (4), any room for dispute. Under the British North America Act property and civil rights in the several Provinces are committed to the Provincial

(1) [1943] S.C.R. 1.
(2) (1918) 57 Can. S.C.R. 150.
(3) [1947] A.C. 88.
(4) [1923] A.C. 695.

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legislatures, but the Parliament of the Dominion in a sufficiently great emergency, such as that arising out of war, has power to deal adequately with that emergency for the safety of the Dominion as a whole.

These binding judicial pronouncements clearly hold that regulations made under the *War Measures Act* and under subsequent statutes, when there is still an emergency arising out of the war, must be held valid. This legislation may, of course, incidentally affect provincial rights, but as long as it is legislation directed to meet the continuing national emergency, it is not legislation in relation to provincial rights, but in "pith and substance", in relation to a matter upon which the Central authority may competently legislate. *Attorney General for Ontario* v. *Reciprocal Insurers* (1); *Attorney General for Canada* v. *Attorney General for Quebec et al.* (2).

Under "Property and Civil Rights", rentals are normally of provincial concern, but as the result of an emergency, the existing provincial laws on the matter become inoperative. The rights of the provinces are not of course permanently suppressed, and their jurisdiction temporarily suspended during the federal invasion, flows afresh when the field is finally abandoned. It is only during the period of occupation that the provincial jurisdiction is overridden. This is the reason that may justify the Dominion Government to offer to some or to all of the provinces to legislate on rentals, and to exercise anew their constitutional rights.

In order however to vest in the Federal Parliament the necessary authority to deal with such matters, there must be an emergency. There is no doubt that such an emergency existed during the war, and that during that period, the jurisdiction of Parliament could not be impugned. But the time that an emergency lasts is not limited to the period of actual hostilities. War is the cause of many social and economic disturbances and its aftermath brings unstable conditions which are settled only after a period of necessary readjustment, during which the emergency may very well persist. As Viscount Haldane said in the *Fort Frances* case:—

> At what date did the disturbed state of Canada which the war had produced so entirely pass away that the legislative measures relied on in the present case became *ultra vires*?

(1) [1924] A.C. 328 at 337. (2) [1947] A.C. 33 at 44.

The preambles of *The National Emergency Transitional Powers Act, 1945*, and of *The Continuation of Transitional Measures Act, 1947*, and the Order in Council submitting this Reference to this Court, clearly declare that the *emergency* still exists as a result of the war, and that by reason of that emergency and in order to *decontrol in an orderly manner*, it is imperative that the Governor General in Council be authorized to enact the necessary regulations.

Of course, these statements are not conclusive and do not close the door to all judicial investigations, but it is only with great caution that the courts will intervene and disregard these declarations of Parliament and of the Governor General in Council. As Viscount Haldane said in the *Fort Frances* case:—

> In such a case the law as laid down for distribution of powers in the ruling instrument would have to be invoked. *But very clear evidence that the crisis had wholly passed away* would be required to justify the judiciary, even when the question raised was one of *ultra vires* which it had to decide, in overruling the decision of the Government that *exceptional measures were still requisite.*

And further, also at page 707:—

> It is enough to say that there is no *clear and unmistakable* evidence that the Government was in error in thinking that the necessity was still in existence at the dates on which the action in question was taken by the Paper Control Tribunal.

In the *Co-operative Committee on Japanese Canadians* v. *Attorney General for Canada* (1), at page 101, Lord Wright expressed his views as follows:—

> The interests of the Dominion are to be protected and it rests with the Parliament of the Dominion to protect them. What those interests are the Parliament of the Dominion must be left with considerable freedom to judge. Again, if it be clear that an emergency has not arisen, or no longer exists, there can be no justification for the exercise or continued exercise of the exceptional powers. The rule of law as to the distribution of powers between the Parliaments of the Dominion and the Parliaments of the Provinces comes into play. But *very clear evidence that an emergency has not arisen,* or *that the emergency no longer exists,* is required to justify the judiciary, even though the question is one of *ultra vires,* in overruling the decision of the Parliament of the Dominion that exceptional measures were required or were still required. To this may be added as a collorary that it is not pertinent to the judiciary to consider the wisdom or the propriety of the particular policy which is embodied in the emergency legislation. Determination of the policy to be followed is exclusively a matter for the Parliament of the Dominion and those to whom it has delegated its powers.

(1) [1947] A.C. 87.

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In the present instance, no evidence of any kind has been submitted to show that the emergency has disappeared and that normal conditions are now prevailing. On the contrary, common knowledge, to which it is surely permissible to appeal in a case of this kind, and the very valuable exhibits in the record which I have usefully consulted, to test the accuracy of the statements, lead me to the irresistible conclusion that an emergency still exists as an aftermath of the war. *Vide*: *The Attorney General for Ontario* v. *Reciprocal Insurers,* (1); *Attorney General for Alberta* v. *Attorney General for Canada,* (2); *Lower Mainland Dairy Products Board* v. *Turners Dairy Ltd.* (3).

The case of *Russell* v. *The Queen* (4) has been referred to during the argument. This case which is very frequently cited has no application. Moreover, it has not the meaning that has been attributed to it, as a result of the dictum of Viscount Haldane in *Toronto Electric Commissioners* v. *Snider* (5). In *Attorney General for Canada* v. *Canada Temperance Federation* (6), Viscount Simon has definitely settled the matter and removed all possible doubts. Speaking for the Judicial Committee, he held that the *Scott Act* was a permanent law and not a law, the validity of which was justified by an emergency. It is not the existence of abnormal and transitory conditions that justified its validity.

The present case must also be distinguished from the Reference submitted to this Court as to the validity of the *Dairy Industry Act. The Margarine Case,* (7). In that case, amongst other submissions, it was contended that there was an emergency that justified the Parliament of Canada under the "Peace, Order and good Government" clause of section 91 of the *B.N.A. Act* to enact the legislation, but this Court held that an emergency did not exist, particularly in view of the allegation in the Order in Council, that margarine was not obnoxious to health, and that therefore the matter was of provincial concern.

It follows that if there is unmistakable evidence to make it clear that there is no emergency, the courts are duty bound to intervene. Otherwise, we would reach a con-

(1) [1924] A.C. 328 at 337.
(2) [1939] A.C. 118 at 130.
(3) [1941] S.C.R. 583.
(4) (1882) 7 A.C. 829.
(5) [1925] A.C. 396.
(6) [1946] A.C. 193.
(7) [1949] S.C.R. 1.

clusion that is not justified by the *B.N.A. Act*. Under the guise of "Peace, Order and good Government", it would be possible for the Parliament of Canada to enact colourable legislation, and wrongly assume powers that belong to the provincial legislatures. Confederation has been erected on more solid foundations.

But such is not the case. The war has created an emergency that justified the Governor General in Council to bring the *War Measures Act* in operation and pass regulations to meet such an emergency. Parliament then enacted *The National Emergency Transitional Powers Act, 1945*, and *The Continuation of Transitional Measures Act, 1947*, because in its opinion the emergency that arose out of the war was still existing, and for the express purpose of decontrolling, and to complete the orderly transition from abnormal to normal conditions. The regulations that were passed to reach that aim are essentially of a temporary character, and the laws from which they derive their validity are in no way permanent. They will come to an end with the emergency.

My answer to the interrogatory is therefore in the negative.

RAND J.: The Governor in Council has referred to this Court the following question:—

> Are The Wartime Leasehold Regulations *ultra vires* either in whole or in part and if so in what particulars or to what extent?

These are part of the general regulations made under the authority of *The War Measures Act* which applied to virtually the entire economic organization of the country, and which no one has seriously suggested were not valid up to the end of actual hostilities, assuming that stage to have been reached before say 1947. The contention before us that sought to end their force at that moment was that of Mr. Beaulieu on behalf of the Province of Quebec. His contention was this: once the war, as distinguished from its aftermath, had ended, the "emergency" by which the regulations were justified had come to an end and it was necessary to their continued validity that the state of things immediately following should constitute, in effect, a new emergency; the latter would be a peace-time emergency, and would necessarily be considered apart

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from its cause. In that view, it would be obligatory upon those supporting the continuance of the central power to show the existence of such a state of things, which had not been done.

In the sense so used, the word "emergency" carries the objectionable insufficiency which prompted the remarks of Viscount Simon in the Temperance litigation reported in [1946] A.C. 193 at p. 206: as he there observed, an emergency may be the occasion which calls for the legislation, but it is the nature of the legislation itself, and not the existence of emergency, that must determine whether it is valid or not. It is the conditions brought about by war that justify the regulation here; and the narrow question is whether the regulation can continue while the conditions remain.

In considering the situation at the war's end, it must be kept in mind that the regulations themselves have played an effective part in producing it. If, at that moment, all restrictions were to be abandoned, no one could doubt that serious disturbances and hardship would follow, and it would not be sufficient to say that they would become the responsibility of the provinces.

That circumstance was emphasized in the case of *Dawson* v. *The Commonwealth* (1), in which Leatham, C.J. at p. 176 says:—

> The defence power does not cease instantaneously to be available as a source of legislative authority with the termination of actual hostilities or even with the end of the war * * * The fact that the Regulations have been in operation itself creates an economic condition which may reasonably be thought to require that continued operation for some further period in order to bring about a gradual return to what might be called more normal conditions, instead of exposing the community to the consequences of a sudden and abrupt creation of what may be a legislative vacuum.

It seems to me to be a legitimate consideration that persons who might directly or indirectly be affected by such drastic action would naturally look to the government originally responsible to take or continue reasonable measures to effect transition with as little injury to them as is consistent with regard to others.

There is direct authority on the question asked of us. It is now settled that for the emergency of war, on which the validity of the regulations is rested, and within con-

(1) (1946) 73 C.L.R. 157.

stitutional procedure, there is virtually no limitation to the scope of legislative action which Parliament, considering it necessary, may take for the defence of the country: *Japanese Reference* (1). That means, among other things, the preservation of the constitutional structure itself whose internal organization governs the ordinary peacetime life of the country. To suggest that the constitutional legislative position of the provinces presents impediments and limitations to the overriding necessity of maintaining the foundation upon which it rests indicates a somewhat inadequate appreciation of the realities of organized society in the world of these times, as well as of the constitutional statute.

In *Fort Frances Pulp & Power Co.* v. *Winnipeg Free Press* (2), the Judicial Committee, speaking through Viscount Haldane, held that an order issued in 1920 by the Paper Controller fixing prices which the Pulp Company should charge the Free Press for a period up to December 31, 1919, was within the authority of Parliament under the power to legislate for the peace, order and good government of the Dominion; and in the course of the reasons, at p. 706, this language is used:—

> At what date did the disturbed condition of Canada which the war had produced so entirely pass away that the legislative measures relied on in the present case became *ultra vires*?

And at p. 707:—

> Their Lordships find themselves unable to say that the Dominion Government had no good reason for thus temporarily continuing the paper control after actual war had ceased, but while the effects of war conditions might still be operative.

Viscount Haldane does not consider the question whether the regulations could be justified by the power of the Dominion to legislate for defence, on which the Australian legislation was upheld, but with that it is not necessary now to deal.

By what means, then, is it to be determined that economic disturbances caused by the war have not yet "entirely" disappeared? A conclusion of this sort is to be gathered from an appreciation of conditions throughout the country. Evidence of that is furnished to Parliament by the representatives in both the Houses: it is gathered by the agencies of the Dominion government charged

(1) [1947] A.C. 87. (2) [1923] A.C. 695.

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with country-wide enquiry, which are at the same time receiving centres of complaints and communications from all districts. There is also the common knowledge of which the Court can take judicial notice.

Of matters of that sort we have the following. In the latest legislative enactment, that of *The Continuation of the Transitional Measures Act, 1947*, these recitals appear:—

> Whereas Parliament, in view of the continuation of the national emergency arising out of the war, by *The National Emergency Transitional Powers Act, 1945*, conferred upon the Governor in Council certain transitional powers * * *
>
> And whereas the national emergency arising out of the war, in certain aspects, has continued since the unconditional surrender of Germany and Japan and is still continuing; * * *
>
> And whereas it is necessary by reason of the existing national emergency that certain orders and regulations * * * be continued in force temporarily * * * in order to ensure an orderly transition from war to peace;

They were followed in 1948 by an address of both Houses of Parliament provided for by the Act, by which its life was extended for a further year; and a similar address in 1949 for the same purpose. These are express and implied affirmations by the two legislative bodies to the effect that the abnormal conditions attributable to the war are still to some extent present, and that in the opinion of Parliament an appropriate degree of regulation is still required for the surrender, without too great shock or violence, of segments of the country's economy to the normal operation of economic forces. With those declarations and the matters of general public knowledge, at least not inconsistent with them, before us, and with nothing seriously challenging them, it would be quite impossible for this Court to find that the war conditions had in fact entirely disappeared, that the declarations of Parliament were not made in good faith, and that its legislation, for some purpose other than that of an orderly accommodation of the regulations to the last stages of the economic derangement, was a colourable device for dealing with matters beyond its jurisdiction.

My answer to the question is, therefore, that the regulations are not, in whole or part, *ultra vires*.

KELLOCK J.:—By s. 3 of the *War Measures Act*, R.S.C., 1927, c. 206, brought into operation by proclamation on September 1, 1939, "the Governor-in-Council may do and

authorize such acts and things and make from time to time such orders and regulations as he may by reason of the existence of real or apprehended war * * * deem necessary or advisable for the security, defence, peace and welfare of Canada". While the section goes on to provide that this authority shall extend to certain enumerated classes of subjects, it is expressly enacted that this enumeration is merely for greater certainty and not so as to restrict the generality of the earlier language; *Co-operative Committee on Japanese Canadians* v. *Attorney-General for Canada* (1).

Under the authority of this statute wartime economic controls, including measures respecting prices and rents, were by Order-in-Council introduced in Canada gradually during the earlier years of the war. Those earlier controls were directed to the meeting of specific difficulties of supply resulting from conditions brought about by the war.

Later, and toward the end of 1941, when a broad inflationary rise in prices generally began to develop, more comprehensive measures designed to maintain economic stability were put into effect, including the establishment of a general price "ceiling". Limitation of rents was also extended so as to include all real property, with the exception of farms. In the great majority of cases rents in effect in October, 1941, were "frozen". Control of wages and salaries also, which, up to that time, had been limited to "war industries", was extended to all industries. By the end of 1942 a fairly complete and integrated system of economic controls had been established and this continued with little change until the summer of 1945.

Following cessation of active hostilities with Germany, these controls began to be eased in the summer of 1945, the first steps being with respect to the use of metals and other materials no longer required for active war purposes. By the end of the year 1946, controls over these particular materials had disappeared. During 1946 wage controls were at first relaxed and later abolished and in that year also there began the easing of the control of prices generally, which continued at an accelerated rate during 1947 and 1948, while rationing of consumers came to an end during 1947.

(1) [1947] A.C. 87 at 105.

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The respondents accept the accuracy of the statement placed before the court on behalf of the federal government that:

> Both price controls and subsidies were withdrawn in steps and stages, with a view to easing the Canadian price structure up toward the world price level in an orderly manner. At times it was necessary to slow down the process of decontrol and occasionally to retrace a few steps when, for example, a long series of protracted industrial disputes in 1946 interrupted the improvement of supplies, and late in 1947 when severe exchange conservation measures required the reimposition of price controls on certain fruits and vegetables. But there was a steady and progressive contraction of the area under control.
>
> The pace of rent decontrol has been slower for a variety of reasons. The effect of demobilization of the members of the Armed Forces accentuated the already existing shortage of houses. Demobilized persons again took up family residences. Many of them married to form new families. Thus the end of hostilities did not, as in the case of other controls, immediately change the conditions that led to the application of controls to accommodation but in fact for the time being intensified these conditions.
>
> Again wartime conditions brought about a significant change in the balance between the demand and supply for houses in Canada. Wartime economic activities increased the demand for housing because of higher incomes which have continued after the war. On the other hand, increases in the supply of houses which might have been expected in these circumstances was cut down by restrictions on civilian construction to release materials and labour for war purposes. This lack of balance between demand and supply takes longer to adjust than in the case of the supply of other goods or services.

As to the nature of the controls affecting real property, the Wartime Prices and Trade Board had been authorized, in addition to the fixing of maximum rents, from time to time, to prescribe the manner in which rentals should be ascertained and what should constitute or be included in any rental. The Board was also authorized to prescribe the grounds on which and the manner in which leases might be terminated and to prohibit termination of leases or eviction otherwise. Every order made in pursuance of the regulations was to apply throughout Canada unless the contrary was specified therein but might be localized to an area or areas or to a class or classes of persons or to types of property.

On the 18th of December, 1945, 9-10 Geo. VI, c. 25, which came into force on January 1, 1946, was passed. By s. 5 it was provided that on and after that day the war against Germany and Japan should, for the purposes of the *War Measures Act,* be deemed no longer to exist.

By s. 4 it was provided that the Governor-in-Council might order that orders and regulations lawfully made under the *War Measures Act,* or pursuant to authority created under that Act, in force immediately before the statute came into force, should, while it remained in force, continue in full force and effect, subject to amendment or revocation under its provisions. By s. 6 the statute was to expire on December 31, 1946, if Parliament should meet during November or December of that year, and if not, then on the fifteenth day after Parliament should first meet in 1947. The section also provided that upon addresses presented to the Governor General by the Senate and the House of Commons at any time while the statute remained in force, praying that the Act should be continued in force for a further period not exceeding in any case one year, it should so continue.

By P.C. 7414 of December 28, 1945, the power conferred by s. 4 was exercised with respect to all orders and regulations lawfully made under the *War Measures Act,* or pursuant to authority created under that Act and in force immediately before the Act of 1945 came into force. Section 12 of the *Interpretation Act* made this Order-in-Council effective.

By 10 Geo. VI, c. 60, assented to on the 31st of August, 1946, a new section 6 was enacted and provision was made for the continuation of the statute until the 31st day of December, 1946, on essentially the same terms as had been provided by the original section. Further, by P.C. 1112 of the 25th of March, 1947, which recited that addresses of the Senate and House of Commons had been presented praying for the continuation of the 1945 statute until the 15th day of May, 1947, it was provided that the Act should remain in force until that date.

By 11 Geo. VI, c. 16, assented to on the 14th of May, 1947, which, by s. 6, was to come into force immediately after the expiry of the 1945 statute, certain Orders-in-Council, including the Wartime Leasehold Regulations, were to continue in force during the term of the new statute subject to revocation in whole or in part by the Governor-in-Council. Provision for the continuation of the Act was also made by s. 7 in terms similar to s. 6 of the

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earlier statute. By P.C. 5304 of December 30, 1947, the 1947 statute was continued in force to March 31, 1948, addresses for the purpose by the Senate and House of Commons having been presented. This legislation has been continued in force by 11-12 Geo. VI, c. 5 and 13 Geo. VI, c. 3. Unless further extended it will expire on March 31, 1950.

It was not suggested by anyone on the argument that conditions did not exist justifying the bringing into force of the *War Measures Act*, nor that under its provisions regulations could not properly have been enacted which would affect landlords and tenants. But it was contended that the conditions which constituted the basis for the continued exercise of this legislative jurisdiction by the federal authority had either passed away or that the particular regulations which are here in question had never been enacted in relation to that jurisdiction but had been at all times enactments purely in relation to property and civil rights in the provinces and therefore at all times beyond the jurisdiction of Parliament.

As will be seen from the above summary of its terms, the legislation outlined above is temporary legislation, having its inception in the extraordinary conditions consequent upon the magnitude of the war which commenced in September, 1939. As has been frequently laid down, subjects which would normally belong exclusively to provincial jurisdiction under classes of subjects specifically assigned by s. 92 of the *British North America Act* may, in time of war, assume a significance of paramount importance and of dimensions that give rise to a standard of necessity calling for the exercise of powers vested only in the federal authority. In such circumstances it is, as Viscount Haldane pointed out in the *Fort Frances* case (1), that:

> It is proprietary and civil rights in new relations, which they do not present in normal times, that have to be dealt with; and these relations, which affect Canada as an entirety, fall within s. 91, because in their fullness they extend beyond what s. 92 can really cover. The kind of power adequate for dealing with them is only to be found in that part of the constitution which establishes power in the State as a whole. For it is not one that can be reliably provided for by depending on collective action of the Legislatures of the individual Provinces agreeing for the purpose.

(1) [1923] A.C. 695 at 704.

Dealing first with the question as to whether the conditions which justified the initial legislation by Parliament have now completely passed away so as no longer to justify the particular regulations here in question, it was pointed out in the *Fort Frances* case that the question as to the extent to which provision for such circumstances may have to be continued is one on which a court of law is loath to enter. It may be, as their Lordships said in that case, that it has become "clear" that the crisis which arose is "wholly" at an end and that there is "no" justification for the continued exercise of an exceptional interference which becomes *ultra vires* when no longer called for, but very clear evidence that the crisis has "wholly" passed away would be required to justify a court in overruling the decision of the government that exceptional measures were still requisite.

Their Lordships asked the question as to when, in the case before them, it was to be said that the necessity "altogether" ceased for maintaining the exceptional measure of control there in question. At what date did the disturbed state of Canada which the war had produced so "entirely" pass away that the legislative measures in question became *ultra vires?* Their Lordships found that there was "no clear and unmistakable evidence" in that case that the government was in error in "thinking" that the necessity was still in existence and they found themselves unable to say that the Dominion Government had "no good reason" for temporarily continuing the control after actual war had ceased, but while the effects of war conditions might still be operative.

In the Japanese reference *ubi cit,* the Judicial Committee reaffirmed the principles laid down in the *Fort Frances* case. The statute there in question provided by s. 2 that the Governor-in-Council might do and authorize such acts and things, and make from time to time such orders and regulations, as he might, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable for the purpose of

> (c) maintaining, controlling and regulating * * * prices * * * use and occupation of property, rentals * * * to ensure economic stability and an orderly transition to conditions of peace;

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(e) continuing or discontinuing in an orderly manner, as the emergency permits, measures adopted during and by reason of the war.

In the Japanese Canadian reference it was contended that at the date of the passing of the Act of 1945 there did not exist any such emergency as justified Parliament in empowering the Governor-in-Council to pass the orders there in question, as the emergency which had dictated their making—namely, active hostilities, had come to an end. It was said that a new emergency justifying exceptional measures might indeed have arisen, but it was by no means the case that measures taken to deal with the emergency which led to the proclamation bringing the *War Measures Act* into force were demanded by the emergency which faced Parliament at the time of the passing of the Act. This contention however, was rejected by the Privy Council as it had been by this court. After pointing out that the statute in its preamble clearly stated the view of Parliament as to the necessity of imposing the powers which were exercised, Lord Wright, who delivered the judgment, added:

> The argument under consideration invites their Lordships, on speculative grounds alone, to overrule either the considered decision of Parliament to confer the powers or the decision of the Governor in Council to exercise them. So to do would be contrary to the principles laid down in *Fort Frances Pulp & Power Co.* v. *Manitoba Free Press Co.* (1) and accepted by their Lordships earlier in this opinion.

In the preamble to the statute of 1947 which is still in force, it is recited that:

> * * * the national emergency arising out of the war, in certain aspects, has continued since the unconditional surrender of Germany and Japan and is still continuing * * * And whereas it is necessary by reason of the existing national emergency that certain orders and regulations of the Governor in Council made under the *War Measures Act* and *The National Emergency Transitional Powers Act, 1945,* be continued in force temporarily notwithstanding the expiry of *The National Emergency Transitional Powers Act, 1945,* in order to ensure an orderly transition from war to peace * * *

While a recital in an act of Parliament cannot be conclusive on a question such as is here involved, it at least furnishes evidence that, in the mind of Parliament, legislation was directed to a continuing condition. There is no suggestion in the present case of bad faith on the part of Parliament.

(1) [1923] A.C. 695.

In my opinion the undoubted legislative power of Parliament in respect of conditions arising out of an emergency such as that created by a war of the proportions of the late war, as established by the authorities referred to, includes, not only the power to prosecute the war and to do everything necessary to that end, but also the power to effect the restoration of conditions of peace by gradual process if that is thought wise and "not necessarily immediately by the crude process of immediate abandonment of all Federal control", to borrow language used by Latham C.J. in *Dawson* v. *The Commonwealth* (1), at 176. The fact that certain conditions have been created by the exercise of the defence power is itself a fact which is relevant to the validity of a continued exercise of that power.

The former Chief Justice of Canada, Sir Lyman Duff, (with whom the present Chief Justice concurred) expressed the same idea in other language in *The King* v. *Eastern Terminal Elevator Co.* (2), at 443, where he said:

> Regarded as legislation essential to prevent such a financial crisis as would be not unlikely to ensue upon the relinquishment, voluntary or forced, of Dominion control over the grain trade, the Canada Grain Act might well withstand the test of validity suggested in the *Board of Commerce* (3), the *Fort Frances* (4) and the *Lemieux Act* (5) cases.

Applying the above principles, it is, in my opinion, clear that the court is not in a position, any more than it was in the case of the 1947 Reference, to overrule the decision of Parliament expressed as late as the 25th of March, 1949, that the rental regulations here in question are still necessary to meet conditions initially arising out of war but still continuing. The kind of evidence necessary to establish that the emergency calling for the exercise of the federal power has "entirely" passed away, is wholly lacking.

The only matter relied upon by the respondents as evidence to that end, was the statement in the Order of Reference that on October 23, 1948, the Minister of Finance had advised the premiers of each of the provincial governments that the Dominion government

> was prepared to vacate the field to any province which might decide to undertake rent control.

(1) (1946) 73 C.L.R. 157.
(2) [1925] S.C.R. 434.
(3) [1922] 1 A.C. 191.
(4) [1923] A.C. 695.
(5) [1925] A.C. 396.

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This, however, is not to be taken alone, as it is immediately followed by the statement that:

> In offering to vacate the field to the provinces a year ago the federal government was not seeking to relieve itself of responsibility for rent control. It was motivated solely by concern for the situation that would arise should rent control be held to be beyond the constitutional powers of the federal authorities. It believed at that time that the sudden end of rent control would result in unnecessary disruption and hardship, and it offered to put the matter beyond doubt by giving the provinces an opportunity to introduce legislation that could not be successfully challenged in the courts.

At the time of the above "offer" there was in effect Dominion-wide legislation designed to deal with a Dominion-wide problem. If it had developed that that problem could have been dealt with by common action agreed upon by the provinces, it might have been that any further justification for the exercise of federal legislative jurisdiction would have ceased. On the contrary, however, "none of the then existing provinces was prepared to undertake rent control" and the problem did not become one that could be "reliably provided for by depending on collective action of the legislatures of the individual provinces agreeing for that purpose", to quote again from the *Fort Frances* case at 704. As the provinces could not in fact agree, the Dominion considered it necessary that this legislation should remain. I do not think that, in the existing circumstances, had one or more of the provinces undertaken to exercise "rent control" within their respective limits so as adequately to form the necessary links with Dominion legislation elsewhere in the country wide system of control, the powers of the Dominion Government to maintain its legislation would have been affected.

If clear evidence had been adduced of the disappearance of any conditions justifying the continued operation of the federal legislation, it would, of course, be not only within the power but the duty of the court to declare the legislation invalid, but in the present case there is nothing of the kind. Such facts as are common knowledge, and of which the court may take judicial notice, indicate the contrary. To this may be added what is obvious, namely, that in such circumstances it is not for the court to consider the wisdom or propriety of the particular policy embodied in the residual emergency legislation. That is matter exclusively for Parliament.

With respect to the second objection to the validity of the regulations, namely, the contention that, from a perusal of the Orders-in-Council, the court could say that their provisions were not enacted with relation to the Dominion field of legislative jurisdiction in time of war, but purely in relation to property and civil rights, in my opinion this contention cannot be sustained. I think it is sufficiently clear that the measures here in question were enacted from the point of view of what was considered called for in the conditions then prevailing. In that view they are valid. Their continuing validity I have already dealt with.

My answer, therefore, to the question referred, is that the Wartime Leasehold Regulations are *intra vires*.

ESTEY J.:—His Excellency the Governor General in Council under s. 55 of *The Supreme Court Act* referred to this Court the question:

> Are The Wartime Leasehold Regulations *ultra vires* either in whole or in part and if so in what particulars or to what extent?

The Wartime Leasehold Regulations were enacted by Order in Council P.C. 9029, November 21, 1941, under the authority of the *War Measures Act,* R.S.C. 1927, c. 206. In 1945 Parliament, after the conclusion of actual hostilities, deemed it desirable that legislation in respect to the emergency arising out of the war should be dealt with under special authority and as a result *The National Emergency Transitional Powers Act,* S. of C. 1945, c. 25, was enacted which continued these Wartime Leasehold Regulations in force. This statute remained in force until May 15, 1947, when *The Continuation of Transitional Measures Act,* S. of C. 1947, c. 16, became effective and continued in force such of these Wartime Leasehold Regulations as had not been repealed.

The validity of the *War Measures Act* was upheld in *Fort Frances Pulp* v. *Manitoba Free Press* (1), and *The National Emergency Transitional Powers Act, 1945,* in *The Co-operative Committee on Japanese Canadians* v. *The Attorney-General of Canada* (2). The power of the Governor in Council to legislate under the *War Measures Act* by Order in Council was upheld in *In re Gray* (3), and *Reference re Chemicals,* (4).

(1) [1923] A.C. 695.
(2) [1947] A.C. 87.
(3) (1918) 57 Can. S.C.R. 150.
(4) [1943] S.C.R. 1.

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The National Emergency Transitional Powers Act, 1945, was held to be valid Dominion legislation in the *Japanese Reference, supra,* and in the course of the judgment of their Lordships of the Privy Council, Lord Wright at p. 101 stated:

> Again if it be clear that an emergency has not arisen, or no longer exists, there can be no justification for the exercise or continued exercise of the exceptional powers. The rule of law as to the distribution of powers between the Parliaments of the Dominion and the Parliaments of the provinces comes into play. But very clear evidence that an emergency has not arisen, or that the emergency no longer exists is required to justify the judiciary even though the question is one of *ultra vires,* in overruling the decision of the Parliament of the Dominion that exceptional measures were required or were still required.

The recital and the provisions of *The Continuation of Transitional Measures Act* set forth that the emergency arising out of the war still continued but only "in certain aspects" and that certain orders and regulations then existing should "be continued in force temporarily * * * in order to ensure an orderly transition from war to peace". Of even greater significance is that by s. 4 the power vested in the Governor in Council is restricted to the revocation either in whole or in part of any existing order or regulation. Parliament here indicates a clear intention that this legislation is of a temporary character, which is further emphasized by the amendments made in 1948 (S. of C. 1948, c. 5) and in 1949 (S. of C. 1949, c. 3). In the latter amendment sec. 7 reads:

> 7. Subject as hereinafter provided, this Act shall expire on the sixtieth day after Parliament first meets during the year one thousand nine hundred and fifty or on the thirty-first day of March, one thousand nine hundred and fifty, whichever date is the earlier: Provided that, if at any time while this Act is in force, Addresses are presented to the Governor General by the Senate and House of Commons, respectively, praying that this Act should be continued in force for a further period, not in any case exceeding one year, from the time at which it would otherwise expire and the Governor in Council so orders, this Act shall continue in force for that further period.

The true nature and character of *The Continuation of Transitional Measures Act, 1947,* is that those orders and regulations necessary because of the continuation of the emergency arising out of the war should, so far as it may be necessary, be continued but that they might gradually and in an orderly manner be repealed as the conditions of emergency continue to diminish. It is in principle legis-

lation similar to *The National Emergency Transitional Powers Act* and valid under the authority of the *Japanese Reference, supra.*

The Attorney-General of Canada submitted that The Wartime Leasehold Regulations as continued in the Schedule of *The Continuation of Transitional Measures Act, 1947,* were valid legislation in relation to the emergency arising out of the war and for the withdrawal in an orderly manner of measures adopted to meet the emergency. In this he was supported by counsel for the respective parties appearing in support of these regulations.

In this submission the essential question is, therefore, does the emergency arising out of the war still exist. This is primarily a matter that the representatives of the people in Parliament must determine. They are not only familiar with the conditions that obtain throughout the various parts of the Dominion, but they have available to them the records and statistics upon which such a question may be determined. The position of the Courts in the consideration of this question is indicated by Viscount Haldane in the *Fort Frances* case, *supra,* at p. 706:

* * * the effect of the economic and other disturbance occasioned originally by the war may thus continue for some time after it is terminated. The question of the extent to which provision for circumstances such as these may have to be maintained is one on which a Court of law is loath to enter. No authority other than the central Government is in a position to deal with a problem which is essentially one of statesmanship * * * But very clear evidence that the crisis had wholly passed away would be required to justify the judiciary, even when the question raised was one of *ultra vires* which it had to decide, in overruling the decision of the Government that exceptional measures were still requisite.

Parliament in 1947 by the recital and provisions contained in *The Continuation of Transitional Measures Act* and the inclusion of The Wartime Leasehold Regulations in the Schedule thereto declared that the emergency in relation to which the regulations were passed still continued. It was clear, however, from the provisions of that statute that the conditions were changing to the point that no longer was it necessary that the Governor in Council should be authorized to pass new orders and regulations. In fact many of these Leasehold Regulations had already been repealed and at the time of this reference only housing and shared accommodation were subject thereto. All this indicates that the Dominion has been pursuing

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a course of gradual decontrol and when the emergency no longer exists its legislation will be completely repealed. It was no doubt in appreciation of these facts that the Province of Ontario supported the submission on behalf of the Dominion and stated "Parliament must be left with a reasonable time (which has not yet expired) to decontrol in an orderly manner" and "which is being done as rapidly as circumstances warrant". This position was also supported by all of counsel appearing in support of the validity of these regulations.

It was contended that the statement of the Minister of Finance in 1948 embodied and made a part of Order in Council P.C. 5840 submitting this reference should be construed to mean "that the circumstances were such that it was no longer essential for Canada as a whole for the Dominion to continue to deal with the landlord and tenant relationship". This submission does not, except by implication, contend that the emergency no longer exists. As already intimated, the Dominion so long as the emergency continues possesses the authority to legislate in relation thereto and how far it should do so is a matter of statesmanship, in regard to which the following is pertinent:

> It is enough to say that there is no clear and unmistakable evidence that the Government was in error in thinking that the necessity was still in existence at the dates on which the action in question was taken by the Paper Control Tribunal. Viscount Haldane in the *Fort Frances* case, *supra,* at p. 706.

The Minister made the statement because the constitutional validity of these Leasehold Regulations had been challenged in the Courts and because in his opinion the emergency still continued. He was, in these circumstances, concerned that should the Courts declare these regulations invalid that the provinces would be prepared to deal with the problem of rent control and by way of assistance and on behalf of the Government he offered to each province its records, information, experience, staff and "subject to Parliament's approval, to pay the cost of any provincial rental administration for one year". Emphasis was placed upon that portion of the statement intimating that the Federal Government was "ready at any time to vacate the field of rent control to any province which makes a formal request to that effect". This portion must be read and construed as part of the statement as a whole. When so

read it indicates that the emergency still continues and is consistent with the position taken throughout by the Dominion that as the scope of the emergency narrows its legislation will be repealed. It can mean no more than that while the emergency still exists, it has so far eased or narrowed that if a province "makes a formal request" the Dominion will not prevent it operating "in the field of rent control". The Minister's statement does not support either a conclusion that the emergency no longer continues or that it is within the authorities no longer essential for the Dominion to deal therewith.

In considering some of the other objections to the validity of these regulations, it is important to keep in mind that the emergency arising out of the war with Germany and Japan was of such magnitude and extent that it imperilled the existence of the Dominion as a nation; that within the terms of the *B.N.A.* Act the Dominion is authorized to deal effectively with this emergency and in that aspect to legislate in relation thereto. That such legislation may involve provisions that under normal circumstances would be classified as in relation to matters which under s. 92 are assigned exclusively to the provinces does not impair its validity. That as enacted it may affect property and civil rights or other matters enumerated under s. 92 must be admitted. If, however, it be legislation in relation to the emergency, so long as that emergency may continue it must be held to override or suspend the provincial legislation, and, indeed, any Dominion legislation with which it may be in conflict. *In re Gray, supra.*

It is unnecessary to set forth the scope and far reaching effects of the national effort. It is sufficient to observe, and it was not contended otherwise, as part thereof it was necessary that as large a measure of economic stability as possible should be maintained. Legislation toward the attainment of that end was unquestionably legislation in relation to the emergency and therefore competent on the part of the Dominion. Neither this nor the fact that such involved legislation for the control of prices, wages, salaries and industry was contested. Any suggestion that this did not include the control of rent cannot be accepted. Rent, in an important respect, is but the price of building and housing accommodation. When prices, wages and

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salaries are controlled the omission to control rent would at least in part nullify the effectiveness of these controls in the attainment of economic stability. Indeed, these Leasehold Regulations cannot be considered separate and apart from but rather as a part of that body of legislation enacted toward the attainment of economic stability which included prices and trade regulations, control of industries, wages and salaries.

It is equally important toward the attainment of this end that building and housing accommodation should be utilized to the best possible advantage and security of tenure made possible. It was therefore not only necessary that rents be fixed but the termination of the leases should also be subject to control. In this regard it is only necessary to recall that building materials during the period of combat had to be largely directed to other than the construction of commercial and housing accommodation and that this made the situation particularly difficult at those points where population had to be concentrated. Any suggestion therefore that these Leasehold Regulations as originally enacted were not in relation to the emergency arising out of the war cannot be maintained.

That the conditions of the emergency arising out of the war continue after cessation of actual combat has been recognized in both the *Fort Frances* case, *supra,* and the *Japanese Reference, supra.* It was submitted, however, on behalf of the Province of Quebec that under the authorities legislation in relation to the emergency, once the actual combat has ceased, must be confined to the completion of that which had been commenced during the period of hostilities. It was suggested that the *Fort Frances* case supported that view. The statute there in question was S. of C. 1919, 9 & 10 Geo. V, c. 63. This statute does not appear to justify so limited a construction. The Order in Council was passed July 8, 1920. Viscount Haldane stated at p. 707:

> It will be observed that this Order in Council deals only with the results following from the cessation of actual war conditions. It excepts from repeal certain measures concerned with consequential conditions arising out of war, which may obviously continue to produce effects remaining in operation after war itself is over.

In the *Japanese Reference, supra,* the Orders in Council were made originally on December 15, 1945, under *The*

War Measures Act. They were continued as valid legislation in relation to the emergency which still continued under *The National Emergency Transitional Powers Act* which came into force January 1, 1945. These Orders in Council were therefore enacted in the first instance after actual combat had ceased and were held to be valid legislation in relation to the emergency.

Neither of these cases support the limited view here contended for but rather indicate that their Lordships in the Privy Council rested their decisions on the broad basis that Parliament has authority to deal adequately with the emergency so long as it may continue after actual combat has ceased.

It was also submitted on behalf of the Province of Quebec that "the dislocations in changing from a wartime economy to conditions of peace are not by themselves sufficient to justify the invasion by the Dominion Parliament of the exclusive field of competency assigned to the provinces." Support for this submission was sought in the *Board of Commerce* case (1), in which the validity of two statutes enacted by the Parliament of Canada—*The Board of Commerce Act* and *The Combines and Fair Prices Act* (respectively 9 & 10 Geo. V, c. 37 and c. 45) was in question. These statutes were enacted in the postwar period but whether they arose out of dislocations in changing from a wartime to a peacetime economy need not be determined. They were not in relation to any emergency arising out of the First Great War but rather were enacted in respect of other matters and as permanent Dominion legislation. Because they were statutes in relation to matters upon which, under s. 92, the provinces have exclusive power to legislate, they were held to be invalid. It is quite conceivable that dislocations in the postwar period may exist which are not in any proper sense part of the emergency arising out of the war. The jurisdiction, however, of the Dominion is restricted to legislating in relation to the emergency arising out of the war as discussed in the *Fort Frances* case. It is significant that the *Fort Frances* case was decided in the year following the *Board of Commerce* case and Viscount Haldane, Lord Buckmaster and Lord Phillimore were members of the

(1) [1922] A.C. 191.

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Judicial Committee in both cases and Viscount Haldane wrote both judgments. As already stated, in the former the Judicial Committee was dealing with legislation that was not, while in the latter it was dealing with legislation that was in relation to the emergency.

It was also contended that these Leasehold Regulations were as originally enacted invalid because the *War Measures Act* did not "authorize the exercise of the power of delegation in the case of the matters dealt with by P.C. 9029 and the Rental Regulations." In support of this it was contended that the delegated powers had to be found in sub-paragraphs (*a*) to (*f*) of subsection 3 of the *War Measures Act*. This submission is contrary to the express words of the section in which, after providing in clear and comprehensive terms that the Governor in Council may within the terms thereof do whatever he deems "necessary or advisable for the security, defence, peace, order and welfare of Canada," continues "and for greater certainty, but not so as to restrict the generality of the foregoing terms," and then sets out sub-paragraphs (*a*) to (*f*). This section was formerly s. 6 and the foregoing submission was rejected in *In re Gray, supra*. In that case at p. 168 it is pointed out that the enumerated portions instead of qualifying the general terms of the section "emphasizes the comprehensive character of it and pointedly suggests the intention that the words are to be comprehensively interpreted and applied".

The contention that P.C. 9029 "ceased to be valid as soon as Parliament declared the *War Measures Act* as no longer the statute upon which authority therefor was based" is completely answered in the *Japanese Reference, supra*. If that contention had been correct the decision in the *Japanese* case would have been otherwise.

In my opinion The Wartime Leasehold Regulations neither in whole nor in part are *ultra vires* .

LOCKE J.:—By s. 3 of the *War Measures Act*, 1914 (2nd Session, c. 2) it is provided, *inter alia*, that the Governor in Council may do and authorize such acts and things and make from time to time such orders and regulations as he may, by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada.

Without restricting the generality of this language, the section further declares that the powers of the Governor in Council shall extend to all matters coming within certain enumerated classes of subjects which include the appropriation, control, forfeiture and disposition of property and of the use thereof. Under these powers a great variety of regulations were made during the second World War, virtually taking charge of and directing the economic life of Canada, and various boards set up to administer them. These included the Wartime Prices and Trade Regulations, the Wartime Industries Control Board Regulations, the Wartime Wages Control Order, the Wartime Salaries Order, the Mobilization Regulations and the Selective Service Regulations, in addition to the Wartime Leasehold Regulations. The necessity for measures such as these in time of war is apparent and the Leasehold Regulations were merely part of the general control which it was considered necessary to exercise in the interest of the country as a whole.

The *War Measures Act* continued in effect until December 31, 1945. On January 1, 1946, *The National Emergency Transitional Powers Act, 1945,* came into force. That statute contained a declaration that as of the last mentioned date the war against Germany and Japan should for the purposes of the *War Measures Act* be deemed no longer to exist. The preamble to the statute, after reciting the powers vested in the Governor in Council by the *War Measures Act* to make orders and regulations deemed necessary or advisable for the security, defence, order and welfare of Canada, recited in part that:—

> Whereas during the national emergency arising by reason of the war against Germany and Japan measures have been adopted under the *War Measures Act* for the military requirements and security of Canada and the maintenance of economic stability; And whereas the national emergency arising out of the war has continued since the unconditional surrender of Germany and Japan and is still continuing; And whereas it is essential in the national interest that certain transitional powers continue to be exercisable by the Governor in Council during the continuation of the exceptional conditions brought about by the war * * *

By s. 2 the Governor in Council was authorized to make such orders and regulations "as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or

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advisable for the purpose of continuing or discontinuing in an orderly manner, as the emergency permits, measures adopted during and by reason of the war".

By Order-in-Council of December 28, 1945, all orders and regulations lawfully made under the *War Measures Act* and in effect on December 31, 1945, were continued in force, subject to amendment or revocation under *The National Emergency Transition Powers Act, 1945*. The last mentioned statute which by its terms was stated to expire on December 31, 1946, was continued in force until May 15, 1947, pursuant to c. 50 of the Statutes of Canada 1946. *The Continuation of Transitional Measures Act, 1947* continued the Leasehold Regulations in force for a further period.

The preamble to that Act, after reciting the circumstances under which the 1945 statute had been passed, recited that the national emergency rising out of the war in certain aspects had continued and was still continuing and that it was necessary "by reason of the existing national emergency" that certain orders and regulations of the Governor in Council made under the *War Measures Act* and the 1945 Act should be continued in force temporarily, notwithstanding the expiry of *The National Emergency Transitional Powers Act, 1945,* in order to ensure an orderly transition from war to peace. These included the Wartime Leasehold Regulations then in effect. By c. 25, Statutes of 1948, and c. 3, Statutes of 1949, the 1947 Act was amended and continued in force so that, as matters now stand, it will expire on the sixtieth day after Parliament first meets during the present year or on March 31, whichever date is the earlier, provided that if at any time while the Act is in effect addresses are presented to the Governor General by the Senate and House of Commons respectively, praying that the Act should be continued in force for a further period not in any case exceeding one year, and the Governor in Council so orders, it shall continue in force for such further period.

By the order of reference, we are informed that the exceptional conditions brought about by the war which made the Wartime Leasehold Regulations necessary are still continuing and that the orderly transition from war to peace had not yet been completed. In addition to this

information there is included in the order an announcement made in the House of Commons by the Minister of Finance on November 3, 1949, stating that the purpose of the Government was to proceed in an orderly way towards the eventual withdrawal of all wartime controls. We are further informed that the controls imposed by orders made under the authority of the *War Measures Act* and the Acts of 1945 and 1947 have been largely rescinded or relaxed. In the case of the Wartime Leasehold Regulations, the orders now in effect apply to the rentals for and the leasing of housing accommodation and shared accommodation only.

That the *War Measures Act* was *intra vires* Parliament has been long since settled (*Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* (1)). Counsel for the Canadian Federation of Property Owners' Associations contends, however, that the Rental Regulations were outside of the powers vested in the Governor in Council by that statute. As to this, it is my opinion that these regulations fell clearly within the general language of the opening clause of s. 3 as well as within the enumeration in clause (*f*) as dealing with the appropriation, disposition and use of property.

The main ground of objection to the present regulations is that it is said that they trench upon the powers of the Legislatures of the Provinces to exclusively make laws in relation to property and civil rights within their boundaries. That these regulations affect property and civil rights in all of the provinces of Canada, other than Newfoundland, is not open to doubt. For those who attack their validity, it is said that, whatever justification there may have been for the making of the regulations during the period of the war, no present justification exists for their continuance.

While the question we are required to determine is as to whether the Wartime Leasehold Regulations are *ultra vires*, either in whole or in part, since it is not contended that these are not authorized by *The Continuation of Transitional Measures Act, 1947* as amended, the matter involves also the question as to whether that statute and the amending Acts are within the powers of Parliament. It is of importance to note at the outset that the statute

(1) [1923] A.C. 695.

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is temporary in its nature, a fact which is made clear from the language of the preamble. This distinguishes the legislation from that which was considered in *Re The Board of Commerce Act* (1), where, as pointed out in the judgment of Viscount Haldane, the Act was not confined to any temporary purpose but was to continue without limit of time. We are to inquire into and determine what is the true nature and character of this legislation and it is, of course, true that in considering this question the matter is not determined by the language used in the preamble or elsewhere in the statute (*Attorney-General for Ontario* v. *Reciprocal Insurers* (2), *Attorney-General for Manitoba* v. *Attorney-General for Canada* (3). There is, however, in the present case no suggestion that the legislation is colourable in the sense that Parliament might be said under the guise of legislation to authorize measures deemed necessary for the peace, order and good government of Canada as a whole, of attempting to usurp provincial powers in respect of property and civil rights, or that the regulations are continued in force with any such object. There is nothing here to suggest that the recital in the Act that the national emergency arising out of the war in certain aspects has continued and still continues, making it necessary to continue the regulations in force temporarily, is not the considered opinion of Parliament, and the statement in the order of reference that the exceptional conditions brought about the war which made the Wartime Leasehold Regulations necessary are still continuing must, on a reference of this nature, be accepted as expressing the opinion of the Executive Government. This is not to say that, in other circumstances, regulations enacted to cope with a situation resulting from a lengthy war under a temporary statute of this nature might not, in the course of time, be found to be beyond the powers of Parliament, but it would be necessary that it should be very clear that the condition of emergency which necessitated their maintenance had passed away before the Court could properly be asked to overrule the decision of the Government that these exceptional measures were still necessary: *Fort Frances Pulp and Power Company* v. *Manitoba Free Press* (4).

(1) [1922] 1 A.C. 191.
(2) [1924] A.C. 328 at 337.
(3) [1925] A.C. 561 at 566.
(4) [1923] A.C. 695 at 706.

In my opinion, upon the material before us in the present matter, the question submitted is determined in favour of the validity of *The Continuation of Transitional Measures Act, 1947* as amended and of the regulations by the decisions of the Judicial Committee in the *Fort Frances* case and in *Co-Operative Committee on Japanese Canadians* v. *Attorney-General for Canada* (1).

My answer to the question, therefore, is:—The Wartime Leasehold Regulations are not *ultra vires,* either in whole or in part.

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

Solicitor for the Attorney-General of Ontario: *C. R. Magone.*

Solicitor for the Attorney-General of Quebec: *L. E. Beaulieu.*

Solicitor for the Tenants within Canada: *J. J. Robinette.*

Solicitors for the Canadian Legion of the British Empire Service League: *Howe & McKenna.*

Solicitors for the Canadian Federation of Property Owners Associations: *Chitty, McMurty, Ganong & Keith.*

Solicitor for the Canadian Congress of Labour: *M. W. Wright.*

(1) [1947] A.C. 87 at 101, 102.

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* Mar. 14, 15
* Dec. 5

FRANK MILLER, Chief Councillor of the Six Nations of the Grand River, on behalf of himself and all others, members of the said Six Nations of the Grand River, and the said Six Nations of the Grand River. (SUPPLIANTS) ..... } APPELLANTS;

AND

HIS MAJESTY THE KING (RESPONDENT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Petition of Right—Whether the Crown in the right of the Dominion of Canada liable for alleged breaches of trust or debts of (a) the government of the Province of Canada, (b) the government of the Province of Upper Canada—s. 111. The British North America Act.

The appellant seeks by Petition of Right to hold the Crown in the right of Canada liable in damages for breaches of trust and contract. The breaches alleged fall under three heads: (1) that in 1824 the Parliament of Upper Canada by statute authorized the flooding by the Welland Canal Co. of some 1800 acres of lands previously granted to the Six Nations Indians, appellant's ancestors, by the Crown and although the statute provided for compensation, the Department of Indian Affairs or its officers as trustees of the said Indians failed to collect it; (2) that in 1836 the Government of Upper Canada authorized a free grant of a further 360 acres of said Indians' lands to the Grand River Navigation Co. and that the said trustees failed to secure compensation therefor; (3) that in 1798 the appellant's ancestors surrendered certain lands to the Crown under an agreement whereby the said lands were to be sold and the purchase moneys held in trust for the said Indians benefit and that in 1836 the said government without the knowledge or consent of the Indians and without authority contracted to purchase stock of the Grand River Navigation Co. for them, and that the said government and, after the Union of 1840, the Government of the Province of Canada, pursuant to such contract paid out $160,000 from the said Indian funds which on the failure of the company was lost. Appellant claims that since by s. 111 of the *British North America Act* the Crown in the right of the Dominion of Canada assumed liability for the debts of the former Province of Canada, the said sum with interest should be restored to the funds held by the present Department of Indian Affairs and the federal government on behalf of the appellants.

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

Held: that as to heads one and two of the Petition, any breach of trust, if it occured, took place before the Act of Union of 1840 and appellant had not shown any basis of obligation upon the Crown in the right of the Dominion of Canada.

As to head three, the appeal was allowed and the matter referred back to the Court of Exchequer.

The question as to whether the claim was barred by the *Exchequer Court Act* or the *Statute of Limitations* was not dealt with by the trial judge nor by this Court.

APPEAL from the judgment of the Exchequer Court of Canada, O'Connor J., (1) answering in the negative the first of two questions of law set down for argument, viz: (1) Assuming the allegations of fact contained in the Petition of Right read with the particulars filed by the Suppliants to be true, does a Petition of Right lie against the Respondent for any of the relief sought by the Suppliants in the said Petition? (2) If a Petition of Right would otherwise lie against the Respondent for any of the relief sought by the said Petition, is the said Petition barred by the *Exchequer Court Act* and the *Statute of Limitations* (Ontario)?

Auguste Lemieux, K.C. for the appellants.

W. R. Jackett for the respondent.

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

KERWIN J.:—This is an appeal by the suppliants against a decision of the Exchequer Court (1) answering in the negative a question of law set down for determination prior to the hearing. The question is as follows:—

> Assuming the allegations of fact contained in the Petition of Right read with the particulars filed by the Suppliants on October 21, 1943, and September 5, 1944, pursuant to orders made by the President of this Honourable Court on June 3, 1942, and December 21, 1943, respectively, to be true, does a Petition of Right lie against the Respondent for any of the relief sought by the Suppliants in the said Petition?

The claims in the petition of right may be classified under three headings. 1. Certain lands in what is now the Province of Ontario were, on February 5, 1798, surrendered by the Six Nations Indians to the then reigning Sovereign by a document which concluded:— "and do

(1) [1948] Ex. C.R. 372.

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beseech his said Majesty to grant the same in fee to the Persons in the said Schedule mentioned for the several and respective considerations to the said Lands annexed which are to receive from the said Persons, as an Equivalent for the same." The unsatisfactory nature of the petition has been pointed out in the reasons for judgment in the Exchequer Court but, giving it the most favourable construction that can be suggested on behalf of the suppliants, this claim, which is for the value of part of the lands so surrendered destroyed by flooding, arose before the Act of Union of 1840 and there is no way in which the respondent can be held responsible. The respondent is His Majesty in the right or interest of the Dominion of Canada which, of course, came into existence in 1867. The same consideration is sufficient to dispose of claim 2, which is for the value of lands contained in a free grant to the Grand River Navigation Company in 1836.

There is more difficulty as to claim 3 as to which it is alleged that in or about the year 1833 the Government of Upper Canada "and subsequently the Government of Canada after the Union of 1840" paid out of the proceeds of the sale of the lands surrendered in 1798, the sum of $160,000 for the purchase of shares of the Grand River Navigation Company. It will be noticed that the only difference so far as dates are concerned between claims 1 and 2, on the one hand, and claim 3, on the other, is that, in the latter, the claim is made that the Government of Canada after the Union of 1840 paid money for the purchase of the shares. The respondent argues that the petition of right shows, at the most, an obligation of His Majesty in the right of the Imperial Government. The allegations are contradictory in many respects but, in disposing of the question of law, they should not be construed too strictly against the suppliants, and I am therefore disposed to leave the matter as the facts to be presented to the trial judge would warrant. Whether or not a trial ensues will depend upon the outcome of the argument of the second question of law set down for determination, viz., as to whether the claims advanced are barred by the *Exchequer Court Act* and the Ontario *Statute of Limitations*. The disposition of the present appeal will

be without prejudice to such question of law being considered and dealt with so far as the third claim is concerned.

The appeal should be allowed and the answer to the question of law should be "No" as to claims 1 and 2, and "Yes" as to claim 3. While the Exchequer Court simply answered the question in the negative, the costs of and incidental to the hearing were made costs in the cause. That direction might well stand. The costs of the appeal should be to the appellants in the cause, subject to this, that, in any event, they should not receive any costs of or in connection with their factum.

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

KELLOCK J.:—In his petition, appellant claims with respect to three separate matters; first, the flooding of approximately 1,800 acres of land on the Six Nations Indian Reserve near Brantford, Ontario, by reason of the execution of works pursuant to the Statute of 1824, 4 Geo. IV, c. 17, and amending Acts, relating to the Welland Canal; second, the taking by Order-in-Council of October 20, 1836, without compensation, of some 368 acres for the purposes of the Grand River Navigation Company; and third, the use made by or at the instance of the Crown, before and after 1840, of certain trust moneys belonging to the said Six Nations Indians in the sum of $160,000.

By his petition and particulars appellant alleges that the lands in claims one and two, and other lands, were the subject of a patent dated the 14th of January, 1793, in favour of "the chiefs, women and people of the said Six Nations and their heirs forever". It is further alleged that on or about the 5th of February, 1798, certain of the said lands were surrendered to the Crown by the Indians for the purpose of being re-granted to certain purchasers, which surrender was accepted by the Crown for the said purpose, the conveyances to the purchasers to be delivered by the Crown upon the production of a certificate from certain trustees authorized by the Indians to receive the mortgages to be given back, certifying that the purchasers

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had done everything necessary to secure to the Indians and their posterity the "stipulated annuities and considerations which they agree to give for the same".

The petition then alleges the passing of the Act of 1824 by the Parliament of Upper Canada and the flooding in the year 1826 of 1826 4/5 acres by the execution of the works without any compensation at any time having been made to the Indians, although provision was made by the statute for that purpose. Section 9 of the statute provided that if the canal should pass through any land in possession of any tribe or tribes of Indians, or if any act occasioning damage to their property or possessions should be done under the authority of the Act, compensation should be made to them in the same manner as provided by the statute with respect to the property, possession or rights of other individuals. "The Chief Officer of the Indian Department within this province" was required to name an arbitrator on behalf of the Indians and any amount awarded was to be paid to the said Chief Officer "to the use of the said Indians". It was subsequently provided in 1826 by 7 Geo. IV, c. 19, s. 5, that all matters to be determined by arbitration under section 7 of the earlier statute should be referred as therein provided "so that the award or awards of such arbitrators may be made public and declared on or before the first day of September next (1826) and that all and every sum of money by such an award or awards directed to be paid by the said company shall be paid to the party or parties entitled to receive the same on or before the first day of October next".

The petition further alleges in paragraph 4 that since the year 1784 the Department of Indian Affairs, through its Superintendent-General or other officer or officers charged with its control and management, was an express trustee for the Indians with respect to the control and management of their lands and property, including moneys received on their behalf. Appellant claims that it was the duty of the officer named in the Act of 1824, namely, "the Chief Officer of the Indian Department" to collect the amount to which the Indians were entitled in respect of the flooding of their lands and that he failed to take any steps to that end, whereby they have suffered loss.

The petition also alleges that on the 20th of October, 1836, an Order-in-Council was passed in Upper Canada declaring 368 7/10 acres of the Indian lands to be a free grant to the Grand River Navigation Company which had been incorporated in 1832 by 2 Wm. IV, c. 13. It is alleged that a patent of the said lands was issued to the company pursuant to this Order-in-Council and that the Indians at no time received any compensation for the lands so taken and that the Crown as their express trustee committed a breach of trust in failing to see that such compensation moneys were paid.

With respect to these first two heads of claim the appellant is in the difficulty that any breach of trust, if it occurred, took place before the Act of Union of 1840, and the appellant has not shown any basis of obligation resting upon His Majesty in the Right of the Dominion of Canada in respect of such a liability, although with respect to liabilities arising after that date section 111 of the *British North America Act* is relevant. I think therefore that the appeal cannot succeed with respect to these two heads of claim.

Coming to the third head of claim, it is alleged by the petition that as a result of the surrender and its acceptance a definite contractual agreement arose under which the Government of Upper Canada undertook to take charge of and sell the surrendered lands, receive the purchase moneys and hold the same intact "for the benefit of the suppliants' ancestors separate and distinct from the public money of the province, for the purpose of providing a certain sure revenue for the support of the suppliants or their ancestors". It is further alleged that in or about the year 1833 the Government of Upper Canada, depository and in control of the funds arising from the sale of the Six Nations lands, of which a very considerable amount was then in the custody and control of the Receiver General of the said province, contracted to purchase in the name of the Six Nations, but without their knowledge or consent, 6,121 shares of the par value of $25 each of the Grand River Navigation Company, and that the Government of Upper Canada, through the said Receiver-General, and subsequently the Government of Canada after the Union of 1840, paid, without further authority, out of collections

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made and arising from sales of lands, the sum of $160,000. It is alleged that these payments were in breach of the contractual agreement referred to. The suppliants claim that the said sum of $160,000 with interest should be restored to the funds held by the Department of Indian Affairs and the present government, on behalf of the Indians, the whole of this money having been illegally paid away for the said purpose and lost.

It is further alleged that by an Act of the Parliament of Canada of the 30th of August, 1851, c. 151, the Navigation Company was empowered to raise 40,000 pounds on debentures of the then town of Brantford by reason of which there was created in favour of the said town a mortgage upon all the assets of the said company as a result of which the said assets were ultimately foreclosed by the said town and lost to the Indians.

As already pointed out, it is also alleged by the petition that the Department of Indian Affairs from its formation in 1784 to the present time is an express trustee of the lands and property of the Indians, including all Indian money paid to it. It is also alleged that, in addition to the relief claimed on the basis of the "Statutes, Ordinances and Orders-in-Council" particularized above, the suppliants are "entitled to succeed on equitable grounds" and the specific claim with respect to the $160,000 is for "repayment of cash paid on stock of the Grand River Navigation Company from *trust* funds of suppliants".

On behalf of the respondent it is first contended that the allegations of fact in the petition and particulars do not show any agreement by His Majesty or anything held by His Majesty in trust. It is said that reference to the Crown (presumably in documents or statutes) as trustee for the Indians and to the Indians as wards of His Majesty is not a technical use of such terms but such references are merely descriptive of the general political relationship between His Majesty and the Indians. It is also contended that the only fact relied upon to show a trust or agreement is the acceptance by the Governor-in-Council in 1798 of the surrender of the Indian lands. In addition to the particular allegation of trust arising out of the surrender and acceptance in 1798 there is, however, the further allegation in the petition that the Crown, through the Indian

Department and its officers, was always a trustee for the Indians with respect to lands or moneys of the Indians.

In *Civilian War Claimants Association* v. *The King* (1), Lord Atkin said:

> There is nothing so far as I know, to prevent the Crown acting as agent or trustee if it chooses deliberately to do so.

In *Kinloch* v. *Secretary of State for India* (2), Lord Selborne, L.C., at 623 said:

> Still it would not be altogether satisfactory to proceed on that ground alone * * * if it really appeared that the intention of the Crown, in the Order in Council and the Warrant which passed from the Crown upon this subject, was to constitute the person who for the time being might fill that office of state a trustee in the ordinary sense of the word, liable to account in a Court of Equity to private persons.

At page 625 the Lord Chancellor further said:

> Now the words "in trust for" are quite consistent with, and indeed are the proper manner of expressing, every species of trust—a trust not only as regards those matters which are the proper subjects for an equitable jurisdiction to administer, but as respects higher matters, such as might take place between the Crown and public officers discharging, under the directions of the Crown, duties or functions belonging to the prerogative and the authority of the Crown. In the lower sense they are matters within the jurisdiction of, and to be administered by, the ordinary Courts of Equity; in the higher sense they are not. What their sense is here, is the question to be determined, looking at the whole instrument and at its nature and effect.

I think the law is correctly stated in *Lewin on Trusts*, 14th Ed. p. 25:

> The Sovereign may sustain the character of a trustee, so far as regards the capacity to take the estate, and to execute the trust.

The authors go on to state that doubts have been entertained whether, the subject can by any legal process, enforce the performance of the trust. They add at p. 26:

> The subject may, undoubtedly, appeal to the Sovereign by presenting a petition of right, and it cannot be supposed that the fountain of justice would not do justice.

In *Pawlett* v. *Attorney-General* (3), the plaintiff had executed a mortgage in favour of a mortgagee who had died and his heir being attainted of high treason the King had seized the lands. The plaintiff thereupon exhibited a bill against the King and the executor, seeking redemption of the mortgage, and the question that arose was whether he could have any remedy against the King for

(1) [1932] A.C. 14 at 27.
(2) (1882) 7 A.C. 619.
(3) (1668) Hardres, 465.

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redemption. It was decided by Lord Hale and Baron Atkyns that the proceedings would lie. In *Esquimalt and Nanaimo Rly.* v. *Wilson* (1), the Judicial Committee in referring to the judgment of Baron Atkyns, said:

> It was stated in the report that he was strongly of opinion that the party ought in this case to be relieved against the King, because the King was the fountain and head of justice and equity, and it was not to be presumed that he would be defective in either, and it would derogate from the King's honour to imagine that what is equity against a common person should not be equity against him.

It is provided by section 18 of the *Exchequer Court Act*, R.S.C. 1927, c. 34:

> The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be subject of a suit or action against the Crown * * *

The effect of this section is to clothe the Exchequer Court with jurisdiction with respect to claims maintainable against the Crown whether under the former practice they were maintainable only by petition of right or otherwise.

With respect to a contention that there was no jurisdiction in the ordinary courts as to claims against the Crown where a petition of right would not lie, their Lordships in the *Esquimalt* case said at page 365:

> But there are many cases in which petition of right is not applicable in which the Crown was brought before the Court of Chancery, and the Attorney-General, as representing the interests of the Crown, made defendant to an action in which the interests of the Crown were concerned * * *

At page 367 their Lordships referred to what was said by Lord Lyndhurst in *Deare* v. *Attorney-General* (2), namely:

> I apprehend that the Crown always appears by the Attorney-General in a Court of Justice, especially in a Court of Equity, where the interest of the Crown is concerned. Therefore, a practice has arisen of filing a bill against the Attorney-General, or of making him a party to a bill, where the interest of the Crown is concerned.

Their Lordships proceeded:

> This statement, though made on the equity side of the Court of Exchequer, is certainly not limited to the Chancery proceedings that were instituted in that Court; it is of wide and general application. It is in entire agreement with the principles enunciated by Baron Atkyns in the earlier authority, and it is recognized as being the existing practice in the Courts today.

(1) [1920] A.C. 358.

(2) (1835) 1 Y. & C. 197, 208.

With respect to the procedure by petition of right their Lordships said at 364:

> That procedure is adopted for the recovery from the Crown of property to which the applicant has a legal or *equitable* right, as, for example, by proceedings equivalent to an action of ejectment or the payment of money.

Section 7, subsection 1, of the *Petition of Right Act*, R.S.C. 1927, c. 158, is as follows:

> If the petition is presented for the recovery of any real or personal property, or any right in or to the same, which has been granted away or disposed of by or on behalf of His Majesty, *or his predecessors*, a copy of the petition and fiat, endorsed with a notice to the effect of the Form C in the schedule to this Act, shall be served upon or left at the last or usual or last known place of abode of the person in possession or occupation of such property or right.

Their Lordships in the *Esquimalt* case at page 364 said in relation to the very similar section of the British Columbia legislation:

> Sect. 7 shows that where a petition of right is presented to recover real or personal estate or any right granted away or disposed of on behalf of His Majesty, a copy is to be left at the house of the person last in possession, *showing that the main claim is against the Crown*, that the person last in possession is not necessarily a proper party to the suit, but that, in order that he may be affected with knowledge, provision is made that he should be served in the manner indicated.

In *Hodge* v. *Attorney-General* (1), the title-deeds of a leasehold estate had been deposited with bankers, by way of equitable mortgage. The depositor was subsequently convicted of felony and a bill was filed by the mortgagees against the Attorney-General for a sale of the property. Alderson B., sitting in equity, held that the court could declare that the plaintiffs were equitable mortgagees and directed the Master to take an account of what was due to the plaintiffs and decreed that the plaintiffs should hold possession of the property until their lien was satisfied. He held that he did not have any jurisdiction to order a sale or to order the Crown to reconvey.

I see no more difficulty in the present instance, should the facts warrant, in making a declaration that the moneys in the hands of the Crown are trust moneys and that the appellant and those upon whose behalf he sues are cestuis que trust, even although the court could not direct the Crown to pay. In this latter event it is inconceivable that at this date, any more than in the time of Baron Atkyns,

(1) (1838) 3 Y. & C. 342.

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the Crown, as the fountain of Justice, would not do justice. I think, however, no such difficulty lies in the way of an order for payment.

In *Feather* v. *The Queen* (1), at 294, Coburn C.J., delivering the judgment of the court said:

> We concur with that court in thinking that the only cases in which the petition of right is open to the subject are, where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money * * *

If this is so with respect to moneys of the subject as to which no trust exists, it cannot be any the less so because the moneys coming to the hands of the Crown are impressed with a trust in favour of the suppliant and there can be no objection, as urged by Mr. Jackett, that the Crown has paid away the moneys. This situation is expressly recognized in section 7 of the *Petition of Right Act,* already cited, and in *In re Gosman* (2) it was held that moneys transferred to the Crown by the trustees and executors of the will of a deceased person where no next-of-kin had been discovered were recoverable by the next-of-kin, although in the meantime the moneys had been paid away by the Crown.

As to the moneys received in respect of the sale of the lands, O'Connor J. construed the petition to allege that they had been received by the trustees for the Six Nations. In this he has, I think, been misled by a seeming ambiguity. In a letter of February 20, 1798, to the Duke of Portland, it is stated that the trustees were "to receive for *their* use mortgages and other securities for the payment to *them* of the several and respective considerations stipulated". This, in my opinion, means that the trustees were merely to hold the securities, not collect them; the words "for the payment to them" describe the obligations for which the securities were given; "their" and "them" signify the Indians. This is confirmed by the minute of council of February 5, 1798, "to secure to the Five Nations and their posterity the stipulated annuities and considerations which they agree to give for the same". The same minute speaks of the trustees as "authorized to receive" mortgages of the said lands. Paragraphs 14 and 15 of the

(1) (1865) 6 B. & S. 257.

(2) (1880) 15 Ch. D. 67; 17 Ch. D. 771.

petition distinctly allege that the Crown was to and did receive the money. The reason for putting the mortgages into trustees would seem to be the obvious one of enabling suit or action to be taken without the difficulty or inconvenience that would attend them in the name of the Crown.

I take the allegations, therefore, to be: that in consideration of the surrender, the Crown, whether acting with Imperial or Colonial advisers, undertook to convey the property to the purchasers named and to others thereafter to be named, to receive the purchase moneys and to maintain them as a converted form of the lands sold for the purposes of a tribal enjoyment equivalent to that to which the Six Nations were entitled under the grant; and that by transmission this obligation has become assumed by the Crown in right of the Dominion. Although the matters present relations of the nature of a trust, they contain likewise the ordinary elements of a contract.

Under the arrangements of 1798 the persons nominated by the Six Nations to receive the securities were the Acting Surveyor General, the Superintendent of Indian Affairs, both officers of the Crown, and one, Alexander Stewart, a barrister. The petition does not show how long these persons acted or how it came about that the Department of Indian Affairs became substituted. Some further light may be obtained from subsequent legislation.

After Union by the Act of 1841, 4 and 5 Victoria, c. 74, it is recited that:

> Whereas three-quarters of the stock of the Grand River Navigation Company is held *in trust* and for the benefit of the Six Nations Indians; and whereas by the provision of the Act incorporating the said Company, *the persons in whose name such Stock is so subscribed and held for the said Six Nations Indians,* have no adequate influence in the appointment of the Directors by whom the affairs of the said Company are regulated and managed * * *

The statute proceeds to enact that it should be lawful for the Governor of the province by and with the advice and consent of the Executive Council to nominate and appoint two directors at every election so long as the proportion of three-quarters of the capital stock should continue to be held for the use and benefit of the said Six Nations Indians. The reason for this enactment was that

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it had been provided by section 22 of the Act incorporating the company that no one person should have more than fifteen votes regardless of the number of shares held.

A further development with respect to the holding of these shares is evidenced by the Act of 1853, 16 Victoria, c. 256. By section 1 the holding of a special meeting of stockholders of the company was authorized and by section 2 it was provided that the question to be put at the meeting was whether the company and all works connected therewith should or should not be placed under the control and management of the government of the province. The proviso to the section reads:

> Provided always that inasmuch as three-fourths of the Stock of the Company is held *in trust* for the benefit of the Six Nation Indians, the decision so come to by the said shareholders, if in the affirmative, shall not be valid or binding until ratified and confirmed by the *Governor as Trustee for the said Six Nation Indians.*

In 1860 by 23 Victoria, c. 151, section 3, it was provided:

> All moneys or securities of any kind applicable to the support or benefit of the Indians or any tribe or band of Indians and all moneys accrued, or hereafter to accrue, from the sale of any lands reserved or held in trust as aforesaid, shall, subject to the provisions of this Act, be applicable to the same purposes and be dealt with in the same manner as they might have been applied to or dealt with before the passing of this Act.

And by section 8 it is provided:

> The Governor-in-Council may, subject to the provisions of this Act, direct how, and in what manner, and by whom, the moneys arising from sales of Indian lands and from the property held or to be held in trust for the Indians, shall be invested from time to time, and how the payments to which the Indians may be entitled shall be made, and shall provide for the general management of such lands, moneys, and property
> * * *

It does not appear who in 1841 were "the persons in whose name such stock is so subscribed and held for the said Six Nation Indians." When the history of the dealings from time to time with the Indian moneys subsequent to their receipt is disclosed from the official records, the court will be in a position to say what was and is the position and obligations in law of the Crown with respect to the moneys in question. For that purpose the matter must go to trial.

It is also contended on behalf of the respondent that if the allegations in the petition show any legal obligation on the part of His Majesty, it is an obligation of His

Majesty in right of the Imperial Government. It is said that until 1855, or later, the Imperial Government retained control of the administration of Indian Affairs in Canada and reference is made to *Rex* v. *Hill* (1); *St. Catherine's Milling and Lumber* v. *The Queen* (2); and *Easterbrook* v. *The King* (3). The statements in these judgments are all, of course, statements of fact and their applicability to the case at bar will depend upon the evidence to be adduced. It would at present appear however, from the Act of 1841 and the Act of 1853, already referred to, that, whatever may have been the general situation, nevertheless, with respect at least to the moneys here in question, the local government was purporting to exercise some measure of control. It is sufficient for the present purposes to say that the Crown's contention cannot be given effect to at this stage and will depend ulimately for whatever force it may have upon the evidence.

It is next contended on behalf of the Crown that any legal claim which might be shown by the allegations of fact in the petition arose prior to 1840, and therefore, the appellants cannot rely upon the provisions of section 111 of the *British North America Act*. I do not read the petition as thus restricted but as alleging payments out of the moneys in question after the Union of 1840. It may be that these payments were all made in pursuance of one contract to buy the shares alleged to have been made in 1833, in which event it may be contended on the part of the appellant that payments made after the Union of 1840 cannot be justified on that ground if the contract was illegal when made. It may be however, that the payments after Union were independent transactions. That again is a matter for the evidence.

The respondent in its factum, although the point was not mentioned in argument, contends that the appellant and those on whose behalf he sues, have not shown that they, as distinct from the original members of the Six Nations living in 1798, are entitled to any interest in the subject matter of the petition. No difficulty was felt on this score in *Henry* v. *The King* (4). Without approving or disapproving of anything decided in that case I do not think this is an objection which can or should be dealt with at

(1) (1907) 15 O.L.R. 406 at 411.
(2) (1888) 14 A.C. 46 at 54.
(3) [1931] S.C.R. 210 at 214.
(4) (1905) 9 Ex. C.R. 417.

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this stage. When the evidence is fully developed the point may or may not be of importance. I would leave it to be dealt with at the trial.

I would allow the appeal with respect to the claim for $160,000 and refer the same back to the Exchequer Court. The learned trial judge below did not, by reason of the conclusion to which he came on the first question, deal with the *Statute of Limitations* which was the subject of the second question, and the reference back will be subject to the determination of that question. This will raise the interesting question as to whether persons with the limited civil rights of the Indians can be barred by the statute. The matter was not argued before us and I do not deal with it.

As to costs, I agree with the order proposed by my brother Kerwin.

LOCKE J.:—The question set down for argument by an order made under the provisions of Rule 149 of the Exchequer Court states the matter to be determined as being whether, assuming the allegations of fact contained in the Petition of Right and the particulars delivered by the suppliant to be true, a petition of right lies against the respondent for any of the relief sought. This has been treated properly, in my opinion, as raising also the question as to whether the Petition of Right discloses any cause of action, and the matter has been disposed of by the learned trial judge upon this footing.

In so far as the claim of the suppliants is to recover damages in respect of the lands flooded by the works of the Welland Canal in the year 1826 and for payment of the value of the lands said to have been granted to the Grand River Navigation Company in 1832 are concerned, I agree that the appeal fails. Apart from the unfortunate amendment to the petition made on April 9, 1943 which, if taken literally, would be fatal to the claim in respect of the lands submerged, it is disclosed upon the face of the petition that the acts complained of took place when the administration of Indian Affairs was in the hands of the Province of Upper Canada. While by section 111 of the *British North America Act* the Dominion of Canada assumed liability for the debts of the Province of Canada, it is neither suggested in the pleadings nor contended in argument before

us that by the Act of Union of 1840 the Province of Canada became liable for liabilities of the Province of Upper Canada of the nature suggested.

As to the claim advanced in respect of the amount of $160,000 or part of it, said to have been expended out of the funds of the Six Nations Indians by the Province of Canada for the purchase of Grand River Navigation Company stock, and the claim for interest, I think there is error in the judgment appealed from.

By paragraph 13 of the Petition of Right, it is alleged that on February 5, 1798, Captain Joseph Brant, acting under a Power of Attorney from certain chiefs of what were then the Five Nations Indians, in pursuance of arrangements made with the Government of Upper Canada, executed a formal surrender to the Crown of "the lands to be sold." When asked for particulars as to the nature of the deed of surrender, the suppliants delivered a copy of the grant which disclosed that the request advanced on behalf of the Five Nations Indians was that the surrender of 352,707 acres of land be accepted for the sole purpose of enabling His Majesty to grant the lands to certain named purchasers for the consideration stated in a schedule to the document. The consideration for the purchase which aggregated an amount in excess of £42,000 was not to be paid to the Crown but to the Acting Surveyor-General, the Superintendent of Indian Affairs for the District, and Alexander Stewart, Esq., described in a letter from the Honourable Peter Russell, President of the Executive Council of Upper Canada to the Duke of Portland, Secretary for the Colonies dated February 20, 1798, as the persons named by the Five Nations as "their trustees to receive for their use mortgages and other securities for the payment to them of the several and respective considerations stipulated." By paragraph 14 the suppliants alleged that as a result of the negotiations between Brant and the Provincial Government of Upper Canada an agreement was entered into whereby the Government was to take charge of and sell the lands and receive the purchase money and hold the same intact for the benefit of the suppliants' ancestors separate and distinct from the public money of the Province for the purpose of providing revenue for the support of the Five Nations.

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By paragraph 15 it is alleged that:—

> In or about the year 1833 the Government of Upper Canada, depositary and in control of the funds arising from the sale of Six Nation lands, of which a very considerable amount was then in the custody and control of the Receiver-General in said Government charged with the duty of selling lands belonging to Suppliants, and receiving the funds arising from such sales and disbursing the same under the contractual agreement made between Joseph Brant aforesaid and the Government of the Province of Upper Canada under which said Government was to hold the proceeds of such lands for the purpose of assuring to your Suppliants and their posterity an annuity for their future support, in despite of the terms of said contractual agreement aforesaid, contracted to purchase in the name of your Suppliants, but without their knowledge or consent, 6,121 shares of $25 each of the stock of the Grand River Navigation Company, and said Government of Upper Canada, through the said Receiver General of its Government and subsequently the Government of Canada after the Union of 1841, paid without further authority out of collections made and arising from said sales of lands authorized and directed to be made by the terms of said contractual agreement with said Brant, the sum of $160,000 from the proceeds of such sales so illegally contracted for without authority to be purchased by him in the name of your Suppliants to complete the payment for such shares, and Suppliants charge that said payment was made in breach of the contractual agreement to hold the whole of said proceeds of sales for the support of your Suppliants or their ancestors as occasion might arise.

and by paragraph 16 the suppliants asked that the said sum should be restored with interest to the funds held by the Department of Indian Affairs and the present Government of Canada "on which is binding and effective the contract founded (sic) by said Brant in 1798." When asked for particulars as to the identity of the person or persons who made the various payments out of the various funds upon the purchase of the stock, the suppliants replied that the information was in the possession of the Indian Affairs Branch of the Department of Mines and Natural Resources.

As pleading, the language of these paragraphs leaves much to be desired. Paragraph 15 speaks of the Government of Upper Canada being "charged with the duty of selling lands belonging to suppliants" and refers to the funds paid for the Grand River Navigation Company stock as being paid "out of collections made and arising from said sales of lands" but without further explanation I think this must be taken to refer to the lands conveyed to the nominees of the Five Nations Indians under the directions given by Brant in 1798, and not to the proceeds of the sale of other lands. While the reference to the

Power of Attorney given to Brant by the Five Nations Indians referred to in paragraph 13 shows that the lands in question were surrendered simply for the purpose of permitting grants to be made to the persons to whom the Indians desired the lands to be sold and the particulars of the deed of surrender show that the consideration for the purchase was to be paid over to the individuals named by the Indians as trustees and these persons are referred to in the communication from Peter Russell to the Secretary for the Colonies as the "trustees to receive for their use mortgages and other securities for the payment to them of the several and respective considerations stipulated" and the pleading does not allege that these trustees thereafter paid over the consideration to the Crown to be held on behalf of the Indians, I think when these paragraphs are read together it is made sufficiently clear that the suppliants claim that the funds realized from the sale came into the possession of the Crown and were held on behalf of the Indians. The identity of the trustees, named, two of whom were the Honourable David William Smith, His Majesty's Acting Surveyor General, and Captain William Claus, His Majesty's Deputy Superintendent of Indian Affairs, and the fact that by c. 74 of the Statutes of the First Parliament of the Province of Canada (4 & 5 Vict.) it was recited that three-quarters of the stock of the Grand River Navigation Company were held in trust for the benefit of the Six Nations Indians (presumably by the Crown) and it was provided that the Governor of the Province, by and with the advice and consent of the Executive Council, might nominate two of the directors of the company, would at least indicate either that possession of the funds by the trustees had been treated from the outset as possession by the Crown or that possession of the funds had thereafter been taken. These are facts which undoubtedly should have been more clearly pleaded but that this is what the suppliants really contend is, in my opinion, evident. It is alleged in paragraph 15 that the Government of Upper Canada contracted to purchase the shares in the Grand River Navigation Company and that the said Government prior to 1841 and the Government of the Province of Canada thereafter paid in the aggregate $160,000 out of the moneys held in trust for the Indians

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upon the purchase of the stock, without saying what amounts were paid by the respective Governments. It is further in the same paragraph alleged that the Government of Upper Canada was to hold the proceeds of the sale of the lands for the purpose of assuring to the suppliants and their posterity an annuity for their future support and that the moneys paid out for the Grand River Navigation Company stock were so paid without authority from the Indians in breach of the agreement between them and the Crown, and in so far as this relates to the moneys disbursed by the Government of the Province of Canada I am of the opinion that a cause of action against that Province is disclosed. While again the pleading is defective, I think the statement in paragraph 22 (*g*) that the suppliants rely upon the *British North America Act* should here be construed as meaning that it is claimed that by virtue of section 111 of that Act His Majesty in right of the Dominion of Canada is liable for the claim as being a debt of the former Province of Canada, liability for which was imposed upon the Dominion by the Statute, and that a cause of action in respect of this part of the claim as against the respondents is shown. Section 111 reads that "Canada shall be liable for the debts and liabilities of each province existing at the Union." The question as to whether this gave a right of action directly against the Dominion in respect of the liability of the province was not raised before us and is not, in my opinion, one of the questions set down for argument and I accordingly express no opinion upon the point.

As to the second branch of the question, I am of opinion that a petition of right lies for the above mentioned part of the relief claimed and that there is jurisdiction in the Exchequer Court for the reasons stated by my brother Kellock.

The question as to whether the claim is barred by the *Exchequer Court Act* and the *Statute of Limitations* was not dealt with by the learned trial judge and was not argued before us and I do not deal with it.

The appeal should be allowed as to the claim advanced in regard to moneys said to have been paid out by the Province of Canada after the date of the Union and as

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to the interest upon these moneys, but as to the remainder of the claims should be dismissed. I agree with the order as to costs proposed by my brother Kerwin.

Appeal allowed as to the claim advanced in respect of moneys alleged to have been paid by the old Province of Canada for the purchase of shares of the Grand River Navigation Co. out of the proceeds of the sale of lands surrendered in 1798. The costs of an incidental to the hearing before the Exchequer Court of the question of law shall be costs in the cause. The costs of this appeal shall be to the appellants in the cause except in any event they shall not receive any costs of or in connection with their factums.

Solicitor for the appellants, *Auguste Lemieux.*

Solicitor for the respondent, *F. P. Varcoe.*

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THE SHERWIN-WILLIAMS COMPANY OF CANADA LIMITED (PLAINTIFF) ..... APPELLANT; *May 13, 16, 17, 18 *Dec. 22

AND

BOILER INSPECTION AND INSURANCE COMPANY OF CANADA (DEFENDANT) ..... RESPONDENT.

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

Insurance—Against damage caused by accident—Policy excludes loss from fire and from accident caused by fire—Accident followed by fire and explosion—Whether loss covered—Cause of—Assignment of insured's rights—No signification—Whether insured can still claim—Arts. 1570, 1571 C.C.

An insurance policy insured appellant against loss on property directly damaged by accident and excluded losses from fire and from accident caused by fire. A tank, which was the object of the insurance, burst permitting the escape of fumes which ignited and exploded causing considerable damage to appellant's factory. The Superior Court maintained the action on the policy and the Court of Appeal dismissed it on the ground that the damages were caused by fire and were not the direct result of the tearing asunder of the tank.

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

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Held: The damage was the direct consequence of the accident to the tank; the bursting of the tank was the proximate cause of the damage. *Coxe* v. *Employers' Liability Ass. Corp.* (1916) 2 K.B. 629; *Leyland Shipping Co.* v. *Norwich Union Fire Ins. Society* [1918] A.C. 350 and *Canada Rice Mills* v. *Union Marine and General Ins. Co.* [1941] A.C. 55 referred to. *Stanley* v. *Western Ins. Co.* (1868) L.R. 3 Ex. 71 distinguished.

Held also, that the appellant was not deprived of its right of action against the respondent, as the assignment of its rights to the fire insurance companies had not been signified to the respondent.

Per Rand (dissenting): The explosion damage was attributable to the fire which, existing briefly after the initial stages of the accident to the tank, caused the explosion and was a new point of departure in the chain of causation.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Tyndale CJ., and dismissing appellant's action on an insurance policy.

J. A. Mann, K.C. for the appellant.

John T. Hackett, K.C. and L. P. Gagnon, K.C. for the respondent.

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

TASCHEREAU J.:—The first point that has to be dealt with, is the question of the appellant's interest. It is contended on behalf of the respondent that the appellant shortly after the institution of the present action, having transferred and assigned to the fire insurance companies, all its rights against the respondent, for and in consideration of the sum of $46,931.28, cannot succeed for lack of interest.

With this proposition, I do not agree, as I think that even if the appellant had assigned its rights before the action was started, without the necessary signification being given, it would still have the necessary interest to claim from the respondent.

The assignees of the claim did not insure the appellant assignor for damage caused by *accident*. Their policies covered damage caused by *fire*, and in this respect they have fulfilled their obligation, by paying to the appellant the full amount of its losses. But they have additionally paid

(1) Q.R. [1949] K.B. 148.

$46,931.28 for the damage caused by *an explosion,* which the appellant now says is covered by the respondent's policy. Assuming therefore the liability of the defendant, it necessarily follows that the fire insurance companies are not the *appellant's insurers* for the damage now claimed in the present action.

We are not confronted here with the case of an insurance company which, after having paid its own client, victim of an accident, the amount to which the latter is contractually entitled, obtains a subrogation receipt against the tort-feasor. In such a case, there is no doubt that the victim, although having signed a subrogation receipt, may still claim against the author of the damage he has suffered. The legal relations that exist between the victim and the insurer are obviously contractual; those between the victim and the wrongdoer are delictual. They are two entirely different causes of action. It is for his own protection that the victim has paid to obtain compensation, and not for the benefit of the wrongdoer. The latter has no concern with the rights of the insured and the insurance company *inter se.*

In such a case the rights of the victim to sue the author of the tort have been often recognized. Vide (*McFee & Co.* v. *Montreal Transportation Co.* (1)); (*Millard* v. *Toronto R.W. Co.* (2)).

In *Hebert* v. *Rose* (3), the Court of Appeal of the Province of Quebec held:—

> Where a certain sum is found to be due for damages caused to an automobile through a collision, an amount received by the plaintiff from an insurance company which had insured his automobile against loss or damage through collision, cannot be deducted from the award.

And later in *Coderre* v. *Douville* (4), Mr. Justice Rivard, speaking for the same Court, said:—

> L'appelant va plus loin; il soutient que le demandeur n'a pas le droit aux dommages-intérêts parce qu'il a déjà été indemnisé par la compagnie d'assurance, qu'il y aurait eu subrogation et novation. Les termes de l'acte intervenu entre le demandeur et l'assureur sont clairs; c'est bien une cession de ses droits que Douville a consenti. Dans ce cas, le recours au nom du créancier contre l'auteur du dommage reste ouvert.

In all these cases, the plaintiffs had been paid by their insurers, but this jurisprudence cannot determine the rights of the plaintiff in the case at bar. I have referred to it,

(1) Q.R. 27 K.B. 421.
(2) 6 O.W.N. 519.
(3) Q.R. 58 K.B. 459.
(4) Q.R. [1943] K.B. 687.

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merely to point out the entirely different rights of the plaintiff, and to avoid any further confusion on the matter. It may also be said that the amendment to section 2468 C.C. enacted by the Quebec Legislature in 1942 (6 Geo. VI, chap. 68), which says that civil responsibility shall in no way be lessened or altered by the effect of insurance contracts, would cover cases similar to those which I have cited. The object of this section being to confirm the principle established by the Court of Appeal of Quebec, that a wrongdoer may not deduct from the amount of damage he has occasioned, the moneys received by the victim from an insurance company.

In the present case, the various fire insurance companies, the transferees of the claim against the respondent, are not insurers against damage originally caused by *explosion.* They are assignees of a debt which they have bought from the appellant, and therefore, different principles have to be applied.

The two relevant sections of the *Civil Code* are 1570 and 1571. They read as follows:—

1570. The sale of debts and rights of action against third persons, is perfected between the seller and buyer by the completion of the title, if authentic, or the delivery of it, if under private signature.

1571. The buyer has no possession available against third persons, until signification of the act of sale has been made, and a copy of it delivered to the debtor. He may, however, be put in possession by the acceptance of the transfer by the debtor, subject to the special provisions contained in article 2127.

Between the appellant and the fire insurance companies, the sale was perfected at the date the relevant document was signed, but it is not contested that a copy of it has never been delivered to the respondent. Of course, this was essential to give the insurance companies "possession available" against the respondent, but it is argued that although the assignees could not exercise their rights until the fulfilment of this requirement of the law, the assignor was nevertheless divested of all his rights of ownership, and could not properly bring the present action. If he did so, it would be in violation of section 81 of the *Code of Civil Procedure,* which says:—

81. A person cannot use the name of another to plead, except the Crown through its recognized officers.

It has been said that this theory has received the support of Mr. Justice Cimon in *Montreal Loan & Investment Co.* v. *Plourde* (1). But I do not think that such is the case. A perusal of that judgment shows that the plaintiff, the assignor had sold to the assignee a claim against the defendant, but the latter, in lieu of notification, *had accepted* the assignment. The learned judge rightly decided that the assignee was the only proper party who could claim, having, on account of the acceptation by the debtor, a "possession available" against him. In view of 1571, the assignor was divested of all his rights, and any action taken by him was in the name of "another" and contrary to 81 Code C.P.

But here, there was no notification, no acceptance, and if, between the seller and the buyer the deed of sale was complete, it was not as to third parties. Until the signification is made, as to third parties, the title remains in the assignor. This is so true, that a garnishee may be served in execution of a judgment against the assignor upon moneys in the hands of the debtor. The former or the assignee will not be allowed to oppose the transfer, if no signification has been made. Vide Aubry & Rau (Traité Pratique de Droit Civil, Vol. 7, p. 450).

Article 1690 of the French Civil Code is similar to section 1571 of the Quebec Code. The French authors are unanimous to accept the theory that until a copy of the deed is served upon the debtor, the title, as to third parties, remains vested in the assignor, who alone may properly bring action to recover the debt.

Troplong (Droit Civil Français, De la Vente, Vol. 2, 1854, page 457) says:—

> Si la signification est encore à faire, le cédant poursuivra le débiteur *sans que celui-ci puisse lui opposer que, lui cédant, il s'est dépouillé de ses droits.* C'est ce qui été jugé par arrêt de la Cour de Cassation du 4 décembre 1827, portant cassation d'un arrêt de la Cour de Colmer, du 27 août 1824.

Zachariae (Le Droit Civil Français, Vol. 4, 1858, pp. 326 and 327) expresses his views as follows:—

> Il y a plus, tant que le cessionnaire n'est pas saisi, le cédant lui-même peut exiger le paiement *sans que le débiteur cédé puisse lui opposer la cession qu'il en a faite.*

(1) 9 R. de J. 292.

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Aubry & Rau (Droit Civil Français, tome 4, 4th Ed. 1871, p. 434) share the same opinion:—

Quant au cédant, il conserve jusqu'à la signification ou acceptation du transport, le droit de faire, tant à l'égard des tiers qu'à l'égard du débiteur, tous les actes conservatoires de la créance, et *même celui d'exercer les actions et poursuites y relatives.*

Planiol & Ripert (Traité Pratique de Droit Civil Français, Vol. 7, 1931, p. 449) also says:—

Pendant l'intervalle qui sépare la cession de l'accomplissement de l'une des formalités de l'article 1690, la créance qui appartient déjà au cessionnaire à l'égard du cédant, *appartient toujours au cédant au regard des tiers.*

At pages 449 and 450, the same author says:—

Ainsi jusqu'à l'acceptation ou à la signification, le *cédant peut poursuivre* le débiteur ou recevoir paiement.

And on the same page:—

Une fois la signification ou l'acceptation intervenue, la situation est renversée. Le cédant est sorti du rapport d'obligation à l'égard de qui que ce soit, *le cessionnaire seul se trouve investi de la qualité de créancier.*

Laurent (Principes de Droit Civil Français, Vol. 24, 3rd Ed. pp. 499 and 500) teaches that:—

L'article 1690 porte que le cessionnaire n'est saisi à l'égard des tiers que par la signification du transport, ou par l'acceptation que le débiteur en a faite dans un acte authentique. De là suit que le cédant reste saisi de la créance à l'égard des tiers, malgré le transport qu'il en a fait, jusqu'à ce que la cession ait été signifiée ou acceptée. C'est ce que dit Pothier; et quand il dit que le cédant n'a point été saisi de la créance, *cela signifie qu'il en reste propriétaire.*

On the same page:—

Le cédant reste propriétaire de la créance à l'égard des tiers, le débiteur est un tiers; donc, le cédant reste créancier et *le débiteur est tenu de payer,* et il a aussi le droit de payer.

To the opinion of these learned authors may also be added, what Mr. Justice Rinfret, now C.J., said in the case of *Lamy* v. *Rouleau* (1). Although section 2127 C.C. was there invoked, which is not the case here, there are some principles which have been enunciated in that judgment, which are useful in the determination of the case at bar.

The assignor, remaining the creditor cannot be considered as claiming in the name of another, in violation of section 81 of the *Code of Civil Procedure.* He has the right to sue in his own name, because as to third parties, the title is still vested in him.

(1) [1927] S.C.R. 288.

It is possible that a different situation would arise if even before a formal signification, the assignee instituted proceedings to recover the amount due by the debtor, because in such a case his action would in itself be a sufficient signification of the act of sale, as decided by the Judicial Committee of the Privy Council in *Bank of Toronto* v. *St. Lawrence Fire Insurance Co.* (1), but this is not the case here.

I have therefore to come to the conclusion that the plaintiff had a sufficient interest to institute the proceedings that he did.

Dealing now with the second ground of defence that the damage claimed is attributable to fire which is specifically excluded from the policy, and not to an "accident" within the meaning of that word contained in the policy, I agree with my brother Locke that it is unfounded.

The terms of the policy are as follows:—

To pay the Assured for loss on the property of the Assured *directly damaged* by such accident (or, if the Company so elects, to repair or replace such damaged property), *excluding* (*a*) *loss from fire* (or from the use of water or other means to extinguish fire, (*b*) *loss from an accident caused by fire,* (*c*) loss from delay or interruption of business or manufacturing or process, (*d*) loss from lack of power, light, heat, steam or refrigeration, and (*e*) loss from any indirect result of an accident.

The relevant schedule attached to the policy is the following:—

B. As respects any such unfired vessel, "Object" shall mean the cylinder, *tank,* chest, heater plate or other vessel so described; or, in the case of a described machine having chests, heater plates, cylinders or rolls mounted on or forming a part of said machine, shall mean the complete group of such vessels including their interconnecting pipes; and shall also include water columns, gauges and safety valves thereon together with their connecting pipes and fittings; but shall not include any inlet or outlet pipes, nor any valves or fittings on such pipes.

C. As respects any object described in this Schedule, "Accident" shall mean a *sudden and accidental tearing asunder of the object or any* part thereof caused by *pressure of steam,* air, gas, water or other liquid, therein, or the sudden and accidental crushing inward of the object or any part thereof cause by vacuum therein; and *shall also mean a sudden and accidental cracking of any cast iron part of the object,* if such cracking permits the leakage of said steam, air, gas, water or other liquid, *but leakage at valves, fittings, joints or connections shall not constitute an accident.*

If, therefore, the damage claimed is attributable to fire, which is specifically excluded from the policy, the action

(1) [1903] App. Cas. 59.

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must fail. On the other hand, if the damage is the result of an *accident* within the above definition, and if it is the direct consequence of such *accident*, the action must succeed and the appeal allowed.

On August 2, 1942, in the East Room of the oil mill at the appellant's plant in Montreal, some of the employees were in the process of bleaching turpentine in a tank called Tank No. 1. This tank was normally used for bleaching linseed oil. In the course of these bleaching operations, a "sizzling" sound was suddenly heard, coming from Tank No. 1, and which was obviously caused by vapour escaping from the periphery of the manhole door of the tank, and this was followed by the sound of the blowing out of the door under the high pressure of this vapour. The evidence reveals that this vapour in itself was not inflammable, but that it was, when it came in contact with the air. Within a few seconds, a terrible explosion occurred causing to the building extensive damage.

It is the contention of the respondent that the loss suffered by the appellant was not a loss directly caused by accident, there being a *nova causa* that intervened which was *fire,* and as the respondent is only liable for direct damage caused by an explosion, it therefore denies all liability. The theory is that, although there has been a minor explosion in Tank No. 1, the vapour that escaped from the tank, coming into contact with the air, was ignited by a *fire,* which was probably an electric spark, and it was only after the intervention of this *new cause* that the explosion occurred.

In order to determine this direct cause, it must be kept in mind, as Lord Dunedin said in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (1):—

> In other words, you seek for the causa proxima, if it is well understood that the question of which is proxima is not solved by the mere point of *order in time.*

In the same case at page 355, Lord Finlay L.C. said that the determining cause of an accident is what *"in substance"* causes the injury. The damage that may be claimed is the damage which is the "natural consequence" of the accident.

In *Cory* v. *Burr* (2), it is said that the *proximate cause*

(1) [1918] A.C. 350 at 363. (2) 8 App. Cas. 406.

is the *direct* and *immediate* cause. In *Gordon* v. *Rimmington* (1), Lord Ellenborough uses *"causa causans"* as the equivalent of *proximate cause.*

It is true that the vapour that escaped from the tank as the result of the explosion, was while floating in the air of the building, suddenly ignited by an electric spark, but I have come to the conclusion that the *"causa causans"* of the damage suffered, what *"in substance"* caused the damage, was the explosion in the tank. The last explosion was the *natural sequel,* the *consequence* of the original explosion in the tank, which was the main element of causation.

In *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society,* cited *supra,* a ship belonging to the appellant was torpedoed, while on a voyage from South America to Le Havre. With the help of tugs the ship reached Le Havre, and she was brought inside the outer breakwater, where she remained for two days, taking the ground at each ebb tide, but floating again with the flood. Finally, her bulkheads gave way, and she sank and became a total loss. It was held that the grounding was not a *"novus casus interveniens"* and that the aggravation of the *original injury* by the bumping against the quay and the successive groundings, did not convert the partial loss into a total loss. The chain of causation between the injuries caused by the torpedo, and the ultimate sinking of the vessel, was not broken by the series of events which occurred in Le Havre.

In the present case, I have come to the conclusion that there was an unbroken sequence between the explosion in Tank No. 1, which is the casualty, and the ultimate loss. There was not an intervening cause, in which was merged the original casualty.

For these reasons, the appeal should be allowed and the judgment of the trial judge restored with costs throughout.

RAND, J. (dissenting):—I take the circumstances of the loss of the appellant's property to be these. The course of escape of gas generated in the tank by the mixture of turpentine and the other substances, as the pressure mounted, was first by way of the small aperture in the manhole door or the vent at the rear, then between the manhole door, forced outward, and the frame, and finally through the

(1) 1 Camp. 123.

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manhole when the door was blown off. The sizzling noise was produced in the second stage; and the first explosive sound was the blasting of the door. The gas mixing with the air in the room became combustible and was ignited by a spark probably from an electric mechanism. This burning tended to reach back toward the source of the gas and while its quantity was limited the combustion was relatively slow and presented flames flashing in different directions as it followed the air currents. When the manhole opened the quantity was so great that the rapidity and extent of combustion issued in an explosion. Tongues of flame licked up the thin streams of grayish gas before that point was reached; both gas and flames were seen through both doors by the men working in the adjoining room. There was this fire in the eastern room for a sensible period of time before the explosion apart from the spark or other source of the original ignition.

The passage of that fire into explosion resulted from the sudden access of the gas; if the slow feed or emission had been maintained or if the peak pressure had been reached before the door gave way, there would have been only the fire. In that case it would ordinarily follow that any damage done by it, either through the burning of property insured or by producing other direct effects, would be fire loss.

Whether the ignition of the gas can be said to have been due to a fire within the meaning of the fire policies ceases, then, to be of importance. There was clearly a secondary stage of fire which superseded the initial cause.

Before deducing the legal consequence from the insurance contracts and the facts stated, I venture to point out the distinction between fire damage and damage caused by fire. An insurance against the former looks to the nature of the loss or destruction; it is damage by burning or combustion only. But insurance against damage by fire treats fire as a cause which in the course of its career may set off other agencies, such as explosion, to bring about damage other than fire to be charged against it. The same consideration arises in exceptions from the main risks; and the question is whether the exception is as to the kind of damage or to the consequences of a certain cause.

The terms of the policies here are, in this respect, reasonably free from doubt. The parties agree "respecting loss . . . . from an *Accident* as herein defined to the *object* described herein." The Company "agrees to pay for loss on the property of the assured directly damaged by such Accident . . . . excluding (a) loss from fire (or from the use of water or other means to extinguish fire, (b) loss from an accident caused by fire . . . . . , and (e) loss from any indirect result of an Accident." The tank was undoubtedly what is called in schedule 2 an "unfired vessel" and an accident to such a vessel was described as "a sudden and accidental tearing asunder, etc." The bulging of the manhole door and its later blasting, was, in my opinion, a rending asunder within that definition.

The language "property . . . . directly damaged by such accident" deals with accident as a casual agency and without more would embrace all loss directly resulting from it: loss "from fire" must, I think, be given the same meaning: *Stanley* v. *Western Insurance Company* (1); and it is intended to eliminate from the trail of consequences of an accident all those which are to be attributed to the interposition of fire as the efficient factor in a chain of subsequent effects.

This may perhaps be clarified by elaboration. The exception is from a liability for an "accident" and its results. The "fire" must then appear or be involved in those results, otherwise it would be outside the risk assumed; and as the word is used in a causal sense, the exclusion extends to all effects that follow from it as cause: we are to conceive it as a new point of departure, and disregard antecedents. In an ordinary policy against fire, we do not go back for originating causes; what has brought fire about is irrelevant; we take it as if it were a first cause. The same conception is to be given to fire as an exception; when it appears we mark it as a new factor and we are not concerned with what has preceded it. Was it then an actuating agent here? I am bound to say that the answer seems to me to admit of no doubt. It was the flame that set the mixed gases into combustion so great and rapid as to produce the explosion. Both the gases and the fire were necessary to that reaction, but the fire was the actor in producing it. The problem is

(1) L.R. 3 Ex. 71.

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not one of abstract or philosophical causal determination; we are endeavouring to ascertain the scope of an exception from a risk assumed, the language of which carries the ordinary and popular sense of these phenomena.

Mr. Mann contends that a fire in other than property insured producing other causes of damage does not entail liability under a fire policy; from which he concludes that, as one or other of the groups of insurance companies must be bound, the disaster must be attributed to the accident. It was, no doubt, a fact that the gas, as substance or property, was not insured against fire; but in the case of *Hobbs* v. *Guardian Insurance Company* (1) approved by the Judicial Committee in *Curtis's & Harvey Limited* v. *North British Company* (2), neither was the match or the gunpowder; and yet this Court held that the burning powder was fire so as to carry responsibility for the explosion which ensued. I take this decision to mean that fire as a cause of damage insured against is fire in any form which may by its proximate consequence produce loss to the property insured. That is precisely what we have here. But whether liability arises accordingly on the part of the fire insurers is a matter beyond the issues in these proceedings; it is enough that the fire be within the exception of the respondent's contract.

This view differs from that of the Chief Justice at trial in the significance attributed to the flashes of flame previous to the explosion. He considers it too fine a distinction, in relation to the language of the policy, to resolve the developing explosion into stages and to treat the first and second —the ignition and the gas combustion periods—as constituting a "fire" existing as such, to be taken as a cause of new consequence. But that depends on the facts and I am unable to interpret them here as not creating an intermediate state of fire, either of the original gases or in the initial stages of the explosion. Time is significant and explosion was not necessarily involved in the burning gases. The minutes or even seconds which elapsed marked a period not of explosion but of a state of things that, in combination with new elements, led to explosion; the impact of the mass of gas upon the floating fire was the same as the contact of

(1) 12 S.C.R. 631. (2) (1921) 1 A.C. 303.

the burning match with the powder in *Hobbs, supra,* and likewise the development of the burning mass into explosion.

The appeal must, therefore, be dismissed with costs.

ESTEY J.:—The appellant at the trial recovered from the respondent under an accident policy for that portion of loss attributed to an explosion. This judgment was reversed upon appeal (1) and the appellant (plaintiff) further appeals to this Court.

On August 2, 1942, the appellant in its linseed oil mill in the City of Montreal was filtering turpentine. A No. 1 steam-jacketted bleacher tank (hereinafter referred to as "the tank") was used as part of the apparatus. This tank was located with other equipment, including motors and dynamos, in the east room on the top or third floor of the mill. 850 gallons of discoloured turpentine were poured into this tank, the steam turned into its jacket at a temperature of 145° to 160°F. Then 200 lbs. of "filtrol" and 50 lbs. of "filter cel" were placed in the tank and the agitator therein operated for half to three-quarters of an hour. It is established that this operation of the agitator in the contents of that tank would generate enough heat and pressure to first push the door and permit some vapour to escape through the periphery with a hissing or sizzling noise and then as the pressure was building up rapidly to quickly blow the door open releasing a large quantity of vapour.

In the room adjoining and to the west was other equipment including the filter presses. The men in charge were not satisfied with the turpentine coming through and gathered around the filter presses. In that position they heard a hissing or sizzling noise. One saw "fumes or vapour, then saw fire," another "saw a big flash like fire" and a third was not sure whether he saw flames or fumes in the doorway connecting these east and west rooms. The men all hurried to the fire escape. As they reached the fire escape they heard a "boom" which is accepted as that of the door being blown off the tank. Then as they proceeded down the fire escape they heard an explosion which damaged the roof, walls and windows and which generally

(1) Q.R. [1949] K.B. 148.

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disturbed the entire structure. The fire followed and the total loss incurred was about $159,724.62. The companies holding the fire insurance have paid that part admittedly caused by fire, but the balance of $45,791.38 is that which resulted from the explosion and which in this appeal the appellant claims under the terms of the accident policy.

The evidence is to the effect that as the vapours escaped through the periphery they were ignited by contact with something in that room, probably an electric switch, motor or dynamo. Whatever it was is described in the proceedings as unidentified, and the fire thus caused was seen by the men as they hurried to the fire escape. One of the experts stated:—

> If you have a tank, such as in this case, which is generating vapors quite rapidly and filling alleyways that are 25 or 50 feet long and many feet wide and many feet high full of an inflammable mixture of turpentine vapors and air, it would be a miracle if they did not explode.

It is further explained that these explosions occur in three stages:

> In the first stage a flame moves through the explosive mixture at a slow, more or less uniform rate of speed. In the second stage the speed of the flame increases, and the flame may oscillate backwards and forwards in the explosive mixture, and there may be turbulence or a mixing up of the gases in the mixture, and finally there is the third stage in which the flame is accelerated in velocity to a great speed and there is usually a loud report and this is the stage termed detonation.

And further:

> When an explosive mixture is ignited, a flame forms and moves slowly through the explosive mixture. This slow movement may last for from a fraction of a second to several seconds or minutes, and the rate of velocity usually is from one foot to ten feet per second.

The policy insured the appellant in respect of a loss from an accident to an object. The tank is enumerated among the objects covered by the policy and the blowing off of its door constituted a "sudden and accidental tearing asunder" of the object and therefore an accident within the meaning of the policy.

It is the contention of the appellant that when the large volume of vapor escaped as a consequence of the "tearing asunder" the explosion followed as a direct cause therefrom, while on the other hand, the respondent contends that the explosion was due to the fire.

Sec. 1 of the policy requires the company:

To pay the assured for loss on the property of the Assured directly damaged by such accident . . . excluding

(*a*) loss from fire (or from the use of water or other means to extinguish fire),

(*b*) loss from an accident caused by fire,

* * *

(*e*) loss from any indirect result of an accident.

The appellant under the terms of the foregoing sec. 1 in order to recover must adduce evidence establishing that the loss or damage to its property was the direct or proximate cause of the accident. McGillivray, Insurance Law, 2nd Ed., p. 811; *Becker, Gray & Co.* v. *London Assurance Corp.* (1). The particular loss we are here concerned with arises out of an explosion the loss or damage from which was not by the terms of the policy specially excluded. The respondent to bring this explosion within the exclusion clause (*a*) must therefore establish that it was directly or proximately caused by a fire. The issue between the parties is, in these circumstances, what was the direct or proximate cause of this explosion,—the accident or the fire? The position is therefore somewhat similar to that in *Leyland Shipping Co.* v. *Norwich Union Fire Ins. Society* (2), where the appellants contended the ship was lost by a "peril of the sea", while the respondents contended the loss was caused by torpedoing for which under the policy they were not liable because of a warranty "from all consequences of hostilities or warlike operations." Lord Dunedin, at p. 363, stated as follows:

> But the moment that the two clauses have to be construed together it becomes vital to determine under which expression it falls. The solution will always lie in settling as a question of fact which of the two causes was what I will venture to call (though I shrink from the multiplication of epithets) the dominant cause of the two. In other words, you seek for the causa proxima, if it is well understood that the question of which is proxima is not solved by the mere point of order in time.

In order to have an explosion of the type here in question there must be an inflammable or explosive mixture and it must be ignited. In this case that explosive mixture was the turpentine vapour and the air; it was ignited and in that sense there was a fire.

Everything happened in a very short space of time. The "tearing asunder" of the door released at first a quantity and almost immediately a large volume of turpentine

(1) [1918] A.C. 101 at 112. (2) [1918] A.C. 350.

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vapour into the room. Without the release of the vapour there would have been no explosion. The "tearing asunder" of the door which released such a volume of vapour would appear to have been the direct or proximate cause of the explosion. The presence of the air and ignition were necessary and in that sense causes of the explosion. Seldom, if ever, does an explosion, fire or accident result from one cause. The law, from all the causes leading up to a result, selects that which is direct or proximate and regards all the others as remote. The direct or proximate cause may not be the last, or, indeed, that in any specified place in the list of causes but is the one which has been variously described as the "effective", the "dominant" or "the cause without which" the loss or damage would not have been suffered. In *Leyland Shipping Co.* v. *Norwich Union Fire Ins. Society, supra,* the torpedoing of the ship was, though not the last cause, that which was held to be the direct or proximate cause. Lord Atkinson at p. 366 stated:

> It is quite true that in the efforts to salve the cargo and the ship her injuries may have been aggravated, but none the less, in my opinion, was the loss the direct and immediate consequence of the torpedoing.

In *Canada Rice Mills Ltd.* v. *Union Marine and General Insurance Co.* (1), a cargo of rice was damaged by heating. The jury found that the rice was damaged by heating caused by the closing of the cowl ventilators and hatches from time to time during the voyage, and it was held that this was a reasonable precaution, having regard to weather conditions. The policy covered "perils of the sea." The main contest was whether the proximate cause was the "peril of the sea" or the closing of the cowl ventilators and hatches. Lord Wright stated at p. 71:

> But it is now established by such authorities as *Leyland Shipping Co.* v. *Norwich Union Fire Society,* (1918) A.C. 350, and many others, that causa proxima in insurance law does not necessarily mean the cause last in time, but what is "in substance" the cause, per Lord Finlay (Ibid. 355), or the cause "to be determined by common-sense principles," per Lord Dunedin, (Ibid. 362). The same rule has been reiterated by the House of Lords several times since then, most strikingly, perhaps, in *P. Samuel & Co.* v. *Dumas,* (1924) A.C. 431 . . . Their Lordships agree with this expression of opinion, and accordingly are prepared to hold that the damage to the rice, which the jury have found to be due to action necessarily and reasonably taken to prevent the peril of the sea affecting the goods, is a loss due to the peril of the sea and is recoverable as such.

(1) [1941] A.C. 55.

The foregoing is on the basis that there was a fire within the meaning of the policy. In view of the conclusion arrived at, it is unnecessary to deal with the important question whether the fire was actually a fire within the meaning of the policy or a part of the explosion.

The circumstances surrounding the payment to the appellant by the fire insurance companies of the amount here claimed are such as not to deprive the appellant of an interest sufficient to initiate and carry on these proceedings. Upon this issue I have had the advantage of reading the reasons of my brother Taschereau with which I fully agree.

The appeal should be allowed with costs.

LOCKE, J.:—This is an appeal from a judgment of the Court of King's Bench for Quebec (Appeal Side) which allowed an appeal by the respondent insurance company from a judgment of Tyndale, J. which had condemned the respondent to pay the sum of $45,791.38 loss occasioned by an explosion on the appellant's premises. Letourneau, C.J., dissented and would have dismissed the appeal.

By the insuring agreement in question, the respondent company agreed with the appellant "respecting loss (excluding loss of the kind described in section II and including loss of the kind described in section IV) from an accident as herein defined to an object described herein occurring during the policy period "inter alia to pay the assured for loss on the property of the assured directly damaged by such accident (or if the Company so elects to repair or replace such damaged property) excluding (*a*) loss from fire (or from the use of water or other means to extinguish fires), (*b*) loss from an accident caused by fire, (*c*) loss from delay or interruption of business or manufacturing or process, (*d*) loss from lack of power, light, heat, steam or refrigeration, and (*e*) loss from any indirect result of an accident." By a schedule to the policy the unfired vessels covered were certain objects designated in a further schedule and included a steam jacketed bleacher tank situate in the East room on the third floor of the appellant's factory in Montreal and as respecting any object described in the schedule "accident" was declared to mean:

A sudden and accidental tearing asunder of the object or any part thereof caused by pressure of steam, air, gas, water or other liquid therein or the sudden and accidental crushing inward of the object or any part

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thereof caused by a vacuum therein; and shall also mean a sudden and accidental cracking of any cast iron part of the object if such cracking permits the leakage of said steam, air, gas, water or other liquid, but leakage at valves, fittings, joints or connections shall not constitute an accident.

The limit of liability for any such accident to one of the designated objects was $50,000.00.

While it is admitted that there was an accident to the steam jacketed bleacher tank above referred to which was followed by an explosion and by fire, there is disagreement as to just what constituted the accident. Stated briefly the facts are that on August 2nd, 1942, during the currency of the policy the bleacher tank was being used by the appellant company for bleaching a quantity of turpentine for the first time. Theretofore it had been used only for the purpose of bleaching linseed oil and it was attempted to bleach turpentine in the same manner. The process involved placing a quantity of turpentine in the tank together with Fuller's earth and a substance called Filter Cel, heating the mixture mechanically. This work was undertaken apparently without a proper appreciation of the danger involved: the effect of the process was to build up a very heavy pressure within the vessel which first loosened the manhole door of the tank permitting an escape of a quantity of vapour, and then blew off the door permitting the escape of a larger quantity. According to the witnesses who were in the adjoining room on the third floor of the factory, they first heard a hissing or sizzling noise which the learned trial judge considered to have been caused by the vapour escaping from around the periphery of the manhole door which had been loosened by the pressure, and this was followed closely by the sound of the door being blown out by the pressure of the vapour. It was within a matter of seconds thereafter that the explosion occurred, causing the shattering of the upper part of the building in respect of which the appellant's claim is made. While a fire followed which did extensive damage to the appellant's premises the resulting loss, liability for which on the part of the respondent was excluded by the policy, was covered by fire insurance policies and no question arises as to this.

There was conflict in the evidence of the foreman and some of the other workmen who were in the room adjoining that in which the tank was situate as to whether any fire

was visible before the explosion occurred. The appellant's foreman said that after hearing the sizzling noise caused by the escape of the vapour from the tank, he saw a flash "like a shot of lightning" and immediately shouted to the men to get out, and this was followed by the noise undoubtedly caused by the door being blown off the tank and this promptly by the explosion, the whole sequence of events lasting, according to him, a very few seconds. Others who were present did not see this, but the point is not of importance in view of the fact that the learned trial judge accepted the evidence of Dr. Lipsett and Dr. Lortie, expert witnesses called by the appellant that a flame would undoubtedly be present in the explosive mixture formed by the mingling of the turpentine vapour with the atmosphere before the actual detonation. According to these witnesses, an explosion of this kind, where the mixture is not closely contained within a vessel occurs in three stages: in the first, a flame moves through the explosive mixture at a slow rate of speed, in the second the speed of the flame increases and it may oscillate backward and forward in the explosive mixture and there may be turbulence or a mixing up of the gases, and finally a third stage in which the flame is accelerated in velocity to a great speed and there is usually a loud report, this being termed detonation. The source of the ignition of the mixture however was not shown. Various possible explanations were given by Dr. Lipsett who said that a mixture of turpentine vapours and air such as was present here can be ignited by a source of ignition that is at 584° Fahrenheit and that a piece of iron at that temperature, which would be far below red heat, could ignite it. This witness said that the manhole door might have become heated up beyond that temperature during the chemical reaction in the tank, but that there were many other possibilities, one of the common causes of ignition of inflammable vapours being sparks from electric motors or from switches or machinery or naked lights and that if there is a large volume of inflammable vapour mixed with the air and set loose in a room, it will usually find a source of ignition. As he expressed it where the vapour was released under the circumstances here existing, it would

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have been a miracle if it did not explode. The learned trial judge found that the source of the ignition of the vapour was not proven.

It is the contention of the respondent that the only accident was the blowing off of the manhole door and that before this had occurred there was a fire burning in the explosive mixture caused by the mingling of the turpentine vapour which had theretofore escaped from the tank with the atmosphere and that accordingly the loss was "from fire" within the meaning of the exception. It was shown by the evidence that after the turpentine, Fuller's earth and Filter Cel had been placed in the tank, steam had been admitted into the jacket surrounding it under pressure to bring the temperature of the mixture up to 165° Fahrenheit. Tests conducted with a similar mixture by Dr. Lipsett disclosed that when these ingredients were heated to this temperature a chemical reaction started which evolved heat, the temperature of the turpentine and the other materials rising at first slowly until a temperature of about 250° Fahrenheit was reached when the reaction became more vigorous and at 315° Fahrenheit the turpentine began to boil, producing the vapours which the witness considered had built up the pressure in the tank which he estimated would have risen to 50 or 60 pounds to the square inch. The manhole door was held closed by a retaining arm which was in turn held in place by bolts passing through lugs on each side of the door. These bolts were shown to have been $\frac{3}{4}''$ in diameter and about 9″ in length, and tests conducted by Dr. Lipsett showed that with a pressure such as would have been exerted upon the interior of the door such a bolt bent almost $\frac{1}{3}''$ and it was the opening caused by the forcing out of the manhole door permitted by the bending of the bolts or one of them that Dr. Lipsett considered to have been the vent through which the first vapours escaped, causing the hissing noise heard by the witnesses. The tank itself was designed to withstand a pressure of 75 pounds, and according to the witness Hazen would withstand about six times that amount but less than this was necessary to force the manhole door partially open. Hazen agreed with Dr. Lipsett that the sides of the door were forced out or lifted by the pressure produced by the vapour and it is apparent that this could occur only

if the arm or the bolts fastening it were bent or forced outward. The learned trial judge has found that the sequence of events after the first escape of the turpentine vapour was that it became ignited in some unknown manner, a flash or flame being visible in the vapour, the manhole door then blew off and the explosion followed. The definition of "accident" speaks of a "sudden and accidental tearing asunder of the object or any part thereof." The word "tearing" is not, I think, one which would commonly be used to describe the shattering of or the distortion of metals which would bend upon the application of sufficient force. It should be interpreted, however, in my opinion, to include a forcing asunder of parts of the object brought about as in the present case by the application of pressure upon the bolt or bolts sufficient to bend them, and forcing the manhole door out of its seating in the wall of the tank, permitting the escape of the vapour. In my opinion, the forcing out of the manhole door and the bending of the bolt or bolts which permitted this and the subsequent blowing off of the door should be treated as the accident and not the latter occurrence alone.

The damage in respect of which the claim is made was not caused by burning. Against this risk the appellant was insured, and the insurance companies have paid the loss. For the appellant it was urged before us that the expression "loss from fire" should be construed as meaning loss from burning only, but I think this contention cannot be sustained and that loss of which fire is the proximate cause is included in the exception. "Loss from fire" in my opinion is not to be construed differently than if the words were "loss caused by fire" and these words have always been construed as relating to the proximate cause. *Coxe* v. *Employers' Liability Assurance Corporation Limited* (1), Scrutton, J. The expression "proximate cause" as pointed out by Lord Sumner in *Becker, Gray and Company* v. *London Assurance Corporation* (2) is not an ideal way of expressing what is intended: he considered that "direct cause" would be a better expression. In *Leyland Shipping Company Limited* v. *Norwich Union Fire Insurance Society Limited* (3), Lord Dunedin, in deciding which of two asserted causes had caused the loss of the vessel, said that

(1) (1916) 2 K.B. 629.
(2) [1918] A.C. 101, 114.
(3) [1918] A.C. 350 at 363.

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the solution lay in deciding what was the dominant cause of the two. It was expressed by Lord Wright, in delivering the judgment of the Judicial Committee in *Canada Rice Mills Ltd.* v. *Union Marine and General Insurance Company Limited* (1) as what is "in substance" the cause. As pointed out by Lord Shaw in the *Leyland Shipping case, (supra)*, to treat the proximate cause as if it was the cause which is proximate in time is out of the question; the cause which is truly proximate is that which is proximate in efficiency.

The law applicable to the matter appears to me to be accurately stated in Welford's Accident Insurance, 2nd Ed., 178 where the learned author says:—

> The operation of the doctrine of proximate cause is not affected by the number of causes that may intervene between the peril and the loss. Thus, a scratch may produce septicaemia which develops into septic pneumonia resulting in death. Nevertheless the death is caused proximately by the scratch. In these cases though the loss is not the immediate result of the operation of the peril upon the subject matter of insurance, there is nevertheless no break in the chain of causation which leads through a succession of causes directly from the peril to the loss. They are so intimately connected the one with the other that but for the operation of the peril the loss would not have happened. The relation of cause and effect is therefore established between them, the intermediate causes are themselves brought into existence by the peril and constitute the instruments by which it produces its ultimate result.

And again at page 184:—

> If there is a causal connection between the peril and the loss, the excepted cause being merely a link in the chain of causation inasmuch as it is a reasonable and probable consequence of the peril, the peril is the cause of the loss within the meaning of the policy.

The doctrine of proximate cause is common to all branches of insurance (Welford & Otter-Barry on Fire Insurance, 4th Ed., 259). In the *Leyland Shipping* case, the steamship *Ikaria* had been torpedoed by a German submarine off the coast of France: the vessel succeeded in making her way into the port of Havre and was taken alongside the quay in the outer harbour. When a gale sprang up, causing her to bump against the quay the harbour authorities ordered her to a berth inside the outer breakwater where she was moored and remained for two days, taking the ground at each ebb tide but floating again with the flood. Finally her bulkheads gave way and she sank and became

(1) [1941] A.C. 55, 71.

a total loss. The policy sued upon covered loss by perils of the sea, but contained a warranty against all consequences of hostilities, and the action failed. The repeated grounding of the vessel at ebb tide and the floating again with the flood was admittedly the immediate cause of the bulkheads giving way and the sinking of the vessel, but it was held that the torpedoing of the ship was the proximate cause. Barclay, J., in his reasons for judgment on the appeal in this matter, has said that while the policy insured against the risk of direct damage, the subsequent exclusion of fire would seem to exclude fire even if it was a direct cause of the loss, and considered that the decision in *Stanley* v. *Western Insurance Company* (1) applied. But here the loss claimed for is not damage by burning but by the shattering of the premises by explosion. In the Stanley case liability for damage by explosion was excluded, and it was accordingly held that there could be no recovery. Here there is no such exclusion. I agree that loss of which fire is the direct or proximate cause is excluded, but in my view the loss was not so caused.

In the present case it was the application of heat by the introduction of steam under pressure into the jacket surrounding the tank heating the contained mixture and producing the turpentine vapours, the pressure of which first loosened and then blew off the manhole door and it was this accident which was the effective cause of the explosion and the resulting damage. I agree with the learned trial judge that there was no break in the chain of causation which led through a succession of causes directly from the peril insured against to the loss. The flash or flame produced by the ignition of the inflammable vapours was undoubtedly a *causa sine qua non,* as was the grounding of the vessel in the *Leyland* case caused by the action of the tide, but this was, in my opinion, one of the two intermediate causes, i.e. the mingling of the turpentine vapour with the atmosphere producing the highly explosive mixture and its ignition from the unknown source brought into existence by the peril insured against and not, therefore, the *causa proxima.* I find nothing in the decision of this Court in *Hobbs* v. *Guardian Assurance Co.* (2), to assist

(1) (1868) L.R. 3 Ex. 71.

(2) (1886) 12 S.C.R. 631.

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the contention of the respondent: there the insurance was against loss or damage by fire and fire was found upon the evidence to have been the proximate cause of the damage.

It was contended in argument before us that the onus was upon the respondent to prove at the trial that the explosive mixture had been ignited by fire and that this had not been done, and further that in any event the flash or flame observed by some of the witnesses prior to the explosion was not a fire within the meaning of that expression as used in the policy but, in view of my conclusion that fire was not the proximate cause of the loss, it appears to me unnecessary to deal with either question.

I have had the advantage of reading the reasons for judgment of my brother Taschereau and I agree with his conclusion that the assignments given by the plaintiff to the various fire insurance companies after the commencement of the action, of which no notice was given to the respondent, do not affect its status to sue.

It was further contended for the respondent that in any event it was liable only for a portion of the loss. This is based upon the fact that the appellant carried at the time of the loss insurance with the Associated Reciprocal Exchanges which covered direct loss or damage by explosion, subject to certain conditions and exclusions, one of these relating to "pressure containers". As to this, I agree with the learned trial judge.

The appeal should be allowed with costs here and in the Court of King's Bench and the judgment at the trial restored.

Appeal allowed with costs.

Solicitors for the appellant: *Mann, Lafleur & Brown.*

Solicitors for the respondent: *Hackett, Mulvena, Hackett & Mitchell.*

ST. ANN'S ISLAND SHOOTING AND FISHING CLUB LIMITED.. } APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

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*Nov. 7

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*Feb. 21

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Indian Lands, Lease of—Direction of Governor in Council mandatory—Failing authorization by Order in Council lease void—The Indian Act, R.S.C. 1906, c. 81, ss. 51, 64.

Section 51 of the *Indian Act*, R.S.C. 1906, c. 81, provides that all Indian lands which are reserves or portions of reserves surrendered to His Majesty, shall be deemed to be held for the same purposes as heretofore; and shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of Part I of the Act.

Held: That the language of s. 51 is mandatory, and in the absence of direction by the Governor in Council, a lease of Indian lands is invalid.

In the case at bar the original lease, having been approved by Order in Council, was a valid one but such approval terminated with the said lease. As to the subsequent leases, they lacked authorization by Order in Council and consequently were void.

APPEAL from a decision of the Exchequer Court, Cameron J. (1), whereby an action brought by the appellant for a declaration of right to a renewal of a lease of surrendered Indian lands, was refused.

The appellant in 1880 secured from the Council of the Chippewa and Pottawatomie Indians of Walpole Island a lease of part of their reserve, St. Ann's Island, for shooting and fishing for a term of five years and renewable for a like term but reserving to the said Indians their right to shoot and fish the leased area. The appellant having raised the question as to whether the lease was a valid one under the *Indian Act*, a formal surrender of the leased lands was made by the Indians to the Crown and an Order in Council was passed approving the surrender and confirming a lease from the Superintendent General of Indian Affairs to the appellant for a term of five years renewable for a like term. From 1884 to 1925 several further leases were entered into between the same

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

(1) [1949] 2 D.L.R. 17.

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parties. Some contained no provision for renewal, some varied the terms of the original lease as to the amount of land, and the terms of payment. The 1925 lease excluded the Indians from shooting or fishing on the leased property and reserved that right to the appellant alone. It also provided for a term of 20 years with the right of renewal for further successive terms of ten years at rentals to be fixed by arbitration. In 1944 the appellant gave notice to the Superintendent General of Indian Affairs of its intention to renew the lease but he refused to grant such renewal or to admit that the lessee was entitled thereto. The matter was subsequently under the provisions of s. 37 of the *Exchequer Court Act*, referred to that Court for adjudication.

A. S. Pattillo and *J. A. Macintosh, K.C.*, for the appellant.

Lee A. Kelley, K.C., and *W. R. Jackett, K.C.*, for the respondent.

KERWIN J.:—I would dismiss this appeal. It is unnecessary to consider that part of the reasons for judgment of the trial judge (1) dealing with the argument that the Crown was estopped from denying the validity of the tenancy of the appellant since counsel for the appellant stated that he did not now advance any such claim. As to the other points, I agree with the trial judge.

During the argument a question was asked as to whether a contention could be advanced that the surrender "to the end that said described territory may be leased to the applicants for the purpose of shooting and fishing for such term and on such conditions as the Superintendent of Indian Affairs may consider best for our advantage", was really a surrender upon condition, and that if the condition were not fulfilled the land would revert. It was suggested in answer thereto that this would not assist the appellant and this was made quite clear by Mr. Jacket when he pointed to ss. 2 (*i*) and (*k*), 19, 48 and 49 of the *Indian Act*, c. 81, R.S.C. 1906. If by some means the lands again became part of the reserve, then s. 49 would apply and, except as in Part I otherwise provided, no

(1) [1949] 2 D.L.R. 17.

release or surrender of a reserve or a portion thereof shall be valid or binding unless the release or surrender complies with the specified conditions.

The determination of the case really depends upon s. 51 of the Act. These lands were Indian lands which had been surrendered and, therefore, in the wording of the section "shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this part." Mr. Jacket pointed out that counsel for the appellant wanted s. 51 to be read as if the words "subject to the conditions of surrender and the provisions of this part" preceded "all Indian lands, etc. * * * ", thus inserting those words, which now appear at the end, at the very commencement, and without taking into consideration the fact that the two parts of the section are separated by a semi-colon. Reference was also made to s. 64 but the collocation of the word "deed" with "lease or agreement" shows that a surrender could not be included under the word "deed".

The trial judge answered the question in the negative and dismissed the claim with no costs to either the claimant or the respondent but there is no reason why costs in this Court should not go against the unsuccessful appellant.

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

TASCHEREAU J.:—By Petition of Right filed in December, 1945, the suppliant-appellant claimed that it was entitled to a renewal of a lease of certain premises, from the Superintendent General of Indian Affairs, dated May 19, 1925. The first document to which we have been referred is a resolution dated March 18, 1880, adopted by the Council of the Chippewa and Pottawatomie Indians of Walpole Island, purporting to authorize an original lease to the St. Ann's Shooting and Fishing Club, of St. Ann's Island. Pursuant to this resolution, the Superintendent General of Indian Affairs executed the lease on May 30, 1881, "for the purpose of shooting over the

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same and angling and trawling in the waters thereof" for a period of five years, renewable on its expiration for a like term.

Following the execution of this lease, the officers of the Club raised certain questions as to the validity of the lease, and more particularly as to whether there had been a surrender of the lands as required by the *Indian Act* of 1880, an acceptance thereof by the Governor General in Council, and finally, an Order in Council authorizing the lease. A further meeting of the Indians was therefore held in February, 1882, and a formal surrender was executed in due form, and on the 24th of February of the same year, the Indian Superintendent at Sarnia wrote to the Club that for the purpose of the lease, a formal surrender had been given, and that the defect in the preliminary proceedings had been remedied. In April, 1882, Order in Council No. 529 was passed purporting to accept the surrender, and on the 18th of April, the Department again advised the Club that the surrender had been accepted, and that the lease had been confirmed by the said Order in Council.

In 1884, 1892, 1894, 1906 and 1915, new leases were entered into between the same parties, but only those of 1894, 1906 and 1915 contained provisions for renewal. In all these leases, except the first one, trustees signed the agreements with the Superintendent General, on behalf of the St. Ann's Island Shooting and Fishing Club.

In May, 1925, the Superintendent General of Indian Affairs signed a new lease with Geoffrey T. Clarkson and Walter Gow, acting as trustees for the St. Ann's Island Shooting and Fishing Club Limited, and it provided that the lessees should be entitled on the expiration of the term granted, to renewals for further successive periods of ten years at rentals to be fixed by arbitration.

The lessees have been in possession of the lands in question since 1881, and have expended substantial amounts for the permanent improvement of their facilities as a hunting and fishing club, including the erection of a club house and other buildings and the opening up of ditches and canals. On September 4, 1945, Geoffrey T. Clarkson and Walter Gow assigned their interest in the lease to the appellant.

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Some correspondence was then exchanged between the Department of Indian Affairs and the Club, as to the renewal of the lease, but as the parties could not agree, it was therefore decided that the question should be referred to the Exchequer Court of Canada for adjudication. Pursuant to the dispositions of the general rules and orders of the Court, the appellant filed a statement of claim on December 17, 1945, and asked for a declaration that the Club was entitled to a renewal of the lease dated May 19, 1925, for a further term of ten years, and subject to the stipulations and provisions contained in the lease of May 19, 1925, save as to rental. The claimant also asked that the annual rent to be paid during the term of the renewal of the lease, from October 1, 1944, to September 30, 1955, be determined by the judgment, instead of by arbitration.

Mr. Justice Cameron, before whom the matter came, reached the conclusion that as the lease of 1925 was never authorized by Order in Council, it was, as well as the provisions for renewal, wholly void.

These lands in question were formerly part of a "Reserve" for the use or benefit of the Chippewa and Pottawatomie Indians of Walpole Island, and there is no doubt that they could not be originally leased in May, 1881, to the predecessors of the appellant, unless they had been *surrendered* to the Crown. The effect of a surrender is to make a reserve or part of a reserve, "Indian Lands", defined in section 2 of the *Indian Act*, para. (*k*) as "any reserve or portion of a reserve which has been surrendered to the Crown".

The necessary surrender was made as a result of the meeting held by the Indians in February, 1882, and which was accepted by Order in Council No. 529 in April of the same year. This Order in Council reads as follows:—

Certified to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 3rd April, 1882.

On a Memorandum, dated 7th March 1882, from the Superintendent General of Indian Affairs, submitting for acceptance by Your Excellency in accordance with the provisions of the *Indian Act* 1880, Section 37, Subsection 2, a Surrender, dated 9th February 1882, made to the Crown by the Chippewa and Pottawatomie Indians of Walpole Island, of that portion of their Reserve known as "St. Ann's Island" and the marshes adjacent thereto, for the purpose of the same being leased for the

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benefit of said Indians to the "St. Ann's Island Shooting and Fishing Club" for shooting and fishing purposes, and in confirmation of a lease covering said premises issued by this Department on the 30th of May, 1881, to the aforesaid "St. Ann's Island Shooting and Fishing Club".

The Committee advise that the surrender be accepted and submit the same for Your Excellency's approval.

It followed that St. Ann's Island became "Indian Land", and in view of s. 51 of the *Indian Act,* could be leased or sold only with the approval of the Governor General in Council. This s. 51 reads as follows:—

> All Indian lands which are reserved or portions of reserves surrendered, or to be surrendered, to His Majesty, shall be deemed to be held for the same purpose as heretofore; and shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this Part.

It is argued on behalf of the appellant that the effect of P.C. 529 is not only to accept the surrender of the lands to the Crown, and to confirm the original lease of May 1881, but also to authorize the Superintendent General of Indian Affairs, to enter into further agreements with the appellant, as he did.

I am unable to agree with this contention. When the Indians surrendered the lands to the end that said described territory may be leased to the applicants, * * * "for such terms and conditions as the Superintendent General of Indian Affairs may consider best for our advantage * * *", the lease with the appellant had then been signed, and the terms of the surrender indicate that its contents were known to all. The object of the surrender was to legalize what was rightly thought to be illegal, and to ratify what had been done. The same may be said of the Order in Council. But neither the authorization to the Superintendent in the surrender, nor P.C. 529 can be construed in my opinion as authorizing the Superintendent at the expiration of the lease, to enter into fresh agreements with the appellant nearly fifty years later, and in which can be found different conditions. When this lease came to an end, P.C. 529 which had authorized it, had served its particular purpose and a new one was therefore needed, in view of the imperative terms of s. 51, to vest in the Superintendent the necessary authority to lease these lands anew.

In view of the declaration of counsel for the appellant that he does not rely on the point raised in the court

below, that the respondent is estopped from denying the validity of the tenancy of the claimant, it is unnecessary to deal with it.

The appeal should be dismissed with costs.

The judgment of Rand and Estey JJ. was delivered by

RAND J.:—The question in this appeal is whether what purports to be a lease executed by the Superintendent General of Indian Affairs to the predecessor trustees of the appellant became binding on the Dominion Government. It was made in 1925 for the term of twenty years with an option for "renewal leases * * * for successive periods of ten years" and was the last of a succession between the same parties dating from 1881. It covers certain lands and waters within an Indain reservation, and was given primarily for fishing and hunting purposes, although not so expressly restricted.

The matter originated in a resolution passed on March 18, 1880, by the Indian Band Council authorizing the letting of what was known as St. Ann's Island to trustees for the St. Ann's Island Shooting and Fishing Club on terms approved by the Council, which was followed by a document signed by the Superintendent General dated May 30, 1881. The term was for five years from May 1, 1881, renewable for a like period; and it was provided that the lands and any buildings erected on them would at the "end, expiration, or other determination" of the lease or renewal be yielded up without any allowance being made for improvements.

Under the *Indian Act* of 1880, a surrender of the Indian interest was required before an effective lease could be made. On February 6, 1882, as a result of enquiries made by the lessees, at a meeting of the Band, an instrument was signed on its behalf which, after referring to the resolution of March 18, 1880, formally surrendered the lands to Her Majesty "to the end that said described territory may be leased to the applicants for the purpose of shooting and fishing for such term and on such conditions as the Superintendent General of Indian Affairs may consider best for our advantage." Then following a

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recital that an executed lease had been read and explained, it declared approval of its terms and the confirmation of its execution by the Superintendent General.

The surrender was accepted by a minute of the Privy Council approved by the Governor General on April 3, 1882 (P.C. 529) as follows:—

> On a Memorandum, dated 7th March 1882, from the Superintendent General of Indian Affairs, submitting for acceptance by Your Excellency in accordance with the provisions of the *Indian Act*, 1880, Section 37, Subsection 2, a Surrender, dated 9th February 1882, made to the Crown by the Chippewa and Pottawatomie Indians of Walpole Island, of that portion of their Reserve known as "St. Ann's Island" and the marshes adjacent thereto, for the purpose of the same being leased for the benefit of said Indians to the "St. Ann's Island Shooting and Fishing Club" for shooting and fishing purposes, and in confirmation of a lease covering said premises issued by this Department on the 30th of May, 1881, to the aforesaid "St. Ann's Island Shooting and Fishing Club".
>
> The Committee advise that the surrender be accepted and submit the same for Your Excellency's approval.

The first lease was superseded by another executed in 1884, which in turn was followed by others in 1892, 1894, 1906, 1915 and finally by that now in question. In those of 1884 and 1892 there was no provision for renewal, but an option to renew for ten years was contained in the instruments of 1894, 1906 and 1915.

Section 51, R.S.C. 1906, c. 81 (the *Indian Act*) provided:—

> All Indian lands which are reserved or portions of reserves surrendered, or to be surrendered, to His Majesty, shall be deemed to be held for the same purpose as heretofore; and shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this Part.

Cameron J., before whom the Reference made by the Minister under s. 37 of the *Exchequer Court Act*, came, construed the surrender to be absolute but held that s. 51 required for the validity of the lease of 1925 that it should have been directed by the Governor in Council, and, as admittedly no other Order in Council than No. P.C. 529 of April 3, 1882 had been made, found it void.

The contention of the appellant is that the surrender was on the condition that the lands should thereafter be subject to a right of leasing by the trustees, on terms satisfactory to the Superintendent General, which, if not perpetual, would continue so long as the Superintendent General determined; that by acceptance of the surrender

the condition became fixed and without more or by virtue of s. 64 of the Act, the Superintendent General became competent thereafter to deal with the lands in relation to the Club as he might consider for the benefit of the Band.

I find myself unable to agree that there was a total and definitive surrender. What was intended was a surrender sufficient to enable a valid letting to be made to the trustees "for such term and on such conditions" as the Superintendent General might approve. It was at most a surrender to permit such leasing to them as might be made and continued, even though subject to the approval of the Superintendent General, by those having authority to do so. It was not a final and irrevocable commitment of the land to leasing for the benefit of the Indians, and much less to a leasing in perpetuity, or in the judgment of the Superintendent General, to the Club. To the Council, the Superintendent General stood for the government of which he was the representative. Upon the expiration of the holding by the Club, the reversion of the original privileges of the Indians fell into possession.

That there can be a partial surrender of the "personal and usufructuary rights" which the Indians enjoy is confirmed by the *St. Catherine's Milling Company Limited* v. *The Queen* (1), in which there was retained the privilege of hunting and fishing; and I see no distinction in principle, certainly in view of the nature of the interest held by the Indians and the object of the legislation, between a surrender of a portion of rights for all time and a surrender of all rights for a limited time.

But I agree that s. 51 requires a direction by the Governor in Council to a valid lease of Indian lands. The language of the statute embodies the accepted view that these aborigenes are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation. For that reason, every such dealing with their privileges must bear the imprint of governmental approval, and it would be beyond the power of the Governor in Council to transfer that responsibility to the Superintendent General.

But the circumstances here negative any delegation of authority. The Order in Council approved a lease for a

(1) (1888) 14 App. Cas. 46.

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definite period on certain stipulations; by its terms, it would come to an end, even with renewal, within ten years; and the efficacy of the Order was exhausted by that instrument.

It was argued that the Crown is estopped from challenging the lease, but there can be no estoppel in the face of an express provision of a statute; *Gooderham & Worts Limited* v. *C.B.C.* (1), and *a fortiori* where the legislation is designed to protect the interests of persons who are the special concern of Parliament. What must appear —and the original trustees were well aware of it—is that the lease was made under the direction of the Governor in Council, and the facts before us show that there was no such direction.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Blake, Anglin, Osler & Cassels.*

Solicitor for the respondent: *F. P. Varcoe.*

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* Oct. 4, 5, 6, 7, 11, 12

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* Feb. 21

SUN LIFE ASSURANCE CO. OF CANADA (PLAINTIFF) ..... } APPELLANT;

AND

THE CITY OF MONTREAL (DEFENDANT) ..... } RESPONDENT.

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

Assessment—Municipal—Office building partly owner and partly tenant occupied—Actual value—Exchangeable value—Prudent investor—Replacement cost—Commercial value—Non-productive features.

In the municipal assessment of a very large office building in Montreal, which is approximately 50 per cent owner-occupied and the remainder rented, and whose size, design and particular architectural features make it impossible to be compared with any other building in that city,

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

(1) [1947] A.C. 66; [1947] 1 D.L.R. 417.

Held: That the actual value which the assessors must find pursuant to the city charter is the exchangeable value or what the building will command in terms of money in the open market, tested by what a prudent purchaser would be willing to give for it; and, on an appeal to either the Superior Court or the Court of King's Bench (Appeal Side), by force of the charter of the City of Montreal, these Courts must render "such judgment as to law and justice appertain". Moreover, a municipal valuation for assessment purposes is not to be made in accordance with the rules laid down with regard to the valuation of a property for expropriation purposes. The valuation must be made of the property as it stands and as used and occupied when the assessment is made.

Held: That the actual value of this building should be determined by giving to the percentage of the replacement cost, after allowing for the extra unnecessary costs of the construction, a figure of no more than 50 per cent.

Held: On principle, the non-productive features of a building, in so far as they do not add to its actual value ought not to be included among items in the determination of that value for municipal assessment.

Per Kerwin J.: The formula used by the assessors, having failed to produce the actual value, should be disregarded and the commercial value only should be considered.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing, St-Jacques and Casey J.A. dissenting, the judgment of the Superior Court, MacKinnon J., and confirming the municipal assessment made by respondent's Board of Revision.

F. P. Brais, K.C., and *H. Hansard, K.C.*, for the appellant.

D. A. McDonald, K.C., and *R. N. Séguin, K.C.*, for the respondent.

The CHIEF JUSTICE:—The subject matter of this appeal is the assessment for municipal purposes of the properties of the Sun Life Assurance Company of Canada in the City of Montreal. While there may be recognized general principles concerning municipal valuations, yet the main concern of the Courts in this case is evidently to apply the several provisions of the charter of the City of Montreal having reference to the subject.

Section 361 of the charter provides that all immovable property situate within the limits of the city shall be liable to taxation and assessment, with certain exceptions with which we are not concerned. It declares that immovable

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property shall comprise lands, buildings erected thereon, and everything so fixed or attached to any building or land as to form part thereof, but shall not include machinery, tools and shafting used for industrial purposes, except such as are employed for the purpose of producing or receiving motive power.

Under section 375(*a*) every three years the assessors shall draw up in duplicate for each ward of the city a new valuation roll for all the immovables in such ward, and this roll shall contain, amongst other things, the actual value of the immovables. However, whenever buildings or constructions erected upon an immovable entered in the previous roll have been changed or altered, or whenever a lot has been subdivided or divided, a new valuation of such property shall be made according to law and entered on the valuation roll by the assessors. The same section provides that at least two assessors shall act together in drawing up the valuation roll. The roll is deposited on the first of December. A public notice thereof is published and, during the delays fixed by the notice, the chief assessor is directed to receive complaints filed with him respecting any entries in the roll and to transmit them immediately to the Board of Revision.

By Section 382 a Board of Revision was created to be composed of three members appointed by Council on the report of the executive committee. The Board hears complaints at public meetings at which witnesses are called. The President decides questions of law. The Board may compel the appearance before it of one or several assessors in order to know in what manner and according to what principles they have proceeded to establish their valuations generally or in a particular case, or on what basis such valuations are founded, after which it may determine itself, or with the assistance of experts, the valuation in question; and, in so doing, it may increase, or reduce, or maintain, the valuation.

By force of section 384 of the charter an appeal lies from any decision rendered by the Board of Revision to any one of the judges of the Superior Court, by summary petition. The judge may order a copy of the record, including copies of the valuation certificate and of the documents annexed thereto, of the proceedings of the Board

of Revision, as well as of the complaint itself; and, after having heard the parties, but without inquiry, he must proceed with the revision of the valuation submitted to him and with the rendering of such judgment as to law and justice shall appertain.

A further appeal lies from the decision of the judge of the Superior Court to the Court of King's Bench, when the amount of valuation contested for the property concerned exceeds five thousand dollars, or when the amount of the rental contested and under examination exceeds one thousand dollars.

I only want to emphasize that, in the case of an appeal, the judge of the Superior Court, under the charter (sec. 384) shall render "such judgment as to law and justice shall appertain." Although this is not repeated with reference to the decision which the Court of King's Bench must render, it cannot be understood to mean that such Court is not to be governed by the same direction as the judge of the Superior Court. If we carefully examine the judgment rendered by the Court of King's Bench (1) in the present instance, and the reasons given by the majority, I am of opinion, with respect, that, in the judgment appealed from, that direction of the charter of the City of Montreal has not been followed. That is apparent by the following considérant of the formal judgment:—

Considérant, par conséquent, que si la base d'une évaluation faite par le Bureau de revision n'est pas manifestement fausse; si le Bureau n'a pas commis d'erreur évidente dans ses calculs, et que la méthode suivie pour déterminer la valeur n'a pas eu pour effet de créer une injustice certaine, ni le juge de la Cour Supérieure ni la Cour du Banc du Roi ne devraient intervenir pour modifier la décision du Bureau.

It is also apparent throughout the reasons given by the learned judges who formed the majority.

Now, of course, the principle embodied in the considérant, above reproduced, is the general principle followed in appeals from municipal assessments, but, as can be seen from the text of the charter, it is not the principle laid down by the latter. The Court of King's Bench professed to be governed by the general principle and applied it to the judgment it rendered and disregarded section 384 of the charter which prescribes, as we have seen, not that they ought not to interfere in the assessment only if the Board of Revision was manifestly wrong and had committed an

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evident error, or created a clear injustice, but that both the judge of the Superior Court and the judges of the Court of King's Bench should render "such judgment as to law and justice shall appertain." It follows that the judgment now under appeal, in my humble opinion, was not rendered according to the law which governs the City of Montreal, and that, for that reason alone, it ought to be set aside.

On the other hand, the learned judge of the Superior Court undoubtedly followed the principle laid down in the charter as to the powers which he was entitled to exercise, to such an extent, as a matter of fact, that the majority of the Court of King's Bench found that he had been wrong in doing so.

I need not insist on the point that a municipal valuation for assessment purposes is not to be made in accordance with the rules laid down with regard to the valuation of a property for expropriation purposes. One main ground why such a course should not be followed is that the expropriation of a property means the permanent divesting of the owner and should legitimately, therefore, take into account the present value and all the prospective possibilities of the property, while the municipal valuation is, generally speaking, only made for one year, or, in the case of the City of Montreal, for three years, with certain provisions for modification if certain events happen, such as alteration, improvement, fire, etc. The rule was laid down by Lord Parmoor in *Great Western and Metropolitan Railway Companies* v. *Kensington Assessment Committee* (1), that in such a case "the hereditament should be valued as it stands and as used and occupied when the assessment is made." In the yearly valuation of a property for purposes of municipal assessment there is no room for hypothesis as regards the future of the property. The assessor should not look at past, or subsequent or potential values. His valuation must be based on conditions as he finds them at the date of the assessment. In particular, in the preent case, there was no ground for considering any other condition, as no suggestion of any kind appears in the record that there was, throughout the period of assessment, a prospect of any change.

(1) [1916] 1 A.C. 23 at 54.

The Sun Life property, as it stood at the time of the valuation now in question, was occupied about sixty per cent by the company itself for its own purposes and about forty per cent by tenants. That is how the assessors found the property at the time they made their valuation, and that is the only aspect of the property that they had to take into consideration. If some material change took place during the three year period following the valuation, the charter of the City of Montreal provided for a fresh valuation taking into account those changes. Again, at the end of the three years, if the situation had been modified, there was then the opportunity to modify the valuation accordingly. But, for the valuation which had to be made and which is now the subject of the litigation, the property had to be taken as it stood then and as it was used and occupied.

The parties agreed on certain admissions showing the gross rental receipts for each tenant and each floor, including the basements, for the year 1941, being the material year. By these admissions the yearly rental actually charged to the company for the years 1937-1941 inclusive, as appears in the books of the Company, in the Company's annual statements and in statements supplied to the Superintendent of Insurance for the Dominion of Canada, for the floor space occupied by it per floor, was established. The amount shown, therefore, establishes the rental value for the year 1941, with which alone the assessors were concerned in their valuation. In turn, such rental value enables one to find the commercial value of the building, or, to adopt another expression which was used throughout the case, to estimate the price which a prudent investor would have been willing to give for the purchase of the property. An increase in rents in the City of Montreal might mean a higher rental value, but that would be the concern of the assessors who would have to render a decision at that time. For the moment, the assessors and the Court cannot be concerned with any other value than that of 1941. It is on such a basis that the judgment in this case must be arrived at.

Now, it is evident from a reading of the record and the opinions expressed by the many experts who were heard, that there is far from being an agreement on the approach

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that should be made to reach a proper valuation in these matters. Some speak of market value, but there is a general consensus of opinion, in the circumstances, that this cannot form the basis of valuation here, as everybody, witnesses, experts, assessors, Board of Revision, judge of the Superior Court, and judges of the Court of King's Bench, state most positively that the Sun Life building now in question is unique and that there is no comparison between it and any other building in either the City of Montreal or the immediate vicinity. We were invited to apply certain *dicta* of a United States court in a judgment dealing with the Federal Reserve Bank of Minneapolis, in the State of Minnesota. I do not find it necessary to pause to consider such a judgment dealing with a property several thousand miles from the one which we are now considering. Counsel for the respondent in the case at bar stated several times in the course of his argument that one way to estimate the value of the Sun Life property would be to look at the valuation of comparable buildings. Of course, that should first mean comparable buildings in the City of Montreal, or the neighbouring country. But I have been so far unable to understand how a comparison of that kind could be helpful. It cannot assist the Court in reaching a conclusion because, of course, that would assume that the so-called comparable buildings have themselves been correctly valued by the assessors. And the Court really does not know anything about those buildings in that respect, more particularly because the owners of such buildings have not been heard in this case. At all events, the evidence is clearly to the effect that there is no building in Montreal comparable to that of the appellant. (*Grampian Realties Co.* v. *Montreal East* (1)).

Moreover, if there is one basis upon which we should be clear as to the method which should be followed for municipal valuation purposes, it is the one which is recognized by the assessors themselves in the memorandum prepared by them on the assessment of large properties. It states:—

> Each property will have to be considered on its merits within the limits outlined above.

(1) [1932] 1 D.L.R. 705.

The Board of Revision expresses the same view as follows:—

> The coupling of the word "real" with the word "value" indicates that real value is a fact, not an hypothesis. Because this conception of real value is overlooked or ignored, the means, the elements to determine the said real value are often taken for the value itself. Such elements are unlimited in number. They vary "ad infinitum" as the cases. There is no fixed rule to determine in what proportion every element must be taken into account and what importance should be given to any element in particular. The same element may have more importance in one case than in another. The law imposes on the asssessor the duty of finding the real value of an immoveable and of inscribing it on the roll, but does not in any way put any limit to the assessor's discretion in considering all the elements he thinks it advisable to consider in exercising his judgment and arriving at a decision.

The "limits outlined above", referred to in the memorandum of the assessors, (Ex. D-5) proceed to divide the properties such as office buildings, apartment houses, departmental stores, hotels, etc., into four main categories. They are as follows:—

(1) Properties that are developed and operated solely on a commercial basis as investment propositions.

(2) Properties that are completely occupied by their owners.

(3) Properties that are partly occupied by the owners and partly rented, among which the Sun Life property is specifically mentioned.

(4) In a separate category all buildings like theatres and hotels.

With respect to the properties in the third category, of which the Sun Life is said to be one, the memorandum proceeds to state that these properties have been constructed or acquired as a permanent home for the enterprise of their owners, and that frequently the building is laid out for future development, the tenant situation being considered only temporary or incidental. In these cases, the memorandum continues, the owner is enjoying the full utility only of the space occupied by himself and is dependent on current rental conditions for the carrying charges on the balance of the building; and it is mentioned that some consideration should be given to the rental value in these cases, so that the replacement factor should be weighted somewhere between 50 and 100 per cent, and the

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commercial value factor make up the difference between 50 per cent and zero. Then the memorandum goes on to say:—

> No hard and fast rule can be given for the division of weight in these factors, as it will depend on the proportion owner-occupied, the extent to which the commercial features of the building have been sacrificed to the main design with a view to the future complete use of the building by the owner, or the enhanced prestige of an elaborate and expensive construction.

Admittedly such were the rules and the guiding principles followed by the assessors in the present case, and it is to that memorandum that we owe the idea embodied in the assessment herein of a certain percentage attributed to the replacement factor and another percentage attributed to the commercial value factor. In this instance the Board of Revision came to the conclusion, after a very complicated calculation, that the ratio of importance to be given to the net replacement cost should be 82·3 per cent and the ratio of the commercial value 17·7 per cent. Counsel for the respondent, in the course of the argument, was asked if a calculation of that kind for municipal valuation purposes was ever accepted in any Court of the province of Quebec and, of course, he could not point to any authority to that effect. Nevertheless, that was the yard-stick applied to the Sun Life property for its valuation by the Board of Revision.

I do not think that it is the function of this Court, acting as third Appeal Court, to proceed to a detailed calculation of what the valuation should be. In that view I am fully in accord with the reasons for judgment of Casey J.A. in the Court of King's Bench (Appeal Side) (1), and I adopt his reasons. Like him, I think that "the learned Justice of the Superior Court acted properly in intervening and in fixing the value of the Company's property, land and buildings at $10,207,877.00." I think the learned judge of the Superior Court succeeded in placing a true objective exchange value on the property and that the result he arrived at should be affirmed. As was said by Casey, J.A. the amount fixed by that Court more closely approaches the actual value of the property, as prescribed by the charter of the City of Montreal, and it should be allowed to stand.

The appeal should, therefore, be allowed and the judgment of MacKinnon J. should be restored with costs both

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here and in the Court of King's Bench (Appeal Side) against the respondent. The award of costs by the Court of King's Bench (Appeal Side) on the appeal to that Court of the Sun Life Assurance Co. of Canada should not be disturbed.

KERWIN J.:—This appeal is concerned with (1) the assessment by the City of Montreal of the appellant's main office building and what is called a secondary building, containing the heating plant; (2) the annual rental value of the two buildings for the purposes of business and water taxes.

The main question is the first and as to it there is no dispute as to the assessable value of the land itself. Article 375 of the charter of the City of Montreal provides for the preparation, every three years, by the assessors, of a valuation roll in each ward of all the "immovables", which expression includes lands and buildings. The roll is to contain "the actual value of the immovables" and the controversy turns upon the method of determining that value or, as it is put in the French version "la valeur réelle des dits immeubles". The rule applicable in determining compensation in expropriation cases is not that to be followed in municipal assessment cases where the land and buildings are to be assessed at their value, or real value, or actual value. The test is an objective one which in many cases may be applied by seeking the exchange value or the value in a competitive market. If there is no such market, then one may ask what would a prudent investor pay for the subject of taxation, bearing in mind the return that might be expected upon the money invested.

The differences between the assessors and the Board of Revision need not be set out since the latter confirmed the amount of the assessment set by the former. Both, however, proceeded in the following manner: Taking the actual rents received by the Company and estimating the rents from other parts of the building available for tenants, and adding to that an estimate of what the Company should pay for the space occupied by itself, and deducting therefrom the operating expenses, gives a net revenue which when capitalized resulted in a commercial value which may be taken as $7,028,623. The assessors and the Board then proceeded to fix the replacement cost of the buildings,

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which may be put at $13,387,131.80. Holding the view that there was no market and that both the replacement value and commercial value should be taken into consideration, it then became necessary, in their opinion, to take certain percentages of the above figures, which in the case of the assessors were put at 90 per cent of the assessed value and 10 per cent of the commercial value, and by the Board at 82·3 per cent and 17·7 per cent. The explanation of how the assessors arrived at their assessment appears in the evidence of one of them, Mr. Vernot, at page 556 of the Case, where he states:—

> I think I will have to corroborate what Mr. Hulse said about the principles and methods agreed upon by the asssessors, and in commercial buildings, first, we agreed on 50 per cent replacement for strictly commercial buildings, and 50 per cent commercial value. When I say strictly commercial I mean a building designed and built for revenue purposes only.
>
> When you come into the owner occupied building and renting part of it, we would have to balance the part of the building assessed for commercial purposes and the part assessed as owner occupied. In the case of the Sun Life it was 40 per cent tenant occupied in 1941 and 60 per cent owner occupied. The occupied space. So that would mean that the 50 per cent for commercial would be divided into 20 and 60. There would be another 30 per cent replacement cost added on the 50, to make it 80 and 20.
>
> But as the revenues in this building were based on revenues of much cheaper buildings—the revenue of this building received no competition—I consider that half of the commercial value of 20 per cent, making it 10 per cent, would pay for the amenities and benefits received by the owner of the building.

On appeal to the Superior Court, Mr. Justice MacKinnon while arriving at a different total for the replacement value, took 50 per cent of that total and 50 per cent of the commercial value in order to arrive at an amount of $10,207,877.40 for land and buildings. The majority of the Court of King's Bench (1) restored the order of the Board but Mr. Justice St. Jacques and Mr. Justice Casey dissented as they would have affirmed the judgment of the Superior Court. Casey J. decided that the commercial value was the proper method of approach and that the net rental revenue at which he arrived, $432,957, would represent a yield of approximately 4·2 per cent on the figure found by the Superior Court. He considered that in view of the evidence of Mr. Vernot that the rate should be 3 per cent for an owner occupied building and 4½ per cent

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for one that is tenant occupied, while Mr. Lobley and Mr. Simpson, for the Company, felt that a yield of 5 per cent was indicated, the figure of 4·2 per cent would not be far out of line. With those reasons and the result, I agree. While the Company sought to obtain a lower valuation on the basis of the evidence of its experts as to a possible purchaser, that evidence is not of such a character as to warrant it prevailing against the almost unanimous evidence of the commercial value.

I have not overlooked the fact that in the Company's annual general statements and in its returns to the Superintendent of Insurance for Canada for the years 1914 to 1941 inclusive, sums of a like amount appeared under the headings "book value" and "market value", which represented actual cost less depreciation. Much was made by the respondent of this fact. Whatever bearing the figures might have when related either to the annual statements or the returns to the Superintendent of Insurance, they cannot, I think, affect the duty of the assessors and of the Board and of the Courts in fixing the value of the Company's immovables for the purposes of municipal taxation.

There remains the City's contention that the assessors and the Board of Revision proceeded in accordance with a memorandum adopted by the asessors at a meeting held at the suggestion of the Board, and that failure to adhere to that memorandum would result in discrimination. The assessors must, of course, proceed so as to cause no discrimination but it is also their duty to see that every ratepayer is assessed for its immovables at their actual value. Where it is demonstrated, as is the case here, that by attempting to use the formula of the memorandum the result arrived at is not such value, then the formula must be disregarded.

As to the second point in the appeal—annual rental value—the appellant has not convinced me that all the judges were wrong and that item should therefore stand. The appeal should be allowed to the extent indicated, with costs, and the judgment of MacKinnon J. restored. The appellant is entitled to its costs in the Court of King's Bench in the appeal of the City of Montreal, but should

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pay the costs of its own appeal in that Court; the cost of printing the case in the Court of King's Bench should be borne equally by both parties.

TASCHEREAU, J.:—The appellant is the owner of a large office building situated on Dominion Square, in the City of Montreal and which occupies an entire city block from Metcalfe to Mansfield Streets on Dorchester Street. From Dorchester Street, it extends northward for approximately one half of a long city block. Part of this building is occupied by the Company itself as its head office, the remainder being rented on a commercial basis to a large number of business tenants.

The appellant is also the owner of a boiler house situated on Mansfield Street, where is located the heating apparatus. The office building and this boiler house, together with the emplacements whereon they are erected, were placed on the municipal valuation roll deposited by the assessors of the respondent on December 1st, 1941, at the respective valuation of $13,755,500 and $520,500. The appellant was also assessed in respect of its occupancy of the main building, at $423,280 for water tax purposes, and at $421,580 for business tax purposes. In the case of the boiler house, the assessment was placed at $26,000.

The appellant feeling that it was aggrieved by these valuations, appealed to the Board of Revision of the City of Montreal, and contended that the true and proper valuations of the said buildings should be $8,330,600 and $102,600 respectively. The valuations placed on the land in both cases (viz: $520,500 and $74,100) were not challenged, but the appellant also appealed regarding the assessed rental value for business tax, claiming that it should be reduced to $352,035. It also asked that the assessment of the rental value of the boiler house, fixed at $26,000, should disappear. During the hearing before the Board, the respondent submitted by counter-appeal that the combined assessment of the main building and boiler house should be increased to $15,651,100. The Board refused this increase, but maintained the assessment as made by the assessors, subject to consolidation of the boiler house assessment with that of the main building, with the result that the annual rental valuation of the boiler house

disappeared. The Board also dismissed the complaint against the assessment of the annual rental value on the roll.

The appellant then appealed to the Superior Court, under the provisions of the City Charter. Mr. Justice Mackinnon sitting in that court, reduced the assessment of both properties, including land, to $10,207,877.40, but refused to disturb the Board's decision as to the annual rental value. He therefore allowed in part the appeal of the Company with costs against the City of Montreal.

Both parties then inscribed the case before the Court of King's Bench of the Province of Quebec (1), which, Messrs. Justices St-Jacques and Casey dissenting, allowed the appeal of the City of Montreal with costs, dismissed the appeal of the Company also with costs, and restored the decision given by the Board of Revision. The appellant now appeals to this Court.

A brief account of the erection of this massive cubical designed building, which rises twenty-five storeys above the ground, is I think useful for a better understanding of this case. It was erected in three different stages. The first building, which now constitutes the southwest, or Dorchester and Metacalfe corner, was commenced in June, 1913, and completed in March, 1918. It was intended to be the head office of the Company. Although a comparatively small building of five or six storeys, occupying only one-sixth of the ground area of the present structure, it was made of very costly materials. The second stage of construction consisted in approximately doubling the size of the original building by extending it east, along Dorchester Street to Mansfield Street, and adding two storeys. This was commenced in the Summer of 1922 and finished in December, 1925. Finally the third stage, during which the great bulk of the existing structure was added, started in May, 1927, and it was only in December, 1930, that it was nearly all completed. Only a number of upper floors were not finished for occupancy by tenants at that time, nor completed until occupancy was from time to time, thereafter contracted for. At the time of the 1941 assessment, which is now in issue, approximately 14 per cent of the rentable space in the building was still unfinished and, therefore, unoccupied.

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Its cost up to April 30th, 1941, was $20,627,873.92, excluding the cost of the land and taxes and interest during construction, and the amount spent from April 30th, 1941, to December 1st of the same year, the date of the roll, was $58,713.70. The cost of the boiler house which was commenced in November, 1928, and ready in March, 1930, exclusive of the land and of interest and taxes during construction, was $709,257.14 plus $154 spent in 1938. The cost of the land, as given by the Company to the assessors, was $1,040,638.20. By adding together the above mentioned amounts, we come to a total of $22,436,636.96.

In 1930, the respondent's assessors placed these properties on the valuation roll of the City of Montreal for the tax year 1931-1932, at $12,400,000, but the present appellant appealed from such assessment to the full Board of Assessors under the provisions of the City Charter then in effect, and the appeal being allowed, the assessment was reduced to $8,000,000. During the ten years which followed, up to 1941, this figure of $8,000,000 was increased annually by amounts corresponding to the sums from time to time expended by the appellant on completion of interior floors as the same were occupied by tenants, and for the year immediately preceding the assessment now in issue, the property stood on the City valuation roll at $9,986,200 and it is from the sudden increase to $13,755,500 that the present appellant now complains. The assessment of the boiler house and land occupied by the appellant had likewise remained constant throughout the same period, at a total of $225,000 and by the assessment now under attack, this sum was increased to $520,500. These increases represent approximately 40 per cent for the office building and approximately 135 per cent for the boiler house. It must be noted that the land valuations were not increased, but on the contrary, slightly reduced, and it follows that the percentages of increase on the buildings as distinguished from the total included in the land, were even greater. The overall increase of the appellant's property affected by the assessment under attack was, therefore, of $4,064,000, and the overall assessment was $14,276,000.

At the same time, the annual rental value of the space occupied by the Company in its building, was increased from $357,280 to $423,280 for water tax purposes and $421,580 for business tax purposes.

In 1940, before the valuation of the properties now in question was made, the assessors of the City of Montreal prepared a "Memorandum" laying down certain rules concerning the assessment of large properties in Montreal, as office buildings, apartment houses, departmental stores, hotels, etc. These properties were divided into four main categories in order to determine the relative importance of the various factors used in arriving at their valuation.

The category with which we are concerned, is the third, and it includes properties that are partly occupied by the owners and partly rented. The "Memorandum" indicates that in order to determine a proper valuation, the replacement and commercial values have to be taken into account, but the replacement factor should always be weighed somewhere between 50 per cent and 100 per cent, and the commercial factor between 50 per cent and zero. This "Memorandum" was produced as exhibit and with it was also produced a list of properties, the valuations of which have been made in accordance with those directions. It appears that in assessing the Sun Life Building, the assessors have thought that the replacement factor should be 90 per cent, and the commercial factor 10 per cent.

Mr. George E. Vernot was the City assessor who made the assessments now challenged. The method followed by Mr. Vernot to value the main property was the following:—

He took the total cost of both properties as at the 30th of April, 1941, which as reported by the Company was $22,377,769.26. From this figure, he deducted the amounts paid for the erection of the boiler house, the construction of the sidewalks, the price paid for the land of both properties, the costs of the temporary partitions during the construction and of the parts demolished to connect the new buildings. These various amounts totalling $4,269,393.72 were then substracted from the total costs, leaving a balance of $19,108,375 for the main building alone, without the land. He then adjusted the cost of replacement to the 1941 figure, using the index of 1927-28-29-30, when most of the money was spent, and having found the difference to be $1,471,344 which he subtracted, he reached a figure of $17,637,031. He allowed 5 per cent for presumed extra cost, as the building was erected in three units, viz: $881,851, giving a balance of $16,755,180.

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He figured the depreciation at $3,081,202 and came to a final figure of $13,673,978 as being the cost of the main building in 1941, after depreciation and without the land. His next operation was to add to this last figure $730,600 value of the land, giving a total *replacement value* of $14,404,578.

The commercial value of the property was also considered by Mr. Vernot. By capitalizing at a rate of 15 per cent, the total revenue of the property which he figured at $1,187,225, he thus gave to the property an economic value of $7,915,000.

Then in order to apply the principles enunciated in the Memorandum, he reached the conclusion that the factor "replacement value" should be 90 per cent, and the commercial factor 10 per cent. By taking 90 per cent of $14,404,578, he obtained $12,964,120 and 10 per cent of $7,915,000, gave the figure of $791,500. His final operation was to add both these figures, subtract the value of the land, with the result that, in his opinion the "real value" of the main building alone, is $13,024,900, or $13,755,500 with the land. To this figure, he added the amount of the valuation of the boiler house, including the land, $520,500, making a grand total of $14,276,000.

When the case was heard by the Board of Revision, Mr. Vernot explained as follows how he arrived at 90 per cent "replacement" and 10 per cent "commercial":—

> We decided that on the large buildings in our Wards that were rented, totally rented, we took into consideration 50 per cent commercial value and 50 per cent replacement value; that is where the building was built solely for commercial purposes and occupied solely for commercial purposes by tenants. Those that were occupied by owners we would take at 100 per cent replacement cost and nothing for commercial value. So the Sun Life happened to fall between these two categories. The total floor space occupied by the Sun Life and the tenants is given by their list and came out to be 60 per cent and 40 per cent.

Later in his evidence, he added:—

> Q. Can you give us some more particulars as to the proportion between the 90 and 10? Do you conclude that 90 per cent must be given to replacement cost and 10 per cent to the commercial?—A. Yes.
>
> Q. Why not 15 and 85, or 20 and 80? You could give me some explanations?—A. I think I will have to corroborate what Mr. Hulse said about the principles and methods agreed upon by the assessors, and in commercial buildings, first, we agreed on 50 per cent replacement for strict commercial buildings, and 50 per cent commercial value. When I say strictly commercial I mean a building designed and built for revenue purposes only.

When you come into the owner occupied building and renting part of it, we would have to balance the part of the building assessed for commercial purposes and the part assessed as owner occupied. In the case of the Sun Life it was 40 per cent tenant occupied in 1941 and 60 per cent owner occupied. The occupied space. So that would mean that the 50 per cent for commercial would be divided into 20 and 60. There would be another 30 per cent replacement cost added on to the 50, to make it 80 and 20.

But as the revenues in this building were based on revenues of much cheaper buildings—the revenue of this building received no competition—I consider that half of the commercial value of 20 per cent, making it 10 per cent, would pay for the amenities and benefits received by the owner of the building.

The members of the Board of Revision accepted the method adopted by the assessors, but reached a higher figure because they reduced the adjustment cost to the index number 1939-40, and reduced also the amount of depreciation. They also applied the formula indicated in the "Memorandum" to the boiler house, which was dealt with separately by the assessors. They thought however that the "replacement" factor should be 82·3 per cent and the "commercial" factor 17·7 per cent. On account of these slight differences, they came to the final conclusion that the "real value" of both properties was $15,051,977.07, and that therefore, the valuation made by the assessors, viz: $14,276,000 was not excessive.

In the Superior Court, Mr. Justice Mackinnon agreed with many of the figures arrived at by the assessors. He however slightly reduced the depreciation on the building, but thought that a further depreciation of 14 per cent, viz: $2,352,932.70, should also be subtracted from the 1941 net cost of the building, being for extra unnecessary costs for granite, monumental work, ornamental stones, bronze sash, bronze doors, etc., as explained by the witnesses Perry, Mills and Désaulniers. He therefore reached the conclusion that the replacement value of the main building was $12,100,786.80 and after adding to this figure, the value of the land, viz: $730,600, plus the value of the boiler house and land, viz: $535,735, he arrived at a total replacement value of $13,387,131.80.

Mr. Justice Mackinnon expressed the view that both the replacement value and the commercial value should be considered, but that each should be given equal consideration, that the "actual value" should be 50 per cent of the replacement value, plus 50 per cent of the com-

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mercial value. He capitalized the net revenue of $752,062.66 at 10·7 per cent which equalled $7,028,623. Adding this last figure to the replacement value, as found by him, and dividing by 50 per cent, he concluded that the real value of both properties including the land, was $10,207,877.40.

Then, the Court of King's Bench (1), to whom both parties appealed, considered the case. The majority found that the valuation of immovables is an operation which requires technical knowledge and an experience that can be found only with specialists in the matter, and that if a valuation made by a Board of Revision composed of experts, is not manifestly wrong, does not contain obvious errors in its figures, if the method followed to determine the value of the property did not cause a manifest injustice, neither a Judge of the Superior Court nor a Court of Appeal should intervene to modify the conclusion arrived at by the Board.

The Court (1) held that, for the proper determination of the real value of immovables one must take into account 1° the indicia of the market, 2° the replacement value, 3° the economic value of the immovable, by capitalizing the revenues that it is susceptible of producing. The Court said that it was impossible to give to the Sun Life Building a market value, because such a building has no market, there being no seller and no purchaser, and that the safest way to come to a proper conclusion is to take into account the replacement value and the economic value. The Court thought that the Board had made no error in choosing these two factors to determine the real value, and it concluded by saying that, the Board having weighted all the elements of the problem that was submitted to it, the decision to apportion 82·3 per cent to the replacement value and 17·7 per cent to the economic value, should not have been disturbed.

The Court, therefore, dismissed the appeal of the Sun Life Assurance Company with costs, maintained with costs the appeal of the City of Montreal, and confirmed the judgment given by the Board, Mr. Justice St-Jacques and Casey dissenting.

This building has been rightly described as monumental and unique. Its external appearance, with its ornamental columns and balustrades, its granite walls, bronze doors,

(1) Q.R. [1948] K.B. 569.

the lavishness of the interior decorations, the unsparing use of marble and other expensive materials, the vastness of its rooms, its cafeterias, gymnasiums, elevators, etc., all contribute to make of this building one of the most sumptuous in the City of Montreal. For the same reasons, however, it is undoubtedly one of the least economical office buildings, and at the same time, one on which it is not easy to place a municipal valuation, and give to it a "real" or "actual" value.

The Charter of the City of Montreal, Art. 375, provides:—

> Every three years, the assessors shall draw up in duplicate for each Ward of the City a new valuation roll for all the immovables in such Ward. Such roll shall be completed and deposited on or before the 1st of December, after having been signed by the Chief Assessor
>
> This roll and each of the supplementary rolls mentioned in paragraph *b*, shall contain:—
>
> 3° The actual value of the immovables.

It is admitted that the words "real value" and "actual value" are interchangeable, and as Sir Lyman Duff, then C.J., said in *Montreal Island* v. *The Town of Laval des Rapides* (1):—

> Obviously, "real value" and "actual value" are regarded by the Legislature as convertible expressions.

But for the purpose of municipal valuation, they do not have the same meaning as the one attributed to them in expropriation cases, and therefore the necessary distinction must be kept in mind. In expropriation matters, "real value" means "value to the *owner*", which is not the case in municipal valuation. In *Pastoral Finance Association Ltd.* v. *The Minister* (2), Lord Moulton who was there dealing with an expropriation case, enunciated the following formula:—

> The owner is entitled to that which a prudent man in his position would have been willing to give *for the land sooner than fail to obtain it.*

Discussing this formula in *Montreal Island Power Co.* v. *The Town of Laval des Rapides* (cited *supra*), at page 307 Sir Lyman Duff expressed the following views:—

> There is no room for the application of any such formula in the administration of an *assessment act,* because the amount ascertained under the formula depends upon the *special position* of *the owner* with *regard to the land.*

(1) [1935] S.C.R. 304 at 305. (2) [1914] A.C. 1083 at 1088.

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And on the same page he added:—

In the case of expropriation, the rule is undisputed. The person whose property is taken is entitled to be compensated for the loss he has suffered by being deprived of his land compulsorily; the value of the land, for ascertaining such compensation, *is the value of the land to him.*

See also *Diggon-Hibben Ltd.* v. *His Majesty the King* (1).

In *Cedars Rapids* v. *Lacoste* (2), Lord Dunedin, speaking for the Judicial Committee, also in an expropriation case said:—

For the present purpose it may be sufficient to state two brief propositions: (1) *the value* to be paid for is *the value to the owner* as it existed at the date of the taking, not the value to the taker. (2) the value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

The reason for this rule is obvious, and I do not think I can put it more clearly than Mr. Justice Hodgins in *Ontario & Minnesota Power Co.* v. *The Town of Fort Frances* (3):—

* * * * the fact that the municipality appraises the land each year as it then is, and in that way gets the benefit, from time to time, of each realized possibility as it occurs, must be considered. The reason for the rule in compensation cases that "all advantages which the land possesses, present or future," must be paid for, is that the land is finally taken, and the owner loses both those present and future advantages, and the taker gets them.

It naturally follows that a building may for municipal purposes, be valued at a much lower amount than the amount of the compensation its owner would be entitled to if expropriated. In the latter case, the "value to the owner" would be considered, but ignored in the former.

In order to reach a proper conclusion in a case of municipal assessment, it is the "real value" that has therefore to be considered. As in many other statutes, these words are not defined in the Charter of the City of Montreal, but they have been the subject of many judicial pronouncements. It is settled law I think, that they mean what the building will command in terms of money in the open market.

In *Lord Advocate* v. *Earl of Home* (4), Lord MacLaren said:—

It means exchangeable value—the price the subject will bring when exposed to the test of competition.

(1) [1949] S.C.R. 712.
(2) [1914] A.C. 569 at 576.
(3) (1916) 28 D.L.R. 30 at 39.
(4) (1891) 28 Sc.L.R. 289 at 293.

In *Grierson* v. *City of Edmonton* (1), Sir Charles Fitzpatrick, C.J., with whom all the Members of this Court concurred, said:—

Speaking generally, the intrinsic value of a piece of property must necessarily be the price which it will command in the open market.

In *Gouin* v. *The City of St. Lambert* (2), it was held:—

La valeur réelle que vise la loi des cités et villes (art. 485) quant aux immeubles imposables d'une municipalité urbaine consiste dans leur valeur vénale à l'époque de la confection du rôle d'évaluation par les estimateurs.

At page 219, Mr. Justice Archambault says:—

Le sens des mots "valeur réelle" de l'article 485 de notre Loi des Cités et Villes est fixé par la doctrine et la jurisprudence. Les mots "valeur réelle" signifient "valeur actuelle", "valeur marchande".

In *Bishop of Victoria* v. *City of Victoria* (3), the British Columbia Court of Appeal decided:—

Under section 212, para. 1, of the British Columbia Municipal Act, for assessment purposes, the term "actual value" means *value in exchange*, that is, what a prudent man of business, taking into consideration the reversible currents which affect the value of land would be likely to pay for a property of the character under assessment.

The respondent itself accepts these views, and in its factum also agrees with the "willing buyer" and "willing seller" formula, which has often been recognized by the courts, and cites the case of *La Compagnie d'Approvisionnement d'Eau* v. *La Ville de Montmagny* (4), where Mr. Justice Pelletier said:—

Dans la cause du Roi v. MacPherson (10 Exch. Ct. Rep. 208), je trouve une définition donnée par le juge Cassels de la Cour d'Echiquier qui me paraît excellente. Voici cette définition: "C'est le prix qu'un vendeur qui n'est pas obligé de vendre et qui n'est pas dépossédé malgré lui, mais qui désire vendre réussira à avoir d'un acheteur qui n'est pas obligé d'acheter, mais qui désire acheter.

I may also add the following authority—In *Lacroix* v. *City of Montreal* (5), Bruneau J., said at page 130:—

La valeur actuelle à laquelle les estimateurs de la Cité de Montréal sont tenus d'évaluer les immeubles doit s'entendre de la valeur vénale savoir, celle que le propriétaire pourrait obtenir pour sa propriété, d'un acheteur qui, sans y être obligé, désirerait en faire l'acquisition.

In order to find this "actual value" it is of course, as Mr. Justice Mackinnon and the Court of Appeal have said, quite in order for the assessors to consider various elements

(1) (1917) 58 S.C.R. 13.
(2) Q.R. 67 S.C. 216.
(3) [1933] 4 D.L.R. 524.
(4) Q.R. [1915] 24 K.B. 416.
(5) Q.R. 54 S.C. 130.

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as recent free sales of identical or comparable properties, the depreciated replacement cost, the economic value of the property itself. The first of these approaches cannot be considered in this case; the Sun Life Building being in a class by itself, no sales of identical or comparable buildings have taken place, and I therefore agree with the courts below, that the two last approaches only can help to come to a proper conclusion.

Dealing first of all with the replacement value, I think there are considerations that have to be kept in mind, and which apply particularly in this present case. Although this method of valuation for municipal purposes is of frequent use, there are cases where it would be dangerous to attach to it too much importance, in view of the particular circumstances which may arise. I do not disagree with the method recommended in the "Memorandum", when of course no other indicia are available, but the rule must not be too rigid. It must have enough flexibility so that it may be applied to certain exceptional cases, as for instance the one with which we are now dealing. Otherwise, a manifest injustice would be the inevitable result. It is not always, although it might happen, that the "market value" or the "exchangeable value" of a building is represented by the amount of the investment made by the owner less depreciation. Some investments are good, some others are not, and certain features of an expensive building may contribute considerably to reduce its "market value."

What I have said previously of the Sun Life Building as to its most expensive construction, is sufficient, I believe, to show that its "replacement value" placed in the books of the Company at $16,258,050 in 1941, is not the figure that a "prudent investor" would consider in trying to determine its "real value". He would obviously disregard many of its amenities and luxuries, thinking rightly that they are superfluous and not productive of a proportionate return.

This amount of $16,258,050 which the Company showed in its books as being the value of the property, and which in the relevant year appeared in its annual statement furnished to the Superintendent of Insurance, does not represent the "real value" of the property for "assessment pur-

poses." It merely shows the amount of money spent in the circumstances already mentioned, with the ordinary annual depreciation. It indicates to the shareholders and to the Superintendent of Insurance how the funds of the Company were invested, but it surely does not reveal all the elements of the "replacement value", which has to be considered with the "economic value".

The proper method to be followed in order to determine the replacement value of a building, is first of all to ascertain the cost of construction, to adjust that cost to the index figure of the year when the valuation is made, then to deduct a reasonable amount for depreciation, and in certain exceptional cases a further amount on account of the special features of the building, keeping always in mind that the "replacement value" is one of the important factors that must be considered in the determination of the "real" or "market value". Expressing in a different form what I have said previously, it would be quite impossible to determine what the building will command in terms of money, if too expensive materials, sumptuous decorations and luxuries are value at their cost price. There must necessarily be an allowance for those special items, the value of which is not commensurate with their cost.

The assessors, the Board of Revision and the Court of King's Bench have refused to allow any reduction for such items as granite, ornamental work, marble floors and walls, etc., which Mr. Justice Mackinnon believes could have been replaced by less expensive materials, as explained by witnesses Perry, Mills and Désaulniers. He therefore, and with this view I fully concur, allowed a further depreciation of 14 per cent for those extra unnecessary costs, which do not add to the "real value" of the property. This additional depreciation amounted to $2,352,932.70. By doing so, he followed the judgment delivered by the U.S. District Court of Minnesota in *Federal Reserve Bank* v. *The State of Minnesota.* This case, of course, is not a binding authority, but an expression of opinion with which I entirely agree. The judgment, after referring to the building of the Federal Reserve Bank, as a "fortress", said:—

* * * * in substantiation of his estimate of the true market as contemplated by the Statute he figured the reproduction cost of the building as of May 1, 1936 to be $2,600,000. He allowed 25 per cent

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depreciation, being approximately 2 per cent per year for the life of the building and by reason of the apparent difference of opinion as to the effect of the distinctive architecture on its market value both artistically and as a utilitarian structure, he allowed an additional 25 per cent for depreciation. Therefore a total of 50 per cent depreciation is to be found in the Assessor's computation.

The judgment also reads:—

Furthermore, it appears that due consideration and allowance have been given by the assessor on account of the architectural and structural limitations that may exist in this building.

I also agree with the other figures arrived at by Mr. Justice Mackinnon, which are not materially different from those of the assessors and of the Board of Revision. I therefore accept his finding that the "replacement value" of the building is $12,100,796.80.

Turning now to the commercial value of the property, it is necessary to consider its gross revenue and its operating expenses. The Board of Revision and Mr. Justice Mackinnon both accept the same figures, viz: Total gross revenue $1,189,055.30 and operating expenses $436,992.64, leaving a net revenue of $752,062.66. After having capitalized this net revenue, they all came to the conclusion that the commercial value of the building, at the relevant date, was $7,028,623, and I find no satisfactory reason why this amount should be changed.

The "replacement value" and the "economic value" having been ascertained, it now remains to determine what consideration should be given to each element. The assessors thought that 90 per cent and 10 per cent were the right figures, while the Board was of the opinion that 82·3 per cent and 17·7 per cent should be adopted. Mr. Justice Mackinnon gave to each factor an equal importance of 50 per cent. It is not an easy task to reach mathematically the exact figure in such a matter, but I have no hesitation in reaching the conclusion that the assessors and the Board have given too much weight to the "replacement" factor. Having in mind that the test of "real or actual value" lies in the exchangeability of the property, I believe that the "prudent investor" would particularly be concerned with the "economic value" of the building, in order to get a fair return on his money.

The "real value" is the "market value" or the "value in exchange", and in order to ascertain it, one must neces-

sarily, even if there has been no sale of the building, try and find what would be the price of the building in the open market. The rule is not that because there is no buyer and no seller, as in the present case, the well-known theory of "willing buyer and willing seller" does not apply. We must ask ourselves this question: What would occur if there was a buyer and a seller? In *Lacoste* v. *Cedar Rapids* (1), Lord Warrington speaking for the Judicial Committee said at page 285:—

> But the proper amount to be awarded in such a case cannot be fixed with mathematical certainty but must be largely a matter of conjecture. It is the price likely to be obtained at an *imaginary* sale, the bidders at which are assumed to ignore the fact that a definite scheme of exploitation has been formed and compulsory powers obtained for carrying it into effect.

I do not agree with the Board of Revision when it says that this case does not apply. True, this was an expropriation case, but the principle of an imaginary sale may as well help to determine the real value of a building, as it does when the courts have to value the future advantages of a water power. Moreover, several witnesses heard before the Board are clearly of opinion that it is quite possible to imagine a market for the property, and that it is a commercial building (Simpson, MacRosie, Archambault, Lobley).

Under these circumstances, I am satisfied that the assessors and the Board have considerably undervalued the "economic factor" which, in a very large measure. would guide the "prudent investor" or "the willing buyer", always anxious to obtain "value in exchange" for his money. I believe that a proportion of at least 50 per cent should be attributed to it, although the replacement value has already been reduced by 14 per cent.

As I do not think that there has been any substantial error in the valuation of the boiler house, the figures should not be altered.

It follows that if we add to the replacement value of the building, viz: $12,100,796.80, the value of the land which is not challenged $730,600 and $555,735, the value of the boiler house and land, we have a total replacement value of $13,387,131.80. This figure added to the economic value, viz: $7,028,623, will give $20,415,754.80, which divided by 50 per cent, will equal the "market value" of

(1) Q.R. (1929) 47 K.B. 271.

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the property, viz: $10,207,877.40. This amount is $2,207,-877.40 higher than the valuation given to the same premises in 1931-32, by the respondent's Board of Assessors.

In coming to this conclusion, I have kept in mind that it is not the function of a Court of Appeal to disturb the valuations made by assessors. But in certain cases it is its duty to do so, particularly when the assessors have proceeded on a wrong principle, and when there is a manifest injustice. Here in refusing to allow an additional 14 per cent for extra unnecessary costs, and in giving a disproportionate consideration to the replacement value, they justified this Court to interfere.

After having carefully read the evidence, I have come to the conclusion that there is no justification to modify the judgment of the court below as to the complaint that the annual rental value is too high.

I would allow the appeal wtih costs, and restore the judgment of Mr. Justice Mackinnon. The appellant should also be entitled to its costs in the Court of King's Bench in the appeal of the City of Montreal, but should pay the costs of its own appeal in that Court; the cost of printing the case in the Court of King's Bench should be borne equally by both parties.

RAND, J.:—This appeal raises the question of the basis of valuation and its application for assessment purposes of the large building in Montreal owned by the Sun Life Assurance Company.

For property designed for business or ordinary private purposes, it is, I think, settled, that, as stated by Duff, C.J., in *Montreal Island Power* v. *Laval des Rapides* (1), "actual value" in article 375 of the charter of Montreal means exchange value, the value actually or theoretically ascertained by the test of competition between a free and willing purchaser and a like vendor. It seems quite evident that the draftsman of the article had not fully explored the conception of "actual value", and in spite of the controversy to which these words have given rise, they remain the legislative language of value for tax assessments. The legislature, in other words, has left it to the courts through experience with the many forms in which

(1) [1935] S.C.R. 304.

property value presents itself, to develop a formula which, adaptable to the generality of property, will produce a rough fairness and uniformity.

In the ordinary case, a commercial building constructed with due regard to the necessary relation between cost and utility presents little trouble whether the exchange value is arrived at by capitalizing revenue or by depreciated reproduction: there are no elements of cost not reflected in competitive value. There may be values imbedded in special features or conditions, but unless they are reflected in exchange value they must be eliminated in its ascertainment.

That value may thus become a highly theoretical conception; for assessment purposes, it is, in any case, an approximation; but in the practical administration of local government, the impact on the individual owner is lessened by the uniformity of the mode and by the small fraction of challenged differences in assessments which reaches him in the tax levied. But notwithstanding that fact, a formula suitable even for substantially the whole body of property must possess a flexibility sufficient to adjust the measure to exceptional features.

Admittedly a great deal of money has been expended in exceptional form in the building in question. It is monumental in design and massive in dimensions, and is seemingly intended to symbolize a business position of commanding power; but it is essentially an office building. The floor space is used both by the company and by tenants, of which approximately 50 per cent is occupied by the company, about 38 per cent is under lease, and the remainder unoccupied. Its total cost, as built in three stages between 1914 and 1930, though still not fully completed, was somewhat over $20,000,000. It is marketable only to a limited number of purchasers; the highest bidder would be one for whom the special features had the greatest attraction; the most likely buyers would be investors in office buildings, for whom the funded excess or uneconomic surplus would be written off. The potential market would thus present competition between investing groups and bids in the course of time of persons having purposes in mind more or less similar to those of the appellant.

In the theoretical market which, by the necessities of the case, must be constructed, competition in some form is

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essential. The case of *Vyricherla* v. *Revenue Officer* (1), although one of expropriation, illustrates one of its difficult aspects. The possibilities of buyers, sellers and properties is to be conceived in all manner and degrees. It is said by the respondent that, in an imagined sale, as the company would concede value to the total expenditure, it would, accordingly, be willing to pay the entire reproduction cost. But that ignores the test. The company, as bidder, would be influenced by the fact that there would likely be no other immediately available bidder with similar purposes in mind and it would drive the price down to the point at which the possibilities of owner bidders of diminishing interests or investment buyers would induce the seller to hold his property: both owners and investors could properly regard the value for the other secondary object as a reserved interest in their purchase.

The Assessment Department, in developing a working basis of valuation of general uniformity, in 1940 drew up a memorandum containing three directions to guide the assessors. Where the commercial building was occupied by the owner and no special characters present, the depreciated original or reproduction cost was to be taken as actual value; where the building was occupied by tenants, one-half of reproduction was to be added to one-half of the capitalization of income; and where occupied in part by owner and in part by tenants the former portion was to be treated as in the first case and the latter as in the second, with the percentage attributable to capitalization to range from 50 per cent to zero. Allowance was to be made for unusual factors by means of the percentages applied.

As exemplified here, the building being in the third class and as to 60 per cent of its available space, deemed occupied by the owner, the first figure would be the reproduction of that 60 per cent; the second would result from the division of the 40 per cent into fractions representing reproduction and capitalization. The assessor attributed first one-half of the 40 per cent to reproduction but by reason of the special enjoyment of the unique elements by the company, divided the remainder, 20 per cent, into one-half to reproduction and one-half to capitalization. In the result, 90 per cent of reproduction and 10 per cent of capitalization produced the assessed valuation. Reproduction cost together

(1) [1939] A.C. 302.

with the land but exclusive of the power plant on a nearby site, was found to be $14,404,578, 90 per cent of which is $12,964,120; capitalization was $7,915,000 which at 10 per cent gave $791,500; total actual value $13,755,500.

For the purchase of the building as an investment for business offices, the price would admittedly range between $7,500,000 and $8,000,000.

Although the latter would be the most likely object of purchase, the appellant does not ask us to take it alone as the determinant of exchange value. There are always the possible purchases for owner purposes, on the chance of which, rather than a sale solely on an income basis, the company would no doubt put a not inconsiderable value. The gradation of increasing possibilities of purchasers with lessening degrees of interest would extend to the purely investment basis; and the crux of the problem would be in estimating the present value of those possibilities.

The error of the assessment made lies in the fact that actual value has been virtually identified with value to the owner. That is clear from the influence on the percentage applied to construction cost of the special features as owner interests. Although the rule in expropriation would take their peculiar value to the owner into account as the assessor has done, that rule has no place in assessment: *Montreal Island* v. *Laval des Rapides* (*supra*) at p. 307. For the purposes here, those values must be subjected to the competitive test.

On the foregoing basis and taking the reproduction cost accepted by the Superior Court at $14,453,729.50, there would be deducted from it what is dead value for any purpose, such as differences in cost between marble and terrazzo flooring, between marble and plaster walls, and excessive decorative and ornamental work, which, as adjusted by McKinnon, J., is $2,352,932.70. To the remainder there would be added $730,000, the value of the land, and $535,735, the value of the heating plant: a total of $13,367,131. Placing the commercial value at the sum of $7,750,000, there remain the percentages to be applied to these two amounts.

As already stated the assessor attributed 90 per cent to reconstruction cost and 10 per cent to capitalization. The modification in this made by the Board of Review was on the basis of estimated rentals, rather than space, 65 per

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cent of which was imputed to the company and 35 per cent to lessees. Adding to the 65 per cent one-half of the 35 per cent gave 82·5 per cent to be attributed to reproduction value and 17·5 per cent to capitalization. This on an increased reproduction cost produced a figure somewhat higher than that of the assessor, but the latter was allowed to stand.

Having regard to the whole group of possible purchasers, the weight to be attributed to the one or other primary basis of price must depend upon the likelihood of their appearance as bidders. A heavy demand from prospective owners and few commercial investors would call for a correspondingly small percentage to be referred to the latter basis; when these proportions are reversed, as here, a like reversal of percentages becomes necessary.

McKinnon, J., was of the opinion that an equal percentage should be applied to each factor, but even with the deduction of surplus expenditure, that does not seem to me to reflect sufficiently the relative possibilities. Taking into consideration all special elements such as functional depreciation and obsolescence, and the comparative chances of sale, I should say that not less than 55 per cent should be related to the commercial figure and 45 per cent to that of reproduction cost. The former yields $4,262,500 and the latter $6,015,208.95, a total of $10,277,708.95. As this is substantially the amount found by McKinnon, J., I accept his figure as the proper valuation. In agreement with him I would allow the assessment of the power house and those in respect of both the business and school taxes to stand as confirmed by the Board of Review.

The appeal should therefore be allowed and the judgment of McKinnon, J., restored; the appellant should have its costs here and in the Court of King's Bench.

ESTEY, J.:—The appellant's main contentions are that the assessment dated December 1, 1941, upon the Sun Life building in Montreal is erroneous: (1) That the plan or method adopted by the assessors did not determine the actual value as required by the Charter of the City of Montreal, and (2) Certain allowances or deductions were improperly disallowed.

The assessment made by the assessors of land and building at $14,276,000 was affirmed by the Board of

Revision, reduced by Mr. Justice Mackinnon in the Superior Court to $10,207,877.40, and restored by a majority of the learned Judges in the Court of King's Bench (Appeal Side) (1), Mr. Justice St. Jacques and Mr. Justice Casey dissenting.

The issues in this appeal are restricted to the assessment of the building, there being here no contest with respect to the assessment of the land.

The assessors determined what they called the commercial value by ascertaining the net rental revenue of the building and capitalizing that amount; and the replacement value by making certain deductions for depreciation and other items from the cost of construction and the adjustment of the cost to the index number 1939-40. Then by apportioning these two amounts on the basis of 90 per cent replacement valuation and 10 per cent commercial valuation they arrived at the actual value. The Board of Revision suggested slight changes might have been made in certain items as well as the percentages in the apportionment but in the end affirmed the decision of the assessors. Mr. Justice Mackinnon allowed a further deduction for extra unnecessary costs and considered that both of these valuations should be given equal consideration as follows:—

50 per cent of replacement value of $13,387,131.80	$ 6,693,565.90
50 per cent of commercial value of $7,028,623.00	3,514,311.50
Real value of both properties....	$10,207,877.40

The appellant submits that this plan or method is not justified within the meaning of the Charter of the City of Montreal.

The assessors under the Charter of the City of Montreal, 62 Vict., c. 58, as amended by S. of Q. 1941, c. 73, s. 33, are required to determine the actual value of the immovables.

375—a. Every three years the assessors shall draw up in duplicate for each ward of the city a new valuation roll for all immovables in such ward .....

This roll and each of the supplementary rolls mentioned in paragraph *b* shall contain:—

3. The actual value of the immovables.

(1) Q.R. [1948] K.B. 569.

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The term "actual value" is not defined in the Charter. The legislature therefore in imposing upon the assessors the duty of determining actual value, without defining that term, intended that the assessors should accept the meaning of that phrase as it has been interpreted by the Courts in decisions respecting assessments. Chief Justice Duff in construing the phrase "actual value" in *The Cities and Towns Act*, R.S.Q. 1925, c. 102, stated in *Montreal Island Power Co.* v. *The Town of Laval des Rapides* (1) at p. 305:—

> Obviously, "real value" and "actual value" are regarded by the legislature as convertible expressions. The construction of these phrases does not, I think, present any difficulty. The meaning of "actual value", when used in a legal instrument, subject, of course, to any controlling context, is indicated by the following passage from the judgment of Lord MacLaren in *Lord Advocate* v. *Earl of Home* (1891) 28 Sc.L.R. 289, at p. 293:—
>
> > Now, the word "value" may have different meanings, like many other words in common use, according as it is used in pure literature, or in a business communication or in conversation. But I think that "value" when it occurs in a contract has a perfectly definite and known meaning unless there be something in the contract itself to suggest a meaning different from the ordinary meaning. It means exchangeable value—the price which the subject will bring when exposed to the test of competition.
>
> When used for the purpose of defining the valuation of property for taxation purposes, the courts have, in this country, and, generally speaking, on this continent, accepted this view of the term "value".

And at p. 307:—

> These assessment provisions, like other assessment provisions, contemplate an objective standard which can be applied with fairly reasonable uniformity to all classes of owners alike.

Mr. Justice Pelletier in *Compagnie d'Approvisionnement d'Eau* v. *Ville de Montmagny* (2), stated at p. 418:—

> Dans la cause du *Roi* v. *Macpherson*, 1 Exch. Ct. Rep. p. 53, je trouve une définition donnée par le juge Cassels de la Cour d'échiquier qui me paraît excellente. Voici cette définition: "c'est le prix qu'un vendeur qui n'est pas obligé de vendre et qui n'est pas dépossédé malgré lui, mais qui désire vendre réussira à avoir d'un acheteur qui n'est pas obligé d'acheter, mais qui désire acheter".

Actual value must be, except where there is a market in which the exchange value may be ascertained, a matter of judgment exercised after determining every item that affects the value of the particular immovable under consideration. *The Bishop of Victoria* v. *City of Victoria* (3); *Massachusetts General Hospital* v. *Belmont* (4).

(1) [1935] S.C.R. 304.
(2) Q.R. [1915] 24 K.B. 416.
(3) [1933] 4 D.L.R. 524.
(4) (1919) 233 Mass. 190 at 191.

In the American and English Ency. of Law, Vol. 27, p. 690, it is stated:—

> The advantages and disadvantages of location, earning capacity, cost of construction, market price, or other elements which enter into and constitute the value of property, should be considered by the assessing officers in arriving at their determination. The method to be followed and the elements of value to be taken into consideration in a particular case must generally be determined by the character and situation of the property involved. There exists in fact no rigid rule for the valuation, which is affected by the multitude of circumstances which no rule can foresee or provide for. The assessor must consider all these circumstances and elements of value, and must exercise a prudent discretion in reaching a conclusion.

Actual value, as above defined, determined upon a consideration of so many factors is unavoidably a matter upon which, in respect to many properties, men of experience and capacity will entertain different opinions. The legislature in recognition of this fact provides that actual value as determined by the assessors in the exercise of their own judgment shall be accepted for assessment purposes.

The relevant provisions of the Charter of the City of Montreal may be summarized: Sec. 375 above quoted requires that every three years the asssessors shall draw up a new valuation roll for all immovables; sec. 375-c. that "the chief assessor shall divide the work in such a manner that at least two assessors shall act together in drawing up the valuation roll;" sec. 373(10) provides that "the assessors shall be held to perform all the duties imposed upon them by the charter;" and sec. 374 requires that each assessor shall, before entering upon his duties, declare upon his oath that "I will faithfully, impartially, honestly and diligently perform the duties of an assessor according to law." The statute gives to them a wide latitude in determining their method of procedure and the source from which they may obtain their information, but requires that the amount when finally determined must be the result of their own independent judgment.

This requirement is in accord with that which exists in similar assessment legislation where it has been held that the assessors must act independently even of their own council. *In re Denne and The Corp. of the Town of Peterborough* (1); *Lounsbury Co. Ltd.* v. *Bathurst* (2).

(1) (1886) 10 O.R. 767. (2) [1949] 1 D.L.R. 62.

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In *Dreifus* v. *Royds* (1), the statute provided in sec. 40(1) "land shall be assessed at its actual value" and then in sec. 69 "the court may, in determining the value at which any land shall be assessed, have reference to the value at which similar land in the vicinity is assessed." The board largely determined the actual value of the land in question from that of neighbouring lands assumed to be of the same character. Duff, J. (later Chief Justice) stated at p. 336:—

> It is very clear to me that the board has proceeded upon the theory that the enactment of sec. 40 ss. 1 is modified by that of ss. 16 of sec. 69 and that the actual value for the purpose of assessment may be something other than the actual value in fact, the determination of which is governed by the practice of the assessor as applied to similar lands in the vicinity. This I think is an erroneous view. The governing enactment is that of section 40, ss. 1, and the rule laid down by ss. 16 of sec. 69, is a subsidiary rule which has been enunciated with the object of facilitating the application of the governing rule. The assessment of other lands may be referred to for the purpose of ascertaining the actual value, that is to say as affording some evidence of the actual value but only for that purpose.
>
> The appeal should be allowed and the matter referred back to the board to enable them to determine the assessment in accordance with this principle.

See also *Rogers Realty Co.* v. *City of Swift Current* (2).

The fixing of a flat rate over a large acreage throughout which values vary has been held to be invalid: *In re Assessment Act* and the *N. & F.S. Rly. Co.* (3); *In re Wauchope School Dist.* (4). These authorities illustrate the personal responsibility of assessors whose duty it is to determine actual value. It is in recognition of this responsibility so placed upon assessors by the legislatures that Courts have refused to interfere with assessments unless they involve some error in principle or substantial injustice.

That the assessors in the City of Montreal should confer with respect to the factors that enter into the making of assessments is to be commended. They may adopt rules and standards which they believe to be of assistance in the more accurate determination of actual value and in the attainment of uniformity in the distribution of the tax burden. In so far, however, as such rules, formulae or plans interfere with, restrict or eliminate the discharge of the assessors' statutory duty, to that extent they cannot be upheld.

(1) (1920) 61 S.C.R. 326.
(2) (1918) 57 S.C.R. 534.
(3) (1904) 10 B.C.R. 519.
(4) (1909) 2 Sask. L.R. 327.

A Real Estate Valuation Manual prepared for and used by the assessors in the City of Montreal contains the following in its foreword:—

> The object of this manual is to explain the system and methods to be used in the municipal valuation of real estate and to demonstrate how the problems which originate with the latter may be analyzed and solved by the adoption of certain recognized rules and standards.

In addition thereto, and about fifteen months before the roll containing the items here in question was completed, the assessors of that city at a conference adopted a memorandum entitled "Memorandum on the assessment of large properties, such as office buildings, apartment houses, departmental stores, hotels, etc." It states: "These properties seem to fall into four main categories, which determine to a large extent the relative importance of the different factors to be used in arriving at their valuation."

This memorandum requires that the two assessors in the ward would first determine whether a building should be classified as one of the "large properties." If so classified, they shall then determine both its replacement and commercial valuations.

The assessors having arrived at what they deem replacement and commercial valuations, are then required by the memorandum to decide whether it is wholly or partially owner or tenant occupied. If tenant occupied these valuations shall be apportioned equally, or 50 per cent of each. If wholly owner occupied 100 per cent replacement cost shall be accepted as the assessment valuation. Then when the property is, as here, partially owner and tenant occupied, the assessors must give the replacement valuation at least 50 per cent or such higher percentage as they may decide and the balance to make up the 100 per cent is the percentage of the commercial valuation in the apportionment. The total of these two percentages constitutes the assessment.

The assessors arrived at the percentages in this case as follows:—

> In the case of the Sun Life it was 40 per cent tenant occupied in 1941 and 60 per cent owner occupied. The occupied space. So that would mean that the 50 per cent for commercial would be divided into 20 and 60. There would be another 30 per cent replacement cost added on the 50, to make it 80 and 20.

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But as the revenues of this building were based on revenues of much cheaper buildings—the revenue of this building received no competition—I consider that half of the commercial value of 20 per cent, making it 10 per cent, would pay for the amenities and benefits received by the owner of the building.

The actual computation was:—

Replacement: 90 per cent of $14,404,578	$12,964,120
Revenue: 10 per cent of $7,915,000	791,500
Say	$13,755,500
Less land	730,600
Building	$13,024,900

The foregoing indicates that the assessors followed the provisions of the memorandum in determining the assessment of the Sun Life building, notwithstanding that the assessor who did the greater part, if not all, of the work in arriving at the amount of the assessment stated "There is no other building in the city to compare with the Sun Life." This statement, founded upon the size and particular architectural features of the building, emphasizes what the authorities insist upon and the Charter of the City of Monreal requires that every building should be assessed upon the judgment of the assessor after considering all the relevant factors. These same authorities indicate that there is an inherent danger in grouping buildings, variously used and located, according to their size. Such is no doubt the paramount reason for the absence in the Charter of the City of Montreal of any rules or other aids or guides to assist in determining actual value.

The Sun Life building is an office building and in following the provisions of the memorandum the assessors because its offices were in part occupied by the owner and in part by tenants were required to accept in the apportionment at least 50 per cent of the replacement valuation and, indeed, it is largely this factor that eventually leads to the apportionment of 90 per cent replacement and 10 per cent commercial valuation. Counsel for the appellant stressed occupancy as between owner and tenant is not a determining factor in the determination of actual

value of a building. He illustrated his contention by pointing out the mere fact that the tenants move out and owners move in and occupy the premises does not, without more, affect actual value and there is support for this contention in *Regina* v. *Wells* (1). In any event, it appears that it has been given an importance in the determination of the actual value of this building that cannot, in the circumstances, be justified.

The assessors themselves computed the commercial value of the land and building at $7,915,000 and the replacement value at $14,404,578. Even if it be granted that these valuations include all relevant factors, the Charter of the City of Montreal contemplates that the assessors shall consider the difference between these valuations, give to the factors that make for that difference such importance as the circumstances warrant and in the exercise of their own judgment determine the actual value. This is far different from their proceeding as they have under the direction of the memorandum that fixes the apportionment largely upon the basis of occupancy. In fact as stated above, proceeding upon this basis they arrived at an apportionment of 80 per cent and 20 per cent and then as "the revenue of this building received no competition" it was decided that a 90 per cent and a 10 per cent apportionment "would pay for the amenities and benefits received by the owners of the building."

It is significant that while in their computation of the assessment only commercial and replacement valuations were considered, upon this appeal respondent submitted that the book and market values as computed by the company and reported to the Superintendent of Insurance should be taken into account. These values were computed and so reported each year. In the year 1941 they were the same and in the sum of $16,258,050.27. On the other hand, the appellant contended that consideration should be given to the fact that after the building was constructed in 1931 it was assessed for the year 1931-32 at $12,400,000, and upon appeal was reduced to $8,000,000, which was increased from year to year as the interior of the building was completed and occupied by tenants until in 1940 the property was assessed at $10,211,200. Both might well be considered but neither is conclusive. These

(1) (1867) 36 L.J.M.C. 109 at 111.

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requests of the respective parties but emphasize again the statement included in the quotation from the American and English Ency. of Law, Vol. 27, p. 690, where it is stated:—

> There exists in fact no rigid rule for the valuation, which is affected by the multitude of circumstances which no rule can foresee or provide for.

Notwithstanding the desirability, if, indeed, not the necessity of the assessors conferring for the purpose, as already mentioned, in a city the size of Montreal, it does seem that having regard to the admittedly unique, distinct and different character of this building that, in the main, it has been assessed as any "large property" within the terms of the memorandum. In these circumstances, notwithstanding the judgment exercised by the assessors in fixing the percentages, there has not been that assessment of this building contemplated by the statute.

The second contention raises issues as to what ought to be made by way of allowances and deductions. The assessors allowed a deduction for the fact that the building was built in three completed buildings, the first in 1918, the second in 1925 and the third in 1930. A further deduction for structural depreciation and an allowance to adjust the cost figure to that of 1941. Mr. Justice Mackinnon allowed a further deduction of 14 per cent for extra unnecessary costs of construction. The appellant, however, contends that there should be a further allowance for functional depreciation, that "the Sun Life Building suffers from a very serious functional disability resulting from the inherent design of the building." This, it is pointed out, involves a large amount of waste space which cannot be utilized, as well as additional space which is undesirable because it is either inadequately lighted or altogether dark. The contention is "this waste space and this excessive undesirable space detract from the value of the building whether to a prospective purchaser or to the Sun Life Company itself."

It is a very large building occupying an entire city block, rising 25 storeys above the ground and appropriately described as of a "massive cubical design . . . with walls unbroken by courts or light wells," that the heavy columns as well as other architectural features and embellishments,

together with the fact that throughout the finest materials and equipment were used made the construction cost excessive in relation to its exchange value.

Mr. Justice Mackinnon granted depreciation for extra unnecessary or excessive costs upon the evidence that the granite walls, bronze sashes, vita plate glass, marble floors and walls, ornamental structure and interior decorations, though adding much to the attractiveness of the building, did not increase its revenue or earning possibilities in a commensurate amount. Mr. Justice Mackinnon stated that:—

> In allowing this additional 14 per cent for depreciation the court has not taken into consideration the excess cost of the hospital, auditorium, kitchen and cafeteria services and private elevators as they all form part of the special services enjoyed by the Sun Life although adding little to the actual value of the building * * * *

The unreported case of *State of Minnesota* v. *Federal Reserve Bank of Minneapolis*, a copy of which was included in the record, was cited in support of a functional allowance. The State of Minnesota required the assessor to determine the "true and full value." It was there contended that because the building was constructed for and solely occupied by the bank that it had "considerable waste space even in its present use," and as its maintenance was excessive, it was unsuitable as a business property. The assessor determined the cost of reproduction in the year in question and then allowed 25 per cent for physical depreciation and a further 25 per cent to cover "the effect of the distinctive architecture on its market value, both artistically and as a utilitarian structure." The Court affirmed the assessment at this valuation. The phrase "both artistically and as a utilitarian structure" would seem to include both that which Mr. Jusice Mackinnon allowed "for extra unnecessary costs" as well as an allowance for what the appellant terms "functional depreciation."

Messrs. Perreault and Archambault, whose valuations were respectively $8,625,200 and $9,001,983 (the lowest replacement valuations deposed to), included an allowance for "functional depreciation." The Board of Revision disallowed this item but stated "that in making allowances for 'functional' depreciation and obsolescence, on top of the physical depreciation, they (Perreault and Archam-

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bault) have overstepped the field of the replacement to encroach on the one of the economic value. The deficiencies, if they exist, are reflected in the rental value on which is based the commercial value; so that Messrs. Perreault and Archambault are making double use of the same allowances."

On principle, it would appear that such non-productive features of a building, in so far as they do not add to its actual value (as already defined) ought not to be included among items in the determination of that value. In so far as such items do not enter into or form a part of the actual value and yet are included in the computation thereof the taxpayer is called upon to pay an annual tax thereon which ought not, within the accepted definition of "actual value", to be included. When, therefore, these factors are established the assessors ought to make such fair and reasonable allowances as the particular circumstances may justify.

The business and water assessments have been affirmed in each of the lower Courts and while in many cases the contention of the appellant would be applicable, there is in the particular circumstances of this case justification for a difference such as has been here computed.

The errors in principle involved in the foregoing determination of actual value would, in the ordinary course, justify a reference back to the assessors. However, at the hearing the parties intimated that they would prefer, should we find such errors, a direction fixing actual value as determined by Mr. Justice Mackinnon. In compliance with that suggestion, the appeal will therefore be allowed and the judgment varied to fix the actual value of the Sun Life Building at $10,207,877.40.

The appellant should have its costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Montgomery, McMichael, Common, Howard, Forsyth & Ker.*

Solicitors for the respondent: *Saint-Pierre, Choquette, Berthiaume, Emard, Martineau, McDonald & Séguin.*

ROSARIO G. DASTOUS and ROSE CANNED FOOD PRODUCTS..... } APPELLANTS;

AND

MATHEWS-WELLS COMPANY LIMITED ..... } RESPONDENT.

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* Mar. 7, 28, 29
* Nov. 23
* Dec. 22

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade Mark—Meaning of words "made pursuant to the provisions of this Act" as used in s. 18—Whether canned chicken "similar" wares to jams, pickles, sauces and vinegars within the meaning of s. 2(l)—Whether the mark "Rose Brand" and the mark "Rosie" are "similar" within the meaning of s. 2(k)—The Unfair Competition Act, 1932, S. of C. 1932, c. 38.

The respondent, a manufacturer of jams, jellies, pickles, sauces and vinegars, etc., is the proprietor of three trade marks; all carry the words "Rose Brand" and each bears the representation of a rose. The first two marks were registered in 1914 and 1931 respectively under the *Trade Mark and Design Act*, the third, a design mark, under *The Unfair Competition Act, 1932*. The appellant under the name of "Rosie Canned Food Products", processes and sells various forms of canned chicken and chicken products. His labels had as their predominant feature the word "Rosie", a contraction of his Christian name Rosario, followed by the word "Brand" in small letters, and a red rose with green leaves protruding from the sides. His application to register the mark "Rosie" was refused by the Registrar on the ground that it was confusingly similar to the registrations of the respondent.

In an action for infringement and passing off the Exchequer Court, restrained the appellant from using the word "Rosie" or any similar word, or the representation of a rose, on prepared food products similar to that of the respondent and in particular, canned chicken.

Held: (Reversing the judgment of the Exchequer Court), that the appeal should be allowed.

Per: Rinfret C.J., Taschereau, Rand and Estey JJ.—The wares of the respective parties are not, in the circumstances, within the scope of similarity defined by s. 2 (*l*).

Per: Rinfret C.J.—The wares are not of the same kind as required by the definition of s. 2 (*k*), and although they may have the common characteristics of food, that is not sufficient to declare them similar, as it would be contrary to the definition of trade mark under s. 2 (*m*).

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

Reporter's Note.—On November 23, 1949, at the request of the Court, counsel were heard further on three points of law suggested by the Court.

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Per: Taschereau, Rand and Estey JJ.—The facts of the case establish an intention to relegate the first mark to the role of a mere supporting registration and its abandonment as a mark for use in association with wares; the new designs of the later two marks have been so evolved and in such circumstances as to lead to the same conclusion.

Per: Rinfret C.J.—The word "Rose", alone is not registrable under the Act, nor could the respondent by mere registration validly acquire a monopoly on the word "Rose" for its wares; there was no infringement of the marks so far as they are limited to the word "Rose Brand", nor was there evidence of confusion or deception by the buying public between the products of the respective parties.

Per: Taschereau, Rand and Estey JJ.—The language of s. 18 as it speaks of registration "made pursuant to the provisions of this Act", is to be taken as signifying the fact of being on the Register and the expression therefore embraces all registrations in the Register maintained under that Act.

Per: Taschereau, Rand and Estey JJ.—Although s. 18 (2) deals with the effect of a certified copy of the record of registration it implies necessarily that the registration itself would carry the like conclusive effect. In the circumstances of this case, the proof was made upon which the section is intended to operate.

Per: Locke J.—The certificates tendered as proof of the registration of the marks claimed to have been made under the *Trade Mark and Design Act* did not prove either the fact of registration nor that the marks were vested in the respondent. They were neither given under the provisions of s. 18 of *The Unfair Competition Act, 1932,* nor did they relate to registration made pursuant to that Act and proved nothing. The trade mark registered in November 1932 was properly proved by a certificate under s. 18 (2) but upon the evidence was only available upon the claim for infringement in respect of pickles and vinegar and the appellant's products were not "wares of the same kind" within the meaning of s. 2 (*k*).

Held: Also, that the evidence did not establish the alternative claim of passing off.

APPEAL from a decision of the Exchequer Court, Cameron J. (1), whereby he held that the appellant had infringed three marks of the plaintiff; (*a*) a specific trade mark registered in 1914 under the *Trade Marks and Design Act* to be used in connection with the sale of jams, preserves, canned goods (except salmon), pickles, sauces, marmalades, jellies (excepting jelly powders), catsups and mustards, and consisting of a label, a rose on a green background with the wording "Rose Brand"; (*b*) a specific trade mark registered in 1931 under the *Trade Mark and*

(1) (1948) 8 C.P.R. 2; 7 Fox Pat. C. 8; (1948) Can. Cur. Law 161.

Design Act, to be applied to the sale of olives, vinegars, peanut butter, mayonnaise and salad dressing, consisting of a reproduction of a red rose with a green leaf on either side, and the word "Rose Brand" being represented in a black parallelogram; (*c*) a design mark registered in 1932 under *The Unfair Competition Act, 1932,* to be used in connection with the manufacture and sale of pickles, pickled goods, condiments, prepared mustards, salad dressings, spices, vinegars, jams, jellies, preserved and canned goods, excluding baking powders, flavouring extracts and jelly powders, consisting of a parallelogram-shaped panel having the reproduction of a rose protruding from one upper corner and a horizontally exposed rectangular panel superimposed upon the parallelogram-shaped panel and bearing the words "Rose Brand" and name of contents, and name of the respondent.

Redmond Quain, K.C., and *T. R. Giles* for the appellant.

Christopher Robinson for the respondent.

The CHIEF JUSTICE:—This is an action for infringement of three trade marks and for passing off, and a reference as to damages and an injunction were granted in favour of the respondent.

The respondent company, whose Head Office is at Guelph, Ontario, is the proprietor of the following three marks:—

(*a*) A specific trade mark to be used in connection with the sale of jams, preserves, canned goods (except salmon), pickles, sauces, marmalades, jellies (excepting jelly powders), catsups and mustards. This trade mark "consists of a label, a rose on green background with the wording "ROSE BRAND", name of contents grown and packed at Rosemount Orchards, Beamsville, Ontario.

(*b*) A specific trade mark to be used in connection with the manufacture and sale of olives, vinegar, peanut butter, mayonnaise, and salad dresing. The trade mark "consists of a red rose with a green leaf on either side and the words "ROSE BRAND", the latter being represented in a black parallelogram".

(*c*) A design mark to be used in connection with the manufacture and sale of pickles, pickled goods, condiments, prepared mustards, salad dressings, spices, vinegars, jams, jellies, preserved and canned goods, excluding baking powder, flavouring extracts and jelly powders. This design mark "consists of a parallelogram-shaped panel having the reproduction of a rose protruding from one upper corner and a horizontally exposed rectangular panel."

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The first and second trade marks were registered under the *Trade Mark and Design Act,* respectively on December 2, 1914, and on July 18, 1931. The design mark was registered under *The Unfair Competition Act, 1932,* on October 2, 1933.

The appellant carries on business under the name of "Rosie Canned Food Products" at Fruitland, Ontario, and is its sole proprietor. On August 7, 1946, he made application to register the mark "ROSIE" for use on wares described as canned chicken dinners (a mixture of chicken, vegetables and gravy), canned chicken stew (a mixture of chicken, vegetables and gravy), canned jellied chicken, and canned chicken sandwich spread. This application was refused by the Registrar on the ground that it was confusingly similar to the registration of the respondent.

The respondent has never manufactured canned chicken or chicken products of any sort. Most of its products are sold in jars or bottles. Only fifteen per cent of its jam is sold in tins, and about five per cent of its pickles also in tins, mostly in gallon size.

The appellant sells his products in small tins, confined entirely to canned chicken and chicken products, chicken being the main ingredient of the latter. He commenced business about 1945, and he adopted the word "ROSIE" as his trade mark (this being a contraction of his name, Rosario) and sold his products under the name of "ROSIE BRAND". The labels on the tins used by him have as their most prominent features the word "ROSIE" (followed by the word "Brand" in small letters), and a red rose with green leaves protruding from the sides.

At the outset the learned trial judge asked Counsel for the respondent his view of the meaning of the words "canned goods", which appear in the specific trade mark above described as (*a*) and in the design mark (*c*), and whether that was a proper term to indicate a particular ware or particular wares as described, to which Mr. Robinson answered as follows:—

> I do not think it is and I am quite prepared to say that it is bad and that it ought to be disregarded. I think that would be the easiest way of dealing with that, my lord, because, quite apart from canned goods, the registration covers in terms jams, jellies, pickles and sauces.

I am not concerned with this registration, Exhibit 1, beyond jams, jellies, pickles and sauces, because those are the goods on which the plaintiffs have used the mark and I obviously can base my claim for infringement on the possible similarity between the goods to which the plaintiff is applying its mark and the goods to which the defendant is applying his mark and I am not concerned to base my contentions on the broad description of goods which may have been covered in the original registration but on which the plaintiff since 1931 does not appear to have used the mark. I do not concede that the mark was not properly registered but I am not relying on that. I am relying on that mark only in so far as jams, jellies, pickles and sauces are concerned. Then we come to the second registration which covers, of the goods on which the plaintiff has used the mark, vinegar, and the third registration covers, of these goods, vinegar and pickles. I will leave the question of infringement, my lord, to be decided on the basis of exhibit 1 as applied to the goods which I have mentioned, exhibit 2, as applied to vinegar, and exhibit 3 as applied to vinegar and pickles, and that my friend concedes is good.

The effect of the above declaration is that while the trade marks or design mark are registered in respect of numerous and all-embracing classifications of wares, the marks were never used by the respondent except for a very limited number of classes of wares, and the issues were accordingly narrowed down. We have it from the admission of Mr. Robinson that the registration was bad and should be disregarded in respect of "canned goods", and that the respondent was not relying on the marks except in so far as they covered jams, jellies, pickles and sauces, or vinegar in the second registration, and vinegar and pickles in the third registration. The declaration further admits that since 1931 the respondent does not "appear to have used the marks".

The respondent complained of the use of the word "ROSIE" by the appellant, or any similar word, or the representation of a rose on prepared food products similar to those made and distributed by the respondent.

It should be noted at once that there is no evidence of confusion, or deception, by the buying public between the products of the respective parties, and this is very material. On this point it is stated by *Kerly on Trade Marks* at p. 206:—

> Where the marks have been circulating side by side in the market where deception is alleged to be probable, the fact that no one appears to have been misled is very material.

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Moreover, I cannot persuade myself that the word "ROSE" considered alone may be registrable under the Act. It is a word of universal use. It is established in evidence that "there are literally scores of Rose Brand articles that grocers buy: smoked meats called 'Rosemount'; British Columbia salmon sold under the name of 'Red Rose Brand'; flour sold under the name of 'Rose Reno' and under the name of 'Rose Canadienne'; canned salmon and pilchard sold under the name of 'Rose Marie'; canned fruits or vegetables under the name of 'Royal Rose'." All the former have been registered as trade marks and, in addition, "Empire Rose" by the Canada Rice Mills, Ltd., Vancouver, B.C., "Glen Rose" by the Kyabram Co-operative Fruit Preserving Co. Ltd., for canned apricot, peaches, pears, pineapple and fruit salad, "Cremerose" for sugar substitute, and "Calirose", on behalf of the firm of Ross MacKinnon, Vancouver, B.C., for canned tomatoes, tomato juice, tomato puree, beans, peas and asparagus. So it seems quite impossible to admit that by mere registration the respondent could have validly acquired monopoly of the word "ROSE" for its wares.

Eliminating, therefore, the use of the word "ROSIE" by the appellant, which is further explained by the fact that it is a contraction of the appellant's name Rosario, it does not seem possible to hold that there has been an infringement in that respect of the marks of the respondent so far as they are limited to the words "ROSE BRAND".

More difficulty, however, is encountered by the appellant when one looks at the get-up of its wares and the dress in which they are presented to the buyer. Kerly at p. 601 states that the material, colour and decoration of the wrappers and the lettering and arrangement of the labels should be looked at to decide whether they were meant as an imitation of the respondent's marks. (*Lever* v. *Goodwin* (1). In that case soap wrapped in the same peculiar parchment paper, with the similar type of printed matter, were treated as an obvious case of fraud. But, as observed by Farwell J. in *Chivers* v. *Chivers* (2), p. 420 at p. 429:— "The real difficulty is the finding of fact."

(1) (1887) 36 Ch. D. 1.

(2) (1900) 17 R.P.C. 420 at 429.

The complaint of infringement alleged by the respondent is based on sub-sections (*a*) and (*c*) of section 3 of *The Unfair Competition Act, 1932,* which read as follows:—

3. No person shall knowingly adopt for use in Canada in connection with any wares any trade mark or any distinguishing guise which

(*a*) is already in use in Canada by any other person and which is registered pursuant to the provisions of this Act as a trade mark or distinguishing guise for the same or similar wares;

* * * * *

(*c*) is similar to any trade mark or distinguishing guise in use, or in use and known as aforesaid.

The section reads "shall knowingly adopt" and the appellant contended that when he adopted the get-up of his wares he did not know that it bore similarity with the get-up registered by the respondent.

However, section 10 of the Act is to the effect that any person who adopts a mark identical with or similar to a mark already in use "shall be presumed to have knowingly adopted the same unless it is established" that it was adopted in good faith and in the belief that one was "entitled to adopt and use it", or that the mark so adopted has been continuously used "in the ordinary course of business and in substantially the manner complained of during the five years immediately before the commencement of the proceedings".

Now the proceedings in this case were commenced on January 11, 1947. The appellant did not urge before this Court that he could claim the benefit of section 10 (*c*) as having continuously used the get-up of his wares in the ordinary course of his business during the five years immediately before the commencement of the proceedings and the evidence, to my mind, would not justify the Court in coming to that conclusion. He did say, however, that he adopted the get-up complained of in ignorance of the use of the get-up adopted by the respondent; but it does not seem possible to give him the benefit of section 10, as one does not find in the record evidence sufficiently convincing that he has succeeded in rebutting the presumption of having knowingly adopted his get-up, if it is found to be similar to the marks of the

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respondent, within the meaning of the Act. I think, therefore, that the litigation must be decided independently of section 10.

Under section 2 (*k*)—

> "Similar", in relation to trade marks, * * * is meant to describe marks, names or guises so resembling each other or so clearly suggesting the idea conveyed by each other that the contemporaneous use of both in the same area in association with wares of the same kind, would be likely to cause dealers in and/or users of such wares to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced, or for their place of origin.

Under sub-section (*l*) of section 2—

> "Similar" in relation to wares, describes categories of wares which, by reason of their common characteristics or of the correspondence of the classes of persons by whom they are ordinarily dealt in or used, or of the manner or circumstances of their use, would, if in the same area they contemporaneously bore the trade mark or presented the distinguishing guise in question, be likely to be so associated with each other by dealers in and/or users of them as to cause such dealers and/or users to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced, or for their place of origin.

It should be noted that in s. 2 (*k*) (the definition just quoted) it is stated that the wares must be "of the same kind".

In the judgment appealed from it is stated that as to the similarity of the respective marks of the plaintiff and the defendant "there can be no doubt", and that they are similar within the definition of that word in section 2 (*k*). The judgment continues to say that the design used by the appellant is identical with the design of the respondent—a red rose with green leaves—and that the word mark "ROSIE" adopted by the appellant and used in connection with the word "BRAND" is obviously similar to that of the respondent.

But it is observed that the definitions of the word "similar" in sections 2 (*k*) and 2 (*l*) offer three particular requirements:—(1) characteristics of the wares, (2) the correspondence of the classes of persons by whom they are normally dealt in or used, and (3) the manner or circumstances of their use. However, when the learned judge speaks of the characteristics of the wares he says that little consideration need be given to the common characteristics; that chicken is the main ingredient of all the products

of the appellant and is not in use in any way by the respondent and that vegetables are used to some degree by the respondent and also by the appellant. He adds, further, that, as to the correspondence of the classes of persons by whom they are normally dealt in or used and the manner or circumstances of their use, it has been established in evidence that the products of both the appellant and respondent are dealt in by wholesale and retail grocers, and in some retail stores they appear alongside each other, and that the products of both parties are purchased by the general public. In that connection the learned judge refers to the judgment of this Court in *Proctor and Gamble Co. of Can. Ltd.* v. *LeHave Creamery Co. Ltd.* (1), where application was made to expunge the registered mark "White Clover", as applied to butter, the appellant having previously registered the same word mark as applied to hydrogenated cottonseed and vegetable oils, and it was held (p. 438) that "the two articles are so associated with each other as to cause the great majority of the purchasing public to infer that the same person assumed responsibility for their character and quality." But in that case it is to be noted that the word marks were identical and that the two products were used to a certain extent for the same purpose, i.e., for shortening; that observation is made by the learned trial judge himself.

Finally, the learned judge states—and that seems to be the main basis of his decision—that "while some of the products of the appellant are used for purposes other than those for which the respondent's goods are used, all are used for food and many of the products of the respondent are used for sandwiches, as are some of the appellant's products." On that ground his conclusion was that the wares of the parties were similar within the meaning of *The Unfair Competition Act, 1932,* and, as he had already indicated that their marks were also similar, he held that the appellant had infringed the respondent's marks and accordingly he granted an injunction to the respondent, with an order for the delivery up of labels and dies of the appellant, as claimed, and costs. As the respondent further had claimed damages, a reference to the Registrar was

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

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directed to inquire and report as to same, if any, sustained by the respondent by reason of the appellant's alleged infringement.

I find myself unable to give to sections 2 (*k*) and 2 (*l*) of *The Unfair Competition Act, 1932,* the application made by the learned trial judge. With respect, in my view, under section 2 (*k*) similarity is not established so long as the wares of the respective parties are not "of the same kind"; and it cannot be held that the wares of the respective parties come under the definition of the word "similar" in section 2 (*l*). As has been seen, Counsel for the respondent himself admitted that the respondent's marks, so far as they were meant to apply to canned goods generally, or to preserved goods, were bad, invalid and could not be upheld.

Trade marks, or design marks, in section 2 of the Act are meant to distinguish "particular wares falling within a general category from other wares falling within the same category"; and it is for that reason that a trade mark cannot be registered or held valid if it should be claimed for wares "of a general category", that is to say, for canned goods or for preserved goods. The trade mark must apply to particular wares in order to distinguish them, says the definition of "Trade mark" (section 2 (*m*)) from "other wares falling within the same category", and that is to say within the same general category.

So, therefore, whilst Counsel for the respondent properly admitted that he could not hold a trade mark generally for canned goods, or preserved goods, and that he had to limit his trade mark to jams, jellies, pickles, sauces and vinegar, in the same way must it be said that the respondent could never have obtained a trade mark, in the words of the learned trial judge, as "used for food".

The trade mark could be adapted, asked and prayed for registration only for "particular" articles of food; and it seems to be quite clear that although the wares of both parties may be classified as coming under the general category of "food", it cannot be held that if the respondent holds trade marks for the particular articles of food, to which Counsel for the respondent has himself limited the validity of the trade marks, to wit, jams, jellies, pickles, sauces and vinegar, it can come before the Courts to ask

them to exclude the appellant from using a trade mark, even if it has the same characteristics as the trade mark of the respondent, to be used in connection with different articles of food, to wit, canned chicken products in which the appellant deals alone. They are not wares of the same kind as required by the definition of "similar" in section 2 (*k*). They may have the common characteristic of food, but that is not sufficient to declare them similar, as it would be contrary to the definition of a trade mark under section 2 (*m*). Denying the use of the appellant's trade mark for his chicken products, on the ground that the latter are food, extends the meaning, or symbol, of the trade mark to a generality going much beyond the meaning of trade mark and its definition under the Act.

I need not repeat here that a trade mark can be registered only if "adapted to distinguish particular wares falling within a general category from other wares falling within the same category." Here the learned trial judge was right in deciding that the wares of both the appellant and the respondent fall within the general category of food; but the respondent's trade mark is limited to distinguish his particular wares falling within the general category of food from the appellant's particular wares falling within the same category.

Under *The Unfair Competition Act, 1932,* food generally cannot be considered a class of goods and no valid registration can be attributed to a trade mark pretending to cover all foods.

But, moreover, the registration obtained by the respondent was not for a general category, even if it could have been so obtained. It is expressly limited to the particular categories of food stated to be jams, jellies, pickles, sauces and vinegar. The trade mark here only preserved the right of the respondent to distinguish these particular wares from other wares falling within the general category of food and, therefore, it can never be claimed to exclude the appellant from using the same mark for chicken products which he alone puts on the market, even if it should be assumed that otherwise the whole of the trade mark adopted by the respective parties are held to be similar in other respects.

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I have already indicated that, in my opinion, the word "ROSE" used by the respondent cannot prevent somebody else from using the same word and, perhaps, more particularly the appellant from using the word "ROSIE", which is an abbreviation of his own name; and as the respondent's marks are composed not only of a rose with green leaves, but they include the words "ROSE BRAND", it may well be said that, as part of the marks registered by the respondent cannot exclude the use of the same part by another manufacturer or producer, for that reason also the respondent was not entitled in this case to the judgment which it secured in the Court appealed from.

So far as the complaint of passing-off is concerned, counsel for the respondent stated in this Court that he submitted it on the record as it stood and it does not appear that any particular evidence was directed to that issue. The learned trial judge, having found for the respondent on the question of infringement, did not consider it necessary to discuss the question of passing-off and in this Court counsel for the respondent merely referred to it.

The claim on that score would come under section 11 (*b*) of *The Unfair Competition Act, 1932,* and, to my mind, the respondent fails on that point in view of the fact that in order to make that section applicable he had to show that the course of conduct of the appellant was "likely to create confusion in Canada between his wares and those of a competitor". The word "competitor" is not defined in the Act and, therefore, must be taken to have its usual meaning. In the *Oxford Dictionary,* 1933 Edition, "competitor" is defined as "one of several who aim at the same object". The use of that word in section 11 (*b*) of the Act, which in section 2 (*m*) forbids the obtaining of a trade mark for a general category of wares and enacts that a trade mark must be limited to particular wares, clearly shows that a "competitor", within the meaning of the Act, is a man who aims at the same object as another, or several, and, therefore, cannot include the trader in chicken products as a competitor to the trader in jams, jellies, pickles, sauces and vinegar.

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

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

RAND, J.:—The respondent claims infringement of three trade marks. The first was registered in 1914 and was described as consisting of "a label, a rose on green background, with the wording 'Rose Brand', the name of the contents and grown and packed at Rosemount Orchard, Beamsville, Ontario." The words "Rose Brand" were printed across the face of the rose. On the register there is a notation of an assignment on May 28, 1931 by the original applicant, Davies, to Matthews and a further assignment on September 25, 1931 by the latter to the plaintiff. The mark was to be used in connection with jams, preserves, canned goods (except salmon), pickles, sauces, marmalades, jellies (excepting jelly powders), catsups and mustards.

The second mark was registered on July 18, 1931 and consisted of the "representation of a red rose with a green leaf on either side and the words 'Rose Brand', the latter being represented in a black parallelogram"; and was to be used in connection with the manufacture and sale of olives, vinegar, peanut butter, mayonnaise and salad dressing.

The third, which extends the parallelogram section of the second, was entered on November 12, 1932 and is described as "a parallelogram shaped panel, having the representation of a rose protruding from one upper corner and a horizontally disposed rectangular panel superimposed upon the parallelogram shaped panel", the illustration of which contains, as its upper portion, the second mark including the words "Rose Brand". It was to be used with pickles, pickled goods, sauces, condiments, prepared mustards, salad dressing, spices, vinegars, jams, jellies, preserved and canned goods, excluding baking powder, flavouring extracts and jelly powders. This registration was under *The Unfair Competition Act* which came into effect on May 13, 1932.

Mr. Robinson disclaims the use of the second and third marks for any other wares than vinegar and pickles, but he claims the benefit of the first for jams, jellies, pickles and sauces. Admittedly the first in its actual form has never been used by the respondent, but it is urged that by the

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effect of section 18 there is a conclusive presumption that in relation to the goods mentioned the first was in use at the time of its registration and in such a manner that the appellant cannot deny that his mark was adopted with knowledge of registration and use.

The language of section 18 as it speaks of registration "made pursuant to the provisions of this Act" presents a question of interpretation of some difficulty. Ordinarily what is done "pursuant" to a statute is done following the authority of the statute, and if we take the word "registration" to indicate the act of registering, then clearly that act in relation to the first mark could not be said to have been so done. But if "registration" is taken to signify the fact of being on the register, which clearly it can be, and if results are to be avoided for which at least no reason appears in the broad purposes of the Act, we are driven, I think, to the conclusion that the expression embraces all registrations in the register maintained under the present Act. As Mr. Robinson points out, section 4 (2) would seem to be inexplicable if the phrase as there used did not include all registered trade marks; and it would seem to me that the same thing can be said of section 3.

I should add perhaps that although section 18 (2) deals with the effect of a certified copy of the record of registration, I take it to imply necessarily that the registration itself would carry the like conclusive effect. The documents showing the registration in all three cases were offered and accepted without objection, and it was assumed that they brought before the court what the register itself could have done had it been offered. In these circumstances, the proof has been made upon which the section is intended to operate.

It is to be taken then that the defendant has adopted his trade mark knowingly in relation to those of the company, but he contends that the first mark has been abandoned. The designs and the circumstances of their adoption lead me to the view that the second and third were intended to supplant the first. In the last no colour of the rose is specified and it is on a green background. In the former, the rose is red with two green leaves projecting one on each side at the bottom; but the significant change is in

the mode in which the words "Rose Brand" as the prominent feature of the mark appear. These now show in silver on the black parallelogram producing, in contrast to the rose, a vivid and arresting effect. There are in evidence over 100 samples of these marks which, in the course of time, have come to be used with the wares, among others, for which the first is claimed.

Another consideration supporting that intention arises from the inscription on the lower part of the first, containing the name of the orchard and the place at which the fruits were grown and packed. Under section 23 (5) (*c*) the first would now be taken to be a design mark without attributing any meaning to these descriptive words, but since they would not be registrable independently of the design, they do not constitute independently a word mark. The matters before us warrant the conclusion that, in representing in fact the place of business of the respondent to be at Rosemount Orchards, Beamsville, they would be misleading; whether or not the respondent is continuing the business of Davies, its place of manufacture, as advertised, is at Guelph. The inscription could, of course, have been dropped, but two modifications in the way of artistic improvement of the remaining design have already been dealt with.

The foregoing facts seem to me to establish the intention to relegate the first mark to the role of a mere supporting registration, and that as a mark for use in association with wares, it has been abandoned.

A similar question arose in *Hart's Trade Mark* (1). There, Hart was the owner of a conventional Red Rose mark registered for the whole of Class 42, which included "substances used as food, or ingredients in food." Although he sold condensed milk, his trade mark had not been used with it, but shortly before an application was made by a competing company to register a red rose device, Hart had decided to apply his own to that commodity. The company moved to have Hart's mark expunged or limited by excluding condensed milk from the goods for which it was registered and Byrne J. held that as there had been no intention to use the mark with condensed milk at the

(1) (1902) 19 R.P.C. 569.

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time of registration, the goods in question should be expunged. This made it unnecessary to decide the question of abandonment, but on that point he observed:—

> I will only say that this must be a question of intention, as was pointed out by Mr. Justice Chitty in *Mouson* v. *Boehm* (1), and I should feel great difficulty in holding that where, as in the present case, the only user relied on, so far as concerns the particular goods, is that evidenced by the mark having been five years on the Register, there has been no abandonment, when, for more than 15 years subsequent to such five years, prior to the assignment to the respondent, there had been no user, but a sale of the description of goods with user of other and different marks.

The later marks here are not different, but their new designs have been so evolved and in such circumstances as to lead to the same conclusion. It is quite true that the respondent has renewed the first mark. That does indeed show an intention to keep the registration alive, but the intention with which abandonment is concerned is that of using the mark in connection with particular goods. Here we have not only no evidence other than the presumption from section 18(2) of the use at the time of registration in 1914 or thereafter by the original owner, but admittedly no user whatever from the time the company began its business in 1931 until the trial, a period of over fifteen years.

The remaining question then is whether the canned chicken goods, including sandwich spread, sold by the appellant and the vinegar and pickles of the respondent sold chiefly in jars are, in the circumstances, within the scope of similarity defined by section 2 (*l*), and I have come to the conclusion that they are not.

A rose is a well-known constituent of a trade mark; the evidence discloses nine or ten examples in which the word itself is used, and in one case with the adjective "red". Such marks are used on canned corn, pumpkin and salmon, the latter of which was, among others, excepted from the general class of canned goods in the application for the first mark. The word, therefore, with or without the flower or its colour or as the name of a "brand", is not unique or exceptional, and the evidence justifies our taking it as one of somewhat close differentiation by the general trade. This characteristic is highly relevant to the likelihood of con-

(1) (1884) 26 Ch. D. 398.

fusion as to the source of wares; and from the facts before us, it would appear that the actual practices in the trade negative that likelihood in relation to those in question.

An alternative claim for passing off was made, but weighing the whole of the evidence with care, I am unable to say that the company has established it.

I would, therefore, allow the appeal and dismiss the action with costs throughout.

LOCKE J.:—In this action the respondent claims an injunction restraining the appellants, their servants and agents, from using the word "Rosie" or any similar word, or the representation of a rose on prepared food products similar to those made and distributed by the plaintiff, an order for the delivery up to the plaintiff of all labels in the possession of the appellants bearing the word "Rosie", and damages. The respondent claims the infringement of three registered trade marks, two of which are said to have been made under the *Trade Mark and Design Act* (R.S.C. 1906, c. 71: R.S.C. 1927, c. 201), and the third under *The Unfair Competition Act, 1932*. By the Statement of Defence the appellants put in issue the allegations that the plaintiff or its predecessor in title had adopted the trade marks in question, or that it was registered as the owner of the marks.

As proof of its ownership of the first of these marks, the respondent filed what appears to be the original certificate of its registration dated December 2, 1914, attached to which there was a certificate signed by the Commissioner of Patents reading "Certified to be a true and correct copy of a specific trade mark as registered in the Trade Mark Register No. 83, folio 20350, in accordance with the *Trade Mark and Design Act* by Arthur Henderson Davies on December 2, 1914, application for which was filed Nov. 16, 1914." Attached to the document is a photostatic copy of Davies' application for registration and of the mark, being the representation of a rose with the words "Rose Brand" printed across it and the words "Grown and packed at Rosemount Orchards, Beamsville, Ont." Upon the back of the certificate of registration there appear two endorsements dated respectively May 28, 1931, and September 25, 1931, indicating that the mark had been assigned first

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to J. G. Mathews and thereafter to the respondent. The second certificate above referred to which, it is contended, proved that the trade mark was registered by Davies and thereafter assigned to the respondent is dated May 22, 1931. In regard to the 1931 mark, the respondent filed what appears to be the original certificate of the registration of a specific trade mark of the words "Rose Brand" in a described setting dated July 18, 1931, attached to which there is what purports to be a copy of the application for registration. There is, however, no certificate as to this document.

These certificates were apparently given by the Commissioner of Patents under the provisions of s. 48 of *The Trade Mark and Design Act,* c. 201, R.S.C. 1927. That section provided that such a certificate should, without proof of the signature, be received in all parts in Canada as prima facie evidence of the facts therein alleged. The certificates, therefore, if receivable in evidence would have shown that the mark had been registered respectively by Davies and by the respondent. The first would not have sufficed to prove the assignments which the respondent contends vested the right to the mark in it as to which it was silent. S. 48, however, was amended by s. 61 (2) of *The Unfair Competition Act, 1932,* by deleting from it the words "trade mark" so that as the section related to procedure only it could not be invoked in support of either certificate at the trial which took place in 1947. It is said for the respondent that the certificates, by virtue of s. 18 of *The Unfair Competion Act, 1932,* are prima facie evidence of the facts set out in the record of the registration of the marks, and further that the person named therein is the registered owner of the mark for the purposes and within the area therein defined and conclusive evidence that at the date of the registration the trade mark therein mentioned was in use in Canada or in the territorial area therein defined for the purpose therein set out, in such manner that no person could thereafter adopt the same or a similar trade mark on the same or similar goods in ignorance of the use of the registered mark by the owner thereof. The language of s. 18 is that "the production of a certified copy of the record of the registration of such trade mark made pursuant to

the provisions of this Act" shall be prima facie evidence of the matters above referred to. This language is capable of the construction that the words "made pursuant to the provisions of this Act" refer to a copy certified in accordance with its provisions, and also of meaning that they refer to the words "trade mark" which immediately precede them. The certificates were tendered in evidence and admitted without objection. The learned trial judge considered that the proper meaning of these words was that the certified copy referred to was one given pursuant to s. 25 of *The Unfair Competition Act, 1932*. It was not drawn to his attention that both of the certificates had been given prior to the date when that Act came into force. For the respondent, it is now said that the words "made pursuant to the provisions of this Act" refer to the registration of the mark and not to the certificate and that since the trade mark register made under the provisions of the earlier Act forms part of the register maintained under the provisions of *The Unfair Competition Act, 1932,* these trade marks fall within the section: the certified copy, it is contended, means a copy certified under any statutory authority. In my opinion, neither contention can be sustained. I think the words "made pursuant to the provisions of this Act" must be interpreted according to what I regard as their plain meaning, that being that the registration referred to is one made pursuant to an application under *The Unfair Competition Act, 1932*. The certified copies which were received being neither given under the provisions of that Act nor being copies of registrations made pursuant to it, were neither prima facie evidence of the facts set out in the record nor conclusive evidence of the matters above mentioned. Copies of the entries made in the trade mark register might have been admitted under s. 26 of the *Canada Evidence Act,* c. 59, R.S.C. 1927, had the seven day notice required by s. 28 been given and the fact that the record was one of the ordinary books kept in the Department proven by the oath or affidavit of an officer of such Department, as required by s. 26. Neither of these steps were taken and I think it is clear that in tendering the certificates either s. 48 of the *Trade Mark and Design Act* or s. 18 of *The Unfair Competition Act, 1932* was relied

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upon. There was no objection made to their reception but, in the circumstances of this case, I think this should not affect the matter.

The respondent seeking to take advantage of the assistance given by s. 18 to a plaintiff filing a certified copy of the record of registration, including the remarkable provision that such copy is conclusive evidence that at the date of the registration the trade mark was in use in Canada in such manner that no other person could thereafter adopt the same or a similar mark on the same or similar goods, must, I think, be required to comply strictly with the requirements of the section. In *Jacker* v. *The International Cable Company* (1), where certain evidence had been wrongly admitted without objection, Lopes, L.J. said that it was the duty of the Court of Appeal to disregard the document improperly admitted as the case should be decided upon legal evidence, a decision referred to and adopted in the judgment of Duff, C.J. in *The King* v. *The Ship "Emma K"* (2). The certificates, in my opinion, were inadmissible and the claim, in so far as it is one for infringement founded upon the alleged registration of the trade marks of 1914 and 1931 and their use, must fail.

The third of the trade marks in question was registered by the respondent as a design mark on November 12, 1932, under the provisions of the 1932 Act and proven in the manner permitted by s. 18. The mark is stated by the application to consist of a parallelogram shaped panel having the representation of a rose protruding from one upper corner and a horizontally rectangular panel superimposed upon the parallelogram shaped panel, and a specimen of the mark annexed shows a rose red in colour. By the application for registration the respondent represented to the Commissioner of Patents that he had adopted and continuously used the mark in connection with the manufacture and sale of pickles, pickled goods, sauces, condiments, prepared mustards, salad dressings, spices, vinegars, jams, jellies, preserved and canned goods, excluding baking powder, flavoring extracts and jelly powders from May 26, 1931. The president of the respondent company, however, disclosed by his evidence at the hearing that these statements as to the user of the mark were

(1) (1888) 5 T.L.R. 13.

(2) [1936] S.C.R. 256 at 262.

largely inaccurate. The respondent company was incorporated by letters patent in the year 1931 and in that year and apparently until the year 1935 the only products manufactured were pickles and vinegar. In 1935 the respondent commenced to put up olives, in 1937 jams and apple butter, in 1938 fruit juices and preserved cherries and in 1939 sauce for use with meat, and while the evidence is not entirely clear as to all of these products it would appear that the mark registered in 1932, with some slight variations in the case of some products, was used. S. 30 of *The Unfair Competition Act, 1932,* requires the applicant for registration of a mark to state in writing the date from which the applicant or his named predecessor in title has or have used the mark. While by the terms of s. 18 (2) of *The Unfair Competition Act, 1932,* a certified copy of the record of the registration of the mark, subject only to proof of clerical error therein, is stated to be conclusive evidence that at the date of the registration the trade mark was in use in Canada for the purpose therein set out in such manner that no person could thereafter adopt the same, it was thus shown as part of the plaintiff's case in the course of the proceedings that if there had been any use of this mark prior to its registration it was in respect of pickles and vinegar only. Counsel for the respondent at the trial, in these circumstances, very properly stated to the trial judge in the course of his argument that so far as the plaintiff's claim for infringement was concerned he relied upon the 1932 registration in respect of vinegar and pickles only.

S. 19 of *The Unfair Competition Act, 1932,* provides that:—

> If it appears to the court that a registered trade mark was not registrable by the person by whom the application for its registration was made, the owner thereof shall not be entitled to any remedy or relief in an action for the alleged infringement of such mark without other evidence of his rights than the mere production of a certified copy of the record of the registration.

Following immediately, as it does, the provision in s. 18 (2) above referred to, that the certified copy is conclusive evidence of the use of the mark in such a manner that no other person could thereafter adopt the same on the same or similar goods, the sections appear to be inconsistent. Where, however, as in the present case, it is

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shown by the evidence tendered on behalf of the owner of the mark that there was no such user in respect of a large number of the products mentioned in the application until years after the registration of the mark, and in particular when counsel for the owner frankly admits that he cannot rely upon the mark in respect to the claim for infringement, except in respect of two of the numerous products mentioned, I think the claim may properly be dealt with on the facts disclosed by the evidence.

The plaintiff's claim should, therefore, be dealt with in so far as relief is claimed upon the basis of an alleged infringement upon the footing that it is properly registered in respect of pickles and vinegar only. The evidence shows that Dastous commenced the business of canning chicken in various forms in the year 1944. S. 3 of *The Unfair Competition Act, 1932,* in so far as relevant, provides that no person shall knowingly adopt for use in Canada in connection with any wares any trade mark or any distinguishing guise which is similar to any trade mark or distinguishing guise in use. "Similar" in relation to a trade mark is defined by subsec. (*k*) of s. 2 as describing marks so resembling each other or so clearly suggesting the idea conveyed by each other that the contemporaneous use of both in the same area in association with wares of the same kind would be likely to cause dealers or users of such wares to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced or for their place of origin. The respondent's design mark exhibits a rose and while the mark applied for and granted did not describe this as a red rose the design filed with the application may perhaps be taken as part of it and on this the rose is red in colour. The mark which the appellants sought to register was a word mark only but in use they exhibited the word written in prominent letters, in conjunction with a red rose. There is thus some likeness in the appearance of the two marks as used. The respondent does not, of course, claim the mark in respect of all articles of food and disclaims any claim to the mark in respect of canned goods generally. The respondent's registration enumerating various articles of food, while claiming the mark for canned goods, ex-

pressly excludes baking powder, flavouring extracts, and jelly powder. The evidence showed that there were a large number of other registered marks, one at least registered long prior to the year 1932, containing the word "rose" in various forms and some containing the representation of a red rose. Thus, as shown by the certified copy of the file relating to the appellant's application filed by the respondent as part of its case, "Rose Brand" was registered as a specific mark by The Canadian Packing Company, Limited, on August 26, 1920, for hams, bacon, lard, butter, cheese, eggs and oleomargarine. This mark was assigned to Canada Packers, Ltd., by an assignment registered on August 26, 1937. The "Red Rose Brand" was registered as a trade mark for canned salmon in 1933 by British Columbia Packers, Limited, and in addition registrations have been made of the words "Royal Rose" in respect of canned fruits, vegetables and canned fish, "Rose Marie" for mint products, and "Rose Canadienne", "Empire Rose", "Glen Rose", "Cremerose" and "Calirose" for various canned foods. The words "Red Rose", in conjunction with a representation of a red rose, have also been widely used for many years as a trade mark for tea. The cross-examination of Mr. Matthews also indicated that there is a rose or red rose mark for jelly powders used by some other manufacturer and, for this reason, these goods were excluded when applying for the registration of the mark. I do not consider that the appellants' chicken products are "wares of the same kind" as the pickles and vinegar sold by the respondent, nor, in view of the large number of other food products sold either with the mark "Rose Brand" or a representation of a red rose, do I think that the use of the appellants' mark will cause either dealers in or users of these chicken products to infer that they were produced by the respondent or that the respondent assumed responsibility for their character or quality. No doubt these various articles of food are exhibited in grocery stores in close proximity with each other. In so far as the dealers in these wares are concerned, I cannot think that there is any possibility of there being any confusion and, as to purchasers who are no doubt not given to scanning carefully what is written upon the labels of food products and who are, I would assume, confronted in

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grocery stores with many different kinds of food bearing the mark "Rose" in some form or another, I think there is no more probability of their being led by the mark to conclude that the chicken products are those of the respondent than they are to conclude that the respondent's goods are put up by the manufacturers of Red Rose tea, or of the hams, bacon and other products of the Canada Packers, or the canned fruits, vegetables and fish of the Windsor Canning Company, Ltd. I think that if there was any such risk the respondent would not have registered this mark in 1932 in the face of the registration of the "Rose Brand" by the Canadian Packing Company, Ltd., twelve years before. The claim for infringement, in my opinion, therefore fails.

The claim for passing-off was not dealt with by the learned trial judge since he was of the opinion that the claim for infringement had been proven. It is said in the Statement of Claim that the use by the defendants of these labels directs public attention to their wares in a manner that might reasonably be apprehended to be likely to cause confusion between the said wares and those of the plaintiff. Upon this aspect of the claim the respondent does not rely upon the registration of his various marks but upon their use prior to the date when the appellants commenced to use their mark. The respondent has shown that, in addition to the manufacture and sale of pickles and vinegar between the years 1931 and 1935, thereafter between the years 1935 to 1939 inclusive, it put up and sold extensively olives, jams, apple butter, fruit juices, preserved cherries and sauce for use with meat. The respondent did in fact discontinue the production of some of these products during the war, but there is no evidence to justify the finding that it has abandoned the use of its design mark upon any of them. The basis of a passing-off action being a false representation by the defendant, it must be proved in each case as a fact that such a representation has been made: the point to be decided is whether, having regard to all the circumstances of the case, the use by the defendant in connection with the goods of the mark, name, or get-up in question impliedly represents such goods to be those of

the plaintiff (*Spalding* v. *Gamage* (1), Lord Parker at p. 284). It is not necessary to prove any actual deception or actual resulting damage, it being sufficient to prove that the practice complained of is of such a nature that it is likely in the ordinary course of business to deceive the public. It was shown by the respondent that the labels used by it upon a variety of products for some years prior to 1944 exhibited a representation of a rose red in colour, in conjunction with the words "Rose Brand". The appellants displayed prominently upon their labels the word "Rosie" in conjunction with the figure of a red rose on goods which are, in my view, of a different kind than those manufactured by the respondent. If anyone has been misled there was no evidence to that effect, the only witness called being the wife of the Toronto representative of the respondent who expressed her opinion that if she saw canned chicken products with the words "Rosie Brand" and the picture of a rose she would think they were the goods of the respondent. Why she should think this rather than that they were products of other manufacturers using the same or closely similar brands, she did not explain. The evidence wholly fails to satisfy me that the use by the appellants of the word "Rosie" alone, or in conjunction with the figure of a rose, is likely in the ordinary course of business to deceive the public and result in a passing-off.

I would allow the appeal with costs and dismiss the action with costs.

Appeal allowed and action dismissed with costs throughout.

Solicitors for the appellants: *Carreau & Quain.*

Solicitors for the respondent: *Smart & Biggar.*

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(1) (1915) 32 R.P.C. 273.

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THE KING ..... APPELLANT;

AND

CHARLES J. JONES, *EX PARTE* NEW BRUNSWICK, RAILWAY COMPANY, *IN RE* THE ASSSESSORS OF THE PARISH OF KENT IN THE COUNTY OF CARLETON } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK APPEAL DIVISION

Assessment and Taxation—Principle to be applied in assessment of timber lands at their "real and true value"—The Rates and Taxes Act, R.S.N.B. 1927, c. 190, ss. 5 (am. 1945, c. 36, s. 2), 78, 124, 125, 126.

The Rates and Taxes Act, R.S.N.B., 1927, c. 190, s. 5, (am. 1945, c. 36, s. 2), provides that "Real and personal property shall be rated at its real and true value". The respondents' assessors in assessing timber lands in the Parish, estimated the average price to be $5 an acre and assessed all such lands, including those of the appellants, accordingly. The appellants appealed to the County Court Judge under s. 78 of the Act alleging that its lands had been overrated absolutely or as compared with other properties in the Parish. He dismissed the appeal. An appeal was then made by way of *certiorari* to the Supreme Court of New Brunswick, Appeal Division, on the grounds that the assessors in making the assessment proceeded upon a wrong principle. That appeal was also dismissed.

Held: The question before this Court is whether on the entire proceedings the assessment appears to have been made on a wrong principle. The Judge in appeal considered the assessment *de novo* in all its aspects. He properly construed the Statute to provide for valuation on a market basis, as between a willing seller and a willing purchaser, each exercising a reasonable judgment, having regard to all elements and potentialities of value as well as of all risks, and reducing them all to present worth: *Montreal Island Power Co.* v. *The Town of Laval des Rapides* [1935] S.C.R. 304. The conclusion to which he came, therefore, is amply supported by evidence adduced before him.

APPEAL from the decision of the Appeal Division of the Supreme Court of New Brunswick (1), dismissing, Harrison J. dissenting, an application by way of *certiorari* from the decision of His Honour C.J. Jones, Judge of the Carleton County Court.

J. J. F. Winslow, K.C., and *C. F. Inches, K.C.,* for the appellant.

A. B. Gilbert, K.C., and *G. W. Montgomery,* for the respondents.

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

(1) (1949) 23 M.P.R. 426; [1949] 4 D.L.R. 259.

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Rand J.

The judgment of the Court was delivered by:—

RAND J.:—These proceedings originated in an order of *certiorari* bringing an assessment of lands by the respondents before the Supreme Court of New Brunswick. Under section 78 of the *Rate and Taxes Act* the appellant had appealed against the assessment to the Judge of the County Court who affirmed the assessment. The petition on that appeal alleged that the lands had been "over-valued absolutely and as compared with the valuation of other property real and personal" in the parish. Section 78 gives a right of appeal to a non-resident if he "considers himself over-rated or otherwise unjustly assessed". On the hearing, questions of the proper principle for determining value, the impropriety of the adoption of a flat rate for timber lands, and the valuation of large tracts of such lands as compared with farm lands and personal property, were raised and evidence presented in relation to them.

Under section 126 of the Act, the Supreme Court may remit the roll to the assessors if they have proceeded upon a wrong principle in whole or part and a proper assessment could have been made by them; and the question considered was whether such an error had been made. On the return of the order *nisi*, it was held, Harrison, J. dissenting, that no such error appeared and the rule was discharged.

The right to *certiorari* is either assumed to exist by or is a necessary implication from sections 124, 125 and 126 of the statute; by the order, the entire record, including the proceedings before the Judge in appeal has been brought up; and although section 126 speaks of "the assessors" proceeding upon a wrong principle, the statute, allowing an appeal, and *certiorari* being taken to lie following an appeal, *The King, ex parte Bank of Nova Scotia* v. *Assessors of Rates and Taxes of Woodstock, N.B.* (1), the question before us, as both counsel assumed, is whether on the entire proceedings, the assessment appears to have been made on a wrong principle.

On that footing, two objections were taken; the first was that the "real and true value" of the lands which section 5, as amended by chap. 36, 1945, provides as the

(1) [1924] S.C.R. 457.

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Rand J.

measures or basis of valuation, should have been found by reference to the capitalization of the net annual productive return ascertained by the use of estimated factors of sale price and a fair rate of interest return; and the second, that for timber lands or as they are called "wild lands", an average rate of $5 an acre had been used by the assessors for all such lands in the parish and that no individual valuation of the substantial holdings of the appellant had been made.

The former was the main contention made before us by Mr. Winslow. His proposition was this: the true value of lands of this character depends upon what they will yield in salable products; what is, then, to be ascertained is the quantity of annual growth of the trees, its commercial value, the expenses of management and an estimate of all risks. From this the capitalized value is calculated as of a permanent investment.

In support of that formula, evidence was led of the annual increment of growth by data contained in government reports covering woodlands throughout the Dominion, and the average of 30′ superficial board measure an acre was taken as the first factor. The expenses as shown by the operations of the appellant were reduced to the same basis. The price was put at $2.50 a thousand feet, and the interest rate was at large. In strict mathematics, if all of the factors, including risks, periodic fluctuations and convertible or competing forms of investment for the realizable capital, were fully and accurately weighed and given effect, the resulting capital would approximate the market value.

But the language of the statute cannot be taken to intend such a process. These considerations are indeed relevant to real value but, as all the judges below have held, the task placed upon the assessors, as men of ordinary understanding and knowledge, is of a much simpler and practical, though possibly much rougher, nature. They are to regard these elusive variables and uncertainties not directly but what they sum up to in the minds of people who actually or theoretically buy and sell woodlands. Those elements, consciously or unconsciously, operate on the business mind and determine the business judgment; but to employ them as factors in the manner submitted,

and on the evidence presented, would substitute an imperfect and artificial estimate for that arising from the experience of the market place. Particularly would that be objectionable when it is remembered that relative valuation is here more important in fact than the so-called absolute.

The figure of $5 an acre was the average price estimated by the assessors from their local knowledge of sales of small holdings, such as 100-acre lots. It was said that these sales ran from $3 to $8 an acre, and that $5 was, therefore, a fair valuation. In this the assessors were undoubtedly wrong. Each taxpayer is entitled to have the value of his property separately ascertained. The difference in the prices used might possibly have arisen from differences in time and market conditions rather than in real marketable worth, in which case the propriety of the amount would depend upon equivalence in value, in the absence of which throughout the parish an average figure could not be used. But such a figure is obviously to be distinguished from an average valuation of a large tract of land belonging to one taxpayer and exhibiting wide variations in the value of its several parts.

But the Judge in appeal considered the assessment *de novo* in all its aspects. Rejecting the principle in the inadequate form urged by the company, he properly construed the Statute to provide for valuation on a market basis, as between a willing seller and a willing purchaser, each exercising a reasonable judgment, having regard to all elements and potentialities of value as well as of all risks, and reducing them all to a present worth: *Montreal Island Power Co.* v. *The Town of Laval des Rapides* (1). I say reasonable judgment because an element of time is involved in the words "real and true"; they are, I think, to be contrasted with what the ordinary opinion would consider fictitious, as a nominal value out of relation to reality, to which it would soon and inevitably return.

The appeal was against the value "absolutely" and this the Judge set himself to ascertain. That in doing so, he is to be taken as having disregarded the evidence of a number of sales of large tracts of the same general character as those in question and confined himself to the evidence of stumpage rates, is an inference which is not

(1) [1935] S.C.R. 304.

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Rand J.

justified. He found that $5 was not in excess of the fair value of the land. The purchases made in 1942 and 1943 show one at $3.15 an acre for a tract of 627,800 acres, one at $3.25 for 20,250 acres, two at $3.50 for 85,600 and 40,000 acres respectively and one at $4 for 176,000 acres. He was satisfied that the companies could have disposed of the stumpage for $12.15 an acre, leaving a residue of lands and fire wood. It was conceded that in 1946 there had been a firm increase in the value of the lands and a sale of 68,715 acres, as stated in the prospectus of the St. John Sulphite Company Limited which is to be treated in the same position as the appellant, "for the price of $515,500 payable by the issue of 51,550 preferred shares at $10 each" represents a rate for each acre of $7.50. The area of the lands of the appellant which are in question is 84,574 acres. The conclusion to which he came, therefore, is amply supported by evidence adduced before him.

The appellant had in 1946 and evidently in 1947 been engaged in a detailed survey of the timber on its lands, extending beyond the parish and county in question. On being asked for a report of it, counsel charily stated that the survey had not been completed, but he did not say that it had not already produced matter material to the assessment.

On the second branch of the claim, the Judge in appeal found that the assessors had improperly fixed arbitrary values for automobiles, trucks and tractors, but on the evidence before him he held that relatively to the real and true values of the property whose assessment was challenged, discrimination against the appellant had not been established. As that was a question of fact in which no principle of law was involved, it is not open on these proceedings.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *J. J. F. Winslow.*

Solicitor for the respondent: *G. W. Montgomery.*

CHARLES B. RANDALL *(Defendant)*.....APPELLANT; 1949 *Nov. 9, 10

AND

LORNE T. McLAUGHLIN *(Plaintiff)*.....RESPONDENT, 1950 *Jan. 30

AND

EFFIE MITCHELL, BLANCHE SUMMERS and MADELINE LATIMER, EXECUTRICES of the ESTATE OF IRENE HILL, deceased, and CHARLES B. RANDALL *(Defendants)* ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Joint Tenancy and Tenancy in Common—Whether conduct of parties inconsistent with Joint Tenancy—Whether title of survivor of Tenancy in Common barred by The Limitation Act or by laches—Limitation of Actions—Declaration of Ownership of Land and Judgment for Rents and Profits—When cause of Action arose—The Limitations Act, R.S.O. 1937, c. 118.

H and M made a joint purchase of a property in 1919, each contributing one half of the purchase price. The deed was drawn by a solicitor acting on H's instructions and he retained the deed. During his lifetime H collected the revenues paying over one half of the net proceeds to M. H died in 1928 and his widow appointed agents, who were adopted by M. These collected the rents, paying one-half of the net rents to M. The widow died in 1937 having by her will devised a life interest in one half of the property to her sister with remainder over to R. The agents continued to collect the rents, paying one half to M and the remainder to the widow's devisees. In 1946 M decided to sell his share in the property and on searching the title found that under the deed to H and himself he held as a joint tenant and not as a tenant in common. He sued for a declaration of title as sole owner, and for an accounting from the executrices of H's widow, R, by order of the trial court, being added as a party defendant. R counter-claimed for a declaration that he was entitled to an undivided one-half interest in the property.

Held: (Affirming the judgment of the Court of Appeal) that the appeal and the counter-appeal be dismissed.

Per: The Chief Justice, Kerwin and Estey JJ., the decision of the trial judge (1) and that of the Court of Appeal (2), that M was the sole owner of the lands in question should be affirmed—his title was not barred by *The Limitations Act,* and he had not been guilty of laches.

(1) [1948] O.R. 330. (2) [1949] O.R. 105.

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

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Kerwin J.

Per: Rand J., where there is joint possession by an owner and third persons under the erroneous belief that they hold as tenants in common, there is unity of possession *de facto* but not *de jure,* and such an actual unity does not permit of possession against the owner within *Baldwin* v. *Kingstone,* 18 A.R., 63.

Held, also by the Chief Justice, Kerwin and Estey JJ., that the claim against the executrices of the widow's estate was barred by The Limitations Act, s. 48 (1) (*g*).

Per: Rand J., that the claim against the executrices must fail as on the evidence M and the widow's heirs dealt directly with the rents through their joint agent and the executrices had withdrawn entirely from any connection with them.

Locke J., agreed with the reasons for judgment delivered by Laidlaw JA., with whom Aylesworth JA., concurred.

APPEAL by the defendant Charles B. Randall from a judgment of the Court of Appeal for Ontario (1) whereby it was declared that the plaintiff McLaughlin was the sole owner of certain lands and premises known as 154 Cowan Ave., Toronto, and cross-appeal by McLaughlin from the dismissal by the Court of Appeal of his claim against the executrices of the Estate of Irene Hill for the rents and profits of the property.

E. P. Brown, K.C., and *Charles Kappele* for the appellant Randall.

R. R. McMurty, K.C., and *D. A. Keith* for the respondent and cross-appellant McLaughlin.

John J. Robinette, K.C., for Executrices of the Estate of Irene Hill, deceased, respondents on the cross-appeal.

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

KERWIN J.:—On December 1, 1919, lands and premises in the City of Toronto were purchased jointly by Laurent T. McLaughlin (also known as Lorne T. McLaughlin) and Thomas Hill and the conveyance was made to the two of them as joint tenants and not as tenants in common. At that time Hill was a widower without children and McLaughlin was not married. Hill was about twenty years older than McLaughlin and had known the younger man intimately ever since his very early youth. When the

(1) [1949] O.R. 105.

latter returned from the first Great War as lieutenant-colonel and with a fine war record, the older man was very proud, and since he had no children looked upon McLaughlin as one of his own. Hill had been successful in investing in real estate and it was his suggestion that the two should purchase the property and, as he was the one who had the experience, everything was left to him and his were the instructions that went to the solicitor who prepared the conveyance. McLaughlin knew nothing of joint tenancy or tenancy in common but testified at the trial of this action that Hill told him that on his (Hill's) death, McLaughlin alone would own the property.

Each provided a like amount for the purchase and received one-half of the rents after an allowance of five percentum to Hill as a management fee, which McLaughlin insisted should be retained by the older man. Subsequently Hill married again. Upon his death, McLaughlin not hearing anything about a will, assumed that the matter must have been overlooked by Hill. He received one-half of the net rents collected by agents appointed by Hill's widow, Irene, but which agents, on the evidence, must be taken to have also been adopted by McLaughlin as his own. It was only early in 1946, when he decided to sell what he thought was his one-half interest, that he ascertained that the conveyance had been made to Hill and himself as joint tenants. Even upon the death of Hill and Hill's widow, this fact had not been discovered by the personal representatives of either as the succession duty forms in connection with each estate stated that Hill, and then his wife, owned a one-half interest.

This action was commenced on May 2, 1946, by McLaughlin against the executrices of Mrs. Irene Hill, asking for the one-half of the rents received by Mrs. Hill from December 13, 1928, the date of the death of Thomas Hill, until her death, viz., April 24, 1937, and thereafter by the defendants. When the case was first ready for trial, at the suggestion of the presiding judge, Charles B. Randall was added as a party and the trial postponed but the statement of claim was not amended. By her will Mrs. Hill had devised the lands and premises in question

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Kerwin J.

to her sister, Elizabeth Randall, for life, and thereafter to her nephew Charles B. Randall, who was the added defendant.

According to a statement of the collection agents filed at the trial, Mrs. Hill received one-half of the net rents to the time of her death; thereafter the "estate of Mrs. I. Hill" received as its one-half share of the rents four cheques from May 21 to August 17, 1937; Elizabeth Randall received twenty-two cheques for her share from September 3, 1937, to August 17, 1943; and thereafter Charles B. Randall received six cheques until this question arose. During all this period, as during Hill's lifetime, McLaughlin received one-half of the net rents. The executrices severed in their defence but all set up *The Limitations Act,* R.S.O. 1937, c. 118. Randall, upon being added a party, adopted the defences of his co-defendants and by way of counter-claim sought a declaration that he was entitled to an undivided one-half interest in the property.

The trial judge (1) and the Court of Appeal (2) decided that the plaintiff was the sole owner, that his title was not barred by *The Limitations Act,* and that he had not been guilty of laches. With these conclusions I agree. The conveyance of December 1, 1919, is clear and unambiguous. The solicitor who drew it had died before the trial and there is nothing in the evidence to substantiate the claim of the defendant Randall that it does not carry out the intention of Hill who gave the instructions to the solicitor. As to *The Limitations Act,* none of the defendants, or their predecessors, was ever in exclusive possession of the lands and premises or any particular part of them since the plaintiff regularly received one-half of the net rents. As to laches, the plaintiff never knew of his rights until shortly before the writ was issued.

The trial judge also gave judgment for the plaintiff against all the defendants for "$936.96, being a one-half portion of the amount of the rents and profits of the entire property from May 2, 1940, together with the sum of $100.30, simple interest thereon at 3%, a total in all of

(1) [1948] O.R. 330; [1948] 3 D.L.R. 834.

(2) [1949] O.R. 105; [1949] 1 D.L.R. 755.

$1,037.26". So far as the defendant Randall is concerned, this is clearly an error as he received only $491.11, the total of the six cheques sent him by the agents. In any event, as has been pointed out previously, the statement of claim was not amended after the addition of Randall as a party defendant and at the trial it was stated that no claim was advanced against him. Under these circumstances, the plaintiff is not entitled to secure anything from him. Within a period of six years prior to the issue of the writ, the only other person who was paid one-half of the net rents was Elizabeth Randall now deceased, and no one representing her is a party. As to all these payments, none went directly through the hands of the executrices of Irene Hill and the agents at this time were not their agents but at the highest the agents for the individuals mentioned and the plaintiff. To any claim that might otherwise have exised against the executrices, section 48 (1) (*g*) of *The Limitations Act* is a complete defence as the action was not commenced within six years after the cause of action arose.

In the result, the appeal of the defendant Randall and the cross-appeal of the plaintiff fail. At the trial, the executrix Blanche Summers severed in her defence from that of her co-executrices and she was separately represented in the Court of Appeal. That Court made no order as to the costs of the action or counter-claim or of the appeals to it. Before this Court, all the executrices were represented by the same counsel. The appellant Randall should pay the costs of the appeal to the plaintiff respondent but the latter should pay the costs of his cross-appeal to the parties hereto.

RAND J.:—The deed conveying the property to the respondent and the deceased, Hill, as joint tenants is shown to have been prepared under the instructions of the latter who and whose successors in title retained it until after the death of the deceased and his widow. The respondent knew nothing of its provisions, and until within a short time of commencing these proceedings assumed that with Hill he was in fact, though not in name, a tenant in common, and that the interest of the deceased had been transmitted to the widow and to the appellant, Randall.

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Rand J.

From this the unassailable fact that emerges is that neither Hill nor his successors had any standing to challenge the joint tenancy so created; and even if the respondent could have done so, he is free to waive such an equity.

The further question is whether or not the appellant acquired the title of a tenant in common by the fact that he and his predecessor had been in receipt of one-half of the rents for over ten years. This question was dealt with in *Baldwin* v. *Kingstone* (1), in which a strong court, after argument by outstanding counsel of that day, held that the statute did not apply where part of the rents during the period for which the benefit of the statute was claimed, had been paid to the owner: that where there is joint possession by the owner and third persons, it is, for the purposes of the statute to be attributed to him. The facts were identical with those here except the circumstance that instead of the owner having the entire estate he was himself a tenant in common; but it was a fractional share of his interest that was in question. The rents had been collected by his co-tenant and had been paid one-sixth to him and one-sixth each to a brother and sister. The latter were in precisely the same relation to him as the appellant here was toward the respondent, McLaughlin; and there as here the parties acted under an erroneous belief that the lands were held by them as tenants in common. In the conception of that tenancy, there is unity of possession and although there was no unity *de jure*, there was in both cases a *de facto* possession of that nature. That actual unity does not permit a possession against the owner within it. The appellant's only answer to this case is that it was one of tenancy in common, but, as I have observed, that was not so in relation to the interests claimed to have been acquired adversely. The appeal must, therefore, be dismissed.

The cross-appeal claiming one-half of the rents against the executrices of the will of the widow must also fail on the simple ground that the evidence makes it clear that the appellant and the respondent dealt directly with the rents through their joint agent, and that the executrices

(1) (1890) 18 A.R. 63.

had withdrawn entirely from any connection with them. The receiver was not their agent at any time within six years of the bringing of the action, and the only ground on which, in the circumstances, they could be held liable is absent. As against Randall, the respondent did not plead a claim for rents received, in fact at the opening of the trial counsel expressly disclaimed any such relief, and he cannot on appeal set it up.

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Rand J.

The respondent, McLaughlin, will be entitled to his costs of the appeal and the respondent executrices and the appellant, to their costs against the respondent, McLaughlin, on the cross-appeal.

LOCKE J.:—I agree with the reasons for judgment delivered by Mr. Justice Laidlaw and with his conclusions and would dismiss both the appeal and the cross-appeal. As to costs, I agree with the order proposed by my brother Kerwin.

Appeal and cross-appeal dismissed with costs.

Solicitors for appellant and respondent on cross-appeal, Randall: *Kappele & Kappele.*

Solicitors for the respondent, and appellant on cross-appeal, McLaughlin: *Chitty, McMurtry, Ganong & Keith.*

Solicitors for respondents on cross-appeal, the Executrices of the Estate of Irene Hill, deceased: *John J. Robinette.*

LOUVIGNY DE MONTIGNY *(Plaintiff)* ..... APPELLANT,

AND

RÉV. PÈRE JACQUES COUSINEAU *(Defendant)* ..... RESPONDENT.

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*Nov. 17

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*Jan. 30

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Copyright—Infringement—Copyrights of enemies vested in Custodian of Enemy Property during war—Whether Custodian can authorize third party to bring action—Whether authors can give permission for publication—Effect of s. 4 of Copyright Act, R.S.C. 1927, c. 32—Effect of Convention of Berne—The Patents, Designs, Copyright and Trade Marks Emergency Order, 1939, (P.C. 3362).

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

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Appellant was authorized by the Custodian of Enemy Property to bring action against respondent for infringement of copyright. The authors of the works in question were residents of France and at the time of the infringement, 1942 and 1943, the copyrights in such works had become vested in the Custodian pursuant to the *Consolidated Regulations Respecting Trading with the Enemy, 1939*. The Exchequer Court dismissed the action on the main ground that the Custodian could not delegate his powers.

Held: That s. 4 of the *Copyright Act* was continued in force during the war by virtue of s. 8 of the *Patents, Designs, Copyright and Trade Marks (Emergency) Order, 1939*, (P.C. 3362), made under the War Measures Act, but any copyright recognized by the section was for that period vested in the Custodian of Enemy Property.

Held: That s. 6 (2) of P.C. 3362 in clear terms permitted the Custodian to delegate his power to such person as he thought fit.

Held: That the authors, being classed as enemies and having no more rights in these copyrights, could not give to the respondent permission to publish these works—assuming that the evidence of this permission was legal.

Per Kerwin, Taschereau, Estey and Locke JJ.: Assuming that the Convention of Berne was suspended during the war, these copyrights were nevertheless protected, because literary property of foreign authors, being property within the meaning of the Regulations Respecting Trading with the Enemy, is protected in Canada not by virtue of the Convention of Berne but by s. 4 of the *Copyright Act*. The Convention serves only to identify the countries the citizens of which are entitled to that protection.

APPEAL from the judgment of the Exchequer Court of Canada, Angers J. (1), dismissing an action for infringement of copyright.

Redmond Quain, K.C., for the appellant.

Jacques Perrault for the respondent.

The CHIEF JUSTICE:—En janvier, février, mars, avril 1942 et mars 1943, l'intimé a reproduit, sans autorisation des auteurs, dans sa revue "Aujourd'hui", certaines compositions énumérées dans l'exposé de la réclamation de l'appelant et qu'il n'est pas nécessaire de reproduire ici.

Chacun des auteurs ainsi reproduits est un citoyen ou sujet d'un pays étranger ayant adhéré à la Convention de Berne et au Protocole additionnel de cette même Convention publiés dans la Seconde Annexe de la Loi de 1921 concernant le droit d'auteur (Chap. 24 S.C. XI, XII—George V) sanctionnée le 4 juin 1921 et reproduite au chapitre 32 des Statuts Revisés du Canada, 1927.

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Par suite de cette qualité, chacun des auteurs en question bénéficiait de l'article 4 (1) de cette Loi concernant le droit d'auteur pendant toute la durée de sa vie et une période de cinquante ans après sa mort (art. 5) et il était "le premier titulaire du droit d'auteur sur son œuvre" (art. 11 (1)), ce qui lui donnait le droit "d'interdire la publication de cet ouvrage ailleurs que dans le journal, dans la revue ou dans le périodique" où il parut originalement.

Il s'ensuit que la publication sans autorisation des compositions énumérées dans l'exposé de réclamation constituait une atteinte aux droits de leurs auteurs et une "violation du droit d'auteur" conformément à l'article 16 de la Loi. Mais cette violation se produisait, comme les dates l'indiquent, au cours de la guerre de 1939 et au moment où la France, dont les auteurs étaient les citoyens ou les sujets, était occupée par l'ennemi et, en conséquence, était devenue un pays considéré comme ennemi aux yeux de la loi canadienne.

Par suite de la guerre, le gouvernement du Canada, ainsi qu'il y avait été autorisé par la Loi des mesures de Guerre, adopta des règlements relatifs au commerce avec l'ennemi et des arrêtés en conseil relatifs au droit d'auteur portant les numéros 3362, 3959, 5353 et 8526.

Il a été décidé judiciairement que ces règlements et arrêtés en conseil adoptés en vertu de la Loi des mesures de guerre, ont la même force et le même effet que s'ils avaient été adoptés comme lois du Parlement du Canada.

Or, d'après l'article 8 (1) de l'arrêté en conseil relatif au droit d'auteur n° 3362, l'article 4 de la Loi concernant le droit d'auteur (Chap. 32, S.R.C. 1927) a continué d'être en vigueur nonobstant l'état de guerre ainsi que les Règlements relatifs aux relations avec l'ennemi, mais avec la restriction suivante pourvue au paragraphe (2) de cet article 8: "Que les droits d'auteurs qui étaient citoyens ou sujets d'un pays étranger, considéré comme ennemi en vertu de la loi, passaient entre les mains du Séquestre du Canada et sous son contrôle de telle façon que, pendant la durée de la guerre, ces droits ne pouvaient être exercés que par le Séquestre ainsi nommé. Tant que la guerre subsis-

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tait, les droits des auteurs étaient suspendus et étaient, pour toutes fins, transmis au Séquestre du Canada" (Article 21 de l'arrêté en conseil n° 2512, tel qu'amendé par les arrêtés en conseil nos 3959 et 5353).

Toujours en vertu des mêmes arrêtés en conseil, le Séquestre était autorisé à poursuivre devant la Cour de l'Échiquier du Canada pour le recouvrement de tout droit payable en vertu des règlements adoptés à cet égard (art. 36 (1)); et aucune personne ne pouvait prendre aucune procédure relative à ces droits sans le consentement du Séquestre (art. 47 (3)). Mais, d'autre part, le Séquestre était autorisé à déléguer et transmettre ses pouvoirs à toute personne qu'il jugerait à propos (art. 6 (2)).

L'article 20 de la Loi concernant le droit d'auteur conférait au propriétaire de ce droit, dans le cas d'infraction par une autre personne, le pouvoir de recourir à tous moyens de réparation, par voie d'ordonnance de cessation ou d'interdiction, de dommages-intérêts, de décomptes ou autrement. Comme conséquence de la guerre, ces droits se sont trouvés transférés au Séquestre du Canada qui, dès lors, pouvait les exercer, soit par lui-même, soit par l'intermédiaire de toute personne à qui il jugeait à propos de les déléguer.

Le 17 avril 1943, le Séquestre délégua tels pouvoirs à l'appelant, M. Louvigny de Montigny, pour poursuivre devant les tribunaux, à l'encontre de l'intimé, la violation des droits d'auteurs commise par ce dernier en publiant les compositions mentionnées à l'exposé de la réclamation de l'appelant.

Muni de cette autorisation, l'appelant demanda à la Cour d'Échiquier du Canada (1) une déclaration à l'effet que les auteurs mentionnés dans l'exposé de réclamation étaient les premiers titulaires des droits d'auteurs sur les compositions qui portaient leurs signatures; que ces ouvrages étaient protégés au Canada jusqu'à l'expiration d'une période de cinquante ans après la mort de leurs auteurs; qu'en reproduisant ces compositions littéraires sans autorisation préalable et formelle, l'intimé avait violé le droit de ces auteurs et avait également frustré le Séquestre du Canada, en temps que cessionnaire et détenteur

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par l'effet des règlements de guerre, des droits des auteurs dont l'intimé avait reproduit les compositions. Il demanda donc l'émission d'une injonction interdisant à l'intimé toute autre reproduction dans sa revue "Aujourd'hui" des compositions d'auteurs protégés au Canada et il réclama des dommages-intérêts au total de $359.55, représentant dix cents par ligne des reproductions illégalement publiées par l'intimé; avec, en plus, une ordonnance obligeant l'intimé à remettre à l'appelant ces exemplaires contrefaits des ouvrages qui font l'objet de la réclamation, ou de lui en payer la valeur équivalente; concluant, en plus, à l'octroi de telles autres indemnités ou compensations que comportait la nature de l'espèce et que la Cour estimerait justes.

Cette action fut rejetée par la Cour de l'Échiquier (1) pour plusieurs raisons, dont la principale était le principe en vertu duquel nul ne peut plaider au nom d'autrui, et que ni la Société des Gens de Lettres de France, ni le Séquestre, et à plus forte raison, l'appelant, n'avait qualité pour intenter une action pour le bénéfice des auteurs des articles en question.

Sur ce point, la Cour de l'Échiquier invoque l'article 81 du Code de procédure de Québec, ainsi que plusieurs jugements rendus en conformité de cette disposition; de même que le droit anglais et la doctrine qui a cours en France.

En plus, le jugement décide que l'article 8 de l'arrêté en conseil sur les brevets, les dessins de fabrique et le droit d'auteur (n° 3362) n'a aucune portée sur le litige. Il interprète cet article comme ayant été "décrété particulièrement pour permettre au registraire des droits d'auteurs d'émettre des licences autorisant la reproduction d'œuvres composées par un ennemi durant la guerre; hors ce cas le droit commun subsiste intégralement".

Enfin, comme motif additionnel, la Cour de l'Échiquier réfère à certaines parties de la preuve où il aurait été déclaré que, dans le cas des articles de deux pères jésuites, les membres de la Compagnie de Jésus pouvaient reproduire, sans autorisation spéciale et sans droit d'auteur, les articles de leurs confrères; et, dans le cas de la publication de l'article de M. Yves-R. Simon, intitulé "Maritain intime,"

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cette publication a été autorisée par l'auteur lui-même; enfin, relativement à la reproduction d'un article d'Henri Ghéon, "L'art du théâtre," M. Jean-Marie Parent, des Éditions du Cap, se prétendant possesseur des droits d'auteur d'Henri Ghéon, aurait verbalement autorisé, en février 1942, la reproduction de cet article dans la revue "Aujourd'hui".

Le jugement dont est appel se termine en disant que l'honorable juge qui a présidé le procès ne croyait pas que l'intimé, en l'occurrence, ait "fait preuve de mauvaise foi". Je puis dire tout de suite, à ce sujet, que nul ne croit que l'intimé ait agi de mauvaise foi, mais que là n'est pas la question. La Loi concernant le droit d'auteur considère comme une violation la publication d'articles protégés par cette loi, sans l'autorisation de l'auteur ou de celui qui est détenteur du droit d'auteur. Et cette loi doit recevoir son application même quand la publication a été faite de bonne foi. Dans ce cas, il faudra dire: *"Dura lex sed lex"*.

En plus, quand le jugement de première instance fait état des autorisations générales ou spéciales qui auraient pu être données à l'intimé par les auteurs des articles, il ne tient pas compte du fait que les articles ont été publiés en temps de guerre; que, dès lors, les droits des auteurs en question étaient suspendus par suite de la guerre; que ces droits étaient transférés par la loi au Séquestre du Canada; et que toute autorisation donnée par les auteurs était donc nécessairement inefficace, puisque ces auteurs ne pouvaient évidemment autoriser et transmettre des droits qu'ils n'avaient pas à ce moment-là—des droits qui étaient suspendus pendant la guerre—et dont seul le Séquestre du Canada était détenteur. Ces autorisations sont de nature à démontrer la bonne foi de l'intimé, mais elles ne peuvent modifier la situation dans laquelle il s'est placé. Si, toutefois, une autorisation pouvait lui être valablement donnée, il fallait qu'elle vienne du Séquestre du Canada.

Sur ce point, j'ajouterais que j'ai plus qu'un doute que la preuve des autorisations dont il s'agit ait été faite conformément à la loi. Elle a été introduite lors de l'enquête à l'encontre des objections du procureur de l'appelant; et, si cela était nécessaire, j'arriverais à la conclusion que

cette preuve, telle qu'elle a été faite, était illégale. Mais, il n'est pas nécessaire d'entrer dans cette discussion, vu qu'il est bien évident, qu'en temps de guerre, pareilles autorisations étaient inefficaces.

Ayant écarté ces motifs supplémentaires du jugement, il ne reste plus qu'à considérer les deux motifs principaux, qui sont: que, d'après le jugement dont est appel, l'article 8 de l'arrêté en conseil n° 3362 n'a aucune portée sur le présent litige; et que, par ailleurs, l'appelant n'avait pas la qualité voulue pour intenter l'action, parce que le Séquestre ne pouvait lui céder ses droits et que l'appelant ne pouvait poursuivre en son nom personnel.

J'ai déjà dit, qu'à mon avis, l'interprétation de l'article 8 de l'arrêté en conseil n° 3362 est à l'effet que l'article 4 de la Loi concernant le droit d'auteur continue d'être en vigueur, nonobstant l'état de guerre, mais avec la restriction que les droits d'auteurs reconnus par cet article 4 sont, pour le temps de la guerre, transférés au Séquestre du Canada, qui, seul, en est détenteur pendant la durée de la guerre et qui, seul, peut les exercer.

Il s'en suit, qu'en l'espèce, nous n'avons pas à considérer les droits respectifs des auteurs des articles et ceux de la Société des Gens de Lettres de France. Pendant la guerre ces droits étaient suspendus, que l'on arrive à la conclusion qu'ils appartenaient aux auteurs eux-mêmes ou à la Société des Gens de Lettres.

Tous les droits en question, pendant la guerre, appartenaient au Séquestre du Canada. Il pouvait les exercer lui-même, ou, comme nous l'avons vu, en vertu de l'article 6 (2) des Règlements sur le commerce avec l'ennemi, résultant des arrêtés en conseil n^{os} 3959 et 5353, le Séquestre pouvait les déléguer à la personne qu'il jugeait compétente.

Le document par lequel le Séquestre a délégué ses pouvoirs à l'appelant est invoqué dans l'exposé de réclamation et a été produit au cours de l'enquête. Le jugement porté en appel devant nous ne réfère en aucune façon à l'article 6 (2) en question.

C'est évidemment l'article qui doit régir le présent litige. Il s'agit d'une mesure de guerre qui doit prévaloir sur

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toute législation provinciale pendant le temps de guerre et, à plus forte raison, sur les arrêts qui ont pu être rendus en France, ou en Angleterre, non pas sur le point particulier de la légalité de l'article 6 (2) (qui autorise le Séquestre à déléguer ses pouvoirs dans les circonstances), mais sur le principe général bien connu que nul ne peut plaider avec le nom d'autrui, si ce n'est le souverain par ses officiers reconnus.

Ici, nous avons un texte bien précis qui permettait au Séquestre de transmettre ses pouvoirs à l'appelant et ce texte doit forcément prévaloir sur tout principe général applicable en temps de paix.

Je conclus donc de tout cela que l'action de l'appelant aurait dû être accueillie et que l'appel doit, en conséquence, être maintenu. D'autre part, il n'est plus utile d'accorder l'émission d'une injonction, parce que les articles ont été reproduits et l'injonction n'aurait donc aucun effet: mais l'appelant a droit aux déclarations qu'il demande dans les paragraphes 1) et 2) des conclusions de son exposé de réclamation et au paiement des dommages-intérêts qu'il a réclamés, sauf la somme de vingt-cinq dollars relative à Yves Simon, dont le demandeur s'est désisté au cours du procès en Cour de l'Échiquier.

Quant au paragraphe 5) de ses conclusions, demandant une ordonnance obligeant l'intimé à remettre à l'appelant les exemplaires contrefaits des ouvrages qui font l'objet de la réclamation, ou de lui en payer la valeur équivalente, cette demande n'a pas été exposée lors de l'argumentation devant cette Cour, et il n'y a donc pas lieu de la discuter.

Le maintien de l'appel comporte évidemment la condamnation de l'intimé au paiement des frais de l'appelant, tant devant la Cour Suprême du Canada que devant la Cour de première instance.

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

TASCHEREAU, J.:—Le demandeur réclame du défendeur des dommages-intérêts pour violation de Droits d'Auteurs, qu'il évalue à la somme de $359.50. Il demande également une déclaration que certains auteurs français dont les noms

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sont mentionnés à l'action, sont propriétaires des œuvres reproduites dans la revue du défendeur, "Aujourd'hui", et une injonction interdisant à ce dernier de publier à l'avenir aucune de leurs compositions littéraires.

Le demandeur est le représentant général au Canada de la Société des Gens de Lettres de France, dont le but est de protéger les droits littéraires de ses adhérents, et il allègue dans son action que dans le cours des mois de janvier, février, mars et avril 1942, et en mars 1943, le défendeur aurait publié sans autorisation des articles dont la propriété littéraire appartient à certains membres de la Société. En reproduisant ainsi ces articles illégalement, le défendeur aurait frustré ces écrivains français de leur légitime revenu, et aurait exploité ces œuvres littéraires à son profit personnel.

La propriété littéraire est protégée au Canada par la loi concernant le "Droit d'Auteur" (S.R.C., 1927, chap. 32). En vertu des dispositions de cette loi, toute œuvre originale littéraire, dramatique, musicale ou artistique, ne peut être reproduite au Canada, si à l'époque de la création de l'œuvre, son auteur était sujet d'un pays étranger ayant adhéré à la Convention de Berne. Il s'ensuit que la propriété littéraire des sujets français jouit de cette protection au Canada, la France étant partie à cette Convention, et que personne ne peut, sans encourir les sanctions de la loi, reproduire ici les œuvres littéraires d'un sujet français.

L'intimé ne nie pas avoir publié les articles en question, mais a soumis plusieurs défenses qui pour la plupart ont été accueillies par le juge au procès. Mais avant de les analyser, il est nécessaire de signaler que lors de l'invasion de la France par l'Allemagne au cours de la dernière guerre, le Gouvernement Canadien a publié un Ordre en Conseil, en date du 31 juillet 1940, portant le numéro 3515, stipulant qu'à partir du 21 juin 1940, les dispositions des "Règlements sur le Commerce avec l'Ennemi", de 1939, (Ordre en Conseil n° 3959), ont été étendues et appliquées à tout le territoire français en Europe, ainsi qu'aux territoires adjacents d'Andorre et de Monaco, et à la zone française au Maroc, à la Corse, à l'Algérie et à la Tunisie.

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Comme conséquence de l'application à la France de ces règlements, ce pays fut déclaré pays "ennemi", et toute personne qui y résidait durant l'occupation allemande était légalement un "ennemi". L'article 21 stipulait que tout "bien" appartenant à des "ennemis" dans les limites de notre pays, devenait *la propriété* du Séquestre officiel, et était assujéti à son contrôle. Le mot "biens" est défini à l'article 1, para. (*h*) des règlements de la façon suivante:

> (*h*) "biens" aux termes des présents règlements vise et comprend toute propriété foncière et personnelle de quelque nature que ce soit ainsi que tous les droits et intérêts qui s'y rattachent, en droit ou en équité, et, sans restreindre la portée de ce qui précède, toutes valeurs, dettes, créances, comptes et droits incorporels.

Les auteurs dont les ouvrages ont été reproduits dans la Revue dont le défendeur-intimé est le propriétaire, étaient donc des "ennemis" au moment où les règlements étaient en vigueur, et tous leurs biens et leurs droits sont devenus par la seule opération de la loi, la propriété du Séquestre officiel.

Il ne me semble pas possible de douter qu'un "droit d'auteur", qui est un droit mobilier, incorporel, qui assure tous les bénéfices que comporte une création littéraire, et qui permet de recourir aux tribunaux pour le faire respecter, soit un "bien", au sens du règlement.

On prétend que le demandeur n'a pas l'intérêt voulu pour instituer la présente action, parce qu'on ne peut pas plaider au nom d'autrui. Ce principe est très vrai à condition qu'il trouve son application. Contrairement à ce qu'on a dit, le demandeur n'a pas institué cette action devant la Cour d'Échiquier, en sa qualité de représentant ou de mandataire de la Société des Auteurs Français, ni même en sa qualité de représentant des auteurs individuellement. Si tel était le cas, la situation juridique des parties pourrait être entièrement différente. Mais M. de Montigny se présente devant le tribunal, porteur d'une autorisation signée par le Séquestre officiel, ce même Séquestre qui, par l'effet des règlements "Sur le Commerce avec l'Ennemi", est propriétaire de l'ensemble des "Droits" de ceux dont les écrits ont été reproduits, et qui en a le

monopole et la maîtrise absolue. Cette autorisation qui porte la date du 17 avril 1943, écrite en anglais, et signée de M. E. H. Coleman, se lit ainsi:

AUTHORIZATION

The Custodian of Enemy Property, by his duly authorized Deputy, Ephraim Herbert Coleman, under the Consolidated Regulations Respecting Trading with the Enemy (1939) being vested with the rights of André Desqueyrat, Georges Bernanos, Louis Hourtioq, Jacques Darcy, Bernard de Peck, Charles Fiessinger, J. E. Janot, Henri Ghéon and Yves-R. Simon, their heirs and assigns, and/or La Société des Gens de Lettres, a body politic and corporate duly incorporated under the laws of the Republic of France and having its head office and principal place of business in the City of Paris, France, hereby authorizes Mr. Louvigny de Montigny, of the City of Ottawa, in the Province of Ontario, general representative and Attorney in Canada of the said La Société des Gens de Lettres, to institute action in the Exchequer Court of Canada against Reverend Father Jacques Cousineau, of the Society of Jesus, for having reproduced without authority the following writings in the magazine "Aujourd'hui" during the period from January 1942 to March 1943:—

Cette autorisation donnée au demandeur-appelant est claire et précise. La preuve révèle que depuis le début des hostilités l'appelant a été chargé par le Séquestre officiel de surveiller les reproductions des œuvres littéraires françaises, non seulement celles des membres de la Société des Auteurs, mais aussi celles de tous les auteurs français. Cette surveillance devait s'exercer pour le bénéfice du Séquestre, propriétaire des droits d'auteur, et nullement pour les auteurs eux-mêmes, qui par l'opération de la loi, n'avaient plus de droits à faire valoir. Cette preuve est amplement confirmée par une lettre écrite à l'appelant quelques mois après l'institution de la présente action, mais avant la production de la défense, par le Séquestre adjoint M. A. H. Mathieu et produite comme exhibit à l'enquête. M. Mathieu réaffirme l'autorisation antérieure donnée à l'appelant, de percevoir les droits provenant de l'utilisation au Canada, des ouvrages des auteurs en territoire ennemi, pour le bénéfice et avantage du Séquestre. Il est clairement stipulé que les fonds perçus doivent être déposés dans un compte spécial "bloqué" à la Banque Canadienne Nationale, qui doit faire rapport au Séquestre lui-même. M. Mathieu rappelle enfin que le mandat conféré à l'appelant de percevoir ainsi des droits d'auteur, lui est donné en vertu du paragraphe 6 (2) de l'Ordre en

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Conseil 3959 (Règlements sur le Commerce avec l'Ennemi) qui sera cité au long, et qui démontre bien que l'appelant a perçu tous les droits et institué la présente action, pour le compte du Séquestre et non pas pour celui des auteurs.

L'article 47, para. 3, n'a pas d'application. Il couvre le cas où une réclamation est exercée contre un sujet, habitant un pays ennemi, et stipule que personne ne pourra poursuivre ou continuer une action déjà commencée, sans l'autorisation écrite du Séquestre. Dans le cas qui nous occupe, l'action n'est pas instituée contre un sujet français, mais est pour faire valoir des droits de citoyens français, dont le Séquestre est investi, contre un citoyen canadien.

Les deux articles suivants des règlements établissent en premier lieu que le Séquestre officiel avait personnellement le droit de poursuivre, et qu'il avait en second lieu, le droit d'autoriser toute personne de son choix à poursuivre également.

L'article 36, para. 1, de l'Ordre en Conseil 3959 (Règlements sur le Commerce avec l'Ennemi) se lit ainsi:

36. (1) Lorsqu'une personne néglige de payer au Séquestre une somme qui lui est payable en vertu des présents règlements, ce dernier peut intenter des procédures devant la Cour de l'Échiquier du Canada pour le recouvrement de ladite somme.

En vertu de l'article 6, para. 2 du même Ordre en Conseil, le Séquestre peut déléguer tout pouvoir qui lui est conféré. Cet article est rédigé dans les termes suivants:

6. (2) Tout pouvoir accordé ou devoir imposé en vertu ou sous le régime des présents règlements au secrétaire d'État et/ou au Séquestre peut être délégué par lui à la personne ou aux personnes qu'il juge appropriées.

Il s'ensuit logiquement que le Séquestre, propriétaire de ces droits d'auteurs, ayant le droit de poursuivre pour en réclamer les avantages pécuniaires et la réparation du préjudice causé, pouvait autoriser le demandeur-appelant à instituer la présente action.

Le texte anglais du document signé par le Séquestre dit que "E. H. Coleman being vested with the rights of . . ." "hereby *authorizes* Louvigny de Montigny . . . to institute action. . .". Le mot *"authorize"* n'est pas le mot que l'on retrouve à l'article 6 (2) qui dit que "any power . . . may be *delegated* . . .". Mais je crois que ces deux expressions

ont le même sens, et que l'autorisation donnée constitue véritablement une délégation de pouvoirs. "To authorize" veut sans doute dire "donner le droit à quelqu'un de faire quelque chose qu'on a soi-même le droit de faire". "Autoriser" est donc "déléguer son pouvoir". "To authorize" c'est "to endow with authority", et "authority' c'est le "derived or delegated power" (Oxford English Dictionary). L'autorisation donnée me semble donc suffisante, et la prétention que le demandeur n'a pas l'intérêt voulu pour instituer les présentes procédures doit être rejetée.

La seconde prétention de l'intimé est que les effets de la Convention de Berne ont été suspendus depuis le 21 juin 1940, date où la France a été déclarée pays "ennemi". L'argument invoqué est qu'en vertu du Droit International Public, un sujet résidant dans un pays ennemi, n'a aucun droit, durant l'existence de l'état de guerre, et qu'en conséquence les Auteurs Français dont les droits auraient été violés au Canada, ne bénéficiaient pas de la protection littéraire que la Convention leur avait assurée. En reproduisant leurs écrits, le défendeur n'enfreignait aucune loi, et le Séquestre officiel n'étant investi d'aucun droit ne pouvait autoriser personne à poursuivre le défendeur.

Il n'y a pas de doute que certains auteurs ont exprimé l'opinion que l'état de guerre suspend entre les pays belligérants les protections que les Traités ou Conventions internationales peuvent accorder. Le Traité de Versailles lui-même, signé le 28 juin 1919, semble confirmer cette théorie, car à l'article 286 on voit que les nations signataires déclarent que la Convention de Berne redevient en force, le jour de la signature du Traité. Le défendeur conclut que si la Convention de Berne était demeurée en vigueur durant les hostilités, il n'aurait pas été nécessaire de la faire revivre à la fin de la guerre.

L'article 4 de la loi concernant le "Droit d'Auteur" se lit ainsi:

4. Subordonnément aux dispositions de la présente loi, le droit d'auteur existe au Canada, pendant la durée mentionnée ci-après, sur toute œuvre originale littéraire, dramatique, musicale ou artistique, si, à l'époque de la création de l'œuvre, l'auteur était sujet britannique, citoyen ou *sujet d'un pays étranger* ayant adhéré à la Convention et au Protocole additionnel de cette même Convention, publiés dans la seconde annexe de la présente loi, ou avait son domicile dans les possessions de Sa Majesté.

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Il semblerait qu'en vertu de ce texte la propriété littéraire des auteurs français est protégée au Canada, non pas à cause des termes de la Convention de Berne, mais comme conséquence de cet article 4, qui est la loi domestique du pays. La Convention identifie les pays dont les sujets jouiront de la protection littéraire, mais c'est le texte de notre loi qui l'assure définitivement, et en consacre l'existence. Mais cette théorie, même si elle était juridiquement fondée, ne s'applique pas à la présente cause, et il est en conséquence inutile de chercher à l'approfondir davantage.

En 1939, le Gouverneur Général en Conseil a en effet passé, s'autorisant de la Loi des Mesures de Guerre, un Ordre en Conseil (N° 3362) intitulé "Arrêté exceptionnel sur les brevets, les dessins de fabrique, le droit d'auteur et les marques de commerce". Cet Arrêté Ministériel contient entre autres l'article 8, qui se lit ainsi:

8. (1) Par dérogation aux dispositions des Règlements sur le commerce avec l'ennemi, 1939, des Règlements concernant la défense du Canada, 1939, ou de toute règle de droit visant les relations ou les rapports avec des ennemis ou pour leur compte, les dispositions de l'article 4 de la Loi du droit d'auteur, chapitre 32 des Statuts revisés du Canada, 1927, sont censées, pour les fins de cette loi, rester en vigueur nonobstant l'état de guerre, sous réserve de toute modification dont elles peuvent être l'objet sous le régime de ladite loi.

(2) Par dérogation aux dispositions des Règlements sur le commerce avec l'ennemi, 1939, des Règlements concernant la défense du Canada, 1939, ou de toute règle de droit visant les relations ou les rapports avec des ennemis ou pour leur compte, tout droit d'auteur qui aurait existé en vertu de l'article 4 précité de la Loi du droit d'auteur, chapitre 32 des Statuts revisés du Canada, 1927, si le propriétaire du droit d'auteur n'avait pas été un ennemi, doit être maintenu de la même manière lorsqu'un ennemi, soit seul, soit conjointement avec une autre personne, en est le propriétaire.

Toutefois, lorsqu'un ennemi, soit seul, soit conjointement avec une autre personne, est le propriétaire du droit d'auteur existant sous le régime de la Loi du droit d'auteur, chapitre 32 des Statuts revisés du Canada, 1927, les dispositions des règlements sur le commerce avec l'ennemi, 1939, des Règlements concernant la défense du Canada, 1939, et de toute autre loi visant les relations ou les rapports avec des ennemis ou pour leur compte, ou les biens, droits ou capacité des ennemis, et toute règle de droit se rapportant à l'une quelconque de ces matières, doivent, à l'égard de cet ennemi, être opérantes relativement au droit d'auteur ainsi maintenu.

On voit donc que l'article 4 de la loi du "Droit d'Auteur" est maintenu malgré l'existence de la guerre, et que comme résultat, la protection littéraire continue à être accordée

aux adhérents de la Convention de Berne. Le dernier paragraphe de cet article que je viens de reproduire est particulièrement significatif. Après que l'Arrêté Ministériel eût clairement déclaré que "les dispositions de l'article 4 de la Loi du "Droit d'Auteur" sont censées rester en vigueur, nonobstant l'état de guerre," il stipule que lorsqu'un ennemi est propriétaire d'un droit d'auteur, les dispositions des Règlements sur le Commerce avec l'Ennemi "doivent être opérantes relativement au droit d'auteur ainsi maintenu". Ceci signifie que tous les biens d'un "ennemi", y compris ses droits d'auteur, deviennent la propriété exclusive du Séquestre, et que tous les pouvoirs que ce dernier possède, dont celui de poursuivre, peuvent être délégués, comme cela a été fait dans le cas actuel.

Le droit International Public n'a pas la primauté; c'est la loi domestique du pays qui doit être souveraine. Si même comme résultat de l'existence de l'état de guerre, les dispositions de la Convention de Berne ont été suspendues, je n'ai pas de doute que les droits d'auteur des citoyens français ont été formellement reconnus par l'Ordre en Conseil que je viens de citer, et qui, à l'époque où il a été passé, avait force de loi.

L'intimé prétend aussi qu'il aurait été autorisé par certains de ces auteurs français à publier les articles qu'il a reproduits. Dans certains cas, l'autorisation aurait été expresse, et dans un autre, elle proviendrait de ce que le défendeur et l'auteur, faisant tous deux partie de la Compagnie de Jésus, seraient liés par un règlement de l'Ordre, permettant à un Jésuite de publier les écrits d'un confrère. Même si la preuve de ces faits avait été légalement établie, la prétention de l'intimé ne serait pas fondée. Qu'il suffise de dire pour en disposer, que tous ces auteurs français ne pouvaient donner semblable autorisation. "Ennemis" au sens de la loi, ils étaient dépouillés de leurs droits, et ils étaient incompétents à donner aucun consentement. Les bénéfices que comportaient leurs droits d'auteur étaient la propriété du Séquestre officiel, qui seul avait l'autorité voulue pour les percevoir et en disposer à volonté.

L'intimé soutient enfin qu'ayant publié ces articles de bonne foi, il ne peut être condamné à des dommages.

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En vertu des dispositions de l'article 22, il n'y aurait lieu qu'à une injonction pour empêcher toute reproduction future. Les avertissements donnés au défendeur, et la correspondance qu'il a échangée avec l'appelant, antérieurement à la publication des articles qui font l'objet de ce litige, disposent de ce moyen de défense.

Une dernière observation s'impose. Au début de ce jugement, j'ai signalé ce que réclame le demandeur dans son action. Je n'ai pas de doute qu'il a été clairement établi que le droit à la propriété littéraire des articles publiés dans la revue "Aujourd'hui", a été violé par le défendeur, et que ce dernier a privé le Séquestre officiel des bénéfices pécuniaires auxquels il avait droit. Mais je ne crois pas qu'il soit nécessaire d'incorporer semblable déclaration dans le jugement formel. La condamnation pécuniaire comporte la constatation de la violation de ces "Droits d'Auteur".

Quant à l'injonction demandée, il me semble impossible de l'accorder. Le demandeur en effet, réclame pour le Séquestre officiel, dont les fonctions sont maintenant terminées, la France n'étant plus pays "ennemi". Cette Cour ne peut pas ordonner au défendeur de cesser à l'avenir de violer un droit dont le demandeur n'est plus investi. Il appartiendra aux intéressés de s'adresser aux tribunaux si le défendeur persiste à ne pas respecter des droits dont ils ont maintenant la complète jouissance. Le montant réclamé est de $359.50, et ce montant, vu la preuve qui a été offerte, me paraît une compensation raisonnable pour réparer le préjudice subi, sauf qu'il faudra déduire une somme de $25, montant originairement réclamé pour les reproductions littéraires de Yves Simon et dont le demandeur s'est désisté à l'enquête.

L'appel doit être maintenu, l'action accueillie jusqu'à concurrence de la somme de $334.50, avec intérêts, et les dépens des deux cours contre l'intimé.

Appeal allowed with costs.

Solicitors for the appellant: *Parisien, Chartrand & Bonneau.*

Solicitors for the respondent: *Perrault & Perrault.*

J. A. COULOMBE (DEFENDANT).....APPELLANT;

AND

LA SOCIÉTÉ COOPÉRATIVE AGRICOLE DE MONTMORENCY (PLAINTIFF) ..... RESPONDENT.

1949 * May 4, 5, 9

1950 * Jan. 30

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

Servitude—Will—Water power—Obligation to repair—Whether personal obligation or real servitude—Servitude upon servitude—Registration of the will—Arts. 449, 503, 545, 549, 550, 555, 1013, 1019, 2089, 2098, 2116, 2166, 2168 C.C.

By her will the testatrix left to her son, the predecessor in title of the appellant, a cardboard factory, the dam serving it and the entire water power up to and including a barrage called the "retenue". To her daughter, the predecessor in title of the respondent she left the adjoining lower lands including a flour and sawmill and a right to water power sufficient to operate them. These properties are situate on the de Lottinville River and some four miles below the retenue erected across the Laval River for the purpose of diverting some of its water into the de Lottinville River. Para. 7 of the will states: "Ma fille Zoé aura le droit de se faire fournir par mon fils Louis, à même le pouvoir d'eau de la manufacture, l'eau nécessaire pour faire fonctionner les moulins..." Appellant contended that the right to receive the water power given to the daughter was a personal right only against the son and could not be asserted against the appellant and also that as the will was not registered in the district in which the retenue lies, it could not be asserted against him. The respondent contended on the other hand that the will created a real servitude and that the appellant was obliged to maintain the retenue in repair. The majority in the Court of Appeal held that the will created a real servitude.

Held: (The Chief Justice and Kerwin J. dissenting) that, what was bequeathed was a real servitude for the benefit of the lower lands, of which the obligation to repair was part and parcel of the entire servitude imposed upon the properties devised to the son.

Held: Even though the right to maintain the retenue is a servitude, the will did not create a servitude upon a servitude as the servitude created is upon the retenue itself which is owned by the appellant.

Held: Appellant cannot complain that the will was not registered as this would be a denial of his own source of title.

Per The Chief Justice and Kerwin J. (dissenting): From the language used in the will, it is impossible to deduct that the testatrix had the intention to create a real servitude. Assuming the intention to create a real servitude, as she did not follow the prescriptions of the Code requiring on the part of the servient land that the servitude be passive and not active, and also that the use and extent of it be determined by the title creating the servitude, the result is a personal obligation on the part of the son.

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

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APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), dismissing, Marchand JA. dissenting, the appeal from the decision of the Superior Court, Boulanger J., holding that a real servitude had been created by the will.

Charles Cannon, K.C., for the appellant.

Jacques Lapointe for the respondent.

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

The CHIEF JUSTICE:—Cette cause dépend essentiellement de l'interprétation que l'on doit donner au testament fait le 5 janvier 1925 par Madame Zoé Turgeon-Richard en faveur de son fils Louis et sa fille Zoé.

Par son testament elle léguait à son fils Louis sa manufacture de carton située à l'Ange Gardien, avec les terrains y attenant et les bâtisses érigées sur ces terrains et servant à l'exploitation de la manufacture. Le legs suit en ces termes:

> Je lui donne et lègue avec dispense de rapport le pouvoir d'eau de la retenue et ce qui sert à l'exploiter tel que chaussées, digues, ainsi que la maison appelée power house. Mondit fils aura droit de passage à pied et en voiture sur les terres léguées à d'autres légataires, pour se rendre au pouvoir d'eau de la retenue, au power house, à la mine, au chemin de fer par les chemins existants déjà et affectés à cet usage;

D'autre part, la testatrice lègue à titre de propre à sa fille Zoé son moulin à scie, son moulin à farine, son cottage situé près du moulin au bas de la côte, la bâtisse des ouvriers, et les emplacements sur lesquels ces immeubles sont situés et les terrains attenant aux dits immeubles, ainsi que leurs dépendances.

Et voici maintenant la clause qui doit être interprétée pour décider la cause:

> Ma fille Zoé aura le droit de se faire fournir par mon fils Louis, à même le pouvoir d'eau de la manufacture, l'eau nécessaire pour faire fonctionner les moulins que je lui lègue présentement; mais si des réparations devenaient nécessaires à la manufacture de carton, ou au pouvoir d'eau lui-même et qu'il fut nécessaire de suspendre le service de l'eau, alors, ma dite fille Zoé devra souffrir cette suspension du service de l'eau sans prétendre aucun recours en dommages contre mon dit fils Louis;

(1) Q.R. [1948] K.B. 761.

L'historique des propriétés dont il s'agit est contenu très au long et d'une façon détaillée dans le jugement de la Cour Supérieure dont l'appel est porté devant cette Cour et je ne crois pas utile de la répéter ici. Il suffit de mentionner que l'appelant était, lors de l'institution de cette cause, le propriétaire des immeubles légués à Louis Richard et l'intimée était la propriétaire des immeubles légués à Zoé Richard, la fille de la testatrice.

L'action fut instituée par l'intimée alléguant que le pouvoir d'eau ou barrage de la retenue était dans un état de vétusté déplorable et que, par suite de ce mauvais état, l'eau s'échappait en grande quantité dans une direction autre que celle des propriétés de l'intimée, "la privant en conséquence d'une partie du pouvoir dont elle aurait besoin pour son moulin, à tel point qu'elle en est privée presque complètement pendant les périodes de sécheresse, dommages qu'elle n'aurait point à subir si le barrage était étanche".

Il est important de constater quelles sont les conclusions de l'action de l'intimée. Elle a conclu

à ce que, par le jugement à intervenir, il soit dit et déclaré que la demanderesse a droit de recevoir toutes les eaux de la rivière Ferrée et de Lottinville nécessaires à l'opération de son moulin à farine situé sur les lots 421 et 422 du cadastre officiel pour la paroisse de Château-Richer; que le défendeur, comme propriétaire du barrage et du pouvoir d'eau, est obligé de faire au barrage les travaux de réparations et d'entretien nécessaires pour fournir à la demanderesse l'eau dont elle a besoin pour son moulin et à ce que le défendeur soit condamné à faire au dit barrage les réparations nécessaires pour en assurer la solidité et l'étanchéité et pour assurer un débit constant au moulin de la demanderesse.

Les conclusions de la déclaration ajoutent une demande qu'à défaut par le défendeur de faire les travaux requis dans les quinze jours du jugement à intervenir "la demanderesse soit autorisée à entrer chez le défendeur pour faire les dits travaux aux frais du défendeur, le tout avec dépens contre le défendeur, la demanderesse se réservant tous autres recours contre le défendeur pour les dommages subis."

Le jugement de première instance est à l'effet que la preuve a démontré sans l'ombre d'un doute que le barrage était en très mauvaise condition et qu'il laissait fuir dans

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la rivière Laval un quart de l'eau qui serait censé se déverser dans la rivière de Lottinville; qu'il avait besoin de réparations urgentes et immédiates qui coûteraient $2,500; et trouve que l'action de la demanderesse était bien fondée; "que le barrage de la Retenue, appartenant au défendeur, est assujetti par et en vertu du testament de Zoé Turgeon-Richard, du 5 janvier 1925, à une servitude en faveur du moulin à farine et du moulin à scie de la demanderesse situés sur parties des lots 421 et 422 du cadastre de Château-Richer et sur le lot numéro 2 du cadastre de l'Ange-Gardien; que cette servitude consiste à fournir aux dits moulins l'usage et l'eau retenue et détournée par ce barrage". Il maintient en conséquence les conclusions de la demanderesse et déclare que la demanderesse a droit de recevoir toutes les eaux des rivières Ferrée et de Lottinville nécessaires à l'opération de son moulin à farine situé sur les lots 421 et 422 du cadastre officiel pour la paroisse de Château-Richer; et déclare que le défendeur, comme propriétaire du barrage du pouvoir d'eau, est obligé de faire au barrage les travaux de réparations et d'entretien nécessaires pour fournir à la demanderesse l'eau dont elle a besoin pour son moulin et condamne le défendeur à faire audit barrage les réparations nécessaires . . . pour assurer un débit d'eau constant au moulin de la demanderesse"; à défaut de quoi, dans les quinze jours du jugement, la demanderesse est autorisée à faire ces travaux et à entrer chez le défendeur pour les faire, aux frais du défendeur; le tout avec dépens.

Ce jugement a été confirmé par la majorité de la Cour du Banc du Roi (en Appel) (1) dans les termes suivants

> Considérant que la preuve documentaire et orale versée au dossier justifie les conclusions prises par la demanderesse en son action confessoire de servitude, et c'est à bon droit qu'elles ont été accueillies par la Cour Supérieure;

l'appel du défendeur est rejeté avec dépens.

Ce jugement de la Cour s'appuie en somme sur les notes de M. le Juge Saint-Jacques, à l'opinion de qui les autres juges se sont ralliés, à l'exception de l'honorable juge Marchand qui exprime sa dissidence en vertu du principe que le testament n'avait pas été enregistré au désir de la

(1) Q.R. [1948] K.B. 761.

loi sur l'immeuble où la servitude était réclamée et qu'en conséquence il avait perdu toute efficacité comme acte constitutif de telle servitude.

Il convient de faire remarquer immédiatement que la déclaration de la demanderesse, ni d'ailleurs ses conclusions n'invoque pas l'existence d'une servitude réelle. Ce n'est que dans les jugements que l'on voit apparaître cette description des obligations respectives et des droits des "héritages" l'un sur l'autre. A lire les allégations de la demanderesse, l'on ne saurait éviter de remarquer qu'elle a réellement basé ses prétentions sur une obligation personnelle de Louis Richard, résultant du testament dont il s'agit.

Il n'est nullement question dans ce document, qui fait la base de l'action, d'une charge imposée sur l'héritage de Louis Richard pour l'utilité de l'héritage légué à sa fille Zoé par la testatrice, ainsi que l'exige l'article 499 du Code Civil.

Il n'y est pas dit que le barrage de la retenue est affecté d'une charge en faveur des moulins à scie et à farine donnée à la fille Zoé par le testament en question; mais on y parle des obligations de Louis Richard qui auraient été assumées par l'appelant.

Or, cela est inexact; l'appelant n'a pas assumé les obligations de Louis Richard de fournir aux moulins de Zoé l'eau qui peut être nécessaire pour les faire fonctionner. Bien au contraire, sur ce point, le titre de l'appelant est plus clair que le testament. L'acquéreur de la faillite de Louis Richard n'assume aucune obligation. L'acte stipule simplement que Dame Ozélia Doyon "aura droit cependant de se servir du dit pouvoir d'eau en aval de la manufacture pour l'entretien du moulin à farine, du moulin à scie ainsi que du Power House et de ses bâtiments actuels sis et situés sur les lots numéros 421 et 422 du cadastre de Château-Richer". L'on remarque, qu'ici encore, il est question "du pouvoir d'eau en aval de la manufacture". Ce pouvoir d'eau ne saurait être le barrage de la retenue qui est situé à quatre milles en amont de la manufacture.

Les obligations assumées par Coulombe dans le contrat de vente que lui a consenti le syndic à la faillite de Louis Richard sont si peu favorables à l'interprétation que la

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demanderesse veut maintenant donner au testament, dont nous nous occupons, que le Juge de première instance et la Cour du Banc du Roi (en Appel), afin d'arriver à leurs conclusions, ont dû dégager la demanderesse des conséquences des stipulations contenues dans cet acte de vente en faisant remarquer que ni la demanderesse, ni son auteur, n'était partie à cet acte et que, par conséquent, cet acte ne pouvait "en aucune façon lier la demanderesse".

Si l'on s'en tenait aux stipulations de l'acte de vente par la faillite à l'appelant actuel, les jugements dont est appel ne pourraient tenir.

C'est donc uniquement du testament que l'intimée peut se réclamer pour maintenir les prétentions qu'elle émet maintenant, et, l'action qu'elle a prise n'est pas une action confessoire de servitude réelle sur le barrage de la retenue; c'est clairement une action basée sur l'obligation personnelle de Louis Richard, à laquelle la demanderesse allégua que Coulombe a succédé. Bien loin de trouver dans l'acte d'acquisition de Coulombe une clause par laquelle il aurait assumé cette obligation, on y trouve la déclaration suivante: "Le vendeur déclare, sous la peine de droit, que les lots et le pouvoir d'eau ci-dessus vendus sont libres de toute hypothèque et charges quelconques, mais vend les dites propriétés à charge de cens et rentes qui pourraient les affecter."

Suit, dans cette vente, toute une nomenclature de servitudes actives et passives (que le Juge de première instance mentionne qu'il est impossible d'identifier faute de plan), mais où l'on chercherait vainement l'établissement d'une servitude sur le barrage de la retenue.

Certes, je m'accorde avec le Juge de première instance pour dire que "le testament, malheureusement, a été rédigé dans des termes lamentablement vagues et imprécis". Mais je cesse de m'accorder lorsqu'il dit "qu'on peut sortir en dehors du testament pour découvrir l'intention véritable de la testatrice".

L'on cite certains jugements, qui ne sont pas dans des causes de la province de Québec, où il aurait été dit que l'on ne devait pas s'en tenir aux termes mêmes du document, mais que l'on doit plutôt rechercher l'intention de la testatrice sans s'arrêter au langage qu'elle a employé.

Tout d'abord, cette prétention est diamétralement contraire à l'article 1013 du Code Civil, qui ne permet pas de s'écarter du "sens littéral des termes du contrat", à moins que la commune intention des parties soit douteuse. Mais, en plus, cela est également contraire au jugement du Conseil Privé dans la cause de *Auger* v. *Beaudry* (1), qui a été rendu dans une cause de Québec, et à laquelle j'aurai l'occasion de référer un peu plus loin. Ce jugement fait remarquer qu'il y a eu des hésitations au sujet de l'interprétation que l'on devait donner à un testament:

> But whatever wavering from the strict rule of construction may have taken place in the past, it is now recognized that the only safe method of determining what was the real intention of a testator is to give the fair and literal meaning to the actual language of the will.

L'on remarque que le Conseil Privé, dans ce jugement, déclare positivement que, nonobstant les jugements qui ont pu être rendus au contraire, dès lors, c'est-à-dire, en 1920 et pour le futur, la seule règle qui doit guider l'interprétation des testaments est de s'en tenir au "sens littéral des termes". Les tribunaux ne sauraient spéculer sur ce que le testament aurait dû dire, ou sur ce qu'il aurait été équitable de dire, ou sur ce qu'il aurait été plus avantageux de dire; les tribunaux doivent s'en tenir à ce qui a été dit.

Ce qui importe réellement dans cette cause-ci, c'est donc d'interpréter la clause du testament invoqué par l'intimée strictement d'après les termes employés dans ce testament.

Et, si je fais ci-dessus allusion à la façon dont la déclaration et ses conclusions sont rédigées, c'est pour indiquer que l'intimée elle-même, lorsqu'elle a décidé d'instituer son action contre l'appelant, n'a pas interprété le testament comme ayant constitué une servitude réelle et qu'elle invoque seulement une obligation personnelle de la part de Louis Richard.

Il est évident que, si nous avions devant nous une action intentée contre ce dernier, la situation serait bien différente. Mais il faut remarquer que l'on prétend ici imposer à un tiers acquéreur une charge qui n'est indiquée ni dans le testament, ni dans la déclaration annexée au bref d'assignation, sans être capable de trouver dans le testament lui-même la création d'une servitude réelle, et, sans que ce

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tiers acquéreur ait pu découvrir au bureau d'enregistrement qu'il acquérait une propriété subordonnée à une servitude réelle, et alors que son vendeur, dans le titre d'acquisition, déclare, au contraire, positivement, comme je l'ai fait remarquer plus haut, que les lots et le pouvoir d'eau vendus par la faillite de Louis Richard "sont libres de toute hypothèque et charges quelconques".

Et, non seulement il n'est pas établi que Coulombe pouvait découvrir au bureau d'enregistrement que cette prétendue servitude était enregistrée sur le barrage de la retenue, mais la testatrice elle-même déclare:

> Attendu que dans mon présent testament les immeubles que j'y ai légués n'y sont pas désignés sous leurs numéros de cadastre, et qu'il pourrait peut être survenir des malentendus entre mes légataires sur la fixation des limites d'iceux, je veux qu'au cas de toute difficulté concernant leur délimitation, la décision de mon exécuteur testamentaire soit finale et irrévocable.

Je ne me prononcerai pas sur la validité de cette clause, par laquelle elle prétend laisser à la décision de son exécuteur testamentaire la fixation des limites des différents immeubles légués par elle, autrement que pour faire remarquer, qu'à tout événement, vu que les malentendus qu'elle prévoyait sont survenus, nous n'avons devant nous aucune décision de l'exécuteur testamentaire à ce sujet. Nous pourrions nous demander, au cas où telle décision aurait été rendue, jusqu'à quel point le désir de la testatrice que cette décision "soit finale et irrévocable" lierait les parties en cette cause et devrait être reconnu irrévocablement par la Cour. Je n'ajouterai aux considérations qui précèdent que cet autre passage tiré du jugement de la Cour Supérieure:

> Voilà pourquoi les anciens titres ne peuvent guère nous aider à déterminer s'il y a servitude actuellement, même s'ils peuvent nous aider à comprendre quel était l'état de choses avant le testament de Zoé Turgeon-Richard.
>
> En effet, c'est dans ce testament qui lègue le moulin à farine à la fille de la testatrice, Zoé Richard-Savard, et le barrage de la Retenue au fils de la testatrice, Louis Richard, qu'il nous faut trouver la création d'une servitude sur l'immeuble du barrage en faveur de l'immeuble de la meunerie, si la demanderesse a raison dans ses prétentions. Il n'y a pas d'autre titre et une servitude ne peut exister sans titre... Pour qu'il y ait servitude, il suffit que l'on puisse trouver dans le titre constitutif la création d'un service imposé sur un immeuble au profit d'un autre immeuble. Évidemment, si ce service immobilier n'apparaît pas dans le titre, il n'y a pas de servitude; il n'y a qu'une obligation personnelle.

Et j'ajoute que, contrairement à ce qui existe en France, et, par conséquent, à ce qu'enseignent les commentateurs du Code Napoléon, pour une servitude, la possession même immémoriale ne suffit pas à cet effet (C.C. 549); le titre constitutif de la servitude ne peut être remplacé que par un acte recognitif émanant du propriétaire du fonds asservi (C.C. 550); et même la destination du père de famille vaut titre, seulement lorsqu'elle est par écrit, et que la nature, l'étendue et la situation en sont spécifiées (C.C. 551).

Il faut rapprocher de cette dernière particularité "que la nature, l'étendue et la situation en sont spécifiées', qu'en vertu de l'article 545, "l'usage et l'étendue de ces servitudes se déterminent d'après le titre qui les constitue, ou d'après les règles qui suivent si le titre ne s'en explique pas".

Or, ici, d'après même la clause du testament que nous avons citée et d'après tout ce que dit le Juge de la Cour Supérieure, il n'est pas possible de déterminer l'usage et l'étendue de la servitude que les deux jugements, qui sont en appel devant nous, ont prétendu imposer au barrage de la retenue; sans compter que l'effet des jugements serait que cette charge qu'ils imposent à l'appelant, si elle est une servitude réelle, comme ils le disent, constituerait sur le barrage de la retenue une charge à perpétuité. En sorte que, tous les acquéreurs successifs de l'héritage légué par la testatrice à Louis Richard seraient tenus indéfiniment à réparer le barrage de la retenue pour le bénéfice des détenteurs des moulins à scie et à farine légués par la testatrice à sa fille. C'est une conséquence à laquelle je ne puis me résoudre dans l'interprétation du texte du testament.

Naturellement, j'ai considéré si, indépendamment de ce texte, l'intimée n'aurait pas pu invoquer les articles du Code qui parlent des servitudes qui dérivent de la situation des lieux. L'article 503 du Code Civil règle le cas de celui dont l'héritage borne une eau courante ne faisant pas partie du domaine public, ou de celui dont l'héritage est traversé par cette eau. Il peut s'en servir, à son passage, pour l'utilité de son héritage, mais de manière à ne pas empêcher l'exercice du même droit par ceux à qui il appartient, et, c'est-à-dire, "à la charge de la rendre à la sortie du fonds à son cours ordinaire".

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Évidemment, ce n'est pas là le droit que l'intimée invoque; et, en plus, elle ne saurait l'invoquer, parce que cet article traite d'une eau courante qui borne ou traverse un héritage dans son cours naturel. Or, ici, c'est l'intimée elle-même qui se charge de nous démontrer que, sans le barrage de la retenue (et, c'est-à-dire, sans le secours de cet ouvrage artificiel), le peu d'eau courante qui borne ou traverse l'héritage de l'appelant ne serait d'aucune utilité pour ses moulins à scie et à farine. Si le barrage de la retenue n'était pas là pour diriger l'eau de la rivière Laval dans la rivière de Lottinville ou Petit-Pré, cette dernière serait absolument insuffisante pour les besoins des moulins de l'intimée.

Or, Pothier dans son Traité des Donations testamentaires, au chapitre 7, intitulé: "De l'interprétation des legs", pose la règle suivante:

357. Art. II—Il ne faut pas néanmoins s'écarter de la signification propre des termes du testament s'il n'y a de juste raison de croire que le testateur les a entendus dans un autre sens que leur sens naturel.

Et nous avons sur ce point la décision du Comité Judiciaire du Conseil Privé dans le cas de *Auger* v. *Beaudry* (1):

The only safe method of determining what was the real intention of a testator is to give the fair and literal meaning to the actual language of the will.

Appliquant les principes ainsi posés par ces deux hautes autorités, il s'en suit que nous devons rechercher l'intention de la testatrice en l'espèce exclusivement dans le langage dont elle s'est servie. En cela, d'ailleurs, nous ne ferons que suivre la prescription du Code Civil (art. 1013) que la portée d'un document doit toujours se déduire du sens littéral des termes employés et qu'on ne doit recourir à une autre interprétation que "lorsque la commune intention des parties est douteuse".

A cet article du Code on doit ajouter que, même dans le doute, le contrat s'interprète en faveur de celui qui est chargé de l'obligation (C.C. 1019).

D'après les strictes règles du Code Civil, par conséquent, il ne s'agit pas ici de rechercher si l'usage de l'eau provenant du barrage de la retenue peut ou non être utile ou même nécessaire aux moulins de l'intimée. C'est la testa-

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trice qui elle-même avait le droit de stipuler quelles seraient les obligations de son fils Louis Richard, et les tribunaux n'ont pas le droit de lui en imposer davantage, au-delà de ce qu'elle a elle-même déclaré dans son testament (Consulter *Riou* v. *Riou* (1), C.C. art. 545). Et quand le droit de servitude est douteux en vertu du titre, le doute doit être donné en faveur de l'immeuble servant, c'est-à-dire, en l'espèce, de l'appelant (*Cross* v. *Judah* (2)), Décision de la Cour de Revision (3).

Référons de nouveau au jugement du Conseil Privé dans *Auger* v. *Beaudry supra.* A la page 1014, il s'exprime comme suit:

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

C'est ainsi qu'il a été décidé dans *Christin* v. *Péloquin* (1):

> A covenant in a deed by which P. acquired the right to erect a wind-mill pump on his neighbour's land to supply water to his premises by a pipe, "that he agrees to permit F., another neighbour, to take water for the use of his premises from the pump, and for that purpose to connect a pipe with the one to be laid by P." does not establish a servitude in favour of F.'s premises. The latter are not described so as to be made a dominant tenement and there is no servient tenement on which the charge is imposed. The covenant only gives rise to a personal obligation by P. to F. and the subsequent owners, *à titre particulier,* of F.'s premises have no rights of servitude that can be enforced against P.

De même, la Cour du Banc du Roi (en Appel) dans *Germain v. Hébert* (2) a jugé que

> Nulle servitude ne pouvant s'établir sans titre, une entente entre certains cultivateurs et le propriétaire d'une beurrerie, en vertu de laquelle ces derniers, en contribuant quelque peu à la construction d'un chemin sur la terre du propriétaire, auraient obtenu la permission d'y passer pour se rendre à la beurrerie, ne constitue pas un titre créant une servitude de passage, même si la municipalité avait contribué une modique somme pour acheter la broche de la clôture de chaque côté du chemin.

Si maintenant l'on se reporte au langage employé par la testatrice dans son testament (testament fait devant deux notaires et, par conséquent, où l'on ne peut alléguer que la

(1) 28 S.C.R. 53.
(2) 15 L.C.J. 264.
(3) Q.R. 40 S.C. 538.

(1) Q.R. 28 S.C. 299.
(2) Q.R. 27 K.B. 532.

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testatrice n'avait pas l'assistance de professionnels versés dans la loi), l'on remarque immédiatement que le mot "servitude" n'est nulle part employé; mais naturellement cela ne serait pas décisif, si par ailleurs les termes du testament justifiaient de croire qu'elle a créé une servitude.

D'autre part, il m'est impossible de trouver dans ces termes une constitution de servitude. Cette affirmation trouvera un appui supplémentaire si l'on tient compte de la situation des lieux.

La testatrice possédait une manufacture de carton avec les terres y attenant et les bâtisses érigées sur ces terrains et servant à l'exploitation de la manufacture. En vertu de la clause 4 du testament, elle donne cette manufacture à son fils Louis et elle y ajoute "la maison autrefois habitée par lui avec droit de passage à pied et en voiture sur la terre voisine pour avoir issue de sa maison sur le chemin public, avec aussi le garage d'automobile, l'automobile et les terrains attenant à la dite maison".

Elle lui donne en plus "le wagon automobile (truck) ainsi que toutes les machineries, courroies, et autres garnitures de son moulin des Saules, lequel dit moulin est disposé plus loin dans mon testament... et le pouvoir d'eau de la retenue et ce qui sert à l'exploiter tel que chaussées, digues, ainsi que la maison appelée power house". Elle stipule que son fils "aura droit de passage à pied et en voiture sur les terres léguées à d'autres locataires, pour se rendre au pouvoir d'eau de la retenue, au power house, à la mine, au chemin de fer par les chemins existants déjà et affectés à cet usage".

L'on remarque que d'abord elle parle là de sa manufacture de carton et des bâtisses et terrains servant à l'exploitation de cette manufacture.

Ce n'est que dans un paragraphe subséquent qu'elle donne "le pouvoir d'eau de la retenue" avec droit de passage à pied et en voiture pour se rendre à ce pouvoir d'eau. Mais quand, dans la clause 7 du testament, elle décrit le legs fait à sa fille Zoé, elle l'exprime comme suit: "...mon moulin à scie, mon moulin à farine, mon cottage situé près du moulin au bas de la côte, la bâtisse des ouvriers, et les emplacements sur lesquels ces immeubles

sont situés et les terrains attenant aux dits immeubles, ainsi que leurs dépendances;". Puis, elle ajoute: "Ma fille Zoé aura le droit de se faire fournir par mon fils Louis, à même le pouvoir d'eau de la manufacture, l'eau nécessaire pour faire fonctionner les moulins que je lui lègue présentement; mais si des réparations devenaient nécessaires à la manufacture de carton, ou au pouvoir d'eau lui-même et qu'il fut nécessaire de suspendre le service de l'eau, alors, ma dite fille Zoé devra souffrir cette suspension du service de l'eau sans prétendre aucun recours en dommages contre mon dit fils Louis;".

Elle fait donc une distinction très nette entre le pouvoir d'eau de la manufacture et le pouvoir d'eau de la retenue. Dans le legs constitué par la clause 4 du testament elle parle d'abord de la "manufacture de carton"; puis, dans un paragraphe distinct, elle parle du "pouvoir d'eau de la retenue". Dans la clause 7, qui est celle qui concerne sa fille Zoé, lorsqu'elle lui lègue le droit de se faire fournir par son fils Louis l'eau nécessaire pour faire fonctionner les moulins qu'elle lui lègue, elle stipule que cette eau devra être prise "à même le pouvoir d'eau de la manufacture".

Or, il est de règle que les mêmes mots employés dans un même document doivent être interprétés comme signifiant la même chose. Appliquant cette règle, il s'ensuit que le pouvoir d'eau de la manufacture, auquel réfère la clause 7, est le pouvoir d'eau de la manufacture de carton mentionné dans la clause 4.

En plus, il n'y a pas de manufacture "au pouvoir d'eau de la retenue". Comment, dès lors, interpréter les mots de la clause 7, "à même le pouvoir d'eau de la manufacture", comme s'appliquant au pouvoir d'eau de la retenue?

Il est clairement établi dans la preuve que "le pouvoir d'eau de la retenue" était la façon reconnue de désigner un autre pouvoir d'eau, qui n'était pas celui de la manufacture de carton, et qui d'ailleurs est situé à quatre milles de distance de la manufacture. Il se peut que l'on eût pu entendre que la manufacture de carton bénéficiait réellement de deux pouvoirs d'eau, celui de la retenue et celui constitué par le barrage qui se trouve à la manufacture;

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mais lorsque la testatrice prend la peine de désigner chacun de ces pouvoirs d'eau d'une façon différente, le langage qu'elle emploie oblige de donner à chacun d'eux un sens différent.

Déjà le fait que le pouvoir d'eau de la retenue est à quatre milles de distance de la manufacture rend vraiment improbable que si la testatrice avait voulu dans la clause 7 désigner la retenue comme étant le pouvoir d'eau d'où sa fille Zoé aurait le droit de se faire fournir l'eau nécessaire pour faire fonctionner les moulins qu'elle lui léguait, elle n'aurait pas employé pour le désigner les mêmes mots qu'elle a employés dans la clause 4.

Personnellement je n'ai pas de doute sur le sens de ces mots; mais, comme on l'a vu tant d'après le Code Civil que d'après la jurisprudence, s'il y a un doute, il doit être interprété en faveur de celui à qui l'obligation était imposée et à l'encontre de celui qui voudrait en bénéficier.

De plus, la clause 7 elle-même fournit une indication additionnelle du véritable sens que l'on doit donner à l'expression: "à même le pouvoir d'eau de la manufacture"; car cette clause ajoute que si des réparations devenaient nécessaires à la manufacture de carton, ou au pouvoir d'eau lui-même et qu'il fût nécessaire de suspendre le service de l'eau, alors, la fille de la testatrice devra souffrir cette suspension de service de l'eau sans prétendre aucun recours en dommages contre son dit fils Louis. Il ne semble pas qu'il puisse y avoir le moindre doute que la référence "au pouvoir d'eau lui-même" venant immédiatement après l'emploi des mots "manufacture de carton" ait pour but de désigner le pouvoir d'eau de la manufacture, celui-là même d'où la fille de la testatrice a le droit de se faire fournir par son frère Louis l'eau nécessaire pour faire fonctionner les moulins que la testatrice lui a légués.

J'ajoute cette analyse seulement à titre supplémentaire car, à mon humble avis, l'expression de la testatrice: "Ma fille Zoé aura le droit de se faire fournir par mon fils Louis, à même le pouvoir d'eau de la manufacture, l'eau nécessaire..." n'a pas pour effet de créer une servitude. Cette expression constitue exclusivement la création d'une obli-

gation personnelle de la part de Louis. Il en résulte qu'il lui incombe de fournir l'eau à sa sœur Zoé avec la restriction que cette eau devra provenir du "pouvoir d'eau de la manufacture". C'est là le sens littéral des mots employés. L'intention n'est pas douteuse; et l'article 1013 du Code Civil doit recevoir sa stricte application. Cette intention découle davantage encore, si possible, du fait que la clause ajoute que la fille devra souffrir toute suspension de service au cas où des réparations deviendraient nécessaires à la manufacture de carton ou au pouvoir d'eau de cette manufacture.

Comme je l'ai dit, c'est dans les notes de l'honorable juge Saint-Jacques qu'il faut trouver les motifs de la décision de la Cour d'Appel, car les autres juges déclarent partager entièrement son opinion. La première observation qui, d'après moi, s'impose à ce sujet, c'est que l'honorable juge s'appuie sur des textes des commentateurs du Code Napoléon: Toullier & Duvergier; Pardessus; Planiol & Ripert et Puzier-Herman.

Or, le Code Civil de la province de Québec, en matières de servitudes, est différent du Code français. Ce sont les codificateurs eux-mêmes qui nous en préviennent; et, d'ailleurs, il suffit de comparer les articles des deux codes pour le constater immédiatement.

Il y a tout d'abord une différence fondamentale: C'est, qu'en vertu du Code civil de la province de Québec (art. 549), nulle servitude ne peut s'établir sans titre et que la possession, même immémoriale, ne suffit pas à cet effet. Sur ce point, le 3e Rapport des codificateurs nous dit:

> Cet article qui n'est qu'une répétition du 186e de la Coutume de Paris, énonce que la servitude ne peut s'acquérir par prescription, que dans tous les cas il faut un titre (54); il remplace les articles 690 et 691 du Code Napoléon, le premier décidant que les servitudes continues et apparentes s'acquièrent par titre et par prescription de trente ans, et le second décrétant que les continues non apparentes et les discontinues apparentes ou non apparentes ne peuvent s'établir que par titre, adoptant en cela le système du droit romain contraire à celui généralement admis en France dans les pays de coutume, où l'on suivait la maxime de la Coutume de Paris, "nulle servitude sans titre".

De même de l'article 545 du Code Civil de la province de Québec, en vertu duquel: "L'usage et l'étendue de ces servitudes se déterminent d'après le titre qui les constitue,

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ou d'après les règles qui suivent, si le titre ne s'en explique pas". Voici, dans le 3e Rapport, ce qu'en disent les codificateurs:

Cet article indique, dans un premier paragraphe, quels sont ceux qui peuvent établir des servitudes sur ou en faveur de leurs fonds, et dans un second, comment s'apprécient et se déterminent l'usage et l'étendue de celles une fois établies; il remplace l'article 686 du Code Napoléon (50) dont il diffère cependant d'abord, en ce que dans le premier paragraphe il est déclaré: "que les services établis ne sont imposés ni à la personne ni en faveur de la personne, mais au fonds et pour le fonds"; énonciation inutile pour nous, et qui a dû être omise, après la déclaration déjà faite qu'il ne s'agit ici que des servitudes réelles et nullement des personnelles; et ensuite en ce qu'il a fallu changer la rédaction de ce même paragraphe pour lui faire dire d'une manière distincte que la seule qualité de propriétaire d'un immeuble ne suffit pas pour permettre de le grever ou de le faire jouir d'une servitude, mais qu'il faut de plus être usant de ses droits et capable d'aliéner, puisque l'imposition d'une servitude diminuant la valeur de l'immeuble en est justement regardée comme une aliénation partielle.

Le second paragraphe de l'article 686 a aussi dû être changé pour le rendre conforme à notre système, qui n'admet pas de servitudes sans titre. Malgré cela il est possible que le titre qui la constitue ne s'explique pas sur l'usage et l'étendue du droit; alors il faut avoir recours à certaines règles qui se trouvent tracées dans la présente section; c'est ce que dit le second paragraphe de notre article tel qu'il est proposé.

A l'égard d'autres articles encore du Code Civil de la province de Québec, les codificateurs indiquent que les articles qu'ils ont proposés (et qui ont été adoptés) sont basés sur la Coutume de Paris et ne sont pas conformes au Code Napoléon. Il n'est pas nécessaire de les énumérer ici, vu que les articles en question ne trouvent pas d'application dans la présente cause.

Mais ce qui précède est suffisant pour démontrer le danger d'accepter, pour interpréter la Loi de Québec, les commentaires des auteurs qui ont écrit sous le Code Napoléon.

Mais, en outre de cette critique qu'il faut nécessairement adresser aux notes de M. le juge Saint-Jacques, il y a surtout que les extraits des commentateurs qu'il cite—je le dis en toute déférence—ne sont pas applicables au présent litige.

Les citations de Toullier-Duvergier (6e édition, Tome 2, n° 588, p. 264) et de Pardessus (Traité des Servitudes—Tome 1, n° 10, p. 25) traitent de la question du point de vue du fonds dominant tandis que la présente cause doit être décidée du point de vue du fonds servant. La cita-

tion de Toullier parle du droit imposé pour un fonds, ou stipulé en faveur de la personne; celle de Pardessus fait de même: "...la concession soit expressément déclarée être faite à ce fonds ou à une personne qui dans le fait possède cet héritage et qui aurait qualité pour acquérir des droits en sa faveur...".

Or, ici, ce que nous avons à rechercher est si une servitude réelle a été "établie sur" l'immeuble de Louis Richard, et cette recherche doit être déterminée d'après le titre qui, suivant qu'on le prétend, aurait ici constitué une servitude, et, c'est à savoir, le testament.

Les mots du testament ont déjà été reproduits plusieurs fois dans ce jugement, mais on ne saurait jamais trop y insister. C'est le droit conféré à la fille Zoé "de se faire fournir par le fils Louis, à même le pouvoir d'eau de la manufacture, l'eau nécessaire...".

Il me paraît impossible d'étendre le sens de cette expression de façon à lui faire dire que les moulins légués à la fille Zoé auront le droit de se faire fournir de l'eau. Le sens littéral et naturel de cette expression est que la testatrice conféra un droit à la fille Zoé elle-même qui, seule, peut contraindre son frère à lui fournir de l'eau.

Mais, surtout, "se faire fournir l'eau nécessaire" par le fils Louis ne saurait impliquer autre chose qu'un acte par Louis de fournir l'eau en question. Il ne s'agit pas ici d'une obligation établie sur l'immeuble de Louis; il s'agit d'une obligation que le fils Louis devra être tenu de remplir par son acte personnel. Ce n'est pas une charge imposée sur le fonds légué à Louis; c'est une dette imposée à Louis personnellement. Pardessus lui-même, dans son Traité des Servitudes (8e édition, Tome 1, p. 25), fait remarquer que:

> La distinction entre les droits personnels et les droits réels, quoique pouvant les uns et les autres être exercés sur des immeubles, n'est pas seulement dans les mots; elle a des effets importants pour le mode d'acquisition, de conservation et d'extinction des droits.

Cette phrase, que je tire de Pardessus, précède immédiatement le passage cité par l'honorable juge Saint-Jacques. Et, au n° 11, qui suit presque immédiatement, le même auteur ajoute:

> Les servitudes consistent, soit dans l'obligation du propriétaire d'un fonds *de souffrir qu'on y exerce un droit*, soit dans l'obligation de ce propriétaire de s'abstenir de quelque chose qu'il aurait naturellement droit d'y faire.

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Entre autres exemples de cette obligation de souffrir qu'on y exerce un droit, il mentionne: "d'aller y puiser, ou d'y conduire ses bestiaux à l'abreuvage, au pacage, etc."

L'auteur donne plusieurs autres exemples, qui, tous, impliquent la stipulation que le propriétaire du fonds dominant aurait la faculté d'accomplir un acte positif sur le fonds servant. Il parle (p. 29) du "droit de prendre dans une forêt les bois nécessaires au chauffage". A la page 49, il dit, en parlant de l'article 686 du Code Napoléon:

> Cet article "ne permettant pas de stipuler des servitudes imposées à la personne, on ne pourrait en donner le nom et en attribuer les effets à des travaux ou journées d'hommes ou d'animaux, que le donateur ou le vendeur d'un immeuble imposerait à l'acquéreur, quand même ces prestations auroient pour objet de procurer une plus grande utilité à un héritage en faveur duquel elles auroient été stipulées ou réservées. Peu importeroit que les contractants eussent déclaré que la charge sera foncière et perpétuelle sur *tel* ou *tel* héritage; parce que la liberté des conventions ne va pas jusqu'à modifier ce qui est de l'essence des choses. On ne pourrait y voir qu'un louage de services; si la durée n'en avoit pas été limitée par la convention des parties, elle devroit l'être par les tribunaux; elle n'obligeroit que celui qui auroit promis et ses héritiers, dans les cas où, d'après les principes du droit commun, ceux-ci sont tenus d'exécuter une obligation de faire, contractée par leurs auteurs. Celui qui, par la suite, deviendroit acquéreur du fonds, dans la vente duquel cette convention accessoire auroit été stipulée, n'en seroit tenu que si une clause spéciale de sa propre acquisition l'en chargeoit, à la différence d'une servitude, dont il seroit tenu de plein droit et sans stipulation expresse.

Et, à la page 38, il avait déjà dit:

> Si le doute étoit absolu, si aucune des circonstances, dont l'appréciation leur appartient (aux tribunaux), ne pouvoit le lever, il seroit plus sûr de décider que la stipulation est personnelle, plutôt que de la qualifier servitude; d'abord parce qu'en général une clause obscure doit être expliquée contre le stipulant et en faveur de l'obligé, conformément à l'art. 1162 du code; en second lieu parce que la cause de la liberté est la plus favorable, et qu'une concession en faveur des personnes, présente une chance de durée moins longue et par conséquent une charge moindre qu'une concession à titre de servitude.

Et M. Planiol, dans son Traité élmentaire de Droit Civil (6e édition, Tome 1, n° 2929, p. 919) expose bien, il me semble, le caractère d'une servitude. Il intitule son paragraphe: "Le service ne doit pas être imposé à la personne", et, au cours de son explication de cette proposition, il dit:

> Le propriétaire du fonds dominant acquiert un droit réel, ayant pour objet l'utilisation *par lui* du fonds d'autrui et le propriétaire du fonds servant est seulement tenu de l'en laisser jouir, sans avoir rien fait dans ce but.

Ce n'est pas moi qui souligne les mots "par lui"; c'est l'auteur lui-même et c'est ce qui l'amène un peu plus loin à parler de la "nature purement passive des servitudes". En d'autres termes, le propriétaire du fonds servant n'a rien à faire dans le but de permettre l'exercice de la servitude, car cette servitude, suivant l'expression de l'auteur, a "pour objet l'utilisation par lui du fonds d'autrui". C'est le propriétaire du fonds dominant qui doit utiliser par lui-même et non pas forcer le propriétaire du fonds servant à accomplir en faveur du propriétaire du fonds dominant un acte positif.

Puis, quand le même auteur est amené à étudier les conséquences de cette situation, au n° 2930 il dit:

> Actuellement, une personne peut bien prendre l'engagement de rendre à un propriétaire certains services, mais cela sous une double restriction: 1° Il ne résultera de sa promesse qu'une obligation qui lui sera personnelle, non une servitude; cette obligation ne passera pas après elle aux propriétaires successifs de son bien; elle-même en sera personnellement débitrice et ne sera pas tenue à raison de son fonds et en qualité de propriétaire.

Plus loin, au n° 2935, Planiol dit, en comparant les servitudes avec les droits d'usage et les obligations:

> Cette obligation peut avoir pour objet une *prestation positive,* une fourniture ou un travail à faire par le promettant.

et

> Une fois créée elle est transmissible aux héritiers de l'une ou de l'autre partie; le droit de créance passe aux héritiers du créancier, la dette aux héritiers du débiteur. Mais les acquéreurs à titre particulier du fonds sur lequel s'exécute la charge n'en sont pas tenus, à moins qu'ils ne s'y soient spécialement obligés.

Et là encore, ce n'est pas moi, mais l'auteur, qui souligne les mots "prestation positive".

Voilà donc, en référant à quelques auteurs, ce que l'on entend, même en France, en vertu du Code Napoléon.

D'autre part, si l'on se réfère à Pothier (Édition Bugnet, Tome 1, p. 312), voici comment cet auteur qui, évidemment, n'écrivait pas sous le Code Napoléon, définit les principes généraux sur la nature des servitudes réelles:

> 1. Le droit de servitude est le droit de se servir de la chose d'autrui à quelque usage, ou d'en interdire quelque usage au propriétaire ou possesseur. La servitude, de la part de celui qui la doit, ne consiste donc à autre chose qu'à souffrir que celui à qui elle est due, se serve de la chose pour l'usage pour lequel il a droit de s'en servir, ou à s'abstenir de ce que celui à qui elle est due a droit d'empêcher qu'on y

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fasse. Au reste, les droits de servitude n'obligent point le possesseur de l'héritage qui la doit, à faire quelque chose ou à donner quelque chose: en quoi ces droits diffèrent des droits de redevance foncière et des droits de corvée.

Les différentes références que je viens de faire indiquent donc ce qui, à mon humble avis, constitue les caractéristiques de la servitude réelle. De la part du fonds servant, elle doit être exclusivement passive et ne pas exiger de son propriétaire une participation active. Dès qu'elle l'exige, ce n'est plus une servitude réelle imposée comme charge sur le fonds dont il est propriétaire, c'est une obligation personnelle.

Un arrêt de notre Cour, qui nous a été citée par l'intimée, *Riverain & Bélanger* v. *Price Brothers Limitée* (1) est un exemple de la différence qu'il faut faire entre une obligation personnelle et une servitude réelle. Dans ce cas, par le titre constitutif, le vendeur cédait à l'acquéreur le droit de jouir à perpétuité du terrain occupé par les dalles d'un certain moulin à farine, "avec le droit de prendre l'eau nécessaire pour faire mouvoir ledit moulin...". Cette désignation du droit du propriétaire du fonds dominant souligne la distinction entre le droit actif de son propriétaire ("droit de prendre"), qui constitue une servitude en faveur du fonds dominant, et l'obligation passive du propriétaire du fonds servant qui doit simplement laisser prendre d'une part; et, d'autre part, la désignation que l'on trouve dans le testament de Madame Richard, qui ne confère pas à la fille Zoé le "droit de prendre" mais simplement "le droit de se faire fournir" ...ce qui ne confère à la fille Zoé aucun droit d'aller prendre l'eau, mais simplement la créance, en sa faveur, qui consiste à "se faire fournir" l'eau par son frère Louis.

C'est d'ailleurs ainsi que l'exposent nos auteurs canadiens. Mignault, dans son "Droit civil canadien" (Tome 3, p. 4) dit

> Quant à la servitude elle peut bien conférer au propriétaire du fonds dominant le droit de faire sur le fonds servant certains actes de maître, comme, par exemple, le droit d'y passer pour l'exploitation de son fonds, ou imposer au propriétaire du fonds servant, l'obligation de n'y pas faire certains actes qui pourraient nuire au propriétaire voisin, comme, par exemple, l'obligation de ne pas hausser sa maison, afin de ne pas nuire aux vues d'une autre maison; mais, jamais elle ne consiste à faire

(1) [1932] 3 D.L.R. 730.

quelque chose. Elle n'est due, en effet, que par l'héritage sur lequel elle est établie, et ce n'est qu'indirectement qu'en souffre le propriétaire; or, si une personne peut être obligée à faire quelque chose, on conçoit qu'il n'en saurait être de même d'un héritage. La servitude ne consiste donc, en général, qu'à souffrir ou à ne pas faire. Le propriétaire auquel elle appartient doit, s'il veut en jouir et la conserver, faire à ses frais tous les travaux qui sont nécessaires à ce double effet; il ne peut rien exiger du propriétaire du fonds servant, si ce n'est qu'il s'abstienne de tous actes qui pourraient entraver l'exercice de son droit.

D'autre part, Langelier, dans son "Cours de droit civil" (Tome 2, p. 248), écrit dans le même sens:

> Un deuxième caractère de la servitude, qui découle du premier, c'est qu'elle ne doit pas consister dans une obligation personnelle du propriétaire du fonds servant, parce qu'autrement le propriétaire du fonds servant deviendrait une espèce de serf du propriétaire du fonds dominant. Il serait obligé envers celui-ci par le fait seul qu'il serait le propriétaire du fonds servant, ce qui serait contraire à notre droit, où le servage est inconnu.
>
> Il résulte de là que, pour qu'il puisse exister une servitude, il faut qu'il y ait un état de choses tel que la servitude puisse être exercée sans aucun travail personnel du propriétaire du fonds servant.

Il en résulte que "le droit de se faire fournir l'eau", qui implique un acte positif de la part de celui qui doit la fournir, n'est rien autre chose qu'une obligation personnelle, en d'autres termes, qu'une obligation de faire—cette obligation dont traite l'article 1065 du Code civil, qui ne donne pas au créancier un droit réel, ou une servitude réelle sur l'immeuble, et qui n'est pas susceptible de faire l'objet d'une action confessoire; mais qui donne uniquement un droit de créance contre le débiteur de l'obligation et qui le rend passible de dommages, au cas de contravention de sa part; et on en trouve l'application dans les conclusions mêmes de la présente action puisque l'intimée, après avoir demandé que la Cour reconnaisse l'existence de cette obligation personnelle, demande, qu'à défaut de son exécution par le débiteur, elle soit autorisée à la faire exécuter aux dépens de son débiteur, sans préjudice à son recours pour les dommages-intérêts dans tous les cas.

Et puis, indépendamment du sens de la clause, elle serait quand même insuffisante pour créer une servitude conformément aux exigences de l'article 545 du Code Civil. En vertu de cet article, tout titre constitutif de servitude réelle doit déterminer "l'usage et l'étendue" de la servitude. Il serait bien difficile, d'après la clause en question, de déter-

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miner ici quels seraient l'usage et l'étendue de la servitude qu'on invoquerait en faveur de la fille Zoé. Il n'y est question que du pouvoir d'eau de la manufacture et de la manufacture de carton elle-même. Ce n'est qu'à cet égard que la clause stipule que des réparations devenant nécessaires, la fille Zoé devra souffrir la suspension de service qui en résultera. Il n'est nullement question dans cette clause du "pouvoir d'eau de la retenue", qui a été légué au fils Louis par la clause 4 du testament et qui, je le répète, est situé à quatre milles de distance du pouvoir d'eau de la manufacture de carton.

Quelle serait donc "l'étendue de la servitude" à laquelle prétend l'intimée? Est-ce qu'elle couvrirait non seulement les terrains attenant à la manufacture de carton et les bâtisses érigées sur ces terrains et servant à l'exploitation de la manufacture, mais également les quatre milles de rivière ou de cours d'eau qui s'étendraient depuis la manufacture de carton jusqu'au pouvoir d'eau de la retenue et le pouvoir d'eau de la retenue lui-même? Mais l'on ne trouve dans le testament aucune description légale de ce prétendu fonds servant. D'après l'article 2166 du Code Civil, un plan et un livre de renvoi officiels doivent être déposés à chaque bureau d'enregistrement indiquant distinctement tous les lots de terre compris dans la circonscription du bureau; et, en vertu de l'article 2168, après que copie des plan et livre de renvoi a été déposée ainsi, le numéro donné à chaque lot sur ce plan et dans ce livre de renvoi est la vraie description de ce lot. D'après l'article 2172, dans les deux ans qui suivent la date fixée par la proclamation du lieutenant-gouverneur, pour la mise en vigueur des dispositions du Code relatives à ce plan et à ce livre de renvoi, tout droit réel sur un lot de terre compris dans cette division doit être renouvelé par l'enregistrement d'un avis désignant l'immeuble affecté par le numéro qui lui est donné sur le plan et dans le livre de renvoi.

Ici, encore, je me reporterais à Pardessus (Traité des servitudes—Tome 1, p. 529)

> Toute servitude établie par convention doit être énoncée et désignée de manière à ne laisser aucun doute sur le domaine au profit duquel elle est établie, sur celui qui en est grevé, et sur l'espèce ou au moins le

genre de service qui doit avoir lieu. L'incertitude absolue sur l'un de ces points anéantiroit la stipulation, par l'impossibilité de connaître la véritable intention des parties.

Dans le testament qui nous occupe il n'y a aucune désignation officielle et légale des immeubles sur lesquels porterait la prétendue servitude.

Naturellement, je n'oublie pas que c'est là précisément une prétention de l'appelant que si, toutefois, une servitude a été créée par le testament, elle n'a jamais été enregistrée, tel que requis par la loi. Il eut fallu évidemment discuter ce point sur lequel s'appuie l'appelant si, par ailleurs, je n'étais pas venu à la conclusion qu'il n'y a pas de servitude en vertu du testament et que, par conséquent, il n'est pas nécessaire d'examiner la question d'enregistrement pour arriver à une conclusion de l'appel.

Mais l'absence de toute désignation légale de ce que l'intimée voudrait considérer comme un fonds servant est suffisante en soi pour empêcher qu'aucune servitude ait été créée conformément aux exigences des articles 499, 545 et 549 du Code Civil. Le testament, l'unique titre constitutif qu'on invoque, ne contient pas les désignations essentielles pour créer une servitude, même si l'on pouvait trouver dans le langage employé par la testatrice un sens suffisant pour en déduire qu'elle a eu l'intention d'imposer cette servitude sur les immeubles qu'elle léguait à son fils Louis.

Bien d'autres questions ont été soulevées au cours de l'argumentation de cette cause devant nous. On a prétendu, par exemple, que le barrage de la retenue lui-même n'était en soi qu'une servitude, puisque le propriétaire de la manufacture de carton n'était pas le propriétaire du fonds immobilier sur lequel le barrage a été érigé. D'où il faudrait conclure, en vertu de la loi, qu'aucune servitude ne pourrait avoir été créée sur le barrage, puisque la règle de droit est bien connue qu'il ne peut y avoir servitude sur servitude.

Ici, je le dis en tout respect, l'intimée me paraît avoir confondu la servitude avec le droit de créance. Les termes employés par la testatrice ont conféré à Zoé simplement le droit de se faire fournir l'eau par son frère et ce, seulement "à même le pouvoir d'eau de la manufacture". La fille

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Zoé a hérité d'un droit de créance de ce genre contre son frère et ce dernier ne s'est vu imposer qu'une obligation personnelle d'acquitter cette créance.

Je ne m'arrête donc pas aux autres moyens soulevés par l'appelant; et je ne dois pas être considéré comme me prononçant sur aucun autre que ceux sur lesquels je m'appuie pour arriver à décider que l'appel doit être maintenu. Mon avis est que le texte du testament ne permet pas de conclure à la création d'une servitude réelle sur les immeubles légués par sa mère à Louis Richard et qui sont actuellement la propriété de l'appelant. En plus, je ne crois pas que, même si d'après les termes du testament l'on pourrait arriver à penser que la testatrice a voulu créer une servitude, elle l'aurait fait suivant les exigences du Code Civil, et en particulier en ce qui concerne le pouvoir d'eau de la retenue. Il en résulte que l'intimée n'a pu acquérir les droits qu'elle tente actuellement d'exercer contre l'appelant, et, suivant moi, elle doit être déboutée de son action.

L'appel devrait donc être maintenu avec les dépens dans toutes les Cours.

RAND, J.:—This appeal raises the question of an obligation to repair on the owner of land and water power, including in the latter expression, retaining works, embankments, dams, etc., for the benefit of lands downstream. Each party traces title to a common owner of all the lands and the water power. The lands consisted of parcels on both sides of a stream called the Lottinville River which flows south-easterly into the St. Lawrence, and has its source a short distance south of a similar water course called the Laval River which flows south-westerly into the Montmorency River. At a point a short distance north of the head of the Lottinville, the Laval widens into a small basin and at its westerly end where the river resumes its ordinary width there was erected over 250 years ago a dam which held the waters of the Laval and by means of a short canal, diverted them into the Lottinville. Near the mouth of the latter there were erected many years ago a flour mill on one bank and a sawmill on the other and about a quarter of a mile upstream in

1897 a cardboard factory was built. The factory and the mills each had a dam furnishing the head of water for power. The upper retaining work which with the small basin is called the "retenue" was about four miles from the flour mill, and the evidence shows that the retenue, the canal, the right to carry the water over the river-bed and the dams, became vested in the holder of the common root title about 1902.

In 1925 that owner died, and by her will she left the cardboard factory, the dam serving it and the entire water power up to and including the retenue to her son; and the adjoining lower lands, including the flour mill and the sawmill and a right to water power sufficient to operate them, to her daughter. The property of the son was purchased by the appellant from the trustee in bankruptcy of the son, and the respondent is the successor in title of the daughter.

The clauses of the will on which the dispute hinges are the provision to the son in these words:—

Je donne et lègue avec dispense de rapport à mon fils Louis ma manufacture de carton située à l'Ange-Gardien, avec les terrains y attenant et les bâtisses érigées sur lesdits terrains et servant à l'exploitation de ladite manufacture; je lui donne et lègue aussi avec dispense de rapport la maison, autrefois habitée par lui avec droit de passage à pied et en voiture sur la terre voisine pour avoir issue de sa maison sur le chemin public, avec aussi le garage d'automobile, l'automobile, et les terrains attenant à ladite maison; je lui donne et lègue toujours avec dispense de rapport le wagon automobile "truck", ainsi que toutes les machineries, courroies, et autres garnitures de mon moulin des Saules, lequel dit moulin est disposé plus loin dans mon présent testament; je lui donne et lègue avec dispense de rapport le pouvoir d'eau de la retenue et ce qui sert à l'exploiter tel que chaussées, digues, ainsi que la maison appelée power house. Mondit fils aura droit de passage à pied et en voiture sur les terres léguées à d'autres légataires, pour se rendre au pouvoir d'eau de la retenue, au power house, à la mine, au chemin de fer par les chemins existants déjà et affectés à cet usage; je donne et lègue à mondit fils également avec dispense de rapport ma mine de mica, avec droit de passage à pied et en voiture, pour s'y rendre, sur les terres de quelqu'autre légataire, si cela est nécessaire; je lui donne et lègue, toujours avec dispense de rapport, tous les meubles qui se trouveront au moment de mon décès, dans la maison, la manufacture ou sur les terrains présentement légués;

and that to the daughter:—

Je donne et lègue avec dispense de rapport et à titre de propre à ma fille Zoé Richard mon moulin à scie, mon moulin à farine, mon cottage situé près du moulin au bas de la côte, la bâtisse des ouvriers, et les

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emplacements sur lesquels ces immeubles sont situés et les terrains attenant auxdits immeubles, ainsi que leurs dépendances; je donne et lègue avec dispense de rapport et à titre de propre à madite fille Zoé ma propriété de la rue Jérôme et l'emplacement qui fait face au boulevard. Ma fille Zoé aura le droit de se faire fournir par mon fils Louis, à même le pouvoir d'eau de la manufacture, l'eau nécessaire pour faire fonctionner les moulins que je lui lègue présentement; mais si des réparations devenaient nécessaires à la manufacture de carton, ou au pouvoir d'eau lui-même et qu'il fût nécessaire de suspendre le service de l'eau, alors, madite fille Zoé devra souffrir cette suspension du service de l'eau sans prétendre aucun recours en dommages contre mondit fils Louis;

The complaint arises from the fact that the continued existence of the retaining work is essential to the maintenance of the water power, and it is now admitted that that work had become out of repair, with the result, as it has been found below, that there was an actual shortage of water power to the flour and saw mills. The factory was burned in 1944, and the interest of the appellant in the power for that purpose has so far disappeared; and the case turns on the question whether he can be called upon to keep in repair the works necessary to the water power of which he may enjoy no use.

The appellant urges two grounds on which the judgment below is said to be unsound; first, that the right to receive the water power given to the daughter was a personal right only against the son and cannot be asserted against the appellant; and secondly, that as the will was not registered in the district in which the retenue lies, it cannot be asserted against him in this proceeding. As a subordinate point, Mr. Cannon contends that the right claimed against the appellant involves active performance on his part and is, therefore, beyond the area of a real servitude.

Construing the two paragraphs of the will in the light of the conditions established for the length of time mentioned, I have no doubt, as the courts below had none, that the intention of the testatrix, sufficienly expressed by her language, was to impose upon the land given to the son the obligation to furnish sufficient water power for the mills below. She was giving to her daughter mills for operations that had been carried on for generations by water power and it would be absurd to say that she was making the gift subject to the contingency that at the

will of the son, the water power could be destroyed by neglect and the daughter left to look for some other form of power. What was bequeathed was a real servitude for the benefit of the lower lands imposed upon the lands of the appellant immediately above them to allow to pass over and from them sufficient water, furnished by the existing works, to enable the lower mills to be operated, together with the benefit of the subsidiary duty of maintaining the works necessary to the water power as had been done for two centuries: and such a servitude is clearly within Article 555. The substance of it is the right to the flow of the water and the active duty, accessory or ancillary to it: the two constituting the real right as in *Dorien* v. *Seminary of St. Sulpice* (1). This is so whether we treat the retaining work of the retenue as in itself a real servitude on lands of another or as being on and part of property belonging to the appellant himself. In each case the duty of maintenance lies within property rights that are ample for that purpose.

The point of registration seems to me to misconceive the position of the appellant. Claiming ownership of the retenue and the factory lands, he must necessarily trace his title through the will by which the property was divided, and he is necessarily limited to the rights which that instrument has given to his predecessors. To complain that the will has not been registered is to deny his own source of title. The object of the requirement for registration is to give a third person notice of an independent conveyance from a grantor, but that can have no application when the same instrument conveys the interests to both parties; and Article 2089 of the Civil Code in speaking of "respective titles" would seem to put the point beyond any question.

I would, therefore, dismiss the appeal with costs.

KELLOCK, J.:—By paragraph 4 of her will Dame Zoé Turgeon Richard provided in favour of her son Louis, the predecessor in title of the appellant as follows:—

Je donne et lègue avec dispense de rapport à mon fils Louis ma manufacture de carton située à l'Ange-Gardien, avec les terrains y attenant et les bâtisses érigées sur lesdits terrains et servant à l'exploitation de

(1) 5 A.C. 362.

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ladite manufacture;... je lui donne et lègue avec dispense de rapport le pouvoir d'eau de la retenue et ce qui sert à l'exploiter tels que chaussées, digues, ainsi que la maison appelée power house. Mondit fils aura droit de passage à pied et en voiture sur les terres léguées à d'autres légataires, pour se rendre au pouvoir d'eau de la retenue, au power house, à la mine, au chemin de fer par les chemins existants déjà et affectés à cet usage;...

By paragraph 7 she gave to her daughter Zoé, the predecessor in title of the respondent:—

...mon moulin à farine, mon cottage situé près du moulin au bas de la côte, la bâtisse des ouvriers, et les emplacements sur lesquels ces immeubles sont situés et les terrains attenant auxdits immeubles, ainsi que leurs dépendances;... Ma fille Zoé aura le droit de se faire fournir par mon fils Louis, à même le pouvoir d'eau de la manufacture, l'eau nécessaire pour faire fonctionner les moulins que je lui lègue présentement; mais si des réparations devenaient nécessaires à la manufacture de carton, ou au pouvoir d'eau lui-même et qu'il fût nécessaire de suspendre le service de l'eau, alors, ma dite fille Zoé devra souffrir cette suspension du service de l'eau sans prétendre aucun recours en dommages contre mondit fils Louis;...

The cardboard factory and dam in connection therewith were on the De Lottinville or Petit Pré River, some four miles below the barrage, called La Retenue, which had been erected across the Laval River for the purpose of diverting its waters through a canal into the De Lottinville River. The flour mill given to the daughter is located a quarter of a mile or so below the cardboard factory.

The respondent alleged in the Superior Court that the effect of the will was to create, in favour of the property given to the daughter, a real servitude upon the property given to the son, with the obligation resting upon the appellant, as owner, to maintain the barrage so as to supply the necessary water to the respondent's mills. The contention of the appellant is that the will did not create a real servitude, but that if any real servitude were in fact created, it was limited to the locality of the dam at the cardboard mill and it did not extend to the retenue. Appellant lays stress upon the difference in language employed in the two paragraphs of the will quoted and contends that "le pouvoir d'eau de la manufacture" in paragraph 7 did not extend to "le pouvoir d'eau de la retenue" in paragraph 4.

The early history of the retenue is to be found in the judgment of the Superior Court in *Quebec Railway Light and Power Co.* v. *Tremblay,* dated May 1, 1901, affirmed

by the Court of Appeal on January 11, 1902. These judgments were filed as exhibits at the trial of this action as evidence in this case and the history therein contained is referred to by the learned trial judge in his judgment. It appears that the barrage was in existence before 1756, having been built by the Quebec Seminary for the purpose of diverting the water from the Laval into the Petit Pré to operate the flour mill here in question then owned by the Seminary. In detailing the history of the retenue and the flour mill, the judgment in question uses the following language:—

...que ladite retenue, ou chaussée avait existé de temps immémorial et avait ainsi que ledit canal, toujours été possédés par le Séminaire de Québec, et avaient toujours servis à fournir le pouvoir moteur au moulin de Petit Pré, sur la rivière de ce nom."

In my opinion "le pouvoir d'eau de la manufacture" in paragraph 7 of the will is "le pouvoir moteur" in the judgment of 1901. If there were no dam at the cardboard mill, as was the fact for many years, the flour mill would operate and could only operate by reason of the water diverted into the De Lottinville by the retenue. The same is true of the cardboard mill. Its motive power derives also from the retenue, the only function of the dam at the mill itself being to make use of the water diverted at the retenue.

A reference to some of the title deeds in the record is also relevant. By deed of sale of the 31st of May, 1871, the Seminary sold to one, George Benson Hall, the flour mill in question "avec la retenue sur la rivière Laval et tous les droits qui pourraient s'y rattacher", which deed was duly registered on the 14th of March, 1881. Hall's widow, Dame Mary Hall, later became the owner, and subsequently, (as appears from an instrument of the 5th of May, 1897) sold to one Tremblay, by deed dated the 16th of November, 1877, and registered on the 17th of December of the same year, all the vendor's rights in the Petit Pré River and all her rights and privileges in the "pouvoir qui fait mouvoir les moulins à farine et à carder." Evidently a woollen mill had been subsequently erected in the neighbourhood of the flour mill. It is to be observed that at the date of the conveyance to Tremblay, the card-

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board factory had not yet been built and the water power referred to in the deed was he "water power which operates the flour and woollen mills."

Therefore, as already stated, it appears clearly that the water power which operates the mill now owned by the respondent owes its existence to the diversion of the Laval River by the barrage at the retenue. This situation was well known to the testatrix, who erected the cardboard factory higher up the stream, to be operated by the same water power. Paragraph 7 itself recognizes that there is only one "pouvoir d'eau" whether it be described as "le pouvoir d'eau de la retenue" or "le pouvoir d'eau de la manufacture". In this paragraph it is provided that if repairs become necessary to the cardboard factory or to the "pouvoir d'eau lui-même", so that "le service de l'eau" is suspended, the daughter shall have no cause of complaint. It is perfectly clear that the only thing which could bring about any suspension in "le service de l'eau" to the daughter's mill would be an act done at the retenue which would have the effect of allowing the water above to follow its natural course down the Laval instead of being diverted into the De Lottinville, or by some diversion of the water at some point *above* the dam at the cardboard mill. No act done at the cardboard mill dam itself could have any such effect. Of this the testatrix was fully aware. Whether the water-power is referred to as "le pouvoir d'eau de la retenue" or "le pouvoir d'eau de la manufacture" the "pouvoir d'eau lui-même" is one and the same and any qualifying words are superfluous. This the testatrix recognizes when she drops the qualifying words and speaks only of "le pouvoir d'eau lui-même". I think, therefore, that the appellant's argument, founded purely upon the use of a different description in paragraph 4 of the will, from that in paragraph 7, is without significance.

Coming to the appellant's contention that no real servitude was created by paragraph 7 of the will, it is to be noted that this appeal was argued on he basis that the lands on both sides of the river which are in any way relevant to the question under consideration, (with the exception of that on which the barrage at the retenue

itself was actually erected) were owned by the testatrix at the time of her death and that, accordingly, the bed of the river also belonged to her; *Maclaren* v. *Atty-Gen.* (1).

Art. 499 of the Civil Code provides that a real servitude is a charge imposed on one real estate for the benefit of another belonging to a different proprietor. It arises either from the natural position of the property, or from the law or it is established by the act of man; Art. 500.

Of servitudes which arise from the situation of property, that to which lands on a lower level is subject toward higher lands, is to receive such waters as flow from the latter "naturally and without the agency of man"; Art. 501. As far as this article is concerned therefore, there was no obligation on the lands given to the daughter, to receive the additional flow created by the diversion of the Laval River by the barrage at the retenue, nor was there any obligation on the part of the son or attaching to the lands devised to him to permit that flow to pass to the daughter's mill. It was to the securing of the benefit of that flow to the property of the daughter that paragraph 7 of the will was directed. Did this paragraph create a real servitude or merely a personal obligation? The daughter is to have the right to "have furnished" to her by Louis the water necessary for the operation of her mill. What does this entail? Would there be any difference if, instead, the will had said that the daughter should have the right "to take" the necessary water?

In my opinion there would be none. In either case the means by which the necessary water will continue to reach the daughter's lands are by the son being prohibited from doing any act on his lands to prevent that result and by the retenue itself being kept in repair. Both obligations would be involved which ever way the will were expressed and as there is no question but that a real servitude would be created if the expression had taken the second of the two forms mentioned above (*Riverin* v. *Price* (2)), I see no reason for holding that the former is not, in the circumstances, equally effective to the same end.

It is plain I think from the fact that the son is given a right of way over the lands intervening between his mill

(1) [1932] 3 D.L.R. 730. (2) [1914] A.C. 258.

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and the retenue and the further fact that the daughter is to have no complaint in respect of any interruption in the water supply arising out of the necessity of making repairs to the son's mill or the "pouvoir d'eau lui-même", that the obligation to maintain the latter is cast by the terms of the will upon the son. In other words, there is a contrary intention shown by the title within the meaning of Art. 554.

In *Dorion* v. *Le Séminaire de St-Sulpice* (1), Sir Montague Smith said with respect to the last mentioned article:

> The obligation to repair a road imposed on one estate for the benefit of the owners of another would prima facie, seem to be a charge within the terms of this article.

There can be no more objection to regarding the obligation to repair a dam for the benefit of another estate as a servitude than to so regard the repair of a road. In the judgment just mentioned, reference is made to the old French law by which a servitude was understood to be such that the owner of the servient tenement was only to suffer, and not to do any act. It is pointed out in the judgment however, that writers on the French Code, (which contains a definition and enumeration of servitudes similar to those found in the Civil Code) admit that this principle has been invaded, although these writers qualify the admission by affirming that only such active servitudes as are ancillary to servitudes in their strict meaning are contemplated by the Code. The judgment makes reference also to Articles 553 and 554 and continues:—

> Therefore, the Code contemplates that, in the creation of a servitude, the parties may by contract impose the active maintenance of it upon the servient tenement.

As was decided in that case, I think the obligation to repair in this case is part and parcel of the entire servitude imposed upon the properties devised to the son, the servitude being to allow the use of the bed of the river to permit the waters diverted into the De Lottinville by the barrage to flow to the daughter's mills, and to keep the barrage itself in repair. I refer also to Montpetit-Taillefer, Vol. 3, pp. 474-5; Planiol Rippert, Vol. 3, pp. 873-4.

The appellant raises another point. It appears that the Seminary, and consequently its successors in title, did not own the land upon which the retenue was erected but built

(1) 5 A.C. 362.

the retenue upon the land of others, with the consent of the owners. The appellant, accordingly, says that he and his predecessors in title have, and had, only a servitude so far as the retenue was concerned and the respondent cannot succeed in its claim as you cannot have a servitude upon a servitude. I think, however, that no such question arises. The appellant owns the barrage, although his right to maintain the structure upon the land is in the nature of a "droit de superficie", which is, in itself, a real right; *Tremblay* v. *Guay* (1). The servitude created by paragraph 7 of the will here in question in favour of the flour mill premises is a servitude upon the retenue itself which is owned by the appellant. The fact that that structure in turn remains in situ by reason of a servitude upon the lands upon which it is erected has no bearing insofar as the entirely distinct and separate servitude in which the retenue itself is subject is concerned.

Appellant further contends that, while the will was registered upon the lands in connection with the cardboard mill, it was not registered with respect to the lands upon which the barrage itself is erected and therefore the appellant is met by the provisions of Article 2116 (*b*) and is not entitled to assert the existence of any real servitude so far as the barrage itself is concerned. Appellant also relies upon the provisions of Article 2085.

Respondent answers this contention by the submission that the appellant alleges that he is the owner of the barrage, having acquired his title from the trustee in bankruptcy of the son of the testatrix. Respondent says that this being so, it must be taken that the will under which the appellant makes title has been registered not only upon the lands where the barrage stands, as otherwise the registration of the transfer from the trustee to the appellant is, by the express language of Article 2098, without effect. In my opinion the submission on behalf of the respondent is well taken and should be given effect in the circumstances.

Appellant no longer contends that the barrage was not out of repair at the time of action brought, but he contends that the shortage of water of which the respondent com-

(1) [1929] S.C.R. 29.

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plained was not due to this lack of repair but to drought. Appellant points to a recital in an instrument of the 14th of November, 1870, which states that the barrage had the object of diverting into the canal "part" of the waters of the Laval River and he contends that the existence in the Laval River in the month of August, 1946, of approximately one-quarter of the flow of the Petit Pré River is consistent with this declaration. However, the judgment in the *Quebec Railway* case, to which I have already made reference, says that except in periods of flood the Laval River was totally and entirely diverted by the barrage into the canal leading into the Petit Pré and I think this finding, treated as evidence by the parties in this case, is entitled to more weight than the recital in the instrument referred to, which is not shown to have been executed with particular reference to this fact.

I would dismiss the appeal with costs.

ESTEY, J.:—The respondent "Société" owns and operates a saw and flour mill on the Lottinville River. In this action it claims a servitude under which from the land of the appellant it has a right to a flow of water sufficient to operate its saw and flour mills and because of and as part thereof the appellant must maintain in good repair "le pouvoir d'eau de la retenue" which directs water into the Lottinville River.

Both parties claim under the will of Dame Zoé Turgeon Richard dated January 5, 1925, who by that instrument gave the property now owned by the appellant to her son Louis Richard, and that now owned by the respondent to her daughter, Zoé Richard.

The benefits under the will to the respective parties are set out in paras. 4 and 7 of the will, the material parts of which are:—

4. Je donne et lègue avec dispense de rapport à mon fils Louis ma manufacture de carton située à l'Ange-Gardien, avec les terrains y attenant et les bâtisses érigées sur lesdits terrains et servant à l'exploitation de ladite manufacture... je lui donne et lègue avec dispense de rapport le pouvoir d'eau de la retenue et ce qui sert à l'exploiter tel que chaussées, digues, ainsi que la maison appelée power house. Mondit fils aura droit de passage à pied et en voiture sur les terres léguées à d'autres légataires, pour se rendre au pouvoir d'eau de la retenue, au power house, à la mine, au chemin de fer par les chemins existants déjà et affectés à

cet usage; je donne et lègue à mondit fils également avec dispense de rapport ma mine de mica, avec droit de passage à pied et en voiture, pour s'y rendre, sur les terres de quelqu'autre légataire, si cela est nécessaire...

7. Je donne et lègue avec dispense de rapport et à titre de propre à ma fille Zoé Richard mon moulin à scie, mon moulin à farine, mon cottage situé près du moulin au bas de la côte, la bâtisse des ouvriers, et les emplacements sur lesquels ces immeubles sont situés et les terrains attenant auxdits immeubles, ainsi que leurs dépendances; ...Ma fille Zoé aura le droit de se faire fournir par mon fils Louis, à même le pouvoir d'eau de la manufacture, l'eau nécessaire pour faire fonctionner les moulins que je lui lègue présentement; mais si des réparations devenaient nécessaires à la manufacture de carton, ou au pouvoir d'eau lui-même et qu'il fût nécessaire de suspendre le service de l'eau, alors, madite fille Zoé devra souffrir cette suspension du service de l'eau sans prétendre aucun recours en dommages contre mondit fils Louis.

The appellant contends that under the foregoing para. 7 the testatrix created only a personal obligation on her son Louis Richard to supply the water necessary to operate the saw and flour mills. Respondent, on the other hand, contends that in this para. 7 the testatrix created a real servitude which insures the necessary water to operate its saw and flour mills and requires the appellant to maintain and keep in repair the dam at the "retenue". It is therefore essential to ascertain the intention of the testatrix as she has expressed herself in he language of her will. *Renaud* v. *Lamothe* (1); (1902) 32 S.C.R. 357; *In re Brown* (2); (1936) A.C. 635; *Métivier* v. *Parent* (3); (1933) S.C.R. 495; *Larose* v. *Valiquette* (4); (1943) 3 D.L.R. 716.

In construing the language used by the testatrix one should endeavour to appreciate the position of the testatrix as she executes that will. As stated by Lord Cairns:—

> In construing the will of the testator,... it is necessary that we should put ourselves, as far as we can, in the position of the testator, and interpret his expressions as to persons and things with reference to that degree of knowledge of those persons and things which, so far as we can discover, the testator possessed. *Bathurst* v. *Errington*, (1877) 2 A.C. 698, at p. 706.

The history of the property and the position of the testatrix in this case may be briefly summarized: Over 200 years ago all of the property here in question was owned by "Le Séminaire de Québec". The saw and flour mills were then constructed and because the flow of water in

(1) [1902] 32 S.C.R. 357.
(2) [1936] A.C. 635.
(3) [1933] S.C.R. 495.
(4) [1943] 3 D.L.R. 716.

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the Lottinville River was inadequate a dam at the "retenue" was constructed about four miles up stream from these mills which directed the water from the Laval into the Lottinville River and thereby insured sufficient supply to operate the mills. The dam and these mills have been in existence since that time.

In 1897 the dam and the saw and flour mills were owned by Richard Tremblay. In that year the testatrix Dame Zoé Turgeon Richard constructed a cardboard factory on the Lottinville River between the dam and the saw and flour mills and entered into an agreement with Richard Tremblay which permitted her to use the water from the dam and to enjoy all privileges and servitudes in common with him.

Then under date of June 17, 1902, Richard Tremblay sold the area, including the dam, the saw and flour mills, to Dame Zoé Richard. She thereby became the owner of the entire property here in question and any servitude which existed upon any part for the benefit of any other part thereof was extinguished by virtue of Art. 561 C.C.

That in brief indicates the history and the position of the property when the testatrix Dame Zoé Turgeon Richard executed her will on January 5, 1925, and that position remained without change until her death on January 17, 1925.

After her death Louis operated the cardboard factory and maintained in repair the dam at the "retenue" providing thereby sufficient water for the three mills. When he made an assignment in bankruptcy his trustee sold the mill to the appellant in 1937. The appellant continued to maintain in good repair the dam at the "retenue" until in 1944 the cardboard factory was destroyed by fire and was never re-built. Thereafter the appellant having no use for the water failed to maintain in good repair the dam at the "retenue", with the result that there was not sufficient water in the Lottinville River to operate the saw and flour mills of the respondent. It therefore brought this action.

The testatrix in the foregoing paras. 4 and 7 gives to her son a mill and the dam, and to her daughter two mills, in their own right and indicates a clear intention that these

mills should continue to be, as they had always been, operated by water. This general intention is important in the construction of the particular sentences upon which the parties base their respective contentions. In this regard the language of Baron Parke in *Quicke* v. *Leach* (1) is pertinent, where after pointing out that Courts ought not to give to words in a will a strained interpretation in order to attain the end which they suppose the testator contemplated, continued at p. 228:—

> At the same time, the circumstance that the language, if strictly construed, will lead to a consequence inconsistent with the presumable intention, is not to be left out of view, especially if other considerations lead to the same result.

Rinfret, J., (now Chief Justice), speaking for the Court in *In re Hammond* (2), at p. 409:—

> But while, for wills as well as for other documents, there are no doubt recognized canons of construction, the cardinal principle—to which any rule is always subservient—is that effect shall be given to the testator's intention ascertainable from the actual language of the will. Indeed the rule itself relied on by the learned Judge as stated in Sir Edward Vaughan Williams' treatise, contains the qualifying words: 'unless, from particular circumstances, a contrary intention is to be collected.'

The testatrix died in 1925 and the parties, as already intimated, carried on until 1944, as the respondent contends, in accord with the terms of the will. That, however, does not necessarily follow, as throughout that time first Louis' and then appellant's conduct was consistent with the position appellant now takes that he was maintaining the dam and keeping it in repair because he needed the water for the operation of the cardboard factory and was not, therefore, maintaining the dam as a consequence of any provision in the will.

In the construction of this will not only must one, as stated by Lord Cairns, place oneself in the position of the testatrix, but in addition thereto where a question of a servitude is raised the language of Pardessus, Vol. 1, p. 547, is important:—

> Peut-être cependant s'il s'agissoit d'une servitude accordée par un acte testamentaire, ne faudroit-il pas suivre cette règle à la rigueur, parce que la volonté de celui qui donne, doit être entendue dans un sens avantageux au légataire, qui n'a pu être à portée de rendre la loi claire et précise.

(1) (1844) 13 M. & M. 218. (2) [1844] 13 M. & M. 218.

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The history of these mills makes it perfectly clear that without the dam at the "retenue" they could not be operated with water power. The disposition of these mills, in the light of that history, and the fact that the testatrix created in favour of the cardboard factory a servitude which made the dam at the "retenue" accessible for maintenance and repair, indicate a clear intention on the part of the testatrix that she was not only fully aware of the need of the dam at the "retenue" but that she intended that these mills should continue to be operated by that water power. If it be suggested that all this was done merely for the son and that the daughter should only enjoy these privileges so long as Louis remained owner of the dam at the "retenue" and the cardboard factory, then one is faced with the conclusion that she intended in respect of these mills to treat the son more generously than she did the daughter, which is an interpretation that, apart from express language or clear implication, ought not to be assumed. In this regard the language of Lamont, J. is pertinent:—

> It is, in my opinion, not sufficient answer for the court to say: 'We do not know what the testator meant by 'advances heretobefore made by me to my children' but as the construction given to it in the court below works an inequality as between the children, the testator could not have meant that'. *Hauck* v. *Schmaltz* (1).

The appellant particularly relies upon the sentence "Ma fille Zoé aura le droit de se faire fournir par mon fils Louis, à même le pouvoir d'eau de la manufacture, l'eau nécessaire pour faire fonctionner les moulins que je lui lègue présentement". This sentence when read and construed in relation to the history, the position of the respective properties at the time the mill was executed and in relation to the other portions of para. 7 does not bear out the appellant's contention.

Throughout these paras. 4 and 7 the testatrix discloses an intention that all three mills shall be operated by water and for that purpose the flow as it had been maintained for over 200 years should be so continued. Her intention as expressed creates for the benefit of the saw and flour mills a right to the flow of that water over the land of Louis. That such may be a servitude within the meaning

(1) [1935] S.C.R. 478 at 484.

of the Civil Code is the effect of *Riverin & Bélanger* v. *Price Bros. Ltd.* (1), where at p. 732 Rinfret, J. (now Chief Justice) stated:—

> As regards 'the right to take the water necessary to run the said grist-mill' it is a servitude established in favour of the mill.

The existence of this flow of water is dependent upon the continued existence in good repair of the dam at the "retenue" and the passage of it through the Lottinville River to the respective mills. The responsibility for the maintenance of this flow of water as far as the cardboard factory the testatrix placed upon her son Louis and required that he was to make the flow of water available from or out of the water at the cardboard factory for the saw and flour mills.

The provisions permitting repairs at the cardboard factory and dam thereat by Louis without incurring liability for damage should he reduce the flow to the saw and flour mills but add to the ambiguity of para. 7. The "pouvoir d'eau de la manufacture" might be entirely out of repair even destroyed and neither that nor the repair thereof would result in a diminution of the flow. On the other hand, if the dam at the "retenue" should need repair the flow might well be dimnished and that diminution might well continue during the course of the repairs, and upon a strict construction of the language used Louis might be held to have no protection with respect to damage that might result from his effecting repairs at the dam at the "retenue". If that is the expressed intention of the testatrix that result must be accepted. However, what is pertinent to the present discussion is that while the testatrix in her will recognizes two reservoirs, one at the "retenue" and one at the cardboard factory, she throughout recognizes that there is but one effective reservoir upon which the flow is dependent, and that one at the "retenue".

The position here is similar to that which obtained in *Dorion* v. *Les Ecclésiastiques du Séminaire de St-Sulpice de Montréal* (2), where Sir Montague E. Smith, speaking on behalf of the Privy Council stated at p. 369 "that the obligation to make and repair the road formed part of an

(1) [1932] 3 D.L.R. 730. (2) (1880) 5 A.C. 362.

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entire servitude". So in this case the testatrix, as already stated, provided for the maintenance of the flow of water over the land of her son Louis for the benefit of the saw and flour mills and placed upon her son the obligation to maintain that flow of water.

I am in agreement with the reasons given by my brother Kellock that the other contentions of the appellant to the effect that a servitude cannot be maintained upon a servitude and with respect to registration cannot be maintained under the circumstances of this case.

The appeal should be dismissed.

Appeal dismissed with costs.

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

Solicitors for the respondent: *Lapointe, des Rivières & Bérubé.*

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*May 30
June 1

M. MARCOTTE .....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

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

Criminal law—Appeal—Special leave—Jurisdiction—Whether statute giving new right of appeal is retrospective—New trial—Starting point of proceedings—Same indictment—11-12 Geo. VI, c. 39, s. 42, enacting s. 1025 (1) Criminal Code.

Held: The amendment to section 1025 (1) of the *Criminal Code,* by which any person whose conviction on an indictable offence has been affirmed by a Court of Appeal may, on any question of law, with special leave granted by a judge, appeal to this Court, creates a new right of appeal "which cannot be construed retrospectively so as to cover cases that arose prior to the new legislation. (Boyer *v.* The King, [1949] S.C.R. 89.)

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

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Held: Even though a new trial ordered by the Court of Appeal was heard subsequent to the coming into force of the new legislation, appellant cannot avail himself of the amendment as the new trial is not the starting point of the proceedings—it is merely the reconsideration of the case under the same indictment.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), dismissing appellant's appeal from his conviction on a murder charge.

Valmore Bienvenue, K.C. for the appellant.

H. M. Loranger, K.C. for the respondent.

The judgment of the Court was delivered by:

TASCHEREAU, J.: In September, 1947, the appellant was originally charged with the murder of Marcel Boileau, and was found guilty in October of the same year. In September, 1948, the Court of King's Bench of the Province of Quebec (Appeal Division) ordered a new trial which was held in November, 1948, and a second verdict of murder was rendered by the jury. The Court of King's Bench (Appeal Division) (2) *unanimously* confirmed this finding in September, 1949.

Special leave to appeal to this Court was granted on the 21st day of October, 1949.

The respondent now raises the question of jurisdiction of this Court and submits that the appellant, having been charged in September, 1947, is still subject to the law, as it existed at that time, and that he may not therefore, even with the permission of one judge, appeal to this Court on a question of law, as he would have the undisputable right, if the proceedings had originated on or after the 1st of November, 1948, date on which the new amendment came into force.

There can be no doubt that special leave to appeal granted by a judge of this Court under the new amendment, on a question of law, does not confer jurisdiction on this Court, if otherwise this jurisdiction does not exist. Special leave to appeal is a condition precedent to the right to appeal, but the latter is subordinate to the power

(1) Q.R. [1949] K.B. 664.

(2) Q.R. [1949] K.B. 664.

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of this Court to hear such an appeal. Moreover, I may add that when the application for special leave was heard, the question of jurisdiction of the Court was not raised.

Before the 1st of November, 1948, an accused person, convicted of a crime, and whose conviction had been *unanimously* affirmed by a Court of Appeal, could appeal to this Court by special leave, under section 1025 of the Criminal Code, only when the judgment of the Court of Appeal came in conflict with the judgment of any other Court of Appeal in a like case. However, since the 1st of November, 1948, the law has been amended, and now any person convicted of an indictable offence, whose conviction has been affirmed by a Court of Appeal, may on any question of law, with special leave granted by one judge, appeal to this Court. The jurisdiction of the Court has thus been considerably extended.

When the appellant made his application for special leave, he did not attempt to show that the judgment of the Court of Appeal conflicted with the judgment of another Court of Appeal in a like case, but merely raised questions of law which he argued, were sufficient under the new amendment to allow his appeal to be heard by the full Court.

It is now said on behalf of the respondent that section 1025 of the Criminal Code as amended, applies only to proceedings that originated after the 1st of November, 1948, and that in view of the *unanimous* judgment of the Court of Appeal, it was imperative upon the appellant in order to obtain special leave, to show the existence of a conflict.

With this proposition, I entirely agree, as I do not think that the new amendment which creates a new right of appeal, can be construed retrospectively, so as to cover cases that arose prior to the legislation. It is true that the new trial was heard in November, 1948, at a date subsequent to the coming into force of the new legislation, but this new trial ordered by the Court of Appeal under the provisions of section 1014 of the Criminal Code, is not the starting point of the proceedings. It is merely the reconsideration of a case previously heard in October, 1947, which in the opinion of the Court of Appeal had

been illegally tried. The indictment is the same, and the new trial is therefore the continuation of proceedings started prior to the new amendment.

In the case of *Boyer* v. *The King* (1), the unanimous judgment of the Court of Appeal was given on the 30th of November, 1948, one month after the coming into force of the amendment. On behalf of the appellant it was argued that the judgment of the Court of Appeal, being posterior to the new legislation, he could take advantage of the amendment and obtain leave to appeal on a question of law. The Chief Justice (1), after consultation with all the members of this Court, held that the amendment created a new right of appeal, and had no retroactive effect. It therefore did not apply to pending cases, which, in the view of the Chief Justice, continued to be governed by the former ss. 1 of s. 1025 Cr. C.

I fail to see how the present case can be distinguished from the *Boyer* case, and I would therefore quash the appeal for want of jurisdiction.

Appeal quashed.

Solicitor for the appellant: *Valmore Bienvenue.*

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

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KALAMAZOO PAPER COMPANY and ACER, McLERNON LIMITED (PLAINTIFFS) ..... APPELLANTS

AND

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... RESPONDENT

AND

BRITISH COLUMBIA PULP & PAPER COMPANY (PLAINTIFF) ... APPELLANT

AND

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... RESPONDENT

AND

QUATSINO NAVIGATION COMPANY LIMITED (PLAINTIFF) ..... APPELLANT

AND

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, BRITISH COLUMBIA ADMIRALTY DISTRICT.

Shipping—Ship damaged on rock and later beached—Allegation that ship's officers were negligent after beaching resulting in damage to cargo—Failure to use all pumping facilities—Whether such neglect was in "the management of the ship"—The Water Carriage of Goods Act, 1936, 1 Ed. VIII, c. 49, Art. IV, s. 2(a).

The insurers of the cargo of a ship damaged by striking a rock and later beached to prevent sinking brought action to recover damages alleged to have been suffered by the cargo after the beaching, owing to the failure on the part of the captain to direct the use of all available pumping facilities to prevent the entry of further water into the hold and away from the cargo. The trial judge held that there had been such negligence after the beaching but that as it was in a matter affecting the management of the ship the defendant was not liable under the terms of the contract of carriage which incorporated Art. IV, s. 2(*a*) of the *Water Carriage of Goods Act*.

Held, affirming the judgment at the trial that, assuming there was such a failure on the part of the ship to utilize the available pumping facilities and that damage to the cargo resulted, this was neglect of the master in "the management of the ship" within the meaning of s. 2(*a*) of the statute and the defendant was not liable.

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

Per Taschereau and Locke JJ.: The failure to exercise reasonable diligence to prevent the entry of further water into the forehold was neglect in the navigation as well as in the management of the ship within the meaning of the subsection.

Per the Chief Justice, Rand and Estey JJ.: The evidence did not establish that any damage was occasioned to the cargo by the entry of water after the beaching.

The Glenochil [1896] p. 10; *The Rodney* [1900] p. 112; *The Ferro* [1893] p. 38; *Good* v. *London SS. Owners' Association* L.R. 6 C.P. 563; *Carmichael* v. *Liverpool Sailing Ship Owners' Association* 19 Q.B.D. 242; *Gosse Millerd Ltd.* v. *Can. Govt. Merchant Marine* [1929] A.C. 223; *Rowson* v. *Atlantic Transport Co.* [1903] 2 K.B. 666; *Hourani* v. *Harrison* (1927) 32 Com. Cas. 305; *The Sylvia* 171 U.S. 462 and *The Sanfield* 92 Fed. Rep. 663 refered to.

APPEAL and CROSS APPEAL from the judgment of the Exchequer Court of Canada, British Columbia Admiralty District (1), dismissing the action of the insurers of the cargo of a ship for damages suffered by the cargo when the ship hit a rock and was later beached.

Alfred Bull, K.C. for the appellants.

J. W. de B. Farris, K.C. and *J. A. Wright, K.C.* for the respondent.

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

RAND J.: In this appeal two determinative questions are raised, one of fact and the other of law, and notwithstanding the conclusion to which I have come on the former, I think it advisable to deal with both.

A claim is made by cargo insurers against a vessel on the ground that, beyond a certain point, damage done to the cargo consisting of wood pulp was caused by the negligence of captain and crew. At 12.30 a.m. on July 29, 1947 the vessel had sailed from Port Alice on the coast of Vancouver Island bound for Vancouver. At about 2 o'clock, in heavy fog, the ship stranded on a ledge of Cross Island in Quatsino Sound. After being held there for approximately one hour and a half, she slid off and proceeded on the voyage. It soon became evident that water was entering in volume, and the captain decided to make for Quatsino where, if necessary, he could beach the vessel in mud. He arrived at that point in about an

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hour's time, where he found the dock occupied by a tug. After a short wait, until sinking appeared imminent, he aroused the tug, which withdrew, and the bow was set in a mud bank, northwesterly from the corner of the dock, at approximately 5.40 o'clock. Later, around noon, with the tide rising, he moved the vessel further on to the bank. Next afternoon, a salvage tug, with heavy pumps and a diver, arrived and by late evening the vessel had been brought to condition and trim to return to Port Alice: and following a stay of a few hours there, to continue the voyage to Vancouver. Arriving on August 2nd, the entire cargo was removed and the vessel placed in dry dock.

It is admitted that up to and including the beaching at Quatsino, the measures taken by the captain were unexceptionable. The case for the insurers is that from that time on there was negligence in failing to keep the water down and out of the cargo. It assumes that at the moment of beaching, the water in the forward hold, numbered 1 and 2, was not more than 1½" above the oil tank tops; and alleges that the available pumping capacity, if properly employed, could have held the water to that level, with the result that the greater part of the loss would have been avoided. It thus becomes necessary to examine these matters in some detail.

The factual assumption rests upon conclusions drawn from a visual examination of the hull made on the morning after the vessel was placed in dry dock by a surveyor representing the cargo insurers as well as the general average adjusters. This surveyor, Clarke, at about 9 o'clock on the morning of August 12th, entered the dock and inspected the damage. No one else was around except two laborers. By that time the water had long since drained out of the hull. He found, first, that half a dozen or so rivets had been disturbed, but whether sheared or not he could not say; several were described as "hanging" but he denies that any were quite out, that is, through both plates entirely; there was a fracture of one of the forward keel plates about 14" in length, ⅜" at its greatest width aft and tapering to a light hair crack forward: and the keel plate and strakes Nos. 1, 2 and 3 on the port side were buckled for upwards of 20 feet. From these facts he

calculated the area of the opening through which the water could have entered, and at this point it will be better to use his own language: "I first took my calculations, this ruptured plate, without going into many difficult calculations for a mere 2 or 3 per cent, the roughness of the hole and the shape, but taking it as a plain orifice which is 2″ square, $\frac{3}{8}$″ by 14 is equal to 2″ square, a plain orifice. Then I allowed for the seven rivets, the allowance for those seven rivets was 1·54 square inches . . . I estimated those rivets at $\frac{3}{4}$″. I didn't measure them but thought they were $\frac{3}{4}$″. If they are smaller it would be less, if larger slightly more. It made a total of 4 square inches that water could enter that ship. Now by a simple method I found with 4″ we get 70 tons per hour that can leak into that ship at a 25 foot draft." Later on he was questioned in relation to the buckled plates:

Q. Do you mean to say there wouldn't be any water go in between those buckled parts?

A. No.

Q. No?

A. I have allowed for $\frac{1}{2}$" to go in there.

Q. That's where you have allowed it to go in? You haven't allowed anything. What have you allowed for rivets other than these seven?

A. I have given in my opinion decimal five of the total area estimated. Instead of ·5, ·3 would have been more accurate. I allowed ·3 to cover any other rivets.

Q. Where the rivets are out—

A. There were none out entirely.

There is some error in this evidence; 2″ square is 4 sq. inches: 14″ by $\frac{3}{8}$″ is 5·25 sq. inches and half of it, 2·6. But disregarding that, on the basis of an orifice of 4 sq. inches, estimating the varying head of water and the discharge by the bilge pump, started when the vessel grounded and kept up throughout, he computed the net intake of water up to beaching. This was then extended for the 14 hours from that time until 8 o'clock in the evening when he arrived on the scene, making 16 hours in all. He concluded that in that period 880 tons had entered the forepeak and the forward hold, an average of 55 tons an hour, and that the quantity held when he arrived was 412 tons, leaving 468 tons to have been discharged by the pump, at an average of 29 tons an hour. In the course of half an hour, he noticed a rise at the aft end of the forward hatch combing on the port side of 2″; the water

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was then within one foot of the 'tween deck and he assumed it to have been rising continuously from the morning; but admittedly a shifting of cargo then going on could explain in part at least the apparent rise of 2″. Nor is his conclusion that there had been a constant rise unchallengeable; considering the position of the vessel and the likelihood of the damaged portion, at low water, being imbedded in the bank, the probabilities are that the level had lowered and risen. When put ahead at noon on a high tide, the vessel was afloat and the damaged parts would then be exposed and the admission of water most likely freer. During the first two hours, from the sliding off the ledge to the beaching, 137 tons, on his basis, would have entered: deducting from this 58 tons pumped out, 79 tons would remain: 44 tons were required to fill /1 tank, and 5 would be in the forepeak: of the remaining 30 tons, half would be absorbed in the pulp and the rest would present the level stated, 1½″ above the tank tops. From this it is seen how the result follows mathematically from the assumed area of entrance and the quantity on his arrival. The latter may for our purposes be accepted and the former becomes the determining factor.

Clarke also estimated that the vessel would go down one foot in the head for each 100 tons of water in the hold. When leaving Port Alice, the draught was 16 feet fore and 17′ 11″ aft. As the net quantity admitted up to the beaching was 79 tons, it would follow that between Cross Island and Quatsino the bow would not be more than one foot below trim. On Clarke's arrival at Quatsino he judged the draught to be 24′-25′. The captain at the time of beaching, with the tide low, looking for the marks by the aid of a torch, had seen that the last one, 21′, was below water. Discounting somewhat Clarke's estimate by reason of the fact that it represents an excessive distance of 9 feet submergence of the bow from trim, and having regard to tide and beaching, these opinions are not greatly in conflict and indicate approximately the same weight of water. To the captain this meant "imminent danger"; the vessel was "going perceptibly by the head": in the words of the first officer, "she was settling fast." On the run back to Port Alice, Clarke thought the head had been down about 9 feet which he says did not seriously affect

the steering; and in his opinion there could have been no or very little difficulty from such a cause in bringing the vessel into Quatsino.

Now the datum so gathered and its conclusions, apart from a confidential communication made to his principals and to counsel, were disclosed to no one until presented in evidence at the trial. By every other person interested, from captain to adjuster, it was assumed that the water at the time of the beaching had reached a level that accounted substantially for all of the damage. In his report of survey, Clarke stated that "all damaged cargo . . . was as a consequence of striking the rock at Cross Island, . . ." He claimed to have passed on his discovery to the surveyor for the hull insurers, Warkman, although apparently his calculations had not then been made. Here is what he said:

Q. But beaching didn't cause any damage, not a word about all the things that did cause it?

A. I don't think they are called for.

Q. We have gone over that question. The underwriters needed to know—

A. The principle involved in these remarks was reported to, was discussed with Mr. Harry Warkman, who represented the underwriters on the other side. I was not doing it entirely without the knowledge of the representatives of the ship knowing my thoughts in the matter.

Q. It's awfully nice, though, afterwards to have it down in black and white what your thoughts were, especially when you start to put them down and then stop?

A. I spoke on the ship to Mr. Harry Warkman.

Q. You never put anything in black and white?

A. It was more or less agreed with Harry Warkman, but the full extent was not estimated until recently.

* * *

"Q. Who was the surveyor?

A. Harry Warkman, I discussed it with him. *We came to the conclusion it was impossible just by observing.* I don't suppose Mr. Warkman has ever gone and taken any figures on the matter. It was just a specimen.

Q. What was it you decided was impossible?

A. *For that amount of water to pass into the ship immediately it slid off the rocks.*

Q. Immediately.

A. *Within the trip across,* impossible for 400 tons of water to pass through that damage on the trip across.

Q. Do you know how long the trip across took?

A. *Yes, just about an hour, approximately.*

Q. Did you figure out with Mr. Warkman how much would go in?

A. No, I did not.

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Warkman denied having been informed of this matter. The trial judge accepted generally the evidence of Clarke but this particular feature is not mentioned. There can be little, if any, doubt that in the secrecy in which Clarke made his inspection and thereafter concealed the information, it would be against all probability that he would communicate matters to Warkman as would make clear the significance of what he now exhibits; there is no suggestion of confidence, and it would have been to run too great a risk of making them common knowledge, which Clarke had no intention of doing. Conceivably some reference might have been made to apparent smallness of openings through which the water entered, but not being clearly associated with the alleged failure in pumping, it would not be significant; and after two years, it is not surprising that Warkman, who had been called hurriedly as a witness, should not recall it; but if its full implication had been revealed, not only Warkman but others through him, would have heard of it. In view of the unusual secrecy, I cannot conclude that an effective disclosure was made to Warkman. Clarke, in cross-examination, suggested the manager of the shipyards should be able to confirm the facts as he gave them, but, as would have been expected, the manager recalled nothing of what at the time carried no importance; but he did say that "no one, I think, could tell approximately what the leak was."

There are other facts to be weighed with the estimates of Clarke. The diver who likewise was called hurriedly gave a clear statement of what he found. His account of the rivet holes was definite that in some cases the rivets had been forced out completely, and that the suction had drawn his thumb into the holes. There was one significant item of damage related by him; he found two or three open seams, two or three feet in length, formed by the separation of hull plates where they overlapped each other. These he plugged with wedges which were seen by Warkman at the shipyard: "Two rows of wooden wedges had been driven in leaking seams." These plates had all been badly buckled for as much as 15 feet, as the specification for repairs of Warkman and the evidence of Smith make abundantly clear; in fact the surfaces were described as corrugated; and the bow had been twisted to almost

a right angle toward the starboard. Clarke had not mentioned seams at all on his direct examination and his later reference to them already quoted was mixed up with the rivet holes. There is this further statement by him:

Q. Did you make a close examination of all the buckled plates?
A. I walked along and closely observed all the landing. (s?)
Q. Yes?
A. For possible leaks. I could find nothing there.
Q. Is it correct to say you found nothing else that would cause—
A. Any serious leaks, with the exception of the rivets and the fracture of these plates.

He was not recalled. Rebuttal evidence explained that the plates could be opened at the outer edge of the overlap and the rivet broken or bent without affecting the inner contact of the plates and in that way the mere existence of the seams did not mean an entrance for water. Against this there are two considerations: the rebuttal dealt with plates in their normal condition and did not take into account the wavy buckling present here; and the diver's evidence was that the wedges were put in because he felt the suction of the water into the hull. The captain says "the plate laps were open . . . I didn't measure the exact distance these plates were open but I saw a large outflow of water which was still taking place from damage to the hull: there was a large outflow of water from these holes." The latter was not seen by Clarke, and the trial judge implies no questioning of the truthfulness of the captain.

As is not wholly unknown in pretentions to completeness and infallibility, it is quite evident that in this seeming mathematical demonstration one important factor at least in the estimate of the area of the openings has been omitted. Apart from the evidence already quoted, it is obvious that any estimate based upon such an examination would be of dubious dependability, except in a gross sense, for the purposes intended. The proper test would have been to put water into the forehold under pressure or a known head and to ascertain its rate of outflow. By that means the state of things Clarke was seeking to confirm might have been established; but this would have eliminated surprises and he would have run the risk of having his basic datum falsified.

There is another circumstance to be considered. On the way to Quatsino the steering had become difficult, the head,

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in the opinion of the captain and first officer, being down 4'-6', on arrival, and, as already stated, beaching was made in what the officers considered a state of sinking. On the return trip to Port Alice, there could not have been more than 250 tons of water in the hold, but Clarke says the head was down 9 feet. According to the scale of the plan of the vessel, this depth would bring the draught above the water line. On Clarke's mathematics, 9 feet would represent 900 tons of water, about double the capacity of the forehold. The forward 'tween deck cargo had been unloaded at Quatsino and the tank in /4 hold had been filled with water. When the vessel arrived at Port Alice, she was "fairly dry", as agreed to by Smith with appellant's counsel. At that point about 250 bales of pulp screenings, deck cargo, had been shifted from forward to aft; and on setting out for Vancouver the fore draft was 20' 5" and aft, 19'. These facts seem to be quite inconsistent with the conclusions formed by Clarke as to the conditions on the run from Cross Island: and I see every reason to accept the statement of the captain that the vessel was down several feet, sufficient to interfere with the steering and to justify his serious apprehension; and that it was considerably less than 9 feet on the return to Port Alice is undubitable.

In the light of all of these matters, including the convinced judgment of the ship's officers that the hold was virtually filled before beaching, it would be entirely too dangerous to ground this substantial liability upon the too plausible deductions of Clarke; there was no danger, once he had found what he thought to be the facts, of losing the evidence of them before they could be verified, if that had been desired: the insurers at that time were in fact in complete command of the vessel; they could have taken any step thought desirable to ascertain any condition or obtain or preserve or confirm evidence of negligence; and the failure to do so, although entirely within the right of Clarke, supports an inference from undisputed or unquestionable facts against his conclusions which his method risked.

I do not think the evidence makes out failure of the officers after beaching. Mr. Bull contends that the onus is on the ship owner to free himself from what is charged.

The statement of claim alleges negligence and gives particulars of it, and on the issues so raised the parties went to trial. Proof was assumed by the plaintiff; but even if we take the initial burden to be on the defendant, a prima facie case for perils of the sea was made out and the onus of showing negligence to displace that thereupon shifted to the plaintiff: *The Glendarroch* (1).

The question of law is this: assuming neglect to use the available pumping capacity and its responsibility for part of the damage done, was it an omission in relation to the care owed to the cargo or in the management of the ship? The bill of lading incorporates the Articles of the *Water Carriage of Goods Act*, 1936: by Article III (ii):—

> Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

and Article IV (ii) provides that:—

> Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from
>
> (a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;

These uniform provisions have been considered in a number of cases in the English courts, culminating in that of *Gosse Millerd Limited* v. *Canadian Government Merchant Marine* (2). In that case it was laid down by the House of Lords that whether the act resulting in the damage to the cargo is one in the management of the ship depends upon the circumstances in which it operates. There the cargo was damaged by the entrance of rain through an uncovered hatch. As the particular use of the tarpaulin was in relation to the protection of cargo only, the omission to keep it over the hatch was neglect in maintaining that protection and not in the management of the vessel.

In the circumstances here there is likewise an omission, but the omission of an act which, as alleged to be necessary for the proper care of the goods, is at the same time claimed to be required in the management of the ship. Mr. Farris' contention is that there was a duty on the captain to utilize the full pumping capacity not only for the general safety of the ship but also specifically to prevent a collapse of the bulkhead between the forehold

(1) [1894] p. 226. (2) [1929] A.C. 223.

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and the engine room; if the pressure of the cargo and the water had broken through that barrier, the vessel would have been in the gravest danger; and measures of anticipation would be acts of management. That view of the situation was accepted by Smith, J. and I respectfully concur in his conclusion. The further question is whether an act or omission in management is within the exception when at the same time and in the same mode it is an act or omission in relation to care of cargo. It may be that duty to the ship as a whole takes precedence over duty to a portion of cargo; but, without examining that question, the necessary effect of the language of Article III(ii) "subject to the provisions of Article IV" seems to me to be that once it is shown that the omission is in the course of management, the exception applies, notwithstanding that it may be also an omission in relation to cargo. To construe it otherwise would be to add to the language of paragraph (*a*) the words "and not being a neglect in the care of the goods."

On both grounds, therefore, the respondent succeeds, and the appeal must be dismissed with costs.

ESTEY, J.:—The appellant, owner of a cargo of wood pulp sulphide on the ss. *"Nootka"* from Port Alice, B.C. to Vancouver, B.C., claims against the respondent as owner of the *"Nootka"* for damage to the cargo en route.

The *"Nootka"* left Port Alice at 12.40 a.m. D.S.T. on July 29, 1947; fog was soon encountered and at 2.01 a.m. the vessel grounded on Cross Island. A rising tide enabled the ship to slide off at 3.40 a.m. It was immediately realized that water was coming into the head of the *"Nootka"* and the captain determined to proceed to Quatsino Wharf where he arrived at 4.43 a.m. At the Quatsino dock the ship was sinking so fast that the captain grounded her in the mud. A diver was sent to Quatsino and after an examination of the ship and temporary repairs the *"Nootka"* left July 30th at 5.09 p.m. and arrived back at Port Alice at 7.39 p.m.

It has been conceded throughout this litigation that there was no negligence on the part of the master and the crew aboard the *"Nootka"* up to its arrival at Quatsino. The learned trial Judge (1), however, found that at Quatsino

(1) [1949] Ex. C.R. 287.

the failure to pump efficiently with the available facilities had allowed the water to rise in the ship and to further damage the cargo. He held that 68 per cent of the damage to the cargo was caused by this negligence but as this negligence was in relation to the management of the ship he hel dthe respondent not liable by virtue of the *Water Carriage of Goods Act*, S. of C. 1936, c. 49, Schedule Art. IV, sec. 2(*a*).

The appellant in this appeal contends that the negligence at Quatsino was not in relation to "the management of the ship" and therefore the respondent does not come within the above mentioned Art. IV, sec. 2(*a*). The respondent cross-appeals and contends that all of the damage was caused prior to the ship reaching Quatsino and therefore consequent upon acts in relation to "the management of the ship."

The first issue is, therefore, whether upon the facts as found by the learned trial Judge the respondent is liable under Art. III, sec. 2, or not liable because of the provisions of Art. IV, sec. 2(*a*), or more precisely stated, was the pumping of the water out of the "*Nootka*" conduct in "the management of the ship" within the meaning of that phrase as used in Art. IV, sec. 2(*a*).

Art. III, sec. 2, of the said Schedule reads as follows:

> Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

Art. IV reads in part as follows:

> 2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,
>
> * * *
>
> (*a*) act, neglect, or defeault of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship.

The origin and history of the foregoing provisions are discussed in Scrutton on Charter parties, 15th Ed., p. 439. Similar provisions were enacted in the United States in 1893 and in Canada in 1910. The immediate provisions are the result of recommendations for the adoption of the "Hague Rules" with slight modifications as a basis of legislation at the diplomatic conference on Maritime law at Brussels in October, 1922. The Imperial Economic Conference in 1923 recommended the adoption of the rules

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throughout the British Empire with the consequence that the Schedule to the Canadian Act is identical with that of the *Carriage of Goods by Sea Act in Great Britain*, 1924.

Lord Sumner states the purpose and object of the foregoing legislation to be as follows:

> The intention of this legislation in dealing with the liability of a shipowner as a carrier of goods by sea undoubtedly was to replace a conventional contract, in which it was constantly attempted, often with much success, to relieve the carrier from every kind of liability, by a legislative bargain, under which he should be permitted to limit his obligation to take good care of the cargo by an exception, among others, relating to navigation and management of the ship. Obviously his position was to be one of restricted exemption.

Gosse Millerd Ltd. v. *Canadian Government Merchant Marine* (1).

In the *Gosse Millerd* Case the House of Lords considered a claim against the ss. *"Canadian Highlander"* for damage to a shipment of tinplates from Swansea to Vancouver. The ship went from Swansea to Liverpool where cargo was both loaded and unloaded. When undocking at Liverpool the *"Canadian Highlander"* suffered injuries and was placed in dry dock for repairs. The damage to the tinplates was caused by negligence in moving and replacing tarpaulins while the vessel was in dry dock which permitted rain water to reach and damage the tinplates. It was held that this negligence in handling the tarpaulins was not negligence in the management of the ship and therefore the case was not brought within the proviso of Art. IV, sec. 2(*a*) and therefore the owners of the *"Canadian Highlander"* were liable under Art. III, sec. 2. Lord Sumner at p. 240:

> I think it quite plain that the particular use of the tarpaulin, which was neglected, was a precaution solely in the interest of the cargo. While the ship's work was going on these special precautions were required as cargo operations. They were no part of the operations of shifting the liner of the tail shaft or scraping the 'tween decks.

In the *Gosse Millerd* Case Lord Hailsham, L.C. approved of the principle laid down in *The Glenochil* (2). *"The Glenochil"* in the course of a voyage from New Orleans to London encountered exceptionally heavy weather. While unloading and loading cargo at London it was necessary to fill some of the water-ballast tanks in order to stiffen the ship. The learned trial Judge there found that if before admitting the water into the ballast tanks an

(1) [1929] A.C. 223 at 236. (2) [1896] p. 10.

examination had been made the broken pipes through which the water passed into and damaged the cotton-seed oil-cake would have been discovered. He held failure to make such an examination constituted negligence causing the damage, but that it was negligence in "the management of the ship", and the owners, therefore, were not liable by virtue of Art. IV, sec. 2(*a*). His judgment was affirmed upon appeal. Sir F. H. Jeune, President, stated at p. 15:

. . . the Act prevents exemptions in the case of direct want of care in respect of the cargo, and secondly, the exemption permitted is in respect of a fault primarily connected with the navigation or the management of the vessel and not with the cargo.

Gorell Barnes, J. at p. 19:

. . . where the act done in the management of the ship is one which is necessarily done in the proper handling of the vessel, though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo, that must be a matter which falls within the words "management of the said vessel."

In *The Rodney* (1), a pipe to carry off water became clogged and was cleared in such a negligent manner as to make a hole in it and permit water to damage the cargo. This was held to be negligent conduct in the management of the ship and therefore under Art. IV, sec. 2(*a*) the owners did not incur liability for the damaged cargo. Sir F. H. Jeune at p. 117:

The acts need not be done merely for the safety of the vessel or for her maintenance in a seaworthy condition. If you extend them to keeping the vessel in her proper condition, then the act in this case is an act done in the management of the vessel, and falls within the principle of *The Glenochil.*

And Gorell Barnes, J. at the same page:

I think that the words "faults or errors in the management of the vessel" include improper handling of the ship, as a ship, which affects the safety of the cargo.

See also *The Touraine* (2).

In *The Ferro* (3), a quantity of oranges, because they were so placed in the vessel were damaged. The owners were held liable due to the provisions under a bill of lading containing language similar to the above quoted passages from the Schedule. Gorell Barnes, J. at p. 46:

It seems to me a perversion of terms to say that the management of a ship has anything to do with the stowage of cargo.

(1) [1900] p. 112.
(2) (1927) 97 L.J.P. 60.
(3) [1893] p. 38.

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The ss. *Germanic* (1) arrived at New York with a heavy coat of ice estimated at 213 tons. This weight was increased by a heavy fall of snow after her arrival. In the course of unloading cargo and loading coal the vessel listed first to starboard, later to port, and then after a short time again to starboard, and finally about four hours later listed to port carrying the lower part of the open coal port below the water line where the pumps could not control the inflow of water, as a consequence of which the ship sank before relief could be had. At the trial, and this was affirmed in the Circuit Court of Appeals, the loss was found to be due to hurried and imprudent unloading. This finding was accepted in the Supreme Court of the United States where it was held that the negligence was not due to the management of the ship. Mr. Justice Holmes stated at p. 597:

> If the primary purpose is to affect the ballast of the ship, the change is management of the vessel, but if, as in view of the findings we must take to have been the case here, the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not make it the less a fault of the class which the first section removes from the operation of the third. We think it plain that a case may occur which, in different aspects, falls within both sections, and if this be true, the question which section is to govern must be determined by the primary nature and object of the acts which cause the loss.

The foregoing authorities make it clear that the management of a ship is not restricted to acts done in relation to the ship while she is sailing. They rather indicate that the line is drawn where the conduct is, in the language of both Gorell Barnes, J. and Mr. Justice Holmes, primarily in relation to the management of the ship as distinguished from acts in relation to the cargo. The conduct of the master and crew prior to beaching at Quatsina was in relation to the management of the ship. The placing of the vessel in the mud in order to prevent her sinking was an act for the preservation of and therefore in relation to the management of the ship. The pumps were started at Cross Island and were kept going all the time the vessel was at Quatsino. The appellant stresses the fact that the master said once the *"Nootka"* was beached at Quatsino she was safe. He, however, explained she was safe unless some unfortunate accident occurred. He had in mind and mentioned the possibility of the bulkheads giving away

(1) (1905) 196 U.S. 589.

which would be a major accident. In order to avoid this it was necessary that the pumps be kept working. The fact that there was negligence in the operation of these pumps does not affect the matter if, as I think, they were operated for the preservation of and therefore were acts in relation to the management of the ship.

The master was, as his duty required, concerned about the cargo. When scows were available at 4.00 p.m. they began unloading the pulp from hold /1. However, the master was obviously of the opinion that whatever damage had been suffered by the cargo had been suffered prior to the landing at Quatsino.

The primary concern of the master in keeping the pumps going was to get as much water out as he could so that the bulkheads would not give way and that possibly the ship might continue her course. That being the primary concern, the fact that the pumping did tend to preserve or affect "the safety of the cargo", as stated by Gorell Barnes, J. in *The Rodney, supra,* does not take the case out of the exception of Art. IV, sec. 2(*a*). This was damage resulting from an act relating to the ship, and as stated by Bankes, L.J., in *Hourani* v. *T. & J. Harrison* (1), "only incidentally damaging the cargo." It was conduct such as Gorell Barnes, J. in *The Glenochil, supra,* refers to as "not primarily done at all in connection with the cargo." The conclusion must follow that the pumping of the water out of the *"Nootka"* was conduct in the management of the ship and therefore the facts bring this case within Art. IV, sec. 2(*a*).

The respondent cross-appealed and contended that the water which caused the damage was in the hold before the ship was beached at Quatsino and that all the damage was done before beaching. I agree that the evidence justifies this conclusion and concur in the analysis of the facts as made by my brother Rand.

The cross-appeal as such was unnecessary within the meaning of Rule 100 of this Court. The respondent in supporting the judgment at trial had a right to raise all the points which he did without a cross-appeal. In the result the appeal should be dismissed with costs including all of the costs of preparing the factum. The cross-appeal should be dismissed without costs.

(1) (1927) 32 Com. Cas. 305 at 313.

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Locke J.

The judgment of Taschereau and Locke JJ. was delivered by

LOCKE, J.:—The appellants as plaintiffs in these consolidated actions brought in the Exchequer Court, British Columbia Admiralty District (1), claim to recover from the defendant railway company as the owner and operator of the ss. *Nootka*, for damage to cargo carried in that vessel occasioned under the following circumstances. On July 29, 1947, shortly before 1 o'clock in the morning the *Nootka* sailed from Port Alice for Vancouver and at about 2 a.m. of the same day ran aground in a dense fog on Cross Island in Quatsino Sound. The vessel carried some 8,000 bales of wood pulp sulphite, the property of the plaintiffs in various proportions and, of this, part was carried in two forward holds known as Nos. 1 and 2 which formed together one common hold with two hatches leading into it. This combination hold, referred to in the reasons for judgment at the trial as the fore hold, consisted of the lower hold and 'tween decks, and cargo was stored in each. The space forward of the hold was occupied by the fore peak which, except for some ship's gear, was empty. The damage claimed is in respect of injury caused by sea water which gained access to the fore hold at some time following the stranding.

The *Nootka* remained aground on Cross Island for approximately one hour and forty minutes and then slipped off on the following tide. The first officer had ascertained by an examination that in the fore peak she was beginning to make water, though no significant amount obtained entry into her until she slid off the rock but, according to both the master and the first officer, within a very short time after this there was difficulty in handling the vessel and they discovered she was going down perceptibly by the head, indicating that she was making water rapidly. The master then decided to proceed to Quatsino Wharf and to run her aground on a mud bank immediately ahead of the wharf and this was done. According to him, they commenced to operate the bilge pumps promptly after the vessel slid off the rock but this was insufficient to keep down the water gaining entrance to the vessel, so that by the time she was tied up at Quatsino Wharf

(1) [1949] Ex. C.R. 287.

at 4.43 a.m. she was considerably below her draft marks forward. The plaintiffs do not complain of any neglect on the part of the defendant up to the time the *Nootka* arrived at Quatsino Wharf. They do, however, dispute the accuracy of the evidence of both the master and the first officer as to the amount of water which had gained entrance into the ship by the time she arrived there. According to the ship's officers, such a large quantity had gained entrance into the fore hold by that time that all of the damage sustained by the cargo had been suffered. The evidence for the plaintiffs, which has been accepted by the learned trial judge, indicated, however, that a comparatively small amount of water had entered the vessel up to that time and it is the plaintiffs' case that it was the negligence of the crew thereafter which caused almost all of the damage to the cargo which ensued. The learned trial judge, however, while deciding this issue in favour of the plaintiffs held them disentitled to recover by reason of the provisions of sec. 2 of Art. IV of the *Water Carriage of Goods Act,* 1936, and dismissed the action. The plaintiffs appeal from this decision and the defendant has cross-appealed on the ground that it was error on the part of the trial judge to find as a fact that the damages claimed by the plaintiffs were caused after the arrival of the vessel at Quatsino Wharf. If the statute is an answer to the claims of the plaintiffs, the question of fact raised by the cross-appeal need not, in my opinion, be considered.

The case of the plaintiffs is that when the *Nootka* arrived at Quatsino Wharf and was beached in the mud there was only some 1½ inches of water in the hold above the top of the fuel oil tanks, it having been kept at this level by the use of the bilge pump only and that had the ship's officers promptly put to work other pumps then readily available the water could have been kept either at or below this level and much the greater part of the damage which was occasioned to the cargo in the forehold prevented. It is said that the master failed in his duty to protect the cargo by neglecting to use the available pumps, so that when the surveyor for the cargo underwriters arrived at the vessel at 8 o'clock in the evening there was some 13 or 14 feet of water in the hold, it being above the 'tween deck level. As a result of arrangements made after

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the arrival of Captain Clarke, the surveyor, the hold was pumped out with the available pumps but the damage had, of course, then been done.

The carriage by sea of the cargo in question was from Port Alice, B.C. to Vancouver and the rules prescribed by the *Water Carriage of Goods Act* (cap. 49, Statutes of Canada, 1936) applied. By sec. 2 of Art. III it is provided that:—

> Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

It is said, however, for the defendant that if there was failure on the part of the ship's officers to care for the cargo no action lies by reason of the provisions of Art. IV, sec. 2(*a*) which provides that:—

> Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,
>
> (*a*) act, neglect, or default of the master mariner, pilot or the servants of the carrier in the navigation or in the management of the ship.

These statutory provisions are taken verbatim from the rules relating to bills of lading contained in the schedule of the *Carriage of Goods at Sea Act 1924 (Imp.)* 14 & 15, Geo. V, c. 22. That statute which was enacted as a result of the recommendations made at the International Conference on Maritime Law held at Brussels in 1922 follows closely in this respect the language of the Harter Act, which had been enacted by the Congress of the United States in 1893. As pointed out in Scrutton on Charter Parties, 15th Ed. p. 263, the Imperial Statute, imitating the Harter Act, draws an implied distinction between negligence in the navigation or in the management of the ship and negligence otherwise than in such navigation or management. From the consequences of the former it allows the ship owner to be relieved, while from those of the latter it does not.

Neither the Canadian or the Imperial Statute or the Harter Act attempt to define the meaning or effect of the words "navigation" or "management". In *Gosse Millerd, Ltd.* v. *Canadian Government Merchant Marine Ltd.* (1), Lord Hailsham, L. C. pointed out that the expression "management of the ship" while first appearing in an

(1) [1929] A.C. 223 at 230.

English Statute in the *Carriage of Goods at Sea Act 1924*, had a long judicial history in that country and expressed the opinion that the words should be given the meaning which had been judicially assigned to them when used in contracts for the carriage of goods by sea prior to its enactment. In the present matter the learned trial judge, after stating that he accepted fully the evidence of Captain Clarke, including his conclusions as to the quantity of water in the vessel at the time it arrived at Quatsino Wharf, said that if the measures taken by Captain Clarke after his arrival at 8 p.m. to clear the fore hold of water had been taken by her own officers when she was first beached, the rise of water in the hold would have been checked and 68 per cent of the damaged cargo saved and said in part:—

> What I think tends to obscure the real issue here is the circumstance that the rising water had such an immediate damaging effect on the cargo, and only that might be relatively regarded as a remote effect on any ship operation. But that cannot matter. Had soundings been taken on arrival at Quatsino Bay (or before) and the ship's actual condition ascertained and appreciated, and the water then in the ship pumped out or reduced in volume (as I have found it could and should have been with the vessel's facilities then available) the ship would again have come to life; she would once more have become a going concern, might even perhaps have found it possible to get under way and move under her own power to Port Alice, 12 miles distant, for survey and temporary repairs. The failure to pump efficiently with all facilities at hand most certainly damaged further cargo, but it was essentially a failure in a matter that vitally affected the management of the ship, viewed in the light of the authorities. It was a "want of care of vessel indirectly affecting the cargo"; or so it seems to me.

For the defendant it is said that if the findings of fact of the learned trial judge be correct, then the neglect or default of the master or other servants of the carrier was in "the navigation or in the management" of the ship, within the meaning of Art. IV, sec. 2(*a*).

The meaning to be assigned to the words "improper navigation" in an agreement was considered in *Good* v. *London Steamship Owners' Association* (1). By the agreement the members of the Association undertook to indemnify each other in respect of "loss or damage which by reason of the improper navigation of any such steamship as aforesaid may be caused to any goods, etc. on board such steamship." The ss. *Severn*, while on a voyage from Memel to Hull, encountered heavy weather and being short of coal put back to Frederickshaven to coal and to

(1) (1871) L.R. 6 C.P. 563.

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trim her cargo which had shifted. Going into the harbour she grounded but got off within an hour and the pumps were put on to try whether she had made any water and, for this purpose, the bilge-cock was opened but through the negligence of the crew was not closed when the attempt to pump ceased. While the vessel was moored at the quay, orders were given to fill the boilers and for this purpose the sea-cock was opened—this communicated with the box or tank in which was the bilge-cock—and when the boilers were filled, the sea-cock being through a like negligence left open, the water entered in large quantities by means of the open bilge-cock and damaged the cargo. This was held to be damage from improper navigation, Willes, J. saying in part (p. 569):—

> Improper navigation within the meaning of this deed is something improperly done with the ship or part of the ship in the course of the voyage. The omission to close the bilge-cock was clearly improper navigation within the meaning of this deed. It was improper navigation in the course of the voyage.

In *Carmichael* v. *Liverpool Sailing Ship Owners' Association* (1), similar language in the articles of a mutual insurance association was considered. While loading a cargo of wheat, an opening or port in the side of the vessel was negligently left insufficiently secure so that water gained access to the cargo and caused damage. The matter came before A. L. Smith and Wills, JJ. by way of a stated case and the neglect was held to fall within the expression "improper navigation." On appeal, Lord Esher, M.R. and Fry, L.J. agreed with A. L. Smith and Wills, JJ. that the decision in *Good* v. *London Steamship Owners' Association,* above referred to, concluded the matter. Lopes, L.J. said in part (p. 251):—

> In my opinion improper navigation means the improper management of a ship in respect of the cargo during the voyage.

In *The Ferro* (2), damage caused to cargo by negligent stowage was held by Sir Francis Jeune and Gorell Barnes, J. to be not within the expression "neglect or default in the navigation or management of the ship" in a bill of lading. In *The Glenochil* (3), goods were shipped under a bill of lading incorporating the provisions of the *Harter Act.* After arrival at her port of destination and during

(1) (1887) 19 Q.B.D. 242.
(2) [1893] p. 38.
(3) [1896] p. 10.

the discharge of the cargo it became necessary to stiffen the ship. For this purpose, the engineer ran water into a ballast tank but negligently omitted first to ascertain the condition of the sounding-pipe and casing which had, owing to heavy weather during the voyage, become broken. Damage to the cargo ensued. The action failed, the loss being held to fall within the exception from liability for "faults or errors in the management" of the vessel. Sir Francis Jeune said in part:—(p. 14)

> It is sufficient for us to say that it is negligence consisting in a mismanagement of part of the appliances of the ship, and mismanagement which arose because it was intended to do something for the benefit of the ship, namely, to stiffen her, the necessity for stiffening arising because part of her cargo had been taken out of her. In that operation of stiffening there was a mismanagement of a pipe and the result was that water was let in and damaged the cargo.

and expressed the opinion that the Act permitted the exemption in respect of a fault primarily connected with the navigation or management of the vessel, and not the cargo. The learned President did not consider that it was necessary to deal with the matter as a question of navigation, saying that (p. 16)

> the word "management" goes somewhat beyond—perhaps not much beyond—navigation, but far enough to take in this very class of acts which do not affect the sailing or movement of the vessel, but do affect the vessel herself.

and said that in *The Ferro* the distinction he intended to draw was one between "want of care of cargo and want of care of vessel indirectly affecting the cargo." Gorell Barnes, J. said in part (p. 19):—

> I think that where the act done in the management of the ship is one which is necessarily done in the proper handling of the vessel, though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo, that must be a matter which falls within the words "management of the said vessel".

In *The Rodney* (1), the exemption contained in the *Harter Act* was again considered. There the vessel meeting with heavy weather and the forecastle becoming flooded the boatswain, while endeavouring with the aid of a poker to clear a pipe used to carry off the drainage, drove a hole through it, thereby admitting water into the forehold and damaging a portion of the cargo. Following the decision in *The Glenochil* the action failed. The

(1) [1900] p. 112.

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President in delivering judgment reversing the decision of a county court judge, referring to the reasons given by the latter in finding for the plaintiff that the word "management" should be confined to the performance (though improper) or non-performance of such acts as are or ought to be done for the safety of the vessel and her maintenance in a seaworthy condition, said that this was too narrow a view and that the acts need not be done merely for the safety of the vessel or for her maintenance in a seaworthy condition, but extended to keeping the vessel in her proper condition. Gorell Barnes, J. agreeing, said that nothing that was said in *The Glenochil* was intended to limit the meaning of the words "management of the ship" to acts done for the safety of the ship but included improper handling of the ship as a ship, which affects the safety of the cargo. In *Rowson* v. *Atlantic Transport Co.* (1), Stirling, L.J. adopted the views expressed in *The Glenochil* and *The Rodney,* and in *Hourani* v. *Harrison* (2), Atkin L.J. noting this fact adopted the statement of Gorell Barnes, J. in *The Rodney* that "faults and errors in the management of the vessel include improper handling of the ship as a ship which affects the safety of the cargo." In the *Gosse Millerd* case, above referred to, Lord Hailsham, L.C. expressly approved the principle laid down in *The Glenochil,* saying that the principles enunciated in that case had repeatedly been cited with approval in England and noting that they had been applied in *The Rodney* and accepted by the Court of Appeal in *Rowson's* case and adopted as correct by the Supreme Court of the United States in cases arising under the *Harter Act.*

The relevant language of the *Harter Act* has been considered in a large number of American cases. The statute was enacted in 1893 and in *The Sylvia* (3), Gray, J. delivering the judgment of the Supreme Court said in part:—

> This case does not require a comprehensive definition of the words "navigation" and "management" of a vessel, within the meaning of the act of Congress. They might not include stowage of cargo, not affecting the fitness of the ship to carry her cargo. But they do include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the

(1) [1903] 2 K.B. 666 at 680. (2) (1927) 32 Com. Cas. 305.
(3) (1898) 171 U.S. 462 at 466.

inroad of the seas; and if there was any neglect in not closing the iron covers of the ports, it was a fault or error in the navigation or in the management of the ship.

and noted that this view was in accordance with the English decisions, referring, inter alia, to *Good* v. *London Steamship Owners' Association, Carmichael* v. *Liverpool Sailing Ship Owners' Association, The Ferro* and *The Glenochil.* In *The Sanfield* (1), Wallace J. delivering the judgment of the Circuit Court of Appeals held that the failure to open a sluice gate designed to empty the bilges which was neglected for twenty days during heavy weather was a fault pertaining to the management of the ship, within sec. 3 of the *Harter Act,* adopting the above quoted language from the judgment in *The Sylvia.*

Here, upon the facts found at the trial, the master having brought his ship safely to the wharf with only a small quantity of wtaer in the forehold and having by causing her to be grounded on the mud bank obviated the danger of her sinking, did nothing to prevent the rise of water in the forehold other than to continue to use the bilge pump which was, as the result showed, quite inadequate. Thus, the ship lay from early in the morning of July 29, 1947, until after 8 o'clock that evening, when Captain Clarke arrived, and having ascertained that there were some 13 or 14 feet of water in the forehold was instrumental in initiating measures which pumped the hold dry and, with the assistance of some temporary work on the hull done by a diver, enabled her to return to Port Alice and thence to Vancouver. There were, as was demonstrated after Captain Clarke's arrival, sufficient pumps immediately available to have kept the hull dry or practically so had they been put promptly to work when the vessel arrived at the wharf. Admittedly, the Captain knew that the vessel was taking water rapidly as she lay at the wharf. He apparently, however, erroneously considered that having consulted the engineer regarding the use of pumps he had discharged his duty.

Accepting the findings of fact made by the learned trial judge, that there was negligence on the part of the master appears to me to be undoubted. That this negligence resulted in damage to the cargo is equally beyond question. Any negligence in failing to take prompt steps to avoid

(1) (1898) 92 Fed. Rep. 663.

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the inroad of seawater into the holds of a vessel carrying perishable cargo must, in my view, be also negligence either in the navigation or the management of the ship. It is said for the appellant that when the *Nootka* was run aground at Quatsino Wharf she was safe from sinking, so that the failure to operate the available pumps did not jeopardize the safety of the vessel and that the presence of the large accumulation of water in the forehold did not constitute a danger to the bulkhead, but I think it must be accepted upon the authority of *The Rodney* that this is not decisive of the matter. Navigation, as indicated by the decisions in *Good* v. *London Steamship Owners' Association* and *Carmichael* v. *Liverpool Sailing Ship Owners' Association,* does not refer merely to the time when the vessel is at sea. The decision in *The Accomac* (1), is clearly distinguishable on the facts, for there the voyage had ended at the time the events occurred giving rise to the claim. I think the failure to exercise reasonable diligence to prevent further water entering the forehold falls within the same category as the failure of the crew to close the bilge-cock in Good's case, and the port in Carmichael's case, and was "neglect in the navigation of the ship" within the terms of the exception. The learned trial judge considered the matter as one of negligence in the management of the ship and, having come to a conclusion on this aspect of the matter, no doubt considered it unnecessary to decide further whether there was not also negligence in the navigation of the ship. The same neglect may, in my opinion, be both in navigation and in management. Adopting the language of Gorell Barnes, J. in *The Rodney,* there was here improper handling of the ship as a ship which affected the safety of the cargo and this was fault or error in management. The learned trial judge has said that the neglect was essentially a failure in a matter that vitally affected the management of the ship, a conclusion with which I respectfully agree.

In view of my conclusion upon this aspect of the matter, I express no opinion upon the issue raised by the cross-appeal. It was unnecessary for the respondent to cross-appeal. Rule 100 provides that a notice of cross-appeal may be given by the respondent if it is intended upon the

(1) (1890) 15 P.D. 208.

hearing of the appeal to contend that the decision of the court below should be varied. Here the action was dismissed by the learned trial judge upon the ground that the fault established was negligence in the management of the ship, for which the respondent was not liable. The respondent did not seek to have the decision varied. The respondent was entitled to support the judgment upon any tenable ground and all of the arguments advanced upon the cross-appeal in support of the contention that the respondent had not been negligent might have been advanced on its behalf.

The appeal should be dismissed with costs which should include all taxable costs in connection with the preparation of the factum, including that portion thereof directed to the question as to whether the respondent had been guilty of negligence. Under the circumstances, I think the dismissal of the cross-appeal should be without costs.

Appeal dismissed with costs; cross-appeal dismissed without costs.

Solicitors for the appellants: *Bull, Housser, Tupper, Ray, Carroll and Guy.*

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

HARRY GORDON WEBB (DEFENDANT)...APPELLANT;

AND

MARIE JULIE WEBB (PLAINTIFF).....RESPONDENT.

1949
*Nov. 10
1950
*Jan. 30

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Criminal Law—Appeal from Summary Conviction under an order adjudging sum of money to be paid into Court—Whether condition precedent to right of appeal met, where appellant prior to date fixed for payment, deposits with the Court the amount fixed by it to cover costs of appeal.—The Criminal Code, R.S.C., 1927, c. 36, s. 750(c), as amended by 1947, c. 55, s. 23. Husband and Wife—Summary Proceedings for Maintenance—The Deserted Wives' and Children's Maintenance Act, R.S.O., 1937, c. 211.

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

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The *Criminal Code*, R.S.C., 1927, c. 36, s. 750(*c*) as enacted by S. of C., 1947, c. 55, s. 23, provides that an appellant, if the appeal is from an order whereby a penalty or sum of money is adjudged by a justice to be paid, shall within the time limited for filing the notice of intention to appeal, in cases in which imprisonment in default of payment is not directed, deposit with such justice an amount sufficient to cover the sum so adjudged to be paid together with such further sum as such justice deems sufficient to cover the costs of the appeal.

On Feb. 17, 1948 the deputy judge of the Family Court of Toronto under the *Deserted Wives' and Children's Maintenance Act*, R.S.O., 1937 c. 211, ordered the appellant to pay his wife at the said Court the sum of $15 per week for her support, the first weekly payment to be made on March 1. On Feb. 24 appellant paid to the Court the sum of $25 as security for the costs of an appeal to the County Court, the amount fixed by the Court as such security, and on Feb. 26 served and filed notice of appeal.

His appeal to the County Court was dismissed on the ground of lack of jurisdiction, and an application for an order of mandamus made to the Supreme Court of Ontario was refused by a judge of that court and on appeal by the Court of Appeal, on the ground that the provisions of s. 750(*c*) of the *Criminal Code* were not complied with.

Held: that at the time the appellant served and filed his notice of appeal there was no "sum of money adjudged to be paid" and the appellant had done all that was required of him in order to vest jurisdiction in the County Court.

Held: also, that the appeal should be allowed, the order below set aside and a writ of mandamus directed to be issued to the County Court to proceed with the hearing of the appeal.

APPEAL from the judgment of the Court of Appeal for Ontario dismissing appellant's appeal from the judgment of Smiley J. who refused appellant's application for an order of mandamus directing a judge of the County Court to hear appellant's appeal from an order of the Toronto Family Court directing payment by the appellant of the sum of $15 per week for the support of his wife.

H. Gordon Webb in person for the appellant.

No one appearing for the respondent.

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

KERWIN J.:—On February 17, 1948, the Deputy Judge of the Family Court for the City of Toronto ordered Doctor Harry Gordon Webb to pay his wife "at the Family Court, 90 Albert Street, in the City of Toronto, the sum of $15 per week for the support of the wife of the said Dr. Harry Gordon Webb, the first weekly payment to be made

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on the 1st day of March, 1948." The order was made under the *Deserted Wives' and Children's Maintenance Act,* R.S.O. 1937, chapter 211. On February 24, 1948, Webb paid to the Family Court $25 as security for the costs of an appeal to the County Court (the amount fixed by the Family Court Judge as such security), and on February 26 served and filed notice of appeal. A County Court Judge decided, purporting to follow the decision of the Court of Appeal for Ontario in *Johnson* v. *Johnson* (1), that the County Court had no jurisdiction to entertain the appeal.

Webb thereupon applied for an order of mandamus directing a judge of the County Court to hear and determine the appeal. This application was dismissed by Smiley J., as was also an appeal to the Court of Appeal. In each case the application was refused on the ground that the provisions of section 750(*c*) of the *Criminal Code* as enacted by section 23 of chapter 55 of the Statutes of 1947 were not complied with. Under the *Deserted Wives' and Children's Maintenance Act,* proceedings are to be in accordance with the provisions of the Ontario *Summary Convictions Act,* R.S.O. 1937, chapter 136. By virtue of section 13 of the latter, an appeal is given in such a case as this to the County Court, and by section 3, certain sections in Part XV of the *Criminal Code,* including section 750(*c*) shall apply *mutatis mutandis.*

The only decision besides the *Johnson* case referred to, so far as we are aware, was *Fink* v. *Fink* (2). There Kellock J.A., with whom Gillanders J.A. agreed, decided that the giving of a cheque was not a "deposit" but he did not determine whether the "amount sufficient to cover the sum so adjudged to be paid" would be the sum of $7, which was the only sum falling due to be paid under the order of the magistrate at the time notice of appeal was given, or the amount of all payments that would fall due under the order between its date and the date upon which the notice of appeal was returnable, or some other amount. I do not read the judgment of the Chief Justice of Ontario as deciding anything beyond that except to point out that it was generally considered that compliance with section 750(*c*) was a condition precedent. At that time that part of section 750(*c*), dealing with appeals in cases where

(1) [1948] O.W.N. 532.

(2) [1944] O.W.N. 172; 81 C.C.C. 196.

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imprisonment in default of payment is not directed, provided for the entering into a recognizance as an alternative to the payment of the deposit. In the *Johnson* case, which was an application for prohibition, which on appeal came before the Ontario Court of Appeal, that Court granted an order of prohibition where cheques had been given instead of cash. By that time the section as we now have it had been enacted omitting the provision for entering into a recognizance. Notwithstanding this alteration, the question left open in the *Fink* case was still undecided.

It is now necessary to decide the precise point. The matter does not lend itself to extended discussion but a reading of the whole of section 750(*c*) satisfies me that the appellant had done all that was required of him in order to vest jurisdiction in the County Court. Section 750(*c*) as enacted in 1947 reads as follows:—

> (*c*) the appellant, if the appeal is from a conviction or order adjudging imprisonment, shall either remain in custody until the holding of the court to which the appeal is given, or shall within the time limited for filing a notice of intention to appeal, enter into a recognizance in form 51 with two sufficient sureties before a county judge, clerk of the peace or justice for the county in which such conviction or order has been made, conditioned personally to appear at the said court and try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as are awarded by the court or enter into a recognizance so conditioned and make such cash deposit in lieu of sureties as the justice may determine; or if the appeal is from a conviction or order whereby a penalty or sum of money is adjudged to be paid, the appellant shall within the time limited for filing the notice of intention to appeal, in cases in which imprisonment upon default of payment is directed either remain in custody until the holding of the court to which the appeal is given, or enter into a recognizance in form 51 with two sufficient sureties as hereinbefore set out, or deposit with the justice making the conviction or order an amount sufficient to cover the sum so adjudged to be paid, together with such further amount as such justice deems sufficient to cover the costs of the appeal; *and, in cases in which imprisonment in default of payment is not directed, deposit with such justice an amount sufficient to cover the sum so adjudged to be paid, together with such further amount as such justice deems sufficient to cover the costs of the appeal;* and upon such recognizance being entered into or deposit made the justice before whom such recognizance is entered into or deposit made shall liberate such person if in custody.

The part italicized deals with the situation that confronted the present appellant. I cannot conceive that, if the appellant had served and filed his notice of appeal and

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deposited the sum deemed sufficient by the justice to cover the costs of the appeal, after one payment had fallen due under the order, he would have been required to pay anything more than that one payment. It might be, as in fact was the case, that some considerable time would elapse before his appeal would be heard, and it could never have been the intention that the appellant should make further deposits from time to time until the appeal was heard. In my view, there was no "sum * * * adjudged to be paid" at or before the time the appellant served and filed his notice of appeal.

The appeal should be allowed, the order below set aside and a writ of mandamus directed to be issued to the County Court to proceed with the hearing of the appeal.

LOCKE J.:—I concur in the allowance of this appeal and in the granting of a writ of mandamus.

Appeal allowed.

WILLIAM NEWELL (PLAINTIFF).....APPELLANT;

AND

H. BARKER and JOHN W. BRUCE (DEFENDANTS) ..... } RESPONDENTS.

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*Nov. 14, 15

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*Feb. 21

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Labour Law—Trade Unions—Union Officials told general contractor, that in event of sub-contractor employing non-union labour the union men would not work on the job, as a result sub-contract was cancelled—Whether act of Union Officials unlawful interference with sub-contractor's contractual relations.

A general contractor under an agreement with a Union, of which the respondents were officers, undertook to employ on its contracts only union labour for that class of work in which the Union engaged. Having secured a contract for a building project it assigned part of the work to a sub-contractor which also employed only union labour. The latter, in the belief that the appellant was also an employer of union labour, gave a contract for part of such work to the appellant and the general contractor sharing the same belief, approved. The respondents, on learning of the contract awarded the appellant, advised the general contractor that their Union under the circumstances would be unable to supply it with union labour for other work of the same general nature as that awarded the appellant. The general contractor then told its sub-contractor that non-union men

PRESENT:—Kerwin, Taschereau, Rand, Estey and Locke JJ.

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could not work on the job and the sub-contractor then advised the appellant that any men he employed there must be union men, and the appellant agreed.

At the time the appellant secured his contract he was aware of the Union's rule forbidding its members to work with non-union men engaged in the same class of work, and of its further rule whereby it entered into collective agreements with the Master Plumbers Association only and not with individual master plumbers such as the appellant. Notwithstanding, he made no effort to join the Master Plumbers Association, nor did his workmen apply to join the Union. He however attempted to negotiate with the Union through the respondents but without success. The contract he had obtained was thereupon terminated by mutual consent and he then brought action against the respondents claiming they had conspired to interfere with his contractual relations.

Held: The respondents as officers of the Union were within their rights in advising the general contractor of the consequences that would ensue if the appellant carried out his contract by the employment of non-union labour. The evidence did not support the contention that they conspired to injure the appellant, nor that any acts on their part, or of either of them, was the cause of the cancellation of the appellant's contract.

Smithies v. *National Association of Operative Plasterers,* [1909] 1 K.B. 310, and *Larkin* v. *Long,* [1915] A.C. 814, distinguished. *Local Union No. 1562, United Mine Workers of America* v. *Williams and Rees,* 59 Can. S.C.R. 240 at 247 referred to; *Quinn* v. *Leathem,* [1901] A.C. 495 and *Lumley* v. *Gye,* (1853) 2 E. & B. 216, applied.

Per: Rand J.—The proper view to attribute to the cancellation of the contract was not the refusal of labour by the respondents but to the chosen course of action by the building contractor.

Per: Rand J.—It is now established beyond controversy that in the competition between workmen and employers and between groups of workmen, concerted abstention from work for the purpose of serving the interest of organized labour is justifiable conduct. *Crofter Harris Tweed Co.* v. *Veitch,* [1942] All. E.R. 142.

Judgment of the Court of Appeal, [1949] O.R. 85; [1949] 1 D.L.R. 544, affirmed.

APPEAL from a judgment of the Court of Appeal for Ontario (1), affirming the judgment of the trial judge, Smiley J. (2), dismissing the plaintiff's action for damages and for an injunction for interfering with his contractual relations.

G. T. Walsh, K.C., and *Thomas Delaney,* K.C., for the appellant.

A. W. Roebuck, K.C., and *D. R. Walkinshaw* for the respondents.

(1) [1949] O.R. 85; [1949] 1 D.L.R. 544.

(2) [1948] O.W.N. 625; [1948] 4 D.L.R. 64.

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

ESTEY J.:—The appellant (plaintiff) carries on business as a master plumber, steamfitter and sprinklerfitter in the City of Hamilton and brings this action against Barker, business agent of Local 67 in Hamilton of the United Association of Journeymen Plumbers and Steamfitters of the United States and Canada (hereinafter described as the "union" where the general association is referred to, or "Local 67" if only the local association is referred to), and the defendant Bruce, official organizer for Canada of the union.

The appellant's contention is that the respondent Barker conspired with the members of Local 67 and the respondent Bruce to injure and obstruct by unlawful means the appellant in pursuit of his business, in consequence of which the W. H. Cooper Construction Company Limited (hereinafter referred to as "the Cooper Company") cancelled a large contract with the appellant for work upon the Proctor & Gamble building in Hamilton.

The appellant's claim for damages and an injunction have been rejected both at trial and in the Appellate Court.

The evidence is largely concerned with the contracts in respect of the construction in 1945 of a large building for Proctor & Gamble Company of Canada Limited in Hamilton. H. K. Ferguson Company Inc. of Cleveland had the contract for its construction and entered into a sub-contract with the Cooper Company for the construction thereof, except that it would itself install "all the new equipment and all the process piping work, and oil refinery, and all those various processes that they use on refining for their soap business." Moreover, the plans were prepared by H. K. Ferguson Company Inc. and its engineers and those of Proctor & Gamble Company of Canada Limited. H. K. Ferguson Co. Inc., had a project manager to whom the Cooper Company had to answer and who approved of all sub-contracts let and materials purchased by the company. A. C. Davis was the project manager.

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H. K. Ferguson Company Inc. had an agreement with the union under which it could employ upon the construction of this building only union men. Moreover, the constitution of the union provided that no member of the union was permitted to work on any job where non-union men were employed on similar work.

The Cooper Company called for tenders for some of the plumbing and steamfitting they were required to do under the contract and as a result offered a contract to Adam Clark Company. Adam Clark Company did not feel, because of their other work, they had sufficient men to undertake this contract, with the result that it was then offered to the appellant. When appellant indicated his willingness to accept, he was told by the Cooper Company to go ahead. He did so, doing a small amount of work and ordering some materials. H. K. Ferguson Company Inc. through its representative Davis approved of Cooper Company accepting appellant's tender. At that time neither Davis nor Cooper knew appellant employed non-union men.

When Barker heard of the possibility of the appellant, who employed non-union men, getting this sub-contract, he immediately communicated with Bruce. Bruce at once, on November 8, 1945, spoke to Davis as follows:—

> I called his attention to the fact that Mr. Newell was a non-union employer and that it would interfere with all of the rest of his operations * * * I made it clear to him that if he desired to have the rest of his work done by members of the United Association, in accordance with the terms of our agreement, that he would have to see that union men were employed on that other work.

Davis immediately spoke to the Cooper Company:—

> I told Mr. Cooper that a non-union man could not work there, because I expected to do a lot of industrial work, and the International men would not work along with them on the same job, which he knew.

Ralph Cooper up to that time understood the appellant hired union men and in fact stated that had he known appellant was not employing union men he would not have offered him the work on this building. Ralph Cooper immediately told appellant "I want it clearly understood that all men that you put on the Proctor & Gamble project must be union men." The appellant admits that the Cooper Company so insisted. He also acknowledges that

he knew that union and non-union men could not work on the construction of this large building because of the union rules, and says that he immediately endeavoured to make a contract with the union that would permit him to do so.

Appellant's first approach to the union was on Saturday, November 10, when he and Barker had a conversation on the street. The respective versions of this conversation are quite different except that it is agreed appellant asked that he be permitted to sign a contract with the union. Whatever Barker's precise reply may have been, he did not encourage appellant, who interpreted his attitude as a refusal. Early that afternoon appellant advised Ralph Cooper to that effect. Ralph Cooper then communicated with Barker and as a consequence, on the following Monday, November 12, Barker, Bruce, Cooper and Davis met at a conference. As to the discussion at this conference there are again contradictions as to the precise language used, but it appears that Bruce did in effect intimate that he could not prevent the Cooper Company contracting with the appellant, but if non-union men were employed he would have difficulty in supplying the men to H. K. Ferguson Company Inc. on their part of the work. The qualifications and possibility of appellant's men joining the union were discussed, as well as that of an agreement or arrangement by which appellant might be permitted to employ union men, but no progress was made toward the attainment of this end. It was agreed at this conference that the Cooper Company would again approach Adam Clark of the Adam Clark Company and Bruce stated that if that company would undertake the contract he would endeavour to get the necessary men.

When Cooper advised the appellant that at this conference nothing had been attained on his behalf, the latter requested a further delay of four days and said that he would write a letter "over the heads of Bruce and the business agent." That same evening at about nine o'clock appellant delivered his letter to Barker. In the course of his evidence he refers to his letter as his written application for a contract with the union. It is not an application; on the contrary, it states he had made application

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on Saturday to Barker which was refused, and that refusal confirmed at the conference on Monday, November 12. He then states that refusal is an interference with his legal rights and unless it is withdrawn in four days he would be forced to take legal action.

When appellant delivered this letter to Barker at the latter's home a conversation took place between the two but no progress was made.

Barker says he showed the letter to Bruce. He also placed it before his executive but no action was taken and no reply was made thereto.

When on November 19 the position remained unchanged, the Cooper Company notified appellant they were "unable to enter into the contract" and at its request he signed the following release:—

> I hereby accept the above notice and release you from all responsibility or liability or damages which I have suffered or may sustain by reason of your being unable to enter into such contract.
>
> Yours very truly,
>
> W. Newell.

The learned trial Judge found that a contract had been concluded between the Cooper Company and the appellant. As it is upon this basis the case may be considered most favourably to the appellant, I accept, as did the learned Judges in the Court of Appeal, that finding.

The evidence discloses that Bruce and Davis at their conversation on November 8 discussed not only the employment of non-union men by the appellant but work which Davis himself had under consideration. It was not a disagreeable conversation. No demands were made. If there is a conclusion suggested by the evidence it is that Davis realized his error in approving of appellant's contract and that he would see that only union men were employed. Neither Bruce nor Davis as to this or any other occasion deposed to language used by Bruce which would support a submission that H. K. Ferguson Company Inc. was threatened, intimidated, coerced or in any way forced to take the position which it did. In this regard the case is quite distinguishable from *Smithies* v. *National Assoc. of Operative Plasterers* (1), and *Larkin* v. *Long* (2).

(1) [1909] 1 K.B. 310. (2) [1915] A.C. 814.

Immediately Davis realized the inconsistent position of his company was due to his having approved of the appellant's contract, without a clause providing for the employment of union men, he took steps to have it, in this regard, rectified.

The respondents, as officers of the union and Local 67, were quite within their rights in advising Davis of appellant's employment of non-union men and the difficulties that the employment of non-union men upon the construction of this building would involve. *Local Union No. 1562, United Mine Workers of America* v. *Williams and Rees* (1).

The appellant immediately took steps to comply with the Cooper Company's condition and his complaint after November 8 is to the effect that they conspired to prevent him from obtaining a contract with the union.

The evidence discloses that Local 67 enters into agreements with the Master Plumbers' Association at Hamilton but not with individual master plumbers. It therefore follows that master plumbers in that city deal with the union through the Master Plumbers' Association. The members of the union are journeymen plumbers who are received into membership upon receipt of individual applications.

Appellant was familiar with the methods and activities of the Master Plumbers' Association, the union and Local 67. He had been in business at Hamilton since 1920. At one time he had been a member of the Master Plumbers' Association and chairman of one of their committees. He employed union men from 1920 to 1934 except for a period of fifteen months commencing in 1929 when, because of some disagreement, the union did not permit their men to be employed under him. In the course of his evidence he detailed a number of differences, commencing in 1923, between himself and the union until in 1934 he dissociated himself from the union and has since maintained a non-union shop. He explained that so long as he was content with small contracts there was no interference on the part of the union but in large contracts the union

(1) (1919) 59 Can. S.C.R. 240 at 247.

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insisted that only union men should be employed and that as union men would not work along side non-union men the presence of the latter on the job stopped the work.

The appellant, notwithstanding this knowledge, placed his tender and when offered the work indicated his willingness to accept. He neither at that time nor at any time material to this litigation made an effort to become a member of the Master Plumbers' Association. His efforts to obtain the right to employ union men was directed to Local 67 and the union. His first approach was on Saturday morning, November 10, when he met Barker on the street and asked to sign a contract with the union. Apart from the fact that some such request was made, the contradictions between these parties as to this conversation are such that it is impossible to ascertain precisely what happened, but it is clear that no progress was made and that afternoon appellant reported to Ralph Cooper that Barker refused to grant him a contract with the union. Then Ralph Cooper arranged for the conference, which took place on Monday, November 12, when Davis, Cooper, Bruce and Barker were present. When this conference failed to advance his position toward the attainment of a contract, appellant asked Cooper for a further delay of four days. This was granted and that evening the appellant wrote and delivered to Barker the letter dated November 12. Throughout this letter, as well as throughout his conversation with Barker, he does not indicate any change in his opinion respecting the union, which he frankly admitted he had often criticized as being unfair to him and not having adhered to its constitution. It was open to the union and respondents to conclude, particularly because of their past disagreements and no indication of any change in his views, that appellant's main concern was that he get a contract with the union which would give him the privilege of carrying out his contract with the Cooper Company. In any event, the union had a right to take the position that it would deal only with master plumbers who were members of the Master Plumbers' Association and that journeymen plumbers should individually apply for membership. The appellant did not endeavour to obtain membership in the Master Plumbers'

Association in Hamilton and through that association to deal with the union, nor did the journeymen plumbers in his employ apply for membership in Local 67.

Appellant selected his own method for making his application to the union and pressing for its acceptance. It was not in accord with the practice of the union. We need not speculate as to what position the union would have taken had appellant become a member of the Master Plumbers' Association. It is sufficient that he did not do so at any time material hereto, and the union was within its rights in these circumstances in not formally considering his application until he had done so.

Appellant's contract was suspended as of November 8 but not cancelled until the 19th of November. The intervening time was given to appellant because of his assurance that he would make arrangements with the union. When on November 19 he had not succeeded, at the request of the Cooper Company he signed the release.

Throughout the evidence establishes that the respondents did no more than what they individually conceived to be their respective duties as officers of the union and Local 67. The evidence as to their conduct does not support a conclusion that they conspired or in any way agreed or combined to injure the appellant. The evidence does support the finding of the learned trial Judge:—

> I am not prepared to find there was anything in the actions of the defendant Bruce inconsistent with an endeavour to have the agreement beween the Union and the Ferguson Company lived up to and to assist it and the Cooper Construction Company in carrying out their respective contracts under the conditions of such agreement plus possibly a desire to secure with respect to that job and future jobs the employment of Union men.

The evidence does not support a conclusion that Bruce in communicating with Davis, or any language or acts on the part of Bruce and Barker or either of them was the cause of the cancellation of appellant's contract. It rather leads to the conclusion that Davis acted upon his own judgment and just as he would have acted had he otherwise learned or discovered that non-union men were being or would be employed on the construction of this building. In these circumstances there was no interference on the part of the respondents with contractual relations within

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the meaning of the oft-quoted statement of Lord Macnaghten in *Quinn* v. *Leathem* (1), in referring to *Lumley* v. *Gye* (2).

* * * that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference.

The evidence does not support any of the appellant's allegations with respect to the existence of a boycott on the part of the respondents.

The appellant asks that conclusions favourable to his contention be drawn from the record in Bruce's diary of Thursday, November 8, reading in part: "Hamilton, with B. A. Barker. We met Mr. Davis of H. K. Ferguson Co. on Proctor Gamble job—and had Newell case disposed of, —saw W. Clark and Adam re job and need of taking on work."

On Thursday, November 8, Bruce visited Hamilton. He saw Davis, as already intimated, and because of the latter's complete acquiescence with respect to his company's obligation to employ only union men, he recorded "had Newell case disposed of." On the same day Bruce interviewed Clark of the Adam Clark Company and assured him that if he would take the contract he (Bruce) would do his best to supply the necessary men. Bruce did not, nor did he purport to, effect a contract between Adam Clark Company and the Cooper Company. It is not suggested he had any authority to do so. Moreover, Ralph Cooper states that at the conference on Monday, November 12:—

* * * and finally we decided that we would go back and talk to the Adam Clark organization and see if they would take the job on.

Bruce's conduct both on November 8 in interviewing Clark and his conduct on November 12 does not appear to be any different from that of a union man who was anxious to have the employers act within the limits prescribed by the union rules and when they did so that he would exert his best effort to see that the necessary men were provided and thereby delays avoided.

The appellant objected to secondary evidence of the agreement between H. K. Ferguson Company Inc. and the

(1) [1901] A.C. 495 at 510. (2) (1853) 2 E. & B. 216.

union. Appellant had indicated upon the examination for discovery that he would insist upon the production of the original if evidence of this agreement was sought to be adduced. As a consequence, respondent Bruce asked his head office in Washington, D.C., for the original. He did not specify the date, and as apparently a new contract is signed every year and his request was made in 1947, head office sent him the 1947 contract. Bruce says he was familiar with both of these contracts and that certainly the sections material to this litigation were identical and that he did not notice the date until the trial. He then wired for the 1945 original which covered the time material to this action and was advised that because of the confusion in moving their offices it could not be found. This evidence does not establish either that it was lost or destroyed. It was out of the jurisdiction, but it is clear that reasonable efforts would have obtained it. On the part of the respondents secondary evidence, therefore, was not admissible. *Porter* v. *Hale* (1).

Appellant overlooks, however, that as part of his own case he adduced in evidence through his witness Ralph Cooper:—

"Well, the H. K. Ferguson Company have an agreement with A. F. of L. steamfitters and pipe men in the States, and of course we have to have union men on this job, so," he said, "you had better cheek into this immediately."

* * * I called Mr. Newell and said to him, "I want it clearly understood that all men that you put on the Proctor & Gamble project must be union men. We want no difficulty. Cooper Company have for years hired nothing but union men, we have nothing but the finest co-operation from the union and it has to be a union job." Mr. Newell said, "All right, I will take care of that," and he said, "you leave it with me for a few days."

And again:—

Q. Taking this specific contract, this P. & G. Contract, would you have been able to hire him on this P. & G. Contract if you knew he did not hire union men?—A. Not with the set-up, not with the agreement which the Ferguson Company had with the A.F. of L. Union.

And the appellant himself deposed:—

In the large contracts it is generally in the closed shops, and it is mandatory for the union members when making agreements that they have a clause inserted there, they must have a sympathetic clause, and no agreements are permissible by the head office, United States, unless the Association the defendants belong to has that clause.

(1) (1894) 23 Can. S.C.R. 265.

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And again:—

That stops the whole job, through my interference, would term it, by not having union men on the job. The union men won't work side by side with the non-union men.

If a party in the conduct of his own case adduces inadmissible evidence, he cannot subsequently complain if that evidence be taken into account in determining the litigation. *Goslin* v. *Corry* (1). This is upon the same principle that evidence adduced to which objection was not taken at the proper time cannot be objected to upon an appeal.

Both parties are bound by the view taken of their respective cases and the mode of conducting them by their counsel at the trial and they cannot look for a new trial on grounds admitted to be urged at N.P. * * * and where evidence has been admitted without objection as relevant to the issue, it cannot be objected to as inapplicable after the judge has begun to sum up.

Roscoe's *Evidence in Civil Actions,* 20th Ed., p. 235; *Phillip* v. *Benjamin* (1); *Wigmore on Evidence,* 3rd Ed., sec. 18, p. 323.

The foregoing evidence of Ralph Cooper, which is supported by that of the appellant, justified the statement of the learned trial Judge:—

The Ferguson Company had an agreement with the United Association of Journeymen Plumbers and Steamfitters of the United States and Canada to use all Union men and of which Bruce was apparently aware.

The judgment of the Court of Appeal for Ontario should be affirmed and the appeal dismissed with costs.

RAND J.:—The courts below have concurred in finding that there was no direct object or purpose by individual or concerted action of the respondents to injure the business of Newell, the appellant. The general building contractor had awarded to Newell certain work of plumbing and heating, and upon that fact coming to the notice of the respondents, they drew to the attention of the Engineering Company, which was entrusted with the total construction, the fact that, in those circumstances, they would be unable to supply union labour required for other work of the same general nature as that awarded Newell. The International Union, which the respondents in dif-

(1) (1839) 9 A. & E. 644.

ferent capacities represented, had a written agreement with the Engineering Company that only union employees for that class of work would be engaged on constructions undertaken by them. It was also a rule of the Union that members would not work on a job in association with non-union labour of the same class except in special cases approved by named officers.

It is now established beyond controversy that in the competition between workmen and employers and between groups of workmen, concerted abstention from work for the purpose of serving the interest of organized labour is justifiable conduct. *Crofter Harris Tweed* v. *Veitch* (1), is the latest authority for this view, and it clarifies the distinction between such action for an object or purpose of the sort mentioned and an agreement of two or more to injure a competitor. In the analysis made by Viscount Simon, in particular, of such and similar purposes as they have been exemplified in the leading cases from *Mogul S.S. Company* v. *McGregor,* Gow & Co. (2), *Allen* v. *Flood* (3), and *Quinn* v. *Leatham* (4), *to Sorrell* v. *Smith* (5), the purpose of malice, as meaning either malevolence or a primary intent to injure a competitor, as distinguished from an incidental effect of a predominating purpose of another nature, and that of strengthening or defending a recognized and accepted social interest, are elaborated and differentiated; and where we are not troubled with questions of mixed or multiple purposes, as we are not here, the legal result in the ordinary case presents little difficulty.

The purpose, therefore, of the respondents as found, which the evidence, I should say, clearly supports, having been to serve the interest of the Union and not having been directed at injury to Newell, the action of the respondents would have been unexceptionable if its effect had been merely to influence the building contractor not to enter into an engagement with Newell. But there was an existing contract which the building contractor elected to

(1) [1942] 1 All E.R. 142.
(2) [1892] A.C. 25.
(3) [1898] A.C. 1.
(4) [1901] A.C. 495.
(5) [1925] A.C. 700.

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bring to an end; and the question is whether that circumstance gave an objectionable character to the conduct of the respondents.

What they did was, at most, to refuse to authorize the union men to work on the job or to persuade them not to do so while a certain condition of things existed. There was no act of which, on the foregoing conception of legitimate conduct, the appellant could complain. A building contractor who, in the conditions of labour organization today, contemplates available labour as unaffected by its own special interests, proceeds on a false assumption; he is familiar with the everyday refusal of union employees, for a variety of reasons, to enter upon work. The market of labour is, therefore, restricted by considerations of competing interests which are now part of the accepted modes of action of individuals and groups.

Does the exercise of those rights become illegal by declaring the reason for it or by stating the conditions necessary to a willingness to work, when that reason or those conditions relate to an existing contract? It would seem to be obvious that it does not. If, when a contractor has entered into an obligation of the sort here, individuals cannot ascribe to that fact their decision to remain as they are, then their freedom of contract is so far denied; and the statement of that reason in the circumstances of this case is not to be converted into an inducing offer to remove the objectionable fact.

The action of the respondents was not, therefore, either a procurement or an inducement of the breach which I will assume took place in Newell's contract; but by it the building contractor, having regard to the arrangement made by the Engineering Company and the Union, and the necessity for obtaining considerable labour for the remaining portion of the plumbing and heating work, facing on the one hand the contract and on the other the source of labour not open to him, was put to a choice of the side on which he considered his own interest to lie. It is, I think, the proper view to attribute the cancellation of the contract not to the refusal of labour by the respondents, but to the chosen course of action of the building contractor. The decision to abstain may have been the

controlling influence upon him, but whether we attribute the rule to the balance of policy between these contending factors, or to the election on the part of the building contractor, the result is the same. If this were not so, by unitedly declining to associate themselves with non-union workers, the respondents and their workmen would involve themselves in illegality brought about by the mere fact that the desire of the building contractor for their labour was stronger than that of observing the contract with Newell: by the offer of work made them, they became involved in the necessity of either accepting it with its objectionable conditions, or of avoiding collective refusal, or paying damages. To state that proposition in relation to the circumstances with which we are dealing is, I think, to answer it.

I would dismiss the appeal with costs.

LOCKE J.:—The appellant's claim as pleaded was that the respondent Barker, who was at the relevant time the business agent of Local Union 67 of the United Association of Journeymen Plumbers and Steamfitters, and Bruce, the organizer for Canada of the said Union, had unlawfully and maliciously conspired and agreed with other members of the said Local Union to injure the appellant by unlawful means in the pursuit of his lawful trade and calling and to destroy his business as a master plumber and steamfitter. In particular it was alleged that by threats, coercion and intimidation practised by the respondents upon the W. H. Cooper Construction Company, Limited, and in consequence of a boycott instituted by the respondents and others unknown against the appellant, the said Company had broken a contract which it had entered into with the appellant, whereby the appellant suffered damage: alternatively, the appellant alleged that the respondents with others unknown had "unlawfully and knowingly procured the W. H. Cooper Construction Company, Limited, to commit a breach of its contract with the plaintiff." While, in addition, the appellant alleged that the respondents operating through the Union had instituted and pursued a system of boycott against the plaintiff, allegations which apparently refer to matters other than the alleged loss of the Cooper contract, this claim was not pursued.

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Accepting the finding of the learned trial judge that there was a concluded oral agreement made by the appellant with the Cooper Company it is not denied that after this had been done Cooper informed the appellant that it was necessary that he should employ Union labour for the work and he agreed to do this. I agree with Laidlaw J.A., that this undertaking on the part of the appellant became a condition of his contract with the Cooper Company, failure to comply with which would relieve that company of its obligations under the agreement. Upon conflicting evidence the learned trial judge has found that the statement made by the respondent Bruce to Cooper was "I can't stop you from carrying on with Mr. Newell's contract at all but you realize that if Mr. Newell carries on with this work that I cannot give Al Davis all the men he will require for this process piping." Davis was an official of the H. K. Ferguson Company of Cleveland, a concern which had the principal contract for the work. This company had given a subcontract to the Cooper Company for part of the work only, the Ferguson Company proposing itself to do a major part of the work including the equipment and process piping, which would require the employment of men of similar qualifications to those employed by the appellant. Apart from any question as to whether a contract between the Ferguson Company and the International Union obligating the former to employ only Union men upon any of its undertakings was in strictness proven, the evidence showed that the members of the Union were by the terms of its constitution forbidden to work with non-Union men and that the Ferguson Company recognized that it was obligated to permit only Union men to work upon the job. It thus appears that Bruce's statement to Cooper was merely a statement of fact. Unless it would be an actionable wrong on the part of the plumbers and steamfitters, members of the Union, as between themselves and the appellant to decline to work with non-Union men, and it is quite clear that it would not, to state that they would so decline cannot be actionable at the suit of the appellant.

When the appellant found that he was unable to comply with the condition of his contract with the Cooper Com-

pany that only Union men would be employed upon the work, he agreed, at the request of that company, to the cancellation of his contract and to release it of any obligation. There was in fact no breach of contract by the Cooper Company, as alleged in the pleadings.

Had the claim been based upon a contention that by some unlawful act of the respondents the appellant had been disabled from carrying out his obligations, it would also, in my opinion, fail. The learned trial judge has found that there was no evidence of conspiracy or of anything unlawful in the acts of the respondents and it has been found in the Court of Appeal that it was not proven that the failure of the appellant to reach an agreement with Local Union 67, or to obtain the benefit of any agreement between that Union and the Master Plumbers' Association, was caused by any act on the part of the respondents. I agree with these conclusions.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Morris & Morris.*

Solicitors for the respondents: *Roebuck, Bagwell, McFarlane and Walkinshaw.*

J. J. GRAY (DEFENDANT) ..... APPELLANT;

AND

J. D. CAMERON, A. L. AINSWORTH, HENRY ARMSTRONG (PLAINTIFF) } RESPONDENTS.

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*Mar. 13

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Guarantee—Specific Performance—Covenant to relieve guarantors of bank loan within specified time—Whether, in absence of demand by bank on guarantors, court empowered to decree specific performance.

The appellant on July 25, 1945, entered into an agreement in writing with the respondents as follows: "For valuable consideration, which I hereby acknowledge to have received from you I hereby covenant to (sic) agree with you to guarantee, in your stead, the debt of Ontario Phosphate Industries Ltd. to the Royal Bank of Canada, twenty-five thousand dollars ($25,000) in amount and further to indemnify and save you harmless against any claim against you whatsoever arising out of your guarantee of the said debt, and to relieve you from your guarantee within sixty days from date."

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

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The respondents, no demand having been made by the bank, brought an action for specific performance of the agreement or, in the alternative, for damages. The action was dismissed. On appeal to the Court of Appeal for Ontario, that court while agreeing with the trial judge that so far as the document sued on gave the respondents a right of indemnity the action was premature, held that the covenant to relieve the respondents from their guarantee within sixty days was a binding agreement in no way contingent upon their first being indemnified, and granted an order for specific performance.

Held: (Affirming the judgment of the Court of Appeal for Ontario). Taschereau and Locke JJ. dissenting in part, that a right was conferred upon the respondents under the covenant to be relieved from their guarantee within the sixty days specified which was in no way contingent upon their first being indemnified under the terms of the guarantee. There was a binding agreement and the appellant was in breach of it. The agreement is more than "to guarantee in your stead" as it reads "to relieve you from your guarantee within 60 days from date". This covenant might be implemented in various ways, and the parties may well have had in mind that the appellant would desire to pay the debt guaranteed by the respondents, which would constitute performance of his obligation. Any award of damages would be too conjectural: *Adderley* v. *Dixon,* 1 S. & S., 607; and in any event would not be adequate.

The respondents have done all that was required of them and the appellant failed to establish that the provisions of the order were beyond the powers of the court and not proper under all the circumstances.

Taschereau and Locke JJ., while otherwise concurring with the majority of the Court, dissented as to the court's power to grant specific performance.

Per: Taschereau and Locke JJ., dissenting in part:—The judgment of the Court of Appeal can only be construed as a direction to the appellant to pay off the bank. So construed it conflicts with the principle that specific performance is not granted of a covenant to pay money to a third person, the covenantee being left to his remedy in damages. *Hall* v. *Hardy,* 3 P. Wms. 187; *Crampton* v. *Varna Ry. Co.,* 7 Ch. 562; *Atty.-Gen.* v. *MacDonald,* 6 Man. R. 545; *Lloyd* v. *Dimmack,* 7 Ch. D. 398; *Ascherson* v. *Tredegar,* 2 Ch. 401.

As to the alternative direction that in default of such payment security be given even if such direction could be supported, there is no warrant for it since the respondents, being apparently satisfied with the appellant's personal covenant, are entitled to nothing more. *Antrobus* v. *Davidson,* 3 Mer. 569; *Brough* v. *Oddy,* 1 Russ. & My. 55; *The King* v. *Malcott,* 9 Hare 592; *Hughes Hallett* v. *Indian Mammoth Gold Mines,* 22 Ch. D. 561.

For the judgment entered by the Court of Appeal an order should be substituted declaring the appellant bound to indemnify the respondents from liability under their guarantee but otherwise dismissing the claim, without prejudice to the rights of the respondents to bring such further action as they may be advised if there is default thereafter.

APPEAL from the judgment of the Court of Appeal for Ontario (1), reversing the judgment of Wilson J., dismissing the action of the plaintiffs respondents.

J. W. Pickup K.C. and *W. B. Williston* for the appellant.

Joseph Sedgewick K.C. for the respondent.

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

KERWIN J.: The defendant, Gray, appeals against a judgment of the Court of Appeal for Ontario reversing the judgment of Wilson J., at the trial, which had dismissed the action of the plaintiffs respondents, Cameron, Ainsworth and Armstrong. The action was brought for specific performance of an agreement dated July 25, 1945, or, in the alternative, for damages in the sum of $25,000 and accrued interest and for further and other relief. The agreement reads as follows:—

To
Messrs. J. D. Cameron, L. Ainsworth and Henry Armstrong

For valuable consideration, which I hereby acknowledge to have received from you I hereby covenant to (sic) agree with you to guarantee, in your stead, the debt of Ontario Phosphate Industries Limited to the Royal Bank of Canada, Twenty-five thousand dollars ($25,000) in amount and further to indemnify and save you harmless against any claim against you whatsoever arising out of your guarantee of the said debt, and to relieve you from your guarantee within sixty days from date.

Dated at Toronto this 25th day of July, 1945.

The Court of Appeal agreed with the trial judge that so far as the document gave the respondents a right of indemnity, the action was premature since the damages against which indemnity was provided had not accrued. However, fixing upon the words "I hereby covenant * * * to relieve you from your guarantee within sixty days from date", the Court of Appeal decided that a right was thereby conferred upon the respondents which was in no way contingent upon their first being indemnified under the terms of the guarantee referred to. With that decision I am in complete agreement. The argument that there was no binding agreement is satisfactorily disposed of by Mr. Justice Roach and nothing, I think, may be usefully added to his reasons upon that point.

Having concluded that there was a binding agreement and that the appellant was in breach of it, the Court of

(1) Not yet reported.

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Appeal made an order which has been vigorously attacked by counsel for the appellant as being unauthorized. It is pointed out in the reasons for judgment in the Court below that no case precisely in point has been found, and counsel have been unable to refer us to any. To a Court of Equity that is no insurmountable objection.

There is no doubt as to the rule that, generally speaking, performance will not be granted of a mere agreement to loan money or to pay money to a third party. Here, however, the agreement is more than "to guarantee in your stead" as it reads "to relieve you from your guarantee within 60 days from date". This covenant might be implemented in various ways, and the parties may well have had in mind that the appellant would desire to pay the debt guaranteed by the respondents, which would constitute performance of his obligation. It is an unusual contract and any award of damages to the respondents would be too conjectural: *Adderley* v. *Dixon* (1); and in any event would not be adequate. The terms of the order made by the Court of Appeal are lengthy but are necessarily so in view of the case and of the position in which the respondents find themselves as a result of the appellant's failure to fulfil his part of the bargain. The respondents have done all that was required of them and counsel for the appellant has been unable to satisfy me that the provisions of that order are beyond the powers of the Court and that they are not proper under all the circumstances. The ordering of the appellant to repay the respondents such sums as they have paid since the issue of the writ is merely a detail that a Court possessing equitable jurisdiction is entitled to cover in the working out of the rights and obligations of the parties.

The appeal should be dismissed with costs.

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

LOCKE J.:—By a guarantee in writing dated October 26, 1944, the respondents and one Ian Armour jointly and severally guaranteed payment to the Royal Bank of Canada of the liability which Ontario Phosphate Industries Limited had incurred or might incur to the bank up to the sum of

(1) (1824) 1 S. & S. 607.

$25,000 with interest from the date of demand for payment at the rate of five per centum per annum. It was alleged in the statement of claim that on October 28, 1944, the above mentioned company borrowed from the bank the sum of $25,000 upon a demand note endorsed by the plaintiffs and that the defendant, by an instrument dated July 25, 1945, had agreed with the respondents to guarantee that debt in their place and stead, to indemnify them against obligation upon their guarantee, and to relieve them of liability thereunder. It was not alleged that the bank had made any demand for payment or that the plaintiffs had paid anything on account of their liability as endorsers of the note. The relief claimed in the action was specific performance of the last mentioned agreement and, in the alternative, damages in the sum of $25,000 and accrued interest to the date of the trial. The statement of defence denied that there was any concluded agreement between the parties, denied that the plaintiffs had suffered any damage and alleged that they had not paid the bank and that the principal debtor was in existence and might pay the bank and contended that the claim was not properly the subject of a mandatory injunction.

By the agreement of July 25, 1945, the appellant agreed with the respondents to guarantee in their stead the debt of the company to the bank "and further to indemnify and save you harmless against any claim against you whatsoever arising out of your guarantee of the said debt and to relieve you from your guarantee within sixty days from date." The evidence did not prove that any demand for payment of either principal or interest had been made by the bank upon the respondents prior to the commencement of the action, nor had they paid anything to the bank. The evidence of the bank manager disclosed that, at least in so far as he was concerned, the guarantee of Gray had never been considered as a substitute for the guarantee of the respondents and of Cameron and that the only way the guarantors would have been relieved was by payment in full of the note. Some payments on account of interest had been made by each of the guarantors but this was some months after the commencement of the action. The learned trial judge, considering that it was impossible to order the bank to accept the appellant's

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guarantee in lieu of that of the respondents, held that the agreement was impossible of performance and, in so far as the claim was for indemnity he considered it to be premature. As to damages, he found that there was no evidence and dismissed the action without prejudice to whatever claim the respondents might thereafter see fit to advance "in regard to what they alleged to be the agreement between the parties." In the Court of Appeal Mr. Justice Roach, delivering the judgment of the Court, found that there was a binding agreement between the parties obligating the present appellant to discharge the obligations referred to in the agreement of July 25, 1945, and, while holding the claim in so far as it was one for indemnity to be premature, decreed specific performance of that part of the agreement whereby the appellant had undertaken to relieve the respondents from their guarantee within sixty days from its date. The formal judgment of the Court declared that the document sued upon was binding on the appellant, directed that he pay to each of the respondents the amount which they had paid respectively to the Royal Bank and required the appellant within thirty days:

to cause the appellants (the present respondents) to be relieved from their guarantee to the bank and in default thereof ordering that the respondent shall either

(*a*) pay into Court in this action an amount equal to the balance unpaid to the bank, or

(*b*) deposit with the Accountant of the Supreme Court securities in such form and in such amounts as shall be adequate for the protection of the appellants against all liability under their guarantee to the bank;

If the parties cannot agree on the amount unpaid to the bank or if they cannot agree on the form or the adequacy of any securities proffered by the respondent pursuant to this judgment, then there shall be a reference to the Master to ascertain the amount or determine the form and adequacy of the securities as the case may be.

If at any time, or from time to time while the liability of the appellants on their guarantee remains undischarged, the bank shall demand payment from them of any sum or sums on account thereof, they shall be entitled to move before the Master, on notice to the respondent, for payment out to them from the money in Court of an amount equal to the amount demanded by the bank or for delivery to them of securities having then a value in the open market equal in amount to the amount demanded by the bank, and the same shall be used by the appellants in satisfying such demand of the bank.

If the liability of the appellants on their guarantee shall have been discharged wholly or in part otherwise than by payment by the

appellants, leave is reserved to the respondent to move before the Master, on notice to the appellants, for payment out to him of an appropriate part or the whole of the money then on deposit with the Accountant or for re-delivery to him of an appropriate part of the securities which shall have been deposited by him in lieu of money.

I agree with the conclusion of the judgment of the Court of Appeal that the agreement of July 25, 1945, became and remains binding upon the appellant. The point to be determined is, in my opinion, whether or not specific performance may be granted of such an agreement.

The judgment of the Court of Appeal, as will be noted, requires the appellant to cause the respondents to be relieved from their guarantee to the bank and this, of necessity, would involve either arranging with the bank to accept the obligation of the appellant in lieu of that of the respondents, or to pay the promissory note. If the first is the meaning ascribed to the language of the undertaking, the claim was obviously not one which could be the subject of an action for a specific performance since this would involve requiring the appellant to make an arrangement with the bank, and that institution was not a party to the action and might refuse to make any such arrangement. A court of equity will not make a decree which cannot be enforced. If the proper construction was that the appellant thereby obligated himself to pay off the debt owing by the company to the bank, it was a covenant by the appellant to pay money to a third person, an obligation in respect of which (with certain exceptions to be hereafter noted) specific performance is not granted, the obligee being left to his remedy at law. Before considering this aspect of the matter, it is to be noted that in so far as the claim advanced in the pleadings may be construed as a claim for indemnity, it was clearly premature since no demand was alleged to have been made, nor was any proven to have been made by the bank upon the respondents prior to the institution of the action and they had paid nothing to the bank prior to that time. The claim, it should be further noted, was not for a declaration that the appellant was liable to indemnify the respondents, nor were the proceedings in the nature of an action *quia timet*.

It must be assumed that it was not intended by the judgment of the Court of Appeal to direct the appellant to make arrangements with one not a party to the action

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to accept his guarantee in lieu of the respondents. Since the only possible alternative is to pay off the bank, the judgment must, in my opinion, be interpreted as an order directing the appellant to do so. In 31 Hals. (2nd Ed.) at 329, it is said that:—

> The remedy (of specific performance) is special and extraordinary in its character, and the Court has a discretion to grant it, or to leave the parties to their rights at law. The discretion of a Court exercising equitable jurisdiction is, however, not an arbitrary or capricious discretion; it is a discretion to be exercised on fixed principles in accordance with the previous authorities. It is not simply a question of what the individual judge thinks is fair or reasonable; the exercise of his discretion must be judicial.

which, in my opinion, accurately expresses the law. The ground of the jurisdiction is the inadequacy of the remedy at law and, where damages will give a party the full compensation to which he is entitled and will put him in a position as beneficial to him as if the agreement had been specifically performed, equity will not interfere. As long ago as 1733 in *Hall* v. *Hardy* (1), in a note to the decision of Sir Joseph Jekyll, M.R., where upon the special facts specific performance of an award was decreed, it is said:

> These decrees may not have been usual, because awards are commonly to pay money; in which cases a bill in equity to compel a performance is improper.

This statement of the law has been applied to contracts to pay money and consistently followed: *Crampton* v. *Varna Co.* (2), Lord Hatherley, L.C. at 567; *Attorney-General* v. *MacDonald* (3), Taylor C.J., at 375 and Killam J. at 378; *Belgo-Canadian Real Estate Co.* v. *Allan* (4), Fullerton J.A. at 560; 31 Hals. (2nd Ed.) 408. Specific performance is not granted of an agreement to loan money (*South African Territories* v. *Wallington* (5)); the remedy is in damages (*General Securities* v. *Don Ingram, Ltd.* (6)). There is, however, an exception in the case of the claims of sureties who may upon payment of the guaranteed debt being demanded of them obtain a decree of specific performance directing the principal debtor to pay it, and the jurisdiction is also exercised in certain circumstances as between co-sureties. The leading cases illustrating the application of the principle in proceedings such as these

(1) (1733) 3 P. Wms. 187; 24 E.R. 1023.
(2) (1872) 7 Ch. 562.
(3) (1890) 6 Man. R. 372.
(4) (1924) 34 Man. R. 545.
(5) [1898] A.C. 309.
(6) [1940] S.C.R. 670.

are *Ranelaugh* v. *Hayes* (1), *Lloyd* v. *Dimmack* (2); *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.* (3); *Ascherson* v. *Tredegar* (4). These cases were brought against the principal debtor by sureties but in *Wooldridge* v. *Norris* (5), a surety on a bond to secure a money debt was secured by another bond of indemnity entered into by the principal debtor's father who had died having by will devised certain properties specifically upon trust to pay the debt, and it was held that the surety, though he had not actually paid anything, was entitled to maintain a bill *quia timet* against the executors for administration, payment of the debt and of an indemnity. Sir G. M. Giffard, V.C. found that the plaintiff was entitled to file the bill on the principle that a court of equity will prevent injury in proper cases before any actual injury has been suffered, by proceedings *quia timet,* in analogy to proceedings at common law where in some cases a writ may be maintained before any molestation or distress. In *Wolmershausen* v. *Gullick* (6), at 525, Wright J. refers to this decision as proceeding on the particular terms of the covenant. Wooldridge's case is, in some respects, similar to the present where the appellant has agreed to relieve the respondents from their liability within a fixed period and might conceivably justify an action *quia timet* if there had been any circumstances present and alleged in the pleadings justifying the intervention of the court to prevent loss; but there is neither one nor the other here.

In my opinion, the judgment in this case, construing it as I do as a direction to the appellant to pay a sum of money to the Royal Bank, not being in a proceeding between surety and principal debtor or between co-sureties or in proceedings taken *quia timet,* conflicts with the long established principle that specific performance is not granted of a contract to pay money to a third person. As to the alternative direction that, in default of such payment, security is to be given either by paying money into or depositing securities in court, there is, in my opinion, no warrant, even if the judgment directing the payment could be supported. The respondents in entering into the agreement with the appellant did not require from him any

(1) (1683) 1 Vern. 189.
(2) (1877) 7 Ch. D. 398.
(3) (1882) 22 Ch. D. 561.
(4) [1909] 2 Ch. 401.
(5) (1868) 6 Eg. 410.
(6) [1893] 2 Ch. 514.

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security that he would discharge his obligation. They were apparently satisfied with his personal covenant and I am unable to preceive upon what ground a court is justified in directing that he give security for its performance. In *Antrobus* v. *Davidson* (1), the colonel of a regiment had taken a bond of indemnity from his agents with another as surety in respect of all charges to which he might become liable by their default: the agent having afterwards become bankrupt and the government having given notice to the representatives of the colonel (who had died) of a demand upon his estate by virtue of an unliquidated account, a bill by such representatives against the representatives of the surety to pay the balance due to the government and also to set aside a sufficient sum out of their testator's estate to answer future contingent demands, though attempted to be supported upon the principle of a bill *quia timet,* was dismissed. The colonel had accepted the covenant of the surety and Grant, M.R. said in part:—

> What is here asked is to have a new security and one of a totally different sort from that which Davidson (the surety) consented to give, —a security by deposit of money instead of a security by personal obligation.

In *Brough* v. *Oddy* (2), where the defendant had entered into an agreement to pay a stipulated amount annually by quarterly payments in the event that they were not paid by the principal obligor, the plaintiff claimed payment of amounts due and security for the payment of amounts thereafter to fall due. Sir John Leach, M.R., after referring to the terms of the engagement, said that he was not aware of any case in which, where the contract created only a personal obligation, the Court had ordered a party to give a security on property for its due performance. In *The King* v. *Malcott* (3), a lessor claimed the administration of the estate of his lessee and to have a sufficient part of the assets impounded to answer future possible breaches of covenant in the lease, thus in effect asking for a decree of specific performance against the estate and the giving of security to ensure it. Sir G. J. Turner, V.C., dismissing the claim, said:—

> Why should the lessor have any such right as he claims in this case? How can it be the result of the relation between landlord and tenant? The landlord has not bargained with his tenant that the tenant's assets,

(1) (1817) 3 Mer. 569.
(2) (1829) 1 Russ. & My. 55.
(3) (1852) 9 Hare 592.

or any fund whatever, should be impounded for the purpose of securing his rent or the due performance of his covenants. He looks to the personal security of the lessee or to the rights which he has expressly reserved to himself over the subject of the demise; and farther than that he cannot proceed at law. Why should a Court of Equity give a more extended effect to the obligation contracted between a landlord and tenant than is given by a court of law?

In *Hughes Hallett* v. *Indian Mammoth Gold Mines supra,* where a claim was made upon a contract of indemnity and security in respect of payments which might become due in the future, Fry, J. referring to *Brough* v. *Oddy, supra* said:—

> If the plaintiff was minded to accept the personal contract of Cookesley for indemnity, he must be content with that and I cannot possibly give him any better indemnity.

The respondents were apparently satisfied with the personal covenant of the appellant and are entitled, in my opinion, to nothing more.

It was shown that after the commencement of the action the respondents had paid to the Royal Bank certain sums for interest upon the note and judgment was given against the appellant for the amounts so paid. As to this, no such claim was advanced by the statement of claim and as the rights of the respondents must be determined as of the date of the commencement of the action this portion of the judgment cannot, in my opinion, be supported.

While the statement of claim did not ask a declaration that the appellant was bound by the agreement of July 25, 1945, that issue has been fully argued upon what, I am satisfied, is all of the available evidence and, in the interests of all parties, should not be further litigated. For the judgment entered by the Court of Appeal I would substitute an order declaring the appellant to be bound to indemnify the respondents from liability under their guarantee but otherwise dismissing the claim, without prejudice to the right of the respondents to bring such further action or actions as they may be advised if there is default hereafter. If there is such default, the respondents will have their remedy in damages.

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The appellant should have his costs of this appeal and I think, since the respondents did not by their pleadings claim the only relief to which they are entitled, there should be no costs of the proceedings other than in this Court.

Appeal dismissed with costs.

Solicitors for the appellant: *Fasken, Robertson, Aitchison, Pickup & Calvin.*

Solicitor for the respondents: *Joseph Sedgwick.*

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*Mar. 27

*May 15

JOSEPH VERNON WELCH.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO

Criminal Law—Appeals—Autre fois acquit—Autre fois convict—Conviction for manslaughter on indictment for murder quashed for misdirection but new trial not ordered nor an acquittal directed—Fresh indictment preferred by Crown for manslaughter—Statutory authority given Court of Appeal to direct acquittal or a new trial, mandatory—Failure of court to exercise such authority precludes another trial under s. 873—The Criminal Code, R.S.C. 1927, c. 36, ss. 856, 873, 905-909, 951, 1014 (3).

The Criminal Code provides:

"Section 1014 (3). Subject to the special provisions contained in the following sections of this Part, when the court of appeal allows an appeal against conviction it may

(*a*) quash the conviction and direct a judgment and verdict of acquittal to be entered; or

(*b*) direct a new trial:

and in either case may make such other order as justice requires."

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

**Reporters Note:* The case was first argued on Nov. 21, 1949 before Rinfret C.J., Kerwin, Taschereau, Estey and Locke JJ. C. L. Dubbin for the appellant and W. B. Common, K.C., and J. D. Bell for the Crown. On Feb. 7, 1950, the Court directed a re-hearing of argument in particular on the effect under Canadian Law of a Court of Appeal quashing a conviction without ordering a new trial. The re-hearing on March 27, 1950, was heard by the full bench. G. A. Martin, K.C., and C. L. Dubbin for the appellant and W. B. Common, K.C., for the respondent.

Held: By the majority of the court (Rinfret C.J., Kerwin and Taschereau JJ., dissenting), that the exercise of the statutory authority given to the court of appeal under s. 1014 (3) to direct an acquittal to be entered, or to direct a new trial, and in either case to make such other order as justice requires, is not permissive but mandatory. The right of appeal being such an exceptional right, all the substantive and procedural provisions relating to it must be regarded as exhaustive and exclusive and need not be expressly stated in the Statute. If therefore the court of appeal fails to exercise its authority and refrains from directing a new trial, another trial cannot be had by resorting to s. 873. The powers under that section are not absolute and cannot obtain in all circumstances. Like many others in the Code, they remain subject to qualifications and restrictions implicitly and necessarily flowing from other provisions in the same Act.

Per Rinfret C.J. and Taschereau J., dissenting: The only competent authority in a case of misdirection to order a new trial is the Court of Appeal, but failure of that court to make such an order does not preclude the Crown from exercising its rights to prefer a fresh bill of indictment under s. 873. The proceedings under the fresh bill of indictment do not constitute a *new* trial, within the meaning of s. 1014, they initiate a *second* trial, entirely independent of the first on a new indictment. A "new trial" which alone the court of appeal has the power to order in a criminal prosecution, is the re-examination of a case on the *same information* or *indictment*. It supposes a completed trial, which for some sufficient reason has ben set aside, so that the issues may be litigated *de novo*. It is ordered so that the court may have the opportunity to correct errors in the proceedings at the first trial. Such is not the case here, and unless there are valid reasons to prevent the Crown to initiate a *second trial* as it did, this appeal must fail. We have to decide if the incomplete judgment of the Court of Appeal, is a bar to the exercise by the Crown of its unquestionable power to prefer a bill of indictment. A solid ground of defence would undoubtedly be a plea of *autre fois acquit* or *autre fois convict*, but this cannot be successfully argued. The appellant has neither been acquitted nor convicted, and it is only in such cases that an accused may say, if he is brought to trial again on the same charge, that he has been in "jeopardy" twice. *Rex* v. *Ecker and Fry*, 64 O.L.R. 1 at 3. The law does not allow that a man be tried a second time when he has already been convicted, or exposed to be convicted, when he has already been acquitted, but it does not forbid a second trial when the first did not come to a legal conclusion. Only the pleas of *autre fois acquit* or *autre fois convict* could be successfully raised by the appellant in the present case, and as they both fail, the appeal should be dismissed.

Per Kerwin J., dissenting: The power given to the Court of Appeal under s. 1014 (3) is permissive as indicated by the use of the word "may" and includes the power to allow an appeal and set aside a conviction leaving the Crown free to prefer a new and different indictment, if it sees fit. The powers of the Court of Appeal are not circumscribed as are those of the Court of Criminal Appeal in England and the decisions of that Court are, therefore, of no assistance on the point under review. This appeal is to be decided under the provisions of the *Criminal Code*, *Rex* v. *O'Keefe*, 15 N.S.W.L.R. 1; *Rex* v. *Lee*, 16 N.S.W.L.R. 6,

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distinguished; *Rex* v. *Welch*, [1948] O.R. 884, *Rex.* v. *Pascal*, 95 C.C.C. 288, approved. *Gudmundson* v. *The King*, 60 C.C.C., distinguished. Where an accused upon an indictment for murder is convicted of manslaughter a court of appeal may properly under s. 1014 (3) allow the appeal and set aside such conviction. If it neither directs a verdict of acquittal to be entered, nor directs a new trial, s. 873 (1) is then wide enough to permit the preferring of a bill of indictment for manslaughter. In provinces where there is no grand jury, subsequent sub-sections of s. 873 takes care of the situation. The second ground of the appeal, that, "the accused was entitled in answer to the present indictment to the common law defence that a man should not be put twice in jeopardy for the same matter,"—is not a plea or defence, as the plea of *autre fois acquit* is grounded on the maxim, that a man shall not be brought into danger of his life for one and the same offence, more than once. *Hawkins, Pleas of the Crown*, 8th Ed. Vol. II, c. 35, s. 1. As to the 3rd and 4th grounds of appeal—(*a*) "s. 902 (2) was a bar to the present indictment;" (*b*) "the accused was entitled to succeed on his plea of *autre fois acquit* pursuant to s. 907."—The meaning of s. 907, may be gathered from the use of the word "lawfully" in s. 906 (3), this expresses what has been well understood for many years viz. that the defence of *autre fois acquit* applies only where the first trial has been concluded by an adjudication: *Reg.* v. *Charlesworth*, 121 E.R. 786; *Rex* v. *Ecker*, 64 O.L.R. 1. Here, the only adjudication was against the accused for manslaughter and that adjudication was merely set aside by the first order of the Court of Appeal. As to the first leg of s. 909 (2) "a previous conviction or acquittal on an indictment for murder shall be a bar to a second indictment for the same homicide charging it as manslaughter". This must mean a previous *general* conviction or acquittal.

APPEAL from the judgment of the Court of Appeal for Ontario (1) dismissing the appellant's appeal from a conviction by a judge and jury for manslaughter. The appellant had previously been indicted for murder and convicted of manslaughter, but the conviction was quashed on appeal. (2)

G. A. Martin, K.C., and *C. L. Dubbin*, for the appellant.

W. B. Common, K.C., and *J. D. Bell*, for the respondent.

The dissenting judgment of the Chief Justice and Taschereau J. was delivered by:—

TASCHEREAU J.:—The accused appellant was charged with the murder of his wife and his trial took place at the City of St. Thomas in the County of Elgin, in March, 1949. He was acquitted of the charge of murder but convicted of manslaughter.

(1) [1949] O.R. 592. (2) [1948] O.R. 884.

The Court of Appeal of the Province of Ontario allowed the appeal, and set aside the conviction for manslaughter on the ground of misdirection by the trial judge. The Court however, did not direct a new trial, but in their reasons for judgment, Laidlaw and Hogg JJ. both made the emphatic statement that the accused *was not acquitted.* Mr. Justice Henderson, who also heard the case, was of the opinion that the appeal should be dismissed.

The reason for not ordering a new trial is that on a count charging murder, no count charging any other offence may be joined. (*Cr. Code,* sec. 856). The contention is that if the Court of Appeal had ordered a new trial, although manslaughter is an included offence in a count of murder, the accused would have had to face a second time an indictment charging murder, an offence of which he had previously been acquitted. (*Cr. Code* 951, para. 2). Vide: (*Rex* v. *McDonald,* (1); *Rex* v. *Anthony,* (2); *Rex* v. *Pascal,* (3), Part XX, 849).

A new indictment charging manslaughter was therefore preferred by the Crown, and before Mr. Justice Schroeder and the jury, the appellant pleaded *"autrefois acquit"*, submitting that the Order of the Court of Appeal which did not direct a new trial, had the effect of an acquittal. A jury having been sworn dismissed this contention of the appellant following in this, the direction of the trial judge. The jury then found the accused guilty of manslaughter and he was sentenced to 10 years in penitentiary. The Court of Appeal unanimously dismissed his appeal.

It is now submitted before this Court that the accused, having once before been tried for murder arising out of the same homicide, and convicted of manslaughter, could not again be tried for manslaughter, because that conviction had been set aside by the Court of Appeal, which did not direct a new trial. It is claimed that he cannot be put twice in "jeopardy" for the same matter, and that, under the provisions of section 909, para. 2, his first acquittal on the indictment for murder, is a bar to a second indictment for the same homicide charging it as manslaughter.

It is an elementary principle of criminal law that when an accused charged of a crime has been convicted or acquitted by a jury, he cannot be charged a second time for

(1) [1943] O.R. 158.
(2) [1943] O.W.N. 778.
(3) [1949] 2 W.W.R. 849.

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the same crime, and it is also clear that if on a charge of murder, an accused is acquitted and not found guilty of manslaughter, he cannot be charged of manslaughter, because under the provisions of section 907, para. 2, *Cr. Code,* the accused *might* on the former trial have been convicted of manslaughter, and this is obviously a bar to a new charge of manslaughter.

But in the present case, the accused was acquitted of murder and found guilty of manslaughter, and the Court of Appeal, although it found that there had been misdirection, *did not acquit the appellant.* The Order of the Court was that the trial was not a fair one, but the reasons of Laidlaw and Hogg JJ. clearly indicate that the accused was not acquitted. The majority of the Court thought that a new trial could not be ordered, but left it to the Crown to take the proper steps, if found opportune, to bring the accused before the courts once more.

I had the advantage of reading the reasons for judgment of my brother Fauteux, and I agree with him, that when the Court of Appeal allows an appeal against a conviction, in a case like the one at bar, it has only two alternatives. It may quash the conviction and direct a verdict of acquittal, or direct a new trial, and it is only when one of these two courses has been followed that it *may* make such other order as justice requires. It is however *imperative* and not only *permissive,* that there should be an acquittal or that a new trial should be directed.

I entertain no doubt that the Court of Appeal had power by virtue of section 1014 (3) of the *Cr. C.,* after having quashed the conviction, to direct a new trial limited exclusively to the charge of manslaughter. This would have clearly been an order authorized by the concluding part of section 1014 (3) *Cr. C.*

But the Court of Appeal did not give such an order, with the result, that the accused has neither been acquitted nor convicted, and as there was no jurisdiction upon this Court to apply the proper remedy, it necessarily follows that for all practical purposes the first indictment cannot be acted upon any further. These proceedings have come to an end, as there can be found nothing in the law to authorize the revival of this first trial.

I fully concur in the view expressed that the only competent authority, in a case of misdirection, to order a *new* trial is the Court of Appeal, but I do not agree that the failure by the court to make such an order had the effect of precluding the Crown from exercising its rights to prefer a fresh bill of indictment under 873 *Cr. C.* as it has been done in the present case.

The proceedings under the fresh bill of indictment do not constitute a *new* trial, within the meaning of section 1014; they initiated a *second* trial, entirely independent of the first, on *a new indictment*. "A new trial" which alone the Court of Appeal has the power to order in a criminal prosecution, is the re-examination of a case on the *same information* or *indictment*. It supposes a completed trial, which for some sufficient reason has been set aside, so that the issues may be litigated *de novo*. It is ordered so that the court may have an opportunity to correct errors in the proceedings at the first trial.

But such is not the case here, and unless there are valid reasons to prevent the Crown to initiate a *second trial* as it did, this appeal must fail. We have to decide if the incomplete judgment given by the Court of Appeal, is a bar to the exercising by the Crown of its unquestionable power to prefer a bill of indictment.

A solid ground of defence would undoubtedly be a plea of *"autrefois acquit"* or *"autrefois convict"*, but I am satisfied that this cannot be successfully argued. The appellant has neither been acquitted nor convicted, and it is only in such cases that an accused may say, if he is brought to trial again on the same charge, that he has been in "jeopardy" twice. As Chief Justice Latchford said in *Rex* v. *Ecker and Fry* (1) (at page 3):—

> This Court was of the opinion that "in jeopardy twice"—the *bis vexari* of the legal maxim—has not the meaning of subjection twice to a trial for the same offence except in cases where the first trial has been concluded by an adjudication or judgment declaring *the accused acquitted or convicted*. Not otherwise could the plea of *autrefois acquit* or *autrefois convict* prevail.

I fully agree with this statement of the law, and I may add that there are a great number of cases, where accused have undergone second trials, when it was established that the plea of *"autrefois acquit"* or *"autrefois convict"* could not be successfully raised. The law does not allow that a

(1) (1929) 64 O.L.R. 1.

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man be tried a second time when he has already been convicted, or exposed to be convicted, when he has already been legally acquitted, but it does not forbid a second trial when the first did not come to a legal conclusion.

Only the pleas of *"autrefois acquit"* or *"autrefois convict"* could be successfully raised by the appellant in the present case, and as they both fail, the appeal should be dismissed.

KERWIN J., dissenting:—By leave granted under subsection 1 of section 1025 of the *Criminal Code* as enacted by section 42 of chapter 39 of the Statutes of 1948, the accused, Welch, appeals against a judgment of the Court of Appeal for Ontario dismissing his appeal against his conviction for manslaughter. He had been previously convicted of manslaughter after his trial upon an indictment for murder, arising from the death of the same person. The Court of Appeal allowed an appeal against that conviction on the ground of misdirection of the jury by the trial judge. The terms of that order and the reasons therefor are succinctly set forth in the following extract from the reasons of the Chief Justice of Ontario for the decision now appealed against:—

> In his reasons for judgment in disposing of the appeal, Mr. Justice Laidlaw, referring to the jury's verdict of guilty of manslaughter, said "That verdict, having been reached after such misdirection, is not a valid conviction and must be set aside. At the same time, I make it clear that the accused has not been acquitted of the offence of manslaughter and I express no opinion as to what further proceedings the Crown can or ought to take against the appellant in the particular circumstances." Mr. Justice Hogg, who concurred in setting aside the conviction said "I agree with the observations made by my brother Laidlaw that the appellant has not been acquitted of the crime of manslaughter." Mr. Justice Henderson, who, with Mr. Justice Laidlaw and Hogg, made up the Court that heard the appeal, was of the opinion that the appeal should be dismissed. The formal certificate of the Court's order, after a recital, was in these words, "This Court did order that the said appeal should be and the same was allowed and that the said conviction should be and the same was vacated and set aside."

A new indictment charging manslaughter was preferred and upon his arraignment the accused pleaded *autrefois acquit*. On the trial of that issue, the jury on the judge's instruction found against the accused. He thereupon pleaded not guilty but was convicted and sentenced to ten years' imprisonment. The appeal to the Court of Appeal

followed, and, upon the affirmance of the conviction, leave to appeal was granted. The points upon which that leave was granted are set forth in the appellant's factum as follows:—

(*a*) The accused having once before been tried for murder, arising out of the same homicide, and convicted of manslaughter, and whose conviction had been set aside by the Court of Appeal, could not again be tried for manslaughter without a formal order of the Court of Appeal directing a new trial.

(*b*) The accused was entitled in answer to the present indictment to the common law defence that a man should not be put twice in jeopardy for the same matter.

(*c*) Section 909 (2) of the *Criminal Code* was a bar to the present indictment.

(*d*) The accused was entitled to succeed on his plea of *autrefois acquit* pursuant to Section 907 of the *Criminal Code*.

It was argued that the Court of Appeal had no power merely to set aside the first conviction and that, therefore, its order must be taken to be an acquittal of manslaughter under the indictment for murder. That argument is based upon the provisions of subsection 3 of section 1014:—

3. Subject to the special provisions contained in the following sections of this Part, when the court of appeal allows an appeal against conviction it may

(*a*) quash the conviction and direct a judgment and verdict of acquittal to be entered; or

(*b*) direct a new trial;

and in either case may make such other order as justice requires.

The contention is that when the Court of Appeal allows an appeal against conviction it must either (1) formally allow the appeal; and (2) quash the conviction and direct a judgment and verdict of acquittal to be entered; and (3) make such other order as justice requires; *or* (1) formally allow the appeal; and (2) direct a new trial; and (3) make such other order as justice requires. The argument amounts to a contention that if the Court merely allows an appeal and quashes the conviction, the case falls within the first alternative. To that argument I am unable to accede. While some plausibility is lent to it by the expression "in either case", the power given to the Court of Appeal is permissive as is indicated by the use of the word "may" and includes the power to allow an appeal and set aside a conviction leaving the Crown free to prefer a new and different indictment, if it sees fit.

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The powers of the Court of Appeal are not circumscribed as are those of the Court of Criminal Appeal in England and the decisions of that Court are, therefore, of no assistance on the point under review.

On the reargument of this appeal before the full Court, a discussion took place as to the powers exercised in England before 1904 of granting a writ of *venire de novo* and as to the powers of a Court of Error. I have considered these arguments and the practice and law prevailing as to each of these matters and particularly the two cases in New South Wales referred to, *Rex* v. *O'Keefe* (1), and *Rex* v. *Lee* (2), but have been unable to gain any assistance from any of these in coming to a conclusion. This appeal is to be decided under the provisions of the *Criminal Code*.

In *Rex* v. *Pascal* (3), the Court of Appeal for British Columbia, by a majority, followed the decision of the Ontario Court of Appeal on the first appeal by Welch to it (4). Mr. Justice O'Halloran dissented and came to the conclusion that the proper order to make in circumstances such as existed in that and the present case was for the Court of Appeal, after setting aside the conviction, to direct a new trial upon the charge of manslaughter, of which the accused had been convicted and which conviction was set aside by the Court of Appeal. That learned judge realized the difficulty in coming to that conclusion in view of the provisions of section 909 (2) of the Code and of the obstacle of arraigning an accused on the same indictment, but concluded that because of his view as to the meaning of 1014 (3), the Court of Appeal had the power to direct a new trial on the charge of manslaughter since, while by section 856, to a count in an indictment charging murder, no count charging any other offence shall be joined, 951 (2) provides:—

> 2. On a count charging murder, if the evidence proves manslaughter but does not prove murder, the jury may find the accused not guilty of murder but guilty of manslaughter, but shall not on that count find the accused guilty of any other offence.

With respect I am unable to agree with Mr. Justice O'Halloran's view of section 1014 (3) and in my opinion the proper course to follow is that adopted by the Ontario

(1) (1894) 15 N.S.W.R. 1.
(2) (1895) 16 N.S.W.R. 6.
(3) (1949) 95 C.C.C. 288.
(4) [1948] O.R. 884.

Court of Appeal and followed by the British Columbia Court of Appeal. Section 873 (1) is then wide enough to permit the preferring of a bill of indictment for manslaughter. In provinces where there is no grand jury, subsequent subsections of section 873 take care of the situation. It may be that in some cases, if an accused is charged with murder and convicted of manslaughter and this conviction is set aside, then, on a new indictment for manslaughter, the accused might be found by the second jury not guilty of manslaughter but guilty of some included offence. This, in my opinion, is not an objection either to what I deem is the proper construction of section 1014 (3) or to the possibility of the accused being found guilty of such included charge which would not have been possible under the first indictment for murder. That possibility does not alter my view as to the correct interpretation of section 1014 (3) nor, in the event of that occurring, would it place an accused in double jeopardy since, on the first indictment, he could not have been found guilty of such included charge.

It was also argued that what the Court of Appeal did was based upon its former decisions in *Rex* v. *MacDonald* (1), and *Rex* v. *Antony* (2), and that these are in conflict with the decision of this Court in *Gudmondson* v. *The King* (3). As appears from an examination of the case and factums in that case, the accused had asked that his conviction be quashed and a new trial not ordered. This Court was not prepared to say that a verdict of acquittal should be entered and, as the point now under discussion was not argued or considered, the decision cannot be taken as being in conflict with the orders made by the Court of Appeal in the cases mentioned. Furthermore, a mere reading of the reasons for judgment on Welch's first appeal shows that the Court did not direct a verdict of acquittal. This disposes of the first ground of appeal.

As to the second ground, it is sufficient to point out that former jeopardy is not a plea or defence as the maxim *nemo debet bis vexari pro una et eadem causa,* or as it is sometimes expressed, *nemo debet bis puniri pro uno delicto,* is merely the basis for the plea of *autrefois acquit.* "The plea of *autrefois acquit* is grounded on this maxim,

(1) [1943] O.R. 158.
(2) [1943] O.W.N. 778.
(3) (1933) 60 C.C.C. 332.

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that a man shall not be brought into danger of his life for one and the same offence, more than once." Hawkins' *Pleas of the Crown,* 8th ed. vol. II, c. 35, s. 1.

The third and fourth grounds may be considered together. Sections 905 to 908 inclusive of the Code deal with the special pleas of *autrefois acquit* and *autrefois convict.* The meaning and effect of section 907, referred to by the appellant, may be better gathered from the use of the word "lawfully" in subsection 3 of section 906.

> 3. In any plea of *autrefois acquit* or *autrefois convict* it shall be sufficient for the accused to state that he has been lawfully acquitted or convicted, as the case may be, of the offence charged in the count or counts to which such plea is pleaded, indicating the time and place of such acquittal, or conviction.

This expresses what has been well understood for many years, viz., that the defence of *autrefois acquit* applies only where the first trial has been concluded by an adjudication: *Reg.* v. *Charlesworth* (1), *Rex* v. *Ecker* (2). Here, the only adjudication was against the accused for manslaughter and that adjudication was merely set aside by the first order of the Court of Appeal. Nor is the appellant assisted by the first leg of subsection 2 of section 909 upon which he relies:—

> A previous conviction or acquittal on an indictment for murder shall be a bar to a second indictment for the same homicide charging it as manslaughter.

This must mean a previous *general* conviction or acquittal. The appellant does not, of course, contend that he was convicted and, as the Chief Justice of Ontario points out, the suggestion that he was acquitted is precisely the same contention advanced in support of the plea of *autrefois acquit.*

The appeal must be dismissed.

The judgment of Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ. was delivered by:—

FAUTEUX J.:—This is an appeal from a unanimous judgment of the Court of Appeal of Ontario (Robertson C.J.O., Laidlaw and Roach JJ. A.) (3) dismissing, on March 17, 1949, an appeal from the conviction of the appellant on a charge of manslaughter. The appellant had been previously tried on an indictment for murder, arising

(1) (1861) 121 E.R. 786. (2) (1929) 64 O.L.R. 1.
(3) [1949] O.R. 592.

from the death of the same person. Upon this first trial, the jury brought in a verdict of manslaughter. An appeal from this conviction was allowed under section 1014, on the ground of misdirection. The formal certificate of the Court's order, after a recital, is in these words:—

> This Court did order that the said appeal should be and the same was allowed and that the said conviction should be and the same was vacated and set aside.

In his reasons for judgment, Laidlaw J.A., with reference to the jury's verdict of "guilty of manslaughter" said:—

> That verdict having been reached after such misdirection is not a valid conviction and must be set aside. At the same time, I make it clear that the accused has not been acquitted of the offence of manslaughter and I express no opinion as to what further proceedings the Crown can or ought to take against the appellant in the particular circumstances.

Concurring in setting aside the conviction, Hogg J.A., said:—

> I agree with the observations made by my brother Laidlaw that the appellant has not been acquitted of the crime of manslaughter.

Henderson J.A., expressed the opinion that the appeal should be dismissed.

No direction was then made by the Court of Appeal either to enter a judgment and verdict of acquittal or for a new trial. The Court of Appeal did not in either respect exercise its authority under section 1014 (3). Confronted with this situation, the Crown first moved to appeal this judgment to this Court but, for reasons of jurisdiction, leave was refused.

It was in these circumstances that a fresh bill of indictment charging the appellant with manslaughter was subsequently preferred by the Crown under the provisions of section 873 of the *Criminal Code*. A true bill was found by the grand jury, the appellant was brought to trial and, eventually, found guilty of the offence charged. His appeal against this conviction was unanimously dismissed by the judgment now before us for review.

As a new trial was not directed by the first judgment of the Court of Appeal, it is manifest that the *sub stratum* of jurisdiction for all the proceedings leading to the conviction of the appellant and eventually to the present appeal can stem only from this fresh bill of indictment preferred under section 873 in the circumstances above

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related. In the present instance, this question of jurisdiction is twofold. Once the appeal is allowed for misdirection and the conviction is quashed by the Court under section 1014, is the statutory authority vested in the Court of Appeal to direct a verdict of acquittal to be entered or to direct a new trial, mandatory or simply permissive? And if this authority is mandatory, can another trial,—notwithstanding the express lack of direction for a new trial by the judicial body solely empowered to make it,—be had by resorting to the provisions of section 873?

Dealing with the first point. The relevant provisions of section 1014 were enacted by Parliament in 1923 (13-14 George V, chap. 41, s. 9). They read:—

1014.

3. Subject to the special provisions contained in the following sections of this Part, when the Court of appeal allows an appeal against conviction it may

(*a*) quash the conviction and direct a judgment and verdict of acquittal to be entered; or

(*b*) direct a new trial;

and in either case may make such other order as justice requires.

The corresponding section of the English Criminal Appeal Act of 1907 (7 Edward VII, c. 23, art. 4) from which the above were taken reads:—

4.

(2) Subject to the special provisions of this Act, the Court of Criminal Appeal shall, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

The above juxtaposition of the two sets of provisions makes it clear that the differences between them, as well as the different manner in which each is set up, are attributable to the existence of an alternative course,—a new trial,—which our Courts only, in a proper case, must, as I propose to show, direct. That in the process of thus amending our law, the indented letter (*a*) has been misplaced before the words "quash the conviction and", rather than being properly placed after them, cannot alter the true meaning and the only possible construction of the section. For it is clear that if the appeal against a conviction is allowed, of necessity the conviction must be quashed. No other purpose can be served by the allowance of the appeal. And it is then, and then only, that

the occasion to exercise the further statutory authority related to the election between a verdict of acquittal or a new trial, may arise.

That there will be cases where the Court of Appeal will not order one or other of the alternatives is certain. Thus a conviction on an indictment signed by an unauthorized person cannot be sustained and must be quashed. And in such a case, an order, either directing a verdict of acquittal to be entered or a new trial, would be meaningless and senseless. It cannot, therefore, be stated that this further authority is given with respect to trials affected with such complete and fatal nullity. On that point, our law is not at variance with the law in England even if, in the relevant provisions of the latter, the word "shall" and not the word "may" is used to govern the construction of the statutory power (*Crane* v. *Director of Public Prosecutions* (1), *Brodie* v. *Rex* (2).) In like cases, the accused, having never been in peril of conviction, could not subsequently if and when validly indicted, plead *autrefois acquit* on the occasion of a trial which, if truly the second in fact, would be the first in law.

However, in a case where the appeal is allowed on ground of misdirection and the conviction is quashed, then necessarily arises the occasion to exercise the further statutory authority. In England, the Court of Appeal, having no power to direct a new trial, "shall" then direct a verdict of acquittal to be entered,—"even though the prisoner be clearly guilty".—(Kenny, *Outlines of Criminal* Law, 13th Ed., foot note page 500). In Canada, the Court of Appeal must equally exercise the further statutory power and order, either a verdict of acquittal to be entered, or direct a new trial. For, until such an order is made, there is still pending before the Court of Appeal a valid indictment upon which there is no final adjudication. And the very procedure to that end is provided for. The accused, for one, has, in such circumstances and under our law, a clear and unimpeachable right to such judicial pronouncement with respect to the election between two courses,—one of which resulting in his acquittal,—on the sole and very basis of the case as then under review and that, according to well established principles.

(1) [1921] 2 A.C. 299.
(2) [1936] S.C.R. 188.

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The expression "may" related to this further authority of the Court is not and cannot, in the context of the section read in the light of paramount principles of our criminal procedure, be permissive. It is mandatory. In *M'Dougall* v. *Patterson* (1), it was held that

> * * * when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority, when the case arises and its exercise is duly applied for by a party interested, and having the right to make the application. For this reason, we are of the opinion that the word "may" is not used to give a discretion but to confer a power upon the Court and Judges and that the exercise of such power depends, not upon the discretion of the Court or Judges, but upon the proof of the particular case out of which such power arises.

That a like reasoning and meaning is to obtain with respect to the same word "may" in the last member of this section clearly stems from the context "and in either case may make such order as justice requires". For new and extraordinary would be a rule of construction stating that, being empowered to make an order required by justice, a Court of justice would be free to refrain from making it when the occasion to do so arises. In *Reg.* v. *Bishop of Oxford* (2), it was held that

> so long ago as the year 1693 it was decided in the case of *R.* v. *Barlow* (3), that when a statute authorizes the doing of a thing for the sake of justice or the public good, the word "may" means "shall" and that rule has been acted upon to the present time * * *."

With like powers, or rather duties, I fail, I must say with deference, to appreciate the alleged obstacles standing in the way of the Court of Appeal to exercise its authority if, as suggested, the majority judges wanted to direct a new trial only on this sole undisposed of part of the indictment, that is, the lesser charge of manslaughter. Legal and sufficient it would have been to direct a new trial on the offence of manslaughter exclusively and to further order that the original indictment of murder be, to that end, amended. Thus, on this new trial, the accused could only be found guilty or not guilty of manslaughter. The language of the statute is broad enough to embrace the authority to make such "other order", if the justice of the case suggests no other. And I know of no principles of law which could have then been violated by such order. I must, therefore, conclude that

(1) (1851) 6 Exch. 335, footnote to *Palmer* v. *Richards* at 340.

(2) (1879) 4 Q.B.D. 245 at 258.

(3) 2 Salk. 609.

the exercise of the statutory authority given to the Court of Appeal, under section 1014 (3), to direct an acquittal to be entered or to direct a new trial and in either case, to make such other order as justice requires, is not permissive but mandatory.

Dealing with the second point, the Court having failed to exercise its authority in the first appeal and having refrained from directing a new trial by a judgment which, though substantially incomplete, remains undisturbed, could another trial be had by resorting to section 873?

It cannot be disputed that, had either one of the courses, which the Court of Appeal was bound to direct, been directed, this fresh bill of indictment would never have been preferred in fact. And never then could, in law, a fresh bill of indictment be authorized under section 873. For on the one hand, the entry of a verdict of acquittal by the Court of Appeal would have brought the case to an end.

On the other hand, had the Court of Appeal directed a new trial, a fresh bill of indictment could no more, in law, have been preferred. For such a course would have subjected the order of the Court to the finding of a true bill by a grand jury. On a new trial being ordered, the accused is not even required to plead. The trial proceeds immediately on the original or amended indictment.

These considerations suffice to indicate that, general and unrestricted as they may appear, the powers under section 873 are not absolute and cannot obtain in all circumstances. Like many others in the Code, they remain subject to qualifications and restrictions implicitly and necessarily flowing from other provisions in the same Act.

Again, the relevant provisions of section 873 were enacted much before those of section 1014 (3) and then, not in relation to the latter. It cannot be contended, therefore, that they were meant, when enacted, to provide a mode of redress,—left, furthermore, at the discretion of the Attorney General or of the trial Judge,—against the failure of a Court of Appeal,—a higher authority,—to comply with the imperative provisions of section 1014 (3).

Our criminal law clearly prescribes two methods leading to the holding of a trial. One is by way of an information

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or complaint and the other is by way (in the province of Ontario) of a preferred bill of indictment. There are no other methods.

Whatever be the method adopted, if on a valid indictment, the trial proceeds, with no defect as to jurisdiction, to verdict and judgment, then the procedure provided by the law for the trial of that issue,—or included issues,—is exhausted and the trial is brought to an end, unless there is an appeal. The legislature does not, in addition to the above procedure, contemplate or authorize,—either by laying another information or complaint, or preferring another bill of indictment under 873,—such a thing as the actual holding of another trial on the same issue, or included issues, parallel to or independently of the first trial and irrespective of the juridical consequences developing and rights accruing thereby to either of the parties, according to law in the course of the latter. For such duplication would, to say the least, render one course futile. So if a trial has been had following the laying of an information, the provisions of section 873 could have no application with respect to the issue, or included issues, therein.

If, the case being concluded in first instance, there is an appeal, for the same reason, like duplication of the procedure cannot obtain. And the matter must, from then on, be considered in the light only of the provisions relating to the appeal.

The right of appeal is an exceptional right. That all the substantive and procedural provisions relating to it must be regarded as exhaustive and exclusive, need not be expressly stated in the statute. That necessarily flows from the exceptional nature of the right.

In Craies, on *Statute Law*, 4th Edition, p. 236, it is stated:—

> In Viner's Abr. (*m*) the following rule is laid down: "Every statute limiting anything to be in one form, although it be spoke in the affirmative, yet includes in itself a negative"; and in Bacon's Abr. (*n*), the rule given is, that "if an affirmative statute which is introductive of a new law direct a thing to be done in a certain way, that thing shall not, even if there be no negative words, be done in any other way."

In *Rex* v. *Howell* (1), an accused person was charged with an indictable offence and when brought before the Magistrate, the latter failed to state to him the matters

(1) (1910) 19 Man. R. 317.

required by the then section 778, subsection 2, of the Code. The accused having elected for a summary trial was found guilty but on appeal the conviction was set aside. Cameron J.A. said in part:—

> Though ss. 2 of sec. 778 of the *Criminal Code*, as it now stands, amended by 8 & 9, Ed. VII, c. 9, is affirmative in form, it must be treated as implying a negative on the principle that "if an affirmative statute which is introductive of a new law directs a thing to be done in a certain way, that thing shall not, even if there be no negative words, be done in any other way."

It was for the Court of Appeal acting under the powers vested in it by subsection 3 of section 1014 to direct a new trial and not for counsel for the Crown, with the consent of the learned trial judge, or for the Attorney-General, to decide that there should be a second trial for the same offence. When the accused was arraigned before Mr. Justice Schroeder, counsel on his behalf contended that, in the absence of an order for a new trial made by the Court of Appeal, the accused could not be tried again for the same offence. As for the reasons above expressed, I think a new trial for the same offence was, in the absence of such an order, prohibited by the statute, effect should have been given to this objection. I express no opinion upon the other grounds of appeal which were argued before us.

I would allow the appeal, quash the conviction and direct the discharge of the accused.

Appeal allowed.

Solicitors for the Appellant: Kimber & Dubbin.

Solicitor for the Respondent: C. R. Magone.

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EUGENE UNGARO.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Receiving stolen goods—Recent possession—Explanation by accused—"Might reasonably be true"—Proper direction—Report under section 1020 Cr. Code.

Appellant was convicted on a summary trial of receiving stolen goods. It was established that the goods were stolen, that appellant at first had denied possession and later explained this denial and also explained his possession. In his reasons, the trial judge referred to the explanation of denial (saying it was "fantastic") but did not refer to the explanation of possession. The majority in the Court of Appeal affirmed the conviction.

Held (Taschereau and Locke JJ. dissenting): That there should be a new trial as the trial judge misdirected himself with respect to the relevancy of the denial and had given to it an importance in relation to the main issue of guilty knowledge not justified by the authorities.

Held: The omission of the trial judge to refer to the explanation of possession is not remedied by his dealing with it in the report made under section 1020, as that report is relevant only as to how he directed himself at the trial.

Held: The statement in the report that the explanation of possession "was not a reasonable one" wrongly placed the onus on accused to prove the truth of this explanation, when the trial judge should have directed himself not on the reasonableness of the explanation but whether that explanation "might reasonably be true" in the particular circumstances and therefore create in his mind a reasonable doubt.

Per Taschereau and Locke JJ. (dissenting): The remarks made by the trial judge at the conclusion of the evidence do not show that he had proceeded upon any wrong principle of law. There is no obligation upon a County Court judge at the conclusion of such a hearing to make a complete statement of his reasons for deciding the guilt or innocence of an accused.

Per Taschereau and Locke JJ.: Having been found in possession, there was a presumption against appellant rebuttal by an explanation which, if it raised a reasonable doubt, entitled him to be acquitted; in the present case, the report shows that the trial judge did not consider that the explanation was a reasonable one and was satisfied beyond a reasonable doubt that appellant knew the goods were stolen at the time he received them.

Richler v. *The King* [1939] S.C.R. 101; *Reg.* v. *Langmead,* (1864) 9 Cox C.C. 464; *Rex* v. *Schama,* 11 C.A.R. 45; *Rex* v. *Curnock,* 10 C.A.R. 208; *Rex* v. *Bush,* 53 B.C.R. 252; *Rex* v. *Currell,* 25 C.A.R. 116, *Rex* v. *Frank,* 16 C.C.C. 237 and *Rex* v. *Gfeller,* [1944] 3 W.W.R. 186 referred to.

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

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APPEAL from the judgment of the Court of Appeal for British Columbia (1) dismissing, O'Halloran J.A. dissenting, appellant's appeal from his conviction on a charge of receiving stolen goods.

J. W. de B. Farris, K.C. for the appellant.

L. A. Kelley, K.C. and *A. C. Butler* for the respondent.

The CHIEF JUSTICE:—I agree with Estey J.

I do not understand Chief Justice Duff's statement in *Richler* v. *The King* (2) as meaning that if the trial judge does not believe the accused it is, nevertheless, his duty to apply his mind to a consideration as to whether the explanation given by the accused might reasonably be true. If the trial judge does not believe the accused the result is that no explanation at all is left, and the case would have to be decided on the well-known principle that possession of recently stolen property is circumstantial evidence of guilt. In the words of Blackburn J. in *Regina* v. *Langmead* (3):

> If he (the accused) fails to account for his possession satisfactorily he is reasonably presumed to have come by it dishonestly.

But, in the present case, on the issue of the accused's credibility, the learned County Court judge, far from stating that he did not believe the accused, refers to the fact that when the latter was "asked by the police regarding these goods he denied knowing anything about it" and adds:

> That, of course, is a factor against him. He has been proved to have made a false statement in one instance, which I am not saying that that detracts from his evidence today but, it is a factor.

Thus the learned trial judge states in his reasons that he did not come to the conclusion that the false statement at first made to the police was, for him, a reason to disbelieve the accused, but that such denial did not detract from the accused's evidence before him at the trial. He says it was only a "factor". Therefore, the explanation given by Ungaro of the circumstances under which he came into possession of the goods was not discarded by the trial judge. The explanation was not unreasonable in the

(1) 94 C.C.C. 184.
(2) [1939] S.C.R. 101 at 103.
(3) (1864) 9 Cox C.C. 464 at 468.

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premises and, therefore, brought the case strictly within the application of *Richler* v. *The King supra* as expressed by Chief Justice Duff.

It is manifest, upon the reasons of the trial judge, that he did not apply his mind to the question whether "the explanation may reasonably be true, though he was not convinced that it was true." Indeed he did not refer to that explanation at all, despite the fact that the reasonableness of the explanation was the main point to be considered in the case.

I do not mean that a trial judge is obliged in his judgment to give all the reasons which lead him to the conclusion that an accused is guilty. Undoubtedly if he finds one valid reason why he should reach that conclusion it is not necessary that he should also give other reasons. It is imperative, however, that he should give a decision upon all the points raised by the defence which might be of a nature to bring about the acquittal of the accused. In the present case, discarding, as he did, as "fantastic", the explanation of Ungaro's denial to the police was insufficient to find the accused guilty. It was much more important that the trial judge should have addressed himself to the main point in the accused's defence, and which was the explanation of the circumstances which accompanied the purchase from Seguin, the thief, of the goods stolen. As to that the learned trial judge said absolutely nothing in his reasons, and, reading them, a Court of Appeal is perfectly justified in holding that he completely overlooked this point.

The judgment of Kerwin and Estey JJ. was delivered by

ESTEY J.:—The majority of the learned judges in the Court of Appeal in British Columbia (1) affirmed the conviction of the accused in the County Court Judges' Criminal Court for receiving stolen property knowing it to have been stolen, contrary to sec. 299 of the *Criminal Code*. Mr. Justice O'Halloran dissented on four grounds:

(1) The learned trial Judge did not take into judicial consideration the appellant's explanation of his possession of the stolen articles;

(2) *Rex* v. *Bush* (2), does not apply to a case of this kind;

(1) 94 C.C.C. 184.

(2) (1938) 53 B.C.R. 252.

(3) The learned judge's report cannot cure No. (1) thereof;

(4) There was no finding upon credibility within the principle of *White* v. *The King* (1).

That the goods were stolen, sold to the accused by a stranger below their value and found in the possession of the accused were clearly established by the evidence. The pertinent issue at the trial was, therefore, did the accused when he purchased these goods know they were stolen?

The thief deposed that he sold the goods to the accused but that he was neither asked for nor did he himself volunteer any explanation as to how he obtained or why he was selling the goods.

The policeman deposed that when he first interviewed the accused the latter denied all knowledge of the goods and then later, when he returned with a search warrant, though the accused at first persisted in his denial, did then explain that he purchased the goods from a man who said he had obtained them from bankrupt stocks in Vancouver and was selling them in the Valley.

The accused, giving evidence on his own behalf, admitted that he had purchased these goods at low prices from the man who now admits he had stolen them, but who then stated to the accused that these goods had been obtained from bankrupt stocks in Vancouver and that he was selling them in the Valley. The accused also explained that to the policeman he denied any knowledge of these goods because of his previous dealings with him and that "he was scared."

The accused therefore made two explanations, one as to his denial of possession and the other that the thief told him the goods had been obtained legitimately.

I agree with all of the learned Judges in the Court of Appeal (2) that in the course of his reasons the learned trial judge refers only to the accused's explanation of his denial to the police and makes no mention of his evidence as to what the thief told him as to the source of the goods. The learned trial judge refused to accept what he termed the "fantastic" explanation made by the accused for his denial to the policeman and therefore that denial remained

(1) [1947] S.C.R. 268. (2) 94 C.C.C. 184.

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unexplained as evidence of guilty knowledge and also relevant to the issue of the accused's credibility. It did not otherwise here affect the main issue which, after the "fantastic" explanation was discarded, still remained to be determined. The emphasis upon this denial without even mentioning the other explanation, which was relevant to the main issue, and particularly the sequence of the language, tends to support a conclusion that the unreasonable denial was given a relevancy and an importance beyond which a proper direction would have permitted and may have constituted the essential factor in finding the accused guilty.

Upon the main issue of guilty knowledge, in view of the explanation made by the accused and denied by the thief that the latter stated he had obtained goods from bankrupt stocks in Vancouver and that he was selling them in the Valley, the learned trial judge should have instructed himself as in *Richler* v. *The King* (1), wherein Chief Justice Duff on behalf of the court stated the law to be as follows (p. 103):

> The question, therefore, to which it was the duty of the learned trial judge to apply his mind was not whether he was convinced that the explanation given was the true explanation, but whether the explanation might reasonably be true; or, to put it in other words, whether the Crown had discharged the onus of satisfying the learned trial judge beyond a reasonable doubt that the explanation of the accused could not be accepted as a reasonable one and that he was guilty.

It was suggested that the extract quoted from the *Richler* Case has been misunderstood and our attention was directed to *Rex* v. *Lockhart* (2), where a passage is quoted from *Rex* v. *Searle* (3):

> It is the reasonableness of the explanation rather than the tribunal's belief in its truth that should guide . . .

This language was used in the *Searle* Case prior to, but its incorporation in the *Lockhart* Case was subsequent to the *Richler* Case. With great respect, it is not the reasonableness of the explanation but whether that explanation "might reasonably be true" in the particular circumstances and therefore create in the mind of the trial judge a reasonable doubt. It may well be that the reasonableness

(1) [1939] S.C.R. 101.
(2) (1948) 93 C.C.C. 157 at 158.
(3) (1929) 51 C.C.C. 128.

of the explanation may assist the learned judge in determining that issue. The Appellate Court in *Rex* v. *Lockhart, supra,* stated:

> . . . weighed in the light of all the surrounding circumstances, the explanation given by the accused is not so improbable that it might not reasonably be true.

If the Appellate Court, with power to review and make findings of fact, concludes that the statement of the accused "might reasonably be true" because of its probability, then in the circumstances no fault can be found with the statement and I think that is the meaning that the learned judges intended to convey.

The record in *Richler* v. *The King, supra,* discloses that the accused was convicted by a judge presiding under Part 18 of the *Criminal Code* (Speedy Trials of Indictable Offences) of receiving stolen goods knowing them to have been stolen. The accused gave an explanation as to which there was a conflict between his evidence and that of the thief. One of the contentions on the part of the accused before this Court was that the learned trial judge had rejected his explanation because he did not believe it to be the true explanation. It was in relation to this issue that the statement was made in the *Richler* Case quoted above.

The reference in the *Richler* Case to the decision in *Rex* v. *Searle* was merely to indicate that the latter had followed *Schama* and not as expressing approval of every phrase used therein by Chief Justice Harvey.

The approach to the problem confronting the judge sitting alone or instructing the jury is all important. The instruction in either case should be that the onus rests upon the Crown throughout and that the judge sitting alone or the jury, after considering the explanation made by the accused in relation to all the other circumstances, must determine whether the proof establishes beyond a reasonable doubt the guilt of the accused. A strict adherence to the determination of this question will avoid many of the errors found in the cases. The language used when other questions are considered, as to whether the explanation is the true explanation or a reasonable or probable explanation, places an onus upon the accused to establish one or the other of these as an affirmative fact. Such would be contrary to the fundamental principle of law in which

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the onus rests upon the prosecution throughout to prove that the accused received the property knowing it to have been stolen. It is true that the possibility of truth or its reasonableness or probability may assist the judge in arriving at his answer to the question of reasonable doubt. As Chief Justice Duff points out, if the judge or jury conclude the explanation "might reasonably be true," which is quite different from whether it is true, reasonable or probable, then a reasonable doubt exists to which the accused is entitled to the benefit.

The judgment in the *Schama* Case, quoted in part in the *Richler* Case was written by Lord Chief Justice Reading. A few months prior thereto he had written the judgment in the *Curnock* Case and had included a quotation from *Regina* v. *Langmead* (1), in which Blackburn, J. stated:

> If a party is in possession of stolen property recently after the stealing, it lies on him to account for his possession, and if he fails to account for it satisfactorily, he is reasonably presumed to have come by it dishonestly; but it depends on the surrounding circumstances whether he is guilty of receiving or stealing.

In the *Curnock* Case (2) Lord Chief Justice Reading refers to the *Langmead* Case and states:

> In that case it was decided that the burden of giving a reasonable explanation was on the appellant.

These authorities, particularly as read in relation to the *Schama* Case, leave no doubt but that when Lord Chief Justice Reading refers to the burden in the *Curnock* Case, and Blackburn, J. in the *Langmead* Case refers to the failure of the accused to explain recent possession, they mean no more than that the evidence of recent possession unexplained raises a *prima facie* case upon which, if the accused does not adduce further evidence by way of explanation, the jury may, not must, find the accused guilty. Whether, however, the explanation is given or not the burden of proving the accused guilty beyond a reasonable doubt remains throughout upon the prosecution. If, therefore, the accused gives an explanation, as Ungaro did, then the trial judge must instruct the jury, or himself if he is presiding without a jury, as in the *Richler* Case, *supra*.

The learned trial judge in the present case in referring to the "fantastic" explanation made by the accused as to why he had made the false statement to the police

(1) (1864) 9 Cox C.C. 464. (2) (1914) 10 Cr. App. R. 208.

states, "This explanation is not reasonable." Then in his report under sec. 1020 he states, "The explanation given by the accused was not a reasonable one" and convicted him. On the assumption that he is in the latter referring to the explanation as to the source of the goods, it is clear the learned judge is directing his mind to whether the explanation is a reasonable one. He therefore falls into the same error that those who consider the truth, the reasonableness or the probability of the explanation rather than direct their attention to whether that explanation as made by the accused, having regard to all the circumstances, might reasonably be true and therefore set up in the mind of the judge a reasonable doubt to which the accused is entitled to the benefit.

The foregoing is of particular importance where, as in the present case, the explanation, having regard to the circumstances, is not unreasonable and contradicted only by the thief. *Reynolds* (1); *Rex* v. *Norris* (2).

The learned trial judge in the course of his reasons makes no mention of the explanation relative to the source of the goods nor of any indication that he had so directed himself. The Crown, under these circumstances, contends that it should be assumed that the learned trial judge directed himself in accord with *Richler* v. *The King, supra.* The learned Chief Justice, with whom Mr. Justice Smith agreed, stated as follows:

> In my view this case falls within *Rex* v. *Bush,* (1938) 53 B.C. 252, and *Rex* v. *Miller,* (1940) 55 B.C.R. 121 at 128. We must assume, in the absence of anything appearing on the record to indicate otherwise, that the learned trial Judge did apply the proper and relevant principles when considering the explanation of possession given by the appellant.

In *Rex* v. *Bush* (3), it was contended that a conviction upon the uncorroborated evidence of an accomplice could not be supported upon appeal unless the trial judge had specifically directed himself as to the danger of his so doing. The Court refused to so hold and in this regard did not follow *Rex* v. *Ambler* (4), decided in the same year by the Alberta Appellate Division in which the foregoing submission was accepted and the conviction quashed. This difference of opinion is commented upon in *Rex* v. *Tolhurst* (5), and *Rex* v. *Joseph* (6). It is unnecessary to here

(1) (1927) 20 Cr. App. R. 125.
(2) (1917) 86 L.J.K.B. 810.
(3) (1938) 53 B.C.R. 252.
(4) [1938] 2 W.W.R. 225.
(5) 73 C.C.C. 32.
(6) 72 C.C.C. 28.

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resolve this conflict as the authorities are unanimous that where the misdirection is "manifest" or the assigned reasons disclose self-misdirection the conviction cannot stand. *Rex* v. *Bush, supra; Rex* v. *Lockhart, supra; Rex* v. *Nelson* (1).

In his reasons, with great respect, the learned trial judge discloses that he had misdirected himself with respect to the relevancy of the denial and given to it an importance in relation to the main issue not justified upon the authorities. Moreover, a reading of the reasons as a whole suggests that he did not direct himself as to the explanation of the source of the goods in relation to the evidence as required in *Richler* v. *The King, supra.* There is at least "reason to doubt that he properly charged himself when forming his conclusions upon the evidence" as stated by Chief Justice Moss in *Rex* v. *Frank* (2), which, with respect would appear to be an accurate statement of the limitation in respect to the presumption upon which *Rex* v. *Bush, supra,* was decided.

Moreover, it may well be suggested that upon these reasons the learned judge directed himself to the effect that the onus rested upon the accused to establish a reasonable explanation.

The Crown contends that whatever consequences might have resulted from the omission to refer to the explanation as to the source of the goods given by the accused, it is remedied by the contents of the report submitted by the learned trial judge under sec. 1020 of the *Criminal Code.* His report concludes as follows:

> I found as a fact that the explanation given by accused was not a reasonable one and convicted him. In reaching this conclusion I found that accused knew the goods were stolen at the times he received them, that the Crown had satisfied the onus placed upon it and that I had no reasonable doubt.

This report read as a whole is another or supplementary statement of reasons supporting the conviction in which the explanation of the source of the goods is as prominent as the explanation of the denial in the reasons given at trial.

The question is, how did the learned trial judge direct himself at trial? In his reasons at trial emphasis is placed upon one of two explanations to the entire exclusion of

(1) [1949] 1 W.W.R. 211. (2) (1910) 16 C.C.C. 237.

the other and that other the more important to the main issue, and concludes "this explanation is not reasonable . . . I have no hesitation in finding that the accused is guilty." Then in his report under sec. 1020 he deals with both explanations and then states "that the explanation given by the accused was not a reasonable one and convicted him." It is impossible under these circumstances for an Appellate Court to conclude that he has directed himself within the meaning of *Richler* v. *The King, supra.*

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

The dissenting judgment of Taschereau and Locke JJ. was delivered by

LOCKE, J.:—The appellant having elected for a speedy trial upon three charges of receiving and having in his possession stolen goods, knowing the same to be stolen, was tried by the County Court Judge for the County of Yale and found guilty. The conviction was upheld by a judgment of the majority of the Court of Appeal for British Columbia (1) and the appeal comes before us upon the grounds of dissent expressed in the reasons for judgment of Mr. Justice O'Halloran.

The case raises important questions relating to the due administration of the criminal law and it is desirable, in my opinion, to set forth the circumstances in some detail. Ungaro is a hotel keeper living in the city of Vernon, where he operates the Kalamalka Hotel. He has a place of residence elsewhere in Vernon and on January 10, 1949, was there found to be in possession of a brown leather jacket, a quantity of nylon silk stockings and a green and black check car robe, all of which had recently been stolen by one Ernest Seguin. At the trial Seguin swore that the car robe had been stolen by him from an automobile on the streets of Vernon on December 31, 1948: the stockings formed part of a quantity stolen from a parcel in the Canadian Pacific Railway station on January 3, 1949, and the leather jacket from a store at Armstrong, a village some miles to the north of Vernon, on the evening of January 7th. On the evening of the same day, he said that he had gone to the Kalamalka Hotel where he had a room, taking two leather jackets which he had stolen at Armstrong and

(1) 94 C.C.C. 184.

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put them in his room, then went to the beer parlour and waited until it closed at 11.30 p.m. and then took Ungaro to his room, showed him the two jackets and asked him if he wanted to buy them. According to Seguin, Ungaro did not ask him where he had got the jackets but agreed to buy them and gave him $4.00 for the two of them. It is not clear from the evidence of this witness whether or not the transactions in regard to the stockings and the car robe were on January 7th, but the evidence as a whole would indicate that they were earlier on that day. Seguin said as to these that he had gone to the beer parlour of the hotel carrying thirteen pairs of the nylon stockings in a bag: that he had asked Ungaro if he wanted to buy them and that the latter had said that he wanted some member of his family to look them over and, having left apparently for this purpose, returned and paid $7.00 as the purchase price. According to Seguin, he had asked $8.00 but the appellant did not pay this amount. At the same time as he made these sales, he claims to have told the appellant that he had two new blankets and that at about 5 o'clock he brought them to the office of the hotel and sold them to him for $6.00 or $7.00. As in the case of the stockings, Seguin said that Ungaro made no enquiry as to where he had obtained them.

Constable Knox, a corporal in the Provincial Police, said that on January 10, 1949, he spoke to the appellant at the Kalamalka Hotel telling him that a green car robe had been stolen from one Campbell and that the police had information it had been sold to him. To this the appellant replied that he knew nothing about it. The constable then asked him if he could help him to locate two leather jackets, asking him if he had seen anyone around the hotel wearing them. To this Ungaro replied that he knew nothing about the leather jackets. The constable further asked the accused if he had been in Seguin's room in the hotel on the night of January 7th and he said he had not. Search warrants were then issued, one for the hotel and one for the home of the appellant and Corporal Knox went to the hotel that night and again asked the appellant if he had any knowledge of the green car robe or leather jackets or windbreakers and a quantity of stockings, warning him that he did not have to say anything in reference to these

matters but that if he did it could be used in evidence. After again denying any knowledge of these things, Ungaro, according to the police officer, took him to his own home in a car where two other constables were then executing the search warrants and had already located the robe and the stockings. There the appellant produced a leather jacket or windbreaker. On the way from the hotel to the house, Ungaro had told the officer that the things for which the officer was searching had been purchased by him from a man "who told him he could get clothes of like materials and articles from bankrupt houses in Vancouver."

Ungaro who gave evidence on his own behalf said that he had first met Seguin on the day he had purchased the articles, that early in the afternoon of that day Seguin had come in to the beer parlour and stopping at the counter had asked him if he wanted some silk stockings and, when the appellant expressed his desire to see them, produced them contained in individual envelopes in a box and asked how much he (Ungaro) would pay for them. Ungaro says that he then asked Seguin where he got them and that "he said he got them from bankrupt houses in Vancouver and sold them through the Valley." According to the appellant, a large number of people were in the beer parlour when this transaction took place and there was no secrecy about it. On the evening of the same day, the appellant says that Seguin came into the office in the lobby of the hotel with two blankets which were wrapped as if they were new merchandise and offered to sell them. One of these was the stolen car robe. Later that night, he says that Seguin told him he had a jacket for sale in his room and he went up and bought it. He admitted that he made no enquiry as to where Seguin had obtained either the car robe or the jacket. As to the jacket, he said there was no conversation as to the price other than that Seguin asked how much he would pay for it and he told him he would give him $4.00 and did so. At the same time he said that Seguin told him that he would bring a car full of blankets if Ungaro needed them for the hotel and that he had told him that that would be all right. The appellant admitted that he had told Corporal Knox that he did not know where the car robe or leather jacket were but said that this was due to the fact that he had had some previous

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difficulty with the constable and that he was afraid. While Seguin did not make clear in his evidence the sequence in which the stockings, car robe and windbreaker were sold by him to Ungaro, it is a proper inference, in my opinion, that they were all sold on the same day and that the stockings were sold first. It should, therefore, be taken that if, in truth, Ungaro asked the thief where he had obtained the stockings it was at the first of the three transactions, so that it may fairly be urged on behalf of the appellant that while he did not make the same enquiry as to the other stolen articles he thought they had been obtained by Seguin in the same way. The jacket was shown to be of the value of $16.00: as to the stockings the appellant admitted on cross-examination that he knew that he was getting a bargain in buying thirteen pairs of nylon stockings for $7.00.

At the conclusion of the evidence the learned County Court Judge found the accused guilty. His remarks which prefaced the finding were as follows:—

> In this case it has been proved that the goods were stolen in each case and sold very much below their value in each case, and it was also proved that they were found in the possession of the accused.
>
> When he was asked by the police regarding these goods, he denied knowing anything about it, that, of course, is a factor against him. He has been proved to have made a false statement in one instance, which I am not saying that that detracts from his evidence today, but, it is a factor, and I would say that when he had had other dealings with the police that that would have taught him.
>
> Now, considering all the circumstances of the accused—Mr. Ungaro—and the other circumstances of the case, it is plain to my mind that this explanation is not reasonable. He says he was scared. It is fantastic.
>
> I have no hesitation in finding that the accused is guilty.

It is, I think, apparent that the explanation referred to in these remarks of the learned trial judge was that given by the appellant for making the false statement to Corporal Knox, to the effect that he knew nothing about the stolen goods. If he had said nothing beyond announcing that he found the accused guilty of the charges, it can scarcely be suggested that the convictions would have been open to attack on any of the grounds now urged against them, since this would involve asking the Appellate Court to assume that the judge had acted upon some wrong principle of law. Here, apart from the statement that the goods had been purchased at an undervalue, the judge

directed his remarks to the question of Ungaro's credibility and in considering this mentioned what he thought absurd the explanation given for having made the false statement to the police officer. Why these remarks should be taken to indicate that the trial judge had failed to consider the credibility of the witnesses or, assuming that he believed that Seguin had made the statement attributed to him by Ungaro as to where he had obtained the goods, whether that was an explanation that might reasonably be true, I am unable to understand. If the contention is that where a County Court Judge is conducting a speedy trial and chooses to make any observations as to any aspect of the case before announcing his judgment he must make a complete statement of all of the reasons which have led him to his conclusion, the argument appears to me to be quite without foundation. The learned judge was not required to give any reasons for his judgment unless he chose to do so but, of course, if in stating the reasons for his conclusions he showed that he had proceeded upon some wrong principle of law, the conviction might be set aside, as might the verdict of a jury when there has been misdirection. I find nothing of that nature in what was said by the learned trial judge in the present case and if the matter is to be considered divorced from the report made by him, as required by section 1020 of the *Criminal Code*, the appeal, in my opinion, fails.

A more difficult question arises, however, by reason of the terms of this report. It is, I think, unfortunate that the section of the Code does not indicate more clearly the nature of the report to be made. The judge is required to "furnish to the Court of Appeal in accordance with rules of Court a report giving his opinion upon the case or upon any point arising in the case." Whatever else may be included in this language, the trial judge may properly, in my opinion, state, if he wishes, his findings as to credibility if there are any such issues involved and his other reasons for arriving at his conclusion. Of course, if he has given reasons for his judgment at the time of announcing it, he cannot properly give inconsistent reasons as had been done in *Baron* v. *The King* (1). Such a report would be disregarded for the reasons indicated in the judgment

(1) [1930] S.C.R. 194.

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of the Court delivered by Chief Justice Anglin. The report and such reasons, if any, as have been delivered are to be read together (*Rex* v. *Reid* (1)). If the report should indicate that the trial judge has proceeded upon a wrong principle, it is manifest that the judgment might properly be set aside, even though reasons given at the time of delivering it indicated no such irregularity.

In the report in the present case the following appears:

Corporal Knox gave evidence of interviewing the accused and receiving an explanation by accused as to his possession of the stolen goods. But this explanation was not given on the first interview. When first interviewed he denied that he had received the goods. On being taken to his residence some hours later he made the explanation which he gave in evidence at his trial. He said the accused told him that he bought the goods from a man who was able to get quantities of bankrupt stock from Vancouver. The thief in his evidence said that accused did not ask him where he got the goods nor did he tell him anything at all as to where he got them. Corporal Knox found the stolen goods in the possession of accused. The accused gave evidence of his financial worth and the explanation he had given Corporal Knox. On cross-examination he stated that previous to coming to Vernon he had been owner of a store dealing in general merchandise.

I found as a fact that the explanation given by accused was not a reasonable one and convicted him. In reaching this conclusion I found that accused knew the goods were stolen at the times he received them, that the Crown had satisfied the onus placed upon it and that I had no reasonable doubt.

The "explanation given by accused" referred to in the concluding paragraph, I think, clearly refers to the explanation given by Ungaro as to the statement he said Seguin had made to him as to where he had obtained the goods. The learned trial judge apparently did not note that the explanation made to Corporal Knox by Ungaro was not quite the same as that stated by the latter in his evidence at the trial, so that apparently the difference did not weigh with him. It is, therefore, apparent that the trial judge had directed his attention to the question as to whether the explanation given by the accused was a reasonable one and had come to the conclusion it was not. I do not find that this is inconsistent with anything said by the learned trial judge at the conclusion of the trial. His comments there touched only upon the veracity of Ungaro.

It is said for the appellant that there was in the present case no judicial determination of the question as to

(1) (1942) 57 B.C.R. 20; [1943] 2 D.L.R. 786.

whether the explanation given by the accused as to how he obtained possession of the goods might reasonably be true and reference is made to a passage from the judgment of Duff, C.J. in *Richler* v. *The King* (1), reading as follows:

> The question, therefore, to which it was the duty of the learned trial judge to apply his mind was not whether he was convinced that the explanation given was the true explanation, but whether the explanation might reasonably be true; or, to put it in other words, whether the Crown had discharged the onus of satisfying the learned trial judge beyond a reasonable doubt that the explanation of the accused could not be accepted as a reasonable one and that he was guilty.

The statement referred to follows a quotation from the judgment of Reading, L.C.J. in *Rex* v. *Schama and Abramovitch* (2). The language there used has unfortunately given rise to some misunderstanding: the passage in question, which is not stated in full in the judgment in *Richler's* case, reads:—

> Where the prisoner is charged with receiving recently stolen property, when the prosecution has proved the possession by the prisoner, and that the goods had been recently stolen, the jury should be told that they may, not that they must, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the jury to say on the whole evidence whether the accused is guilty or not; that is to say, if the jury think that the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled to an acquittal, because the Crown has not discharged the onus of proof imposed upon it of satisfying the jury beyond reasonable doubt of the prisoner's guilt. That onus never changes, it always rests on the prosecution. That is the law; the Court is not pronouncing new law, but is merely restating it, and it is hoped that this re-statement may be of assistance to those who preside at the trial of such cases.

In *Woolmington* v. *Director of Public Prosecutions* (3), Lord Sankey, L.C. delivering the judgment of the House of Lords and pointing out that the burden of proving the guilt of the prisoner always rests upon the prosecution and that there is no such burden laid on the prisoner to prove his innocence, since it is sufficient for him to raise a doubt as to his guilt, said in part:—

> This is the real result of the perplexing case of *Rex* v. *Abramovitch*, 11 C.A.R. 45, which lays down the same proposition, although perhaps in somewhat involved language.

The language used by Lord Reading has been interpreted otherwise than in the manner stated by Lord Sankey. In

(1) [1939] S.C.R. 101 at 103.
(2) (1914) 11 C.A.R. 45 at 49.
(3) (1935) 30 Cox C.C. 234.

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Rex v. *Searle* (1), (a case which is mentioned without comment in *Richler's* case) Harvey, C.J.A. said in part (493):

> While recent possession of stolen property is always considered as circumstantial evidence of guilt it is evident that alone it could not, without violation of the general principle, suffice for proof of guilt, because it is not inconsistent with innocence and in *Rex* v. *Schama* it was pointed out that it would be a wrong direction in law to tell the jury that, it being established that recently stolen goods were in the prisoner's possession, they might convict, if not satisfied of the truth of the explanation given by the prisoner.

and again, after referring to the fact that the police magistrate in his report to the court had said in part: "The accused endeavoured to give an explanation which I have no hesitation in saying was false," said (495):—

> In the present case if the magistrate thought it was sufficient that he should disbelieve the story told he was wrong in his law.

The learned Chief Justice, judging from the passages quoted, appears to have overlooked the statement of Blackburn, J. in *Reg.* v. *Langmead* (2), where he states the rule:—

> If a party is in possession of stolen property recently after the stealing, it lies on him to account for his possession, and if he fails to account for it satisfactorily, he is reasonably presumed to have come by it dishonestly;

a statement which, as stated by Reading, L.C.J. in *Thomas Henry Curnock* (3), is the leading authority on the point. With respect, I think it was error to say that possession of recently stolen property did not in itself give rise to a presumption upon which there might be a conviction, in the absence of an explanation. I think also the statement of the learned Chief Justice that if the magistrate thought it was sufficient that he should disbelieve the story told he was wrong in his law, is expressed too broadly and is not justified by anything said in *Schama's* case. If by this the learned Chief Justice meant that if the explanation given by the accused was considered by the magistrate upon all of the evidence to be untrue and if, accordingly, it raised no reasonable doubt in his mind of the guilt of the accused he was not entitled to convict, I respectfully disagree. Where a person is found in possession of recently

(1) [1929] 1 W.W.R. 491.
(2) (1864) 9 Cox C.C. 464 at 468.
(3) (1914) 10 C.A.R. 208.

stolen property, the presumption referred to in *Reg.* v. *Langmead* arises, but this may be rebutted by an explanation by the prisoner as to how it came into his possession. This question was considered in *Rex* v. *Gfeller* (1), a judgment of the judicial committee on appeal from the West African Court of Appeal. The accused in that case was charged with having received a quantity of gin, knowing the same to have been stolen. The appellant, whose wife had an interest in and was manageress of the Grand Hotel at Lagos, assisted her in the buying of goods and spirits and some six months before the date of the offence a Syrian named Jaffar had been introduced to him as a person who could get supplies of alcohol and provisions and he had given him many orders which were fulfilled from time to time. The appellant said that he believed that Jaffar was getting the supplies from various shops and stores. On the day in question Jaffar had told him that he could obtain a large quantity of gin at something less than the current price and the appellant had agreed to take it and to pay him a commission. Later in the day 156 bottles of gin were delivered to the hotel, not packed in any way and being brought there in a taxicab. The appellant said that he did not remember asking Jaffar where he had obtained the gin and Jaffar deposed that he did not tell the appellant where he got the gin. Sir George Rankin, in delivering the judgment of the court, said that the trial judge had dealt with the charge of receiving on the basis of the law laid down in the well known case of *Rex* v. *Schama* and quoted from the following statement made in the charge to the jury:

> Upon the prosecution establishing that the accused were in possession of goods recently stolen they may in the absence of any explanation by the accused of the way in which the goods came into their possession which might reasonably be true find him guilty, but that if an explanation were given which the jury think might reasonably be true, and which is consistent with innocence although they were not convinced of its truth the prisoners were entitled to be acquitted inasmuch as the prosecution would have failed to discharge the duty cast upon it of satisfying the jury beyond reasonable doubt of the guilt of the accused.

and, after expressly approving this statement of the law and pointing out certain circumstances which might cast

(1) [1944] 3 W.W.R. 186.

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doubt upon the story of the accused that he had made no inquiry as to the source of the supply or the immediate supplier, said:—

> In this summary every single fact might turn out to be free from suspicion, but if it can be regarded as a broad statement of the main facts the appellant had something to explain. The question must then be whether the explanation given was such that the learned Judge ought to have directed himself or the jury to the effect that, while they might or might not think it proved, they were obliged to hold that it might reasonably be true and in this limited sense to accept it. Their Lordships are unable so to hold. They think that it was open to the jury to reject as untrue the story that the appellant asked Jaffar nothing and was told nothing about the person from whom Jaffer got so substantial a quantity of gin. The appellant did not have to prove his story but if his story broke down the jury might convict. In other words the jury might think that the explanation given was one which could not reasonably be true, attributing a reticence or an incuriosity or a guilelessness to the appellant beyond anything that could fairly be supposed. The verdict must in view of the summing-up be taken in this sense. Whether it was right, may depend in some measure on the habits of the people and the conditions of life in Lagos at the time or on the mentality of the appellant—whether he was shrewd or dull, quick or slow-witted, sharp or unsuspecting. These matters are typical of the considerations which a jury may be taken to appreciate, but the existence of a case to go to the jury did not depend upon them.

The case gives a practical illustration of the application of the principle in *Reg.* v. *Langmead* and of the rule as to the burden of proof.

In *Rex* v. *Currell* (1), Hewart, L.C.J. said that *Schama's* case decided no more than this, that the burden of proof was always upon the prosecution. The passage in that case which has caused so much difficulty was referred to by Lord Goddard, C.J. in *Rex* v. *Booth* (2):—

> That is a very hard-worked case, and, I think, very often misunderstood. It laid down no new rule of law. All that it said was this: The onus is always on the prosecution in a criminal case. In the case of receiving stolen goods, the prosecution may discharge the onus by showing that the prisoner was in possession of property recently stolen, and, in the absence of any explanation given by the prisoner, the jury are entitled, on that evidence alone, to convict. If, however, the prisoner gives in evidence a story which leaves the jury in doubt, that is to say, creates a doubt in their minds whether he received the goods feloniously, then they should acquit. *Rex* v. (*Schama and*) *Abramovitch* merely means that if the story told by the prisoner has caused doubt in the jury's mind, they should acquit him.

This statement and that of Sir George Rankin in *Gfeller's* case are to be contrasted with the above quoted language from *Rex* v. *Searle* and in other cases in which what was

(1) (1935) 25 C.A.R. 116 at 118. (2) (1946) 175 L.T.R. 306.

said in that case has been adopted. The quoted passage from the judgment of Duff, C.J. in *Richler* v. *The King* above mentioned is to the same effect as the language used by Goddard, L.C.J. in *Booth's* case. The burden is not upon the accused to convince the judge or jury that he is innocent and if his explanation raises a reasonable doubt he is entitled to be acquitted. The effect of the authorities is accurately summarized in Phipson on Evidence (8th Ed. 33) as follows:—

> Similarly, on charges of stealing or receiving, proof of recent possession of the stolen property by the accused, if unexplained or not reasonably explained, or if though reasonably explained, the explanation is disbelieved, raises a presumption of fact, though not of law, that he is the thief or receiver according to the circumstances; and upon such unexplained, or not reasonably explained, possession, or disbelieved explanation, the jury may (though not must) find him guilty. It is not, however, for the accused to prove honest dealing with the property, but for the prosecution to prove the reverse; and if an explanation be given which the jury think may be true, though they are not convinced that it is, they must acquit, for the main burden of proof (i.e., that of establishing guilt beyond reasonable doubt) rests throughout upon the prosecution. and in this case will not have been discharged.

In the present case the learned trial judge, as stated in his report, did not consider that the explanation given by the accused was a reasonable one and was satisfied beyond a reasonable doubt that the accused knew the goods were stolen at the time he received them.

I would accordingly dismiss this appeal.

Appeal allowed; new trial directed.

Solicitors for the appellant: *Farris, Stultz, Bull and Farris.*

Solicitor for the respondent: *E. Pepler.*

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*Oct. 25, 26, 27.
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*Mar. 30

MUNICIPAL DISTRICT OF SUGAR CITY No. 5 (DEFENDANT) ..... APPELLANT,

AND

BENNETT & WHITE (CALGARY) LIMITED (PLAINTIFF) ..... RESPONDENT,

AND

ATTORNEY GENERAL OF CANADA...INTERVENANT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Taxation—Municipal—Personal property—Construction contract providing that plant and equipment used will be "property" of Crown—Whether title of ownership in Crown or in contractor—Whether taxable—Recovery—Distress—Whether decision of Alberta Assessment Commission res judicata—Assessment Act, R.S.A. 1942, c. 157, ss. 5, 35, 45, 53—Municipal District Act, R.S.A. 1942, c. 151, s. 370—Vehicles and Highway Traffic Act, R.S.A. 1942, c. 275, s. 119.

Respondent contracted to do certain works at an irrigation project for the Crown. It was provided that respondent would furnish all machinery, plant, equipment and materials but that, until completion of the works, they would "be the property of His Majesty for the purposes of the said works" without His Majesty being answerable for loss or damage to such property; that they could not be removed without the consent of His Majesty; and that upon completion of the works they would be delivered to respondent. Should respondent be in default, His Majesty could use this property for the completion of the works and could sell or otherwise dispose of it.

Appellant assessed and taxed the said plant and materials. On appeal, where it was argued that the property belonged to the Crown, the assessment was confirmed by the Court of Revision and later by the Alberta Assessment Commission. Being threatened with seizure of the plant and equipment under powers of distress given by the *Municipal District Act,* respondent asked by the present action that the assessment be declared invalid. The trial judge maintained the action and the Appellate Division affirmed.

Held: The contract did not transfer the absolute title of ownership which remained in respondent, subject to the clauses binding the use of the plant and equipment to the works and tying them to the area within which they were brought for that purpose. All that was vested in the Crown was a group of rights and powers which, being security for the performance of the contract, would be specifically enforceable and would constitute an interest *ad rem.* Therefore respondent was taxable but, as there is no statutory provision for the recovery of tax on personal property by action, no such right can be implied nor can the appellant distrain upon the property taxed while it is under the obligations of the contract.

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

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Held further: The decision of the Alberta Assessment Commission is not *res judicata* as regards liability to taxation, because section 53 confers jurisdiction on the Commission only to correct or confirm the actions of the assessors and of the Court of Revision within their administrative jurisdiction of taxation and cannot be construed as vesting in the Commission judicial authority to determine questions of exemptions which involve the civil rights of property owners.

Per Kerwin J.: The decision of the Alberta Assessment Commission as regards liability to taxation is *res judicata,* as section 53 clearly confers upon the Commission jurisdiction to determine whether any person was legally assessed. But appellant is not entitled to judgment for the amount of the taxes involved as there is no provision in the *Act* to recover taxes in respect of personal property as a debt; he can recover by distress but not on the property which is subject to the terms of the contract.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), affirming the decision of the trial judge, Shepherd J., maintaining an action for a declaration that a municipal assessment on personal property was invalid.

A. C. Virtue, K.C. for the appellant.

S. J. Helman, K.C. and *R. H. Barron* for the respondent.

D. W. Mundell, K.C. for the Attorney General of Canada.

KERWIN J.: The respondent, Bennett & White (Calgary) Limited, brought an action in the Supreme Court of Alberta against the appellant, Municipal District of Sugar City No. 5, for a declaration that the assessment of the respondent for personal property, made by the appellant for the year 1947, is invalid; for an order that the respondent's name be stricken from the appellant's tax roll in respect of personal property for 1947; and for an injunction restraining the appellant from attempting to enforce its alleged claim for taxes and taking any steps to seize any of certain chattels, equipment and tools, hereafter referred to. The appellant counter-claimed for a declaration and decree that the assessment and taxation referred to were properly made and imposed; terminating the interim injunction already granted; in the alternative and in any event, that certain proceedings before the Court of Revision and the Alberta Assessment Commission preclude the

(1) [1949] 2 W.W.R. 129.

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respondent from maintaining the action; and, in the further alternative, for judgment against the respondent for the amount of the taxes involved and penalties. The trial judge granted the declaration and order firstly and secondly asked by the respondent, dismissed the counterclaim and, no doubt considering it unnecessary, made no order continuing the interim injunction. His judgment was affirmed by the Appellate Division (1).

The respondent is a company incorporated under the *Companies Act* of the Province of Alberta, having its head-office in Calgary, and the appellant is a municipal district constituted pursuant to the provisions of the *Municipal District Act*, R.S.A. 1942, c. 151. On July 22, 1946, the respondent, therein called the contractor, entered into an agreement with His Majesty, represented therein by the Minister of Agriculture of the Dominion of Canada, to construct certain diversion and irrigation tunnels at the St. Mary's Dam Project which lies within the boundaries of the appellant. By clause 3 of this agreement, it was provided that the respondent should at its own expense provide all and every kind of labour, superintendence, services, tolls, implements, machinery, plant, materials, articles and things necessary for the due execution and completion of the works, and should deliver the works complete in every particular to His Majesty on or before certain fixed dates. By clause 12, all plant, materials, etc., were included in the price payable by His Majesty under the agreement. By clause 15 (speaking generally) all plant, etc., became the property of His Majesty subject to a term whereby upon the completion of the works such of the plant, etc., as should not have been used and converted in the works, or disposed of by His Majesty under powers conferred by the contract, should upon demand be delivered up to the respondent. This clause reads as follows:—

15. All machinery, tools, plant, materials, equipment, articles and things whatsoever, provided by the Contractor or by the Engineer under the provisions of sections 14 and 16, for the works, and not rejected under the provisions of section 14, shall from the time of their being so provided become, and, until the final completion of the said work, shall be the property of His Majesty for the purposes of the said works, and the same shall on no account be taken away, or used or disposed of, except for the purposes of the said works, without the consent in writing of the Engineer. His Majesty shall not, however, be answerable for any

(1) [1929] 2 W.W.R. 129.

loss, or damage, whatsoever, which may at any time happen to such machinery, tools, plant, materials, equipment, articles or things. Upon the completion of the works and upon payment by the Contractor of all such moneys, loss, costs and damages, if any, as shall be due from the Contractor to His Majesty, or chargeable against the Contractor, under this contract, such of the said machinery, tools, plant, materials, equipment, articles and things as shall not have been used and converted in the works or disposed of by His Majesty under powers conferred in this contract, shall, upon demand, be delivered up to the Contractor in such condition as they may then be in.

In pursuance of this agreement, the respondent moved considerable plant and materials to the site of the works to be performed, the site being owned by His Majesty and being within the limits of the appellant. In 1947, the appellant assessed and taxed the said plant and materials under the provisions of the *Assessment Act,* R.S.A. 1942, chapter 157, and the *Municipal District Act.* Upon receipt of notice of the assessment, the respondent, in pursuance of section 35 of the *Assessment Act,* appealed to the Court of Revision which, by section 37, is composed of members of the council of the municipal district. By a letter supplementary to its notice of appeal to the Court of Revision, the respondent had taken the ground that the plant, etc., which was the subject of the assessment, did not belong to it but to His Majesty in the right of the Dominion of Canada. The Court of Revision confirmed the assessment and, pursuant to section 47, the respondent appealed against that decision to the Alberta Assessment Commission, constituted as provided by the *Alberta Municipal Assessment Commssion Act,* R.S.A. 1942, chapter 156. Section 53 of *The Assessment Act* reads as follows:—

53. In determining all matters brought before the Commission it shall have jurisdiction to determine not only the amount of the assessment, but also all questions as to whether any things are or were assessable or persons were properly entered on the assessment roll or are or were legally assessed or exempted from assessment.

The Commission dismissed the appeal except for a reduction in the amount of the assessment.

The appellant thereupon threatened to seize the plant and equipment under the powers of distress given it by subsection 4 of section 310 of the *Municipal District Act* in relation to taxes which are not a lien upon land. The present action followed and the interim injunction referred to above was secured.

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A number of interesting and difficult questions were argued at bar and some of them are referred to in the reasons for judgment in the Courts below. The first to be determined is whether the decision of the Assessment Commission is *res judicata*. The trial judge considered that a previous decision of the Appellate Division in *In Re Companies Act, In Re Northern Transport Co. Limited and Village of McMurray* (1), effectively disposed of the contention, and his reasons were adopted by the Appellate Division in the appeal (2) in the present case. In the *McMurray* case, the Appellate Division, holding that the principle to be applied was to be found in *Toronto Railway Company* v. *Toronto* (3), *Victoria* v. *Bishop of Vancouver Island* (4), and *Donohue Bros.* v. *St. Etienne* (5), decided that the Alberta Assessment Commission had no power to determine that non-taxable property was taxable.

The *Toronto Railway* case was decided upon the provisions of the *Ontario Assessment Act*, R.S.O. 1897, chapter 224. Section 68 of that *Act* enacted with reference to the Court of Revision:—

> At the time or times appointed, the Court shall meet and try all complaints in regard to persons wrongfully placed upon or omitted from the roll, or assessed at too high or too low a sum.

Provision was made for an appeal to a Court of Revision, a County Judge, a Board of County Judges where the assessment exceeded a certain amount, and to the Court of Appeal. Proceedings were taken thereunder wherein the Court of Appeal determined that the Railway Company's electric cars were real estate and assessable. The Company brought an action for a declaration that its cars were personal property and not subject to assessment or taxation. The Judicial Committee held, reversing the Court of Appeal and the trial judge, that the previous decision of the Court of Appeal in the assessment proceedings was not *res judicata* because by section 68 the jurisdiction of the assessment courts was confined to the amount of assessment and did not extend to validate an assessment unauthorized by the statute.

In the *Victoria* case, no appeal from the assessment had been taken by the Bishop, and the Judicial Committee held

(1) [1949] 1 W.W.R. 338.
(2) [1949] 2 W.W.R. 129.
(3) [1904] A.C. 809.
(4) [1921] 2 A.C. 384.
(5) [1924] S.C.R. 511.

that provisions whereby any one complaining of an "error or omission in regard to himself" as having been wrongfully placed on the assessment roll should have a right of appeal to a Court of Revision and that the assessment roll, as revised, confirmed and finally passed, should be deemed valid and binding notwithstanding any defect or error, etc., were merely machinery sections and did not empower the corporation or its officers to assess and tax any property expressly or impliedly exempt from taxation.

In the *Donohue* case, which arose in the Province of Quebec, this Court held that the appellant was not restricted to an appeal under the assessment provisions but was entitled to bring an action in the Superior Court for a declaration that the assessment of its machinery was null and void.

After the decision in the *Toronto Railway* case, the *Ontario Assessment Act* was amended in 1910 by 10 Edward VII, chapter 88, when section 19 was enacted, which subsequently became section 83 of R.S.O. 1914, chapter 195, whereby power and jurisdiction were given the Court of Revision to determine not only the amount of any assessment but also all questions as to whether any person or things are, or were, assessable. In *Village of Hagersville* v. *Hambleton* (1), Hambleton had been assessed by the Village in respect of income and the assessment was confirmed by the Court of Revision and no further appeal taken. The defendant's plea in an action subsequently brought by the Village for taxes, based upon that assessment, that he did not reside in the Village and was not assessable was rejected by the Court of Appeal who held that it was *res judicata* because of the provisions of section 83. Middleton, J.A., pointed out that in two intervening cases, *City of Ottawa* v. *Nantel* (2), and *City of Ottawa* v. *Keefer* (3), the attention of the Court had not been drawn to the amendment to the *Assessment Act*.

The *Hagersville* case was referred to by Smith J., in delivering the judgment of this Court in *Sifton* v. *Toronto* (4). There, Sifton removed from Toronto to the Township of York on December 14, 1923. An assessment roll for Toronto had been prepared in 1923, while Sifton still

(1) (1927) 61 O.L.R. 327.
(2) (1921) 51 O.L.R. 269.
(3) (1924) 54 O.L.R. 86.
(4) [1929] S.C.R. 484.

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resided there and he was entered on the roll for income. It was pointed out that he could not have successfully appealed against this assessment. In 1924, Toronto adopted, pursuant to a by-law passed in accordance with the *Assessment Act*, the 1923 assessment as the one for 1924. It was held that the assessment in question was on Sifton's income for 1924 and that by various enactments referred to, the municipality was prohibited from attempting to exercise jurisdiction outside the municipality and was exceeding its powers to "levy on the whole rateable property within the municipality." The *Hagersville* case was clearly distinguishable and it was held that it had no application.

In the subsequent case of *City of Ottawa* v. *Wilson* (1), the Court of Appeal held that where a person in an action for income taxes was found to have been not resident in the municipality at the time of assessment, the provisions of the *Ontario Assessment Act* did not empower the assessor to place her upon the assessment roll. The *Hagersville* and *Sifton* cases were referred to by Grant, J.A., and it was found that as the facts underlying the *ratio decidendi* in the former were not present, the decision did not affect the matter under consideration. Middleton, J.A., and Masten, J.A., who had taken part in the *Hagersville* decision, agreed. In *Becker* v. *Toronto* (2), the Court of Appeal, without giving reasons, held that a man whose property was exempt from taxation could recover taxes paid under protest. In each of these cases the party assessed had not appealed from the assessment.

In the present case, section 53 of the *Alberta Assessment Act* is very clear in conferring jurisdiction upon the Commission to determine whether any things are, or were, assessable, or persons were properly entered upon the assessment roll, or are, or were, legally assessed. That jurisdiction was appealed to by the present respondent and it cannot now be heard to raise the same point again. It is not to the purpose to argue that the members of the Court of Revision were not lawyers and, therefore, presumably incompetent to pass upon legal questions, and that the Commission might not be composed of persons of legal training. The legislature has seen fit to set forth in unmis-

(1) [1933] O.R. 21. (2) [1933] O.R. 843.

takable language the power and jurisdiction of the Commission and the meaning of section 53 should not be abridged even if it were thought that such a power should not have been conferred upon such a body. This is the only point decided and, in the absence of the Attorney General of Alberta, nothing is said as to the power of the legislature to confer such a jurisdiction upon the Commission.

The respondent is therefore not entitled to a declaration that the assessment in question was invalid or to an order that its name be stricken from the appellant's tax roll in respect of personal property for 1947 and, on the other hand, the appellant is entitled to a declaration and decree that the assessment and taxation were properly made and imposed. However, the appellant is not entitled to judgment for the amount of the taxes involved. Section 305 of the *Municipal District Act* provides that the taxes due in respect of any land, mineral, or timber, or business, may be recovered with interest as a debt. There is no reference to taxes due in respect of personal property and the rule is well-settled at common law that there is no such right. Section 370 of the *Municipal District Act* does not confer it. The appellant is entitled to exercise whatever powers of distress are conferred by subsection 4 of section 310 of the *Municipal District Act* but, in view of the agreement between His Majesty and the respondent, the appellant is not entitled to seize any of the machinery, tools, plant, materials, equipment, articles and things of the respondent, referred to in the agreement, while they are subject to the terms thereof.

The appeal should be allowed and judgment entered for the appellant in accordance with the foregoing. The appellant is entitled to its costs of the claim and counter-claim throughout. There should be no costs to or against the Attorney General of Canada.

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

RAND, J.: This appeal raises questions going to the taxability of certain plant and equipment used by the respondent as contractor for works undertaken with the Dominion Government. The works were on a large scale

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and embraced diversion and irrigation tunnels on what is known as the St. Mary Dam Project. The plant and equipment belonged to the respondent and was within the municipality in such circumstances that if they had not been affected by the terms of the contract there would have been no question of their liability to taxation.

The main point of controversy arises from the provisions of paragraph 15 which reads thus:—

> All machinery, tools, plant, materials, equipment, articles and things whatsoever, provided by the Contractor or by the Engineer under the provisions of sections 14 and 16, for the works, and not rejected under the provisions of section 14, shall from the time of their being so provided become, and, until the final completion of the said work, shall be the property of His Majesty for the purposes of the said works, and the same shall on no account be taken away, or used or disposed of, except for the purposes of the said works, without the consent in writing of the Engineer. His Majesty shall not, however, be answerable for any loss, or damage, whatsoever, which may at any time happen to such machinery, tools, plant, materials, equipment, articles or things. Upon the completion of the works and upon payment by the Contractor of all such moneys, loss, costs and damages, if any, as shall be due from the Contractor to His Majesty, or chargeable against the Contractor, under this contract, such of the said machinery, tools, plant, materials, equipment, articles and things as shall not have been used and converted in the works or disposed of by His Majesty under powers conferred in this contract, shall, upon demand, be delivered up to the Contractor in such condition as they may then be in.

The effect of that paragraph is said to be to vest such a title or interest to the plant and equipment in the Crown or to affect the title of the respondent in such manner as renders the assessment invalid, and the first question is whether that conclusion is sound.

It will be seen that both plant, equipment and materials are included, and that they are declared to be the property of His Majesty "for the purposes of the said works". The purpose of the materials is obviously quite different from that of the plant and equipment, and the qualifying clause must appropriately respond to that difference. It was argued that the phrase defines the time or period of a transferred ownership; but at law there are no estates or remainders in personal property: the only title is the absolute title. The true conception where successive ownerships in A and B are in mind seems to be that the property in B is made subject to a right or power of use in A for a

specified period: but no doubt contractual stipulations may affect transfers of title on the happening of events or conditions.

The effect of the clause is both to bind the use of the plant and equipment to the works, and to tie them to the area within which they are brought for that purpose. It is seen that the Minister may permit units to be removed from the works which the contractor would be at liberty to return, and it would be treating title rather freely to conceive it as shuttling back and forth as the units might move on or off the working grounds.

The contractor is undoubtedly to remain in actual and legal possession of the plant and equipment while he is not in default; likewise his beneficial interest in them is not affected and with it the risk of loss or damage. Power is given to the Minister, in certain contingencies, to take the works, as it is said, "out of the hands" of the contractor and use the plant and equipment to complete them. Upon completion, the plant and equipment are to be, not "reconveyed" or "re-transferred" to the contractor, but "delivered up" to him as they may then be, which I take to signify no more than that the powers binding them come to an end.

Then it is contemplated that the plant or equipment or parts of either may not be owned by the contractor at all, but hired or rented by him, as in paragraph 29 which speaks of sums due for "hire of horses, teams or carts" "or any claims against the contractor, or any subcontractor for . . . plant, equipment . . . hired or supplied upon or for the works". In case of default, also, paragraph 18 provides that, "all plant, including horses and all rights, licences, powers and privileges affecting the personal property acquired or possessed by the contractor for the purposes of the work shall remain and be the property of His Majesty for all purposes incidental to the completion of the works, and may be used, exercised and enjoyed by His Majesty as fully, to all intents and purposes, connected with the works as they might theretofore have been used, exercised and enjoyed by the contractor, and the Minister may also, at his option, on behalf of His Majesty, sell or otherwise dispose of" them.

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Shepherd, J. at the trial who found against the assessment seemed to extract some support for his view from the language of paragraph 12 providing, as he stated it, "that all plant and materials furnished by the plaintiff were included in the prices payable by the Government under the agreement"; but that, with great respect, does not seem to be the true meaning of the language paraphrased. What is there being declared is that the price or prices shown in paragraph 34, which deals with unit prices, include everything done and furnished by the contractor and the reference to the plant excludes by way of precaution any question of adding to those prices rental or other compensation for the use of the equipment. Such allowances are, in special circumstances, contemplated by the paragraph which, for new work, provides that in addition to the actual and reasonable cost, "10 per cent thereon for the use of tools, contractor's plant, superintendence and profits" is to be allowed. It is, I think, incontrovertible that neither plant nor equipment is, in such sense, "paid for" by the Crown.

These stipulations make it clear to me that what has been vested in the Crown, in relation to the plant and equipment, is a group of rights and powers to the extent of the contractor's title or interest in them; and that the contractor employs his own property as he would ordinarily do but within those restrictions both as to its use and its residence. The effect of the language is not, "I give you the property but subject to my use of it for the purposes of the contract"; it is rather, "I give you the right to have the property kept on your land and its use applied to those purposes whether I fulfill them or some one else does". That arrangement is virtually identical with that in *Keen* v. *Keen, Ex p. Collins* (1). Such was the situation at the time of the assessment.

On appeal (2), Ford J.A. seems to lay it down that taxability of personal property depends upon the competency of the taxing authority at the moment of assessment to exercise against the property the powers of distress given by the statute, which, in some manner, follows from the fact that the power given is "to tax property

(1) [1902] 1 K.B. 555. (2) [1949] 2 W.W.R. 129.

and not persons in respect of an interest therein". What, then, is meant by taxing property as distinguished from persons in respect of property?

The notion that to "tax property" is to subject it, as a legal object, to some sort of inhering obligation vaguely to be regarded as the equivalent of a lien, is, I think, a misconception. Although the *Assessment Act* speaks of the taxation of property or business, it does not always do so: section 26(3), "every person who is assessed in respect of such property"; section 32, "where any person was at the time of the assessment taxable in respect of any property, business, trade or profession"; section 33, similar language but also "the assessment of the property"; section 291 of the *Municipal Districts Act* refers to business taxes "payable by each person assessed . . . in respect of a taxable business"; section 295, to the taxes due by a person whose name appears on the roll "in respect of the property or business for which he is assessed"; section 310(4), dealing with distress for taxes which are not a lien on land, in paragraph (*a*) provides for distress "upon the goods or chattels of the person taxed wherever found within the province"; and paragraph (*c*), "upon the goods and chattels in the possession of the person taxed, etc."

On the other hand, section 305, dealing with taxes "due in respect of any land, etc.", declares that they may be recovered as a debt and "shall be a special lien on the land". But no lien is created on personal property. Although the personal property existing at the time is the basis of the assessment, the collection of the tax is not in any manner bound up with it. The tax based on today's personal property may be collected on tomorrow's property, whether within or without the municipality. These provisions distinguish between the assessment and imposition of a tax and the modes of collection, but all three of them must be found either expressly or impliedly in the taxing statute; together they constitute the legislative authority and power for the exaction. Except as it may be evidential of an implied means of collection, the conception of the assessment, *per se*, as of property or of a person in relation to property, carries no practical significance of difference.

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The Minister's rights and powers, being security for the performance of the contract, would be specifically enforceable and constitute an interest *ad rem*. It may be, on the principle of *In re Marriage, Neave & Co.* (1), that such an interest cannot be asserted by a subject against a distress of this nature: but, as enjoyed by the Crown, it could not so be defeated.

But these rights and powers are no essential part of the title; they are exercisable in relation to the use of the property and so far they derogate from one of the incidents of ownership; but they assume title in the contractor. Being of such a nature, the interest as at the time of assessment, if held by a subject, would not be a taxable interest under the *Assessment Act*.

The statute contains nothing that even purports to make assessability conditional upon contemporaneous exigibility by distress. The basic fact for assessment is the ownership or legal possession of personal property, and here, at the critical time, both were in the respondent. Goods subject to a chattel mortgage and in the possession of the mortgagor are clearly liable to assessment and to distress, and, seemingly, I should say, distrainable whether or not in his possession, where not in the possession of the mortgagee. Before that step, the mortgagor is the owner within the meaning of the statute. A *fortiori* a mere interest *ad rem* does not affect that title or prevent a distress.

Taking the personal property, then, as being taxable, can the taxes be recovered by suit against the owner as for a debt? Since the remedy must appear from the statute and as the statute here, while specifically providing for the recovery by suit of taxes imposed in respect of land, has not done so for taxes on personal property and has instead provided the means of distress, no such right can be implied.

It is objected that the interest of the Crown, exempt from taxation, has nevertheless been included in the property taxed; but as that interest was not at the time of assessment a taxable interest, and the value of the user has never in fact been out of the contractor, the point falls. Moreover, this contention ignores the distinction between

(1) [1896] 2 Ch. 663.

taxing an interest of the Crown and taxing an interest of the subject as if, for purposes of amount, he were the owner of the Crown's interest: *Fairbanks* v. *Halifax* (1).

The remaining question is whether any of the plant and equipment is exempt under paragraph (*z*) of section 5(1) as being within the expression "motor vehicles". The word "vehicle" in its original sense conveys the meaning of a structure on wheels for carrying persons or goods. We have generally distinguished carriage from haulage, and mechanical units whose chief function is to haul other units, to do other kinds of work than carrying, are not usually looked upon as vehicles. But that meaning has, no doubt, been weakened by the multiplied forms in which wheeled bodies have appeared with the common feature of self-propulsion by motor.

The object, then, of the exemption becomes important; and, quite apart from the canon that an exemption from taxation should be in precise language, it seems to me that in this case, in relevant statutory expressions that object does appear. By section 119 of *The Vehicles and Highway Traffic Act,* chap. 275, R.S.A. 1942, it is declared that except where an Act specifically provides to the contrary, "no municipality shall have the power to pass, enforce or maintain any by-law requiring from any owner of a motor vehicle or chauffeur, any tax, fee, licence or permit for the use of the public highways . . .". Although the tax is associated with the use of the highways, I take it to evidence the intention that the exaction of fees or taxation for motor vehicles—which, to some extent at least, use highways as part of their normal operation—is to be provincial and not municipal. But "motor vehicle" in that Act does not include traction engines or vehicles running on rails. What was intended by the exemption in the *Assessment Act* was to make clear the uniformity between the two statutes. The exemption then does not include units of self-propelled equipment whose main purpose is either that of haulage or work other than conveying or vehicles running on rails as distinguished from general locomotion.

The objects fall within four categories. There are, first, what are described as dumptors assessed at $18,000:—these are ordinary four-wheeled vehicles with gasoline engine,

(1) [1928] A.C. 117.

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the body of which is a box and the purpose of which is to carry material from place to place. I am unable to distinguish them from the ordinary truck, and they would seem clearly to be exempt. The second class consist of caterpillar tractors used, with concave blades attached to the front as bulldozers, or with other devices attached behind to gather up material of excavation. These, as clearly, are not exempt. The third are known as draglines; these are large units, in operation like mechanical shovels, which excavate earth and other materials by means of a scoop bucket dragged along the ground by heavy cables. The entire body moves on caterpillar treads by its own power, but as can be seen, its whole function is that of doing work as against carrying, which excludes it from the exemption. The fourth are locomotives and cars which run on rails to carry away the excavated material: they remain taxable. Other items of equipment such as dozer blades, caterpillar power units, dragline buckets, and Letourneau Carryalls, are all accessories to or integral parts of the units in the four classes, which they must follow.

In the result, then, the assessment should be reduced by the amount representing the dumptors and their accessories; subject to that, it remains.

Mr. Virtue contends that as the respondent appealed both to the Court of Revision and the Alberta Assessment Commission, the taxability of the respondent is by the effect of section 53 of the *Assessment Act res judicata.* The section provides:—

> In determining all matters brought before the Commission it shall have jurisdiction to determine not only the amount of the assessment, but also all questions as to whether any things are or were assessable or persons were properly entered on the assessment roll or are or were legally assessed or exempted from assessment.

This language, it will be noticed, does not purport to conclude issues on the questions mentioned. If the Commission were an ordinary court, dealing in a judicial sense with matters of civil rights, the import of jurisdiction would be unquestioned. But taxation is essentially an administrative function; the assessor is directed by the statute to ascertain the value of certain property as the basis on which the province will exact a contribution from persons interested in it to enable government to be carried on. That ascertainment is an act *in rem* and its execution, given the

jurisdiction to tax, lies in such mode and such means as the legislature may prescribe.

But the statute, in defining the subject matter of taxation, necessarily limits the scope of legal action, and if, as we say, a subject is excluded from taxation, then as to it, a purported administrative act would have no legal effect.

Whether an act is or is not within a jurisdiction depends, if challenged, upon a determination by a tribunal. Ordinarily, jurisdictional facts, arising under a statute, are found by the civil courts; and when we speak of a finding of non-assessability of property, we mean as that conclusion has been or is declared by those tribunals. But the initial question is not what the fact is in actuality, which must be as it appears to some mind; it is rather, what is the tribunal to which we must look for that jurisdictional determination?

In dealing with taxation, from assessors to taxation commissions, the provisions of the statute regarding liability and exemption are necessarily taken into account by lay persons and bodies. The determination of an exemption involves an interpretation of the statute, and it thus affects a civil right. But the assessor must have regard to exemptions for the purpose of the administrative integrity of the roll; and although it is his duty to follow the provisions of the statute to the extent his judgment permits him to do so, it is undoubted that that preliminary judgment is essentially different from a judicial determination of the legal question.

The assessor, as part of his administrative duty, and as distinguished from purely administrative acts, exercises a lay judgment in the interpretation of the statute. From the whole of his exercise of authority, the statute ordinarily gives a right of appeal. By the nature of appeal, in the absence of special and original powers given to the revising body, it is to be taken as limited to examination of the matter that was before the assessor and to the giving, in the same sense, of the decision which he should have given.

In this case, section 35 of the *Assessment Act* provides for a complaint to the Court of Revision which is to be in respect of:—

(*a*) any error or omission alleged in respect of the assessment of any property or persons;

(*b*) any assessment alleged to be too high or too low;

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(c) any property or business in any way wrongfully assessed;
(d) the name of any person alleged to be wrongfully entered upon or omitted from the assessment roll.

Section 45 provides:—

Upon the termination of the sittings of the Court of Revision . . . the Secretary-Treasurer shall . . . enter . . . the following certificate . . .; and the roll as thus finally completed and certified shall be the assessment roll for that year, subject to amendment on appeal to the Alberta Assessment Commission . . . and shall be valid and bind all parties concerned, notwithstanding any defect in or omission from the said roll or mistake made in or with regard to such roll or any defect, error or misstatement in any assessment slip or notice or any omission to deliver or to transmit any assessment slip or notice.

Authority must obviously be vested in that court to amend in any respect the roll as completed by the assessor, and the provisions of the *Act* do that. As in the case of the assessor, finality is given or confirmed to the purely administrative acts, but in the quasi-judicial determinations, the decision is of the same character as that of the assessor.

It is seen, next, that further amendment by the Assessment Commission shall be "on appeal", and it is on that footing that section 53 confers jurisdiction on the Commission as preceding sections had vested jurisdiction in the Court of Revision. But following the same rule, what the Commission does is to correct or confirm the actions of the assessor and the Court of Revision within their jurisdictions. It is for determining "all matters brought before the Commission" that the jurisdiction is declared, but those matters are such as come by way of appeal, and I see nothing in the section which introduces a new and original authority to deal with those matters in other than the administrative manner in which they have already been dealt with: I see nothing intended to confer a purely judicial function dealing with civil rights.

The material sections in the Alberta Act have their prototypes in provisions of the *Ontario Assessment Act*, and it is argued that the case of *Village of Hagersville* v. *Hambleton* (1) has given an authoritative interpretation of section 83, which corresponds to section 53, to the effect that a confirmation by the Court of Revision of an assessment for income tax was conclusive as to the residence

(1) (1927) 61 O.L.R. 327.

of the person assessed. The Judicial Committee in *Toronto Railway Company* v. *Toronto* (1), had found the jurisdiction of the Court of Revision limited to the question of more or less in value, from which it followed that whether a person was or was not a resident of a municipal area within the meaning of the statute was a question to be determined by the civil courts. But section 83 had been amended and the application of that authority was rejected. Riddell, J.A., at the opening of his judgment, says:—

> I may say at once that if the liability of the defendant to be assessed depended on the evidence of residence given at the trial, the judgment appealed from could not stand.

He held the amendment to have established exclusive tribunals of appeal to which only the assessed person could resort, and that the fact of residence as found by the Court of Revision was conclusive. In this view, the other members of the Court concurred.

In the next year, *Sifton* v. *City of Toronto* (2) came before the same court. There, the plaintiff had resided in Toronto from the beginning of the year until the 14th of December of 1923 when he moved to and became a resident of another municipality where he continued to reside during the whole of 1924. He had been assessed in 1923 for income and had paid the tax to Toronto. Under section 56 of the *Assessment Act*, on the 28th of February, 1924, Toronto passed a by-law adopting the assessment made for 1923 as that for the current year 1924, and later in 1924 demanded taxes accordingly from the former taxpayer. They were paid, and proceedings brought to recover them. On appeal from the judgment of the County Court dismissing the action, the court was equally divided: Mulock, C.J., and Grant, J.A. were to dismiss and Magee, J.A. and Hodgins, J.A. were for allowance. In this Court (3), the judgment below was reversed. Smith, J., who gave the judgment, distinguished the case of *Hagersville* v. *Hambleton* (4) on the ground that upon the adoption of the roll by the by-law of February 28th there was no tribunal to which the taxpayer could appeal against an improper assessment. But what lay at the bottom of the decision was the fact that in February, 1924, when the resolution

(1) [1904] A.C. 809.
(2) (1929) 63 O.L.R. 397.
(3) [1929] S.C.R. 484.
(4) (1927) 61 O.L.R. 327.

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of adoption of the roll was passed, the person assessed was not resident in Toronto. There was an apparent conflict between the statutory provision that Toronto could tax only those who were resident within its boundaries, and the declaration that the roll as certified was to be the roll for the year in question. But the fact giving rise to that conflict was held to be determinable by the civil court, and the former provision to be controlling.

That case was followed by *Ottawa* v. *Wilson* (1). The situation was somewhat similar. Before the assessment against the defendant was made, she had moved from Ottawa to Rockcliffe, but after that removal, and in the same year, her name had been entered upon the roll for Ottawa. No appeal was taken to the assessment tribunals. In an action to recover the taxes, it was held that it was *ultra vires* of Ottawa to assess a person who, as determined by the civil courts, was not a resident. Although the *Hagersville* case is mentioned, it is declared by Grant, J.A. that, as interpreted by the *Sifton* judgment, it did not affect the case at bar. With Grant, J.A. agreed Mulock, C.J.O. and Masten, J.A. Middleton, J.A. concurred in those views: he treated the *Sifton* decision as carrying to its logical conclusion the principle that a person can only be assessed for income "in the municipality in which he resides". But again arises the question, as found by what tribunal?

So far as the *Hagersville* case declares an exclusive jurisdiction in the assessment tribunals for determining the fact of residence, it must be taken to be inconsistent with these subsequent decisions; and I attribute to those tribunals only a jurisdiction of an administrative body as I have defined it. What questions of law involved in the assessment can be dealt with on appeal from those tribunals to a superior court, a step which in Alberta does not lie, depends on the language of the statute giving the right of appeal. What appears then is this, that if as found by the civil courts, jurisdiction for the act of assessment is absent, neither the decision of the assessment courts nor any statutory provision dealing with the conclusiveness of the roll is effective.

(1) [1933] O.R. 21.

That was the view taken of somewhat similar language in *R. M. Buckland* v. *Donaldson* (1), and in *Victoria* v. *Bishop of Vancouver* (2).

The same principle applies *a fortiori* to the question of exempted property. Whatever may be determined to be in that class is beyond the jurisdiction of assessment; and the judicial interpretation and application of the language of exemption is for the civil courts.

It may be, given property within the province, that the legislature might declare the scope of the exemption should be as interpreted by the assessment tribunal: that would be to vest a sub-legislative taxing authority in the Commission. But in this case the legislature has not done so. Or the legislature might purport to set up special provincial courts to interpret judicially legislative provisions affecting civil rights. If it were clear that that was the effect of the statute in this case, then the serious question of *ultra vires* would be presented. But where the legislative language is capable, as here, of being given rational meaning within undoubted provincial authority, and any other view would raise doubts and anomalies within the statute, the legislature's intention to go beyond that authority and within a questionable field should not be inferred.

For these reasons, section 53 is not to be construed as purporting to vest in the Assessment Commission judicial authority to determine questions of jurisdiction arising out of the provisions declaring exemptions; as the civil rights of owners of property are involved, the section is to be taken, in that respect, to contemplate only such dealing with the roll by the Commission in the exercise of its practical judgment on such matters as will render it as free as possible from errors of law.

I would, therefore, allow the appeal and, subject to the modification in the assessment roll mentioned, dissolve the injunction and dismiss the action. On the counterclaim, the appellant is entitled to a declaration that the taxes as modified were properly imposed: but the appellant cannot distrain upon the property taxed while it is under the obligations of the contract. The appellant should have its

(1) [1928] 1 W.W.R. 40. (2) [1921] 2 A.C. 384 at 396.

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costs of the action including the counterclaim throughout. The intervention of the Attorney General will be without costs.

Appeal allowed with costs.

Solicitors for the appellant: *Virtue, Russell and Morgan.*

Solicitors for the respondent: *Helman, Mahaffy and Barron.*

Solicitor for the intervenant: *D. W. Mundell.*

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*Feb. 13, 14
*April 25

JOGGINS COAL COMPANY LIMITED ..... } APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Revenue—Income Tax—Depletion Allowance re coal mines—Meaning of the words "lease" and "lessee" in leases of mines as used in the Income War Tax Act, R.S.C., 1927, c. 97, s. 5(1) (a) as amended.

Section 5(1) (*a*) of the *Income War Tax Act* provides that:

The Minister in determining the income derived from mining * * * may make such an allowance for the exhaustion of the mines, * * * as he may deem just and fair, and in the cases of leases of mines * * * the lessor and lessee shall each be entitled to deduct a part of the allowance for exhaustion as they agree and in case the lessor and lessee do not agree the Minister shall have full power to apportion the deduction between them and his determination shall be conclusive.

Held: that the word "leases" and the word "lessee" in s. 5(1) (*a*) of the *Income War Tax Act* are not used in the narrow or technical sense. Such "leases" include a grant to the "lessee" of an exclusive right to mine and appropriate the mineral to the use of the grantee.

Held: also, that the refusal by the Minister to consider the appellant as a "lessee" involved an error in law and therefore was not a good ground for refusing to make an allowance for depletion.

D. R. Fraser Co. Ltd. v. *Minister of National Revenue,* [1949] A.C., 24; *McCool* v. *Minister of National Revenue,* [1950] S.C.R., 80, followed.

Judgment of the Exchequer Court of Canada, [1949] Ex. C.R., 361, reversed.

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

APPEAL from the judgment of the Exchequer Court of Canada, Cameron J., (1) dismissing the appeal of the appellant and affirming the assessments made by the respondent under the Income War Tax Act for the years 1939, 1940 and 1941.

C. B. Smith, K.C. for the appellant.

J. T. MacQuarrie, K.C. and *A. J. MacLeod* for the respondent.

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

KELLOCK J.: This is an appeal from the decision of the Exchequer Court, Cameron J. (1) affirming the dismissal by the Minister under the provisions of *The Income War Tax Act* of an appeal by the appellant in respect of its assessment for income for the years 1939, 1940 and 1941.

During the said years the appellant derived its entire income from mining the coal from "the 40 Brine Seam"; the right to mine which was granted *inter alia* by two "mining leases" made by the Province of Nova Scotia in 1903 and renewed on July 2, 1923, on the basis of certain rents and royalties.

The interest of the original lessee in these leases was acquired by one Ralph Parsons by virtue of a sale under execution and he became duly entered in the records of the Provincial Mines Office as the lessee.

On June 4, 1937, the said Parsons entered into an agreement with the Fundy Coal Company Ltd. to sell to the latter all his right, title and interest in the said mining leases and this company, by agreement of June 7, 1937, assigned to the Tantramar Coal Company all its right in the agreement with Parsons and its interest in the mining leases.

Again, on June 1, 1939, the Tantramar Company entered into an agreement with one J. H. Winfield, by which the Tantramar Company, as "vendors", granted to Winfield, as "purchaser", "the sole and exclusive right or option to mine and purchase such coal as the purchaser desires to win from the said 40 Brine Seam under the terms and conditions hereinafter recited". This agreement provided for the payment of certain royalties on a graduated scale

(1) [1949] Ex. C.R. 361.

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to the vendors as well as the provincial royalties and obligated the purchaser to mine all the marketable coal in the seam which, under sound mining practice, would be practical and expedient to mine from a certain shaft then under construction. Subject to certain indefeasible rights in any shafts sunk, the agreement provided that if the purchaser at any time ceased reasonably active operations on the seam, any coal remaining therein should "revert" to and be the sole property of the vendors. By agreement of September 2, 1939, Winfield, as vendor, assigned and transferred to the appellant, as purchaser, all his rights in the leases and undertook to perform all obligations of the vendor.

It is convenient at this point to refer to the nature of the rights granted by the original "leases" themselves. The surface rights in the lands in respect of which the leases here in question were issued had previously been granted to private owners and under the provisions of the Statute, R.S.N.S. (1923) c. 22, the lessee was prohibited from entering upon or using the lands for mining purposes without acquiring a right to do so by agreement with the owner of the surface rights or by proceedings taken under other provisions of the statute.

By section 184 "lease" is defined, so far as minerals other than gold or silver are concerned, as "a lease of the right to mine minerals", and by section 185 "every application for a lease shall state the mineral for which the right to mine is sought and shall describe the tract of ground sought to be covered by such * * * lease". By the statutory form of lease the Crown "grants and demises unto the lessee all the rights of the Crown to the * * * (coal?) * * * in that certain tract of ground situated at and described as follows. It also provides that:

> the lessee shall have during the term of this lease or any renewal thereof the exclusive right of mining for and taking for his own use all * * * contained in the said tract of ground and appropriating the same to his own use.

It is also expressly provided that nothing in the lease shall authorize entry by the lessee upon the surface of the land or interference in any way with it.

The matter here in issue involves the right of the appellant to an allowance or deduction from its taxable income

for "depletion" under the provisions of section 5(1) (*a*) of the *Income War Tax Act*. With relation to the taxation year 1939 the Act read as follows:

5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—

(*a*) * * * the Minister in determining the income derived from mining * * * shall make such an allowance for the exhaustion of the mines * * * as he may deem just and fair, and in the case of leases of mines * * * the lessor and the lessee, shall each be entitled to deduct a part of the allowance for exhaustion as they agree and in case the lessor and the lessee do not agree the Minister shall have full power to apportion the deduction between them and his determination shall be conclusive.

This appeal was argued on the footing, and it must now be taken to be the fact, that the Minister in the exercise of his discretion with respect to the making of an allowance for exhaustion or depletion of the particular mine here in question, fixed the allowance at ten cents per ton of coal actually mined. However, while the appellant mined some 29,000 tons of coal in the year 1939, the Minister refused it any part of this allowance. His ground for so doing is made clear in certain letters written to the appellant pending its appeal to the Minister, by the Director General of the Legal Branch of his department.

In a letter of December 4, 1947, the following appears:

This case presents special difficulties, in that it raises the question as to *which of two taxpayers* is entitled to the depletion allowance under paragraph (*a*) of section 5 of the Income War Tax Act.

On the facts in this case we would consider that the lessor is the Crown in the right of the Province of Nova Scotia and as the province is not a taxpayer, there is no question of making an allowance to the lessor. The question, however, remains as to the proper *party* to be considered as the lessee.

The agreement dated 1st June, 1939 under which J. H. Winfield, and subsequently this company, (the appellant) obtained the right to operate the mine, is not made in the form of a lease or sub-lease, but appears to be merely for the *sale of the coal in the mine*. The purchaser obtains "the sole and exclusive right or option to mine and purchase such coal as the purchaser may desire to win from the said 40 Brine Seam". Under clause 8 of this agreement, the coal reverts to the vendor if the purchaser ceases to mine the property.

In our opinion, this agreement is not a sub-lease or assignment of a lease, but *merely a sale* of the coal and the necessary licence to mine the coal. The vendor apparently remains the lessee from the Crown and would therefore be the lessee within the meaning of the relevant provisions of the Income War Tax Act.

* * *

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If the Tantramar Company had assigned all its interest to the Joggins Coal Company Limited, then we would agree that the Joggins Company became the lessee in place of the Tantramar Company, but as stated before, we do not think the agreement in 1939 has this effect.

(The Italics are mine.)

A further letter of January 14, 1948, reiterates the refusal of the Department "to accept the proposition that this company" (the appellant) "is the lessee of the Crown within the meaning of section 5 (*a*)". Referring to the agreement of June 1, 1939, the letter states:

Presumably, the Tantramar Coal Company Limited takes the stand that it was not a lease, but merely a sale of the coal and a licence to operate the property.

The letter continues:

This Department is in the position of having to decide *which* of two taxpayers is entitled to the allowance for depletion in the absence of an agreement between them. To give your client the benefit of the doubt would require depriving another taxpayer of the allowance. Under these circumstances, we consider that the question should be determined by the Exchequer Court.

* * *

Your appeal can only be sustained on the grounds that the Joggins Company has replaced the Tantramar Company as lessee from the Crown and as stated before, we do not consider this to be the effect of the Agreement of June, 1939.

In accordance with the view thus expressed, the appellant was excluded from all benefit under the section. It received no allowance for depletion in 1939, although its entire income was "derived from mining".

The statement of defence maintains this position. It alleges:

(*a*) That the Appellant has no proprietary or other exhaustible interests in the mine from which it derives its income;

(*b*) That the Appellant is not a Lessee of the said mine within the contemplation of paragraph (*a*) of subsection 1 of Section 5 of the *Income War Tax Act;*

In my opinion the respondent's stand is based on a complete misapprehension of the status of the appellant under the statute. The word "lessee" is not there used in the narrow or technical sense attributed to it by the Minister. Leases of mines commonly take the form of granting nothing more than the exclusive right to mine the coal and to appropriate it to the use of the grantee. Lord Cairns in *Gowan* v. *Christie* (1), at 263 said:

(1) (1873) 2 Sc. 273.

> For although we speak of a mineral lease, or a lease of mines, the contract is not, in reality, a lease at all in the sense in which we speak of an agricultural lease * * * What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land. It is liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things there if he can find them, and to take them away, just as if he had bought so much of the soil.

As has already been pointed out in the above references to the Nova Scotia legislation nothing more than this was granted by the original leases and nothing more could be or was acquired by the Tantramar Company and by it transferred to the appellant. The reason given for refusing to consider the appellant as a "lessee" because the assignment to it from Tantramar was "merely a sale of the coal and the necessary licence to mine" involved therefore a misapprehension of the position in law of the appellant and was accordingly not a good ground of disqualification of the appellant under the statute. The fact that Tantramar retained an interest entitling it to royalties instead of its interest having been bought out once and for all by a capital payment does not differentiate the nature of the rights acquired by appellant from the Tantramar Company from those acquired by the latter from the Fundy Company. The persons concerned under the section were the Tantramar Company and the appellant, as lessor and lessee, respectively, for the purpose of apportioning between them the allowance for depletion of the mine from which both derived their entire income.

It may further be observed, in considering the sense in which the word "lessee" is used in the statute, that the Judicial Committee in *Fraser's* case (1), considered that the holder of a licence to cut timber was within the section. The contention to the contrary on the part of the Minister was abandoned in the Privy Council. The same view of the statute was the basis of the decision in *McCool* v. *Minister of National Revenue* (2).

Coming now to the 1939 assessment, which is first to be considered the Statute in its then form, provided that taxable income derived from mining "shall" be subject to certain specified deductions and that in determining such income the Minister "shall" make such allowance for exhaustion as he deems just and fair, with the provision for apportionment already referred to.

(1) [1949] A.C. 24. (2) [1950] S.C.R. 80.

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Therefore, in determining the appellant's taxable income for 1939, the Minister had laid upon him an "administrative duty of a quasi-judicial character—a discretion to be exercised on proper legal principles," to employ the language of the Judicial Committee in the *Pioneer Laundry* case (1), at 259. If he did not consider the appellant a "lessee" the provision for "apportionment" had no application to the appellant whose legal right to some depletion allowance under the earlier part of the section remained, and "no proper legal principle" has been invoked under which it could be withheld. It is only when the Minister is apportioning depletion allowance between lessor and lessee that the Minister's decision is conclusive. Nothing of the kind arises here. The Minister considered Tantramar as the lessee and the province the lessor, and as the Province was not a taxpayer, he gave the full allowance for depletion allotted to the mine to Tantramar. The fundamental error was accordingly an error in law in failing to appreciate the true position of the appellant and in depriving it of its statutory right to an allowance for depletion.

In my opinion therefore, the respondent cannot rely upon the concluding words of the section. He did not act under them as he considered the appellant did not come within them. So far as the 1939 assessment is concerned therefore, the appeal should be allowed and the matter referred back to the Minister for disposition under the section.

In 1940 the statute was amended by the substitution of the word "may" for "shall" where that word first appears in paragraph (*a*), so that thereafter it read:

> 5(1) "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions:—
>
> (*a*) The Minister in determining the income derived from mining * * * may make such an allowance * * *

In respect of the assessments for 1940 and 1941, the Minister proceeded upon the same view of the Statute as already described, but because of the fact that the royalties received by the Tantramar Company were less than the full amount of depletion allowance allotted to the mine in these years, appellant was allotted the surplus as a deduction. It is this fact alone which gives plausibility to the contention made on behalf of the respondent that the

(1) [1939] 4 All E.R. 254.

decision of the Minister in connection with the allowances for these years is conclusive and not the subject of appeal. These allowances however, were not made in exercise of the power given to the Minister under the section to apportion *as between lessor and lessee* but only because the Tantramar Company did not have enough income to absorb them. The letter of January 14, 1948, previously referred to, is express on the point. It says:

> Your company is being allowed depletion to the extent that it has not been claimed by the Tantramar company.

It is therefore plain to my mind that with respect to the later years, as well as with respect to 1939, the decision of the Minister was based on the same erroneous view in law of the position of the appellant. As the latter did not act in accordance with the Statute he may not invoke it to preclude the appeal provided for by sections 58 and 60.

The alternative allegation in the statement of defence should be mentioned. It alleges that if the appellant were a lessee within the meaning of the section "which the respondent does not admit but denies", the Minister has properly apportioned the depletion allowance between the appellant and Tantramar. This cannot, in my opinion, avail the respondent. As already pointed out, he did not make any apportionment at all in the exercise of his statutory power. The alternative plea in the respondent's defence has therefore no relevancy as it has no foundation in fact in anything which the Minister did or purported to do under the statute.

In *Fraser's* case (*supra*) their Lordships had to consider the statute as it stood after the 1940 amendment. It was there held that the Minister has a two-fold discretion under the section, first, to determine whether the case is one for an allowance for depletion, and, second, if so, to determine how much should be allowed. In the present case the Minister has exercised the first head of his discretion, as already mentioned, by determining that ten cents per ton was to be allowed for depletion in respect of the mine.

As to the second head, their Lordships held that the Minister must proceed on "just, reasonable and admissible grounds". In defining this discretion their Lordships said at page 36:

> The criteria by which the exercise of a statutory discretion must be judged have been defined in many authoritative cases, and it is well

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settled that if the discretion has been exercised bona fide, uninfluenced by irrevelant considerations and not arbitrarily or illegally, no court is entitled to interfere even if the court, had the discretion been theirs, might have exercised it otherwise.

In the case at bar the Minister acted with respect to the years 1940 and 1941 as with respect to 1939 on the irrelevant consideration that the appellant had no standing as a lessee under the section. Had he not been mistaken in his view as to the legal position of the appellant and the Tantramar Company and had apportioned the depletion allowance as between them *as lessor and lessee,* it might have been that Mr. MacQuarrie's argument that no appeal lay from the Minister's decision would have been well taken. That point need not be decided in the present case as in my view it does not arise on the facts. He did not do that. I think therefore, that as in the case of the 1939 assessment, the appeal with respect to the assessments for the later years must also be allowed and the matter referred back to be dealt with in accordance with these reasons.

When the matter was reviewed by the Minister, all the relevant facts for the statutory apportionment were in the material before him. It was shown, contrary to the contention of the respondent, which was given effect to by the learned trial judge, that there had been a capital consideration paid by the appellant to Winfield in the issue of 747 paid up shares of the appellant company for the assignment to the appellant of the interests here in question and other property, and in the balance sheet of the appellant a value of $70,700 was placed on its "coal leaseholds". The appellant also invested other amounts in the development of the mine in respect of some of which no allowance, such as depreciation, appears to have been made. Amounts invested would ordinarily be one of the relevant matters for consideration in making the allowance for depletion, but would not necessarily be the only consideration.

Appeal allowed.

Solicitor for the appellant: *C. B. Smith.*

Solicitor for the respondent: *T. Z. Boles.*

JOSEPH BOUCHARD (PETITIONER).....APPELLANT; 1950

AND * Mar. 6, 7
* Mar. 13

LES COMMISSAIRES D'ÉCOLES POUR LA MUNICIPALITÉ DE SAINT-MATHIEU-DE-DIXVILLE (DEFENDANTS) ..... RESPONDENTS.

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

Mandamus—School law—Commissioners—Eviction of pupils—Insubordination—Discipline—Education Act, R.S.Q. 1941, c. 59, ss. 69 (as amended by 7 Geo. VI, c. 13, s. 2), 221 (14).

A mandamus to force the School Commissioners to admit to school pupils who had been evicted "pour cause d'incapacité de suivre les cours" will not be entertained when it is established that the backward mentality and insubordination of these pupils were prejudicial to the good order, discipline and advancement of the rest of the class.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court ordering the issue of a Writ of Mandamus.

J. C. Samson, K.C., and *P. Gérin* for the appellant.

E. Veilleux for the respondents.

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

THE CHIEF JUSTICE:—L'appelant a demandé l'émission d'un bref de mandamus contre les intimés pour qu'il soit enjoint à ces derniers d'admettre et de recevoir ses enfants, comme élèves à leur école n° 1, en ajoutant qu'une résolution adoptée par les intimés, le 28 septembre 1947, soit déclarée nulle et illégale, à toutes fins que de droit. Cette résolution était à l'effet que les deux enfants de l'appelant étaient "renvoyés définitivement des écoles de la municipalité pour cause d'incapacité de suivre les cours".

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

(1) Q.R. [1949] K.B. 30.

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Les intimés ont plaidé, entre autres, que les deux enfants de l'appelant sont arriérés mentalement au point de ne pouvoir suivre les cours de la toute première année; qu'ils sont insubordonnés et, à cause de leur insubordination, ils empêchent les institutrices des intimés de donner les cours que les autres élèves pourraient suivre, causant ainsi un préjudice considérable à l'avancement des autres élèves.

Le jugement de première instance, tout en admettant qu'il était apparent que les deux enfants en question étaient mentalement arriérés, au point que, après avoir été cinq ans à l'école, ils en étaient encore au premier cours et que leurs témoignages au procès indiquent des enfants bien au-dessous de la normale, fut d'avis que les intimés avaient failli dans leur preuve de démontrer que les élèves en question étaient "habituellement insubordonnés", suivant leur allégation, et que, par conséquent, ils n'avaient pu justifier le renvoi de ces élèves.

La Cour du Banc du Roi (en Appel) (1) a été d'avis que le jugement lui-même de la Cour Supérieure démontrait "qu'étant donné ses admissions et qu'étant donné la preuve faite en cette cause, il n'est pas possible de conclure au maintien de ce bref de mandamus", et le jugement de première instance a, en conséquence, été mis de côté.

Nous sommes d'avis que ce dernier jugement doit être confirmé.

Sans doute, en règle générale, le jugement du tribunal de première instance sur une question de fait possède un poids considérable et qu'un tribunal d'appel ne devrait pas mettre de côté sans des raisons sérieuses. Mais, ici, nous ne pouvons en venir à une autre conclusion que celle que la Cour d'Appel était justifiée d'infirmer le jugement dont est appel, même sur les faits.

Sans entrer dans la discussion détaillée de l'enquête—et, entre autres raisons, agissant ainsi par un souci de délicatesse à l'égard des enfants et de leurs parents—nous trouvons que la preuve est surabondante en faveur de la prétention des intimés, que les élèves en question étaient "habituellement insubordonnés", au sens de l'article 221, para. 14, de la *Loi de l'Instruction publique* (S.R. 1941, c. 59). Cela ressort à la fois du témoignage de leur insti-

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tutrice et du témoignage des autres élèves, qui ont pu rapporter des faits détaillés, et dont les plus caractéristiques sont récités au long dans le jugement très élaboré de l'honorable juge Saint-Germain, auquel tous les autres juges de la Cour d'Appel se sont ralliés. Il faut avouer que toute cette preuve est aussi convaincante qu'elle pouvait être, et il n'est pas étonnant que le docteur Georges Samson, appelé comme témoin de l'appelant, ait conclu son témoignage en disant qu'il vaudrait mieux mettre ces enfants "dans une institution spéciale"; ... "que, manifestement, d'après son opinion personnelle, il ne les laisserait pas à l'école de Dixville", et, il ajoute: "Ç'a une mauvaise influence sur les autres enfants. Si c'était mes enfants je ne le ferais pas" (voulant dire, d'après le texte, que, s'il avait des enfants comme ceux dont il s'agit, il ne les laisserait pas à l'école de Dixville).

Mais il n'y a pas que la surabondance de la preuve qui justifiait la Cour du Banc du Roi (en Appel) d'approuver la conduite des intimés.

En tout respect, nous devons dire que le savant juge de première instance n'a pas abordé la cause comme elle devait l'être.

Après avoir dit que les activités des enfants de l'appelant ajoutées à la distraction que leurs réponses aux interrogatoires causaient aux autres élèves dans la classe, et que tout cela, évidemment, rendait la tâche de l'institutrice très difficile, il insère dans son jugement le considérant suivant:

> To deny the right of a child to attend the public schools of this Province, the insubordination would have to be of a very grave character and then if it was habitual expulsion would be justified.

A notre sens, le passage du jugement indique la mentalité avec laquelle l'honorable juge a envisagé cette cause. Il s'est inspiré davantage de l'article qui oblige les commissaires d'écoles à admettre chaque enfant qui est domicilié dans la municipalité scolaire, depuis l'âge de cinq ans jusqu'à l'âge de seize ans (art. 69 de la Loi de l'Instruction publique, tel qu'amendé par l'article 2, du chapitre 13, Statut 7, George VI), plutôt que du paragraphe 14 de l'article 221, auquel nous avons déjà fait allusion.

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Il est évident que si, d'une part, les commissaires d'écoles doivent admettre tous les enfants de la municipalité—ce qui est la règle générale—c'est également leur devoir "de renvoyer de l'école les élèves habituellement insubordonnés, ou dont la conduite est immorale en paroles ou en actions" (art. 221, par. 14). Et, dans toutes ces questions administratives, il est de règle qu'une large discrétion doit être laissée aux commissaires d'écoles de la même façon que, pour les conseillers municipaux, il est de jurisprudence de ne pas intervenir dans leurs décisions, à moins d'y découvrir un parti-pris ou une injustice manifeste, ou, bien entendu, une irrégularité ou une illégalité.

Nous croyons donc que le juge de première instance a posé la question d'une façon erronée en disant qu'il fallait trouver ici, pour justifier la résolution des commissaires d'écoles, une insubordination "of a very grave character".

Comme dans tous les cas de cette nature, les conseillers municipaux et les commissaires d'écoles sont évidemment les premiers juges et les tribunaux doivent éviter de substituer à la leur l'appréciation des circonstances qui ont entouré leur décision.

Sans doute, il est d'un intérêt primordial de ne pas priver les enfants de l'instruction à laquelle ils ont droit; mais il est également nécessaire pour la bonne administration municipale ou scolaire que ceux qui en sont chargés, conseillers municipaux ou commissaires d'écoles, ne soient pas entravés dans l'exercice de leur devoir par l'intervention des cours de justice, excepté pour des raisons graves—ce qui est l'inverse de ce que semble avoir envisagé l'honorable juge de première instance.

Et cela est d'autant plus important qu'il s'agit ici d'un mandamus, c'est-à-dire, d'un bref qui, en vertu de l'article 992 du Code de Procédure Civile, ne peut être ordonné que "lorsqu'il n'y a pas d'autre remède également approprié, avantageux et efficace"; et, en plus, où la règle est suivant *High's Extraordinary Legal Remedies* (3rd Ed., pages 15 and 16):—

> To warrant a court in granting a mandamus, it must be shown first that the petitioner has a clear legal right to the performance of a particular act or duty at the hands of the respondent.

Il reste seulement à signaler que l'appelant a fait valoir le point suivant:

La résolution des intimés déclare que les deux enfants sont renvoyés définitivement des écoles de la municipalité "pour cause d'incapacité de suivre les cours". D'autre part, le plaidoyer écrit des intimés invoque, comme raison de la décision qu'ils ont prise, que les enfants "sont arriérés mentalement au point de ne pouvoir suivre les cours de la toute première année; qu'ils sont insubordonnés et, à cause de leur insubordination, ils empêchent les institutrices des intimés de donner les cours que les autres élèves pourraient suivre, causant ainsi un préjudice considérable à l'avancement de l'instruction des autres enfants".

L'appelant a prétendu, au cours de son argumentation devant cette Cour, que les intimés étaient limités à la cause mentionnée dans la résolution et qu'ils ne pouvaient ainsi y ajouter d'autres causes dans leur plaidoirie écrite.

Nous ne pouvons nous rendre à cette prétention. Il est très clair que toute l'enquête a roulé sur l'existence des différentes causes invoquées dans la défense.

La véritable manière de soulever ce point, s'il était sérieux, eut été pour l'appelant de faire *ab initio* une motion pour faire rejeter l'allégation d'autre cause que celle qui se trouvait dans la résolution.

A défaut de cette motion, l'allégation est restée dans le plaidoyer écrit et, évidemment, l'enquête devait porter sur cette allégation. Le juge de première instance, dans son jugement, s'est contenté d'émettre un doute sur le droit des intimés de faire valoir d'autres moyens que celui qui a été mentionné dans la résolution.

La Cour d'Appel, au contraire, a considéré que, ce qui importait pour la décision du litige, ce n'était pas les termes dont les commissaires d'écoles se sont servis pour exprimer le motif de leur décision, mais, plutôt, la suffisance du motif qu'ils ont invoqué dans leur défense et la preuve qu'ils en ont faite.

Nous ne croyons pas que ce moyen de l'appelant soit de la nature de ceux dont la Cour Suprême doive se préoccuper après que le plus haut tribunal de la province s'est

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prononcé là-dessus. Il y a là, semble-t-il, beaucoup plus une question de pratique et de procédure qu'une question de droit substantiel.

D'autre part, l'ensemble des jugements des membres de la Cour du Banc du Roi (en Appel) se résume certainement dans ce passage des notes de l'honorable juge Bissonnette:

> Quel sens faut-il donner à l'incapacité à suivre les cours, si ce n'est l'inaptitude à se soumettre aux règlements de l'école. Pour ma part, je ne puis en découvrir un autre.

L'appel doit être rejeté avec dépens.

The judgment of Taschereau, Kellock and Cartwright JJ. was delivered by

TASCHEREAU, J.:—L'appelant, requérant devant la Cour Supérieure, a obtenu l'émission d'un bref de mandamus, afin de contraindre la Corporation défenderesse de recevoir ses deux enfants d'âge scolaire, à l'école de l'arrondissement D, de St-Mathieu-de-Dixville, d'où ils auraient été illégalement expulsés.

M. le Juge Campbell, siégeant à Sherbrooke, a accueilli cette demande, mais la Cour d'Appel l'a rejetée avec dépens.

Le 29 septembre 1947, l'appelant a reçu du Secrétaire-Trésorier de l'intimée la lettre suivante:

M. Joseph Bouchard — Dixville le 29 jour septembre 1947
Dixville
Monsieur

Il a été résolu unanimement à la dernière séance tenue dimanche le 28 septembre 1947 que vos deux enfants Rodolphe et Robert soit renvoyé définitivement des écoles de la municipalité pour cause d'incapacité de suivre les cours.

Et que vos deux autres Gilbert et Gilberte soit retirées de l'école N° 2 St Thérèse, et transféré à l'école N° 1 du Christ Roi dans votre arrondissement.

Par ordre des commissaires.

P. E. JODOIN,
sec. trés.

La résolution n'a pas été produite, mais personne ne conteste que cette lettre représente bien la teneur véritable de la décision des commissaires. C'est quelques jours après avoir reçu cet avis que l'appelant a institué des procédures judiciaires.

En vertu de l'article 69 de la *Loi de l'Instruction Publique,* telle qu'amendée en 1943, les Commissaires d'Ecoles

sont *tenus* d'admettre tout enfant d'âge scolaire, domicilié dans la municipalité, mais l'article 221, para. 14, leur permet de renvoyer de l'école ceux qui sont "habituellement insubordonnés" ou dont "la conduite est immorale en paroles ou en actions". C'est ce dernier article que la défenderesse invoque pour demander le rejet du présent appel. Elle allègue spécialement que les deux enfants du requérant sont "arriérés mentalement", "qu'ils ne peuvent suivre les cours", "qu'ils sont insubordonnés", et qu'à cause de leur condition mentale et de leur insubordination, ils nuisent au bon ordre de la classe, et à l'avancement des autres élèves. Ce plaidoyer contient des raisons de justification plus élaborées que celle contenue dans la lettre du 29 septembre 1947, où il était dit que la cause du renvoi était "l'incapacité de suivre les cours", mais je ne crois pas que l'insuffisance de raison dans le premier avis empêche la défenderesse-intimée d'invoquer tous les motifs légaux qui ont pu justifier l'expulsion.

La preuve établit surabondamment que les enfants du requérant sont malheureusement des "arriérés mentaux" et que leur "insubordination habituelle" est un obstacle à la discipline de la classe. Par leur conduite répréhensible que les autorités scolaires ont tolérée pendant plusieurs années, ces enfants ont été une sérieuse cause de trouble que les commissaires ont non seulement le droit, mais l'impérieux devoir de réprimer. Chargés de l'instruction et de l'éducation d'un grand nombre de jeunes enfants, ils ne peuvent évidemment pas permettre que par l'insubordination de quelques-uns, qui exigerait la vigilance constante de la maîtresse, l'attention des autres élèves soit détournée de leurs études. Comme d'autres témoins, mademoiselle Lamontagne, leur maîtresse, dit qu'ils sont des "arriérés mentaux", "des insubordonnés", qu'ils sont des "causes de désordre", qu'ils "en causaient continuellement", et M. le Docteur Samson, témoin de l'appelant, qui a examiné ces deux jeunes enfants, est d'opinion qu'ils sont des "arriérés mentaux", et dit que s'ils étaient ses propres enfants, il ne "les garderait pas à la classe", "que ça a une mauvaise influence sur les autres enfants".

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Taschereau J.

Je partage l'opinion de la Cour d'Appel que les Commissaires étaient justifiés d'expulser ces deux élèves de la classe, et l'appel doit en conséquence être rejeté avec dépens.

Appeal dismissed with costs.

Solicitors for the Appellant: *Samson & Gérin.*

Solicitors for the Respondents: *Veilleux & Péloquin.*

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*May 25, 26, 27

*Dec. 22

ALBERT J. J. McCONMEY (PLAINTIFF) ..... APPELLANT;

AND

THE CORPORATION OF THE TOWN OF COATICOOK (DEFENDANT).... RESPONDENT.

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

Municipal law—Flood—Closing of a street—Farm—Enclave—Indemnity—Prescription—Cities and Towns Act, R.S.Q. 1941, c. 233, arts. 429, 622, 623—Arts. 407, 540, 1085, 1088 C.C.

The lease of a farm provided that if certain conditions were fulfilled, the rent paid would serve as the price of the sale of the property. During the existence of the lease, a flood took place with the result that the Corporation passed a by-law closing a portion of the street running through the farm. No provision for indemnity was made in the by-law. More than two years later appellant exercised his right to buy the property and immediately took action for indemnity against the town. The action was dismissed by the Superior Court and the Court of Appeal.

Held: The enclave was not caused by the closing of the street but by the flood and the Town had the right to close the street but should have paid appellant an indemnity since it did not transfer the site of the street to appellant as provided for by para. 33 of art. 429 of the *Cities and Towns Act.*

Held: Appellant had the necessary interest to take this action because by virtue of art. 1088 C.C. when he exercised his right to buy the property, things were replaced in the same state as if the lease had not existed and the property had been bought *ab initio.*

Held: The short prescription of arts. 622 and 623 of the *Cities and Towns Act* does not apply as this is not an action in damages but one for indemnity—very closely akin to an action for compensation for expropriation.

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

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), confirming, Bissonnette and Casey JA. dissenting, the dismissal by the Superior Court of an action for indemnity as the result of the closing of a street.

J. C. Samson, K.C., and *Paul Gérin* for the appellant.

W. H. Shurtleff, K.C., and *A. Laurendeau, K.C.*, for the respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—Le demandeur-appelant est en possession depuis de nombreuses années d'une ferme située dans la ville de Coaticook, dont une partie, se trouvant au nord de la rue Washington, comprend les lots 1896 et 1897 du cadastre de la localité, et l'autre partie, soit les lots 1844, 1846, 1847, 1848 et 1849, du côté sud de ladite rue, représente avec le reste de la terre, une superficie d'environ 40 acres.

Cette rue Washington traverse en conséquence la ferme de l'appelant, dans une direction est-ouest, à partir d'un pont situé sur la rivière Coaticook, et se dirigeant jusqu'à l'extrémité de la ville, aux bornes du Canton Barford. Toutes les bâtisses de l'appelant, soit une maison et ses dépendances, sont situées du côté nord de la rue Washington de sorte que, pour se rendre de ses bâtisses à la partie sud de sa terre, il lui faut nécessairement traverser cette rue en question qui, jusqu'aux incidents qui ont donné naissance à la présente action, était une rue publique.

Dans le cours du mois de juin 1943, une pluie torrentielle causant une inondation considérable, a détourné le cours de la rivière Coaticook, lui traçant un nouveau lit à l'intersection de la rue Washington et de la rue Évangéline, à une distance d'environ 200 pieds du pont. Comme résultat de cette inondation, le demandeur, qui antérieurement avait accès par la rue Washington aux autres rues publiques ainsi qu'au pont qui y conduit, est pratiquement privé de cet avantage. A quelques périodes de l'année, il peut traverser à pied ou à cheval le nouveau lit de la rivière, ou

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bien il doit parcourir une distance d'environ un mille en traversant la terre d'un nommé Beaulieu, pour se rendre à la rue Riverdale.

S'autorisant des dispositions de l'article 429 (1) de la Loi des Cités et Villes, le Conseil Municipal a, le 13 mars 1944, adopté un règlement connu sous le N° 310, par lequel il a aboli et fermé à la circulation cette partie de la rue Washington qui se trouve à l'est du nouveau lit de la rivière Coaticook, jusqu'aux limites de la ville de Coaticook touchant au canton Barford. En vertu de l'article de la Loi des Cités et Villes susdit, ce pouvoir d'ordonner la fermeture des rues existantes appartient au Conseil, mais toutefois, le règlement qui décrète ainsi la fermeture d'une ou de plusieurs rues, doit pourvoir à indemniser s'il y a lieu ceux qui sont lésés, et est sujet à l'approbation de la Commission Municipale de Québec avant d'entrer en vigueur.

Comme résultat, et de l'inondation et de ce Règlement N° 310 décrété par l'intimée, le demandeur est non seulement enclavé sur sa terre, privé de toute issue aux rues publiques, sauf de la manière indiquée précédemment, mais il lui est également impossible, à moins de passer sur cette rue Washington dont la fermeture a été décrétée, de circuler librement sur cette partie de sa terre au nord de l'ancien site de la rue, pour se rendre au côté sud, et vaquer ainsi à ses occupations quotidiennes de fermier.

Le Règlement N° 310 ne pourvoit à aucune indemnité, mais contient une clause à l'effet que la Corporation ne doit payer aucune compensation comme résultat de la fermeture de ladite rue, parce que c'est le débordement de la rivière Coaticook qui serait la cause de la situation où se trouve l'appelant. Le demandeur-appelant a, en conséquence, institué une action dans laquelle il demande que huit des Attendus du Règlement N° 310 soient annulés et déclarés *ultra vires*, et que la défenderesse soit condamnée à lui payer la somme de $5,500 à titre d'indemnité avec intérêts et dépens.

La Cour Supérieure, par jugement en date du 25 mars 1947, a rejeté l'action avec dépens, et la Cour d'Appel (1) a confirmé ce jugement, MM. les Juges Bissonnette et Casey dissidents. M. le Juge en chef Létourneau en est

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arrivé à la conclusion que la ferme du demandeur-appelant a été enclavée comme résultat de la destruction d'une partie de la rue par l'inondation, et que la fermeture de cette partie de la rue contiguë à la propriété de l'appelant, n'a pas rendu la position de ce dernier pire, car la rue, après l'inondation, ne servait aucun but utile. M. le Juge Barclay conclut que l'appelant avait droit à une indemnité, mais que la seule mesure des dommages dus comme résultat de l'enclave, était le prix d'une nouvelle sortie qu'en vertu de la loi il avait droit d'obtenir, et la dépréciation, s'il y en avait, à sa propriété. Cependant, comme d'après lui, la preuve ne révèle pas le montant des dommages soufferts, il rejetterait l'action. M. le Juge Marchand est également d'opinion que l'action doit être rejetée mais pour des motifs différents. Il croit en effet que l'action est une action en dommages, et qu'elle est prescrite. Selon lui, en vertu de la Loi des Cités et Villes, articles 622, alinéa 5, aucune action en réclamation de dommages n'est recevable à moins qu'elle ne soit intentée dans les *six mois* qui suivent le jour où l'accident est arrivé ou le jour où le droit d'action a pris naissance, et la même règle est répétée à l'article 623 de la même loi. M. le juge Bissonnette avec qui concourt M. le juge Casey, accueillerait l'action, et condamnerait l'intimée à payer à l'appelant la somme de $2,500 avec intérêts depuis l'institution de l'action et les dépens.

La première objection soulevée par l'intimée est que l'appelant n'a pas la qualité voulue pour instituer la présente action, vu qu'il ne serait pas le propriétaire des lots affectées par le Règlement N° 310. L'examen des titres révèle en effet que le 17 mai 1940, un nommé John B. Cleveland de la ville de Coaticook, a vendu la terre qui a fait l'objet du présent litige à un nommé Armand Grégoire, et audit acte de vente est intervenu le présent demandeur qui, pour et en considération de la somme de $650, dont quittance, a renoncé en faveur de l'acheteur à tous les droits qu'il pouvait avoir en vertu d'une promesse de vente consentie en sa faveur par ledit Cleveland le 25 juin 1925. A la même date, devant G. Albert Normandin, notaire, Armand Grégoire a loué avec promesse de vente audit Albert J. J. McConmey, la même terre avec bâtisses dessus

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construites, circonstances et dépendances. Cette promesse de vente était accompagnée d'un bail, en vertu duquel l'appelant, durant une période de trois ans, s'engageait à payer comme loyer la somme de $1,050. Il a été également convenu que si l'appelant payait bien et fidèlement le loyer ci-dessus mentionné, et s'il remplissait les autres obligations stipulées au contrat, le loyer payé durant trois années serait considéré comme le prix de vente de ladite propriété, et Grégoire s'engageait alors à donner un titre valable au locataire McConmey. Le 30 juillet 1945, pour donner suite à la promesse ci-dessus mentionnée, Armand Grégoire a vendu au présent appelant la propriété en question, et à l'acte il est mentionné que le vendeur déclare que l'appelant lui a payé toutes sommes qu'il pouvait lui devoir en capital et intérêts en vertu dudit bail et de la promesse de vente. Grégoire a également déclaré dans cet acte qu'il n'a jamais eu l'intention d'acheter cette propriété pour lui, mais que l'acte de vente de la susdite propriété lui fut consenti seulement dans le but d'obtenir une garantie sur un prêt de $1,050, qu'il avait consenti à l'appelant.

Je partage entièrement les vues de l'honorable Juge en chef de la Cour d'Appel, et je suis d'opinion que quand l'acte de vente a été signé, en vertu duquel le demandeur appelant est redevenu le propriétaire de l'immeuble en question, le 30 juillet 1945, c'est-à-dire quelques jours avant l'institution de la présente action, les choses ont été remises dans l'état où elles étaient originairement. (Code Civil 1088.)

Comme le dit M. Mignault, tome 5, page 443:

> La condition accomplie ayant un effet rétroactif au jour du contrat, les choses se passent comme si le contrat avait été pur et simple *ab initio*.

Toutes ces transactions ont évidemment été faites dans le seul but d'effectuer à l'appelant un prêt de $1,050, et ce dernier n'a signé les contrats dont je viens de parler, que pour donner des garanties à son prêteur. Le jour où il a repris de sa propriété par l'acte de rachat de juillet 1945, le droit de l'acheteur a été anéanti comme s'il n'avait jamais existé. Je crois donc que la première objection de l'intimée n'est pas fondée, et que l'appelant avait l'intérêt nécessaire pour instituer les présentes procédures.

Je n'entretiens pas de doute non plus, que c'est comme conséquences de cette pluie torrentielle que la rivière a changé son lit, et je ne crois pas qu'il ait été démontré que l'intimée avait l'obligation de réparer une ancienne digue construite il y a plusieurs années, et destinée à retenir les eaux de la rivière. Le résultat évident du changement de lit de la rivière a été d'enclaver à toutes fins pratiques, la propriété du demandeur-appelant. Il pouvait, il n'y a pas de doute, circuler encore sur la rue Washington depuis la partie ouest de la rue, à l'endroit du lit nouveau de la rivière, jusqu'à la limite est, où la Municipalité de Coaticook est en bordure du canton Barford. Mais c'est dans ces étroites limites que ses activités étaient restreintes, pour les fins d'exploitation de sa ferme.

Plusieurs juges de la Cour d'Appel ont par erreur assumé que quand la rivière Coaticook, comme conséquence de l'inondation, s'est ainsi creusé un lit nouveau, le pont qui autrefois traversait la rivière a été emporté sous la poussée des eaux. Évidemment, ceci est une erreur, car aucun pont n'a été emporté, et le pont utilisé pour traverser la rivière, existe encore et se trouve à l'extrémité ouest de la rue Washington, de l'autre côté du lit nouveau de la rivière, mais il est inaccessible à l'appelant. Il faudrait que l'appelant ou la Municipalité construise un nouveau pont à l'endroit où la rivière a creusé son lit nouveau et ces travaux, tel que le révèle la preuve, entraîneraient des dépenses considérables. Il ne s'agirait donc pas, pour trouver une issue sur la voie publique au demandeur-appelant, qu'un pont soit reconstruit pour remplacer un autre détruit, mais il faudrait construire un pont nouveau à quelques cents pieds de celui qui existe encore.

En conséquence, quand la Municipalité défenderesse a adopté le Règlement N° 310, dans lequel elle a décrété la fermeture de la rue Washington sur la longueur que l'on sait, elle n'a donc pas enclavé la terre de l'appelant, car avec les réserves que je viens de signaler, cette enclave existait déjà. Il est incontestable, comme le demandeur-appelant l'admet lui-même dans son plaidoyer écrit, que l'intimée avait le droit de fermer cette rue, en s'autorisant des dispositions de l'article 429, para. 1 de la Loi des

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Cités et Villes, qui régit l'intimée, mais la question qui se pose est de savoir si elle était tenue de payer une indemnité à l'appelant. Évidemment, cette indemnité ne devait être payable que si, comme résultat de la fermeture de cette rue, l'appelant subissait un préjudice. Dans l'affirmative, la loi est claire et précise, et l'indemnité doit être payée. Assurément, pour que l'indemnité puisse être exigée de la défenderesse, il faut de toute nécessité que la fermeture de la rue soit la cause *sine qua non* du préjudice souffert par le demandeur.

Ici, une distinction s'impose. Je n'ai pas de doute que ce préjudice en ce qui concerne la privation "d'une issue sur la voie publique, pour *l'exploitation* de son héritage", (C.C. 540) est la conséquence de l'inondation. Pour qu'un fonds soit considéré comme enclavé, il n'est pas essentiel que son propriétaire n'ait aucune issue sur la voie publique; si la seule issue est insuffisante à l'exploitation du fonds, il y a enclave. Vide (12, Jousselin, 550) (Marcadé, vide art. 682 C.C.) (Aubry & Rau, 35, para. 243) (12, Demolombe, M. 600) (8, Laurent, M. 76 & 81) (Planiol & Ripert, Vol. 3, pages 857 & 860) (Baudry-Lacantinerie, Vol. 6, page 783) (Juris-Classeur Civil, art. 680-682, page 6, verbo servitudes légales). Il semble donc évident que même si le Règlement N° 310 n'avait pas été adopté par le Conseil Municipal, la terre du demandeur-appelant serait enclavée au sens de l'article 540.

La défenderesse est-elle obligée de construire un pont ou de refaire le chemin pour permettre la traversée au-dessus du nouveau lit de la rivière, et donner accès au demandeur à la voie publique? Dans les circonstances de la présente cause, je ne le crois pas. Il ne s'agit pas ici d'entretien de chemin, ou de pont, mais véritablement de construction, dont le coût serait disproportionné aux bénéfices, que le public en général pourrait en retirer. Vide (*La Corporation de la Paroisse de St-Jacques-des-Piles* v. *Blais* (1).

Mais si le Règlement N° 310 n'est pas la cause de l'enclave subie par le demandeur, il en résulte tout de même, à mon sens, que la terre en question se trouve complètement séparée en deux, et qu'il est maintenant impossible au demandeur de circuler du nord au sud, ou *vice versa*.

(1) Q.R. 30 K.B. 398.

On sait que le Code Municipal est différent sur ce point de la *Loi des Cités et Villes*. En vertu du Code Municipal, lorsque le Conseil décide de fermer une rue, l'assiette de la rue ainsi fermée, appartient automatiquement aux propriétaires riverains. (C.M. 467.) En vertu de la *Loi des Cités et Villes*, la situation est entièrement différente, car l'assiette de la rue fermée reste la propriété de la Cité ou de la Ville qui, par règlement, en a ordonné la fermeture. En vertu de l'article 429, para. 33, le Conseil de Ville a le droit, par vente ou échange, ou de gré à gré, de disposer du terrain qui faisait partie de la rue dont la fermeture a été ordonnée, pourvu que la Commission municipale de Québec ait approuvé le contrat de vente ou d'échange. Si l'intimée avait, de gré à gré, transporté l'assiette de la rue à l'appelant, il n'y aurait évidemment aucun grief qui pourrait lui être reproché, mais malheureusement, ceci n'a pas été fait, avec le résultat que l'appelant souffre le préjudice que je viens de mentionner et pour lequel il a droit, je crois, à une indemnité.

Quel est le montant qui doit être payé au demandeur-appelant? L'action telle qu'instituée contient les allégations voulues pour permettre au demandeur de réclamer l'indemnité à laquelle il a droit, mais malheureusement, la valeur du préjudice qu'il subit n'est pas clairement établie. Je suis en conséquence d'opinion, parce que cette Cour a le pouvoir de le faire, qu'une ordonnance soit émise, retournant le dossier de cette cause à la Cour Supérieur du district de St-François, afin que les dommages subis par le demandeur soient établis devant un tribunal compétent.

En déterminant le montant de cette indemnité, le tribunal évidemment ne devra pas tenir compte du montant qu'il en coûtera à l'appelant pour obtenir un droit de passage sur la terre de Beaulieu, pour se rendre à la rue Riverdale, car l'enclave au sens de l'article 540 ne résulte pas du Règlement 310. Mais il devra, je crois, prendre en considération le fait que par la fermeture de la rue Washington, la terre du demandeur-appelant a été partagée en deux, et que par l'effet de ce même règlement, l'issue au chemin public, à pied ou à cheval, qui lui restait à travers le nouveau lit de la rivière, lui est maintenant interdite. Cette

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issue sans doute n'était pas suffisante pour l'exploitation de l'héritage, mais était tout de même un avantage, minime il est vrai, mais dont la suppression est une cause de préjudice.

Un autre point a été soulevé par l'intimée, et c'est que la présente action serait prescrite en vertu des dispositions des articles 622, para. 5, et 623, de la *Loi des Cités et Villes*. Le premier de ces articles est à l'effet qu'aucune action en réclamation de dommages n'est recevable contre la Municipalité, à moins qu'elle ne soit intentée dans les six mois qui suivent le jour où l'accident est arrivé, ou le jour où le droit d'action a pris naissance. L'article 623 nous dit que toute action, poursuite ou réclamation contre la municipalité ou l'un de ses officiers ou employés, pour dommages résultant de délits, de quasi-délits ou d'illégalités, est prescrite par six mois à partir du jour où le droit d'action a pris naissance, nonobstant toute disposition de la loi à ce contraire.

Je suis clairement d'opinion, comme le procureur de l'intimée l'a lui-même admis lors de l'audition de cette cause, que cette courte prescription des articles 622 et 623 ne s'applique pas. Il ne s'agit pas d'une action *en dommages* résultant de *délit*, de *quasi-délit* ou d'illégalité, mais bien d'une réclamation pour indemnité résultant d'un acte légal que la Municipalité avait parfaitement le droit de poser, ce qui nécessairement exclut toute idée de délit, de quasi-délit ou d'illégalité. La fermeture de la rue ne tombe dans aucune de ces catégories, et la nature de l'indemnité à laquelle un contribuable a droit quand il souffre un préjudice, du genre de celui qui nous occupe, ressemble au montant de la compensation qu'il peut réclamer, quand il y a expropriation. Ces actions où l'on conclut à une indemnité, ou encore ces compensations accordées dans les cas d'expropriation, sont entièrement différentes des réclamations en dommages qui, selon les dispositions des articles 622 et 623 de la Loi des Cités et Villes, se prescrivent par six mois.

Sur le tout, je crois que le présent appel devrait être maintenu, et que le dossier devrait être retourné au tribunal du district de St-Francis pour qu'il soit procédé à

la détermination de l'indemnité payable au demandeur-appelant. Étant donné les circonstances spéciales de cette cause, le demandeur-appelant aura droit en Cour Supérieure, tant pour la première que la seconde audition, et en Cour d'Appel, à ses frais d'une action de la classe qui sera déterminée par le montant des dommages accordés par le juge qui entendra la cause de nouveau. Il aura droit également à tous ses déboursés devant cette Cour et à la moitié des honoraires taxables.

Appeal allowed with costs.

Solicitor for the Appellant: *J. C. Samson.*

Solicitors for the Respondent: *Shurtleff & Bouchard.*

LOUIS F. ROTHSCHILD AND CO. (PLAINTIFFS) ..... } APPELLANTS;

AND

ALFRED R. DUFFIELD (DEFENDANT) ... RESPONDENT.

1950
*Feb. 15
*Mar. 28

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

Mandate—Brokers—Authorized by client to buy and sell shares for him—Indemnification of broker for unforeseeable losses incurred during execution of mandate—Whether settlement made prior to delivery of shares is final—Art. 1701, 1713, 1725 C.C.

Appellants as brokers purchased for respondent 750 shares on the New York Stock Exchange. When in a position to deliver them, they were instructed by respondent to sell 250 of the shares and to apply the proceeds toward the purchase price of the 750. This sale was done, and, at the request of respondent, the remaining 500 shares were delivered to him and the account was then determined and paid before the 250 shares were delivered to and paid for by the buyer of the same on the New York Stock Exchange. A modification of the exchange rate of the dollar taking place after determination of the account and before such delivery and payment resulted in a loss for appellants which they seeked to recover from respondent. The action was maintained in the Superior Court but dismissed in the Court of Appeal.

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

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Held: The contract between the parties being clearly in the nature of a mandate, appellants therefore are entitled to recover the loss incurred during the execution of the mandate as the result of unforeseeable changes in the exchange rate, since a mandatary should not be impoverished by the due execution of his mandate.

Held: As the mandate could only come to an end after delivery and payment were made on the sale of the 250 shares, the settlement made prior to that time could not be more than provisional.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the decision of the Superior Court maintaining an action to recover losses incurred by a broker in the execution of transactions for a client.

Roger Cordeau for the appellants.

Hazen Hansard, K.C., for the respondent.

The judgment of the Court was delivered by

FAUTEUX, J.:—The essential facts of this case are not disputed and are substantially stated as follows by the Trial Judge:—

On the 1st of July 1946, the Respondent, who describes himself as an investment dealer, decided to purchase shares of the International Paper Company, a company whose stock is listed on both the Montreal and the New York Stock Exchanges. It being "Dominion Day", the Montreal Stock Exchange was closed. The Respondent was aware that under the Regulations of the Foreign Exchange Control Board, he could not purchase shares in New York without United States currency. He had also seen a notice in the Montreal *Daily Star* in which the Appellants advertised that they could provide facilities for the purchase of American stocks under said Regulations. Thereupon, the Respondent called on one MacKinnon, co-manager of the Appellants' Montreal office, and placed an order for the purchase of 500 shares of International Paper Company and later, on the same day, another order to purchase 250 more shares of the said stock. As a result, on the 1st of July 1946, the Appellants purchased 750 shares of International Paper Company common stock on the New York Stock Exchange in their own name, but for the benefit of the Respondent. According to Rule 109 of the New York Stock Exchange,

(1) Q.R. [1949] K.B. 312.

in force on the 1st of July 1946, the delivery of the shares would be made "on the second full business day following the day of the contract." That would be the 3rd of July, 1946. The Respondent having instructed MacKinnon to deliver these shares to the Canadian Bank of Commerce, L. J. Swinburne, the Security clerk in the Appellant's employ, telephoned the bank on the 3rd of July 1946 and was told that no instructions had been received to take delivery of the securities for the Respondent. On the same day, 3rd of July 1946, the Respondent telephoned MacKinnon stating that he had decided to take up only 500 shares and instructed him to sell the remaining 250 shares and to credit the proceeds thereon on account of the purchase price of the 750 shares. Accordingly, 250 shares were sold that date for the sum of $11,572.54 in United States currency. On the same 3rd of July 1946, the Respondent and William Goldburn, the Appellant's office manager, had a conversation over the telephone; and the 250 shares having been sold, the Respondent says he was desirous of closing the transaction on that date. They together, over the telephone, checked the figures. Purchase price of the 750 shares, including the brokers' commission and the premium of United States currency amounted to $39,966.28, of which the Appellants' manager gave the Respondent credit for $12,729.79, being the proceeds of the sale of the said 250 shares in Canadian currency, leaving a net balance due by the Respondent of $27,236.49 which the Respondent paid and took delivery for the 500 shares. But, on the 3rd of July, 1946, when that alleged settlement was made, the Appellants had not yet been paid for the said 250 shares by the purchaser on the New York Stock Exchange. The 3rd of July 1946 was a Wednesday, and it is admitted that on Thursday, the 4th of July, being a United States holiday, the New York Stock Exchange was closed. Friday, the 5th of July, was then the first "full business day following the day of the contract" which was related to the sale of the 250 shares. Saturday, 6th of July, and Sunday, the 7th of July, the New York Stock Exchange was also closed. So that, according to the Rules of the New York Stock Exchange, Monday, the 8th of July, 1946, was the first day on which the purchaser of the 250 shares could be compelled to take delivery and pay the price of the same.

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Meanwhile, in the evening of Friday, 5th July 1946, the Canadian currency had been brought to a parity with the United States currency. As a result of this change in the value of the two currencies, $11,572.54 United States currency did no longer amount to $12,729.79, but was then worth only 10% less, that is a difference of $1,157.25 which the Appellants seek to recover from the Respondent.

The Respondent urged three points. He first says that the original purchase by the Appellants in their own name, of the 750 shares and the subsequent sale by the Appellants of 250 of them were all part and parcel of one single modified transaction by which the Respondent bought from the Appellants as principals, 500 shares of the stock in question and the Respondent being entitled to assume, as he did, that the Appellants were acting as principals throughout, that the operations conducted by them on the New York Stock Exchange were for their own account and that it was up to them to protect themselves in respect of the exchange premium. The Respondent further urges that the settlement reached between the parties on the 3rd of July was final and intended to be so by both parties. And, finally, the Respondent contends that if the Appellants were acting as his mandataries in disposing of the 250 shares, they failed to execute their mandate with the reasonable skill and care of a prudent administrator by not protecting the mandator in respect of the exchange premium.

These submissions were not accepted by the Trial Judge who maintained the action of the Appellants for $1,155.43, being the amount claimed through error by the Appellants instead of $1,157.25.

This judgment of the Trial Court was reversed in Appeal (1) by a majority judgment now before us for review.

The judgment appealed from contains only two reasons. One held by one of the Judges of the majority is formulated as follows:—

> The agreement of July 3rd, 1946, was final and complete as between the parties and the loss suffered consequently must be borne by Respondents.

(1) Q.R. [1949] K.B. 312.

(The Appellants herein.)

The second reason formulated by the two other Judges of the majority reads:—

That there existed facilities whereby the loss of the premium could have been avoided and that since Respondents—

(The Appellants herein)—

must be presumed to have had knowledge of these facilities, their failure without reason to make use of them prior to the close of business on July 5th amounts to a negligence of sufficient gravity to engage their responsibility for the loss thereby incurred.

The whole transaction, purchase as well as sale of these shares, were made by the Appellants in performance of the Respondent's instructions which they had accepted, and was carried on in the ordinary course of the business in which they were engaged. The contract between the parties is clearly of the nature of a mandate (1701, C.C.). That the Appellants have, by reason of the Foreign Exchange Control Board Regulations, acted as principals with respect to the party from whom they purchased the 750 shares on the New York Stock Exchange, does not change the nature of their contractual relations with the Respondent.

At the relevant time, Rule 109 of the Rules of the Board of the New York Stock Exchange made a distinction between a "cash transaction" and a "transaction in the regular way." In the case of the former, the delivery date was the very day of the contract whereas, in the case of the latter, it was the second full business day following the date of the contract. Furthermore, and under the same rule, a transaction was presumed to be a "transaction in the regular way" unless otherwise specified. The Appellants who were brokers, and known as such by the Respondent, were by the same mandate given authority to do, what they were asked to do, in the ordinary course of the business they followed. Such authority is inferred by law (1706, C.C.). And if need be, reference may be had to the fact that the Respondent, describing himself as an investment dealer, and who, it was admitted before us, was equally associated with another brokers' firm, cannot and did not disclaim knowledge of such ordinary course in which the business committed by him to the Appellants was to be carried on, and by his failure to otherwise specify, he accepted the same. The Judicial Committee held in *Forget* v. *Baxter* (1) that:—

(1) [1900] A.C. 467.

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When one employs a broker to do business on a Stock Exchange he should, in the absence of anything to shew the contrary, be taken to have employed the broker on the terms of the Stock Exchange.

The relevant transaction being a "transaction in the regular way", the delivery date of the 250 shares sold by the Respondent through the Appellants, on the New York Stock Exchange, on the 3rd of July 1946, was, in the circumstances and for the reasons indicated above, on the 8th of July, 1946. It is then only on or from that date that the purchaser of these shares in New York could be compelled to take delivery and make payment, and only on or from that date that the mandate committed to the Appellants by the Respondent could, after and subject to the proper fulfilment or liquidation of the purchaser's obligations, come to an end. In the meantime, all the obligations contracted by the Appellants for the Respondent, within the mandate, were the latter's obligations.

However, five days previous to that date, the Respondent wanted to take delivery of the 500 shares and at his request, for his accommodation, and without any obligation on their part and, evidently, with no intention of jeopardizing any of their rights, the Appellants indicated to him in a telephone conversation, the then position of the account, delivered the 500 shares on payment of the assumed amount of the balance. On the occasion, there was no reference as to what remained to be done to perfect the execution of the mandate. Further contractual obligations, related to both parties and to the very essence of the mandate, were still outstanding. In point of fact, it is established that the delivery and the payment of the 250 shares took place in New York on the 8th of July, 1946; this being the normal course of business implicitly agreed upon by the Respondent.

That the mandatary must not enrich himself beyond the consideration agreed and must not be impoverished by the due execution of the mandate is a general and fundamental principle (1713, 1725, C.C.). As pointed out by one of the learned Judges of the minority, if one is to accept the alleged settlement as final, the two results indicated above would have obtained: the first one, had the value of Canadian currency been decreased instead of being increased, and the second one, had the purchaser of the 250 shares

failed to take delivery or make payment. There is no evidence that the parties ever intended to deviate from these paramount principles nor can such intention be inferred from the circumstances in which the Appellants were called by the Respondent to accommodate him. On the contrary, the latter, well aware that the perfection of the execution of the mandate was not yet achieved and was still conditioned by the subsequent delivery and payment of the shares, made no reference to this fact and said nothing to nullify or minimize the relevant obligations of the parties hereto. To say that this settlement was anything more than provisional, I am, with deference, unable to do.

As to the alleged negligence of the Appellants to protect the exchange position, I think it is manifest from the circumstances in this case that neither of the parties, the mandator, or the mandatary, directed their mind to the matter, on the occasion. The Respondent's witness, E. A. Robson, in charge of the Foreign Exchange Control Department of the Royal Bank of Canada,—authorized dealers under the Regulations and, besides, the very bankers of the Appellants,—admits that "the change was not foreseen by anyone"..., "that it came as quite a surprise"..., "that the Appellants could not have foreseen it." That there were facilities to protect the exchange position is established. The record also shows that the procedure devised to that end and indicated in a circular letter proven to have been addressed several months previously, to the banks,—but not to brokers,—was not recommended or resorted to in practise. Once being appraised of the change and of its nature, it becomes easy for the Respondent to think of protection and, thus, formulate the above argument. Speculation is not necessary to envisage how the Respondent's contention would have been formulated had the value of Canadian currency been decreased, instead of being increased, and had the Appellants frozen the exchange position by any method, without being so instructed by the Respondent. And it cannot be stated that such authority "to protect" could be inferred from the circumstances of the provisional settlement. There was no law, and no custom, or instructions proved to suggest the existence of an obligation for the Appellants to "protect the exchange

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position." (*Barthelmes* v. *Bickell and others* (1)). The fact that the Appellants advertised that they were providing "facilities for the purchase of American stocks" has no relevancy to the point in issue.

Under the circumstances of this case, I am of the opinion that this appeal should be maintained, that the judgment of the Court of the King's Bench (Appeal side) rendered on the 28th of February, 1949, should be reversed and that the judgment of the Superior Court, rendered on June 18, 1947, condemning the Respondent to pay to the Appellants the sum of $1,155.43 with interest from the 8th of July, 1946, and costs be restored; with costs here and in the Court below.

Appeal allowed with costs.

Solicitors for the Appellants: *Heward, Holden, Hutchison, Cliff, Meredith & Ballantyne.*

Solicitors for the Respondent: *Montgomery, McMichael, Common, Howard, Forsyth & Ker.*

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*Mar. 21
*May 15

NORTHERN BROADCASTING COMPANY LIMITED ..... } APPELLANT;

AND

THE IMPROVEMENT DISTRICT OF MOUNTJOY ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment and Taxation—Definition of "land", "real property", "real estate"—What constitutes "machinery" erected, or placed upon, or affixed to land—The Assessment Act, R.S.O. 1937, c. 272, ss. 1(i) (iv), 4(17) (am. 1947, c. 3, s. 4 (3)).

The appellant operates a radio broadcasting transmitter station. On premises, leased for a ten-year period, it erected a frame building in the basement of which it installed a transformer and on the first floor a transmitter. Each rested by its own weight only on the respective floors. The power required for broadcasting was carried from high voltage lines into the building to the transformer, by further wires to the transmitter, and thence by the same means to exterior broadcasting towers. A clause in the lease permitted the removal by the lessee of all buildings, fixtures and structures erected on the land.

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

(1) (1921) 62 S.C.R. 599.

The respondent assessed both the transformer and transmitter under the general heading of "machinery and equipment". The assessment was appealed on the ground that neither the transformer nor the transmitter constitute "land", "real property" or "real estate" within the meaning of s. 1 (1) (iv) of the *Assessment Act* which provides that: "'Land', 'real property', and 'real estate' shall include: All buildings, or any part of any building, and all structures, machinery and fixtures erected or placed upon, in, under, or affixed to land."

Held: Affirming the decision of the Court of Appeal, [1949] O.R. 695, Rinfret C.J. and Kerwin J., dissenting, that both the transformer and transmitter were "land" within the meaning of the Statute and therefore assessable.

APPEAL from the judgment of the Court of Appeal for Ontario, Aylesworth J.A. dissenting (1), affirming a decision of the Ontario Municipal Board whereby the transformer and transmitter of the appellant was found to be assessable under the *Assessment Act*.

H. E. Manning K.C. and *Allan D. Rogers* for the appellant.

D. D. Carrick and *S. A. Gillies* for the respondent.

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

KERWIN J.: By leave of the Court of Appeal for Ontario, Northern Broadcasting Company Limited appeals against a judgment of that Court confirming an assessment made by the Ontario Municipal Board upon an appeal to it by the Company under the provisions of the Ontario Assessment Act, R.S.O. 1937, c. 272.

The Company had previously operated a broadcasting system in Timmins, Ontario, but, in 1947, in accordance with prescribed regulations of the Department of Transport, it moved part of its system to a point some distance away in the Improvement District of Mountjoy. The Company there leased land for a period of ten years with successive rights of renewal for one year to a total of four, and upon it erected three towers and a frame main building containing a basement, a first floor, and residential accommodation for the resident engineer and his wife on the second floor. The Company's programmes originate in

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its studios in Timmins and are fed on special telephone wires to the new location and put into a transmitter and onto the towers which radiate the signal.

A transformer was brought into the main building after the latter's completion and there is a voltage regulator beside it on a wooden base, both of which are movable. The transformer, which is an integral part of the transmitter, is located in the basement and, as required by law, is installed in a concrete vault. The transformer rests on the floor and from it wires run through a conduit pipe projecting through the ceiling of the basement to connect with the hydro wires outside the building. Electrical power is fed through these lines to the transformer, which steps the voltage received down to that required by the transmitter.

The transformer is connected with the transmitter by wires which penetrate the ceiling of the basement. The transmitter is entirely demountable, having been brought in in sections. It is situated on the first floor of the main building and rests on a linoleum covering on the wooden floor. For its own protection and that of personnel, it is surrounded by a wire screen which is bolted to the floor and which at first was screwed to the top of the transmitter. At the time of the hearing before the Board the screws had been removed as they were not required but the bottom of the screen remained bolted to the floor. The transmitter is connected to the towers by No. 8 wires of six strands which constitute a transmission line suspended on poles. The connection of the wires to the transmitter is the ordinary connection and can be changed or moved.

All of this is what is described as "a tailor-made job", which, however, means only that it was done according to the specifications of the company's president and the engineers of the manufacturers of the equipment. The buildings are not substantial and it is expected that the towers, wires (or ground system), transmitter and transformer, will be obsolete before the expiration of the leases held by the Company. Under those leases the latter may remove any building, fixture or structures erected by it on the land.

The Company was assessed on behalf of the District in 1948 for taxation in 1949 at $100 for land and $27,500

for buildings. It appears that the assessor made up the latter sum by placing on the main building a value of $7,200; on the towers, a value of $3,000; on the ground system of wires, $1,200; on the transmitter, $15,600; and on the transformer $500. This assessment having been confirmed by the Court of Revision and the Company having appealed to the Board, the latter altered the assessment to $2,500 for the building and $11,000 for the towers, ground system, transmitter and transformer under the general heading of "machinery and equipment". The Company's appeal to the Court of Appeal was restricted to the last item and it did not there allege, as it did not before this Court, that the towers and ground system were not assessable. That leaves for consideration the transmitter and transformer.

Before referring to the relevant provisions of the present Ontario *Assessment Act,* the well-known fact should be noticed that prior to *The Assessment Act* of 1904 both real and personal property were assessable. By section 2(9) of the previous Act, R.S.O. 1897, c. 224, it was provided in part that " 'Land,' 'real property' and 'real estate' " respectively, shall include all buildings or other things erected upon or affixed to the land, and all machinery or other things *so fixed to any building as to form in law part of the realty.*" By the 1904 Assessment Act, personal property ceased to be liable to assessment but the definition section omitted the words underlined and inserted the word "placed". These changes have been carried forward to section 1(i) of the present Assessment Act, R.S.O. 1937:

"Land", "real property" and "real estate" shall include:

* * *

(iv) All buildings, or any part of any building, and all structures, machinery and fixtures erected or placed upon, in, over, under, or affixed to land:

* * *

Section 4 as amended, 1947, c. 3, s. 4(17) provides:

All real property in Ontario * * * shall be liable to taxation subject to the following exemptions:

* * *

17. All fixed machinery used for manufacturing or farming purposes including the foundations on which the same rests; but not fixed machinery used, intended or required for the production or supply of motive power including boilers and engines, gas, electric and other motors, nor machinery owned, operated or used by a transportation system or by

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a person having the right, authority or permission to construct, maintain or operate within Ontario in, under, above, on or through any highway, lane or other public communication, public place or public water, any structure or other thing, for the purposes of a bridge or transportation system, or for the purpose of conducting steam, heat, water, gas, oil, electricity or any property, substance or product capable of transportation, transmission or conveyance for the supply of water, light, heat, power, or other service.

Under this legislation, Hope J.A. in the present case, held that the transformer and transmitter fell within the statutory definition of "real property" as machinery placed upon land. Laidlaw J.A., agreed but added: "While in one sense the transformer and transmitter are movables they are nevertheless integral parts of the broadcasting plant. There was no intention whatsoever on the part of the owners when they installed those items of equipment, or at any time afterwards, to regard them as chattels but rather as part and parcel of the real property." Aylesworth J.A. dissented, being of opinion that the intention was to install the transformer and transmitter where they were installed for their beneficial and convenient use as machines and for no other purpose, relying upon the decisions of the Court of Appeal for Ontario in *Re City of Ottawa and Ottawa Electric Railway Co.* (1), and in *Re Ford Motor Co. of Canada, Ltd.* and *Town of Ford City* (2).

The first of these cases was concerned with an agreement between the City of Ottawa and the Electric Railway Company. Rose J. who delivered the judgment on behalf of the Court of Appeal, held that when the question is to determine whether a machine has become part of the realty for the purpose of assessment, the test to be applied is whether the intention is to improve the land, as when a central heating plant is installed, or whether the intention is to put the machine in a place where it can conveniently be used as a machine.

In the *Ford Motor* case, Middleton J.A., delivering the judgment of the Court, first decided that a gantry crane fell within the exemption of "fixed machinery used for manufacturing * * * purposes", provided for in paragraph 17 of section 4. It was therefore unnecessary, as he pointed out, to determine whether the crane should be

(1) (1922) 52 O.L.R. 664. (2) (1929) 63 O.L.R. 410.

regarded as "machinery and fixtures erected or placed upon * * * or affixed to land," but he was inclined to think that the crane was chattel property and in that connection adopted the view of Rose J. in the Ottawa case. Without calling upon counsel for the respondent, this Court [1929] S.C.R. 490, dismissed the appeal of the Town of Ford City upon the ground that the crane clearly fell within the exemption.

It is not suggested that the case falls within section 4(17) and specifically it is not claimed that the transformer and transmitter are used for manufacuring purposes, but a consideration of the paragraph is of assistance in determining the scope of the definition of real property in section 1(*i*). The opening leg of paragraph 17 exempts "all fixed machinery used for manufacturing * * * purposes." On the construction of 1(*i*) adopted by the Court of Appeal in the present case, machinery so used but not fixed would be caught by the words "machinery * * * erected or placed upon, in, over, under, or affixed to land." With respect, such a construction does not appear to be the proper one.

I am inclined to the view that the transmitter and transformer are not machinery as held by the Court of Appeal. Where is the line to be drawn? Would such articles as domestic washing machines and sewing machines be included in the term? However, assuming the transformer and transmitter are machines or structures or fixtures, some limitation must be put upon the words "erected or placed upon, in, over, or affixed to land." The test suggested in the *Ottawa Electric* case and approved in the *Ford Motor* case appears to be the proper one.

While, as pointed out by Laidlaw J.A., the transformer and transmitter are integral parts of the broadcasting plant, I am unable to agree with his statement that there was no intention on the part of the owners at any time to regard them as chattels. I think the intention, as evidenced by the terms of the leases of the land by which the Company might remove any building, fixtures or structures erected by it thereon, and also as evidenced by the manner of the placing of the transformer and transmitter on the land exhibit an intention to the contrary, that is, to regard them

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as chattels. The transformer, the voltage regulator and its base, and the transmitter were installed where they could conveniently be used as chattels.

The appeal should be allowed with costs here and in the Court of Appeal. However, the Company does not escape assessment for the towers and ground system. Section 86 of the *Assessment Act* (made applicable by subsection 3 of section 84 to appeals to the Board) provides for the correction of any omissions or errors in the assessment roll and, as this Court is to give the judgment that should have been given by the Court of Appeal, the matter should be remitted to the Board with a direction to assess, under the head of "Value of Buildings", the sum of $2,500 already fixed by the Board as the assessable value of the buildings proper, plus a fair and proper assessable value for the towers and ground system.

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

KELLOCK J.: The question involved in this appeal is as to whether or not a transformer and a transmitter, located in a building on premises held by the appellant under lease and used for broadcasting purposes constitute "land", "real property" or "real estate" within the meaning of the Ontario Assessment Act, R.S.O. 1937, c. 272, s. 1, clause (*i*), and liable to assessment and taxation as such under the provision of that statute. It is not necessary to repeat the facts, and I accept the finding of the Municipal Board that both are not attached to the building apart from their own weight and the electric wires or conduits originating outside the building and passing to and from each to the broadcasting towers.

The statutory definition is as follows:

> 1. (i) "land", "real property" and "real estate" shall include:
>
> (iv) All buildings, or any part of any building, and all structures, machinery and fixtures erected or placed upon, in, over, under, or affixed to land;

The first question calling for consideration is as to whether or not the two items here in question are "machinery" within the meaning of the Statute. The appellant has referred us to certain dictionary definitions,

but apart from the Statute itself, it would be sufficient to refer to one definition given in the Oxford Dictionary:

> Any instrument employed to transmit force or to modify its application.

As an illustration, the following is given:

> By this singular power of transmitting pressure, a fluid becomes, in the strictest sense of the term, a machine.

I think that both the transformer and the transmitter are within the above definition. They are instruments employed either to transmit force or to modify its application, or both.

The Statute, however, furnishes its own dictionary. In paragraph 17 of section 4 which is an exempting provision from the general liability imposed by that section on "all real property" in Ontario, it is provided that fixed machinery used for manufacturing or farming purposes is not to be considered "land", but this does not apply to fixed machinery required for the production or supply of motive power including "boilers." Mr. Manning contends that unless moving parts are involved, the article, while it may be "apparatus" or "equipment", cannot be a machine. This contention would exclude a boiler which the statute expressly includes. By the same paragraph, the exemption is not to apply to machinery used by certain described persons "for the purpose of conducting * * * electricity * * * for the supply of power." A transformer used by a street railway company would clearly fall within this language, as would a transmitter used by a telegraph company. The transformer and the transmitter, therefore, are to be considered machinery within the meaning of the Statute.

The second question which arises is as to whether or not a machine merely "placed" upon land without having acquired the character of land at law, falls within the definition.

The Statute took its present form in 1904 by 4 Edward VII, c. 23, s. 2, para. 7(*d*). Prior to that time, the definition as contained in R.S.O. 1897, c. 224, s. 2, para. 9, was as follows:

> 9. "Land", "real property" and "real estate" respectively, shall include all buildings or other things erected upon or affixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty * * *

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The amended Statute of 1904 (now found in R.S.O. 1937, c. 272, s. 1(*i*) in common with the present Statute, reads:

> All buildings, or any part of any building, and all structures, machinery and fixtures erected or placed upon, in, over, under, or affixed to land.

I am content to assume that the Statute of 1897 was concerned only with fixtures at common law in the sense that they had become part of the realty.

Appellant says that no change was effected by the Statute of 1904. If this argument be sound, the dropping of the words "so fixed to any building as to form in law part of the realty" as applied to "machinery" is without significance and the insertion of the word "placed" serves no purpose save to render the Statute tautologous. To so construe the Statute would be contrary to settled principle.

Prima facie, therefore, the words "erected", "placed" and "affixed" do not connote the same things, and the word "placed" at least must connote something less than is involved in the word "affixed."

With respect to "placed", I do not think it is used in the Statute as equivalent merely to "brought upon" so as to take in mere personal property which is intended to be shifted about at will. It involves the idea of setting a thing in a particular position with some idea of permanency. Thus, merely to bring a gas engine and portable saw upon premises would not be to "place" them upon the land within the meaning of the Statute, any more than would be the case with a table, or a chair, or a typewriter, or similar articles.

"Placed" is defined in the Shorter Oxford Dictionary as

> to put or set in a particular place, position or situation.

In the context of the Statute, I think the Legislature must be taken to have had in mind the including of things which, although not acquiring the character of fixtures at common law, nevertheless acquire "locality" which things which are intended to be moved about, do not.

It is noteworthy that the Statute does not say "all buildings" *simpliciter*, any more than it says "all machinery." If only buildings which become part of the land at common law are to be considered as falling within the statutory definition, there are many cases of buildings which might well be outside the Statute. All buildings are

not necessarily fixtures at law, *vide*: *Blanchard* v. *Bishop* (1); *Phillips* v. *The Grand River Mutual Fire Insur. Co.* (2), per Armour J. as he then was, at 353; *Bing Kee* v. *Yick Chong* (3). It has also been held that even the word "fixtures" does not necessarily connote things affixed to the freehold (see per Parke B. in *Sheen* v. *Rickie* (4). I do not think the intention of the legislature was to merely make assessable buildings which at law become part of the land, and I therefore think that the change in the wording of the Statute should be given its *prima facie* effect.

It is to be remembered that when the Statute of 1904 was passed, the assessment of personal property was abolished. Prior to the change it was unimportant for assessment purposes whether a given thing had become real or continued to be personal property, as both were assessable. In my opinion, the change in the definition of "land" made by the new legislation indicates an intention which the language used connotes on its face, namely, that the Legislature did not intend to abolish but to continue the assessment of chattels which, although not fixtures at law, nevertheless were not things intended in use to be moved from place to place.

I therefore conclude that it is sufficient in the present case to bring the two articles here in question within the meaning of "land" in the Statute, that they are heavy articles placed each in one particular spot with the idea of remaining there so long as they are used for the purpose for which they were placed upon the premises.

Mr. Manning contends that to give this meaning to the Statute involves an absurdity when paragraph 17 of section 4 is considered. It reads as follows:

> All fixed machinery used for manufacturing or farming purposes, including the foundations on which the same rests; but not fixed machinery used, intended or required for the production or supply of motive power including boilers and engines, gas, electric and other motors, nor machinery owned, operated or used by a transportation system or by a person having the right, authority or permission to construct, maintain or operate within Ontario in, under, above, on or through any highway, lane or other public communication, public place or public water, any structure or other thing, for the purposes of a bridge or transportation system, or for the purpose of conducting steam, heat, water, gas, oil,

(1) (1911) 2 O.W.N. 996.
(2) (1881) 46 U.C.Q.B. 334.
(3) (1910) 43 Can. S.C.R. 334.
(4) 5 M. & W. 174 at 180.

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electricity or any property, substance or product capable of transportation, transmission or conveyance for the supply of water, light, heat, power, or other service. R.S.O. 1937, c. 272, s. 4, par. 17; am. 1947, c. 3, s. 4(3).

It is said that on the above view of the Statute, machinery used for manufacturing or farming purposes which is "fixed" (i.e. according to the argument, fixtures at law) is not to be considered as part of the land, while machinery not "fixed" (similarly mere personal property) would be considered real estate. I do not think this contention is sound, as in my opinion the word "fixed" in paragraph 17 is not used in the sense of excluding everything which has not become a fixture at law, but as involving the idea connoted by the word "placed" with which I have already dealt, namely, as having acquired locality. While "fixed" by itself may normally involve something in the nature of attachment, it is, according to the Shorter Oxford English Dictionary, also used as the equivalent of "placed", and if the Statute is to be construed as a consistent whole, as it should, (*Cartwright* v. *Toronto* (1)) the word should be given this meaning in paragraph 17. This was essentially the view of the majority in the Court below. The view to which I have come was not put forward or considered in *Town of Ford City* v. *Ford Motor Co.* (2). The decision of this Court was that the crane there in question fell within the provisions of the exempting clause.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Zimmerman, Blackwell and Haywood.*

Solicitors for the respondent: *Caldbick & Yates.*

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(1) (1914) 50 Can. S.C.R. 215 at 219.

(2) (1929) 63 O.L.R. 410; [1929] S.C.R. 490.

GEORGE WILLIAM YEATS AND PAULINE VERA YEATS (PLAINTIFFS) ..... APPELLANTS;

AND

CENTRAL MORTGAGE AND HOUSING CORPORATION (DEFENDANT) RESPONDENT.

1950
*May 5
*June 23

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Crown—Central Mortgage and Housing Corporation—Contract made in the name of the Corporation—Whether Corporation subject to Supreme Court of Alberta—Central Mortgage and Housing Corporation Act, S. of C. 1945, c. 15, s. 5.

Held: The Central Mortgage and Housing Corporation, having entered in the name of the Corporation into a contract under section 5(2) of the *Central Mortgage and Housing Act,* is subject to the jurisdiction of the Supreme Court of Alberta in respect of any obligations arising out of that contract.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division, (1), affirming, Ford J.A. dissenting, the decision of Macdonald J. holding that the Central Mortgage and Housing Corporation, being a servant and agent of the Crown, could not be sued in the Supreme Court of Alberta.

Neil V. German for the appellants.

D. W. Mundell, K.C. for the respondent.

The judgment of the Court was delivered by

KERWIN J.: The Appellate Division of the Supreme Court of Alberta (1) affirmed an order of H. J. Macdonald, J., striking out the name of Central Mortgage and Housing Corporation as a party defendant in this action on the ground that, for all purposes, it was a servant and agent of the Crown, and that the plaintiffs could not maintain the suit against it in the Supreme Court of Alberta. The action is based on contract and was brought by Mr. and Mrs. Yeats against the Corporation, the Manufacturers

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

(1) [1949] 2 W.W.R. 1110.

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Life Insurance Company, and Bow River Construction Company, Limited. It claims relief for breach of certain contracts for the construction of a house by the construction company and the loaning of a part of the cost thereof by the other defendants. The application to strike out the Corporation as a party defendant was made on the advice of its legal advisers and effect was given to their argument in the Courts below. When these judgments came to the attention of the Attorney General of Canada, he took a different view of the matter and no objection was raised to an application to the Appellate Division for leave to appeal to this Court, which leave was granted.

It is agreed that the Corporation entered into the contracts sued upon, on behalf of His Majesty within subsection 2 of section 5 of the *Central Mortgage and Housing Corporation Act, being* chapter 15 of the Dominion Statutes of 1945, the said Corporation being described in the contracts as representing His Majesty the King in the right of Canada. It is also agreed that the Corporation in the manner aforesaid acquired or incurred a right or obligation in its own name under subsection 4 of section 5. This *Act* established the Corporation, consisting of the Minister of Finance and those persons who from time to time comprise the Board of Directors. Provision is made for the appointment of such a Board and an Executive Committee thereof, for advances by the Minister to the Corporation, and for loans under various Housing Acts therein specified. Section 5 reads:—

> 5. (1) Except as provided in section fourteen of this *Act*, the Corporation is for all purposes an agent of His Majesty in right of Canada and its powers under this Act may be exercised by it only as an agent of His Majesty.
>
> (2) The Corporation may, on behalf of His Majesty, enter into contracts in the name of His Majesty or in the name of the Corporation.
>
> (3) Property acquired by the Corporation is the property of His Majesty and title thereto may be vested in the name of His Majesty or in the name of the Corporation.
>
> (4) Where the Corporation has acquired or incurred a right or obligation in the name of the Corporation, it may sue or be sued in respect thereof in the name of the Corporation.

Section 14, referred to, empowers the Corporation on its own behalf to "employ such officers and employees for such purposes and on such terms and conditions as may

be determined by the Executive Committee and such officers and employees are not officers or servants of His Majesty."

Although at one time it was also agreed that the issue to be determined is whether or not there can be liability on the Corporation in an action in the Supreme Court of Alberta in respect of any alleged obligation incurred under section 5, subsection 4, the appeal was argued on the basis that the only matter to be determined is whether the Corporation is subject to the jurisdiction of the Supreme Court of Alberta. That point should be decided in the affirmative. While by subsection 1 of section 5 of the *Act* the Corporation is for all purposes an agent of His Majesty and its powers under the *Act* may be exercised by it only as an agent of His Majesty, subsection 2 provides that the Corporation may on behalf of His Majesty enter into contracts in the name of His Majesty or in the name of the Corporation. It being agreed that the contracts in question were entered into in the name of the Corporation, therefore, by virtue of subsection 4, it may sue or be sued in respect of any right or obligation so acquired or incurred. A number of cases are referred to in the reasons for judgment in the Courts below but only those now to be mentioned need be considered.

While there are differences between the contracts here sued upon and the agreement in question in *International Railway Co.* v. *Niagara Parks Commission* (1), the reasoning of the Judicial Committee in that case applies as the appellants have sued only the Corporation. See also *Rattenbury* v. *Land Settlement Board* (2).

The latest pronouncement is the judgment of the House of Lords in *Tyne Improvement Commissioners* v. *Armement Anversois S/A (The Brabo)* (3). The point there determined was that leave to serve notice of a concurrent writ out of the jurisdiction could not be granted as the action had not been "properly brought" against the Minister of Supply within the meaning of R.S.C. Order 11, r. 1(*g*). However, in the course of so concluding, their Lordships stated that it was plain under the relevant statu-

(1) [1941] 2 A.E.R. 456.
(2) [1929] S.C.R. 52.
(3) [1949] A.C. 326.

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tory enactments that the Minister could be sued in the ordinary Courts without the necessity of a petition of right but that did not debar him from the protection which the Crown itself would have had in the particular case.

We have not before us a case like *City of Halifax* v. *Halifax Harbour Commissioners* (1), because there the judgment was based upon the conclusion that the occupancy of the harbour property by the Halifax Harbour Commissioners was of such a character as to constitute that occupation an occupation "for the Crown" and, therefore, the Commissioners were not taxable in respect thereof. When such a question does arise, it will be necessary to consider the provisions of subsection 2 of section 30 of the *Act*:—

(2) Where title to real or immovable property becomes vested in the name of the Corporation or of His Majesty, whether alone or jointly with any other person, in consequence of foreclosure or other proceedings taken in respect of a mortgage assigned to the Corporation or to which His Majesty is a party under the Housing Acts, the Corporation may pay to a municipal or other taxing authority an amount equivalent to the taxes which might be levied in respect of the said property or of the interest of the Corporation or of His Majesty therein by the said authority if the said property or interest were not so vested, and may enter into such agreements as may be necessary to give effect to the provisions of this subsection.

The *Exchequer Court Act*, R.S.C. 1927, chapter 34, was referred to in the reasons for judgment of H. J. Macdonald, J., but the only suggested applicable sections are 18 and 19. Section 18 does not apply as this case is not the "subject of a suit or action against the Crown" and the meaning of these words in the early part of the section is not enlarged by the concluding phrase "or in which the claim arises out of a contract entered into by or on behalf of the Crown." Section 19, so far as it might have any relevancy, makes provision in respect of "claims against the Crown." Here, the appellants desire to have decided their claims against the Corporation (not the Crown) at the same time as their claims against the other defendants. The provisions of the *Central Mortgage and Housing Corporation Act* are apt to authorize the Corporation being sued in the Provincial Court and the judgments below should, therefore, be set aside and the motion to strike out the Corporation as a party defendant and dismiss the

(1) [1935] S.C.R. 215.

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action as against it, should be dismissed. The appellants are entitled to their costs throughout against the Corporation.

Appeal allowed with costs.

Solicitors for the appellants: *German, Mackay and McLaws.*

Solicitors for the respondent: *Macleod, Riley, McDermid and Dixon.*

1950

*Feb. 7
*Apr. 25

BERNARD FREY (PLAINTIFF) ..... APPELLANT;

AND

STEPHEN FEDORUK AND RICHARD PERCY STONE (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—"Peeping tom"—Whether criminal offence—Conduct likely to cause breach of peace—False imprisonment—Arrest without warrant—Burden of proof—Criminal Code, ss. 30, 646, 647, 648, 650—Supreme Court Act, R.S.B.C. 1936, c. 56, s. 77.

Appellant was chased, caught and detained by respondent, Fedoruk, after he had been seen on Fedoruk's property looking into a lighted side window of the house where a woman was preparing for bed. A policeman, the other respondent, was called and, after some investigation, arrested appellant without warrant.

On a charge that he "unlawfully did act in a manner likely to cause a breach of the peace by peeping . . ." appellant was convicted by a Police Magistrate but acquitted by the Court of Appeal.

His claim for damages for malicious prosecution and for false imprisonment was dismissed by the trial judge and this was affirmed by a majority in the Court of Appeal on the ground that appellant had been guilty of a criminal offence at common law and therefore that there had been justification for the arrest without warrant. The appeal to this Court is concerned only with the claim for false imprisonment.

Held: Appellant's conduct did not amount to any criminal offence known to the law. Therefore respondents have failed to satisfy the onus placed upon them to justify the imprisonment under ss. 30, 648 or 650 of the *Criminal Code.*

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

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Held also: Section 30 Cr. C. authorizes a peace officer to arrest without warrant only if he, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, but not if he erroneously concludes that the facts amount to an offence, when, as a matter of law, they do not.

Held further: Conduct, not otherwise criminal and not falling within any category of offences defined by the criminal law, does not become criminal because a natural and probable result thereof will be to provoke others to violent retributive action; acts likely to cause a breach of the peace are not in themselves criminal merely because they have this tendency. It is for Parliament and not for the Courts to decide if any course of conduct, which has not up to the present been regarded as criminal, is now to be so regarded.

Per Kerwin J.: The appellant, by "peeping", did not commit a breach of the peace. If he had, it is not an offence for which either a police constable or a private individual might arrest without warrant under ss. 646 or 647 of the *Criminal Code*. Sections 30, 648 and 650 afford no assistance to either respondents since no criminal offence was committed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) affirming, Robertson JA. dissenting, the dismissal by the trial judge of an action for false imprisonment and malicious prosecution.

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

Lee A. Kelley, K.C. and *W. R. Meredith* for the respondent Stone.

KERWIN J.: The plaintiff in this action, Frey, appeals against a judgment of the Court of Appeal for British Columbia (1) affirming by a majority, so far as the defendants Fedoruk and Stone are concerned, the dismissal of the action by the trial judge. The action as tried was for false imprisonment and malicious prosecution but the action stands dismissed as against all defendants on the latter issue and we are not concerned with it in this appeal.

The claim for false imprisonment arose from the following circumstances which, though some are denied by the appellant, must be taken to be established. While on his way home from work about 11.15 p.m. on March 4, 1947, the appellant stopped the truck which he was driving on the highway, turned out the lights on the truck and walked to the rear of a house occupied by the defendant Fedoruk, his wife, and mother. There he peeped through a window

(1) 95 Can. C.C. 206.

upon which there was no blind but the curtains of which had been drawn to within six to eight inches of each other, and was seen by Fedoruk's mother while she was standing in her nightgown in her lighted bedroom. The mother's cry, "Man at window", was heard by the wife of Fedoruk, who called him. Seizing a butcher knife, he ran out the door in time to see the appellant leaving the property. Upon Fedoruk's shouting, the appellant started to run but was caught by Fedoruk about 300 feet down the road while the appellant was attempting to insert the key in the ignition lock of the truck. Fedoruk brought the appellant back to the house and the police were notified. The defendant, Constable Stone, and another police officer came and, after investigating thoroughly by examining the footprints upon the dewy ground and in other ways, Stone arrested the appellant and took him to a police station. There he was charged that he "unlawfully did act in such a manner likely to cause a breach of the peace by peeping at night through the window of the house of S. Fedoruk". His conviction by a magistrate on that charge was set aside by the Court of Appeal and the present action followed.

There was agreement in the Court of Appeal that a bare trespass not amounting to a breach of the peace is not a criminal offence. The difference of opinion arose between the majority, who considered that an actual breach of the peace had occurred, and Mr. Justice Robertson who thought otherwise. As Mr. Justice O'Halloran, speaking for the majority, pointed out:—"Furthermore, it would seem plain at common law that if the intruder's conduct did not constitute a criminal offence, then he could not be charged with conduct likely to cause a breach of the peace by the Fedoruks." It may be difficult to define exhaustively what is a breach of the peace but, for present purposes, the statement in Clerk and Lindsell on Torts, (10th edition), page 298, may be accepted:—

> A breach of the peace takes place when either an actual assault is committed on an individual or public alarm and excitement is caused. Mere annoyance or insult to an individual stopping short of actual personal violence is not a breach of the peace. Thus a householder—apart from special police legislation—cannot give a man into custody for violently and persistently ringing his door-bell.

(1) 95 Can. C.C. 206.

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As authority for the last sentence, a case of false imprisonment, *Grant* v. *Moser* (1), is cited. It is true that it was decided on a pleading which ultimately the defendant was permitted to amend but the latter part of the report, containing the argument of Sergt. Talfourd for the defendant, including interpolations by Chief Justice Tindal and Cresswell J. is significant. It reads:

It is submitted that the plea sufficiently discloses a breach of the peace at the time of the arrest. After stating that the plaintiff "with force and arms" came to the house and violently rang the bell, and continued so doing after being requested to desist, it states that "thereupon (which must mean instanter) the defendant gave him in charge. In *Baynes* v. *Brewster* (2 Q.B. 375; 1 G. & D. 669) a plea justifying the plaintiff's arrest for creating a disturbance by rapping at the defendant's door was held bad because it appeared that the disturbance was over at the time of the arrest (Tindal C.J. And that, although the plea stated that the defendant gave the plaintiff in charge "in order to preserve the peace." Cresswell J. What allegation is there in this plea of anything having been done in breach of the peace?) It alleges that the disturbance took place "against the peace of our Lady the Queen." (Tindal C.J. Those are mere *verba sonantia*. One party cannot arrest another for a mere unlawful act. Cresswell J. Every trespass is laid as a breach of the peace. Suppose the plaintiff had blown a horn in the front of the defendant's house, that might have been a breach of the metropolitan police act (2 & 3 Vict. c. 47. See sect. 54, div. 14); but it would not have been a breach of the peace. Tindal C.J. To make this a good defence there should be a direct allegation either of a breach of the peace committing at the time of giving the plaintiff into custody, or that a breach had been committed, and that there was reasonable ground for apprehending its renewal.)

In the earlier case of *Green* v. *Bartram* (2), to quote the headnote:

(A. went to the house of B. to demand a debt, which B. said he could not pay. Angry words passed, and B. told A. to leave his house, this A. refused to do unless he was paid. Upon this B. sent for a police officer, and had A. locked up in the watch-house: Held, (by Lord Tenterden, C.J.) that if A. was making a disturbance B. would have been justified in turning him out of his house, but that he was not justified in imprisoning him.)

Notwithstanding the contemptible actions of the appellant, I find myself in agreement with the dissenting judge that the appellant did not, even in view of all the surrounding circumstances, commit a breach of the peace. If he had, it was not an offence for which either a police constable or a private individual might arrest without warrant under sections 646 or 647 of the *Criminal Code*. Section 30 authorizes a peace officer to arrest without warrant only

(1) (1843) 5 Man. & G. 123. (2) (1830) 4 Car. & P. 308.

if he, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed. Since no criminal offence was committed, subsection 1 of section 648:

> A peace officer may arrest, without warrant, any one whom he finds committing any criminal offence.

affords no assistance to the respondent Stone even if it could be said that he had found the appellant "committing". Similarly, section 650 affords no assistance to the respondent Fedoruk, assuming that he was the owner of the property. The majority in the Court of Appeal considered that the statute 34 Edw. III, c. 1, was not in force in British Columbia but, even if it were, it would not apply since no offence had been committed.

The appeal should be allowed and judgment should be entered for the appellant for the amounts fixed by Mr. Justice Robertson as to which no question was raised; that is, against Fedoruk for $10 and against Stone for $50. The appellant is entitled to his costs in the Court of Appeal and in this Court. There should be no costs of the action against the respondents so far as the issue of false arrest is concerned unless the appellant is able to secure an order under section 77 of the *Supreme Court Act of British Columbia.*

The judgment of the Chief Justice and of Taschereau, Rand, Kellock, Locke and Cartwright, JJ. was delivered by:

CARTWRIGHT J.: This appeal raises questions as to whether the conduct of the Plaintiff, which is popularly described as that of a "peeping tom", constitutes a criminal offence and if so, whether the Defendants Fedoruk and Stone were justified in arresting the Plaintiff without a warrant.

In this Court, the appeal was presented as depending upon undisputed facts which may be briefly stated as follows:

About 11.15 p.m. on the 4th of March 1947, the mother of the Defendant, Fedoruk, while standing in her night-gown in her lighted bedroom in her son's house saw the Plaintiff peeping into her window, the curtains of which were only partially drawn. She was frightened and called

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to her son who seized a butcher knife and ran outside. He shouted at the Plaintiff who was then just leaving Fedoruk's property. The Plaintiff started to run; Fedoruk chased him about one hundred yards to a point where the Plaintiff was trying to unlock and get into his truck. The lights of the truck were out. Fedoruk took the Plaintiff back to his house, threatening him with the knife. Fedoruk's mother identified the Plaintiff as the man whom she had seen at her window and the police were called. The Defendant Stone, a police constable, arrived accompanied by another police officer, and after some investigation, as a result of which he formed the opinion that the Plaintiff had been "peeping", he told the Plaintiff he was under arrest and took him to the Police Station where he was confined.

There are allegations in the pleadings and in the evidence that the Defendant Stone assaulted the Plaintiff on his way to the Police Station and at the Police Station, but as to this, there appear to be concurrent findings of fact against the Plaintiff, and counsel for the Plaintiff made it clear in his factum and in his argument that the Plaintiff's appeal was limited to his claim for damages for false imprisonment as against the Defendants Fedoruk and Stone.

The learned trial Judge dismissed the action against all three Defendants. The Court of Appeal (1) unanimously allowed the appeal as to the Defendant Watt and awarded the Plaintiff $100 damages against him, and from this award no appeal was taken. The majority of the Court of Appeal dismissed the Plaintiff's appeal as against Fedoruk and Stone. Robertson, J.A. dissenting would have allowed the appeal as to these Defendants also and would have awarded the Plaintiff damages of $10 against Fedoruk and $50 against Stone. Leave to appeal was granted to the Plaintiff by the Court of Appeal.

The majority of the Court of Appeal were of opinion that the Plaintiff was guilty of a criminal offence at Common Law, and that the Defendants were justified in the circumstances in arresting him without a warrant. Robertson, J.A. was of the view that on the facts as found, no criminal offence was committed by the Plaintiff.

(1) 95 Can. C.C. 206.

The claim being one for damages for false imprisonment, in my opinion, the following short passage from Halsbury's Laws of England, Second Edition, Volume 33, page 38 correctly states the law:

> The gist of the action of false imprisonment is the mere imprisonment; the plaintiff need not prove that the imprisonment was unlawful or malicious, but establishes a *prima facie* case if he proves that he was imprisoned by the defendant; the onus then lies on the defendant of proving a justification.

There is no question on the facts but that the Plaintiff was imprisoned first by Fedoruk and afterwards by Stone, and in order to succeed it was therefore necessary for each of them to plead and prove that the imprisonment was legally justifiable. The justification pleaded by Fedoruk consists of a brief statement of the facts outlined above followed by the allegation that fearing that the Plaintiff was under the circumstances in question, doing an act which was likely to cause a breach of the peace, to wit, peeping without any lawful excuse into the windows of his mother's bedroom while hiding outside, he pursued the Plaintiff through his property and arrested the Plaintiff because of the violation of law committed by the said Plaintiff.

The justification pleaded by Stone is that he placed the Plaintiff under arrest by reason of the commission of an act by the said Plaintiff that was likely to cause a breach of the peace by reason of the said Plaintiff peeping at night through the window of the home of Stephen Fedoruk, and in particular through the window of the bedroom of the said Defendant's mother while she was undressing and preparing for bed and only after having investigated the explanation given by the Plaintiff and having found that the same could not be in accordance with the facts.

It will be observed that the Defendant Stone does not plead that he believed a breach of the peace had been committed or that such breach had in fact been committed. He limits his plea to the allegation that the Plaintiff had committed an act likely to cause a breach of the peace.

The only charge laid against the Plaintiff was that he:

> unlawfully did act in a manner likely to cause a breach of the peace by peeping at night through the window of the house of S. Fedoruk, there situated, against the peace of our Lord the King, his Crown and dignity; Contrary to the form of Statute in such case made and provided.

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On this charge the Plaintiff was convicted by a police magistrate sitting for the summary trial of an indictable offence. The formal conviction concludes with the words: and I adjudge the said Bernard Frey for his said offence to keep the Peace and be of good behaviour for the term of one year.

This conviction was quashed by the Court of Appeal on the ground that the evidence on the record did not support the conviction, without that court finding it necessary to decide whether or not the acts charged constituted a criminal offence. This is stated in the judgment of O'Halloran, J.A. who was a member of the Court which quashed the conviction.

It would appear that the acquittal of the Plaintiff on the criminal charge does not preclude the Defendants from showing as their justification for having imprisoned him that he had in fact committed the offence of which he had been acquitted. See *Cahill* v. *Fitzgibbon* (1) and *Cook* v. *Field* (2).

O'Halloran, J.A. with whom Sidney Smith, J.A. agrees, stated his conclusion that the Plaintiff had committed an offence at Common Law in the following words:

> He himself committed a breach of the "King's Peace" by acting in a way that produced fear in the inmates of the house; he disturbed their tranquillity and privacy in a manner that he would naturally expect to invite immediate violence against him. Among other things it is instinctive in man to take physical reprisal against invasion of the privacy of his womenfolk particularly at night. Accordingly his breach of the "King's peace" was more than likely to cause an immediate breach of the King's peace by the inmates of the house; and he contributed another sinister incident by running when Fedoruk shouted at him instead of stopping and talking to Fedoruk.
>
> No attempt is made to define completely the Common Law offence of "breach of the King's Peace", except to say, it is not used here in its common and more narrow sense.

O'Halloran, J.A. later continues:

> As previously intimated, breach of the peace has two significations; the narrow and common one applicable to riots, tumults and actual physical violence; and the other and wider one which goes so deeply into the roots of the Common law, viz., any disturbance of the tranquillity of people, which if not punished, will naturally lead to physical reprisals, with wider and more aggravated disturbances of the "King's Peace."

While O'Halloran, J.A. takes the view that the *Criminal Code* does not expressly make the Plaintiff's conduct criminal and that at Common Law merely looking through

(1) (1885) 16 L.R. Ir. 371. (2) (1788) 3 Esp. 133.

a window at night is not in itself a criminal offence, he goes on to hold that the circumstances in which the act is done may change its character, and continues:

> It is my judgment that the circumstances here surround the intruder's act of looking in the window with such sinister implications, that in the lack of a credible explanation, his conduct as a whole must be regarded as criminal at Common Law. It was late at night, the intruder was on private property some thirty to forty feet back from the street line; he was looking in a side window which did not face the street, the window was lighted and he could see a woman preparing for bed. Quite apart from the "peeping tom" aspect, the presence of a prowler in such circumstances, the dread of the hostile unknown at night, would naturally frighten the inmates of the house, and incite them to immediate violent defensive or offensive action against him.

Robertson, J.A. dissenting, was of opinion that the Plaintiff did not commit an actual breach of the peace. He points out that "an indictment will not lie for a bare trespass not amounting to an actual breach of the peace." This statement of the law is amply supported by the authorities cited by Robertson, J.A. all of which were decided long after the passing of C.8 of 5 Rich. II (1381), referred to in the judgment of O'Halloran, J.A. as making unlawful entry into any lands a criminal offence even if unaccompanied by violence. In my view that statute contemplates entry with the intention of taking possession and has no reference to an isolated and temporary act of trespass such as occurred in this case. I agree with the conclusion of Robertson, J.A. that the Plaintiff did not commit any criminal offence.

We have been referred to no reported case in which the conduct of a "peeping tom" was held to be a criminal offence. It is well settled that, while the rule may not be so strict as in criminal cases, in a civil case where a right or defence rests on an allegation of criminal conduct a heavy onus lies upon the party alleging it, and questions that are left in doubt by circumstantial evidence must be resolved in favour of innocence.

There is no suggestion in the evidence of any attempt on the part of the Plaintiff to offer violence to anyone. A reasonable inference to be drawn from the facts recited above is that the Plaintiff had no intention of himself doing any violent act and hoped that he would not be discovered.

When he was discovered he at once ran away. In my opinion, the mere fact that his presence at night in close

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proximity to the window would have the probable effect of frightening the inmate of the room does not make such conduct criminal at Common Law.

While I agree with the view expressed by O'Halloran, J.A. that such conduct, if discovered, would naturally frighten the inmates of the house and that it would tend to incite them to immediate violent action against the intruder, I am doubtful whether such action could be properly described as defensive. I would describe it rather as offensive and retributive. I do not think action is defensive when the person against whom it is taken has given no indication of any intention to attack and is already in flight. I do not think that it is safe to hold as a matter of law, that conduct, not otherwise criminal and not falling within any category of offences defined by the Criminal Law, becomes criminal because a natural and probable result thereof will be to provoke others to violent retributive action. If such a principle were admitted, it seems to me that many courses of conduct which it is well settled are not criminal could be made the subject of indictment by setting out the facts and concluding with the words that such conduct was likely to cause a breach of the peace. Two examples may be mentioned. The speaking of insulting words unaccompanied by any threat of violence undoubtedly may and sometimes does produce violent retributive action, but is not criminal. The commission of adultery has, in many recorded cases, when unexpectedly discovered, resulted in homicide; but, except where expressly made so by Statute, adultery is not a crime.

If it should be admitted as a principle that conduct may be treated as criminal because, although not otherwise criminal, it has a natural tendency to provoke violence by way of retribution, it seems to me that great uncertainty would result. I do not think it safe by the application of such a supposed principle to declare an act or acts criminal which have not, up to the present, been held to be criminal in any reported case.

This would be my view if the matter were not covered by authority, but it also appears to me to be supported by authority. In my view it has been rightly held that acts likely to cause a breach of the peace are not in themselves

criminal merely because they have this tendency, and that the only way in which such conduct can be dealt with and restrained, apart from civil proceedings for damages, is by taking the appropriate steps to have the persons committing such acts bound over to keep the peace and be of good behaviour.

This appears to be the view of Lord Goddard, with whom Humphreys, J. agrees, in *Rex* v. *County of London Quarter Sessions Appeals Committee* (1), particularly at page 475, where he says:

> In *Dalton's Country Justice,* a work of the highest authority, a catalogue is given, not intended, I think, to be exhaustive, of a large number of instances which would justify sureties for good behaviour being taken. It starts with rioters and barrators, and goes on to such cases as nightwalkers and eavesdroppers, suspected persons who live idly and yet fare well, or are well apparelled having nothing whereon to live, and common gamesters.
>
> None of these were ever indictable offences. Eavesdroppers are first defined in *Termes de la Ley* as "such as stand under walls or windows by night or by day to hear news and to carry them to others to make strife and debate amongst their neighbours".
>
> Though it is said in *Russell on Crimes* that eavesdropping was dealt with in the Sheriff's Tourn and Courts Leet as an offence, so far as I am aware no instance can be found in the books of any indictment being preferred for this offence at common law. It follows, therefore, that nobody can be convicted of eavesdropping or nightwalking, or of many of the other matters which are mentioned by Dalton, although, no doubt, in modern times, the necessity for good government in towns and cities has caused the Legislature to pass Acts which make things which in earlier days were regarded as no more than bad behaviour criminal offences; and it is necessary to bear in mind that in the present case which we are considering no charge of having committed any offence against a statute such as the Metropolitan Police Act was preferred.

In *Ex parte Davis* (2), Blackburn, J. points out that the binding over of a person to keep the peace is not an action or proceeding by way of punishment, but is only a precautionary proceeding to prevent a breach of the peace.

In *Rex* v. *Sandbach Ex parte Williams* (3), Humphreys, J. citing Blackstone, Volume (iv), page 256 points out that a man may be bound to his good behaviour for causes of scandal *contra bonos mores,* as well as *contra pacem.*

In my view, the Plaintiff's conduct in peeping through the window was *contra bonos mores,* but was not *contra pacem* in the sense of being a breach of the criminal law.

The case of *Davies* v. *Griffiths* (4), is a decision of the

(1) [1948] 117 L.J.R. 472.
(2) (1871) 24 L.T. 547 at 548.
(3) [1935] 2 K.B. 192.
(4) (1937) 53 T.L.R. 680.

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King's Bench Division. The judgment is given by Lord Hewart, C.J., and the other members of the Court, Macnaghten and Singleton, JJ. agree with him.

It is stated in the report that the relevant facts proved or admitted, showed that the appellant, Davies, had attempted to address a meeting near the entrance to a colliery and persisted in such conduct, despite the protest of a police inspector, that previously there had been breaches of the peace at the colliery and that the appellant's conduct was such as might lead to a breach of the peace.

Davies had been convicted by justices on two informations preferred against him by the respondent Griffiths. The first of these was "having on August 18, 1936 been guilty of conduct near the Taff Merthyr Colliery, Gelligaer, which might lead to breaches of the peace, contrary to the common law". The Lord Chief Justice, having stated that the major point in the appeal was as to this first charge said:

> With regard to the first information it is quite evident that there was a misconception. The only course open to the justices when the facts had been proved was, if they thought fit, to bind the appellant over to keep the peace and perhaps to find sureties. It is common ground at the Bar that the course which the justices took was a course not open to them. They fined the appellant on the basis that he had committed a substantive offence to which a penalty might apply. In so doing they erred in point of law.

In my view, the definition of a breach of the Peace in Wharton's Law Lexicon, 14th Edition, page 143, quoted by Robertson, J.A. "offences against the public which are either actual violations of the peace, or constructive violations, by tending to make others break it", is too wide if the concluding words "or constructive violations, by tending to make others break it" are intended to include conduct likely to produce violence only by way of retribution against the supposed offender.

O'Halloran, J.A. does not refer to any reported case in which the conduct of a "peeping tom" has been held to be a criminal offence. As mentioned above, we were referred to no such case by counsel, and I have not been able to find one.

I do not understand O'Halloran, J.A. to suggest in his elaborate reasons that there is precedent for the view that the Plaintiff's conduct in this case was criminal. Rather

he appears to support the finding of the trial Judge to that effect on the grounds stated in the following paragraph:

> Criminal responsibility at Common law is primarily not a matter of precedent, but of application of generic principle to the differing facts of each case. It is for the jury to apply to the facts of the case as they find them, the generic principle the Judge gives them. Thus by their general verdict the jury in practical effect decide both the law and the facts in the particular case, and have consistently done so over the centuries, and cf. *Coke on Littleton* (1832 Ed.) vol. 1, note 5, para. 155 (*b*). The fact finding Judge in this case, as the record shows, had not the slightest doubt on the evidence before him that what the appellant had been accused of was a criminal offence at Common Law.

In my opinion when it is read against the background of the rest of the Reasons of O'Halloran, J.A., it appears that, in relation to the facts of this case, the "generic principle" which the learned Judge has in mind is too wide to have any value as a definition. The genus appears to be "a breach of the King's Peace" in the wider signification which is attached to that expression elsewhere in the Reasons.

It appears to me that so understood, the genus is wide enough to include the whole field of the criminal law. As it is put in Pollock and Maitland, History of English Law (1895) Volume 1, page 22:

> all criminal offences have long been said to be committed against the King's peace.

and in Volume 2 of the same work at page 452, it is stated:

> to us a breach of the King's peace may seem to cover every possible crime.

Once the expression "a breach of the King's Peace" is interpreted, as O'Halloran, J.A. undoubtedly does interpret it, not to require as an essential ingredient anything in the nature of "riots, tumults, or actual physical violence" on the part of the offender, it would appear to become wide enough to include any conduct which in the view of the fact finding tribunal is so injurious to the public as to merit punishment. If, on the other hand, O'Halloran, J.A. intended to give to the expression a more limited meaning so that it would include only conduct of a nature likely to lead to a breach of the peace in the narrower sense of which he speaks, the authorities referred to elsewhere in this Judgment seem to me to show that this is not an offence known to the law.

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I am of opinion that the proposition implicit in the paragraph quoted above ought not to be accepted. I think that if adopted, it would introduce great uncertainty into the administration of the Criminal Law, leaving it to the judicial officer trying any particular charge to decide that the acts proved constituted a crime or otherwise, not by reference to any defined standard to be found in the code or in reported decisions, but according to his individual view as to whether such acts were a disturbance of the tranquillity of people tending to provoke physical reprisal.

To so hold would, it seems to me, be to assert the existence of what is referred to in Stephen's History of the Criminal Law of England, Volume 2, Page 190, as:

> the power which has in some instances been claimed for the Judges of declaring anything to be an offence which is injurious to the public, although it may not have been previously regarded as such.

The writer continues:

> this power, if it exists at all, exists at Common Law.

In my opinion, this power has not been held and should not be held to exist in Canada. I think it safer to hold that no one shall be convicted of a crime unless the offence with which he is charged is recognized as such in the provisions of the *Criminal Code,* or can be established by the authority of some reported case as an offence known to the law. I think that if any course of conduct is now to be declared criminal, which has not up to the present time been so regarded, such declaration should be made by Parliament and not by the Courts.

Having reached the conclusion that the Plaintiff's conduct did not amount to any criminal offence known to the law, the question whether the Defendants were justified in arresting Frey presents little difficulty. The justification put forward in argument was based on certain sections of the *Criminal Code* all of which, with the exception of Section 30, would require as a condition of their affording justification to the Defendants the fact that some criminal offence had been committed.

Section 30 would be of no avail to Fedoruk who was not a peace officer, but it must be examined in regard to Stone. The section reads as follows:

> Every peace officer who, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has

been committed, whether it has been committed or not, and who, on reasonable and probable grounds, believes that any person has committed that offence, is justified in arresting such person without warrant, whether such person is guilty or not.

It may be that Stone's Statement of Defence is not aptly framed to raise this section as a defence but I do not think it necessary or desirable to decide this point upon the precise form of the pleadings. In my opinion, assuming, without deciding, that the form of the pleadings permits Stone to rely upon it, this section does not afford any justification for his arresting the Plaintiff.

I think that this section contemplates the situation where a Peace Officer, on reasonable and probable grounds, believes in the existence of a state of facts which, if it did exist would have the legal result that the person whom he was arresting had commited an offence for which such person could be arrested without a warrant. It cannot, I think, mean that a Peace Officer is justified in arresting a person when the true facts are known to the Officer and he erroneously concludes that they amount to an offence, when, as a matter of law, they do not amount to an offence at all. *"Ignorantia legis non excusat"*.

Having reached the conclusion that the Plaintiff committed no criminal offence, it is not necessary to examine the authorities collected and discussed by O'Halloran, J.A. as to the meaning of the terms "found committing" or "whom he finds committing".

For the reasons set out above, I am of the opinion that the Plaintiff's conduct did not amount to a criminal offence, and that the Defendants Fedoruk and Stone have failed to satisfy the onus which lay upon them of showing some justification in law for having imprisoned him. I agree with Robertson, J.A. that the Plaintiff was entitled to succeed as against both Defendants.

I would not vary the assessment of the damages proposed by Robertson, J.A. The Plaintiff's counsel does not ask that they be increased and I do not think that the amounts suggested are excessive. While I agree with Robertson, J.A. that in a sense "the whole matter was brought upon the Plaintiff by himself", the facts remain that his arrest was effected by Fedoruk by the threatening

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use of a deadly weapon, he was deprived of his liberty for several hours and subjected to some minor indignities at the police station, all without any justification in law.

In the result I would allow the appeal and direct that judgment be entered against Fedoruk for $10 and against Stone for $50 with costs of the appeal to the Court of Appeal and of the appeal to this Court. There should be no costs of the action against the Respondents unless the Appellant is able to secure an order under section 77 of *The Supreme Court Act of British Columbia,* allowing him costs of the action so far as the issue of false arrest is concerned.

Appeal allowed with costs.

Solicitors for the appellant: *Fleishman and Fleishman.*

Solicitor for the respondents: *Angelo E. Branca.*

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*Feb. 20, 21. 22, 23, 24.
*Jun. 23

HIS MAJESTY THE KING (DEFENDANT) . . APPELLANT,

AND

CANADA STEAMSHIP LINES LIMITED (SUPPLIANT) . . . . . } RESPONDENT,

HIS MAJESTY THE KING (DEFENDANT) . . APPELLANT,

AND

H. J. HEINZ COMPANY OF CANADA LIMITED,
CUNNINGHAM & WELLS LIMITED,
RAYMOND COPPING,
W. H. TAYLOR LIMITED,
CANADA AND DOMINION SUGAR COMPANY LIMITED (SUPPLIANTS) } RESPONDENTS,

AND

CANADA STEAMSHIP LINES LIMITED . . . . . } THIRD PARTY RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Lease of shed by Crown to water carrier—Damage caused to lessee and to third parties by negligence of servants of Crown—Whether lease exempts from liability by negligence—Whether gross negligence—Third party proceedings—Exchequer Court Act, R.S.C. 1927, c. 34, s. 19(c)—Water Carriage of Goods Act, 1 Ed. VIII, c. 49.

*PRESENT: Rinfret C.J. and Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.

A shed, leased by appellant to respondent C.S.L. and in which were stored respondent's and third parties' goods, caught fire while appellant's employees, acting within the scope of their duties, were doing repairs to it in compliance with appellant's obligation to maintain the shed under clause 8 of the lease.

Clause 7 provided that "the lessee shall not have any claim or demand against the lessor for detriment, damage or injury of any nature . . . to the said shed . . . or materials . . . goods . . . placed, made or being . . . in the said shed".

By clause 17 it was provided that "the lessee shall . . . indemnify . . . the lessor . . . against all claims and demands . . . based upon, occasioned by or attributable to the execution of these presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder".

The trial judge held that appellant's employees had been negligent and that clause 7 could not be invoked as their negligence amounted to "faute lourde". For the same reason, he dismissed the third party proceedings instituted by appellant under clause 17. At the hearing, this Court declared that the finding of negligence by the trial judge could not be disturbed.

Held: The intention of the parties to be gathered from the whole of the document was that, as between the lessor and the lessee, the lessor should be exempt under both clauses 7 and 17 from liability founded on negligence (Locke J. contra as to clause 7).

Held also: The conduct of appellant's employees did not amount to "faute lourde".

Per Locke J. (dissenting in part): As there was here a double liability—the contractual obligation on the part of the Crown to maintain the shed under clause 8 and the liability of the Crown under s. 19 of the Exchequer Court Act—the liability in negligence not having been expressly or by implication excluded, remains and therefore clause 7 does not afford an answer to respondent's claim.

Glengoil Steamship Co. v. *Pilkington* (1897) 28 S.C.R. 146; *Phillips* v. *Clark* [1857] 2 C.B. (N.S.) 156; *Price* v. *Union Lighterage Co.* [1904] 1 K.B. 412; *Rutter* v. *Palmer* [1922] 2 K.B. 87; *McCawley* v. *Furness Ry. Co.* (1872) L.R. 8 Q.B. 57; *Reynolds* v. *Boston Deep Sea Fishing Co.* (1921) 38 T.L.R. 22; *Beaumont-Thomas* v. *Blue Star Line Ltd.* [1939] 3 All E.R. 127 and *Alderslade* v. *Hendon Laundry Ltd.* [1945] 1 All E.R. 244 referred to.

APPEALS by the Crown against the judgments of the Exchequer Court of Canada, Angers J. (1), holding that the lease did not exempt the Crown from liability for damage done by the gross negligence of its servants and allowing respondent's petition of right.

A. J. Campbell K.C. and *J. Desrochers* for the appellant.

H. Hansard K.C. and *R. E. Morrow* for Canada Steamship Lines and H. J. Heinz Company.

(1) [1948] Ex. C.R. 635.

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John Bumbray K.C. for Cunningham & Wells, for Copping and for W. H. Taylor Ltd.

John L. O'Brien K.C. and *John Nolan* for Canada and Dominion Sugar Co. Ltd.

THE CHIEF JUSTICE: These are appeals from judgments of the Exchequer Court of Canada rendered by Angers J. in November, 1948 (1).

By the first judgment, the Court below maintained with costs the Petition of Right of the Respondent Canada Steamship Lines, Limited, for the sum of $40,713.72.

By the second judgment, the Court below maintained with costs the Petition of Right of the Respondent H. J. Heinz Company of Canada, Limited, for the sum of $38,430.88.

By the third judgment, the Court below maintained with costs the Petition of Right of the Respondent Cunningham and Wells, Limited, for the sum of $15,159.83.

By the fourth judgment, the Court below maintained with costs the Petition of Right of the Respondent Raymond Copping, for the sum of $1,662.37.

By the fifth judgment, the Court below maintained with costs the Petition of Right of the Respondent W. H. Taylor, Limited, for the sum of $3,670.25.

By the sixth judgment, the Court below maintained with costs the Petition of Right of the Respondent Canada and Dominion Sugar Co., Limited, for the sum of $108,310.83.

Third Party proceedings were instituted by the Appellant against the Respondent Canada Steamship Lines, Limited, in each of the above cases, except, of course, the petition directly made by Canada Steamship Lines, Limited, itself.

These six cases were tried together and all arise out of a fire which, on May 5, 1944, completely destroyed the Canada Steamship Lines Ottawa street freight shed located on the Lachine Canal in the inner harbour of Montreal.

The damages awarded to each of the Petitioners were established by admissions filed in each case and, therefore, the only question remaining to be decided was as to the responsibility of the Appellant, which the learned trial judge found against the latter.

(1) [1948] Ex. C.R. 635.

At the hearing in this Court, after the conclusion of the argument of the Appellant's counsel, the Court declared that the findings of negligence on the part of the Appellant's employees, as made in the judgments appealed from, could not be disturbed. It follows that the judgments in favour of the Respondents H. J. Heinz Company of Canada, Limited; Cunningham and Wells, Limited; Raymond Copping; W. H. Taylor, Limited; and Canada and Dominion Sugar Co., Limited, must be confirmed with costs of the appeal against the Appellant.

With regard, however, to the petition of Canada Steamship Lines, Limited, and the Third Party proceedings, other considerations apply, in view of the existence between the Appellant and Canada Steamship Lines, Limited, of a lease whereby the latter was put in possession of the freight shed owned by the Appellant. It is the effect of that lease with regard to the respective claims of Canada Steamship Lines, Limited, and His Majesty which stands to be discussed.

The lease in question, dated the 18th of November, 1940, gave to Canada Steamship Lines, Limited, the right and privilege to occupy, use and enjoy the shed for the purpose of receiving and storing therein freight and goods loaded into or unloaded from vessels owned and operated by them. It was there agreed between the parties that the lease was made and executed upon and subject to the covenants, provisoes, conditions and reservations thereafter set forth and contained, "and that the same and every of them, representing and expressing the exact intention of the parties, are to be strictly observed, performed and complied with". One of these covenants, provisoes, conditions and reservations is contained in Clauses 7 and 8 of the lease; and another is contained in Clause 17, which it is convenient to reproduce here:

7. That the Lessee shall not have any claim or demand against the Lessor for detriment, damage or injury of any nature to the said land, the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed.

8. That the Lessor will, at all times during the currency of this lease, at his own cost and expense, maintain the said shed, exclusive of the said platform and the said canopy.

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17. That the Lessee shall at all times indemnify and save harmless the Lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these Presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder.

It is apparent that Clauses 7 and 8 have to do with the direct claim of Canada Steamship Lines, Limited, and Clause 17 is invoked by the Appellant in connection with the Third Party proceedings.

Taking first Clauses 7 and 8, the contention of the Appellant is that they relieved him of any claim or demand by the Canadian Steamship Lines, Limited, for the damage suffered by the latter in the circumstances.

The fire was caused by the employees of the Appellant, while they were repairing the shed, and it is clear that, when carrying out those repairs, the Appellant was complying with his obligation to maintain the shed by force of Clause 8. It could not be disputed that the employees were then acting within the scope of their duties or employment, thus bringing into play Section 19(*c*) of *The Exchequer Court Act* (R.S.C. 1927, c. 34), by force of which this claim for injury to the property of the petitioners resulting from the negligence of the servants of the Crown could be determined against the Appellant.

I have already said that the finding of the learned trial judge to the effect that there was in this matter negligence of the employees acting within the scope of their duties or employment could not be disturbed, and it follows that the Appellant was rightly condemned to pay the damages claimed by the Canada Steamship Lines, Limited, unless Clause 7 of the lease comes to the rescue of the Appellant.

The learned trial judge decided that it did not so operate. The ground for so deciding was that, in the opinion of the learned judge, the evidence has established that the fire, which destroyed the shed or warehouse in question and its contents, was caused by the gross negligence of the officers and servants of the Crown and that, in such a case, the Appellant could not invoke Clause 7.

It was common ground that the gross negligence referred to in the judgment appealed from is the equivalent of what is called "faute lourde" in the French Civil Code, and it

was not disputed either that the lease must be interpreted and applied according to the law of the Province of Quebec.

The learned judge devoted almost the whole of his judgment to a discussion of what constituted "faute lourde". But, of course, the question whether "faute lourde" exists is not merely a question of fact; it is also a question of law. The facts found must be brought within the proper legal definition of "faute lourde".

On that point, it does not seem to me that one can be on safer grounds than to adopt the definition of POTHIER. This learned author, who might truly be looked upon as being in most respects the basis of the Civil Code of Quebec, says that the "faute lourde consiste à ne pas apporter aux affaires d'autrui le soin que les personnes les moins soigneuses et les plus stupides ne manquent pas d'apporter à leurs affaires".

Here, the so-called "faute lourde", in the mind of the learned judge, would have resulted from the fact that, in order to enlarge a hole in a steel beam—an operation which admittedly would not require more than three or four minutes at most—the employees used an oxyacetylene torch and two experts testified that, instead of the torch, they should have used a drill or a reamer.

As the operation of the torch on the metal was expected to cause sparks to be emitted, the employees had installed a wooden beam or board, seven to eight feet long, nine to ten inches wide and one inch thick. The board started from the roof of the shed and came down to about three feet from the floor. The object of it was to prevent any spark flying from the spot of the operation unto bales of cotton waste stored in the shed. The bales incidentally caught fire and from there the fire spread all over the shed and destroyed all its contents. How the spark found its way to the bales of cotton waste, notwithstanding the board placed by the employees for the very purpose of preventing such an event, remained unexplained, as the whole occurrence happened so quickly that one of the employees, who had been placed inside the shed in order to guard against a possible mishap, had to escape hurriedly and did not even have time to use a pail of water which had been put at his disposal as an additional precaution.

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It should be stated, however, that in cross-examination, Newill, one of the experts heard, admitted that blow torches are used currently in many industries, in repairs to buildings and for the purpose of burning holes.

The judgments appealed from proceed to examine whether the Appellant could invoke any relief, under Clause 7 of the lease, and conclude as follows:

> After carefully perusing the doctrine set forth by the authors, French and Canadian, and adopted by the Courts of the Province of Quebec and the Supreme Court of Canada, with respect to the bearing of the exculpatory clause in the lease Exhibit A in the case of gross negligence, I have reached the conclusion that this clause does not exempt the respondent from his responsibility in connection with the damages suffered by the suppliant as a consequence of the fire.

The learned judge accordingly gave judgment in favour of the Suppliant against the Appellant.

It will be seen, therefore, that although recognizing that in the case of simple negligence ("faute ordinaire", "faute légère"), Clause 7 would have operated as relieving the Appellant from any claim or demand for "detriment, damage or injury of any nature" to the "materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed"—and that is to say, for the damages claimed in the Petition of Right of Canada Steamship Lines, Limited—the Petitioner is entitled to recover in this particular case, because the employees of the Crown, in this instance, were guilty of gross negligence or of "faute lourde"; and that, in the premises, this circumstance prevented the Crown from obtaining relief under Clause 7.

No other ground can be found in the judgment for maintaining the Petition of Right against the Appellant in favour of the Respondent Canada Steamship Lines, Limited.

This calls, therefore, for the examination of two points: (1) Whether the facts justify a finding of "faute lourde" in the circumstances in this case; and (2) whether, in law, the existence of "faute lourde" would operate as an exception to the bearing of Clause 7 in the lease.

Applying to the facts the definition of POTHIER above recited, I do not think, with respect, that it can be said that there was a "faute lourde" committed by the employees

of the Crown. That definition goes extremely far; the words used by POTHIER are: ". . . le soin que les personnes les moins soigneuses et les plus stupides ne manquent pas d'apporter à leurs affaires". Upon the evidence, I do not find it possible to state that the employees here can be placed in the category of "les personnes les moins soigneuses et les plus stupides".

As already stated, the evidence shows that the use of blow torches for the purpose of burning holes is made currently in many industries and by men of construction and demolition companies. The operation was to last only a few minutes. The men had no drill or reamer with them at the time. Stopping the work to go and get a drill or reamer might have meant a long delay and much inconvenience. It was only natural that for this extremely short work they should use the instruments or tools which they had immediately at hand. They were only doing what admittedly is being done currently in works of that kind. Moreover, they had taken the precautions which ordinarily and in their own mind would be adequate: the board installed between the place where they were burning the hole and the goods inside the shed; the pail of water; and the man placed on the bales of cotton waste, so that he could at once see a possible spark flying towards the bales and act on the spur of the moment to extinguish any beginning of a fire. It seems that it would be very exacting indeed to ask for any further precaution. It was both improbable and very nearly impossible to expect that a spark would reach the bales. It is enough to say that, under those circumstances, the finding that the employees were negligent and have caused the fire through such negligence should not be reversed by an Appellate Court, as was decided by this Court at the close of the Appellant's argument. With respect, I am unable to agree that what the men did was the act of "les personnes les moins soigneuses et les plus stupides". It is unnecessary, of course, to add that there can be here found neither "faute intentionnelle" nor "faute volontaire". And if, as many authors and commentators on the Civil Code think that, with very slight "nuance", the notion of "faute lourde" should be taken as the equivalent of "dol", it would be stressing the definition

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of "faute lourde" to its extreme limit to decide that the negligence of the Crown's employees amounted here to gross negligence or "faute lourde".

This would be sufficient to dispose of the ground upon which the learned trial judge refused to give to the Crown-Appellant the benefit of Clause 7 of the lease.

But it is not amiss to add that on the authorities and true interpretation of a clause, such as Clause 7, I could not either come to the conclusion that gross negligence or "faute lourde" should render Clause 7 inoperative. Since the decision of this Court in the case of *The Glengoil Steamship Company* v. *Pilkington* (1) the matter, in the Province of Quebec, must be taken to have been settled that a clause of that character is neither illegal nor void, and that the jurisprudence, both in France and in the Province of Quebec, now sanctions the validity of such a contract (*Glengoil* Case, Pages 156 and 157). It is generally admitted that such a stipulation of non-responsibility is not contrary to public order. This principle was reaffirmed by this Court in *Vipond* v. *Furness, Withy and Company* (2).

The leading case on that subject in the Province of Quebec is *Canadian National Railway Company* v. *La Cité de Montréal* (3). This judgment was delivered for the Court of King's Bench (Appeal Side) by Surveyer J. It was there decided that

> La clause d'un contrat stipulant immunité en faveur d'une partie, pour le cas de dommages susceptibles d'être causes par sa propre faute, sans distinguer entre la faute contractuelle et la faute délictuelle, telle distinction n'existant pas dans notre loi,—n'est pas contraire à l'ordre public, —est légale et valide. —En conséquence, dans l'espèce, une compagnie de chemin de fer dont la voie traverse à niveau la rue d'une municipalité, peut s'immuniser et se garantir par contrat avec la dite municipalité contre la responsabilité lui résultant d'accidents pouvant survenir à la traverse, même par la faute de ses propres employés.

The judgment relies on LAURENT, Vol. 16, No. 230; MARCADE, Vol. 4, Nos. 506-7; and a former judgment of the Court of King's Bench (Appeal Side) in *Canadian Northern Quebec Railway Co.* v. *Argenteuil Lumber Company* (4), where the Court of Appeal decided:

> A party to a contract may legally stipulate that he will not be responsible for the negligence of his employees. Therefore a clause in an agreement between a Railway Company and a private individual for

(1) (1897) 28 S.C.R. 146.
(2) (1916) 54 S.C.R. 521.
(3) (1927) Q.R. 43 K.B. 409.
(4) (1919) Q.R. 28 K.B. 408.

the building of a siding, connecting with the company's railways, which purports to exempt the company from liability for injury or loss caused by its negligence or that of its servants in use of said siding, is not as being against public order, as far as the fault of the company's employees is concerned.

The same judgment cites SIREY, 1882-2-24, to the effect that the definition of "faute lourde" in France is: "La faute commise à dessein et en pleine connaissance de cause". This clearly cannot be applied to the negligence of the Crown's employees in the present case, and we should add that, if such be the law as between private litigants, a fortiori should the Crown be given the benefit of such law in view of the limited responsibility of the Crown in these matters.

Clause 7 itself provides for no exception whatever. It covers "any claim or demand . . . for detriment, damage or injury of any nature . . . to materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed".

It is obvious that the clause covers the goods, articles, effects or things, the damage or injury to which is claimed for by the Petitioner-Respondent in the premises. There could be no possible exception to the non-liability of the Appellant under the clause.

Applying Articles 1013 and following of the Civil Code dealing with the interpretation of contracts, I must say that, here, the meaning of the parties is not doubtful, it is not susceptible of two meanings, and, although the terms are quite general and all-embracing, I cannot see how they could be said not to extend to the goods destroyed by the fire in the present case, nor is it evident that the parties did not intend to contract to cover those goods (C.C. 1020).

Both on the interpretation of the clause in accordance with the Civil Code, as well as in law and on the facts, I am of opinion that Clause 7 of the lease between His Majesty and Canada Steamship Lines, Limited, should receive its application and the Petition of Right of Canada Steamship Lines, Limited, should be dismissed with costs, in this Court and in the Exchequer Court.

Dealing now with the Third Party proceedings, they were all dismissed by the learned trial judge again on the

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ground that the existence of "faute lourde", as he found, should exclude the right of the Appellant to be indemnified by the Respondent Canada Steamship Lines, Limited. This calls for a discussion of the effect of Clause 17 of the lease.

In that connection, I need not repeat what is already said above on whether the negligence of the Crown's employees can be styled gross negligence or "faute lourde". My conclusion on the facts leads to a decision that none could be found in the circumstances of this case. It would follow that the ground of the learned trial judge for excluding Clause 17 is not well founded.

There remains, however, to interpret Clause 17 and to see whether, upon its true construction, the Appellant was entitled to call upon the Respondent Canada Steamship Lines, Limited, to indemnify Him and save Him harmless from the claims of the other Petitioners.

For that purpose, Clause 17 may be divided into two parts: the first part reads:

> That the Lessee shall at all times indemnify and save harmless the Lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted . . .

It does not seem doubtful that this first part upholds the contention of the Appellant.

> actions . . . brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these Presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder.

Here, the enquiry must be whether the actions brought by H. J. Heinz Company of Canada, Limited; Cunningham and Wells, Limited; Raymond Copping; W. H. Taylor, Limited, and Canada and Dominion Sugar Company, Limited, are included within the actions, suits or proceedings enumerated and specified in that last part.

Undoubtedly, unless it were so, it would be difficult to attribute a meaning to that clause, although the rule of interpretation contained in Article 1014 of the Code states that:

> When a clause is susceptible of two meanings, it must be understood in that in which it may have some effect rather than in that in which it can produce none.

It would not follow, therefore, that the mere fact of coming to the conclusion that the clause might produce

no effect would be sufficient to dispose of the present discussion. Article 1014 contemplates that there may be clauses in contracts which are susceptible of producing no effect, if no meaning can be attributed to them. It is only when a clause is susceptible of two meanings that preference must be given to the meaning having some effect rather than to the meaning which produces none.

Here, however, after the most careful consideration, I cannot find two meanings in Clause 17.

The Crown is seeking to be indemnified by Canada Steamship Lines, Limited, and to be saved harmless from and against claims and demands, suits or proceedings brought against it for loss, costs and damages based upon, occasioned by or attributable to the execution of the lease.

As we have seen, Clause 8 thereof compelled the Crown "at all times during the currency of the lease, at its own cost and expense, to maintain the shed" in which the goods destroyed by the fire had been placed and were then in the shed. Maintaining the shed was one of the obligations of the Crown arising under the lease and attributable to the performance or execution of the lease. The loss, cost or damages to the other claimants or Petitioners, which form the basis for the Third Party proceedings against the Respondent Canada Steamship Lines, Limited, are certain claims and demands for their loss, cost and damages in actions, suits or proceedings brought or prosecuted in a manner attributable to the execution and performance of the lease by the Crown; and, accordingly, they are brought strictly within the application of Clause 17. This, to my mind, was exactly the intention of the parties to the lease when the latter was agreed to between them. The result, of course, is unfortunate because it has the effect of placing upon the shoulders of the Canada Steamship Lines, Limited, the full burden of the damages which resulted from the fire caused by the negligence of the employees of the Appellant; but the law of the contract is the law of the parties; and this result is brought about only as a consequence of the stipulations to which the Lessee submitted itself when it signed the lease. And it is not unnatural that, having rented the shed to Canada Steamship Lines, Limited, the Crown should have insisted that, if any loss

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occurred during the currency of the lease and such loss was claimed against the Crown, it, in turn, would be entitled to be indemnified and saved harmless by the Lessee. Canada Steamship Lines, Limited, agreed to that, and, in deciding that the Third Party proceedings must be maintained against it, the Court is only applying the inevitable result and consequence of what it agreed to.

I am, for all these reasons, of opinion that the judgments must be confirmed in so far as are concerned the petitions of H. J. Heinz Company of Canada, Limited; Cunningham and Wells, Limited; Raymond Copping; W. H. Taylor, Limited, and Canada and Dominion Sugar Co., Limited, and the appeals from these judgments should be dismissed with costs; but the appeal should be maintained as against Canada Steamship Lines, Limited, both in respect to its own petition against His Majesty and also with regard to the Third Party proceedings, which ought to be maintained against it in each case of H. J. Heinz Company of Canada, Limited; Cunningham and Wells, Limited; Raymond Copping; W. H. Taylor, Limited, and Canada and Dominion Sugar Co., Limited. The judgments rendered in favour of Canada Steamship Lines, Limited, on its own petition and on the Third Party proceedings should, therefore, be set aside; its petition should be dismissed and the Third Party proceedings maintained against it, together with all costs in each instance in favour of the Appellant both in this Court and in the Exchequer Court.

RAND J.:—On the argument, the Court intimated that, notwithstanding Mr. Campbell's able argument, the finding of Angers, J. (1) on the facts could not be disturbed. There remain, therefore, three questions: first, whether under paragraph 7 of the lease, the Crown is exempt from liability for the loss suffered by the respondent; whether, under paragraph 17, the Crown is entitled to call upon the respondent for indemnity against the claims of the third parties; and whether the negligence was "faute lourde" against which, it is contended, an indemnity would be contrary to public order.

Paragraph 7 is as follows:—

That the Lessee shall not have any claim or demand against the Lessor for detriment, damage or injury of any nature to the said land,

(1) [1948] Ex. C.R. 635.

the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed.

As can be seen, this language is broad enough to embrace every claim against the Crown for damage to any property of the respondent in or on the land leased. For example, an aeroplane of the Air Force might, through negligence, get out of control and crash through the building, or sparks from a locomotive on the government railway might set fire to it. But they are claims against the "Lessor" and this means that they must arise within some scope of action under the lease. Are they, on the one hand, to be limited to damage resulting from breaches of covenant? The only express obligation on the Crown is that to maintain the "said shed exclusive of the said platform and the said canopy". Under the law of Quebec, which the parties take as governing, the duty to repair would arise after notification by the lessee. The Crown might deliberately or negligently delay such work in circumstances that might lead to damage, as, say, from rain or other inclemency of weather. The mere breach of the covenant, without damage to property, would be outside the paragraph. Or, on the other hand, are the parties to be presumed to have had in mind consequences incidental to any act arising out of the relation of lessor and lessee? Before coming to a conclusion on this question, I think it advisable to examine paragraph 17.

That paragraph reads:—

That the Lessee shall at all times indemnify and save harmless the Lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these Presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder.

The question here is this: what claims of third parties could arise against the Crown within the scope of matters bounded by the lease? There could be no contractual rights or duties: at most only delicts or quasi-delicts. But the non-liability of the Crown for wrongs done to the subject is a basic constitutional rule which was the law of Lower Canada in 1867 and remains the constitutional position of

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the Crown except so far as it has been changed by statute: *Quebec* v. *The King* (1). *The Exchequer Court Act*, by section 19(*c*), has created a right in the subject where he has been injured or his property damaged by the negligence of an employee of the Crown in the course of his duty and any liability within the Province of Quebec must arise out of such a delinquency. The only possible claims, then, within paragraph 17, are those founded in negligence.

The rule striking negligence from exceptions of liability arose out of the interpretation of contracts of carriage both by sea and by land. The nature of those undertakings as well as the early conditions under which they were performed dictated an insurer's responsibility against loss or damage unless caused by an Act of God, the King's enemies or inherent vice, to which there was added by law the obligation to use care, and in the case of ships, that they be seaworthy. But although the rule is not now confined to carriers, the researches of counsel have turned up no case of property which has not involved a bailment. The common factor in all has been the commitment of personal property by one person to another, a relationship in many instances of which duties by law and obligations by contract have not been wholly and satisfactorily integrated. But there is no such relation here and the rule must be examined anew.

The first question for a court is the rational consideration upon which the rule is based. In examining that, I disregard both the fact that the Crown is landlord and the ordinary rule of interpretation in the case of Crown grants. Since the matter is primarily in contract, the exception should appear as the presumed intention of the parties. In sea carriage there were obvious perils to be encountered, and if the ship owner stipulated for freedom from them, without more, it would be reasonable to assume that misconduct on his part was not contemplated. In some, at least, of the exceptions, the result could be explained in terms of causation. Although a peril was the immediate cause, yet as it was engaged with negligence, on the ordinary reasoning the loss would be attributed to the latter. But it was not only against negligence that the rule struck. The warranty of seaworthiness was in substance absolute,

(1) (1894) 24 S.C.R. 420.

and yet, its breach, regardless of the nature or cause of it, was excluded from general exceptions or from exceptions of specific causes with which it co-operated.

One test would seem to be whether the words of exemption can be given a reasonable application short of negligence, as was suggested by Atkin, L.J. (as he was) in *Rutter* v. *Palmer* (1). In the lease before us, the Crown has undertaken only one obligation, to maintain the building, and the only sources of liability are, failure to maintain and negligent performance. It is said that the former is within section 7 and the latter not. But what, in reasonableness, is the difference between a culpable refusal to carry out an obligation, which involves either an intentional or negligent disregard of it, and the performance in good faith but accompanied by less than reasonable care? If, for instance, the electric wiring of this building had, through deterioration, become dangerous, precisely the same results might have followed the neglect to repair as in this case; and if it goes to the reasonableness or even morality of the default, how can it be said that either one is more reasonable or more unreasonable than the other? I am unable to appreciate any jural distinction between them. As in the cases where unseaworthiness has overridden exceptions, it is irrelevant that there might be liability which did not involve culpability, although I should add that I do not see how there could be here.

Reverting, then, to paragraph 7 and considering it in the light of paragraph 17, it would seem rather absurd to say that the fire, so far as it damaged the goods of a third party, gave rise to a right in the Crown against the Steamship Company for indemnity, which, in my opinion, it would; but that claims for damage to like property of the Steamship Company were not within the broad language of paragraph 7.

It will be noticed that, although the duty to repair does not extend to the canopy or the platform, additions to the building made by the lessee, these are enumerated in paragraph 7. Damage to them arising out of a failure to repair the main part of the building can perhaps be imagined, but it would be very remote in cause and beyond any likely contemplation of the parties. It would seem

(1) [1922] 2 K.B. 87 at 94.

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much more probable that direct damage to them was in mind, a claim for which could be only from a negligent act.

The last question is whether the negligence in the work done was of such an outrageous character as to bring it within the principle of faute lourde. In view of the development of the law of insurance in the province and its radical departure from the Coutume de Paris, it would seem to be very questionable that the principle could now be invoked at all; but assuming it could, the scope would not in these days extend beyond the bounds laid down by Pothier in his definition:—

dans le fait de ne pas apporter aux affaires d'autrui le soin que les personnes les moins soigneuses et les plus stupides ne manquent pas d'apporter à leurs affaires.

It cannot seriously be contended that the conduct of these employees was of the character so described. They were doing their work in the ordinary manner; they had anticipated the possibility of sparks and had taken some considerable, and what they thought to be adequate, precautions against them. To say of their conduct that it was more indifferent than the most careless and the most stupid of men would exercise towards their own interests is either to disregard what they did or to misconceive the standard laid down.

The result is simply this: the Crown leases on terms that under no circumstances will it be responsible for damage to any property on the land: to the lessee it is said: you must bear that entire risk, against which you may, of course, insure yourself. As the respondent is a carrier, in custody of all the goods as such or as warehouseman, that risk is part at least of its ordinary responsibility: and in the work of repair, it is as if the persons doing it were employees of the respondent but at the cost of the Crown.

I would, therefore, allow the appeal, dismiss the petition of right and allow judgment on the counterclaim for indemnity, with costs in this Court and in the Court below.

KELLOCK J.:—This is an appeal by His Majesty from a judgment of the Exchequer Court (1) in proceedings arising out of the destruction by fire of certain goods, the property of the respondent and certain third parties. The respondent, Canada Steamship Lines, was the tenant of

(1) [1948] Ex. C.R. 635.

certain dock property under lease from the appellant upon part of which property was situate a freight shed which the Steamship Company used in connection with its business of transporting freight. The lease is dated the 18th of November, 1940, and is for a term of twelve years. Under its provisions the lessee had the right to construct, at its own expense, a loading platform along the southerly face of the freight shed and a canopy above. It also provided that the appellant would, during the currency of the lease, maintain the shed but not the platform or canopy.

Five or six days prior to the fire, the Steamship Company had complained to the appellant's superintendent as to the state of repair of the various doors in the shed and it was in the course of the repair of these doors on the 5th of May, 1944, by servants of the appellant that the fire occurred, completely destroying the shed and its contents.

The learned trial judge held that the fire was due to the negligence of the appellant's servants and we affirmed this finding on the hearing, subject to the question as to whether the negligence amounted to gross negligence, and the effect, if any, of such a finding. Judgment was given in favour of the Steamship Company against the appellant and also judgment in favour of the third parties. The learned judge further held that clause 7 of the lease, to be hereinafter referred to, could not be availed of by the appellant as a defence to the Steamship Company's claim, as he considered that under the law of Quebec such a clause was no answer where there had been gross negligence or "faute lourde". He also refused relief to the appellant against the Steamship Company in third party proceedings taken for the purpose of indemnification against the claims of the third parties. The learned judge held that clause 17 of the lease upon which the appellant relied for this purpose could not be made available for the same reason.

In my opinion the judgment in appeal cannot be sustained upon the ground upon which the learned trial judge proceeded. The definition of faute lourde most favourable to the respondent Steamship Company, namely, that of Pothier, is:

dans le fait de ne pas apporter aux affaires d'autrui le soin que les personnes les moins soigneuses et les plus stupides ne manquent pas d'apporter à leurs affaires.

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Even accepting this definition for the purposes of the present case, the evidence does not make out such a case. Clause 7, relied upon by the appellant as a defence to the claim of the respondent company, reads as follows:

That the Lessee shall not have any claim or demand against the Lessor for detriment, damage or injury of any nature to the said land, the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed.

Prior to the decision of this court in *Glengoil* v. *Pilkington* (1), all such clauses were considered invalid by the courts of the Province of Quebec, but as stated by Taschereau J. in *Grand Trunk Railway* v. *Miller* (2):

The legality of such clauses was concluded by that decision.

In the course of his judgment in the *Glengoil* case, Taschereau J. said at 159:

Then conditions of this nature limiting the carrier's liability or relieving him from any, are to be construed strictly and must not be extended to any cases but those expressly specified; *Phillips* v. *Clark*, 2 C.B. N.S. 156; *Trainor* v. *the Black Diamond Steamship Co.*, 16 S.C.R. 156.

It is well settled that a clause of this nature is not to be construed as extending to protect the person in whose favour it is made from the consequences of the negligence of his own servants unless there is express language to that effect or unless the clause can have no operation except as applied to such a case. In *Alderslade* v. *Hendon Laundry* (3), Lord Greene M.R. expressed the principle as follows at page 245:

. . . where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because if it were not so construed it would lack subject-matter. Where, on the other hand, the head of damage may be based on some ground other than that of negligence, the *general principle* is that the clause must be confined to loss occurring . . . through that other cause to the exclusion of loss arising through negligence. The reason for that is that if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms, and in the absence of such clear terms the clause is to be construed as relating to a different kind of liability and not to liability based on negligence.

It is therefore argued for the respondent in the case at bar that the provisions of paragraph 7 do not extend to

(1) (1897) 28 S.C.R. 146.
(2) (1903) 34 S.C.R. 45 at 56.
(3) [1945] 1 All E.R. 244.

exonerate the Crown from its liability under the provisions of section 19(*c*) of the *Exchequer Court Act* for the reason that negligence is not expressly mentioned and need not of necessity be implied as, under the provisions of the lease itself, circumstances could have arisen entailing liability upon the Crown apart altogether from negligence.

Under the provisions of paragraph 8 of the lease, the Crown had covenanted to maintain the freight shed during the currency of the lease. It is said that goods in the shed might well be damaged because of non-repair occasioned by mere delay or non-availability of materials or labour, altogether apart from negligence. The Crown is liable for breach of contract whether the breach lie in omission or commission: *Windsor* v. *The Queen* (1). The argument, therefore, is that in such case, clause 7 would operate to bar any relief by the appellant in respect of damage to its goods and therefore its provisions should not be construed as including claims for damage arising from negligence in the execution of repairs.

Before dealing with this argument, it will be convenient to refer to the appellant's claim against the respondent for indemnity in respect of the claims of the third parties. The appellant invokes against the respondent in this connection the provisions of paragraph 17 of the lease, which reads as follows:

> That the Lessee shall at all times indemnify and save harmless the Lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these Presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder.

The principle already discussed in considering the terms of paragraph 7 is equally pertinent as to the construction of paragraph 17, but in my opinion the terms of paragraph 17 protect the Crown in respect of claims of third parties against it for damages occasioned by the negligence of its servants. No such person could have any claim against the Crown in circumstances which would ensue upon the granting of the lease except on a basis other than contract. That being so, I think the clause must be taken to extend to claims for damages by reason of negligent acts of Crown

(1) (1886) 11 A.C. 607.

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servants such as that here in question. Such claim would be a claim "occasioned by or attributable to" an "action taken or thing done by virtue hereof", namely, the action of the Crown's employees in carrying out the obligation to repair imposed upon the Crown by the lease to repair the shed. "By virtue" of the lease is equivalent to "as a consequence of" or "because of."

With respect to paragraph 7, it may well be that if that paragraph stood alone, the respondent's argument would be valid. I do not need to decide that question, however, but will assume its soundness for the purposes of the present case. Paragraph 7 does not stand alone, and in my opinion the presence in the lease of paragraph 17 affects the proper interpretation to be given to paragraph 7.

The respondent is a water carrier subject to the provisions of the *Water Carriage of Goods Act*, 1 Edward VIII c. 49, and to the rules relating to bills of lading set out in the schedule to that Act. By Article IV para. 2, the carrier is not liable for loss or damage arising from fire unless caused by its actual fault or privity. Accordingly, the respondent would not, under the terms of the article just mentioned, be liable to the owner of goods lost by reason of the fire here in question, even though the goods were in the possession of the respondent as carrier and not as warehouseman. However, it is provided by Article V that

> A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under the Rules contained in any of these Articles, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

At all times since the passage of this statute, then, it was open to the carrier to waive the benefit of Article IV para. 2 and to accept goods for carriage on terms involving it in liability, even though a loss took place without any negligence on the part of the carrier or its servants or agents.

This being an express provision in the law at the time of the execution of the lease here in question, I think it must be taken that the lease was executed in the light of the possibility of the respondent having goods from time to time in its possession in the demised premises for the loss of which, arising from circumstances such as are here in

question, it would be liable to the shipper as insurer and therefore entitled itself to recover against a wrong-doer for such loss.

In my opinion, the respondent, under such circumstances, would have sufficient interest within the meaning of Article 77 of the Code of Civil Procedure to maintain such an action. It would be illogical that an action for revendication at the suit of a depositary should lie under Article 946 where the article is still in existence, and at the same time that the depositary would have no right of action against a wrong-doer for damages if the article had been destroyed. I think the principle is correctly stated in Fuzier-Herman, Répertoire vo Action en justice, no. 95, referred to by Guerin J. in *Bélisle* v. *Labranche* (1) as follows:

> L'intérêt pour agir doit être un intérêt immédiat, dit à cette égard M. Garsonnet et, suivant la formule, né et actuel; mais il n'est pas nécessaire que le préjudice à raison duquel on agit soit encore réalisé ni que l'exercice du droit qu'on veut défendre soit dès maintenant entravé, car il peut-être utile de prévenir un dommage imminent, ou de se mettre un droit à l'abri d'une contestation ultérieure.

This being so, it would be an anomaly if, upon claim being made by the shipper upon the appellant, the respondent would be liable to indemnify the appellant under the provisions of paragraph 17, and yet that the respondent, if called upon to pay directly by the shipper, could recover from the appellant on the ground of the negligence of its servants, and paragraph 7 of the lease would not be the answer. I therefore think it must be held that paragraph 7 would be an answer to such a claim and that it must be read as applying to causes of action founded upon negligence. The appeal should therefore be allowed with costs here and below.

ESTEY J.:—At the hearing of this appeal the Court affirmed the finding of the learned trial Judge (2) that the fire here in question was caused by the negligence of the appellant's agents and servants acting in the course of their employment. The Court, however, did not affirm the learned trial Judge's view that the negligence was such as to constitute "faute lourde" or "gross negligence." "Faute lourde" is discussed by a number of French authors and the definition more generally accepted is that of

(1) (1916) Q.R. 51 S.C. 289 at 292. (2) [1948] Ex. C.R. 635.

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Pothier: "dans le fait de ne pas apporter aux affaires d'autrui le soin que les personnes les moins soigneuses et les plus stupides ne manquent pas d'apporter à leurs affaires." In this case the servants and agents did take some precautions and, with respect, I do not think their conduct was so wanton or reckless as to constitute "faute lourde."

The appellant, therefore, by virtue of sec. 19(*c*) of the *Exchequer Court Act* is liable for the damage suffered by respondent Canada Steamship Lines Limited unless it is protected therefrom by virtue of the provisions of clause 7 of the lease:

> 7. That the Lessee shall not have any claim or demand against the Lessor for detriment, damage or injury of any nature to the said land, the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform, or in the said shed.

The language of this paragraph is sufficiently comprehensive to include claims and demands founded in negligence, but it is submitted by respondent that it should not be so construed. In this submission it is emphasized that the word "negligence" does not appear throughout the paragraph and while its absence is not conclusive, without it the language must be such as to admit of no other reasonable construction. That this clause 7 should be construed as to limit its application to breach of covenant in the lease and as there is no breach the clause has no application.

This type of clause first appeared in contracts with respect to the carriage of goods. The common carrier who defaulted in his obligations to carry goods at common law was liable irrespective of the cause, except it was the King's enemies, acts of God or inherent vice of the goods. The common carrier in order to protect himself from such liability began inserting protective clauses in the contract for carriage. These have, apart from clear language to the contrary, been construed to reduce his liability but not to the extent of excluding that due to his own negligence or that of his servants or agents, unless there was an express provision to that effect or language that permitted of no other reasonable construction.

The agreement here is a lease and not a contract with a common carrier. MacKinnon, L. J., in *Alderslade* v. *Hendon Laundry Ltd.* (1), in a case where articles were lost by a laundry and where a clause limiting liability had to be construed, stated at p. 247:

> Reliance upon cases between shipowners and owners of goods is illusory.

Similar clauses in contracts other than those with common carriers for the carriage of goods are discussed in *Reynolds* v. *Boston Deep Sea Co.* (2); *Rutter* v. *Palmer* (3); *Beaumont-Thomas* v. *Blue Star Line Ltd.* (4); *Alderslade* v. *Hendon Laundry Ltd., supra.*

That which determines the matter is the intention of the parties as expressed in the language of the clause as construed in association with the contract as a whole. In cases of difficulty or doubt in the construction of these clauses in contracts other than those with common carriers the authorities suggest two rules. Where liability exists in addition to that founded in negligence, the Courts have, as stated by Lord Greene, followed the general principle and restricted the exemption of liability to that other than that founded upon negligence. *Alderslade* v. *Hendon Laundry Ltd., supra,* at p. 245. If, however, negligence be the only basis for liability the clause will, as Lord Justice Scrutton stated, "more readily operate to exempt" liability based upon negligence: *Rutter* v. *Palmer, supra,* at p. 92.

In this case the appellant as lessor under clause 5 reserved "at all times full and free access" to any part of the land, shed and platform, and under clause 8 undertook to "maintain said shed." This at least included the obligation to keep the shed in repair. Clause 7, notwithstanding its comprehensive terms, has been so drafted that it does not exempt the appellant from damages incurred when the appellant makes default in his obligation to repair and the respondent, as tenant, in that event makes the same and claims the cost thereof by way of damages from the lessor. In that event there is no "claim or demand . . . for detriment, damage or injury . . ." to the objects specified in clause 7 and therefore its provisions would not exempt the lessor. This is significant, and particularly so

(1) [1945] 1 All E.R. 244.
(2) (1922) 38 T.L.R. 429.
(3) [1922] 2 K.B. 87.
(4) [1939] 3 All E.R. 127.

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in relation to the respondent's contention that the clause should be restricted in its application to a breach of covenant in the lease. The clause has obviously been drafted with care and the non-exemption of the aforementioned liability cannot be regarded as accidental. That a clause drafted not to include one form of liability but otherwise in such general all-inclusive terms should be given such a restricted meaning as here contended for would appear to be contrary to the intent of the parties.

Then it must be assumed that clause 7 was drafted with reference to detriment, damage or injury to the premises, property or freight. In the preparation thereof the parties would have in mind at least the more likely sources or causes of liability on the part of the lessor. It would therefore be liability for damages arising out of the exercise of the privilege of access or duty to maintain that would be uppermost in their minds. In respect to the former any liability arising therefrom would almost invariably be founded on negligent conduct. As to the latter the lessee being in possession would notify the landlord of the need for repair. If any detriment, damage or injury should occur to the premises, goods or freight after the notice and prior to the completion of the repairs, it would more likely arise from neglect on the part of the lessor, his servants and agents. It must be assumed, therefore, that the parties in drafting that clause would fully appreciate that the most probable source of liability upon the lessor would be negligent conduct.

At the hearing it was suggested that detriment, damage or injury to the goods and property might result from the collapse of a shed or breaking of a water main or some other source quite apart from any question of negligence and that clauses 7 and 17 should apply only to such liability. These possibilities of detriment, damage or injury to the goods and property are, in comparison to the possibility of such from negligence, so remote as to make it unreasonable to conclude that the parties, having regard to the language of clauses 7 and 17, intended to so restrict the exemption therein provided for.

Clause 17 of the lease reads as follows:

17. That the Lessee shall at all times indemnify and save harmless the Lessor from and against all claims and demands, loss, costs, damages,

actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these Presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder.

These clauses 7 and 17 must be read and construed together and as part of the lease as a whole. Clause 17 is drafted in language of the widest import. The respondent, Canada Steamship Lines Ltd., apart from emphasizing the fact that "negligence" is not used in the paragraph, refers particularly to the words "any action taken or things done or maintained by virtue hereof" and "the exercise in any manner of rights arising hereunder." These statements, it was submitted, limit the clause to where the action taken or the things done or the exercise of the right would be done in a legal and proper manner and therefore to the exclusion of the negligent doing or taking of the steps contemplated. The inclusion of such phrases as "any action" and the words "in any manner" would appear not to support the contention made on behalf of the Canada Steamship Lines Ltd. However, when these portions are read with the other parts of clause 17 one is led to the conclusion that the parties are here providing for liability not in a restricted but rather in a general sense including liability founded in negligence. Indeed, unless liability for negligence be included in this clause 17 it lacks subject-matter or content.

It is conceded that liability may under clause 7 arise apart from that founded on negligence, but the authorities already mentioned make it clear that such a fact is significant as an aid in determining intention but is not conclusive. It is the expressed intention of the parties that concludes the issue. This intention is made rather clear in clause 17 and when these clauses are read together, as they must be, with due regard to the relationship between the parties (landlord and tenant) and their respective positions, rights and obligations under the lease, they do not support the view that in respect to liability founded upon negligence there should be any difference in the effect of the two clauses. It, therefore, follows that the lessor is exempt under both clauses for liability founded on negligence.

The appeal should be allowed with costs.

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LOCKE J. (dissenting in part):—The petition of right filed by the respondent, Canada Steamship Lines, Limited, alleges a cause of action for negligence on the part of the employees and servants of the Crown. There was ample evidence, in my opinion, to support the finding of the learned trial judge (1) that the fire resulted from such negligence and it was intimated before the conclusion of the argument that we would not disturb this finding. If, however, Pothier's definition of faute lourde be accepted, it is, in my opinion, clear that the actions of the servants of the Crown could not be so classified. They took precautions to avoid damage from sparks but these proved inadequate. Difficult as it is to attempt to define what constitutes gross negligence, I see no justification for a finding that there was any such here, or faute lourde within the above mentioned definition.

By the lease of November 18, 1940, between His Majesty and this respondent it was recited that the lessor demised and leased unto the lessee the property in question, together with the right to use and occupy it for the purpose of receiving and storing therein freight and goods loaded into or unloaded from vessels owned or operated by the lessee, and the term of the lease was expressed to be 12 years from May 1, 1940. By paragraph 8 it was agreed that the lessor would at all times during the currency of the lease, at his own cost and expense, maintain the shed erected upon the premises leased. It was in pursuance of the obligation thus assumed that the servants of the Crown went upon the premises to carry out the repairs to the door of the shed and it was their negligence in performing the work which forms the basis of the action. It is to be noted that the claim pleaded sounds in tort and not in contract. This was, in my opinion, the true nature of the plaintiff's claim. In Pollock on Torts, 14th Ed. at 427, the learned author says:—

> If a man will set about actions attended with risk to others, the law casts on him the duty of care and competence. It is equally immaterial that the defendant may have bound himself to do the act or to do it competently. The undertaking, if undertaking there was in that sense, is but the occasion and inducement of the wrong. From this root we have as a direct growth the whole modern doctrine of negligence.

(1) [1948] Ex. C.R. 635.

The point is of importance in construing paragraph 7 of the lease which reads:—

That the lessee shall not have any claim or demand against the lessor for detriment, damage or injury of any nature to the said land, the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed.

Claims for damage or injury to property caused by negligence are not specifically excepted, but the words "any claim or demand against the lessor" however, if given an unrestricted meaning, affords a complete answer to the claim of this respondent.

In the case of a common carrier it is, in my opinion, clear that a clause similar to paragraph 7 would not relieve him of liability for negligence. In *Phillips* v. *Clark* (1), a shipowner who had stipulated in the bill of lading that he was "not to be accountable for leakage or breakage" was found liable for a loss by these means arising from negligence. Cockburn, C.J. said in part (p. 162):—

Admitting that a carrier may protect himself from liability for loss or damage to goods intrusted to him to carry, even if occasioned by negligence on the part of himself or his servants, provided any one is willing to contract with him on such terms; yet it seems to me that we ought not to put such a construction upon the contract as is here contended for, when it is susceptible of another and a more reasonable one. It is not to be supposed that the plaintiff intended that the defendant should be exempted from the duty of taking ordinary care of the goods that were intrusted to him. When it is borne in mind what is the ordinary duty of a carrier, it is plain what the parties intended here. So long ago as in the case of *Dale* v. *Hall*, 1 Wils. 201, it is laid down (by Lee, C.J.) that "everything is a negligence in a carrier or hoyman that the law does not excuse, and he is answerable for goods the instant he receives them into his custody, and in all events, except they happen to be damaged by the act of God or the King's enemies; and a promise to carry safely, is a promise to keep safely." Amongst the events which the carrier here would under ordinary circumstances be responsible for, are, leakage and breakage. He stipulates to be exempted from the liability which the law would otherwise cast upon him in these respects. But there is no reason why, because he is by the terms of the contract relieved from that liability, we should hold that the plaintiff intended also to exempt him from any of the consequences arising from his negligence. The contract being susceptible of two constructions, I think we are bound to put that construction upon it which is the more consonant to reason and common sense; and to hold that it was only intended to exempt him from his ordinary common law liability, and not from responsibility for damage resulting from negligence.

(1) [1857] 2 C.B. (N.S.) 156.

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Cresswell, J. said (p. 163):—

> Ordinarily, the master undertakes to take due and proper care of goods intrusted to him for conveyance, and to stow them properly; and he is responsible for leakage and breakage. Here he expressly stipulates not to be accountable for leakage or breakage, leaving the rest as before.

In *Price* v. *Union Lighterage Company* (1), goods were loaded on a barge under a contract for carriage whereby the barge owner was exempted from liability "for any loss or damage to goods which can be covered by insurance." The barge was sunk owing to the negligence of the servants of the barge owner and the goods were lost. It was held that the exemption being in general terms not expressly relating to negligence the barge owner was not relieved of liability for loss or damage caused by the negligence of his servants.

The risk of loss was clearly one against which insurance might have been obtained but Lord Alverstone, C.J. after pointing this out said (416):—

> The question, however, is not whether these words could be made to cover such a loss, but whether in a contract for carriage they include on a reasonable construction, an exemption from negligence on the part of the carrier. We have only to look at the case to which I have referred, and in particular to *Sutton* v. *Ciceri*, 15 A.C. 144, to see that the words of this contract can receive a contractual and business like construction and have effect without including in the exemption the consequences of the negligence of the carrier. That being so, the principle that to exempt the carrier from liability for the consequences of his negligence there must be words that make it clear that the parties intended that there should be such an exemption is applicable to this case and the learned judge was right in holding that the contract does not exempt the defendants from liability for their own negligence.

In *Rutter* v. *Palmer* (2), the defendant, a garage owner, was sued by a customer who had delivered a car into his possession for the purpose of sale. In holding that the terms of the contract there made protected the defendant from a claim based upon negligence, Atkin, L.J. explained the principle upon which the common carrier cases were decided in these terms (p. 94):—

> There is a class of contracts in which words purporting in general terms to exempt a party from "any loss" or to provide that "any loss" shall be borne by the other party, have been held insufficient to exempt from liability for negligence. Those are contracts of carriage by sea or land. The liability of the carrier is not confined to his acts of negligence or those of his servants; it extends beyond liability for negligence; therefore when a clause in the contract exempts the carrier from any loss it may have a reasonable meaning even though the exemption falls

(1) [1904] 1 K.B. 412. (2) [1922] 2 K.B. 87.

short of conferring immunity for acts of negligence. That is the reason at the root of the shipping cases. The same reason does not so often apply to the railway cases because, when acting as carriers, railways generally come under special legislation. But where in the circumstances a railway company is exposed to one kind of liability only, and that is a liability for negligence, there if the parties agree that the risk of loss or damage is to be borne by the passenger or the owner of goods they must intend to exempt the company from liability in the only event which is likely to expose them to liability; that is the negligence of their servants.

As opposed to the decisions in the common carrier cases are those where what may be called clauses providing exemption from liability in general terms have been found effective on the ground that, since the only possible claim would be for negligence, the parties must be held to have intended to exclude such liability. In *McCawley* v. *Furness Railway Company* (1), a passenger on the defendant railway claimed damages for personal injuries caused by the negligent management of the train. The defendant pleaded that the plaintiff had been received to be carried under a free pass as the drover accompanying cattle, one of the terms of which was that he should travel at his own risk. By replication, the plaintiff alleged that it was by reason of the negligence of the defendant that the accident had happened and on demurrer it was held that the replication was bad. Cockburn, C.J. said that the terms of the agreement under which the plaintiff became a passenger excluded everything for which the company would have been otherwise liable: they would have been liable for nothing but negligence and he considered that of necessity any such liability was excluded. Blackburn, Mellor and Quain, JJ. agreed. In *Reynolds* v. *Boston Deep Sea Fishing Company* (2), a claim was made by the owner of a steam trawler against ship repairers for damage sustained by the trawler while in the defendant's slip which, it was contended, was caused by negligence. By the contract between the parties it was provided in part that: "all persons using the slip must do so at their own risk and no liability whatever shall attach to the company for any accident or damage done to or by any vessel, either in taking it to the slip or when on it or when launching from it." For the plaintiff it was contended that a clause so worded did not protect the defendant against the consequences of its own negligence and *Price* v. *Union Lighterage Company,* above

(1) (1872) L.R. 8 Q.B. 57.
(2) (1921) 38 T.L.R. 22.

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referred to, was cited in support of this proposition. Greer, J. considered that under the circumstances there was a presumption of negligence which the defendant had not rebutted but that, since the real obligation of the defendants as the operators of the slip was only to use reasonable care in the circumstances, it must be held that liability for negligence was excluded. *Orchard* v. *Connaught Club Ltd.* (1) and *Calico Printers' Association* v. *Barclay's Bank* (2) were decided upon similar grounds. In *Beaumont-Thomas* v. *Blue Star Line Ltd.* (3), where a passenger who had been injured by falling upon the deck of a vessel claimed damages for negligence and where by the terms of the ticket sold the passengers took upon themselves "all risks whatsoever of the passage," Scott, L.J. in allowing an appeal from a judgment of Lord Hewart, L.C.J. at the trial said in part:—

> In order to construe any exception of liability for events happening in the performance of the contract, where the words of the exception are not so clear as to leave no doubt as to their meaning, it is essential first to ascertain what the contractual duty would be if there were no exception. In the contract of a common carrier by land, or of a shipowner for the carriage of goods by sea, broadly speaking, the carrier is an insurer of the safe delivery of the goods. If they are damaged on the way, he is liable. That is his primary duty. There is also a secondary duty, however—namely, the duty to use skill and care. That duty comes into play in case of the carrier invoking some term of an exception clause as a protection against liability. In such a case, if the excepted peril has been occasioned by the negligence of the carrier's servants, the failure to perform the secondary duty debars him from reliance upon his exception. In the case of a carrier of passengers, no such double liability attaches. He is under a duty to use due skill and care, and no more. The absolute duty of the goods carrier to keep and deliver safely does not apply. This fundamental difference in the basic contract caused the common law courts of England during the last 100 years to make a difference in the interpretation of general works of exception from liability according as the contract to be construed was one imposing the double duty or only the one duty. In each interpretation they had two principles to guide them, (i) the rule of construction contra proferentem, and (ii) their natural reluctance to read into a contract a release from the duty of skill and care, unless quite unambiguous language made that construction unavoidable . . .
>
> In the case of double duty, the courts have treated the exception as *prima facie* directed to the absolute undertaking of safe delivery, but as not applying to the performance of the duty of skill and care. On the other hand, in a contract where there was no duty except the duty of skill and care, the courts have construed the same words of exception in the opposite sense—namely, as directed to the duty of skill and care—

(1) (1930) 46 T.L.R. 214.
(2) (1931) 145 L.T. 51.
(3) [1939] 3 All E.R. 127.

for the two simple reasons (i) that some meaning must be given, and (ii) that no other meaning than an exception of liability for negligence was left. This principle of interpretation runs through a long line of cases, of which *Price & Co.* v. *Union Lighterage Co.* 1904, 1 K.B. 412; *Pyman S.S. Co.* v. *Hull & Barnsley Ry. Co.*, 1915 2 K.B. 729, and *Rutter* v. *Palmer*, 1922, 2 K.B. 87 are the chief. In the last case, Scrutton, L.J., after referring to the above rule of construction, speaks of a garage proprietor taking charge of cars and selling them on commission after demonstrating their performance to prospective customers, and says, at pp. 92, 93:

"What is his liability (the garage proprietor's liability for a servant driving a car) in these circumstances? He is only liable for his own negligence and the negligence of his servants. If an accident happened without his negligence or that of his servants he would not be liable; but if it happened through his or his servants' negligence he would be liable. In these circumstances he introduces this clause into the contract of his customer: "Customers' cars are driven by your staff at customers' sole risk." There are two obvious limitations to be imposed upon the meaning of those words: First "staff" must mean "driving staff"; secondly, "driven" must mean driven for the purposes of the bailment, namely, the purpose of selling the car. The clause does not mean that the garage keeper is to be free from liability if a member of his clerical staff takes the car out for pleasure. So limited, the clause, which is regularly inserted in all contracts by garage keepers to sell cars for customers and to run them for that purpose, can have only one meaning, and that is that the owner of the car must protect himself by insurance against accidents for which without the clause the garage keeper would be liable, that is against accidents due to the negligence of the garage keeper's servants." In the same case, Atkin, L.J., at p. 94, states the reasons with which I began in terms of convincing logic, and his reasoning, in my view, applies directly to, and governs, the present case.

The distinction between cases such as these and the common carrier cases is clearly stated by Lord Greene, M.R. in *Alderslade* v. *Hendon Laundry Ltd.* (1).

In my opinion, the principle of law governing the construction of contracts which was applied in these cases is applicable here. Under the provisions of section 19(*c*) of the *Exchequer Court Act* the Crown might be held liable for damage to property resulting from the negligence of its servants in the discharge of their duties, a liability quite distinct and not in any way dependent on the contractual obligation to maintain the shed during the currency of the lease. As stated by Pollock, the fact that the work was done pursuant to the lessor's obligations under the contract is merely irrelevant. The Crown reserved the right of access to the property by the terms of the lease and would equally be liable for the negligence of its servants in exercising this right in the course of their duties if damage

(1) [1945] 1 All E.R. 244.

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to property resulted. Yet, if the argument for the Crown be accepted, there would be no liability for such damage by virtue of paragraph 7 or for any other damage caused in any other manner by servants of the Crown while acting within the scope of their duties or employment. Under the contract to maintain the shed, which I think is properly to be construed as a covenant to keep the demised premises in a fit state of repair, the Crown might be held liable in damages if, by way of illustration, the foundation of the shed gave way, due to lack of repair, causing the collapse of the building and injuring goods of the plaintiff on the premises, or if, assuming there were a metal roof, this was allowed to be eaten away by rust permitting the entrance of rain and damaging the respondent's property. Whether notice of the lack of repair to be given by the lessee would or would not be a necessary element in establishing the Crown's liability for any such damage appears to me to be a matter of indifference. Such liability would be in contract and not in tort. That the legal liability to repair was imposed by contract rather than by the common law or by the terms of Art. 1675 of the Civil Code, as in the case of the carrier, does not appear to me to differentiate the position of the appellant and I see no logical reason for making any distinction. The liability of the Crown, as in the case of the common carrier was not confined to that for the negligence of its servants: there was here, as with the carrier, a double liability and, in my opinion, the liability in negligence not having been expressly or by necessary implication excluded remains.

Under paragraph 17 of the lease the respondent agreed to:

> indemnify and save harmless the lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder.

The work being done by the servants of the Crown was done "by virtue hereof" in that it was in the discharge of the obligation to maintain the shed. I am unable to see how there could be any liability on the part of the Crown towards third persons for anything done falling within the ambit of this clause, other than for the negli-

gence of the Crown's officers or servants within subsection (*c*) of section 19 of the *Exchequer Court Act*. This being so, these general words must be construed as obligating the respondent to indemnify the Crown against the claims of the other respondents, all of which are founded upon negligence of that nature. Harsh as it may seem that the respondent should be found liable to indemnify the Crown against the consequences of the negligence of its own servants, I see no escape from the conclusion that the principle above referred to applies here.

In the result the appeal of the Crown against the judgment in favour of the respondent, Canada Steamship Lines, should be dismissed with costs and the appeal upon the third party proceedings in the cases of H. J. Heinz Company of Canada, Ltd., Cunningham and Wells Ltd., Raymond Copping, W. H. Taylor, Ltd., and Canada and Dominion Sugar Co. Ltd. allowed with costs.

CARTWRIGHT J.:—This appeal raises questions as to the true construction of two paragraphs in a lease dated the 18th day of November 1940, whereby His Majesty the King leased to Canada Steamship Lines Limited certain lands on the west side of St. Gabriel Basin No. 1 of the Lachine Canal in the city of Montreal together with the right to "occupy, use and enjoy, for the purpose of receiving and storing therein freight and goods loaded onto and/or unloaded from vessels owned and operated by the Lessee, the whole of St. Gabriel Shed No. 1, so called (hereinafter referred to as "the said shed") . . . erected on the said land". The term of the lease was twelve years from the 1st of May 1940 and the rent reserved was $12,866.62 per annum.

Paragraph 8 of the lease provided that the Lessor would, at all times during the currency of the Lease, at his own cost and expense, maintain the said shed.

A few days before the 5th day of May 1944, the Respondent, Canada Steamship Lines Limited, requested the Appellant to make certain repairs to the doors of the shed in question. On the 5th day of May 1944, while the employees of the Appellant were at work repairing the said doors, for which purpose they were using an oxy-acetylene torch, a fire was caused which totally destroyed

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the shed and all of its contents, including large quantities of goods owned respectively by Canada Steamship Lines Limited and the other Respondents.

Canada Steamship Lines Limited and the other Respondents presented Petitions of Right seeking payment from the Appellant for the loss of their goods, on the ground that such loss had been caused by the negligence of the servants of the Appellant while acting within the scope of their employment. The Appellant by his defence denied negligence and pleaded that in any event he was relieved from liability by the terms of paragraph 7 of the lease. In each action other than that instituted by Canada Steamship Lines Limited steps were taken by the Appellant to add Canada Steamship Lines Limited as a third party from which indemnity was claimed, pursuant to paragraph 17 of the lease, as to any amounts which the Appellant might be ordered to pay to the Suppliants in such proceedings.

The petitions were tried together before Angers, J. (1) who gave judgment in favour of Canada Steamship Lines Limited and all the other Suppliants against the Appellant and dismissed the Appellant's claims for indemnity. From these judgments His Majesty appealed to this Court.

The appeals as against the Respondents, other than Canada Steamship Lines Limited, were all dismissed at the hearing, the Court being unanimously of opinion that the fire was caused by the negligence of the employees of the Appellant while acting in the scope of their employment. There remain for determination the appeal against the judgment awarded to Canada Steamship Lines Limited and the appeals against the dismissal of the claims for indemnity.

Counsel were in agreement that the matters in question are governed by the law of Quebec.

The learned trial Judge was of opinion that the conduct of the employees of the appellant which caused the fire amounted not merely to negligence but to faute lourde. I am in agreement with what I understand to be the opinion of all the other members of the Court that the conduct of such employees, while clearly negligent, did not amount to faute lourde. It therefore becomes unnecessary

(1) [1948] Ex. C.R. 635.

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to consider the question, which was fully argued before us, as to whether, under the law of Quebec, a party can validly provide by contract that he shall not be liable for his own faute lourde or that of his employees.

The decision of this Court in *Glengoil Steamship Company* v. *Pilkington* (1) makes it clear that there is no rule of law in Quebec that renders invalid a stipulation in a contract that a party shall not be liable for the negligence of his employees.

This leaves for determination the question whether, properly construed, clauses 7 and 17 of the lease contemplate damage caused by the negligence of the employees of the Lessor. These clauses read as follows:—

7. That the Lessee shall not have any claim or demand against the Lessor for detriment, damage or injury of any nature to the said land, the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed.

17. That the Lessee shall at all times indemnify and save harmless the Lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these Presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder.

We were referred to the following articles of the Civil Code as laying down the general rules of construction which should be applied:—

1013. When the meaning of the parties in a contract is doubtful, their common intention must be determined by interpretation rather than by an adherence to the literal meaning of the words of the contract.

1018. All the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire act.

1019. In cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation.

1020. However general the terms may be in which a contract is expressed, they extend only to the things concerning which it appears that the parties intended to contract.

In my view these rules of interpretation do not differ from the rules of construction which guide the Courts of common law. Counsel for the appellant submitted that the following provision in the lease should also be borne in mind when construing the paragraphs quoted above:—

AND FURTHER AGREED by and between the said parties hereto that these Presents are made and executed upon and subject to the

(1) (1897) 28 S.C.R. 146.

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covenants, provisoes, conditions and reservations hereinafter set forth and contained, and that the same and every of them, representing and expressing the exact intention of the parties, are to be strictly observed, performed and complied with namely:—

This clause seems to me to be an added reason for observing the rule stated by Lord Wensleydale in *Thellusson* v. *Rendlesham* (1):

> In construing all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or to some repugnance, or to some inconsistency with the rest of the instrument, in which case the grammatical or ordinary sense of the words may be modified, so as to avoid that absurdity, repugnance, or inconsistency, but no farther.

Dealing first with paragraph 7 of the lease, it is clear that the claim of the Respondent, Canada Steamship Lines Limited against the Appellant is a claim for damage to goods in the said shed, and giving to the words used their ordinary and grammatical meaning, they are wide enough to bar the lessee's claim. The Respondent argues, however, that the line of cases commencing with *Phillips* v. *Clark* (2), and of which *Price & Company* v. *Union Lighterage Company* (3), *Rutter* v. *Palmer* (4), *Beaumont-Thomas* v. *Blue Star Line* (5) and *Alderslade* v. *Hendon Laundry Limited* (6) are examples, have established a rule that a clause of this nature shall be so construed as not to exempt from liability for damage caused by negligence unless either words are used expressly referring to negligence or the circumstances are such that the only possible liability for damage which could fall upon the party for whose benefit the clause is inserted is one arising from negligence.

The Respondent contends that while this rule has been formulated in England it is equally applicable to the construction of contracts governed by the law of Quebec. I do not find it necessary to decide whether this is so. I shall assume, without deciding, that the rule to be found in the line of cases referred to is applicable to the construction of the lease in question.

A careful consideration of all the cases to which Counsel made reference on this point has led me to the conclusion that the rule for which the Respondent contends is too widely stated. The rule had its origin in *Phillips* v. *Clark*

(1) (1858) 7 H.L. Cas. 429 at 51.
(2) (1857) 2 C.B. (N.S.) 156.
(3) [1904] 1 K.B. 412.
(4) [1922] 2 K.B. 87.
(5) [1939] 3 All E.R. 127.
(6) [1945] 1 K.B. 189.

cited above. The words of exemption there relied on were "Not accountable for leakage or breakage". Cockburn, C.J. points out that the Defendant being a carrier would be responsible for leakage or breakage occurring without any negligence on his part and that the words used were susceptible of the construction that this absolute liability was all that the parties intended to exclude. He continues at page 162:—

> The contract being susceptible of two constructions, I think we are bound to put that construction upon it which is the more consonant to reason and common sense; and to hold that it was only intended to exempt him from his ordinary common law liability, and not from responsibility for damage resulting from negligence.

Crowder, J. at page 163 deals with the matter as follows:

> The construction put upon the contract by my Lord, is evidently the most just and reasonable,—as absolving the defendant from liability for leakage and breakage the result of mere accident, where no blame was imputable to the master, and for which but for the stipulation in question he would still have been liable. It clearly was not intended to relieve him from responsibility for leakage or breakage the result of his negligence and want of care. The construction contended for on the part of the defendant would be giving the contract a sense not necessarily involved in the words as they stand.

In my opinion the test to be applied is found in this passage. If there is a potential, and indeed probable, source of liability to which a party is exposed although he be free from any blame, then the meaning of general words of exemption may be restricted to liability arising from such source. I see no good ground for holding, and I find nothing in the numerous authorities cited to us that appears to me to decide, that general words of exemption wide enough in their ordinary sense to cover every sort of liability should be held not to cover liability arising from negligence merely because some other equally blameworthy source of liability can be imagined. In the case at bar the source of possible liability other than negligence to which it is suggested paragraph 7 of the lease would apply is liability for damage to the goods in the shed resulting from a breach by the Appellant of the covenant to maintain the shed. It is said that goods might be damaged, for example by rain, as a result of the lessor failing, after due notice, to repair the roof of the shed and that as this is a ground of liability other than negligence upon which the words of paragraph 7 can operate they should be interpreted not to cover a claim for damage caused by negligence.

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Such a construction does not appear to me—to use the words of Cockburn C.J.—"consonant to reason and common sense". It would bring about the surprising result that a person who had covenanted to do work would escape liability for damage resulting from his failure or refusal to fulfil his covenant at all but would be liable for similar damage resulting from negligence of his employees in doing the work which he had agreed to do. It seems to me that to fail or refuse to perform a contractual obligation is at least as blameworthy as to be guilty of some negligent act or omission in the course of its performance.

The construction of paragraph 7 is, I think, aided by a consideration of paragraph 17. Counsel for the Respondent has not been able to suggest any damages for which the Lessor could be held liable to persons other than the lessee except damages caused by the negligence of the Lessor's servants. In my opinion the words of Section 17 are apt to describe the claims in respect of which the Appellant seeks indemnity in these proceedings. I think that such claims are based upon, occasioned by, or attributable to an action taken or thing done by virtue of the lease, that is the action or deed of the Lessor's employees in repairing the doors of the shed pursuant to the obligation so to do cast upon the Lessor by paragraph 8 of the lease.

Under the Civil Code, Section 1018, quoted above, as under the common law, the lease must be construed as a whole. I can find no reason in the words of the document, and I can think of none, why the parties should agree that the lessee must indemnify the lessor against claims of third parties arising against the lessor by reason of the negligence of his servants while the lessee should remain free to claim damages from the lessor for the loss of its own goods from the same cause. I think the construction to be gathered from the whole document and which is the more consonant to reason and common sense is that the intention of the parties was that all the risks of liability for damages to goods on the demised premises was to fall upon the Lessee.

For the above reasons it is my opinion that the appeals should be disposed of as proposed by my Lord, the Chief Justice.

FAUTEUX J.:—By indenture of lease, His Majesty the King, therein represented by the Minister of Transport, leased to Canada Steamship Lines, the respondent hereinafter referred to as C.S.L., St. Gabriel shed No. 1 on the waterfront, in Montreal, for the purpose of receiving and storing freight and goods loaded into or unloaded from vessels owned and operated by them. The lessee took possession and the occupation was continued at all times material to the present litigation.

On May 5, 1944, the employees of the Department of Transport, pursuant to a request of the lessee and in compliance with the lessor's obligation under the lease, were effecting certain minor repairs to the premises, including doors of the shed. Upon removal of the hinges of a door, it was found necessary to enlarge one of the holes in the steel upright to which the hinges were attached. Before proceeding into such a work of short duration with an oxy-acetylene cutting torch, certain precautions against the danger of fire relating to such operation were taken. To contain and deflect towards the floor any sparks coming from the torch, a wooden plank was wired against the flanges of the steel H beam, inside the shed in a position extending from the roof to within three feet of the cement floor, and an employee with a pail of water was stationed inside to watch for sparks. In the result, a spark fell on some bales of cotton waste and almost immediately the shed was aflame, with the result that it, and its contents, were nearly completely destroyed.

The petition of right of C.S.L., lessee of the premises, as well as petitions of five other suppliants—also respondents herein,—having stored property therein, were presented, all claiming damages and alleging fault and negligence of the employees and servants of the lessor while acting in the performance of the work for which they were employed.

In all the cases, the appellant entered a plea denying negligence. Further and with respect to the petition of right of C.S.L., the appellant pleaded that any rights the former might have were barred by clause 7 of the lease, which excludes claims of the lessee against the lessor for damages. With respect to the petitions of right of the five

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other suppliants, the appellant filed third party notices directed to C.S.L. claiming, on the basis of clause 17 of the lease, a right to be indemnified and saved harmless by the lessee against any liability.

On the evidence common to all cases, which were heard together, the trial judge (1) found that the fire was due to "faute lourde" of the employees of the Department of Transport. Further deciding as a matter of law that one cannot stipulate against the consequences of such fault, the trial judge, by separate judgments, dismissed the contentions of the appellant based on clauses 7 and 17.

The present appeal is against all these judgments. This case is governed by ss. (*c*) of section 19 of the *Exchequer Court Act* R.S.C. 1927 ch. 34 as amended, worded as follows:

> The Exchequer Court shall have the exclusive jurisdiction to hear and determine the following matters:—
>
> (*a*) . . .
>
> (*b*) . . .
>
> (*c*) Every claim against the Crown arising out of any death or injury to the person or property resulting from negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

The above statutory provision imposes a liability on the Crown in respect of claims arising *ex delicto* and such liability is to be determined by the laws of the province where the cause of action arose. *The Queen* v. *Filion* (2); *The Queen* v. *Grenier* (3); *The King* v. *Armstrong* (4); *The King* v. *Desrosiers* (5).

The evidence adduced clearly establishes that the fact alleged in support of these claims for tort is, as required by the law of the province of Quebec to be successful, illicit, imputable to the appellant, and tortious. Negligence, even if not to the extent found by the trial judge, is proven. The measure of damages suffered in each case is covered by admissions of the appellant. And it is conceded that the damage was caused by servants of the Crown while acting within the scope of their duties and employment.

Were there nothing else to be considered in the litigation, the cases of all the suppliants would then be successfully

(1) [1948] Ex. C.R. 635.
(2) (1894) 24 S.C.R. 482.
(3) (1899) 30 S.C.R. 42.
(4) (1908) 40 S.C.R. 229.
(5) (1908) 41 S.C.R. 71.

established against the appellant on the basis of the above principles of law and findings of fact. And this is the result so far as the cases of the five suppliants are concerned, for their claim rests exclusively on the above legal principles. It was consequently indicated, at the hearing of the argument, that the judgments of the trial judge with respect to them would be maintained.

With respect to the appellant and the respondent, C.S.L., there is to be considered, in addition to the principles of law of general application, the agreement between them, —more especially clauses 7 and 17,—which, within limits of validity and applicability in the matter, constitutes the law of the parties.

As to the validity of a stipulation excluding liability for negligence of one's own employees, there cannot be any doubt. *The Glengoil Steamship Company* v. *Pilkington* (1); *Vipond v. Furness, Withy and Company* (2); *Canadian National Railway Company* v. *La Cité de Montréal* (3); *Canadian Northern Quebec Railway Company* v. *Argenteuil Lumber Company* (4). There is no need here to go further and deal with the validity of such clause with respect to a fault amounting to "faute lourde". On this I say nothing.

But the real point to be considered is the applicability of clauses 7 and 17 in order to decide whether the provisions of the former constitute here a bar to the claim of C.S.L. against the appellant and whether those of the latter clause oblige C.S.L. to indemnify and save harmless the appellant with respect to the judgments obtained by the five other suppliants.

It is convenient here to reproduce the text of clause 7:—

7. That the Lessee shall not have any claim or demand against the Lessor for detriment, damage or injury of any nature to the said land, the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed.

The language of clause 7 is adequate to bar effectively "any claim or demand" of the lessee against the lessor for any "detriment, damage or injury",—to things therein enumerated,—resulting from the breach of one or several obligations created by the sole will of the parties under

(1) (1897) 28 S.C.R. 146.
(2) (1916) 54 S.C.R. 521.
(3) (1927) Q.R. 43 K.B. 409.
(4) (1918) Q.R. 28 K.B. 408.

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the contract. And it is not difficult to conceive cases where such breaches would bring the clause into full operation. Thus, damage is done by rain to goods placed in the shed, consequential upon the failure of the lessor to repair the roof of the same. Without this clause of non-responsibility, the lessee, owner of the goods damaged, would have a right of action against the lessor. Equally, if the goods damaged belong to a third party, the lessee would have a right of action in warranty against the lessor, if this third party should sue him for damages. But resting exclusively on the contractual obligation of the lessor to repair, these rights of action of the lessee against the lessor are, in the present instance, nullified equally by another contractual provision as to non-responsibility.

The contract, however, is not the only source of obligation. For such "detriment, damage or injury" may equally result from the breach of the legal duty, imposed upon all, not to cause damage to others. Such legal duty pre-exists and persists quite independently of the contract. The right of action resulting from its breach is *prima facie* maintained. It is the law. If a party to a contract wants to make an exception to a legal principle of general application and be relieved of the obligation to compensate for damage arising out of his employees' negligence, he must so stipulate in the contract. The maxim "Reus in exipiendo fit actor" applies. The burden is on him to show that the exception was made and is applicable to the case under consideration. And the stipulation will be strictly interpreted. (Mazeaud, Traité de la responsabilité civile, délictuelle et contractuelle, tome 3, page 724, no 2578). In brief, the intention of the parties must be manifested. The law exacts no more. Such intention may at times be implied in a relevant contractual obligation. Thus if the covenant is to make repairs in the most prudent manner, the legal duty is absorbed in the contractual obligation. Savatier (Traité de la responsabilité civile en droit français, tome 1, no 153):

. . . il n'en est pas moins vrai que le contrat peut être construit de telle manière qu'il ne laisse pas concevoir, dans certains compartiments, l'usage d'une responsabilité délictuelle, parce qu'il l'absorberait dans la responsabilité contractuelle.

The clause of non-responsibility for damages would then embrace damages *ex contractu* and *ex delicto* as well.

The covenant to repair, agreed by the parties herein is worded as follows:

> 8. That the Lessor will, at all times during the currency of this Lease, at his own cost and expense, maintain the said shed, exclusive of the said platform and the said canopy.

The appellant's contention is that the legal duty not to do damage to others is absorbed in this clause, and he then concludes that the responsibility flowing from the breach of this all embracing covenant is thus excluded by clause 7. He rests his contention on the following test given by Savatier, a leading writer on the matter (Traité de la responsabilité civile en droit français, tome 1, no 153):

> . . . le simple devoir de ne pas nuire à autrui, bien qu'il puisse, en l'absence de tout contrat, fonder une responsabilité délictuelle, est recouvert et absorbé par le contrat, toutes les fois que la cause du dommage réside exclusivement dans l'inexécution d'un engagement contractuel.

I am unable, I must say, to accede to the views of the appellant, that in this case the "cause of damage is to be found *exclusively* in the inexecution of the obligation" to repair. On the contrary, the damage was caused by an act of negligence arising while the contractual obligation to repair was being,—and in point of fact was nearly completely,—executed. An opposite view I would have, had damage in this case been done to goods by rain as a result of the default of the lessor to repair the roof of the shed.

Can this intention to exclude responsibility for damage *ex delicto* be found in the very clause of non-responsibility, clause 7? This clause is clearly comprehensive with respect to the varieties of damages, "detriment, damage or injury", and definite as to things covered by it. And for this reason, one could reasonably gather from its wording that the minds of the parties were directed much more to the result of a breach of obligation than to the nature of the breached obligation itself. In the latter respect, there is nothing said except what could be inferred from the opening words "any claim or demand". These words are strictly general. Had the parties intended to cover only damages *ex contractu* or only damages *ex delicto* or both kinds of damages, the expressions used "any claim or demand" would in each of these three alternatives have been apt to convey any

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one of such different intentions. The same words are equally capable of referring to the procedural nature of the recourse: principal action or action in warranty. Isolated from the contract, I could not, for the reasons above indicated, obtain from the reading of this clause, the satisfaction that the appellant has discharged the burden of showing that the parties definitely considered, in addition to the contractual obligation the legal duty existing beyond their contract and that they thus intended to exclude "claims or demands" arising out of the breach of such legal duty by the lessor's employees.

The meaning of the parties in clause 7 being open to question, their common intention must be ascertained by interpretation rather than by adhering to the literal meaning of the words of the clause. To that end, the following rule of the Civil Code may be resorted to.

1018. All clauses of the contract are interpreted the one by the other giving to each the meaning derived from the entire act.

It is particularly relevant to consider at first the allied provision: clause 17 of the contract:—

17. That the Lessee shall at all times indemnify and save harmless the Lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these Presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder.

This clause refers to claims and demands of third parties against the lessor for damages. There being no contractual relations between the former and the latter, such claims and demands for damages must, of necessity, be for damages *ex delicto*. Thus clause 17 affords manifest evidence that the minds of the parties were directed to other obligations than those flowing simply from the contract, that the legal duty not to do damage to others was considered and dealt with and this precisely in terms all embracing and thus consistent with the generality of the terms of clause 7 as they can be and are, in fact, interpreted by the appellant. The general intention and the will of the lessor to be effectively relieved of all responsibility in this respect as well as with respect to contractual obligations, cannot be

better manifested, implemented in a greater measure and in a more efficient manner than they are by the terms of clause 17.

The governing provision of the lease as to interpretation reads:

> AND FURTHER AGREED by and between the said parties hereto that these Presents are made and executed upon and subject to the covenants, provisoes, conditions and reservations hereinafter set forth and contained, and that the same and every of them, representing and expressing the exact intention of the parties, are to be strictly observed, performed and complied with namely:

Thus to obtain the lease, the lessee agreed, by clause 7, to waive all rights to any claim or demand for damages against the lessor. Moreover, and by clause 17, the lessee went further by assuming obligations which it did not have under the law and thus accepted such unpredictable and immeasurable risks.

In my view, clause 17 is not only adequate to maintain the third party notices directed to C.S.L. by the appellant, but, read with the above covenants, quite indicative that the parties really meant all that they said by the generality of the opening words of section 7 "any claims or demands". On the whole, I am satisfied that the lease was granted on the condition that all the risks relating to breaches of obligation, contractual and legal, were to be borne exclusively by the lessee.

For all these reasons, I concur in the conclusions reached by my Lord the Chief Justice as to the disposal of these appeals.

Appeals against C.S.L. allowed with costs.

Appeals against the other respondents dismissed with costs.

Solicitor for the appellant: *F. P. Brais.*

Solicitors for C.S.L. and for Heinz Co.: *Montgomery, McMichael, Common, Howard, Forsyth & Ker.*

Solicitors for Cunningham & Wells, for Copping and for Taylor Ltd.: *Bumbray & Carroll.*

Solicitors for Canada & Dominion Sugar Co.: *O'Brien, Stewart, Hall & Nolan.*

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*May 2, 3
*Jun. 23

IN THE MATTER OF THE HOME ASSURANCE COMPANY OF CANADA (IN LIQUIDATION)

ALL PERSONS ON THE LIST OF CONTRIBUTORIES, REPRESENTED BY H. S. PATTERSON Sr. (DEFENDANTS) ..... } APPELLANTS;

AND

ALFRED GORDON BURTON, AS LIQUIDATOR OF HOME ASSURANCE COMPANY OF CANADA (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Companies—Wound up under Dominion Winding Up Act—Contribution of shareholders—Whether liable to calls when shares issued in violation of Alberta Sale of Shares Act—Subsequent conduct as shareholders—The Alberta Sale of Shares Act, R.S.A. 1922, c. 169—The Winding Up Act, R.S.C. 1927, c. 213.

The Home Assurance Company of Canada having been wound up under the Dominion Winding Up Act on the ground of insolvency, the liquidator applied to have the appellants listed as contributories as being liable to call for the amount remaining unpaid on their shares. The appellants pleaded that they were not liable since the shares had been issued in violation of the provisions of the *Alberta Sale of Shares Act*. The call was allowed by the trial judge and was confirmed by the Appellate Division of the Supreme Court of Alberta.

Held: Following the principle laid down in *McAskill* v. *North Western Trust Co.* ([1926] S.C.R. 412), the appellants, even though the original contracts of sale of the shares were void due to the non-compliance with the *Alberta Sale of Shares Act*, must be held to be contributories as their subsequent conduct as shareholders has resulted in "independent binding agreements".

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), confirming the decision of Macdonald J. fixing the list of the contributories in the winding up of the Home Assurance Company of Canada.

H. S. Patterson K.C. and *Malcolm Millard K.C.* for the appellants.

W. A. McGillivray for the respondent.

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

(1) 30 C.B.R. 142.

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

TASCHEREAU J.—The Home Assurance Company was incorporated by private Act of the Legislature of the Province of Alberta in 1918, with an authorized capital of $500,000, divided into 5,000 shares, having a par value of $100 each. By the terms of its Charter, the company was empowered to make contracts for fire, storm, hail, accident, automobile, plateglass, burglary, theft, etc.

On the 2nd day of November, 1948, after nearly thirty years of operations, the company was ordered to be wound up under the *Dominion Winding Up Act*, by order of the Honourable Mr. Justice Hugh J. MacDonald, on the ground of insolvency, and the plaintiff-respondent Alfred Gordon Burton was appointed permanent liquidator. On the 8th of March, 1949, the latter filed a statement of claim praying that the shareholders of the company, who had paid originally only a small instalment plus the premium, on the purchase price of their shares, be listed as contributories, as being liable to call to the extent of $85 for each share held by such contributory. The claim was allowed by Mr. Justice MacDonald, and his judgment was unanimously confirmed by the Appellate Division of the Supreme Court of Alberta (1).

The relevant facts which give rise to the present litigation may be summarized as follows:

In 1922, four years after its incorporation, the company, pursuant to the provisions of *The Sale of Shares Act* (R.S.A. 1922, c. 169), applied to the Board of Public Utilities of the province, for leave to sell shares to the public, and on January 19, 1923, was authorized to sell 500 shares. Further permissions were also granted on June 29, 1923, and on February 14, 1924, for 1,000 shares each time, making a grand total of 2,500 shares. The Board also fixed the premium on these shares at $10, and prescribed a form of contract covering their sale.

The defendants-appellants' submissions are manifold in view of the fact that although all the alleged shareholders are representd by Mr. H. S. Patterson, they have separate grounds of defence. Some claim that they cannot be compelled to pay the balance of 85 owing on each share,

(1) 30 C.B.R. 142.

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because the shares in question were issued contrary to the provisions of *The Sale of Shares Act,* in that shares to the number of 5,000 were issued by the company when the number authorized by the Board was only 2,500. It is also contended by others that sales were made by non-registered agents, that in other cases licensed agents failed to produce to the purchasers their licences or did not deliver copies of contracts, that numerous sales were made at premiums other than those allowed by the Board, and, at times when the company did not have any certificate from the Board, and finally, that fraudulent representations were made to several prospective investors.

It was found quite impossible to deal with each case individually, and therefore, counsel for both parties have signed the following agreement:

1. That so far as the existence of Certificates of the Board, the existence of Agents' Licenses and the forms of the Applications for Shares are concerned, and as to whether sales were made in excess of the Certificates issued or by unlicensed salesmen or at premiums other than those permitted by the said Certificates, we are satisfied that all the evidence available is before the Court and the matter should be disposed of on that basis. We may say that should either side discover additional evidence not available at the time of the trial of the issues, the other will not oppose an application to present it in the interests of having before the Court the true facts.

2. That so far as the defences that copies of contracts were not delivered and that agents did not exhibit their licences to the prospective purchasers at the time of sale, and the question of fraud, the individual contributories may bring additional evidence applicable to particular cases if these defences are found to be valid.

In their statement of defence, the defendants allege that the contracts of sale of these shares are *void,* and created no liability on their part. The defence of absolute nullity however does not cover the cases where false representations may be proven.

In support of this proposition, the defendants rely on the case of *McAskill* v. *North Western Trust Co.* (1), where it was held that if a company to which *The Manitoba Sale of Shares Act* applies, sells its shares without having complied with the provisions of the *Act,* the sale and all steps taken to carry it out, such as an allotment of shares, are *void* and not merely *voidable.*

In the case at bar, it is not contested that serious breaches of the Alberta *Sale of Shares Act* occurred, as for

(1) [1926] S.C.R. 412.

instance the sale of a larger number of shares than the number authorized, sales at a premium higher than $10, and it is not disputed that many agents were not registered, that some others did not produce their licences to purchasers and did not deliver them copies of the contracts as required by the *Act*.

I have no hesitation in deciding that all these violations of the law bring these sales within the sweep of the *McAskill* case, and make them not merely *voidable but void*. Where the transaction is a nullity, as it is here, the alleged shareholder need not ask for the recision of the contract, as the case would be between him and the company, if fraud or misrepresentation were established. Here, as Sir Lyman Duff said in the McAskill case: "The agreement though concluded in fact, is in point of law, a nullity." The case therefore cannot be governed by such decisions as *Oakes* v. *Turquand* (1), where the contract was merely voidable. In such a case, when there has been misrepresentation, a distinction must be drawn between the rights of the shareholders towards the company and his rights towards the liquidator. As Sir Lyman Duff said in the *McAskill* case, at page 419:—

> The case would, of course, be very different if the appellant were the holder of shares allotted to him pursuant to a contract capable of being rescinded on some proper legal ground, such as fraud, but valid and binding until so rescinded. Such a right may be lost by reason of some change in the circumstances making it unjust to permit the exercise of that right, and accordingly it has been held, and has long been settled law, that a registered shareholder, having a right to rescind his contract to take shares on the ground of misrepresentations contained in the company's prospectus, will lose that right if he fails to exercise it before the commencement of winding-up proceedings. The basis of this is that the winding-up order creates an entirely new situation, by altering the relations, not only between the creditors and the shareholders, but also among the shareholders *inter se*.

But the authority of the *McAskill* case has also been relied upon by the liquidator. All these contributories whom the liquidator seeks to put on the list, have accepted and kept their certificates, paid the first instalment on each share and a further call in 1945, and from 1932 to 1947 inclusive, have received and cashed 16 dividends amounting to approximately $14 per share. There can be little doubt that they have acted as shareholders, and it is also fair to assume that the vast majority of them have sent

(1) (1867) L.R. 2 H.L. 325.

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proxies or have attended personally annual and special meetings of the company. It is contended that in view of these circumstances they have by their conduct, acquired the status of shareholders with all the liabilities imposed upon them by the law.

Although it was held in the *McAskill* case that all sales made in violation of *The Sale of Shares Act* were *void,* there are in the reasons given some qualifications that mitigate the rigour of the main principle that was laid down. The Court held that the sale was void and that the alleged shareholder could not be listed as a contributory, but it clearly envisaged the possibility that under different circumstances, even in a case of absolute nullity, an entirely different result might obtain.

Speaking for himself and for Mr. Justice Newcombe, Sir Lyman Duff said at page 420:—

> There are no facts in the stated case to support a conclusion that there was a *valid contract by conduct* between the Company and the appellant not falling within the prohibiton of "The Sale of Shares Act."

And further at page 422, discussing the judgment of Lord MacNaghten in *Welton* v. *Saffery* (1), he added:—

> I am quite unable to entertain a doubt, however, that the shares had been dealt with, or that the shareholders had acted with respect to the shares in such a way as to create an *agreement by conduct* to accept them, an agreement not affected by the condition that the shares should be treated as fully paid up.

Mr. Justice Mignault, with whom Chief Justice Anglin concurred, is not less emphatic. He says at page 431:—

> The application for shares by the appellant and the allotment of these shares to him are consequently void, and there is no contract between him and the Company. No dealings of the appellant with the stock are alleged, and there is nothing from which an *independent agreement to keep* the stock and pay for it can be implied.

In *Re Railway Time Tables Publishing Company; Ex Parte Sandys* (2), an independent contract to keep the shares and pay for them was implied, although it was held that the original contract to purchase shares at a discount was void. But the purchaser had dealt with the stock, had sold or attempted to sell a part of it, and had signed proxies as a shareholder for voting purposes, and it was therefore held that this implied *independent contract* was binding.

(1) [1897] A.C. 200. (2) 42 Ch. D. 96.

In *Acme Products Limited* (1), the Court of Appeal for Manitoba decided:—

An applicant for shares in a company who accepted the shares allotted him, paid for them in part, allowed his name to appear on the list of shareholders, attended both in person and by proxy shareholders' meetings and accepted a dividend held to be precluded from contending for the first time after a winding-up order had been made that the directors who made the allotment were only *de facto* not *de jure* directors, and from disputing his status as a shareholder.

At page 587, in the same case, Mr. Justice Dennistoun speaking for the Court said:—

In my opinion his conduct has the effect of precluding him from disputing his status as a shareholder, and he cannot at this stage overcome the onus which is upon him by simply stating, "I did not know until after the winding-up order was made that the directors in 1928 were not properly qualified."

I have reached the conclusion that although the original contracts were void in view of the *McAskill* case which is a binding authority, the shareholders, appellants in the present case, must be held to be contributories. By their acts, posterior to the impugned agreements, they have agreed to become shareholders, and from their conduct *independent binding agreements* have resulted. They have agreed to keep the stock, they now must pay for it. It would indeed be strange that persons, who during over fifteen years have claimed all the benefits of these shares, could now be allowed to repudiate one of the liabilities imposed by law upon the shareholders, which is to pay the purchase price.

I agree with the conclusions reached by the courts below, and I would therefore dismiss the appeal, with costs of the appellants and respondent to be paid by the liquidator, out of the assets of the company, reserving however to each party the right to bring additional evidence applicable to particular cases, in accordance with their agreement.

RAND J.:—In this appeal, the question of the effect of the issue of shares in violation of the provisions of the *Sale of Shares Act,* c. 169, R.S.A., 1922 on the liability of contributories is raised.

Over five thousand shares in all were issued, of which more than half were sold to persons in Alberta, over two thousand to persons in British Columbia and a small

(1) [1932] 2 W.W.R. 586.

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Rand J.

number in Manitoba and in Saskatchewan; and the sales were all made between 1922 and 1928. It may be taken that those sold outside of Alberta were not authorized by certificates issued under the *Act*. Between 1932 and 1947 the company paid 16 dividends totalling $14 a share, and in 1945 made a call for $2.50 a share. All but 100 or so of the shares had, in the course of the years, been transferred. On November 2, 1948 an order was made to wind the company up under the *Winding-Up Act*. The company was heavily involved, and the liquidator applied for leave to call up the amount remaining unpaid of $85 on each share issued. The courts below have held against the defences raised, and I think they were right.

Mr. Patterson puts his case on the principle laid down by this Court in *McAskill* v. *The Northwestern Trust Company* (1), that the prohibition of sale by such a statute renders the *de facto* transaction void in law. In that case, the shareholder had remained on the registry for something less than $1\frac{1}{2}$ years, but had taken no step of any kind as a shareholder. The purported sale being a nullity, and nothing having occurred to change that state of things, an order removing his name was directed.

The difficulty arises from the fact that legislation of this sort looks only to the relation between the prospective shareholder and the company, and if they were the only parties at any time concerned, it would be easily resolved. But as it is well exemplified here, other interests arise; the legislation has condemned only the transaction carried out in the specified circumstances and the question is whether a new and unprohibited transaction or situation has arisen, to be evaluated in the light of those considerations in the setting of which the statute has, in fact, been enacted.

Although the immediate transaction is voided, the beneficiaries of that protection have in fact enabled the company in this case to commence business and to involve itself in heavy obligations to members of the public; what, then, is the true ground upon which they can be said to have precluded themselves from insisting on the original nullity?

Disregarding the question whether a certificate authorizing the sale of shares in Alberta applies to sale to residents

(1) [1926] S.C.R. 412.

of British Columbia by allotment in Alberta, and whether the failure to furnish a copy of the contract, the effect of which is that the contract "shall not be binding upon" the purchaser, is to be taken to be voidable rather than void, it is clear that by accepting dividends, by paying a call and by transferring shares, the holder at such time acknowledged himself to be a shareholder. It may be that he was acting in ignorance of the matters giving rise to the nullity; but although such statutes are enacted for his protection, they assume that he will be reasonably vigilant in his own concern; and if he either fails to do that or by an act irrevocably affirms his membership in the company, then the protection disappears. There is nothing to prevent the individual by an overt act from agreeing, in effect, absolutely, at any time, that his name is properly on the register and thereafter he will be bound to the consequences flowing from that fact. By purporting to transfer shares in a lawful manner, he makes such an irrevocable election; by accepting dividends and paying calls after the expiration of any reasonable time for enquiry into the circumstances of the company or of the sale to him of the shares, he makes the same election; and other situations are possible in which the lapse of time and the rise of new interests will supersede the purpose of the statute.

For these reasons, I would dismiss the appeal with costs.

ESTEY J.:—The shareholders of the Home Insurance Company of Canada in liquidation contend that their names ought not to be included in the list of contributories on the basis that the shares were originally sold by the company in contravention of the *Sale of Shares Act* (1922 R.S.A., c. 16 enacted 1916 St. Alta. c. 8). The company was incorporated by private Act of the Legislature of Alberta in 1918 (St. of Alta., 1918, c. 58). The shares were sold in the years 1922 to 1928, inclusive.

The shareholders do not deny either the purchase of their respective shares, the allotment and their acceptance thereof, the presence of their names on the share register or that they received sixteen dividends between the years 1932 and 1947 and paid a call in 1945.

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They assert that the contract is void because of non-compliance with the *Sale of Shares Act*, in that the certificates issued by the Public Utility Commissioners did not cover all of the shares sold; all of the shares were not sold by licenced agents; the agents did not produce their licences at the time of the sale; the contracts of the purchase did not specify the unpaid balance and no copy of the contract was delivered to the shareholders at the time of the purchase.

The evidence upon which the shareholders ask that it be found that the *Sale of Shares Act* was not complied with in respect of the granting of the certificates and agents' licences may be summarized as follows: A search of the company's records discloses that the share records, original minutes, financial statements, cancelled share certificates and stubs of certificates are all the records now available. The company has no record of any correspondence with the Board of Public Utility Commissioners, of the certificates or agents' licences issued by that Board.

The file produced from the office of the Board of Public Utility Commissioners discloses that on December 11, 1922, the company filed a statement showing that the directors had purchased 500 shares of the capital stock and asking permission to offer for sale to the public a further 500 shares. This permission was granted January 19, 1923. In June, 1923, the company was permitted to offer a further 1,000 shares and in February, 1924, a similar permission in respect of a further 1,000 shares. The records, therefore, disclose that the company was permitted to sell to the public 2,500 shares and that its own directors had purchased 500 shares, a total of 3,000 of the 5,039 shares sold. The file also discloses that in 1923 and 1924 seven agents were authorized to sell the shares of this company by the Public Utility Commissioners.

It is significant that this company began selling shares to the public in 1922 and that the foregoing file covers the latter part of 1922 and the years 1923 and 1924. The last certificate issued for the sale of shares in February, 1924, would not expire until February, 1925. Shares continued to be sold in the years 1925 and 1926, but only 35 in 1927 and 1928. It will, therefore, appear that well over

one-half of the total of 5,039 shares purchased were sold either to the directors or the public after the required certificates were obtained from the Public Utility Commissioners granting permission to this company to sell its shares. It is not at all suggested that the file produced from the records of the Public Utility Commissioners contains all of the correspondence between that body and the company nor certificates and agents' licences issued. It was produced by the assistant auditor of the Board who had no personal knowledge of this matter, as he had been with the Board only since June 1, 1946. No person purported to say that the file contained a complete record of all that had passed between the Board and the company. This file, admitted in evidence without objection, warrants the conclusion that the company in 1922, 1923 and 1924, at least so far as the obtaining of certificates and agents' licences was concerned, were complying with the provisions of the *Sale of Shares Act*. As regards the years 1925, 1926, 1927 and 1928, this evidence goes no further than saying that the records are not now available. In view of the foregoing, it cannot be doubted that there were records at one time in the possession of the company, but it is not in any way suggested that there has been any improper conduct associated with the fact that they are not now available. In the result, there is no evidence that the *Sale of Shares Act* was not complied with in the obtaining of the necessary certificates granting permission to sell shares to the public or agents' licences. The appellants have not, therefore, upon these bases established that the contracts under which the shares were purchased were void transactions.

As stated by Baron Parke in *Shaw* v. *Beck* (1), ". . . every transaction in the first instance is assumed to be valid and the proof of fraud lies upon the person by whom it is imputed." This case is distinguishable from those where a contract upon its face disclosed that the purchaser had not become a shareholder as in *Standard Fire Insurance Co.* (2).

Then, as to the other defences, the position is somewhat different. While the shareholders may well maintain that they did not know until after the winding-up proceedings

(1) (1853) 8 Exch. R. 392 at 399 (2) (1885) 12 O.A.R. 486.

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what the company did as regards obtaining of certificates and agents' licences, they did know from the outset that at the time of the sale the agents did not produce their licences; that they did not receive a copy of the contract under which they purchased the shares, and, as far as they were concerned, it did not specify the unpaid balance, all of which was required by the *Sale of Shares Act*.

These shareholders, with knowledge of the foregoing facts, as well as the fact that the shares had been allotted, the share certificates received by them and their names on the share register, conducted themselves as shareholders and were accepted as such by the company. Some of them transferred their shares. They or their successors accepted some sixteen dividends over a period of fifteen years from 1932 to 1947, and paid a call in 1945. At least some of these shareholders, it must be assumed, attended and took part in the shareholders' meetings. It is on the basis of this conduct that the liquidator, at the hearing of this appeal, submitted that, notwithstanding that the original contract was void, the shareholders in the company had so conducted themselves that a new contract, independent of any illegality, should be implied covering the purchase of the shares.

The non-disclosure by agent of their licences and failure to give to the purchaser of shares a copy of his contract constitute breaches of the *Sale of Shares Act* that would make these contracts void and in law a nullity. *McAskill* v. *The Northwestern Trust Co.* (1). Moreover, conduct pursuant to such a transaction cannot accomplish anything in law and is likewise a nullity. This was the position in *re London and Northern Ins. Corp.* (2), where it was stated:—

> . . . all those acts were, however, done in conformity with, and in pursuance of, this void transaction; and there was no evidence of any separate agreement on the part of Colonel Stace and Mr. Worth.

In *Bank of Hindustan* v. *Alison* (3), the company failed in its action to enforce a call. Kelly C.B., with whom all of the learned judges concurred, stated, at p. 225:

> But, when we come to look at what the transaction really was between the parties as to the granting and acceptance of these shares, it is clear beyond a doubt that all that was done was done in pursuance

(1) [1926] S.C.R. 412.
(2) (1869) L.R. 4 Ch. 682.
(3) (1871) L.R. 6 C.P. 222.

and upon the faith of the agreement of amalgamation, and, therefore, when it turned out that that agreement was void, it follows that all that was done under it became void also, and conferred no right or obligation on either party. If the defendant had received certificates for shares, or even if he had received dividends, he would have been bound to return them.

Though not a proceeding to enforce a call in liquidation proceedings, the foregoing is relevant as when the transaction is void it can neither be enforced by the company nor liquidator. Buckley on The Companies Act, 12th Ed. p. 281.

These cases, however, contemplate the possibility of a valid contract subsequent to a void transaction, when the parties in possession of the facts conduct themselves as and are accepted by the company as shareholders. *Welton* v. *Saffrey* (1), is an illustration of such a contract. There, notwithstanding the original contract for the purchase of the shares was void, the Court found a valid contract independent of the illegality existed. The shareholder with knowledge of his position and in spite of opportunities to alter his position for one and a half years prior to the winding up, the company continued to accept him and he to conduct himself as if he was a shareholder. The precise conduct is not disclosed in any of the reports of this case. Duff J. (later Chief Justice) after commenting upon this fact, continued as follows:

> I am quite unable to entertain a doubt, however, that the shares had been dealt with, or that the shareholders had acted with respect to the shares in such a way as to create an agreement by conduct to accept them, an agreement not affected by the condition that the shares should be treated as fully paid up." *McAskill* v. *The Northwestern Trust Company supra,* at p. 422.

In *re Railway Time Tables Publishing Company* (2), there were no winding-up proceedings, but a shareholder asked the register be rectified by the removal of her name therefrom. There the original purchase was void, but her subsequent conduction with knowledge of her position justified the conclusion that a new contract existed between the company and herself. See also *In Re Barangah Oil Refining Company* (3); *Re Atlas Loan Co. -ex parte Contributories* (4); *Re Pakenham Pork Packing Co.* (5).

(1) [1897] A.C. 299; L.J. 66 Ch. 362.
(2) (1888) 42 Ch. D. 98.
(3) (1887) 36 Ch. D. 702.
(4) (1910) 30 C.L.T. 368.
(5) (1906) 12 O.L.R. 100.

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The appellant shareholders, because of the enumerated breaches of the *Sale of Shares Act*, upon which their other defences were supported, might have succeeded if only the original contract should be considered. These shareholders, however, with knowledge of the facts upon which they now contend their contracts were void, have conducted themselves as shareholders. Either the original shareholders, or their successors, have assumed the obligations and accepted the benefits. They do not suggest they did not know of the *Sale of Shares Act* or its provisions. Even if they had, their lack of knowledge of this statute, enacted for their benefit prior to and in force in the province of Alberta throughout the twenty-six years this company existed, would not be of assistance in their present contention. In this regard their positions are quite distinguishable from the position of the shareholders in the above mentioned case where both parties proceeded for a time under a misapprehension, as disclosed by a subsequent determination, of what might well be included under the heading of doubtful points of law.

The circumstances are such that a new contract, independent of the original void transaction, exists, based upon the conduct of these shareholders and the company. It follows that the shareholders have been properly included in the list of contributories.

The appeal should be dismissed with costs of the parties hereto payable out of the assets of the company.

Appeal dismissed with costs.

Solicitors for the appellants: *Patterson, Hobbs* and *Patterson.*

Solicitors for the respondent: *Fenerty, Fenerty, McGillivray* and *Robertson.*

IN THE MATTER OF THE HOME ASSURANCE COMPANY OF CANADA (IN LIQUIDATION)

1950
May 3, 4
Jun. 23

ALFRED GORDON BURTON, AS LIQUIDATOR OF HOME ASSURANCE COMPANY OF CANADA — APPELLANT;

AND

CONTRIBUTORIES OF HOME ASSURANCE OF CANADA ..... — RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Companies—Incorporated in Alberta—Wound up under Dominion Winding Up Act—Whether liquidator can call on contributories for full amount owing on share—"Maturity of the debt" in s. 60(2) of Winding Up Act (Can.)—Alberta Insurance Act, R.S.A. 1942, c. 201, ss. 119, 135—Winding Up Act, R.S.C. 1927, c. 213, ss. 53, 55, 59, 60.

Held: (The Chief Justice and Taschereau J. dissenting): In the winding up under the Dominion Winding Up Act of a company incorporated by private Act of the Province of Alberta (s. 9 of which made the *Alberta Insurance Act* applicable to the company), the "maturity of the debt" referred to in s. 60(2) of the Dominion Winding Up Act is not determined by s. 119(9) of the *Alberta Insurance Act,* but by the Court. Therefore a call can be made on the contributories by the liquidator for the full balance still owing on each share.

Judgment appealed from (30 C.B.R. 234) reversed.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), reversing the decision of Macdonald J. authorizing the liquidator to make a call on the contributories of the Home Assurance Company of Canada for 100 per cent of the amount owed on each share.

W. A. McGillivray for the appellant.

H. S. Patterson K.C. and *Malcolm Millard K.C.* for the respondents.

The Chief Justice (dissenting):—I agree with Mr. Justice Taschereau, for the reasons he has given, and I would dismiss the appeal with costs to be paid to both parties out of the assets of the company.

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

(1) 30 C.B.R. 234.

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KERWIN J.:—Home Assurance Company of Canada is being wound up under the provisions of the *Dominion Winding-up Act*, R.S.C. 1927, c. 213. The liquidator moved for an order making a call on each of the shareholders of the company for one hundred per cent of the amount for which they are, or may be, respectively settled upon the list of contributors as being the amount unpaid on their shares. By its special Act, the company was subject to the *Insurance Act* of Alberta, c. 58 of the 1918 Statutes, s. 119(9) of which is as follows:—

119(9). The shares of the capital stock subscribed for shall be paid by such instalments and at such times and places as the directors appoint; the first instalment shall not exceed twenty-five per cent and no subsequent instalment shall exceed ten per cent and not less than thirty days' notice of any call shall be given, and no call shall be made at a less interval than thirty days from the last preceding call.

Sections 31, 53, 55 and 59 of the *Winding-up Act* provide:—

31. Upon the appointment of the liquidator all the powers of the directors shall cease, except in so far as the court or the liquidator sanctions the continuance of such powers.

53. Every shareholder or member of the company or his representative, shall be liable to contribute the amount unpaid on his shares of the capital, or on his liability to the company, or to its members or creditors, as the case may be, under the Act, charter or instrument of incorporation of the company, or otherwise.

2. The amount which he is liable to contribute shall be deemed an asset of the company, and a debt due to the company, payable as directed or appointed under this Act.

55. The liability of any person to contribute to the assets of a company under this Act, in the event of the business of the same being wound up, shall create a debt accruing due from such person at the time when his liabilities commenced, but payable at the time or respective times when calls are made, as hereinafter mentioned, for enforcing such liability.

59. The court may, at any time after making a winding-up order, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of contributories, to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves.

In view of these provisions there would be no question that the winding-up order overrides the contract between the company and the shareholder: In *re Cordova Union Gold Co.* (1); *London Provident Building Society* v. *Morgan* (2); *In Re Pyle Works* (3), per Lindley L.J.; *Re Wiarton Beet Sugar Co.* (*Jarvis'* case) (4). The respond-

(1) (1891) 2 Ch. 580.
(2) (1893) 2 Q.B. 266 at 272.
(3) (1890) 44 Ch. 534 at 583.
(4) (1905) 5 O.W.R. 542.

ent, however, relies upon subsection 2 of s. 60 of the *Winding-up Act*, both subsections of which read as follows:

60. The court may, in making a call, take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same.

2. No call shall compel payment of a debt before the maturity thereof, and that the extent of the liability of any contributory shall not be increased by anything in this section contained.

It is said that the maturity of the debt is governed by s. 119(9) of the *Alberta Insurance Act* and that in making calls the liquidator and the Court are bound by its provisions. It was so decided by Walsh J. in *Re the Alliance Investment Company (Canada) Limited* (1), and by the Appellate Division of the Supreme Court of Alberta in the present case. With respect, I am unable to agree, in view of the cessation of the directors' powers and the intervention of the winding-up order and the provisions of the Winding-up Act previously set out. The maturity of the debt is that set by the Court in making the calls.

After deciding to this effect, the judge of first instance, H. J. Macdonald, J., settled a list of contributories and ordered payment on or before March 15, 1950. The appeal should be allowed, the order of H. J. Macdonald, J. restored except that the time for payment should be extended to September 15, 1950. The costs of all parties throughout may be paid out of the assets of the company.

TASCHEREAU J. (dissenting):—This case is a counterpart of the case of *Patterson es-qual,* v. *Burton* (2), decided this same day, in which I came to the conclusion that the shareholders of the Home Assurance Company were liable to call as contributories to the extent of $85 per share.

Before the judgment of the Court of Appeal had been rendered, the liquidator applied to Mr. Justice Hugh J. Macdonald for an order making a call on each of the shareholders, for 100 per cent of the amount for which they were respectively settled upon the list of contributories. This application was allowed by Mr. Justice Macdonald, but the Court of Appeal held, reversing the trial judge,

(1) [1919] 1 W.W.R. 17.

(2) [1950] S.C.R. 578.

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that calls should be for the amounts and at the intervals specified by section 119(9) of *The Insurance Act*, which reads as follows:

s.s. (9). The shares of the capital stock subscribed for shall be paid by such instalments and at such times and places as the directors appoint; the first instalment shall not exceed twenty-five per cent and no subsequent instalment shall exceed ten per cent and not less than thirty days' notice of any call shall be given, and no call shall be made at a less interval than thirty days from the last preceding call.

This company is being wound-up under the provisions of the *Winding-up Act*, and the following sections of that statute are particularly relevant:—

53. Every shareholder or member of the company or his representative, shall be liable to contribute the amount unpaid on his shares of the capital, or on his liability to the company, or to its members or creditors, as the case may be, under the Act, Charter or instrument of incorporation of the company, or otherwise.

2. The amount which he is liable to contribute shall be deemed an asset of the company, and a debt due to the company, payable as directed or appointed under this Act.

55. The liability of any person to contribute to the assets of a company under this Act, in the event of the business of the same being wound up, shall create a debt accruing due from such person at the time when his liability commenced, but payable at the times or respective times when calls are made, as hereinafter mentioned, for enforcing such liability.

59. The court may, at any time after making a winding-up order, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of contributories, to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding-up, and for the adjustment of the rights of the contributories among themselves.

60. The court may, in making a call, take into consideration the probability that some of the contributories upon whom the same is made, may partly or wholly fail to pay their respective portions of the same.

2. No call shall compel payment of a debt before the maturity thereof, and that the extent of the liability of any contributory shall not be increased by anything in this section contained.

Pursuant to section 119(9) of *The Insurance Act*, which I have already cited, the company adopted a by-law relating to the payment of the shares. It reads as follows:—

The directors may exercise the power to make calls as conferred by Section 119 of the *Alberta Insurance Act* in the measure therein provided from time to time on the members in respect to all moneys unpaid on their shares, one tenth of the nominal amount of the share or be payable at a date less than one month from the date fixed for payment of the last call, and each shareholder shall be liable to pay the call.

Furthermore, the prospectus which was issued by the company, when the sales were offered to the public, provided as follows:—

> The company now proposes to offer for sale to the public 2,500 shares of its capital stock at $115 per share, subject to the right of the directors at any time to withdraw this offer.
>
> The full sum of $115 is to be paid by such instalments as the directors may see fit, subject to the provisions of *The Insurance Act*. The subscribers will require to pay on application $27.50 per share of which $15 is a premium. The premium will be used to cover the costs of procuring incorporation and of subscriptions for stock. $12.50 only will be marked on the stock certificate as paid up and the subscriber will be liable for an additional $87.50 per share which, however, can only be called in 10 per cent calls at thirty-day intervals.

The application for the purchase of shares was in the following terms:—

> Gentlemen: Having paid to Mr..... the sum of..... being a deposit of $22.50 per share on ..... shares in the above named company of which $10 is premium and $12.50 is the first call per share, I hereby request you to allot me..... shares in the above named company, upon the terms of the company's prospectus, dated the.....day of.....A.D. 1923, and I hereby agree to accept the same or any smaller number, which may be allotted to me, and covenant and agree to pay the balance of $..... per share on call as provided by the said prospectus and I hereby authorize you to register me the holder of the said shares.

It is submitted on behalf of the appellant that the provisions of the *Alberta Insurance Act*, the company's by-laws, and the prospectus which restrict the directors of the company from making a call except by instalments and after notice, as well as the form of application for shares, have no bearing on the right of the liquidator in a winding-up to call for full balance due on the shares.

This submission is based on a decision given by Mr. Justice Kekewich *In Re Cordova Union Gold Company* (1), where he held that the contract for payment by instalments was determined by the *Winding-Up Act* of England, and that the liquidator was entitled to make an immediate call for the amount remaining unpaid in respect of the shares.

The appellant also relies upon the case of *Irma Co-Operative Co. Ltd.* (2) in which it was decided that a contributory to an insolvent company is liable to pay the

(1) (1891) 2 Ch. 580.
(2) [1925] 1 D.L.R. 27.

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full balance owing on his shares, although under the subscription contract such balance is not due, being payable by instalments.

In 1919, the precise question came before Mr. Justice Walsh on appeal from the Master at Calgary, in *Re The Alliance Investment Company (Canada) Limited (In Liquidation)* (1). The head note reads:—

> Under the Winding-Up Act, R.S.C. 1906, Ch. 144, leave will not be granted to call up the whole amount remaining unpaid on shares, where the time fixed for payment by the terms of the shareholder's application has not arrived.

Mr. Justice Walsh based his judgment on section 58 of the *Winding-Up Act* which is now section 60, para. 2, and which says:—

> No call shall compel payment of a debt before the maturity thereof, and that the extent of the liability of any contributory shall not be increased by anything in this section contained.

Mr. Justice Walsh pointed out that section 102 in the English Companies Act, 1862, (206 of *The Companies Act, 1929*), is in almost the same language as section 57 (59 at present) of the Dominion Winding-Up Act, and as the first sentence of section 58 (at present 60(1)). These sections are the sections which empower the Court to make calls upon the contributories, but there is nothing in the English Act which corresponds with section 60(2), and which is clearly to the effect that under the *Winding-Up Act,* no call shall compel payment of a debt before its maturity. And it is also made very clear that the extent of the liability of a contributory cannot be increased by the mere fact of the winding-up.

The *Irma* case (*supra*) can easily be distinguished from the present case, as it appears from the reasons of Mr. Justice Tweedie, that he based his conclusions on the provisions of the *Bankruptcy Act* in which, section 60(2) of the *Winding-up Act* or its equivalent, is not found.

I have no hesitation to reach the conclusion that section 60, para. 2, of the *Winding-Up Act* clearly applies. The liability of the contributories must be determined by the provisions of section 119(9) of the *Alberta Insurance Act,* by the terms of the By-law of the company, as well as by the conditions mentioned in the prospectus. In view of

(1) [1919] 1 W.W.R. 117.

the opinion expressed in the case of *Patterson et al* v. *Burton*, that the contracts of sale are *void*, I attach no importance to the forms of application.

The appeal should be dismissed, with costs to be paid to both parties out of the assets of the company.

RAND J.:—The question here is whether, in making a call in the winding-up of this company for the sum of $85 unpaid on the issued shares, the liquidator is bound by section 119(9) of the *Insurance Act of Alberta*, in these words:—

(9) The shares of the capital stock subscribed for shall be paid by such instalments and at such times and places as the directors appoint; the first instalment shall not exceed 25 per cent and no subsequent instalment shall exceed 10 per cent and not less than 30 days' notice of any call shall be given, and no call shall be made at a less interval than 30 days from the last preceding call.

In addition to that provision, the Articles of Association contained a similar clause.

The controversy arises out of the application of section 60(2) of the *Winding-Up Act* which reads:—

(2) No call shall compel payment of a debt before the maturity thereof, and that the extent of the liability of any contributory shall not be increased by anything in this section contained.

If section 119(9) appeared alone in the *Insurance Act*, it would, I think, bring the case within the language of section 60(2); but section 135 of the *Insurance Act*, dealing with the liability of shareholders contains these provisions:—

(1) Every shareholder shall, until the whole amount of his stock has been paid up, be individually liable to any creditor of the company to an amount equal to that not paid up thereon; but shall not be liable to an action therefor by any creditor until an execution against the company at the suit of the creditor has been returned unsatisfied in whole or in part.

(2) The amount remaining unpaid by the shareholder on his stock shall be the maximum amount recoverable from him, but if action is brought against him he shall also be liable to pay such costs as may be awarded against him.

The question to be decided is this: What, for the purposes of the proceedings, is the maturity of the liability to pay the balance owing fixed by the *Insurance Act*? The presence of section 135 by which a creditor is entitled to sue a shareholder for that balance, indicates, I think, a

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limitation on section 119(9); obviously, the terms of call of the latter are there disregarded; and as the two provisions must be reconciled, on what can that be done except the assumption that section 119(9) is not intended to operate against creditors? As against them, the balance is due from the time of purchase. Since an order for liquidation is an execution for all creditors, the section is without application or effect vis a vis the liquidator: at the moment of liquidation it has lost the possibility of maturity beyond it. Viewed in another aspect, the terms apply only in the case of a call made by directors and while the company is carrying on business. Similarly the article to the same effect as section 119(9) is overridden by the effect of section 135. This is not, of course, the same thing as construing the rights of the liquidator under the *Winding-Up Act* to override the terms of section 119(9) or the article; it is simply finding that neither, in such a case, furnishes a continuing time or maturity to which section 60(2) could apply. This was in substance the ground on which Macdonald, J., on the application, proceeded, and I think he was right.

In ascertaining the intention of Parliament underlying section 60(2), it must be kept in mind that administering a bankrupt estate is a very practical matter in which delays produce general inconvenience. In subjecting it to contractual or statutory stipulations of this nature we ought not to exceed what is clearly indicated by the legislature, which is simply to respect the terms of the debt. To do otherwise would be to disregard the original basis of limited liability in joint stock companies. When members of such an association were individually liable for all debts, no agreement between them as to the amount of or the times for payment of their contributions could avail against creditors; and the application of such a restriction as that of section 60(2) would not be justified beyond the precise language, in this case, of the legislation dealing with terms of payment.

I would, therefore, allow the appeal and declare that the call may be made without relation to the terms of section 119(9).

ESTEY J.:—The appellant is the liquidator of The Home Assurance Company of Canada and the respondents are the contributories.

In this appeal, the appellant contends that a call may be made upon the contributories for any balance that may be owing under a contract for the purchase of shares, while the respondents submit it cannot be made except for amounts and within the periods permitted under sec. 119(9) of *The Alberta Insurance Act* (St. of Alta. 1915, c. 8, now R.S.A. 1942, c. 201, s. 119(9).

Mr. Justice Macdonald authorized "the liquidator to make a call on each of the contributories . . . for one hundred per cent of the amount for which they are or may be respectively settled upon the list of contributories." This judgment was reversed in the Appellate Division and a direction made that the calls should be made at amounts and intervals specified by section 119(9) of *The Alberta Insurance Act.*

Sec. 119(9) reads as follows:

(9) The shares of the capital stock subscribed for shall be paid by such instalments and at such times and places as the directors appoint; the first instalment shall not exceed 25 per cent and no subsequent instalment shall exceed 10 per cent, and not less than 30 days' notice of any call shall be given, and no call shall be made at a less interval than 30 days from the last preceding call.

The Home Assurance Company of Canada was incorporated by special statute enacted by the Legislature of Alberta (1918 St. Alta., Ch. 58). Section 9 of that Act directed that the provisions of the *Alberta Insurance Act* including the above sec. 119(9), should apply to the company.

The express language of this section including as it does the words "as the directors appoint", discloses that the legislature intended this section should apply only while the directors were directing the affairs of the company. This is emphasized by the fact that section 152 of *The Alberta Insurance Act* incorporates the Winding-Up provisions of the *Companies Act of Alberta* (R.S.A. 1942, c. 240).

Section 164 of the *Companies Act* reads as follows:

164. The liability of a contributory shall create a debt of the nature of a specialty, accruing due from him at the time when his liability commenced, but payable at the times when calls are made for enforcing the liability.

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Estey J.

Sec. 164 discloses that the legislature intended in the event of a winding-up the terms of the payment under a contract for the purchase of shares would be superseded by the provisions of that section. A reading of these two sections makes it clear that the legislature intended sec. 119(9) should apply prior to winding-up proceedings, but once they were commenced the provisions of sec. 164 should apply.

While this company is not being wound up under sec. 164 and, therefore, its provisions do not apply to these proceedings, they do, when read with sec. 119(9), indicate on the part of the legislature an intention that calls should be made once winding-up proceedings are commenced in accord with the statutory provisions under which those proceedings may be taken. This company is being wound up under *The Dominion Winding-Up Act* (1927 R.S.C., c. 213). The relevant provisions are sections 50, 53, 55, 59 and 60(2).

It is upon the provisions of section 60(2) that the Appellate Division founded its judgment and upon which the respondent bases its submission.

Section 60(2) reads as follows:

> 60 (2). No call shall compel payment of a debt before the maturity thereof, and that the extent of the liability of any contributory shall not be increased by anything in this section contained. R.S., c. 144, s. 58.

Sec. 50 provides that at the commencement of the winding-up, the list of contributories shall be settled and sec. 53 that "every shareholder . . . shall be liable to contribute the amount unpaid on his shares." Sec. 53(2) provides that the liability of the contributory shall be deemed "a debt due to the company payable as directed or appointed under this Act," and sec. 55, the liability of the contributory "shall create a debt accruing due from such person at the time when his liability commenced but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability." Sec. 59 provides that "the Court may at any time after making a winding-up order . . . make calls on and order payment thereof by all or any of the contributories . . . to the extent of their liability."

The foregoing provisions of sections 50 to 59 are in effect similar to those in the *Companies Act*, 1862 of Great

Britain (25 & 26 Vict., Ch. 89). Under that provision, it has been held that the terms of payment in the contract endured "only during the life of the company" and, therefore, the liquidator might call up the whole of the unpaid balance at any time after winding-up proceedings have been commenced. In *re Cordova Union Gold Company* (1).

The respondent, however, points out that sec. 60(2) in *The Dominion Winding-up Act* has no counterpart in the British Act, and that as it provides "no calls shall compel payment of a debt before the maturity thereof," the terms of the original contract must be adhered to in the making of calls. The sections 50 to 60(2) inclusive are all under the general heading "contributories" and when read together the debt referred to in sec. 60(2) is that created by sec. 53(2), and which under sec. 55 is "accruing due from such person at the time the liability commenced but payable at the time . . . when calls are made . . ." Then in sec. 59, it is already pointed out the Court may at any time make calls and order payment to the extent of the liability of the contributories.

Moreover, the foregoing is in accord with the intent and purpose of winding-up proceedings, which are designed to realize the assets of a company and to distribute them among the creditors as soon as circumstances may permit.

These sections, and particularly sec. 59, contemplate such an order as that made by Mr. Justice Macdonald. His order should be restored. The appeal allowed with the costs of the parties hereto payable out of the assets of the company.

Appeal allowed with costs.

Solicitors for the appellant: *Fenerty, Fenerty, McGillivray and Robertson.*

Solicitors for the respondents: *Patterson, Hobbs and Patterson.*

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(1) (1891) 2 Ch. 580.

1950

*May 1, 2
*Oct. 3

IN THE MATTER OF THE DOMINION SUCCESSION DUTY ACT

CHARLES McCARROLL SMITH and PHYLLIS G. RUDD..... } APPELLANTS;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Succession duty—Valuation of estate—Interest in estate not falling under the Act—How to determine fair market value—Succession Duty Act, 4-5 Geo. VI (Can.) c. 14, ss. 2(a) (e), 5(1), 34, 58(2).

Held: The provisions of the *Succession Duty Act* (Can.) are not retroactive and accordingly in assessing duty thereunder, s. 34 is not applicable in valuing an interest in the estate of a person whose death occurred prior to its enactment.

APPEAL from the judgment of the Exchequer Court of Canada, Cameron J. (1), affirming the assessment made for succession duties by the Minister of National Revenue in respect of the valuation of the interest of the deceased in the estate of her father.

R. Robinson K.C. for the appellants.

F. A. Sheppard K.C. and *A. J. MacLeod* for the respondent.

The judgment of the Court was delivered by

KELLOCK J.:—This is an appeal from the judgment of the Exchequer Court, Cameron J. (1), affirming the decision of the Minister on an appeal against an assessment for succession duties. The appellants are each entitled to life interests in the residuary estate of the late Mary Catherine Fisher, deceased, and the only matter in dispute between the parties is the value of one item of that residue, namely, the interest of the said estate in the estate of the late Charles Woodward, deceased, the father of the said Mary Catherine Fisher.

By his will and codicil, the late Charles Woodward bequeathed to a sister and a brother, out of the income to be

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

(1) [1950] Ex. C.R. 104.

received by his trustees from his Vancouver real estate, an annuity of $200 per month each, during their respective lives and, subject thereto, he directed that such income should be distributed annually between three persons, of whom the deceased daughter was one, during a period ending with the death of the last survivor of four named persons. It has been held by a judgment of the Supreme Court of British Columbia that the interest of the deceased Mary Catherine Fisher did not determine with her death but continued for the benefit of her estate. It is to be noted that the late Mary Catherine Fisher died on 23rd October, 1943, after the *Succession Duty Act* came into force, but her father, the late Charles Woodward, died prior thereto, his estate, therefore, not being subject to the provisions of the statute.

In valuing the interest of the daughter in her father's estate, the Minister applied the provisions of section 34 of the *Act*, as he did also in valuing the respective interests of the appellants in the estate of their testatrix. The appellants do not object to the application of the section in this last-mentioned respect, but they contend that the Minister erred in applying the provisions of the section in ascertaining the value of the asset here in question as part of the residuary estate of Mary Catherine Fisher. The appellants say that s. 34 is not, but that the provisions of s. 2(*a*) and (*e*) and s. 5(1) are applicable.

S. 34 is as follows:

> The value of every annuity, term of years, life estate, income, or other estate, and of every interest in expectancy in respect of the succession to which duty is payable under this Act shall for the purposes of this Act be determined by such rule, method and standard of mortality and of value, and at such rate of interest as from time to time the Minister may decide. (1940-41, c. 14, s. 34).

The important words for present purposes are the words, "in respect of the succession to which duty is payable under this Act." The only successions in respect of which duty is payable under the *Act* are the successions of the appellants to the estate of Mary Catherine Fisher. The section in its clear terms, therefore, has no application to anything but the valuation for duty purposes of the interests of the appellants in that estate. Paragraphs (*a*) and (*e*) of s. 2 and s. 5(1) are as follows:

> 2. (*a*) "aggregate net value" means the fair market value as at the date of death, of all the property of the deceased, wherever

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situated, together with the fair market value, as at the said date, of all such other property wherever situated, mentioned and described in section three of this Act, as deemed to be included in a succession or successions, as the case may be, from the deceased as predecessor, after the debts, incumbrances, and other allowances are deducted therefrom as authorized by subsection six of section seven and by section eight of this Act.

(*e*) "dutiable value" means, in the case of the death of a person domiciled in Canada, the fair market value, as at the date of death, of all property included in a succession to a successor less the allowances as authorized by subsection six of section seven and by section eight of this Act and less the value of real property situated outside of Canada, and means, in the case of the death of a person domiciled outside of Canada, the fair market value of property situated in Canada of the deceased included in a succession to a successor less the allowances as authorized by subsection six of section seven and by sections eight and nine of this Act.

5. (1) Notwithstanding that the value of the property included in a succession to which each heir, legatee, substitute, institute, residuary beneficiary, or other successor is entitled, cannot in any case be determined until the time of distribution, nevertheless, for the purposes of this Act, all such property shall be valued as of the date of death, and each successor shall be deemed to benefit as if such property less the allowances as authorized by section eight of this Act were immediately distributed, and as if each successor benefited accordingly.

In my opinion, the appellants are right in their contention that the value of the asset of the Fisher estate here in question falls to be determined under the provisions of s. 2(*a*) and (*e*) and s. 5(1), in other words, at the fair market value at the date of the death of Mary Catherine Fisher on 23 October, 1943.

Although it is not raised by the pleadings, Mr. Sheppard for the respondent contends that s. 58(2) is applicable independently of s. 34, and that under the relevant regulation the same result is arrived at as if the provisions of s. 34 applied. S. 58(2), so far as material, is as follows:

The Minister may make any regulations deemed necessary for carrying this Act into effect, and in particular may make regulations:—

(*c*) prescribing what rule, method and standard of mortality and of value, and what rate of interest shall be used in determining the value of annuities, terms of years, life estates, income, and interests in expectancy.

The only regulation to which we were referred is regulation 19 which reads in part as follows:

19. (1) The value of every annuity, term of years, life estate, income, or other estate and of every interest in expectancy, shall be determined,

(ii) if the succession depends on life contingencies, on the basis of interest as aforesaid, together with the standard of mortality as defined in Table II below . . .

In my opinion, the terms of this regulation are thus expressly limited, as is s. 34 itself, to the valuation of the interests mentioned *which are included in the succession, the duty in respect of which is being determined.* Again, both a basis of interest and a standard of mortality enter into the computation and it is clear from Table II itself, which bears the heading, "Standard of mortality prescribed for the purposes of section 34", that the basis of computation prescribed by the regulation is for use only under that section. Even if s. 58 could stand alone, therefore, no regulation has been passed under it which could apply to the valuation of the item here in question as part of the residuary estate of Mary Catherine Fisher.

Appellants also asked in their statement of claim that the court should determine the fair market value, and both parties led evidence on the point.

In determining the fair market value where there is no competitive market at the date as of which the value is to be ascertained, other indicia may be resorted to as pointed out by Sir Lyman Duff C.J. in *Montreal Island Power Co.* v. *Town of Laval des Rapides* (1). The learned Chief Justice went on to say:—

> There may be reasonable prospects of the return of a market, in which case it might not be unreasonable for the assessor to evaluate the present worth of such prospects and the probability of an investor being found who would invest his money on the strength of such prospects; and there may be other relevant circumstances which it might be proper to take into account as evidence of its actual capital value.

This principle was applied by this court for succession duty purposes in *Attorney General of Alberta* v. *Royal Trust Company* (2). The subject matter of that case was the value of land and buildings, and the court took into consideration the revenue producing qualities of the property.

The respondent contends that the item here in question is "a bequest of $10,000 a year", that is, "a bequest of one-third of the annual rental of $30,000." The appellants, on the other hand, contend that their testatrix was entitled only to "one-third of the net income" from the property in question; that the gross rental was subject to certain charges and one annuity to one of the two annuitants who survived Mrs. Fisher; and that payment

(1) [1935] S.C.R. 304 at 306. (2) [1945] S.C.R. 267.

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of the rent was further subject to certain contingencies, such as, for example, the continued solvency of the tenant. From the standpoint of the outstanding annuity alone, the income from the rent was obviously subject to reduction to that extent. In addition, the trustees of the Woodward estate were entitled under the *Trustee Act* of British Columbia to compensation, and the income from the rents would be subject to some reduction on this account. It is further pointed out that the lease contains the usual exception of reasonable wear and tear and damage by fire and tempest from the lessee's covenant to repair, and that this would involve some expenditure on the part of the Woodward estate to keep the building intact. The witnesses for both parties agree that such expense together with the expense of extra insurance, which the owners as a matter of good business practice should carry, would total approximately $3,000 per year. It cannot, therefore, be said that there was "a bequest of $10,000 per year."

Further, while the rent is collaterally secured by two mortgages given by the tenant on adjoining property owned by it, and while the lessee covenanted to pay rent, taxes, light, gas and telephone charges, and to return the property at the end of the term with a building thereon worth not less than $125,000 in a good and sufficient state of repair, and to keep the building insured for $100,000, one cannot disregard entirely the possibility of insolvency of the tenant or even the possibility of some disaster occurring during the term of the lease, which had some 44 years to run at the date of Mrs. Fisher's death. A purchaser would no doubt make some allowance for such eventualities.

Perhaps the two most outstanding features of this asset are, first, the uncertainty of the term, in that it depends upon four lives, one of those lives being that of a person at the date of Mrs. Fisher's death engaged in combat service in the Royal Canadian Air Force. The other important consideration is that the asset is not a capital asset but income, and therefore subject in the hands of a purchaser to income taxation.

The appellants called two experts with respect to value. One, William Reeve, said that the asset would be a very difficult thing to sell as it involved considerations of a

highly speculative nature. He himself had had no actual experience in selling such an interest. In his opinion, the fair market value would be not more than $67,230. He arrived at that figure by taking the annual net income as $9,000 and considering that any purchaser would require the return of his capital in not more than twenty years and would expect an interest rate of 12 per cent. In the opinion of the other witness called by the appellants, D. S. Mansell, a purchaser might have been found in October 1943 who would have paid $55,000. He pointed out, in addition to the factors already mentioned, that at that date the country was engaged in a world war. His figure of $55,000, he said, was on the basis of return of the principal within 13½ years with interest at 4 per cent.

The witness called for the respondent made a valuation of $150,000 but left entirely out of consideration the fact that the subject matter of sale was income and therefore subject in the hands of a purchaser to income tax. For this reason alone I think his evidence is to be disregarded.

On all the evidence, there would be no justification, in my opinion, for putting a higher value upon the asset in question than the figure given by Mr. Reeve, namely, $67,230, on the basis of the income being $9,000 per year, which may well be too high.

It was suggested by Mr. Boultbee, the respondent's witness, that the element of uncertainty as to the duration of the term could be eliminated by the purchase of life insurance. It may well be that this would be the case, but the premium or premiums would be substantial and would involve an increase in the purchaser's outlay. The evidence with respect to this aspect of the matter was not sufficiently related to the computation of value to permit of the fixing of an amount greater than $67,230, the higher of the two figures put forward by the appellants.

I therefore would allow the appeal and reduce the valuation to the figure mentioned. The appellants should have their costs here and below.

Appeal allowed with costs.

Solicitors for the appellants: *Robinson and Haines.*

Solicitor for the respondent: *I. G. Ross.*

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*Feb 27, 28
Mar 1
*June 9

IN RE BOWATER'S NEWFOUNDLAND PULP AND PAPER MILLS, LIMITED: Tax Exemptions Claimed Under Pre-Confederation Statutes of Newfoundland.

Constitutional Law—Dominion and Provincial jurisdiction—Power of Parliament to (a) repeal, abolish or alter pre-Confederation Newfoundland law; (b) to bring into force Statutes of Canada in the Province of Newfoundland, by Act of Parliament or by proclamation and by such proclamation to provide for the repeal of certain laws of Newfoundland—The British North America Act, 1867 to 1949, ss. 91, 92, 146,—"An Act to approve the Terms of Union of Newfoundland with Canada", 1949 (Can.) 1st Sess., c. 1, Terms 3, 18 (1), (2), (3), (27)—"An Act to amend The Income Tax Act and the Income War Tax Act," 1949 (Can.) 2nd Sess. c. 25, s. 49.

Upon the passing of *The British North America Act, 1949*, 12-13 Geo. VI (Imp.), and "An Act to approve the Terms of Union of Newfoundland with Canada", 1949 (Can.) 1st Sess., c. 1, Newfoundland became a province of the Dominion of Canada. Thereupon the legislative powers theretofore possessed by Newfoundland became vested in the Parliament of Canada and the legislature of the Province of Newfoundland in accordance with sections 91 and 92 of the B.N.A. Act.

Between the years 1915 and 1947 the Government of Newfoundland entered into a series of agreements, subsequently in part confirmed and in part enacted by the Newfoundland Legislature, with Bowater's Pulp & Paper Mills Ltd., and their predecessors in interest, whereby that company was granted exemptions for a term of years (extending beyond the date of union with Canada) from customs duties and taxes on certain imports and exports and from other taxes including income tax. By "An Act to amend The Income Tax Act and the Income War Tax Act", 1949 (Can.) 2nd Sess., c. 25, s. 49, Parliament provided that notwithstanding any other law heretofore enacted by a legislative authority other than the Parliament of Canada (including a law of Newfoundland enacted prior to April 1, 1949) no person is entitled to

(*a*) any deduction, exemption or immunity from, or any privilege in respect of

(i) any duty or tax imposed by an Act of the Parliament of Canada, or

(ii) any obligation under an Act of the Parliament of Canada imposing any duty or tax, or

(*b*) any exemption or immunity from any provision in an Act of the Parliament of Canada requiring a licence, permit or certificate for the export or import of goods, unless provision for such deduction, exemption, immunity or privilege is expressly made by the Parliament of Canada.

Following the passing of the said Act, the Governor in Council under s. 55 of *The Supreme Court Act* referred to this Court the three questions, (which are fully set out in the reasons for judgment that follow), as to the effect of the said amendment on the said exemptions.

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

Held: (Taschereau J. dissenting) that:—

(1) Bowater's Newfoundland Pulp & Paper Mills Ltd. is not entitled by reason of the certain Statutes of Newfoundland in question, to any deduction, exemption or immunity from or any privilege in respect of any duty or tax imposed by an Act of the Parliament of Canada.

(2) The company is not entitled by reason of the said Statutes of Newfoundland, to any deduction or exemption or immunity from, or any privilege in respect of any obligation under any Act of the Parliament of Canada imposing any duty or tax.

(3) The company is not entitled by reason of the said Statutes of Newfoundland, to any exemption or immunity from any provision in an Act of the Parliament of Canada requiring a licence, permit or certificate for the export or import of goods.

REFERENCE by His Excellency the Governor General in Council (P.C. 6510, dated December 29, 1949) to the Supreme Court of Canada for hearing and consideration pursuant to the authority of the *Supreme Court Act,* R.S.C., 1927, c. 35, s. 55 of the questions cited in full at the beginning of the reasons for judgment of the Chief Justice of this Court.

F. P. Varcoe, K.C. and *D. W. Mundell, K.C.* for the Attorney General of Canada.

L. R. Curtis, K.C., Attorney General of Newfoundland, in person.

G. H. Steer, K.C., C. F. H. Carson, K.C. and *C. G. Heward,* K.C., for Bowater's Newfoundland Pulp & Paper Mills Ltd.

THE CHIEF JUSTICE:—The following questions of law, touching the interpretation of the British North America Acts, 1867 to 1949, have been referred to the Supreme Court of Canada for hearing and consideration:

1. Is Bowater's Newfoundland Pulp & Paper Mills Ltd. entitled by reason of the Statutes of Newfoundland listed hereunder to any deduction, exemption or immunity from, or any privilege in respect of any duty or tax imposed by an Act of the Parliament of Canada?

2. Is Bowater's Newfoundland Pulp & Paper Mills Ltd. entitled by reason of the Statutes of Newfoundland listed hereunder to any deduction, exemption or immunity from, or any privilege in respect of any obligation under any Act of the Parliament of Canada imposing any duty or tax?

3. Is Bowater's Newfoundland Pulp & Paper Mills Ltd. entitled by reason of the Statutes of Newfoundland listed hereunder to any exemption or immunity from any provision in an Act of the Parliament of Canada requiring a licence, permit or certificate for the export or import of goods?

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REFERENCE IN RE BOWATER'S PULP AND PAPER MILLS LTD.

Rinfret C.J.

List of Statutes referred to in the above questions:

Newfoundland
1. 6 Geo. V, c. 4 (1915)
2. 8 Geo. V, c. 3 (1917)
3. 9-10 Geo. V, c. 12 (1919)
4. 14 Geo. V, c. 1 (1923)
5. 15 Geo. V, c. 27 (1925)
6. 18 Geo. V, c. 4 (1927)
7. 25-26 Geo. V, c. 42 (1935)
8. 2 Geo. VI, c. 53 (1938)
9. 6 Geo. VI, c. 35 (1942)
10. 6 Geo. VI, c. 45 (1942)
11. 7 Geo. VI, c. 56 (1943)
12. 11 Geo. VI, c. 8 (1947)

Upon the reference, this court heard arguments from counsel representing the Attorney-General of Canada, the Attorney-General of Newfoundland and the Bowater's Newfoundland Pulp and Paper Mills, Ltd.

The statutes of Newfoundland referred to in the questions are all statutes enacted by the Governor, Legislative Council and House of Assembly of Newfoundland or the Governor by and with the advice of the Commission of Government before the union of Newfoundland with Canada. No question is raised as to the validity or effect of these statutes before the union.

Substantially all of these statutes are concerned with giving effect to and carrying out so-called agreements between a corporation and the government of Newfoundland. The 1915 to 1919 statutes were enacted in relation to the Newfoundland Products Corporation, Ltd. The name of this company was then changed to the Newfoundland Power and Paper Company Ltd. and the 1923 and 1925 statutes use this name. The 1927 statutes, amongst other things, confirm the substitution under the agreements of a new corporation for the earlier one, the new corporation being the International Paper Company of Newfoundland Ltd. Thereafter, the name of this corporation was changed on November 9, 1927, to "International Power and Paper Company of Newfoundland Ltd." and on August 18, 1938, to "Bowater's Newfoundland Pulp and Paper Mills Ltd., the present name of the company. Since all the statutes and agreements now relate to the last-named company, reference will be made only to the "company", by which is meant the last-named company.

The original operations of the company were the utilization of water powers and mineral resources in Newfoundland for the manufacture of a fertilizer. Subsequently, the operations were extended to the generation of power for the manufacture of pulp and paper products. Later still, the operations of the company covered the cutting and export of timber and related activities. The executive government of Newfoundland and the company, apparently, from time to time conducted negotiations as to the operations of the company. The government was interested in promoting the development of industry in Newfoundland. The company was interested in obtaining water powers, lands, mineral rights, timber rights and concessions for its operations. It also, apparently, needed the financial support of the government by way of guaranteeing loans raised by the company. As a result of these negotiations these so-called agreements were arrived at between the company and the executive government.

The agreements, amongst other things, contained terms making special provision as to the taxation of the company and in respect of activities carried on by it. The agreement of 1927 appears to have supplanted, for practical purposes, earlier provisions for this purpose in the agreements of 1923 and 1915. Clause 2 of the 1927 agreement contains extensive provisions both new and by way of amendment to earlier provisions. Its provisions were also later amended by the 1938 agreement.

The effect of the taxation provisions of these agreements and statutes, still in force before the union of Newfoundland to Canada, may be stated generally speaking as follows:

> (*b*) The stock and shares and the bonds, debentures, debenture stock, mortgage and other securities of the company, and all issues, transfers, sales and other dispositions of, purchases, holding and receipts of the same, and the dividends on such stock and shares and interest on such securities, and the receipt thereof by the holder other than holders (except the International Paper Company, a corporation of the State of New York, or any successor to substantially all its property and assets or any subsidiary of said International Paper Company or of its said successor) domiciled in Newfoundland, shall be exempt from taxation for a period of fifty years from the date hereof, provided that the company shall not be exempt from any fees payable upon the registration in the Registry of Deeds of a document,

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REFERENCE IN RE BOWATER'S PULP AND PAPER MILLS LTD.

Rinfret C.J.

deed or instrument which apply to all documents, deeds and instruments generally. (1927 Agreement; cl. 2 para. (*b*) unamended; Case p. 60, l. 12.)

(*c*) The company shall pay to the government in respect of its income for each year, beginning with the year 1928, and ending with the year 1973, before deduction of interest, depreciation and depletion, a tax of twenty per cent of such income, provided that if the tax in any year so calculated would exceed the maximum tax below defined the income applicable to the payment of interest and to depreciation and depletion shall be exempt from taxation to such extent as shall be necessary in order that the tax shall not exceed the maximum tax below defined, and provided further that if the tax so calculated after exempting all income applicable to the payment of interest and to depreciation and depletion would still exceed the maximum tax below defined, then the rate per cent for calculation of the tax shall be reduced to such extent as shall be necessary in order that the tax shall not exceed the maximum tax below defined. The maximum tax in respect of the income for each of the years 1928, 1929, 1930 and 1931 shall be $75,000, and for each of the years 1932 to 1973, inclusive, shall be $150,000. Dividends and interest received by the company shall be included in its income. Such tax shall be payable on or before March 31 of the succeeding year. And except as aforesaid and subject to Section 3 of the Act of 1915 the company shall be exempt from all taxation of every kind whatsoever other than duties (including Sales Tax) levied under the general laws of the colony on goods imported by the company and not otherwise exempt. Provided, however, that nothing in this clause contained shall be construed to exempt individual officers, shareholders or employees of the company from any taxation otherwise payable by them: Provided further that this clause shall remain in force during the period ending 30th June, 1973, and after that date shall cease to have effect *in toto*. (1923 Act, s. 13; Case p. 27, l. 35 as amended by 1927 Agreement cl. 2, para. (*c*); Case p. 60, l. 27.)

(*d*) All materials, articles and things required from time to time for construction, installation and equipping of the company's water power, hydro-electric, electrical, ground wood pulp, chemical pulp, cellulose, paper and barking mills, buildings, plants and works and all buildings and plants incidental thereto, wharves, docks, quays, piers, lights and buoys, warehouses, woods and logging operations, fire protection, transmission lines, railways, roads and towns (including all houses, buildings and structures, hospitals and laboratories erected by or for the company on any townsite or protective area around it owned or controlled by it, sewerage, water, heating and lighting systems, and any other public amenities or utilities which may be provided by the company), vessels, boats, mechanical transport for goods, aircraft, and telegraph and telephone equipment all for the company's own operations for original installation or for additions or extensions but not in substitution for old shall until the 2nd day of August, 1952, be admitted into Newfoundland, free of duties and taxes, subject however to any prohibition of general application against the importation of any articles and except as provided

below in sub-clause (*g*) of this Clause 2. (1927 Agreement, cl. 2, para. (*d*), Case p. 61, l. 51, as amended by 1938 Agreement, cl. 25, Case p. 99, l. 22.)

(*e*) All materials not procurable in Newfoundland of quality and at prices which shall be satisfactory to the company required for the purposes of the manufacture of the products of the companies' and/or its subsidiary companies' electro-chemical, electro-metallurgical and other electric industries not concerned with pulp and paper making shall for the period of twenty (20) years calculated from the date of the entry into commercial operation of each of such industries be admitted into the colony free of taxes and duty. (1915 Agreement cl. 12, Case p. 19, l. 19 as amended by 1923 Act, s. 6, Case, p. 26, l. 16, as amended by 1927 Agreement, cl. 2, para. (*e*) Case p. 61, l. 33.)

(*f*) On materials, articles and things required by the company for renewals or replacements of or repairs to or for use in substitution for materials, articles and things imported free of duty or of or to or for materials, articles and things previously imported for renewals or replacements of or repairs to or for use in substitution for materials, articles or things imported free of duty (including materials, articles and things required for or in connection with carrying out or effecting such renewals, replacements, repairs or substitution) the company shall pay such import duties and taxes of general application (if any) as shall be in force from time to time under the general laws of Newfoundland provided that until the 2nd day of August, 1967, such import duties and taxes taken together shall not exceed 25 per centum of the value of the material, article or thing in question. (1927 Agreement, cl. 2, para. (*f*), Case p. 61, l. 35 as amended by 1938 Agreement, cl. 27, Case p. 100, l. 14.)

(*g*) Provided that no exemption in or to which are applicable the provisions of the foregoing sub-clauses (*d*), (*e*), and (*f*) shall apply to, and the company shall pay such import duties and taxes of general application (if any) as shall be in force from time to time under the general laws of the colony on, the following:

(1) Food, clothing, dry goods and hand-tools;

(2) Moveable articles of household and office furniture and equipment and camp utensils, including stoves other than furnaces;

(3) Articles and goods intended by the importer for the personal and private ownership of individuals;

(4) Lumber of sizes and qualities manufactured in Newfoundland from timber grown in Newfoundland, if such lumber can be obtained in Newfoundland as and when and of sizes and qualities required by the company from time to time; and

(5) Windows and doors, and casings therefor, sashes, mouldings, mantles, stairs, cupboards, ships, boats and barges made or constructed mainly or entirely of wood, of kinds, qualities and sizes manufactured in Newfoundland from timber grown in Newfoundland, if such windows and doors, and casings therefor, sashes, mouldings, mantles, stairs, cupboards, ships, boats and barges can be obtained in Newfoundland as and when and of qualities and dimensions required by the company from time to time;

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(6) Bricks, nails, and paints for use in town construction, of sizes and kinds manufactured in Newfoundland, if such bricks, nails and paints can be obtained in Newfoundland as and when and of the sizes and kinds required by the company from time to time;

(7) Ropes and twines and nets of kinds and sizes manufactured in Newfoundland. (1927 Agreement, cl. 2, para. (*g*), Case p. 62, l. 6 as amended by 1927 Act, s. 8, Case p. 57, l. 15, and 1938 Agreement, cl. 28, Case p. 100, l. 30.)

(*ga*) Baling wire, metal core caps, metal seals, metal strips and laminated heads to be used in binding or packing goods, sulphur, adhesives, silicate of soda, hessian, cores made of paper or other material, chlorine for industrial purposes shall be admitted free of taxes and duties.

(*gb*) The following materials if imported for use as bleaching materials or in connection with bleaching shall be admitted free of taxes and duties, namely, caustic soda, bleaching powder (calcium hypochlorite), chlorine, sodium thiosulphate, potassium permanganate, sulphuric acid and hydrochloric acid and such other bleaching materials as the company may from time to time show to the satisfaction of the government are to be used in the manufacture of bleached pulp. (1938 Agreement, cl. 29, Case p. 100, l. 34.)

(*h*) On all goods, materials and articles, other than those specified in or to which are applicable the provisions of the foregoing subclauses (*d*) to (*gb*) imported into the colony and for use by the company in its business of manufacturing pulp or paper or operations incidental thereto, or its business of generating or transmitting electrical power or energy.

(1) the company shall, for a period of twenty years from the date hereof, pay import duties and taxes of general application (if any) in force from time to time under the general laws of the colony, provided that, in cases where under the general laws of the colony now in force a duty or tax is payable, the company shall not pay duties or taxes in excess of those so payable under the general laws now in force, and in cases where under the general laws of the colony now in force no duty or tax is payable, the company shall not pay duties or taxes, and provided further that on kerosene and gasolene such import duties and taxes of general application payable by the company shall not in the aggregate be in excess of five cents a gallon and on coal such import duties and taxes of general application payable by the company shall not in the aggregate be in excess of fifty cents a ton and on crude petroleum and fuel oil such import duties and taxes of general application payable by the company shall not in the aggregate be in excess of such per cent of the value thereof as fifty cents per ton bears to the delivered price at the mills of the company in Newfoundland of coal of the quality and from the source ordinarily used in such mills; and

(2) the company shall, for a further period of twenty (20) years, pay import duties and taxes of general application (if any) in force from time to time under the general laws of the colony, provided that in cases where under the general laws

of the colony now in force a duty or tax is payable the company shall not pay duties and taxes aggregating more than the sum of (i) those so payable under the general laws now in force, and (ii) ten per cent of the value of the goods, materials or articles in question, and in cases where under the general laws of the colony now in force no duty or tax is now payable, the company shall not pay duties and taxes aggregating more than ten per cent of the value of the goods, materials or articles in question, and provided further that on kerosene and gasolene such import duties and taxes of general application payable by the company shall not in the aggregate be in excess of five cents a gallon plus ten per cent of the value thereof and on coal such import duties and taxes of general application payable by the company shall not in the aggregate be in excess of fifty cents a ton plus ten per cent of the value thereof and on crude petroleum and fuel oil such import duties and taxes of general application payable by the company shall not in the aggregate be in excess of such per cent of the value thereof as fifty cents per ton plus ten per cent of the value thereof bears to the delivered price at the mills of the company in Newfoundland of coal of the quality and from the source ordinarily used in such mills. (1927 Agreement, cl. 2(*h*), Case p. 62, l. 32, as amended by 1938 Agreement, cl. 29(2) and (3), Case p. 101, l. 13.)

(*i*) Wherever under any provision of the foregoing subclauses of this Clause 2, and for the period that, any goods, materials or articles are exempt from import duties or taxes and are imported into the colony in containers or wrappings, such containers or wrappings, shall be admitted free of duties and taxes; and wherever under any provision of the foregoing sub-clauses of this Clause 2, and for the period that, any goods, materials or articles are subject to limited duties or taxes and are imported into the colony in containers or wrappings, such containers and wrappings shall be subject to import duties and taxes of general application aggregating not more than such per cent of the value thereof as the aggregate of the duties and taxes on the goods, materials or articles in such containers or wrappings bears to the value of such goods, materials, or articles.

(*j*) Wherever the company shall have imported any article or goods free of duties or taxes or subject to limited duties or taxes under the provisions of this Clause 2 and shall sell, give or otherwise transfer the same to any person or corporation not entitled to import such article or goods free of duty or taxes or subject to such limited duties or taxes, it shall be the duty of the vendor, donor or transferor to notify the Customs Department forthwith of such sale, gift or transfer, and to pay such duties and taxes, if any, as shall be necessary, in addition to any duties and taxes already paid thereon, to make up the full amount of the import duties and taxes, if any, which would be payable on such article or goods by such vendee, donee or transferee under the Customs Act and Tariff in force at the time of such sale, gift or transfer, upon the basis of the value for duty of such article or goods at that time.

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(*k*) The company shall be deemed to have guaranteed payment of duty to the government in the cases in the foregoing sub-clause (*j*) provided for, and shall be secondarily liable for such duties and shall pay the same if the Minister of Finance and Customs shall have been unable to collect the same from the person or corporation primarily liable.

(*l*) The expression "company" wherever used in the foregoing sub-clauses (*b*) to (*k*), inclusive, or in the sections of the Act of 1923 or clauses of the agreement of 1923 to which the foregoing sub-clauses (*c*) and (*e*) apply, shall include the company's subsidiary companies engaged in the business of generating or transmitting electrical power or energy or of manufacturing pulp or paper or operations incidental thereto or in any business of the nature to which the provisions of the foregoing sub-clause (*e*) apply; the expression "import duties and taxes of general application" wherever used in the foregoing sub-clauses (*f*), (*g*), (*h*) and (*i*) shall mean import duties and taxes (including sales taxes on imports) applicable to all importers into the colony of the goods, materials or articles in question, provided that the existence of special reductions, exemptions or rebates lawfully created in favour of fishermen shall not of itself prevent a duty or tax from being deemed of general application; the expression "now in force" wherever used in the foregoing sub-clause (*h*) shall mean in force prior to the present session of the Legislature; and the expression "value", wherever used in the foregoing sub-clauses (*f*), (*h*) and (*i*) shall mean the current domestic value of the article or material in question in the principal markets of the country whence and at the time when the same was exported directly to this colony. (1927 Agreement, cl. 2 (*i*), (*j*), (*k*) and (*l*), Case p. 64, l. 8.).

In addition to amending the provisions of the 1927 Agreement, the 1938 Agreement added the following new provisions:

24. All property of the company within the area of any towns or settlements established by the company shall be exempt from municipal taxation. (Case p. 99, l. 14).

26. If within five years from the completion respectively of the extensions referred to in Clause 2 of this Agreement or the increase referred to in Clause 3 of this Agreement the company wishes to instal any plant of a type contemplated in the original design of such extensions or increase as the case may be which the company was unable to instal at the time of the original construction for reasons beyond its control, such plant shall be treated as part of the original installation and be admitted free under Clause 2(*d*) of the Agreement of 1927 as amended by Clause 25 of this Agreement. (Case p. 100, l. 3).

30. Notwithstanding the provisions of Clause 2(*h*) of the Agreement of 1927 the company shall be entitled to import coal for the operation of the extensions to its sulphite plant and the increase in the paper capacity of its mills hereinbefore referred to free of duties and taxes. For the purpose of giving effect to this provision it shall be assumed (*a*) that the coal consumed by the company in its Corner Brook mills in each year up to but not exceeding 20,000 tons is coal imported otherwise than

for such operation as aforesaid and the same shall accordingly be liable to payment of duty under Clause 2(*h*) of the Agreement of 1927 and (*b*) that the coal consumed by the company as aforesaid in each year in excess of 20,000 tons is coal imported for such operations as aforesaid and the same shall accordingly be free of duties and taxes.

31. Save as mentioned in the foregoing clauses of this agreement no unmanufactured timber exported by the company under this agreement shall be subject to the payment of any tax duty or charge.

32. The government agrees that it will not impose on the company nor shall the company be liable to pay at any time hereafter any taxes, duties or charges of a special or discriminatory nature. (Case p. 101, l. 20).

The Act of 1927 relating to the 1927 Agreement provided as follows:

1. The agreement made between His Excellency Sir William Lamond Allardyce, G.C.M.G., Governor of Newfoundland and its Dependencies, in Council, of the one part, and International Paper Company of Newfoundland, Limited, of the other part, dated the 2nd day of August, A.D., 1927, and forming the schedule to this Act, is hereby approved, confirmed and adopted, and all and singular the several clauses and provisions thereof are hereby declared to be valid and binding upon the said parties thereto and each of them respectively, and to have the force and effect of law, and all and singular the several acts, matters and things therein provided to be done or performed by or on the part of the parties respectively are hereby declared to be proper and lawful, and the parties and each of them shall have full power and authority from time to time to do and perform or omit to do and perform all and singular the several acts, matters and things in and by the said agreement provided to be done or not to be done, as the case may be, in the manner and with the effect and under the conditions stipulated and provided in the said agreement. (Case p. 55, l. 17).

The remaining provisions amended various provisions of the agreement or dealt with related matters. (Case pp. 56-7).

The Act of 1938 relating to the 1938 Agreement provides as follows:

1. The agreement made between His Excellency Sir Humphrey Thomas Walwyn, K.C.S.I., C.B., D.S.O., Governor of Newfoundland and its Dependencies in Commission of the one part and Bowater's Newfoundland Pulp and Paper Mills Limited, a company incorporated under the laws of Newfoundland and having its registered office at Corner Brook in the Island of Newfoundland of the other part, dated the 29th day of November, A.D. 1938, and forming the schedule to this Act is hereby approved and confirmed and declared to be valid and binding upon the parties thereto.

2. In Clause 5 of the agreement forming the schedule to this Act there shall be inserted after the words "riots or civil commotions" the words "or by adverse commercial or economic conditions existing in any season or seasons which the company shall show to the satisfaction of the government make it reasonable for the company not to comply with such obligations in whole or in part" and the figures and words "25 cents" shall be struck out and the words "two dollars" substituted therefor

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3. Subject to the amendments above set forth, all and singular the several clauses and provisions of the said agreement set forth in the schedule hereto are hereby declared to have the force and effect of law for all purposes as if expressly enacted herein.

4. Subject to the amendments above set forth, the parties and each of them shall have full power and authority from time to time to do and perform or omit to do and perform all and singular the several acts, matters, things and agreements in and by the said schedule provided to be done or not to be done, as the case may be, in the manner and with the effect and under the conditions stipulated and provided in the said schedule. (Case p. 84).

Sections 49 and 50 of "An Act to amend The Income Tax Act and the Income War Tax Act", c. 25, S. of C. 1949 (2 Sess.) provide as follows:

49. For greater certainty it is hereby declared and enacted that, notwithstanding any other law heretofore enacted by a legislative authority other than the Parliament of Canada (including a law of Newfoundland enacted prior to the first day of April nineteen hundred and forty-nine), no person is entitled to

(*a*) any deduction, exemption or immunity from, or any privilege in respect of,

(i) any duty or tax imposed by an Act of the Parliament of Canada, or

(ii) any obligation under an Act of the Parliament of Canada imposing any duty or tax, or

(*b*) any exemption or immunity from any provision in an Act of the Parliament of Canada requiring a licence, permit or certificate for the export or import of goods, unless provision for such deduction, exemption, immunity or privilege is expressly made by the Parliament of Canada.

50. Notwithstanding anything contained in this or any other Act an exemption from taxation provided for in an international treaty or international agreement binding on Newfoundland before the union of Newfoundland with Canada may be extended by regulation of the Governor in Council to taxation by or under any Act of the Parliament of Canada.

The Attorney General of Canada submits that the answer to each of the three questions referred to the Court should be in the negative because:

(1) The statutes referred to in the questions ceased to operate at the time of the Union of Newfoundland with Canada;

(2) Even if these statutes continued in operation after the Union they do not apply in respect of Acts of the Parliament of Canada extended to Newfoundland pursuant to the Union to confer any deduction, exemption, immunity or privilege in respect of a duty, tax, obligation or requirement imposed thereunder;

(3) Even if these statutes continued in operation and any of the provisions thereof apply in respect of Acts of the Parliament of Canada to confer any deduction, exemption, immunity or privilege in respect of a duty, tax, obligation or requirement under an Act of the Parliament of Canada, they have been overridden by section 49 of the "Act to amend

The Income Tax Act and the Income War Tax Act" (Ch. 25, Statutes of Canada, 1949—Second Session), which is validly enacted by Parliament within its authority under the British North America Acts, 1867-1949.

The Terms of Union of Newfoundland with Canada approved and given force of law by the British North America Act, 1949, are Terms 3 and 18:

3. The British North America Acts, 1867 to 1946, shall apply to the Province of Newfoundland in the same way, and to the like extent as they apply to the provinces heretofore comprised in Canada, as if the Provice of Newfoundland had been one of the provinces originally united, except in so far as varied by these terms 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 all of the provinces originally united.

18. (1) Subject to these terms, all laws in force in Newfoundland at or immediately prior to the date of Union shall continue therein as if the Union had not been made, subject nevertheless to be repealed, abolished, or altered by the Parliament of Canada or by the Legislature of the Province of Newfoundland according to the authority of the Parliament or of the Legislature under the British North America Acts, 1867 to 1946, and all orders, rules, and regulations made under any such laws shall likewise continue, subject to be revoked or amended by the body or person that made such orders, rules or regulations or the body or person that has power to make such orders, rules, or regulations after the date of Union, according to their respective authority under the British North America Acts, 1867 to 1946.

(2) Statutes of the Parliament of Canada in force at the date of Union, or any part thereof, shall come into force in the Province of Newfoundland on a day or days to be fixed by Act of the Parliament of Canada or by proclamation of the Governor General in Council issued from time to time, and any such proclamation may provide for the repeal of any of the laws of Newfoundland that

(*a*) are of general application;

(*b*) relate to the same subject-matter as the statute or part thereof so proclaimed; and

(*c*) could be repealed by the Parliament of Canada under paragraph one of this term.

(3) Notwithstanding anything in these terms the Parliament of Canada may with the consent of the Legislature of the Province of Newfoundland repeal any law in force in Newfoundland at the date of Union.

(4) Except as otherwise provided by these terms all courts of civil and criminal jurisdiction and all legal commissions, powers, authorities, and functions, and all officers and functionaries, judicial, administrative, and ministerial, existing in Newfoundland at or immediately prior to the date of Union, shall continue in the Province of Newfoundland as if the Union had not been made, until altered, abolished, revoked, terminated, or dismissed by the appropriate authority under the British North America Acts, 1867 to 1946.

The effect of Terms 3 and 18 of the Terms of Union of Newfoundland is first that the British North America Acts, 1867 to 1946, will apply to the Province of New-

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foundland in the same way and to the like extent as they apply to the provinces heretofore comprised in Canada, as if the Province of Newfoundland had been one of the provinces originally united. The only exceptions are if they are varied by the Terms, or if they are in the provisions which may be held to be specially applicable to or only to affect one or more and not all of the provinces originally united.

Furthermore, subject to the Terms of Union of Newfoundland with Canada, all laws in force in Newfoundland at or immediately prior to the date of union continued therein "as if the union had not been made".

Those laws, nevertheless, may be repealed, abolished or altered by the Parliament of Canada or by the Legislature of the Province of Newfoundland according to the authority of the Parliament or of the Legislature under the British North America Acts, 1867 to 1946.

In addition, all orders, rules and regulations made under any such laws continued, subject to be revoked or amended by the body or person that made such orders, rules or regulations, or the body or person that has power to make such orders, rules or regulations after the date of union according to their respective authority under the British North America Acts, 1867 to 1946.

In my opinion, the "authority" referred to in Term 18(1) is the authority which is given jurisdiction on the respective subject-matters enumerated in Sections 91 and 92 of the British North America Act, that is to say, that by force of Term 18(1) the Parliament of Canada is thereby given the authority to repeal, abolish or alter any and all laws in force in Newfoundland at or immediately prior to the date of union, which deal with the subject-matters in Section 91, and the Legislature of the Province of Newfoundland is given authority to repeal, abolish or alter all laws in force in Newfoundland at or immediately prior to the date of union which deal with the subject-matters in Section 92 of the Act.

That proposition is further supported by subsection (2) of Term 18, which gives to the Parliament of Canada power to put in force, either by Act of the Parliament or by proclamation of the Governor General in Council, all

Statutes of Canada in force at the date of union which are of general application, or which relate to the same subject-matter as the statute or part thereof so proclaimed, and which could be repealed by the Parliament of Canada under paragraph 1 of Term 18.

Likewise subsection (2) authorizes the Parliament of Canada to repeal any of the laws of Newfoundland thus mentioned in that subsection. It is to be noted that subsection (1) of Term 18 is slightly different, for example, from the corresponding terms in the Acts of Union with Alberta and Saskatchewan.

It is said here that the laws of Newfoundland shall remain in force "as if the union had not been made" which means, to my mind, that notwithstanding that those laws may be dealing with subject-matters rightly coming under the jurisdiction of the Parliament of Canada under Section 91 of the British North America Act, they might nevertheless not cease to operate immediately upon the date of the union until they are repealed, abolished or altered by the Parliament of Canada. But I do not think that we need consider that possible interpretation for the purpose of answering the three questions submitted to the court and which refer only to Bowater's Newfoundland Pulp and Paper Mills, Limited.

I wish, therefore, to make it well understood that any general proposition laid down in the present opinion is strictly limited to that company and to the questions as they are submitted.

In this case, the Parliament of Canada by section 49 of an Act to amend The Income Tax Act and the Income War Tax Act, assented to 10th December, 1949, has legislated that, "notwithstanding any other law heretofore enacted by a legislative authority other than the Parliament of Canada (including a law of Newfoundland enacted prior to the first day of April nineteen hundred and forty-nine), no person is entitled to

(*a*) any deduction, exemption or immunity from, or any privilege in respect of,

(i) any duty or tax imposed by an Act of the Parliament of Canada, or

(ii) any obligation under an Act of the Parliament of Canada imposing any duty or tax, or

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(*b*) any exemption or immunity from any provision in an Act of the Parliament of Canada requiring a licence, permit or certificate for the export or import of goods,

unless provision for such deduction, exemption, immunity or privilege is expressly made by the Parliament of Canada".

The legislation contained in s. 49 clearly relates, in fact and specific terms, to the statutes of Newfoundland whereby Bowater's Newfoundland Pulp and Paper Mills, Ltd., is entitled to deductions, exemptions, immunities or privileges in respect of any duty or tax and of any obligation; and also to exemptions or immunities requiring a licence, permit or certificate for the export or import of goods.

It follows that by force of subsection 2(*b*) of Term 18 these matters relate to the same subject-matter as the statute or part thereof so proclaimed by Canada and, therefore, that *pro tanto* section 49 of the *Income Tax Act* and *Income War Tax Act* (S. of C. 1949 (2 Sess. c. 25)) repeals the laws of Newfoundland granting these deductions, exemptions or immunities and privileges to Bowater's Newfoundland Pulp and Paper Mills, Limited. It clearly and undoubtedly has that effect and it must be so held unless it could be successfully contended that the legislation of Parliament is unauthorized by the Terms of Union and, accordingly *ultra vires*.

I am of opinion that section 49 was competently enacted both under subsection (2) and subsection (1) of Term 18.

The argument of counsel for the Bowater's Newfoundland Pulp and Paper Mills, Ltd., was that the laws and agreements invoked by that company were to be looked upon as a single indivisible whole and not severable, and that subsection (3) of Term 18, which reads:

> (3) Notwithstanding anything in these terms the Parliament of Canada may with the consent of the Legislature of the Province of Newfoundland repeal any law in force in Newfoundland at the date of Union.

therefore applies. They say it follows that the statutes and agreements whereby the Bowater's Newfoundland Pulp and Paper Mills, Ltd., was granted its exemptions, immunities and privileges could not be done away with or altered except with the consent of the Legislature of the Province of Newfoundland.

I cannot agree. Subsection (3) is limited to "repeal" and I would go as far as saying that that subsection may be used by the Parliament of Canada and the Legislature of the Province to authorize the repeal of a law in force in Newfoundland at the date of union even if it relates to a subject-matter under section 92 of the British North America Act.

Interpreting it as meaning that no laws of Newfoundland can be repealed, except with the consent of the Legislature of that province, would lead to an absurdity. It is only necessary to mention that the statutes and agreements concerning Newfoundland grant immunities from customs and excise duties to show that any such intention can never have entered into the minds of the drafters of the Terms of Union, for customs and excise duties clearly belong to Parliament under section 91 of the British North America Act, and, if we suppose that Newfoundland would refuse its consent to the repeal of at least that part of the statutes and agreements with Bowater's Newfoundland Pulp and Paper Mills, Ltd., the customs and excise duties owed by the latter would forever remain under the jurisdiction of Newfoundland; the Parliament of Canada would be helpless to remedy that situation and as the whole organization of customs and excise duties administration is with the Parliament of Canada, the whole matter would become unworkable.

Nor do I think that the principle of severability, as it is expounded in several decisions of this Court and of the judicial committee of the Privy Council, applies in the premises. It has come into play when the courts had to examine the validity of legislation emanating from one Parliament or Legislature, but never in a case like the present one, when we are discussing the respective authority of Parliament of the one part and the Legislatures of the other part.

Above all, I am of opinion that subsection (1) of Term 18 was made precisely to cover the severability resulting from the union. By force of that subsection, Parliament was recognized as the true authority henceforth to repeal, abolish or alter the laws, orders, rules or regulations having as subject-matters those which are enumerated in section

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91 of the British North America Act; and the Legislature of Newfoundland, on the other hand, was given the authority to repeal, abolish or alter the laws, orders, rules or regulations which deal with the subject-matters enumerated in section 92 of the British North America Act. It could not be otherwise, and, if it had not been so, the Terms of Union could never have functioned.

So that the argument of indivisibility or severability not only cannot apply in the operation of the Terms of Union but it is specifically provided for in subsection (1) of Term 18.

As a consequence of that subsection, upon the union being consummated, all subject-matters under section 91 came under the jurisdiction of the Parliament of Canada and the subject-matters under section 92 remained under the jurisdiction of the Province of Newfoundland "according to their respective authority under the British North America Acts, 1867 to 1946".

It seems to me, therefore, abundantly clear that, upon the union taking place, customs and excise duties being properly in the domain of the Parliament of Canada, that Parliament became the only competent body to legislate in regard to them throughout Canada, including Newfoundland. As said before, I do not think that the questions call upon the court to say what happens in that respect during the period extending from the date of the union to the date when legislation from the Parliament of Canada is made to come into force either for the purpose of repealing, abolishing or altering.

As for taxes, and amongst them, income taxes or income war taxes, the situation is somewhat different for both the Parliament and the Legislatures have been given the power to tax. I would not doubt that the exemptions in respect of taxes remain in force for the benefit of the Bowater's Newfoundland Pulp and Paper Mills, Ltd., in so far as they apply to provincial taxes; but these exemptions, if sought to be invoked as against federal taxes, can of course have no effect and they become inoperative. Under no rule of interpretation can Bowater's Newfoundland Pulp and Paper Mills, Ltd., be regarded as having been given an exemption or an immunity from the taxes imposed by

the Parliament of Canada. In that sense they are in no different situation from any other company in any other province of Canada. The British North America Act authorizes double taxation within the limits therein stated and innumerable examples could be given of companies enjoying exemption and immunity from provincial taxes and which, of course, does not carry exemption and immunity from federal taxes. In the present case, the imposition of federal taxes is only the imposition of an additional tax upon Bowater's Newfoundland Pulp and Paper Mills, Ltd.—a situation against which, of course, the former colony of Newfoundland can never protect the Bowater's Newfoundland Pulp and Paper Mills, Ltd.

Section 49 does not divest the Bowater's Newfoundland Pulp and Paper Mills, Ltd., of its immunities, exemptions or privileges in respect of taxes within the territory of Newfoundland. It says merely that the exemptions, immunities and privileges granted by Newfoundland do not apply with respect to federal taxes.

Having come to those conclusions, the answers to the questions referred to the court must be in the negative.

To Question No. 1, I answer no;

To Question No. 2, I answer no;

To Question No. 3, I answer no, since export or import of goods are exclusively of the competency of the Parliament of Canada.

KERWIN J.:—Under section 55 of the *Supreme Court Act* the Governor in Council referred to this court for hearing and consideration the following questions: (See p. 609 *supra*).

No question is raised as to the validity or effect of these statutes before the Union of Newfoundland with Canada. Newfoundland became part of Canada as a province thereof on, from, and after the coming into force of the Terms of Union between the two countries, which were agreed to between representatives of both and were approved by the Government of Newfoundland, and, by chapter 1 of the Statutes of 1949 of Canada, by the Canadian Parliament, assented to February 18, 1949. As the British North America Act, 1949 (Imperial), confirmed the Terms of Union and enacted that they should have the force of law

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notwithstanding anything in the British North America Acts, 1867 to 1946, the terms, by virtue of number 50, came into force immediately before the expiration of March 31, 1949.

All of the Newfoundland statutes listed were enacted before the Union of Newfoundland with Canada by the Governor, Legislative Council and House of Assembly of Newfoundland or by the Governor by and with the advice of the Commission of Government. Newfoundland had a Constitution until it was suspended by the Commission of Government referred to, as of February 16, 1934, and by Term 7 of the Terms of Union that Constitution as it existed immediately prior to that date "is revived at the date of union and shall, subject to these terms and the British North America Acts, 1867 to 1946, continue as the Constitution of the Province of Newfoundland from and after the date of union, until altered under the authority of the said Acts."

By Term 3:—(See p. 619 *supra*).

By other Terms of Union provision is made for the executive and legislature and such special matters as education, patents, trade marks and fisheries but the important term is 18, the four paragraphs of which read as follows:—(See p. 619 *supra*).

In pursuance of paragraph (2) of this term the Governor General in Council by a proclamation dated April 1, 1949, brought into force in the province as of that date the *Customs Act* and the *Excise Tax Act* of Canada. By another proclamation, of May 9, 1949, the Dominion Income Tax Act was brought into force in the province as of May 16, 1949, the date of the publication of the proclamation in the *Canada Gazette*. If there were any doubt as to the intention to make applicable the *Customs Act*, the *Excise Tax Act*, and *The Income Tax Act*, of the Dominion, such doubt is removed by the provisions of s. 49 of c. 25 of the 1949 Canadian Statutes (2 Sess.),

The questions submitted may be answered by a consideration of paragraphs (1) and (3) of Term 18 when applied to the listed statutes which I assume are part of the "laws in force in Newfoundland at or immediately prior to the date of union." These statutes deal with Bowater's

Newfoundland Pulp and Paper Mills Ltd. or its predecessors, all of which will be hereafter included in the term "company". They were concerned with giving effect to and carrying out various agreements between the company and the Government of Newfoundland. The latter was interested in promoting the development of industry in the country and the company was interested in obtaining lands, mineral rights, water rights, timber rights and concessions. It may be stated briefly that the agreements provide:—the stock and shares, and the bonds, debentures, debenture stock, mortgage, and other securities of the company are exempt from taxation for a period of fifty years; the company is to pay the Government for five years in respect of its income, a tax of twenty percentum subject to a maximum; import duties on certain articles are foregone; certain property of the company is exempt from municipal taxation; the Government of Newfoundland and the Treasury in England agree to guarantee certain debentures of the company, which guarantees, we are informed, have been given. On the other hand, the company agrees to establish and maintain certain water-power developments and manufacturing establishments, and we are told that its investment in Newfoundland amounts approximately to eighty-six million dollars.

The company admits that the Dominion may require to be taken out a licence, permit, or certificate, as referred to in the questions, but denies that Canada may exact duties or taxes otherwise than as provided by the Newfoundland statutes. Its first argument runs as follows. While it is admitted that paragraphs (1) and (4) of Term 18 correspond generally to s. 129 of the *British North America Act, 1867,* it is pointed out that the B.N.A. Act, 1949 (Imperial), gave the Terms of Union the force of law notwithstanding anything in the B.N.A. Acts, 1867 to 1946. Hence it follows, it is said, that Term 18 must be taken to contain all the provisions relative to the determination of the points involved in this reference and, to give full effect thereto, the laws of Newfoundland in force at the date of union must be divided into three categories:—

(a) those which fall clearly within the Dominion field under the B.N.A. Act and are subject to be repealed, abolished or altered by the Federal Parliament;

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(*b*) those which fall clearly within the provincial field and are subject to be repealed, abolished or altered by a provincial legislature;
(*c*) those not falling within either of the categories (*a*) or (*b*) but which are of mixed subject matter and inseverable such as the Bowater's law, which is a law in which matters under Dominion and Provincial control are so interwoven as to constitute an indissoluble mixture of consideration flowing to and from Bowaters as to be inseverable.

If any particular law falls within (*a*) or (*b*), then either Parliament or the Legislature, as the case may be, is empowered to act but, if, as is contended here, it is within category (*c*), then paragraph (3) of Term 18 applies and Parliament may repeal it but only with the consent of the Legislature. This paragraph, it will be noticed, does not provide for a mere alteration and the argument cannot prevail since it leaves no room for the application of paragraph (1) of Term 18.

While the questions are general in their terms as to the Acts of the Parliament of Canada, the discussion at Bar centered around *The Income Tax Act,* the *Customs Act,* and the *Excise Tax Act.* As to these, I have no difficulty in answering each of the questions in the negative upon a consideration of paragraph (1) of Term 18, taken in conjunction with paragraph (3) thereof, because those fields are indisputably open to the Dominion under s. 91 of the *British North America Act, 1867,* and those three Acts were brought into force in Newfoundland by proclamations as provided by paragraph (2). The same result follows with respect to any duty or taxes imposed by an Act of the Parliament of Canada, or any obligation under any such Act imposing any duty or tax, or any such Act requiring a licence, permit, or certificate for the export or import of goods so long as such Act relates to any field allotted to the Dominion. Whatever may have been in the mind of the draftsman, the mere power conferred by paragraph (3) to repeal with the consent of the Newfoundland Legislature cannot cut down the previous power to repeal, abolish and alter, that, in the relevant fields, is conferred by paragraph (1) upon the Parliament of Canada. This conclusion is strengthened by paragraph (4) of Term 27, which appears under the heading "Tax Agreement". This term provides for a possible agreement between the Government of Canada and the Government of the Province

of Newfoundland for the rental to the former of the income, corporation income, and corporation tax fields, and the succession duties tax field. Paragraph (4) reads:—

(4) The Government of the Province of Newfoundland shall not by any agreement entered into pursuant to this term be required to impose on any person or corporation taxation repugnant to the provisions of any contract entered into with such person or corporation before the date of the agreement and subsisting at the date of the agreement.

The very fact that in connection with such a matter provision is made whereby the Newfoundland Government is not obliged to impose taxes repugnant to a mentioned contract indicates that under Term 18 (1) the power of Parliament is untrammelled when acting within its proper field of activity.

The second of the company's arguments starts with the assumption that paragraphs (1) and (4) of Term 18 correspond to s. 129 of the *British North America Act, 1867*, and then proceeds to rely upon the decision of the judicial committee in *Dobie* v. *Temporalities Board* (1), delivered by Lord Watson, as establishing that since the Canadian Parliament could not have entered into all the terms of the various agreements with the company, and since all the terms thereof are so indissolubly mixed, Parliament has no jurisdiction to enact legislation relating to any of the terms. In that case a statute of the old Province of Canada had created a corporation having a corporate existence and rights in Ontario and Quebec, and it was held by the judicial committee that after Confederation it could not be repealed or modified by the Legislature of either Ontario or Quebec or by the joint operation of both but only by the Parliament of the Dominion. An Act of Quebec, which purported to amend the pre-Confederation statute, did not profess to repeal and amend the earlier Act only in so far as its provisions might apply to or be operative within the Province of Quebec and its enactments were apparently not framed with a view to any such limitation. Lord Watson points this out at page 150 and states that the reason for it was obvious and that it was a reason fatal to the validity of the Act. He continues:—

The corporation and the corporate trust, the matters to which its provisions relate, are in reality not divisible according to the limits of provincial authority. In every case where an Act applicable to the two

(1) (1881) 7 App. Cas. 136.

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provinces of Quebec and Ontario can now be validly repealed by one of them, the result must be to leave the Act in full vigour within the other province. But in the present case the legislation of Quebec must necessarily affect the rights and status of the corporation as previously existing in the province of Ontario, as well as the rights and interests of individual corporators in that province.

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This extract clearly shows the distinction between that case and the problem presented to us.

But the Company points particularly to the following statement by Lord Watson in the same case at page 147 with reference to s. 129 of the *British North America Act, 1867*:

> The powers conferred by this section upon the provincial Legislatures of Ontario and Quebec to repeal and alter the statutes of the old Parliament of the province of Canada are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of the Act of 1867. In order therefore to ascertain how far the provincial Legislature of Quebec had power to alter and amend the Act of 1858 incorporating the board for the management of the Temporalities Fund, it becomes necessary to revert to s. 91 and 92 of the British North America Act, which enumerate and define the various matters which are within the exclusive legislative authority of the Parliament of Canada, as well as those in relation to which the Legislatures of the respective provinces have the exclusive right of making laws. If it could be established that, in the absence of all previous legislation on the subject the Legislature of Quebec would have been authorized by s. 92 to pass an Act in terms identical with the 22 Vict. c. 66, then it would follow that the Act of the 22nd Vict. had been validly amended by the 38 Vict. c. 64. On the other hand, if the Legislature of Quebec has not derived such power of enactment from s. 92, the necessary inference is that the legislative authority required in terms of s. 129 to sustain its right to repeal or alter an old law of the Parliament of the province of Canada is in this case wanting, and that the Act 38 Vict. c. 64, was not intra vires of the Legislature by which it was passed.

Furthermore, the company relies upon the statement of Lord Watson, delivering the judgment of the Privy Council in the *Distillers and Brewers Case, Attorney General for Ontario* v. *Attorney General for Canada* (1), at page 366, where he says:—"It appears to their Lordships that neither the Parliament of Canada nor the provincial legislatures have authority to repeal statutes which they could not directly enact. Their Lordships had occasion, in *Dobie* v. *Temporalities Board, supra,* to consider the power of repeal competent to the legislature of a province . . . The same principle ought, in the opinion of their Lordships, to be applied to the present case." But on that reference it was

(1) [1896] A.C. 348.

held that in so far as the provincial enactments came into collision with the provisions of the Canada Temperance Act of 1886 they must yield to Dominion legislation. Instead of assisting the company's present argument, the decision is definitely against it.

Here it is not suggested by the questions that any attempt would be made by Parliament to repeal the Newfoundland statutes but the point involved is whether Parliament may enact legislation relating to subjects assigned to it although such legislation may affect provincial matters. The rule that it may do so is well settled and has been consistently followed and neither the judgment in the *Dobie* case nor Lord Watson's statements at pages 147 and 150, quoted above, are in conflict with it. I therefore answer each of the questions in the negative.

Taschereau J.

TASCHEREAU J., dissenting:—From 1915 to 1947, the Government of Newfoundland enacted several statutes for the purpose of ratifying or modifying various agreements entered into with the Bowater's Newfoundland Pulp and Paper Mills and its predecessors.

It is, I think, unnecessary to analyse in detail all these laws and agreements. It will be sufficient to mention that the Government of Newfoundland, for the purpose of developing enterprises in the colony, and creating new industries, made certain concessions and granted privileges to the company, in consideration of which the latter assumed specific and quite onerous obligations.

The purpose of this reference is to obtain the opinion of this court, as to whether or not the company is entitled, since Newfoundland has become a Province of Canada, to any deduction, exemption or immunity in respect of any duty or tax imposed by any act of the Parliament of Canada.

The company has fulfilled all its obligations, has spent over $85,000,000 and now claims that it is entitled to the exemptions and deductions of income tax, customs and excise duties granted by the agreements entered into with the Government of Newfoundland, and which in view of the statutes enacted, have the force of law. It is of course not contested that income tax, customs and excise

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duties may be properly imposed by the Dominion Government, but the submission is that by the Terms of Union, the company still enjoys the privileges granted by the Government of Newfoundland, and that it is therefore beyond the powers of the Dominion to deprive the company of the exemptions conferred by the then competent authority.

The Attorney-General's of Canada's submission is that Parliament has legislative authority to amend or override laws of Newfoundland that are continued after the union, to the extent that the subject matters of the laws fall within the legislative authority of Parliament, under s. 91 of the British North America Act. This would be expressly reserved to Parliament by Term 18 of the union which continues the laws, subject to the power of Parliament and the Legislature, to amend or override them within their respective spheres.

Section 18(1) of "An Act to approve the Terms of Union of Newfoundland with Canada" and assented to on the 18th of February, 1949, is as follows:—(See p. 619 *supra*).

It will be observed that section 18(1) is substantially similar to section 129 of the British North America Act, dealing with the continuation and repealing of laws. This s. 129 is as follows:—

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.

Pursuant to the powers granted to the Dominion under s. 18(2), the Governor General in Council issued a proclamation on April 1, 1949, bringing into force in Newfoundland the *Customs Act* and the *Excise Act,* and on May 9, 1949, another proclamation brought into force the Dominion Income Tax Act. Furthermore, in 1949, the Parliament of Canada enacted "An Act to Amend The Income Tax Act

and The Income War Tax Act" (S. of C., 1949 (2 Sess.) c. 25) and the relevant sections which are 49 and 50, provide as follows:—

49. For greater certainty it is hereby declared and enacted that, notwithstanding any other law heretofore enacted by a legislative authority other than the Parliament of Canada (including a law of Newfoundland enacted prior to the first day of April nineteen hundred and forty-nine), no person is entitled to (*a*) any deduction, exemption or immunity from, or any privilege in respect of,

(i) any duty or tax imposed by an Act of the Parliament of Canada, or

(ii) any obligation under an Act of the Parliament of Canada imposing any duty or tax, or

(*b*) any exemption or immunity from any provision in an Act of the Parliament of Canada requiring a licence, permit or certificate for the export or import of goods, unless provision for such deduction, exemption, immunity or privilege is expressly made by the Parliament of Canada.

50. Notwithstanding anything contained in this or any other Act an exemption from taxation provided for in an international treaty or international agreement binding on Newfoundland before the union of Newfoundland with Canada may be extended by regulation of the Governor in Council to taxation by or under any Act of the Parliament of Canada.

Before joining Confederation, Newfoundland had a unitary Government and by virtue of its undivided powers, had full authority to enact laws concerning the various matters found in the agreements with the company. It could competently deal with income tax, customs and excise duties, land and water grants, mining concessions, municipal taxation, matters which under the scheme of Confederation are not attributed to only one authority. The validity of the agreements entered into are therefore unchallengeable.

However, by entering Confederation, Newfoundland renounced its rights to legislate on all subject matters which are under the British North America Act, of the exclusive jurisdiction of the Parliament of Canada, and its legislative authority was therefore limited to the narrower sphere of s. 92. This limited status created an entirely new situation for Newfoundland, and the question now arises as to which authority has the power to repeal *in toto* or partially, the statutes which have given force of law to the agreements entered into between the parties.

The Terms of Union contemplate the continuation, amendment, or repeal of the laws of Newfoundland, and

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the enforcement and application in the new province of the laws of Canada. It is unquestionable that all the laws enacted by the former Government of Newfoundland, and dealing with matters enumermated in s. 91 of the B.N.A. Act, may be repealed, abolished or altered by the central government, which is, by virtue of the law, vested with the necessary authority to deal with these matters. The case would be an easy one if we had merely to decide that federal income tax, customs and excise duties imposed by the Parliament of Canada, apply to Newfoundland, but the statutes with which we have to deal cover so many different matters, of both provincial and federal competency, and are so linked together that an entirely new situation arises. They cover matters some of which are now within the legislative powers of the Province of Newfoundland.

Under the Terms of Union, Newfoundland has obviously a new status, but I cannot agree with the submission of the Attorney General for Canada, that the statutes referred to in the questions submitted, ceased to operate at the time of the Union of Newfoundland with Canada. By the very terms of s. 18, para. (1) of the Act to approve the union, all the laws in force in Newfoundland, at or prior to the date of union, continue as if the union had not been made, subject to be repealed, abolished or altered by the Parliament of Canada or by the Legislature, according to their respective authority under the B.N.A. Act. It follows that these statutes continue to be in force, until repealed by the competent authority.

It cannot be contested that agreements of this kind are given a legal effect only because of a statutory approval, and that they cease to have such an effect, with the withdrawal of the approval. (*Attorney General for B.C.* v. *Esquimalt and Nanaimo* (1)). But with respect, I believe that neither the Parliament of Canada, by legislation, nor the Governor General in Council, by proclamation, may withdraw the approval which has been given to the statutes now under consideration. If all the matters covered by the agreements were matters on which the Dominion could competently legislate under s. 91, I would not hesitate to answer the interrogatories in the negative, in view of s. 18(1), because the statutes would then be repealed,

(1) [1950] 1 D.L.R. 305.

abolished or altered by the competent authority. But these statutes do not deal only with matters of federal concern, but also with matters which are now clearly within the exclusive province of the local Legislature. They are so closely interwoven that they form together a complete unity that makes them inseverable. They must be read together; they form a group that cannot be altered piecemeal, without affecting fundamentally their *"raison d'être"*. If so, they would not have any effective operation, as the whole scheme contemplated would be entirely destroyed. They surely would not have been adopted, amputated of all that is now proposed to be repealed. (*Attorney General for Alberta* v. *Attorney General for Canada* (1)).

In *Dobie* v. *Temporalities Board* (2), the judicial committee discussed s. 129 of the B.N.A. Act, a section which is substantially similar to s. 18(1) of the Terms of Union, and at page 147, their Lordships expressed the following views:—

> The powers conferred by this section upon the provincial Legislatures of Ontario and Quebec to repeal and alter the statutes of the old Parliament of the Province of Canada are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of the Act of 1867 * * *
>
> If it could be established that, in the absence of all previous legislation on the subject the Legislature of Quebec would have been authorized by sect. 92 to pass an Act in terms identical with the 22 Vict. c. 66, then it would follow that the Act of the 22nd Vict. has been validly amended by the 38 Vict. c. 64. On the other hand, if the Legislature of Quebec has not derived such power of enactment from Sect. 92, the necessary inference is that the legislative authority required in terms of sect. 129 to sustain its right to repeal or alter an old law of the Parliament of the Province of Canada is in this case wanting, and that the Act 38 Vict. c. 64, was not intra vires of the Legislature by which it was passed.

Later, in *Attorney General for Ontario* v. *Attorney General for the Dominion* (3), their Lordships said at page 366:—

> It appears to their Lordships that neither the Parliament of Canada, nor the Provincial Legislatures have authority to repeal Statutes which they could *not directly enact*.

Applying these principles to the present case, it would appear that the Dominion cannot legislate in any way to modify these inseverable statutes in such a way that their purpose would be defeated, for the reason that it could

(1) [1947] A.C. 503 at 519.
(2) 7 App. Cas. 136.
(3) [1896] A.C. 348.

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not, in view of the divided legislative powers attributed by the B.N.A. Act, *directly enact them*. If it did so, it would invade a field which is reserved exclusively to the jurisdiction of the Legislature, and consequently, act beyond its constitutional powers.

Unless very extraordinary conditions happen, the respective legislative authority of the Dominion and of the provinces, is found in ss. 91 and 92 of the B.N.A. Act, and the exclusive powers that belong to each authority cannot be delegated to the other. But there are cases, where serious conflicts would occur if the co-operation of the Dominion and the provinces was not willingly offered, to arrive at a satisfactory solution. (*Attorney General for B.C.* v. *Attorney General for Canada*, (1).

The present case is, I think, one of these, and it seems to be reasonably clear, that it is with the above pronouncement of the judicial committee in mind, that the framers of the Terms of Union incorporated s. 18(3) in the Act to approve the Terms of Union. It reads as follows:

> 18 (3). Notwithstanding anything in these terms, the Parliament of Canada may *with the consent of the Legislature* of the Province of Newfoundland repeal any law in force in Newfoundland at the date of Union.

Of course, the consent of the Legislature cannot empower the Dominion to legislate on provincial matters. But the Imperial statute which ratified the Terms of Union vested in the Dominion the necessary authority to do so, after the consent has been obtained legally.

At the hearing, the Attorney General for Newfoundland who intervened to support the stand taken by the company, said that this section 18(3) was incorporated in the Act for the very purpose of dealing with cases such as the one which is submitted to this court. The plausibility of this statement cannot be challenged, for it was common knowledge that the former unitary Government of Newfoundland, being then supreme in its legislative powers, had enacted laws which are now of a mixed federal and provincial character, and that they continued in force by the Terms of Union. There being no authority to repeal these inseverable laws, the necessary power was granted by

(1) [1937] A.C. 368 at 389.

the Imperial Parliament to the Dominion to repeal them, with however the consent of the Legislature of Newfoundland.

As this consent has not been obtained, I have come to the conclusion that the Parliament of Canada alone has no power to impose taxation upon the company in contravention of the terms of the agreements which have been ratified by statutes. I would therefore answer the interrogatories as follows:

1. Yes; the deductions, exemptions, immunities and privileges provided for in the said Statutes of Newfoundland.

2. No, except in respect of the obligations to pay duties or taxes otherwise than as provided by the said Statutes of Newfoundland.

3. No, except in so far as the acquisition or possession of any such licence, permit or certificate entails the payment of duties or taxes otherwise than as provided by the said Statutes of Newfoundland.

RAND J.:—The Governor in Council has referred to this court the following questions:—(See p. 609 *supra*).

They arise in the context of a series of instruments executed between 1915 and 1942 between His Majesty represented by the Governor in Council of Newfoundland and the respondent company or its predecessors in title and confirmed in several forms by the legislature of that colony. Those up to and including 1923 were "approved and confirmed": amendments in 1927 and 1935 were, in addition, declared to "have the force of law" and each party to have "full power and authority" to carry out their provisions; and in 1938, "to have the force and effect of law for all purposes as if expressly enacted herein." The legislation effected original modifications, also, both by way of amendment of clauses contained in the instruments and in the form of new provisions.

The matter of this convention was a large scale industrial development at Corner Brook, Newfoundland, involving the extensive use of hydro-electric power in the production of fertilizers and allied substances and the manufacture

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of pulp and paper. The company was granted lands, waters and water powers. The capital investment was to be not less than $20,000,000.

The company was to enjoy two concessions which raise the controversy here, one, an exemption, for periods specified, from customs duties or taxes on certain imports and exports; the other, an exemption for 50 years from all other taxes by a statutory clause which at the same time provided for an annual payment based upon a percentage of defined income with a maximum of $150,000 per annum. The provisions governing the former were in part contained in the instruments and in part in legislative amendments or original enactments.

Throughout the instruments and the legislation there is preserved the conception of a contractual arrangement. Its matter was of a nature that required legislation which, I think, has given statutory fixation to its terms. The grants taken by themselves may or may not have been within the authority of the Crown to make; but the exemptions and certain powers of administrative regulation could be carried out only under legislative authority.

It is, to me, indubitable that the colonial Legislature before the union could, of its own motion, and regardless of the assent of the company, have altered the terms with which we are concerned without affecting the validity or force, though not necessarily the interpretation or effect, of those then remaining.

Newfoundland entered into the federal system of Canada as of the 1st day of April, 1949. The Terms of Union, confirmed by Parliament at Westminster, and the provisions of the British North America Acts, 1867 to 1946, provide the investment and distribution of legislative and executive powers in and between the new province and the Dominion and the answers to the questions depend on the effect of those enactments upon the legislative contract.

As has been so often reiterated, throughout the Commonwealth His Majesty maintains a constitutional identity as the sovereign source of executive and legislative power, and in its contractual aspect the arrangement suffered no disruption by reason of the political alteration. In the aspect of legislation, section 18(1) of the Terms of Union declares that:—(See p. 619 *supra*).

This, for all purposes here, is identical in effect with s. 129 of the British North America Act. S. 18(3) introduces a further and new provision:—

> Notwithstanding anything in these terms the Parliament of Canada may with the consent of the Legislature of the Province of Newfoundland repeal any law in force in Newfoundland at the date of Union.

The legislative result of the union has been to transfer to the field of the Dominion those provisions of law which relate to matters attributed in the constitutional structure to the Dominion; from the moment of union they operate as Dominion laws, subject thereafter to be dealt with under s. 18(1); so, likewise, in the case of the province. Is the exercise of these new jurisdictions restricted by the contractual nature of the arrangement or on the ground that the instruments and the legislation, or the latter alone, constitute a legislative entirety?

At the outset, several propositions must be postulated: the totality of legislative power exercisable under the federal constitution must be taken to be vested in the Dominion and province with each, in its own field, sovereign, whether the effective exercise is exclusive or in co-operation, but always as a several exercise; the effect of s. 18(1) of the Terms of Union and s. 129 of the British North America Act is to maintain a continuity not of statutes but of laws, in the sense of distributive provisions which take their place in the one or other jurisdiction according to their subject matter: *Dobie* v. *Temporalities Board,* (1); and that modification of the continued laws may be by repeal or amendment or by way of repugnant enactment: *Attorney General of Ontario* v. *Attorney General* for the *Dominion,* (2).

There is nothing in the British North America Acts or in the Terms of Union which allocates a legislative contract as a subject matter of jurisdiction. A contract is a convention resting upon and within limits allowed by law. It may deal with matters regulated by laws of either the Dominion or province. Its performance is carried out by acts subject to those laws. But here the provisions dealing with customs duties and taxes are necessarily legislative

(1) 7 App. Cas. 136. (2) [1896] A.C. 348.

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provisions which only the state could undertake; and as the legislature cannot bind its future action, they remain subject to the contingency of that action.

What in substance is urged by the company is that the Crown, exercising both executive and legislative capacities, has entered into a legislative bargain which, as an entirety, must be brought within a single jurisdiction as a legislative subject matter. Before the union, the Crown as executive and in legislature possessed totality of power. The union effected a division of jurisdiction in laws applicable to the several items of the contract, from which it followed that the source of law now necessary to the contract as a whole is seen to be in both Parliament and Legislature. The action of these bodies, then, not several but joint as by one legislative organ, upon the total subject matter, is the only means by which the terms can be altered. Consistently with this, the Crown as executive would now have two sets of advisers acting jointly and each interested in the whole. So conceived, the act of each body requires as a condition of its legislative efficacy the identical act of the other; the contract has become the subject matter of simultaneous and conditional legislative jurisdiction of Canada plus Newfoundland. This is, of course, to be distinguished from an aggregate of several power, each jurisdiction acting with full efficacy *ab initio*. Such a conception is novel in the history of federal constitutionalism, and I am unable to find anything in the constitutional enactments that gives the slightest countenance to it.

Admittedly the provisions are not severable as terms of a contract, but they are clearly so as legislative subject matters. If it were otherwise, the province could not now by itself authorize the slightest change in the conditions of any licence or local matter involved without the executive and legislative concurrence of the Dominion: nor could the Dominion modify even beneficiently to the company the customs or tax concessions and maintain them within the integrity of the legislation. Such results would, I think, be absurd. It attributes to Parliament and Legislature a joint jurisdiction exceeding their several aggregate. It, in fact, remits the arrangement to the

exclusive jurisdiction of the Imperial Parliament. S. 18(3) of the Terms of Union permits only a *repeal* of any law. This contrasts repeal with repugnancy but it is a cumulative power and cannot be taken to derogate from the jurisdiction of Parliament under 18(1). The consequence of an inability to repeal, in its strict sense, would be the persistence of the colonial statute to which future legislation would be related as the underlying law: s. 18(3) enables that state of things to be eliminated.

But the contractual effect or the internal relations of legislation are not determinative of jurisdiction under the Act of 1867: it is the matters with which it deals. So far as the contract needs legislative sustenance, it is dependent on appropriate statutory action. There might, of course, be matter which could be dealt with affirmatively under union only by aggregate action. If, for instance, there had been a railway belonging to the company which connected with that of the provincial government now by the Terms of the Union passed to the Dominion, and between the two lines a statutory tariff of joint rates had been in force, then under the ruling in *Montreal* v. *Montreal Street Railway* (1), the legislative authority to bring about such a rate would be in both legislatures acting concurrently, although they could not by such action repeal the colonial law; but it could not be doubted that in such a case either legislature, exercising its own jurisdiction, could frustrate the colonial law by repugnant law, each operative independently from the time of its enactment. But that character of legislative action is denied for the situation here. If it were not available, there would be a lacuna in jurisdiction which we have long since excluded from our constitutional endowment.

The case of *Dobie* v. *Temporalities Board, supra,* was strongly urged as governing the issues here. In that case, the Legislature of Quebec had repealed a statute of the Province of Canada, continued in force after the union by s. 129, which had this peculiarity, that its provisions applied both to Quebec and to Ontario, and were incapable of being severed so as to make them applicable to one of these provinces only. It was argued that the matter applicable to two provinces was analogous to matter distributed

(1) [1912] A.C. 333.

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between two jurisdictions which here, as in that case, was not severable. I think the analogy fails on both grounds. The statutory incorporation was obviously of a nature beyond the competence of either province to enact or to repeal: and the exemptions from customs duties and Dominion taxation are for legislative purposes as severable as if they were contained in another statute. It is only when we consider them in a contractual or an internal dependency aspect that any such question arises. Any effect upon the remaining terms of the arrangement is an incidental consequence of the exercise of a paramount legislative jurisdiction. Results of this nature may frustrate the original object, but that is a question for Parliament; with it, the courts have nothing to do.

Mr. Carson urged the ordinary rule of severability as the test of Dominion jurisdiction, but I cannot see its relevancy. The question is not whether we can conclude that the colonial legislature would have enacted the legislation with the clauses relating to duties and taxes omitted; I assume it would not; the question is the wholly different one of its jurisdiction to repeal those clauses once enacted while maintaining the remainder of the legislation; and if the colonial legislature, as I think, could have done so, as certainly the Imperial Parliament could have done, then the Canadian Parliament, exercising its jurisdiction over the same matters, may do so even if its power is confined to these items and that of the colonial legislature was not.

On April 1, 1949 the *Customs Act* and on May 9, 1949, The *Income Tax Act,* were brought into force in Newfoundland by proclamation under s. 18(2) of the Terms of Union.

By chapter 25 of the Statutes of Canada 1949 (2 Sess.) the following amendment to the Income Tax Act was enacted:—(See p. 618 *supra*).

The effect of this amendment, the general application of which was not disputed, is to override any provision of the legislative arrangement before us with which the statutes mentioned conflict.

I would, therefore, answer the questions as follows:

1. No.
2. No.
3. No.

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KELLOCK J.:—It is not necessary to restate the questions referred to this court. The essential question throughout is as to whether or not the respondent company may claim exemption from the provisions of certain federal legislation, namely, the *Income War Tax Act*, the *Customs Act* and the *Excise Act*, by reason of anything contained in certain statutes of Newfoundland enacted prior to union. The last two mentioned statutes were proclaimed to be in force in the new province as of April 1, 1949, pursuant to subsection (2) of Term 18 of the Terms of Union, and the first named was similarly proclaimed as of the 16th of May following.

By subsection (1) of Term 18 it is provided that, subject to the terms, all "laws" in force in Newfoundland at or immediately prior to union shall continue therein, subject to be "repealed, abolished, or altered" by Parliament or the provincial legislature according to the authority of each under the British North America Act, 1867 to 1946.

By subsection (2), already referred to, it is provided that "statutes" of the Parliament of Canada in force at the date of union, or any part thereof, shall come into force in the new province on a day or days to be fixed by Act of Parliament or by proclamation of the Governor General in Council. Subsequent to the proclamations with respect to the three statutes already referred to, Parliament by 13 George VI, c. 25, s. 49, enacted as follows:

(See p. 618 *supra*).

Respondent contends in the first place that nothing in the Canadian legislation affects its position under the pre-union legislation of Newfoundland. It is said that, since the pre-union legislation includes subject matters which are now apportioned for legislative purposes between Parliament and the provincial legislature by sections 91 and 92 of the British North America Act, and since neither legislature can validly legislate with respect to these entire matters, neither can, of itself, "repeal, abolish or alter" such legislation. In support of this argument, reliance is placed upon the judgments of the Privy Council in *Dobie* v. *The Temporalities Board* (1), and *Attorney General for Ontario* v. *Attorney General for the Dominion* (the Local Prohibition case) (2). In the second place, it is said that

(1) 7 App. Cas. 136. (2) [1896] A.C. 348.

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the only means by which the pre-union legislation can be effectively dealt with is by joint action of the two legislatures under subsection (3) of Term 18.

With respect to this last mentioned argument, I am of opinion that subsection (3) in no way limits the operation of subsections (1) and (2). It is expressly limited to "repeal" and, in any event in my view, merely provides one means by which repeal of any pre-union "law" may be effected.

As to the first argument, it was held in *Dobie's* case that a pre-Confederation statute of Canada which created a corporation having its corporate existence and rights in what subsequently became the provinces of Ontario and Quebec, could not be repealed by the legislature of either province, or by the joint operation of both, but only by the Parliament of the Dominion, it being there laid down that the power of a provincial legislature to alter, or amend, a pre-Confederation *statute* is precisely co-extensive with its power to enact identical legislation.

In the Local Prohibition case, Lord Watson, in delivering the judgment of the Board, said at page 366:

> But the Dominion Parliament has no authority conferred upon it by the Act to repeal directly any provincial *statute,* whether it does or does not come within the limits of jurisdiction prescribed by s. 92. The repeal of a provincial *Act* by the Parliament of Canada can only be effected by repugnancy between its provisions and the enactments of the Dominion * * * It appears to their Lordships that neither the Parliament of Canada nor the provincial legislatures have authority to repeal *statutes* which they could not directly enact.

The board held in that case that The Canada Temperance Act of 1886, insofar as it purported expressly to repeal the prohibitory clauses of the pre-Confederation statute of 1864, was invalid. That statute was purely local in its nature and as Parliament could not enact legislation of that character, neither could it repeal it. It will be seen that in both these cases what the board was concerned with was the power of repeal of *statutes* or *sections* of statutes in their entirety and that the subject matters of the same were outside the legislative jurisdiction of Parliament under section 91. Even in the *Dobie* case, at page 150 Lord Watson had said:

> If, by a single Act of the Dominion Parliament, there had been constituted two separate corporations, for the purpose of working, the one a mine within the province of Upper Canada, and the other a mine

in the province of Lower Canada, the Legislature of Quebec would clearly have had authority to repeal the Act so far as it related to the latter mine and the corporation by which it was worked.

In *Bonanza Creek* v. *The King* (1), Viscount Haldane, in the course of his judgment, said with reference to another pre-Confederation statute of 1864, at page 583:

> It was obviously beyond the powers of the Ontario Legislature to repeal the provisions of the Act of 1864, *excepting insofar as the British North America Act enabled it to do this in matters relating to the province.*

In *Attorney General for Canada* v. *Attorney General for Quebec* (2), (the Fisheries case), the Judicial Committee had to deal with the respective powers of the Dominion and the provinces to legislate with respect to fisheries. In this case their Lordships referred to their earlier decision in 1898 A.C., page 700, which had dealt with legislation affecting the same subject matter. By a pre-Confederation statute of 1865 the legislature of Canada provided for the amendment of the law relating to fishing and fisheries, and this statute applied to the whole of Upper and Lower Canada. Section 3 authorized the Commissioner of Crown lands to issue fishing leases and licences while other sections of the statute dealt with the management and regulation of fisheries, the obstruction and pollution of streams, and deep sea fishing. After Confederation, in 1868, the Dominion Parliament, by 31 Vic. c. 60, repealed the Act of 1865 (s. 20) and in addition enacted a number of provisions in many respects resembling those of the Act of 1865. The substance of this last mentioned Act was subsequently incorporated into c. 95 of the Revised Statutes of Canada, 1886. S. 4 of this statute was in the terms of the former corresponding sections of 1868 and 1865, save that the Minister of Marine and Fisheries was substituted for the Commissioner of Crown Lands. Their Lordships point out that the board in 1898 had held that the Dominion had no power to enact s. 4, as it dealt with a matter committed exclusively to the legislatures of the provinces and that this decision must be taken to be settled law. There is no suggestion in the decision of 1898, nor in that of 1921, that because of the inclusion of the provision in s. 2 as to leases and licences, with respect to which the Dominion could not validly legislate, the repeal of the legislation of 1865 by

(1) [1916] 1 A.C. 566. (2) [1921] 1 A.C. 413.

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s. 20 was invalid also. On the contrary, Viscount Haldane, at page 426, pointed out that by reason of s. 20 of the Act of 1868, the Act of 1865 had been in force for only three years and that

> Section 91 of the British North America Act, 1867, had conferred on the Dominion Parliament exclusive authority to legislate in regard to sea coast and inland fisheries, and it was under this authority that the *repeal* was effected.

At page 430 the following occurs:

> As to s. 3 of the Act of 1865 * * * this was obviously within the competence of the Legislature which was then unrestricted in the scope of its power to alter the provincial law. No distinction was, or needed to be, contemplated between power of regulation and power over proprietary title. Bearing this in mind, their Lordships think that s. 3 was in its character as much a regulative provision as it was one directed to property. These two aspects of its subject matter were really then inseparable. In so far as its powers were powers of regulation, they have passed to the Dominion Parliament.

There was no discussion as to whether, because of the fact that the subject matter of s. 3 of the Act of 1865 had become vested for legislative purposes in two different legislatures, the repeal in 1868 was ineffective as to that section. Perhaps, consistently with the earlier decisions that should have been the result, but the point was not in issue.

I therefore think that what was said by Lord Watson in 1896 A.C., at page 366, in the passage already cited is limited to that which was before the board in that case, namely, the repeal as a whole of a statute or certain specific parts. If Parliament cannot enact, it cannot repeal, no matter whether the attempted mode is by express repeal or by the enactment of repugnant legislation.

> For neither the Parliament of Canada nor the provincial legislatures have authority under the Act to nullify, by implication any more than expressly, *statutes* which they could not enact;

Per Viscount Haldane in the *Great West Saddlery* case, (1).

However, where, as in the case at bar, pre-Confederation, or pre-union legislation covers matters as to which there has since obtained a division of legislative jurisdiction by reason of sections 91 and 92 the respective legislatures may deal with the matters competent to each and thereby affect the position formerly existing under the legislation enacted prior to such division. In the present case there is no

(1) [1921] 2 A.C. 91 at 117.

"express" repeal but in my opinion the three Dominion statutes under consideration do now effectively "alter" and "abolish" the privileged position to which the respondent was entitled under the legislation of Newfoundland prior to 1949.

The word "laws" in Term 18 is not synonomous with "statutes", as it is clear from subsection (2) that when the one or the other was intended, the proper term was employed. Accordingly, any law, statutory or non-statutory, may, by the express terms of subsection (1), be dealt with by the legislature competent to deal with the subject matter. There is no question but that Parliament has exclusive jurisdiction to deal with the subject matters of legislation embodied in the three statutes in question. If the pre-union Newfoundland statutes are to be considered as continuing in force after the proclamation of the Dominion statutes, on the theory that the Newfoundland acts are special legislation and, therefore, constitute an exemption from the terms of the general Acts, s. 49 of the 1949 Act, already quoted, is effective to abolish the position obtaining under the special legislation.

The decision in this court In *re New Brunswick Penitentiary* (1), is in harmony with the view just expressed. In that case certain questions were referred to the court by the Governor General in Council with regard to the power of Parliament to legislate as to persons to be confincd in the New Brunswick Penitentiary. That penitentiary had been constituted, and provision made, for the class of persons to be confined therein, by pre-Confederation legislation. Subsequent to 1867 Parliament passed legislation providing for a joint penitentiary for the provinces of Nova Scotia, New Brunswick and Prince Edward Island, and delineating the class of persons to be confined therein. On a question raised by the Government of New Brunswick as to the power of Parliament to so legislate, it was held that under s. 91 Parliament had power to so enact, and that that power was in no way limited, restricted, or affected by any legislation of the province either prior or subsequent to Confederation.

While the exemptions here in question originated by way of contract, they required for their efficacy the inter-

(1) (1880) Coutlée's Cases, 24.

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vention of the legislature and, as already pointed out, with respect to the matters with which we are here concerned, legislative jurisdiction passed upon union to Parliament. There is no ground, in my opinion, upon which it can be said that Parliament is restrained from legislating as it sees fit with regard to such subject matter.

The questions should, therefore, be answered in the negative.

ESTEY J.:—The Bowater's Newfoundland Pulp and Paper Mills, Ltd., by virtue of a series of agreements concluded with the Government of Newfoundland from 1915 to 1947 assumed obligations and obtained exemptions from certain taxes and customs duties, and in this reference it claims that these exemptions were continued under the Terms of Union between the Dominion of Canada and Newfoundland.

The said agreements were all confirmed by statutes and such as were in force at the date of the Union were continued by virtue of para. 18(1) of the Terms of Union and are hereinafter referred to as "Bowater's law."

We are in this reference in the main concerned with the provisions of the 1927 and 1938 agreements under which it was provided that Bowater's Company "in respect of its income for each year" should pay a tax between the years 1932 and 1973 not to exceed the sum of $150,000 per year; that apart from an exemption not material hereto, upon payment of that tax "the company shall be exempt from all taxation of every kind whatsoever other than duties (including sales tax) levied under the general laws of the colony on goods imported by the company and not otherwise exempt." These words "not otherwise exempt" refer to provisions under the agreements whereby Bowaters were granted exemptions from customs duties, completely or partially, upon specified commodities for varying periods.

Under the authority of 18(2) of the Terms of Union (hereinafter quoted) the Governor General in Council proclaimed as of April 1, 1949, the *Customs Act*, the *Tariff Act* and other named statutes, and by a further proclamation of May 9, 1949, the *Income War Tax Act* and other named statutes were brought into force as of May 16, 1949, in the province of Newfoundland and certain pre-union

statutes of Newfoundland were specifically repealed by each of these proclamations. Bowater's law was not included as it did not come within the terms of 18(2) (*a*), (*b*) and (*c*) and therefore could not be dealt with by proclamation. These provisions of 18(2) (*a*), (*b*) and (*c*), however, do not apply to statutes enacted by the Parliament of Canada.

Later in 1949 the Parliament of Canada amended the *Income War Tax Act* and these amendments came into force December 10, 1949, (S. of C., 1949, 2nd Sess., c. 25). The amendments relative to this discussion are secs. 49 and 50: (See p. 618 *supra*).

The amendments in s. 49 are intended to repeal *pro tanto* Bowater's law and as a consequence the three questions under consideration were submitted to this court. The answers thereto are dependent upon the meaning and effect of the Terms of Union.

The procedure contemplated by s. 146 of the B.N.A. Act for the admission of Newfoundland into Confederation was not followed as at all times material to negotiation and conclusion of the Terms of Union Newfoundland was governed by a Commission. The Terms of Union were negotiated and signed by representatives of both Newfoundland and the Dominion of Canada and were made a schedule to legislation approving it in Canada (S. of C. 1949, c. 1), and Great Britain (12 & 13 Geo. VI, c. 22). This approval gives to every clause of the agreement statutory validity: *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (1), 31 Hals., 2nd ed., p. 465, paras 569 and 571; *International Rly. Co.* v. *Niagara Parks Comm.* (2).

The Terms of Union contain the following paragraph: (Here follows Term 3 for which see p. 619 *supra*).

Then under the general heading "Continuation of Laws" para. 18 reads as follows: (See p. 618 *supra*).

On behalf of the Dominion it is pointed out that sub-paras. (1) and (4) of para. 18 are in effect identical with the relevant portions of s. 129 of the B.N.A. Act and are enacted in respect of all laws in force in Newfoundland at the time of the union. Further, that sub-para. 18(1) continues Bowater's law in force and provides for its repeal,

(1) [1901] 2 Ch. 37 at 50.

(2) [1937] 3 All E.R. 181 at 184.

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abolition or alteration; that s. 49 of the *Income War Tax Act* (S. of C. 1949, 2nd Sess., c. 25, s. 49 and 50) is competent Dominion legislation which specifically refers to a law enacted prior to April 1, 1949, in Newfoundland and goes on to provide that no person is entitled to any deductions, exemption, immunity from or any privilege in respect of Dominion duties or taxes as therein specified.

On behalf of Bowaters it is contended that when para. 18 in the Terms of Union is read and construed as a unit that the meaning and purpose of sub-para. 18(3) can only be given effect to if the pre-union laws of Newfoundland are divided into three categories:

(*a*) those which fall clearly within the Dominion field under the B.N.A. Act and are subject to be repealed, abolished or altered by the Federal Parliament;

(*b*) those which fall clearly within the provincial field and are subject to be repealed, abolished or altered by a provincial Legislature;

(*c*) those not falling within either of the categories (*a*) or (*b*) but which are of mixed subject matter and inseverable such as the Bowater's law, which is a law in which matters under Dominion and provincial control are so interwoven as to constitute an indissoluble mixture of consideration flowing to and from Bowaters as to be inseverable.

Counsel for Bowaters submits that laws classified within the foregoing paras. (*a*) and (*b*) are dealt with under sub-para. 18(1) and those within (*c*) under sub-para. 18(3); further, that Bowater's law is of "mixed subject-matter," in its nature "indivisible or incapable of severance" and as such is classified under para. (*c*) and therefore dealt with only under sub-para. 18(3). It is further contended that in any event the enactment of the above quoted s. 49 did not repeal any part of Bowater's law.

It was submitted that inasmuch as the statute in Great Britain confirming the Terms of Union provided "The agreement containing Terms of Union between Canada and Newfoundland * * * shall have the force of law notwithstanding anything in the British North America Acts, 1867 to 1946," that in the construction of the Terms of Union no regard should be had to the provisions of the

B.N.A. Acts, 1867 to 1946. The Canadian statute approving the agreement did not include any such provision. These differences in the respective enactments, the express provisions of para. 3 that the B.N.A. Acts, 1867 to 1946, "shall apply to the Province of Newfoundland * * * except in so far as varied by these terms," the repeated references to the B.N.A. Act in the Terms of Union, together with the fact that Newfoundland could not in the circumstances be admitted as contemplated by s. 146 of the B.N.A. Act, suggest that the words in the above mentioned British statute were inserted to remove any question that might arise out of the procedure followed not being that provided for in s. 146 rather than that in the construction of the Terms of Union no regard should be had to any provisions of the B.N.A. Act, 1867 to 1946.

The B.N.A. Act divides the entire legislative field between the Parliament of Canada and the legislatures of the provinces, or as it is stated by Lord Hobhouse:

> * * * an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies * * * *Bank of Toronto* v. *Lambe* (1).

See also *A.-G. for Ontario* v. *A.-G. for Canada* (2).

The B.N.A. Act therefore defines the legislative power and authority of the Dominion and the Provinces to enact legislation. It has, however, been determined that the power to repeal is co-extensive with that to enact. *Dobie* v. *Temporalities Board* (3); *A.-G. for Ontario* v. *A.-G. for Dominion* (4).

The respective jurisdictions of the Dominion and the Province in respect to pre-Confederation legislation was considered by the Privy Council in *A.-G. for Canada* v. *A.-G. for Quebec* (5). The particular legislation there in question was enacted in 1865, (29 Vict., c. 11), and therefore prior to Confederation, by the Parliament of Upper and Lower Canada. After Confederation the Parliament of Canada by s. 20 of the Fisheries Act (S. of C. 1868, c. 60) repealed the legislation of 1865. It did not, however, follow that all of the powers exercised by Lower Canada became

(1) 12 App. Cas. 575 at 587; 1 Cam. 378 at 388.
(2) [1912] A.C. 571 at 581; 1 Cam. 723 at 732.
(3) 7 App. Cas. 136.
(4) [1896] A.C. 348; 1 Cam. 481.
(5) [1921] 1 A.C. 413; 2 Cam. 198.

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thereby vested in the Dominion. Referring particularly to s. 3 of the pre-Confederation Act of 1865 their Lordships stated:

> As to s. 3 of the Act of 1865, which enables the Commissioner of Crown Lands, where the exclusive right of fishing does not exist by law in favour of private persons, to issue fishing leases and licenses for fisheries and fishing wherever carried on, this was obviously within the competence of the Legislature which was then unrestricted in the scope of its power to alter the provincial law. No distinction was, or needed to be, contemplated between power of regulation and power over proprietary title. Bearing this in mind, their Lordships think that s. 3 was in its character as much a regulative provision as it was one directed to property. These two aspects of its subject matter were really then inseparable. In so far as its powers were powers of regulation, they have passed to the Dominion Parliament * * * the disposal of property and the exercise of the power of regulation. The former of these functions has now fallen to the province, but the latter to the Dominion; and accordingly the power which existed under s. 3 of the Act of 1865 no longer exists in its entirety.

This illustrates how completely the field of legislation is divided between the Dominion and the province and the necessity of careful examination of the statute and of the individual sections thereof in order to determine whether a particular provision should be classified as within the Dominion or provincial legislative field within the meaning of the B.N.A. Act.

In re New Brunswick Penitentiaries (1), this court held that legislation enacted relative to penitentiaries by the Parliament of Canada superseded legislation passed by New Brunswick prior to Confederation and continued in force in that province after Confederation by virtue of s. 129 of the B.N.A. Act.

The foregoing decisions were made under the B.N.A. Act of 1867 and indicate how pre-Confederation legislation has been treated.

It is not contended that the legislative division set forth in the foregoing paras. (*a*), (*b*) and (*c*) exists under s. 129 of the B.N.A. Act, s. 16 of the Alberta and Saskatchewan Acts, or under any of the express terms to be found in the admission of any other province. It would seem, therefore, that if in the Terms of Union it was intended to introduce such a classification and to effect so radical a change in the construction of 18(1) by the inclusion of 18(3), appropriate language would have been used to express that intention in

(1) Coutlée's S.C. Cas. 24.

either one or both of sub-paras. (1) and (3); on the contrary, 18(1) is expressed in clear and comprehensive language without any exception or limitation and no such division is suggested in either that sub-para. or sub-para. (3).

Moreover, the acceptance of this submission on behalf of Bowaters would impose a limitation upon the Parliament of Canada to the extent that competently enacted legislation so far as it would be contrary to the pre-Confederation Bowater's law could have no application to that company until such time as Newfoundland would give its consent to the repeal of Bowater's law. In effect the exemptions from taxation and payment of certain customs duties provided for in Bowater's law would remain until such time as Newfoundland permits the Parliament of Canada to legislate in regard thereto. No similar provision was embodied in the Terms of Union of any other province, and while that is not at all conclusive, it is significant in this sense, that a provision so important, far reaching and contrary to the general scheme of legislative jurisdiction under the B.N.A. Act would have been expressed in language clear and unambiguous. Sub-para. 3 contains no such language. Indeed, its language as ordinarily construed does not suggest that the legislative authority of either the Dominion or the province is interfered with.

The opening words of sub-para. 18(3) "notwithstanding anything in these terms," together with its express provision that it applies to "any law in force at the date of the union" indicates that its provisions are by way of an exception to the general provisions of the Terms of Union rather than as submitted a provision to deal with a third (para. (*c*) *supra*) classification of legislation. The language of 18(1) is general and all embracing: That of 18(3) provides that notwithstanding all that has been provided "the Parliament of Canada may with the consent of the Legislature of the Province of Newfoundland repeal any law." These sub-paras. 18(1) and (3) when read and construed together do not support a construction that they are dealing with separate and distinct portions of a general classification of legislation such as submitted by Bowaters in paras. (*a*), (*b*) and (*c*).

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Bowater's law is not mentioned in sub-para. 18(3) nor in any other section throughout the Terms of Union. The absence of any specific reference to this law or any group or type of laws in which it might be included rather suggests that the classification of legislation such as here submitted was not intended but rather that all legislation should be subject to the provisions of 18(1).

It may be implicit in the submission for Bowater's that neither the Dominion nor the Province of Newfoundland can legislate with respect to Bowater's law until such time as the province shall consent to its repeal by the Parliament of Canada under sub-para. 18(3). The difficulty is to find language to support such a view. Whatever opinion one may entertain of the submission with respect to the suggested construction of sub-para. 18(3) in its application to the Dominion it does not contain language that suggests any such limitation upon provincial enactments. It would therefore appear that the province might repeal, abolish or alter any part of Bowater's law classified within provincial jurisdiction. Para. 24 of the 1938 Bowater's law that "all property of the company within the area of any towns or settlements established by the company shall be exempt from municipal taxation" is such a provision. If it was intended that the province in respect of Bowater's should not possess the power to legislate within its jurisdiction, again appropriate language to that effect would have been included. Its omission rather supports the view that it was intended both the representatives in Parliament and the Legislature would legislate in their respective fields without any limitation such as that involved in the submission on behalf of Bowater's.

Counsel for Bowater's further contends that if Bowater's law comes within the provisions of sub-para. 18(1) the Parliament of Canada cannot repeal that law as it has purported to do by the enactment of s. 49 of the *Income War Tax Act, supra.* It is here contended that Bowater's law is indivisible or incapable of severance and therefore its provisions cannot be divided between the Dominion and the province as contemplated by the B.N.A. Act and cannot be repealed, abolished or altered by the Parliament of Canada.

This impossibility, as I understand it, is not because the provisions of Bowater's law cannot be allocated to the respective Dominion and provincial legislative jurisdictions but rather that the subject-matters of that legislation are so "inextricably interwoven into what constitutes a single Newfoundland law" that it "must be regarded as comprising the terms of a single contract which has been confirmed and given the force of law by legislation," that to do so in effect destroys it or makes it something entirely different. It is not contended that Newfoundland prior to union had not the jurisdiction to repeal the whole or any part of Bowater's law, but though the legislative jurisdiction of Newfoundland was under the Terms of Union completely divided between the Parliament of Canada and the legislature of the province, neither acting independently can now repeal Bowater's law.

Bowater's law, as already stated, is pre-union legislation enacted by a political entity that no longer exists and is carried forward as legislation in force in the Province of Newfoundland by virtue of sub-para. 18(1) of the Terms of Union. Under the B.N.A. Act the entire legislative field is divided between the Dominion and the province. *Bank of Toronto* v. *Lambe, supra,* or as stated by Earl Loreburn, L.C.:

> * * * the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. *A.-G. for Ontario* v. *A.-G. for Canada, supra,* at p. 581.

The Terms of Union under sub-para. 18(1) provide that all pre-union legislation continued in force in the Province of Newfoundland shall be divided as provided in the B.N.A. Act. Under this provision Bowater's law is subject "to be repealed, abolished or altered by the Parliament of Canada or the Legislature of the Province of Newfoundland" legislating within their respective jurisdictions as defined under the B.N.A. Act, 1867 to 1946. In fact, the provisions in respect to customs, excise and income legislation here in question are clearly within the legislative jurisdiction of the Parlament of Canada.

The principle applied in the *Dobie* case, *supra,* that the power to repeal is co-extensive with the power to enact is applicable to Bowater's law. It, however, applies once the

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respective jurisdictions of the Dominion and the province are determined but does not assist in the determination thereof. It does not suggest that because the statute cannot be entirely repealed by either the Dominion or a province that either cannot repeal or amend that portion of the statute which is within its legislative jurisdiction. The fact that such legislative action on the part of one or the other may create difficulties to be subsequently dealt with does not affect the question of jurisdiction. Whatever such difficulties may be will no doubt in due course be dealt with by the appropriate authorities, but those are not matters to be dealt with by the courts, particularly when as here, this court is called upon to determine only the question of jurisdiction. Under the scheme of Confederation and under the Terms of Union even if the "rights and obligations are inextricably interwoven into a single Newfoundland law" as here contended, that would not alter or affect the legislative classification of the various portions of Bowater's law nor the jurisdiction of either the Dominion or the province to deal therewith.

The contention that the provisions of Bowater's agreement are not severable as that term has been used in regard to contracts found to contain provisions in restraint of trade or statutes in part *ultra vires* of the enacting body are not relevant to this discussion. In those cases when a portion of the contract or statute has been declared invalid the question arises as to the disposition of the remaining portion. Hals. 2nd ed., vol. 32, p. 439; *A.-G. for Alberta* v. *A.-G. for Canada* (1). Here Bowater's law as confirmed by statute is entirely valid and the issue quite different. We are here first concerned with the law as a whole and then with the jurisdiction of the Parliament of Canada to repeal a portion thereof.

The jurisdiction of Parliament to enact legislation must be determined from the nature and character of the legislation. Any statement or declaration contained therein on the part of Parliament as to its jurisdiction is not conclusive. Once, however, the jurisdiction to enact the legislation is found to exist, the language thereof must be examined to determine the meaning and intent of Parliament in enacting the same. The language of s. 49,

(1) [1947] A.C. 503 at 518.

supra, while it makes no specific reference to Bowater's law, is designed to and does cover just such provisions as contained in that law. It expressly covers any such legislation in all of the provinces and specifically covers such pre-union legislation in Newfoundland. The contention that sub-para. 18(1) should be construed to apply only to repeal, abolition or alteration when the statute specifically so states would impose an unwarranted limitation upon the comprehensive language there used.

The foregoing finds support in the principle that one parliament cannot bind its successors.

> That parliaments have more than once intended and endeavoured to pass Acts which should tie the hands of their successors is certain, but the endeavour has always ended in failure. Dicey, Law of the Constitution, 9th ed., p. 65.

If it were not for this principle a parliament finding itself bound by the legislation of its predecessors would be unable to discharge that imperative duty which rests upon every parliament to legislate as in its wisdom it may determine to be necessary or desirable.

The enactment of the foregoing s. 49 of the *Income War Tax Act* was legislation competently enacted by the Parliament of Canada and enforcible as regards the Bowater's Company, notwithstanding the provisions of the Bowater's law.

The questions here submitted should be answered:

(1) No.

(2) No.

(3) No.

LOCKE J.:—At the date of the entry of Newfoundland into Confederation Bowater's Newfoundland Pulp and Paper Mills Ltd. was subject to the obligations imposed and entitled to the benefit of certain rights and exemptions granted by a series of agreements entered into by it and its predecessors in title with the Dominion of Newfoundland, and by a series of statutes by which they were confirmed. The company carries on very extensive operations in the manufacture of newsprint and sulphite pulp and other allied activities at Cornerbrook and elsewhere in Newfoundland and has extensive timber limits in the province. The agreements were made and the statutes which approved and confirmed them and gave to their terms the force of

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law were enacted at various times between the years 1915 and 1946 and dealt with a variety of matters, all of which were then within the legislative jurisdiction of the Dominion. Pursuant to and relying upon these agreements, the company and its predecessors have invested in Newfoundland some $86,000,000 in the construction and equipping of manufacturing plants, the establishment of towns and settlements, the development of water power, the acquisition of timber limits, and in other works and plant necessary for the carrying on of its activities. In consideration of the undertaking of these extensive developments which, it is evident, were regarded as being of importance and benefit to the state, and the assumption of various obligations of a continuing character including an agreement to pay to the Dominion in respect of its income for each year beginning with the year 1928 and ending with the year 1973 a tax of twenty per cent of its income, limited to a maximum of $75,000 for the years 1928 to 1931 inclusive and $150,000 for each of the years 1932 to 1973 inclusive, the Dominion of Newfoundland by the said agreements and by the various statutes undertook, *inter alia,* that the stocks, shares, bonds, debentures and other securities of the company and the dividends or interest payable in respect of them and the receipt of the same by holders domiciled in Newfoundland (with certain named exceptions) should be exempt from taxation until the year 1977, that certain described goods and commodities imported by the company should be free of customs duties and others subjected to duties limited in amount, and that all its property within the area of towns and settlements established by it should be exempt from municipal taxation.

By s. 146 of the *British North America Act, 1867,* provision was made for the admission of Newfoundland, Prince Edward Island and British Columbia into the union on addresses from the Houses of Parliament of Canada and of the respective legislatures of what were referred to as the Colonies or Provinces "on such terms and conditions in each case as are in the addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act; and the provisions of any Order-in-Council in

that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland." In the case of the Provinces of Canada, Nova Scotia and New Brunswick, the union of which was effected by the Act, s. 129 provided that all laws in force in these provinces at the time of 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.

When Newfoundland sought to enter the union it had no legislature, the power to enact laws having since the coming into operation of letters patent granted by His Majesty on January 30, 1934, been vested in the Governor and the Commission of Government which it authorized. In these circumstances, the union was brought about by amendment to the British North America Act passed in 1949 which, by section 1, provided that:—

> The agreement containing terms of Union between Canada and Newfoundland set out in the schedule to this Act is hereby confirmed and shall have the force of law notwithstanding anything in the British North America Acts 1867 to 1946.

Section 3 of the Terms of Union provides that the British North America Acts 1867 to 1946 shall apply to the new province in the same way and to the like extent as they apply to the provinces heretofore comprised in Canada "except in so far as varied by these terms 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 all of the provinces originally united."

Subsections 1 and 4 of s. 18 of the Terms of Union repeat in substance s. 129 of the Act of 1867, with the substitution of Newfoundland for the names of the former provinces which then entered the union. Section 18 contained, however, the following further provisions governing the alterations of the laws of the new province which are not to be found in the British North America Act, or in any of its amendments made prior to March 31, 1949, or in the Terms

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of Union under which British Columbia and Prince Edward Island entered Confederation, or the statutes which established the Provinces of Manitoba, Alberta or Saskatchewan. These provisions read:— (See Term 18(2) at p.—? *supra*).

By an amendment to *The Income Tax Act* and *Income War Tax Act* (s. 49, c. 25, 13 Geo. VI), it was provided that notwithstanding any other law heretofore enacted by a legislative authority other than the Parliament of Canada, including a law of Newfoundland enacted prior to April 1, 1949, no person shall be entitled to any exemption or immunity from or any privilege in respect of any duty or tax imposed by an Act of the Parliament of Canada. By a proclamation made on April 1, 1949, the *Customs Act* and the *Customs Tariff Act* were declared to be in force in the new province as of that date, and by a further proclamation of May 9, 1949, *The Income Tax Act* was declared to be in force on the date of the publication of the proclamation. These proclamations are in terms stated to be made under the provisions of paragraph 2 of Term 18. The amendment to *The Income Tax Act* was not one made with the consent of the Legislature of the Province of Newfoundland under the provisions of subsection 3 of section 18. If the legislation is effective, a substantial part of the consideration which the agreements and the confirming statute provided should move from Newfoundland to the company and upon the faith of which the latter and its predecessors entered into the agreements, expended these large sums of money and undertook these continuing obligations, would be taken away.

Newfoundland was prior to its entry into Confederation a unitary state: the property and revenues of the Dominion were vested in the Sovereign, subject to the disposal and appropriation of the Governor and the Commission of Government. It cannot be successfully contended that by amending or repealing the statutes which confirmed and gave the force of law to the various agreements made between the company and the Dominion these might not have been either amended or terminated. Upon such entry, however, the powers, executive and legislative, and the right to dispose of the said revenues were distributed between the new province and Canada in the manner

defined by s. 91 and 92 of the British North America Act, subject, however, to the terms of the amendment of 1949. Since the statutes in question confer rights such as the exemption from municipal taxation and all other provincial taxation, which are matters lying entirely within the jurisdiction of the province, and at the same time grant exemptions from custom duties and taxation of a nature lying entirely within the jurisdiction of the Dominion, the question to be determined is whether by unilateral action the Dominion may "repeal" or alter the statutes or the law as declared by them relating to matters clearly falling within section 91.

The amendment to the Income Tax Act of 1949 and the terms of the *Customs Act* and the *Customs Tariff Act* of Canada are repugnant to the terms of the statutes of Newfoundland dealing with these matters which have been referred to. Parliament has not assumed to repeal the statutes in toto but merely to amend the law as declared by them in respect to matters within the jurisdiction of Parliament. In determining the question no assistance is obtained from what transpired in the years immediately following the Act of Union of 1867. Parliament at that time by a series of enactments assumed to repeal in whole or in part a large number of statutes of the former Provinces of Canada, Nova Scotia and New Brunswick, but its power to do so was not questioned. In 1880 there was a reference to this court *In Re New Brunswick Penitentiary* (1), to determine whether the legislative jurisdiction of the Parliament of Canada in respect of the establishment, maintenance and management of penitentiaries could in any way be limited, restricted or affected by legislation of the Province of New Brunswick, either previous or subsequent to Confederation. It was there held that since Canada had the exclusive power of legislation in reference to criminal law, except the constitution of courts of criminal jurisdiction but including procedure in criminal matters and also as to the establishment, maintenance and management of penitentiaries, Parliament alone was vested with power to decide what classes of prisoners should be imprisoned and maintained in the penitentiary. I refer to the case since it was contended that it gave some support

(1) Coutlée's S.C. Cas. 24.

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to the position of Canada in the present matter. However, I find nothing in the decision which is of assistance in determining the present questions and, so far as I can discover, there is no decision binding upon us affecting them until the decision of the judicial committee in *Dobie* v. *The Temporalities Board* (1). The decision of the main point in that matter turned upon the proper interpretation to be placed on s. 129 of the *British North America Act, 1867,* and that section is not to be distinguished from subsections 1 and 4 of s. 18. Much reliance has been placed by the company upon the provisions of subsection 3 of s. 18 but, other than as an indication that the parties responsible for the drafting of the terms were of the opinion that there were laws in force in Newfoundland relating to matters within federal jurisdiction, the repeal or amendment of which would require the consent of the new province, I think the subsection does not affect the matter. The facts in *Dobie's* case are fully stated elsewhere and need not be here repeated. Lord Watson's judgment, at page 147, says that, in order to ascertain how far the Provincial Legislature of Quebec had power to alter or amend the Act of the Province of Canada passed in 1858, it was necessary to consider whether it could be established that in the absence of all previous legislation on the subject the Quebec Legislature would have been authorized by s. 92 to pass an Act identical in its terms and that, if it could not do so, it could not repeal or alter the statute of 1858. The statement, is, however, amplified and explained by what follows. In a later passage of the judgment, after pointing out that the Quebec Act of 1875 dealt with the civil rights of a corporation and of individuals, present or future, for whose benefit it was created, Lord Watson said that if those rights and interests were capable of division according to their local position in Ontario and Quebec respectively, the legislature of each province would have power to deal with them so far as situate within the limits of its authority, and then said:— (p. 150)

> The Quebec Act 38 Vict. c. 64 does not profess to repeal and amend the Act of 1858, only in so far as its provisions may apply to or be operative within the province of Quebec, and its enactments are apparently not framed with a view to any such limitation. The reason is obvious, and

(1) 7 App. Cas. 136.

it is a reason which appears to their Lordships to be fatal to the validity of the Act. The corporation and the corporate trust, the matters to which its provisions relate, are in reality not divisible according to the limits of provincial authority. In every case where an Act applicable to the two provinces of Quebec and Ontario can now be validly repealed by one of them, the result must be to leave the Act in full vigour within the other province. But in the present case the legislation of Quebec must necessarily affect the rights and status of the corporation as previously existing in the province of Ontario, as well as the rights and interests of individual corporators in that province.

Thus in the case of an Act of the Province of Canada applicable to the two provinces of Quebec and Ontario, either province, though it could not have enacted it, could validly repeal it in so far as it applied to matters within its own legislative jurisdiction, so long as it was left in full vigour in the other province. The decision in *Dobie's* case turned upon the point as to whether the Quebec Act in question dealt with matters which lay outside the powers given to the province by s. 92 and, as it dealt with the constitution and privileges of a company having its corporate existence and rights in Ontario as well as in Quebec, it was held *ultra vires*. The imposition of a federal income tax and of customs duties are within the powers vested in Parliament by section 91. It is apparently unfortunately the fact that in the present matter to deprive the company of these exemptions will be to cause virtually a frustration of the contracts. The question, however, is as to the right to exercise these powers and not the consequences of such exercise. I do not consider that the decision in *Dobie's* case affects that right, or that it is otherwise impaired or taken away.

By the terms of subsection 1 of s. 18 of the Terms of Union all laws in force in Newfoundland at the date of union are to continue, subject to be repealed, abolished or altered by the Parliament of Canada or by the Legislature of the Province of Newfoundland, according to the authority of Parliament or of the Legislature under the British North America Acts 1867 to 1946. In enacting the amendment to *The Income Tax Act* and proclaiming the *Customs* and the *Customs Tariff Act* and other statutes dealing with matters admittedly within federal jurisdiction and which are repugnant to the terms of the statutes in question, Canada has, in my opinion, altered the law as

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declared by them by a valid exercise of its powers under the British North America Act and the Terms of Union.

I would, therefore, answer the questions as follows:

1. No.
2. No.
3. No.

Solicitors for the Attorney General of Canada: *F. P. Varcoe* and *D. W. Mundell.*

Solicitor for the Attorney General of Newfoundland, *L. R. Curtis.*

Solicitors for Bowater's Newfoundland Pulp & Paper Mills Ltd.; *Heward, Holden, Hutchinson, Cliff, Meredith and Ballantyne.*

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* May 30, 31
* Oct. 3

ARTHUR SAUVAGEAU, JOSEPH SAUVAGEAU, CLÉOMEN SAUVAGEAU AND PRICE NAVIGATION COMPANY LIMITED (DEFENDANTS) ..... APPELLANTS;

AND

HIS MAJESTY THE KING (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Barge sunk in channel of navigable river—Obstruction to navigation—Removal by Department of Transport—Liability for costs of removal—Whether Minister must sell wreck—Whether tug towing barge in charge thereof—The Navigable Waters' Protection Act, *R.S.C. 1927, c. 140, ss. 14, 15, 16, 17.*

A barge owned by appellant, Sauvageau, foundered in the channel of the St. Lawrence River while being towed by a tug belonging to the other appellant, Price Navigation Co. Ltd. Because of its interference with navigation and in view of the inaction of appellants, the Department of Transport caused the wreck to be removed from the channel and left elsewhere on the bed of the river. The action taken by the Crown to recover the costs of the removal was maintained by the trial judge who held that the Minister was not bound to have the wreck sold and that both appellants were jointly and severally liable for the expenses.

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

Held (The Chief Justice and Rand J. dissenting) that the sale of the property removed from interference with navigation is a condition precedent to the recovery, under s. 17 of *The Navigable Waters' Protection Act,* of the expenses of removal unless there is nothing which can be sold. The Crown, invoking a statute which creates an obligation unknown at common law and which must be interpreted strictly, cannot recover as it did not bring itself within the conditions of the statute.

Per The Chief Justice (dissenting): As the Minister was not obliged to sell and furthermore as it was established that there was nothing which could be sold, the Crown can recover from the owner of the barge and from the tug, as being in charge of the barge, but not jointly and severally.

Per Rand J. (dissenting): The sale of the property is not a perequisite to recovery, but credit must be given to the owner for the salvage value, whether that value is realized by sale or by valuation. The owners of the tug do not come within the scope of s. 17 of the *Act.*

APPEAL from the judgment of the Exchequer Court of Canada, Angers J. (1), holding that both appellants were jointly and severally liable for the costs of removal of the wreck made by the Crown.

Léon Méthot, K.C., for appellant Sauvageau.

J. P. A. Gravel, K.C., and *C. Russell McKenzie, K.C.,* for appellant Price Navigation Co. Ltd.

William Morin, K.C., for the respondent.

The CHIEF JUSTICE (dissenting): Sa Majesté le Roi, par le moyen d'une Information, produite à la Cour de l'Échiquier (1), par le Procureur général du Canada, a réclamé des appelants la somme de $18,168.32 avec les intérêts légaux sur cette somme, à compter du 14 octobre 1941, et les dépens, comme représentant le coût des opérations d'enlèvement de l'épave de la barge *Belœil,* du 6 au 22 juin 1942.

Cette barge avait sombré dans le fleuve Saint-Laurent le 25 septembre 1941, alors qu'elle était à la remorque du *Chicoutimi,* propriété de l'appelante, "the Price Navigation Company Limited", et que durant ce remorquage, ainsi qu'il est allégué, la navigation de cette barge était sous le contrôle exclusif de ce remorqueur.

(1) [1948] Ex. C.R. 534.

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Le chenal où sombra la barge est entièrement navigable et fréquenté par des unités navales et marchandes de tout tonnage. Il fut allégué qu'elle était devenue un obstacle et un danger constant à la navigation dans les parages où elle avait sombré et que les navigateurs engagés dans la navigation se plaignirent à l'agent des Transports, à Montréal, des dangers auxquels les exposait l'épave.

A la suite de ces plaintes, l'agent du ministère des Transports, le 9 octobre 1941, mit en demeure les appelants d'avoir à enlever l'épave, mais, nonobstant ces mises en demeure, ils négligèrent de se conformer à la demande du ministère des Transports et le Ministre dut, dans l'intérêt de la navigation, faire enlever cette épave dans le cours du mois de juin 1942 et la faire transporter dans un endroit où elle ne pourrait plus constituer un danger constant pour la navigation.

Les appelants Sauvageau, propriétaires de la barge, plaidèrent qu'ils n'étaient pas en charge de cette barge, qu'ils n'avaient aucun contrôle sur elle et que les personnes en charge n'étaient ni leurs serviteurs ni leurs préposés; que, d'ailleurs, le ministère des Transports n'a pas renfloué la barge et qu'il ne s'est en aucune façon conformé aux dispositions de la Loi de la protection des eaux navigables. Il en serait résulté que, dans les circonstances, le Roi n'avait aucun recours, soit en fait, soit en droit, contre les trois appelants Sauvageau.

L'autre appelante, "the Price Navigation Company Limited", a nié que lors du naufrage de la barge, elle en avait la charge et le contrôle exclusif. Elle a allégué dans sa plaidoirie écrite, qu'en fait, cette barge était alors sous le contrôle du capitaine et de l'équipage de la barge elle-même ou de ses propriétaires. Elle a ajouté que le coût de l'enlèvement était exhorbitant et excédait toutes dépenses raisonnables qui auraient pu être encourues de ce chef.

A ces défenses, Sa Majesté le Roi a répondu que ce ne fut que par suite de la négligence des appelants d'enlever l'épave et après avoir demandé des soumissions à plusieurs entreprises dans le renflouement et le déplacement des

épaves que le Ministre des Transports dut, dans l'intérêt de la navigation, prendre l'initiative de l'enlèvement et de déplacement de l'épave.

Sur la production de ces différentes défenses et réponses, la contestation fut liée.

Le jugement rendu par la Cour de l'Échiquier (Angers J.) (1) est à l'effet que l'épave de la barge *Belœil* était un obstacle à la navigation et qu'elle a été déplacée par le ministère des Transports à la suite de mises en demeure, par lettres recommandées, aux appelants Arthur Sauvageau et la compagnie Price; que cette compagnie avait le contrôle et la charge de la barge lorsqu'elle sombra et que, de ce fait, elle est tenue, en vertu de la Loi, au même degré que les propriétaires Sauvageau, au remboursement à Sa Majesté le Roi du montant payé pour l'enlèvement de l'épave.

Le jugement décide que la preuve révélait que le coût du déplacement s'est véritablement élevé à $18,168.32, tel que constaté par les états de comptes produits, et que cette somme a été payée à même les deniers publics du Canada durant l'année fiscale 1942-1943.

Le jugement décide, en plus, qu'il a été établi par la preuve que la ferraille de la barge aurait représenté une valeur d'environ $5,500, dont il aurait fallu, cependant, déduire celle de $500 pour réduire la barge à la ferraille; mais, qu'il fut également prouvé, sans contradiction, qu'il n'y avait aucun avantage à vouloir la renflouer et vendre l'épave, parce qu'il aurait fallu pour cela utiliser deux autres navires, au coût de $6,000, et que le ministère n'était pas intéressé dans autre chose que de libérer le chenal.

Après, ainsi que le Juge de la Cour de l'Échiquier le déclare, avoir examiné attentivement la preuve orale et documentaire, étudié la Loi et la jurisprudence, il en est venu à la conclusion que les appelants, en vertu de la Loi de la protection des eaux navigables, étaient conjointement et solidairement responsables du remboursement de la somme de $18,168.32, avec intérêt, du 21 avril 1943, date de la signification de l'Information, et les dépens; et il rendit jugement dans ce sens.

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L'Information avait également été signifiée à Dame Marie Poliquin-Malone, faisant affaires sous la raison sociale de J. C. Malone & Company, mais elle fut rejetée quant à Dame Marie Poliquin-Malone, et il n'y a pas eu d'appel de cette partie du jugement.

La cause est régie par la *Loi de la protection des eaux navigables* (S.R.C. 1927, c. 140).

L'article 14 de cette Loi décrète ce qui suit:

14. Si la navigation de quelque eau navigable sur laquelle s'étend la juridiction du Parlement du Canada est obstruée, embarrassée ou rendue plus difficile ou plus dangereuse par suite du naufrage d'un navire qui a sombré, s'est échoué ou s'est jeté à la côte, ou de ses épaves, ou de toute autre chose, le propriétaire, le capitaine, le patron ou l'individu en charge du navire ou autre objet qui constitue cette obstruction ou cet obstacle, doit immédiatement donner avis de l'existence de l'obstruction au ministre, ou au percepteur des douanes et de l'accise du port le plus rapproché ou dont l'accès est le plus facile, et placer et, tant que subsiste l'obstruction ou l'obstacle, maintenir, de jour, un signal suffisant, et, de nuit, une lumière suffisante pour en indiquer la situation.

2. Le ministre peut faire placer et maintenir ce signal et cette lumière si le propriétaire, le capitaine, le patron ou l'individu en charge du navire ou de l'objet qui cause l'obstruction ou l'obstacle manque ou néglige de le faire.

3. Le propriétaire de ce navire ou de cette chose doit aussitôt en commencer l'enlèvement, qu'il doit poursuivre avec diligence jusqu'à ce que l'enlèvement soit complet; mais rien dans le présent article ne peut être interprété comme restreignant les pouvoirs que la présente loi confère au ministre.

L'article 15, ayant trait au pouvoir du ministre des Transports (ci-devant Ministre de la Marine et des pêcheries), ordonne, entre autres:

15. Si le ministre est d'avis

(*a*) que la navigation de ces eaux navigables est ainsi obstruée, embarrassée ou rendue plus difficile ou dangereuse par le fait d'un navire ou de ses épaves, sombrés, en partie sombrés, ou jetés à la côte ou échoués, ou par le fait de quelque autre obstacle; ou..... il peut, lorsque l'obstruction ou l'obstacle ainsi causé subsiste pendant plus de vingt-quatre heures, le faire enlever ou détruire de la manière et par les moyens qu'il croit convenable d'employer.

L'article 16, concernant le transport de l'obstruction, sa vente et l'emploi du produit, est ainsi conçu:

16. Le ministre peut ordonner que ce navire, ou sa cargaison, ou les objets qui constituent l'obstruction ou l'obstacle, ou en font partie, soient transportés à l'endroit qu'il juge convenable, pour y être vendus aux enchères ou de toute autre manière qu'il croit plus avantageuse; et il peut en employer le produit à couvrir les dépenses contractées par lui pour faire placer et entretenir un signal ou un feu destiné à indiquer la situation de cette obstruction ou de cet obstacle, ou pour faire enlever, détruire ou vendre ce navire, cette cargaison ou ces objets.

2. Il est tenu de remettre tout surplus du produit de cette vente du navire, de la cargaison ou des objets, au propriétaire, ou à toutes autres personnes qui ont droit de réclamer la totalité ou partie du produit de la vente.

L'article 17, relatif au coût de l'enlèvement ou la destruction d'une épave et à son recouvrement, contient, entre autres, les dispositions suivantes:

17. Lorsque, sous l'autorité des dispositions de la présente Partie, le ministre

a) .....

b) a fait enlever ou détruire quelque débris, navire ou épave, ou quelque autre objet par lequel la navigation de ces eaux navigables est devenue ou deviendrait vraisemblablement obstruée, embarrassée ou est ou serait rendue plus difficile ou dangereuse; ou

c) .....

et que les frais d'entretien de ce signal ou de ce feu, ou de l'enlèvement ou de la destruction de ce navire, ou de ses épaves, de débris ou d'un autre objet, ont été payés sur les deniers publics du Canada; et que le produit net de la vente, effectuée en vertu de la présente Partie, du navire ou de sa cargaison, ou de l'objet qui causait l'obstruction ou en faisait partie, ne suffit pas à couvrir le coût ainsi acquitté à même les deniers publics du Canada, l'excédent de ces dépenses sur ce produit net, ou le montant total de ces dépenses s'il n'y a rien qui puisse être vendu, ainsi qu'il est dit ci-dessus, est recouvrable, avec dépens, par la Couronne,

a) Du propriétaire du navire ou de l'objet qui causait l'obstruction ou l'obstacle, ou du propriétaire-gérant, ou du capitaine, du patron ou de l'individu en charge du navire ou de l'objet lorsque l'obstruction ou l'obstacle s'est produit; ou

b) De toute personne qui, par son fait ou par sa faute, ou par le fait ou par la négligence de ses serviteurs, a été cause que cette obstruction ou cet obstacle s'est produit ou a subsisté.

Comme le dit très bien le Juge de la Cour de l'Échiquier: "L'économie de la Loi de la protection des eaux navigables est qu'aucune obstruction ne doit être tolérée dans les eaux navigables. Il en va de la sécurité des navires qui y circulent". Les appelants, ayant été notifiés d'avoir à enlever la barge du chenal où elle avait sombré, parce qu'elle était devenue un danger pour la navigation, étaient tenus de voir à l'enlèvement de cette épave de la position où elle se trouvait, et cela immédiatement puisqu'elle obstruait la navigation.

On voit par l'article 14, ci-dessus reproduit, qu'ils étaient même obligés de donner immédiatement avis de l'existence de l'obstruction au Ministre ou au Percepteur des douanes et de l'accise du port le plus rapproché ou dont l'accès est le plus facile, et placer et, tant que subsistait l'obstruction

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ou l'obstacle, de maintenir, de jour, un signal suffisant, et, de nuit, une lumière suffisante pour en indiquer la situation.

Le propriétaire de la barge devait aussitôt en commencer l'enlèvement et le poursuivre avec diligence jusqu'à ce que l'enlèvement fut complet. L'article 14 ajoute que rien dans cet article ne pouvait être interprété comme restreignant les pouvoirs que la Loi confère au Ministre.

Et, en vertu de l'article 15, si le Ministre était d'avis que la navigation des eaux navigables était ainsi obstruée, embarrassée ou rendue plus difficile ou dangereuse par le fait de cette épave, il avait le pouvoir, lorsque l'obstruction ou l'obstacle ainsi causé subsistait pendant plus de vingt-quatre heures, de le faire enlever ou détruire de la manière et par les moyens qu'il croyait convenable d'employer.

L'article 16 ajoute que le Ministre pouvait ordonner que la barge soit transportée à l'endroit qu'il jugeait convenable pour y être vendue aux enchères ou de toute autre manière qu'il croyait plus avantageuse. Il pouvait, dans ce cas, employer le produit de la vente à couvrir les dépenses contractées par lui pour faire placer et entretenir un signal ou un feu destiné à indiquer la situation de cette obstruction ou de cet obstacle, ou pour faire enlever, détruire ou vendre cette barge.

Dans le cas de vente, le Ministre est tenu de remettre tout surplus au propriétaire ou à toutes autres personnes qui ont droit de réclamer la totalité ou partie du produit de la vente.

Enfin, d'après l'article 17, lorsque le Ministre fait enlever ou détruire quelque débris ou épave, et que les frais d'entretien du signal qu'il a ordonné de faire mettre pour indiquer l'endroit où l'épave se trouvait, ainsi que les frais de l'enlèvement ou de la destruction sont payés sur les deniers publics du Canada; et que le produit net de la vente, effectuée en vertu de la Loi, ne suffit pas à couvrir le coût ainsi acquitté à même les deniers publics du Canada, l'excédent de ces dépenses sur ce produit net, ou le montant total de ces dépenses, s'il n'y a rien qui puisse être vendu, ainsi qu'il est dit ci-dessus, est recouvrable, avec dépens, par la Couronne, du propriétaire de l'objet qui causait l'obstruction, ou du propriétaire-gérant, ou du capitaine, du

patron ou de l'individu en charge de l'objet lorsque l'obstruction ou l'obstacle s'est produit; ainsi que de toute personne qui, par son fait ou par sa faute, ou par le fait ou par la négligence de ses serviteurs, a été cause que cette obstruction ou cet obstacle s'est produit ou a subsisté.

Les propriétaires Sauvageau avaient à bord de la barge, lors de son naufrage, deux de leurs employés, savoir, Henri-Paul Sauvageau et Daneau, qui étaient payés par eux. Le jugement les qualifie respectivement comme le matelot et le capitaine.

L'eau qui était entrée dans la cale de la barge provenait des fortes vagues soulevées par un vent assez violent durant la soirée. Le juge déclare que cette barge était étanche et en état de naviguer, en sorte que l'eau n'y est pas pénétrée par suite d'un défaut de la barge elle-même.

D'autre part, le juge décide, en fait, que "the Price Navigation Company Limited" avait le contrôle et la charge de la barge lorsqu'elle sombra. Pour décider ainsi, il s'est appuyé sur le témoignage de Larsen, le capitaine du remorqueur, qui, dit-il, "sur ce point est catégorique". C'est de là qu'il conclut que l'appelante "Price Navigation Company Limited" était donc tenue, comme les propriétaires Sauvageau, au remboursement à Sa Majesté le Roi du montant que celui-ci a payé pour l'enlèvement de l'épave.

La preuve invoquée par le juge de première instance est que la barge n'avait aucun pouvoir quelconque pour se mouvoir par elle-même. Elle était, sur ce point, entièrement dépendante du remorqueur, et, après avoir opéré le déchargement à Trois-Rivières, elle devait, pour pouvoir se rendre ensuite à Québec, s'en rapporter exclusivement au remorqueur lui-même.

Henri-Paul Sauvageau déclare bien que Daneau, le capitaine de la barge, était celui qui en avait la charge et qui donnait les ordres. La barge avait un gouvernail qui était manœuvré par Daneau et à ce point de vue l'on pouvait dire que ce dernier "était en charge de la navigation de la barge". Ce sont là les termes mêmes employés par Sauvageau dans son témoignage.

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D'autre part, Larsen, dont le juge de première instance déclare que le témoignage est "catégorique" à l'effet que le capitaine du remorqueur avait la charge de la barge, témoigne en effet comme suit:

Q. With a tow like that, who shaped the course?
R. The tow-boat, of course, or the master of the tow-boat.

"Tow-boat" signifie le remorqueur. Donc, d'après le capitaine de la "Price Navigation Company", le remorqueur était en charge de la navigation. Le fait est que, toujours au cours de son témoignage, il décrit ce qui se produisit lorsque les employés du remorqueur virent le signal donné par la barge les avertissant qu'elle était en péril:

—My mate was in the wheel-house. I told him we had better go for shelter and see what the trouble was. At that time, or a few minutes after, there was a steamer coming up and we had to give her the right-of-way. She proved to be the *Saguenay* of the Canada S.S. Line. By that time we were nearing the bend of Cap St. Charles, and then, after she had passed us, there was a big ocean steamer coming down, going towards Quebec. We had to give her the right-of-way and we started over to North. An ocean steamer was coming down with another auxiliary schooner and we had to obey the rules of the road, to give port to port.

A mon avis, cela démontre bien que pour la navigation la barge était entièrement à la charge du remorqueur et que c'est ce dernier qui devait nécessairement contrôler les opérations. La barge ne pouvait prendre aucune initiative à cet égard et devait suivre le remorqueur dans la direction que décidaient et que prenaient les personnes en charge de ce remorqueur.

Si, donc, il est exact, comme l'a déclaré Sauvageau, que le capitaine Daneau était en charge de la barge, il est difficile, à raison de la preuve, de ne pas en conclure, comme l'a fait le jugement dont il y a appel, que la navigation proprement dite du remorqueur et de la barge, prise comme unité, n'était pas sous le contrôle et en charge des employés de l'appelante, "the Price Navigation Company Limited".

Mais, il reste maintenant à appliquer à ces faits la *Loi de la protection des eaux navigables.*

La première objection des appelants serait que, en l'espèce, le Ministre n'aurait pas rendu une décision expresse à l'effet que la barge constituait un obstacle à la naviga-

tion et qu'il fallait la déplacer du chenal, mais le Statut n'exige pas que le Ministre rende une décision formelle. La version anglaise lui permet d'agir simplement "if, in his opinion", et la version française est "si le Ministre est d'avis". M. Weir, qui s'est décrit comme "Superintendent of Lights in the St. Lawrence River, in the Montreal District", dit qu'à la suite des plaintes reçues à l'effet que la barge constituait un obstacle à la navigation, il s'adressa au département pour faire enlever l'épave par un entrepreneur et demander des soumissions pour cette opération. Les soumissions furent demandées; puis, le département s'adressa à M. Weir lui-même pour savoir s'il prendrait la responsabilité de déplacer l'épave. Il soumit un chiffre, "much against my wishes", dit-il, et il reçut alors l'ordre du département de pourvoir lui-même à l'enlèvement de l'épave dans les vingt jours qui suivraient. Il consulta un capitaine Aussant, qu'il décrit comme "wrecking-master" et, muni des conseils de cet expert, il procéda au déplacement de l'épave. Le coût de ces opérations s'éleva à $18,168.32. Il en produisit un état comme exhibit dans la cause. Je ne trouve pas utile d'entrer ici dans les détails des opérations qui, d'ailleurs, ont été approuvées par le juge de première instance.

On demanda à M. Weir si quelque chose aurait pu être vendu après le déplacement et il ajoute que le produit de cette vente possible n'aurait pas été suffisant pour couvrir le montant de $6,000 que le département eut été obligé de dépenser pour le renflouement de l'épave. Lui-même, Weir, et le capitaine Aussant assistèrent personnellement à ce déplacement. Il ajoute, d'ailleurs, que le coût de l'opération n'inclut pas "the departmental equipment" qui fut utilisé dans ce but.

Il déclare même que premièrement les propriétaires ne se donnèrent même pas la peine de répondre à la lettre par laquelle il les sommait d'enlever l'épave, mais, qu'après que les courroies eussent été placées sous la barge, il offrit aux propriétaires de terminer l'opération eux-mêmes et que cette offre ne fut pas acceptée.

Le capitaine Aussant, entendu comme témoin, confirme le témoignage de M. Weir.

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Il résulte de tout ce qui précède que, en vertu du principe bien connu, *Omnia rite acta esse praesumuntur,* même si une décision formelle du Ministre était requise par l'article 15 de la Loi, l'on doit présumer que cette décision avait été rendue, puisqu'il n'est pas possible de penser que toutes ces opérations auraient été entreprises sur la seule initiative des employés du département. Lorsque M. Weir, comme il l'affirme, s'adressa au département pour en recevoir des instructions, il faut prendre pour acquit que ces instructions lui furent transmises de la part du Ministre; et si les appelants prétendaient que le Ministre n'avait pas été d'avis que les opérations, telles qu'elles ont été faites, devaient être entreprises, il incombait aux appelants eux-mêmes d'affirmer que le Ministre n'était pas intervenu et de le prouver.

On doit donc décider que, conformément à l'article 16 de la Loi, le Ministre a ordonné que la barge qui constituait l'obstruction soit transportée "à l'endroit qu'il jugeait convenable".

L'article 16 ajoute que le Ministre pouvait alors ordonner que l'épave fut vendue aux enchères "ou de toute autre manière qu'il croit plus avantageuse". Il pouvait également faire détruire ou vendre la barge. La façon d'en disposer était laissée à sa discrétion.

Dans le cas actuel, il ordonna que la barge fut enlevée de l'endroit où elle nuisait à la navigation, et du moment que cette opération eut été complétée, la barge fut laissée là où elle avait été transportée.

Comme l'a décidé le juge de première instance, le Ministre n'était pas obligé de faire plus. Il eut pu ordonner de détruire la barge ou de la vendre, mais l'article 16 exprime ces différentes opérations dans l'alternative et, en plus, il n'est que facultatif, de sorte qu'il n'impose aucune obligation au Ministre; le tout est laissé à sa discrétion.

S'il décide de faire vendre la barge, alors, d'après le paragraphe 2 de l'article 16, tout surplus du produit de la vente, au delà du coût de l'enlèvement ou de la destruction, doit être remis au propriétaire ou à toutes autres personnes qui ont le droit de réclamer ce produit.

Enfin, l'article 17 édicte que lorsque le Ministre a fait enlever l'épave et que les frais de cet enlèvement ont été

payés sur les deniers publics du Canada; et que le produit net de la vente ne suffit pas à couvrir le coût ainsi acquitté à même les deniers publics du Canada, l'excédent de ces dépenses sur ce produit net, ou le montant total de ces dépenses, s'il n'y a rien qui puisse être vendu, est recouvrable, avec dépens, par la Couronne, du propriétaire de la barge qui causait l'obstruction (ici, ce sont les appelants Sauvageau), ou du patron ou de l'individu en charge de l'objet lorsque l'obstruction s'est produite.

Un autre sous-paragraphe permet également au Ministre de recouvrer les dépenses de l'enlèvement de toute personne qui, par son fait ou par sa faute, ou par le fait ou par la négligence de ses serviteurs, a été cause que cette obstruction s'est produite ou a subsisté; mais, dans le cas actuel, la Cour de l'Échiquier a été d'avis qu'il n'y avait pas lieu d'appliquer ce dernier sous-paragraphe et il n'y a donc pas lieu d'y insister. Seule, d'ailleurs, l'appelante "the Price Navigation Company Limited" eut pu être tenue responsable, en vertu de ce sous-paragraphe, si, par ailleurs, il ne pouvait pas être décidé que sa responsabilité est déjà engagée, en vertu du sous-paragraphe (*a*) de l'article 17, comme patron ou individu en charge de la barge.

Les appelants Sauvageau, comme propriétaires de la barge, ne peuvent donc échapper à leur responsabilité pour le montant des dépenses encourues pour l'enlèvement que s'ils ont raison de prétendre que le Ministre n'aurait pas accompli les formalités exigées par la *Loi de la protection des eaux navigables*. La Cour de l'Échiquier a été d'avis que toutes les conditions requises avaient été remplies, et je ne puis me persuader, qu'en arrivant à cette conclusion, il y a erreur dans le jugement qui a été rendu.

Nous avons déjà constaté que le Ministre doit être tenu pour avoir été d'avis que la navigation des eaux navigables était obstruée, embarrassée ou rendue plus difficile ou dangereuse par le fait de l'épave. Il a sommé les propriétaires et l'appelante, "the Price Navigation Company Limited", de faire enlever ou détruire l'épave. Mais, non seulement cette sommation n'a pas été obéie, les appelants n'en ont pas tenu compte, et M. Weir déclare qu'il n'a reçu aucune réponse à la lettre de sommation qu'il leur avait fait parvenir par poste recommandée.

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Là-dessus, usant de sa discrétion, le Ministre ordonna que la barge fut transportée "à l'endroit qu'il jugeait convenable". Il se contenta de cela, le principal but des articles de la Loi en discussion ayant alors été rempli, l'obstacle ayant été écarté du chenal destiné à la navigation.

Il n'y a rien dans la Loi à l'effet que le Ministre était obligé de faire vendre l'épave. L'article 16, nous le répétons, n'est que facultatif. Mais, même s'il l'eut fait vendre, le reste de l'article, qui lui permet d'employer le produit de la vente à couvrir les dépenses contractées par lui, n'est également que facultatif. Ce n'est que dans le paragraphe 2 de l'article 16 qu'il devient impératif pour contraindre le Ministre, s'il a fait vendre, à remettre tout surplus du produit de cette vente au propriétaire ou à toutes autres personnes qui ont droit de réclamer la totalité ou partie du produit de la vente.

Venons-en maintenant à l'article 17 sur lequel les appelants se sont surtout retranchés pour prétendre que, comme il n'y avait pas eu vente de l'épave, la Couronne ne pouvait rien réclamer, soit du propriétaire, soit de "the Price Navigation Company Limited".

Cet article édicte que, lorsque les frais encourus par le département pour l'entretien des signaux ou pour l'enlèvement d'une épave ont été payés sur les deniers publics du Canada; et que le produit net de la vente de l'épave qui causait l'obstruction ne suffit pas à couvrir le coût ainsi acquitté à même les deniers publics du Canada, l'excédent de ces dépenses sur ce produit net, ou le montant total de ces dépenses s'il n'y a rien qui puisse être vendu, est recouvrable, avec dépens, par la Couronne, du propriétaire de l'objet qui causait l'obstruction, ou, en l'espèce, du patron ou individu en charge de l'objet lorsque l'obstruction ou l'obstacle s'est produit.

Il faut envisager cet article d'abord au point de vue des faits; et la première question qui se pose est celle de savoir s'il y avait quelque chose qui pouvait être vendu dans le cas qui nous occupe. Car, la condition est bien claire: s'il n'y a rien qui puisse être vendu, le montant total des dépenses de l'enlèvement est recouvrable, avec dépens.

Or—et le témoignage de M. Weir sur ce point n'est aucunement contredit—après que l'épave eut été déplacée du chenal de la navigation (j'emploie ici les mots mêmes du témoignage de M. Weir):

...if the vessel had been raised entirely, it would have meant taking the vessel out of the channel, where there was less current, turning around to the bottom again and using two other vessels with cross logs or gallow frames and raise her up again in order to bring her free of the water. This would have cost at least another $6,000—and the Department was not interested in any other part of the work than clearing the channel of an obstruction. That was the reason why the vessel was not raised entirely.

On lui demande alors:

Q. Now, could anything have been sold out of that wreck?

R. Possibly, but not for any great amount of money, not enough to pay the Department for the extra $6,000—as we have learned by experience on other occasions.

Q. Have you had quite a long experience in that wrecking business?

R. I believe I did my first wrecking job about 52 years ago.

Q. According to your experience, Captain, do those wrecks bring quite a lot of money whenever they are sold?

R. No money was to be made: all was lost.

On voit donc que la preuve démontre que, conformément à l'article 17 (*c*), il n'y avait rien dans le cas actuel qui pouvait être vendu; et il s'ensuit que le montant total des dépenses du département est recouvrable, avec dépens, par la Couronne.

Cette constatation dispenserait de discuter le sens de cet article 17 (*c*), mais, comme les appelants Sauvageau ont prétendu que le droit de la Couronne de recouvrer exigeait préalablement qu'il y eut eu une vente des débris de l'épave, et que la Couronne ne pouvait recouvrer que si la vente de ces débris avait eu lieu, je dois dire que je ne puis me rendre à ce raisonnement.

Les différents articles que nous avons cités au commencement de ce jugement doivent, suivant la règle d'interprétation ordinaire, être interprétés les uns par les autres. Aucun de ces articles ne fait une obligation au Ministre de vendre l'objet qui constituait l'obstruction ou l'obstacle. Au contraire, l'article 16, comme nous l'avons vu, est exclusivement facultatif. Comme le fait remarquer le témoin Weir, le principal but de tous ces articles est qu'un obstacle à la navigation soit écarté du chenal, et, du moment que cela est fait, ce but est atteint et l'esprit de la Loi a été observé.

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Même s'il y a eu vente, par suite de l'exercice de la discrétion du Ministre, là encore il n'y a pas d'obligation pour lui d'employer le produit à couvrir les dépenses qu'il a contractées pour faire placer les signaux ou pour faire enlever ou détruire l'obstacle. Cette partie de l'article 16 n'est également que facultatif.

Dans toutes ces dispositions de la Loi, le seul article qui soit impératif est le paragraphe 2 de l'article 16, en vertu duquel le Ministre, s'il a fait vendre, est tenu de remettre le surplus du produit de la vente, après avoir payé les dépenses contractées par lui, au propriétaire ou à toutes autres personnes qui ont droit de réclamer la totalité ou partie de ce produit.

Si l'on tente d'interpréter l'article 16 concurremment avec l'article 17, il serait donc incompatible que le Ministre, qui, dans sa discrétion, aurait décidé de ne pas vendre, ne put recouvrer ses frais d'entretien ou d'enlèvement que s'il décidait de vendre. En l'espèce, cela voudrait dire que le département aurait encouru une dépense de $18,168.32, et, parce qu'il aurait décidé de ne pas vendre, vu que cette vente non seulement n'aurait rien rapporté mais, au contraire, aurait ajouté encore aux frais du département, ainsi que le déclare le témoin Weir, l'article 17 ne lui permettrait pas de recouvrer de ceux qui les doivent les frais encourus par lui. Cette interprétation, suivant moi, conduirait littéralement à une absurdité.

En toute déférence, mon opinion est que l'article 17 doit se lire dans l'alternative: s'il n'y a pas eu vente, soit parce "qu'il n'y a rien qui puisse être vendu", soit parce que le Ministre, dans sa discrétion, a décidé qu'il n'y avait pas lieu de vendre, la Couronne a le droit de réclamer le coût de l'enlèvement, avec dépens.

Ce n'est que s'il y a eu vente et que, les frais encourus par le département ayant été déduits, il reste un surplus, ce surplus doit être remis au propriétaire ou à toutes autres personnes qui y ont droit. Dans ce cas, bien entendu, si le produit de la vente a été suffisant pour couvrir les frais du département, il n'y a rien à réclamer.

Pour ces deux raisons, à la fois parce que, suivant l'interprétation qui doit être donnée aux articles du Statut, le

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Ministre n'était pas tenu de vendre, et qu'il a droit de recouvrer ses frais, avec dépens; et parce que également, dans la cause actuelle, il a été prouvé qu'il n'y avait rien à vendre, puisque les frais qui eussent été rendu nécessaires pour la vente eussent absorbé et au delà de ce que la vente de la barge aurait pu rapporter; quelle que soit la façon d'envisager l'article 17, soit du point de vue de l'interprétation légale, soit du point de vue des faits, je suis d'avis que le jugement qui a été rendu contre les propriétaires Sauvageau est bien fondé et doit être maintenu.

Quant à l'appelante, "the Price Navigation Company Limited", je suis du même avis. Dans le cas qui nous occupe, c'était bien le personnel du remorqueur qui avait la charge de la barge. La preuve démontre que cette barge ne pouvait rien faire d'elle-même. Lorsque ceux qui s'y trouvaient, le capitaine Daneau et le matelot Sauvageau, constatèrent que les vagues embarquaient dans la barge et menaçaient de la faire couler, comme l'événement s'est produit, ils étaient apparemment impuissants pour empêcher l'accident. Ils se mirent à faire des signaux au personnel du remorqueur. Ce personnel se rendit bien compte que, si la barge était en péril, ce n'était pas les personnes qui étaient sur la barge qui pouvaient y remédier, mais, seul, le remorqueur pouvait le faire. Ainsi que l'avoua le capitaine Larsen, il a alors cherché "for shelter". C'est lui et non la barge qui devait se rendre à ce "shelter". Mais, lorsqu'il tenta de le faire, d'abord le *Saguenay*, de la Canada Steamship Line, venait vers le remorqueur et il dut lui abandonner le droit de passage. Après que le *Saguenay* l'eut dépassé, un paquebot descendait le fleuve dans la direction de Québec et là encore, il dut céder le droit de passage à ce paquebot. Ils étaient alors près de la courbe qui contourne le Cap Saint-Charles. Il tenta de se diriger vers le nord, mais un autre paquebot descendait le fleuve "with another auxiliary schooner", et pour obéir aux règles du chemin ("rules of the road"), une fois de plus le remorqueur fut empêché de suivre la manœuvre qui lui paraissait nécessaire.

A la suite de tous ces empêchements, les personnes en charge du remorqueur s'aperçurent que la barge *Belœil*

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avait disparu. Ils mirent alors à l'ancre et ils coupèrent la ligne de remorque qui les reliait à la barge.

Tout ce récit du capitaine Larsen démontre bien que c'est le remorqueur qui était en charge de la barge et que cette dernière, par elle-même, ne pouvait rien faire. Sans doute, il y avait sur la barge des personnes qui représentaient les propriétaires, mais, au sens de la *Loi de la protection des eaux navigables,* c'était bien le personnel du remorqueur qui était en charge de la barge et qui, comme les propriétaires, doit être tenu responsable vis-à-vis de la Couronne, ainsi que l'a jugé la Cour de l'Échiquier.

Les appelants Sauvageau ont cité, à l'appui de leurs prétentions, un jugement de cette Cour dans la cause de *Anderson* v. *The King* (1).

Je suis d'avis que cette cause ne s'applique pas à l'espèce actuelle. Il faut d'abord faire remarquer que dans cette affaire la Cour s'est divisée à trois juges contre trois et que, par conséquent, il n'y a pas eu vraiment de jugement rendu, ce qui a pour effet de laisser subsister le jugement de la Cour de l'Échiquier, rendu par l'honorable juge Cassels, et par lequel l'action de la Couronne avait été maintenue.

Mais il suffit de lire les notes des juges de la Cour Suprême (1) pour constater que la question qui a été soulevée et qu'ils ont discutée n'était pas celle de savoir si, pour avoir le droit de recouvrer les frais d'enlèvement, la Couronne était d'abord obligée, comme condition essentielle et préalable, de vendre les débris de l'épave pour réclamer le déficit, s'il y en avait après avoir appliqué le produit de la vente à ces frais.

Dans la cause d'Anderson, le département, qui avait demandé des soumissions pour l'enlèvement de l'épave, avait spécifié que, comme compensation à l'entrepreneur qui procéderait à l'enlèvement, "the materials in the obstruction, when the removal is satisfactorily completed, but not before, to become the property of the contractor."

Trois des juges (Sir Louis Davies, Juge en Chef, et les juges Brodeur et Mignault) furent d'avis qu'en procédant de la sorte, le département avait en substance observé la Loi, puisque l'entrepreneur, s'il n'eut pas eu la propriété des débris de l'épave, eut exigé un montant plus élevé pour

(1) (1919) 59 S.C.R. 379. .

opérer l'enlèvement; que le propriétaire avait eu le bénéfice de cette réduction du coût de l'enlèvement; qu'il n'avait donc subi aucun préjudice et que rien ne pouvait le justifier de refuser de payer le coût de l'enlèvement que lui réclamait la Couronne.

Les trois autres juges firent remarquer que là n'était pas la question. Le Statut prescrivait un mode spécial de procéder à la vente des débris de l'épave et il était nécessaire pour permettre à la Couronne de recouvrer, dans les circonstances, que le département ait procédé strictement suivant les prescriptions de la Loi.

Or, cette Loi ordonnait que, s'il y avait vente, il fallait qu'elle eut lieu "aux enchères ou de toute autre manière que le Ministre croyait plus avantageuse". Ici, il n'y avait pas eu vente aux enchères conformément au Statut, mais le Ministre avait adopté une procédure par laquelle l'entrepreneur de l'enlèvement devenait propriétaire des débris de l'épave, en vertu même de son contrat et sans qu'il y eut d'enchères. La méthode de procéder prescrite par le Statut n'avait donc pas été suivie et cela avait pour effet d'empêcher la Couronne de recouvrer.

Il n'est nullement discuté dans les raisons données par les juges en cette cause pour arriver à la conclusion adoptée par eux, la question de savoir si le Ministre est obligé de faire vendre, comme condition essentielle et préalable, pour lui permettre ensuite de recouvrer les frais d'entretien des signaux, ainsi que les frais d'enlèvement ou de destruction.

Comme le fait remarquer Lord Halsbury dans la cause de *Quinn* v. *Leathem* (1):

> ...Now, before discussing the case of *Allen* v. *Flood* (1898 A.C. 1) and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides.

Le jugement condamne les appelants conjointement et solidairement. Je ne crois pas qu'il s'agisse ici d'un cas de solidarité, bien que les deux débiteurs, c'est-à-dire, les propriétaires, d'une part, et "the Price Navigation Company

(1) (1901) H.L. 506.

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Limited", d'autre part, soient "obligés à une même chose", soit au paiement de la même somme d'argent (C.C. 1103); mais ils n'y sont pas obligés en la même qualité. Les appelants Sauvageau sont contraints à rembourser en leur qualité de propriétaires de la barge; l'appelante, "the Price Navigation Company Limited", y est tenue comme étant la personne en charge, au sens de la Loi.

Cependant, cela n'affecte pas le jugement qui a été rendu, car je suis d'avis que l'obligation des appelants est indivisible (C.C. 1124) et chacun d'eux y est donc tenu pour le total (C.C. 1126). Le résultat reste donc le même, sauf que le jugement doit subir cette légère modification: les appelants ne sont pas responsables du remboursement à l'intimé "conjointement et solidairement", mais chacun d'eux doit y être tenu pour la somme totale de $18,168.32, avec intérêt à compter du 21 avril 1943, et les dépens; mais réserve est faite en faveur de chacun d'eux du droit à exercer leur réclamation respective l'un contre l'autre, s'il y a lieu.

Je suis donc d'avis que les appels respectifs des propriétaires Sauvageau et "the Price Navigation Company Limited" doivent être rejetés, avec dépens.

The judgment of Taschereau and Locke JJ. was delivered by

TASCHEREAU J.:—Le Juge en chef, dans des notes très élaborées, a résumé de façon complète les faits qui ont donné naissance au présent litige. Il a également expliqué les prétentions respectives des parties, tant dans la plaidoirie écrite qu'à l'argument devant cette Cour, et il serait en conséquence inutile d'y revenir. Je me bornerai simplement à discuter un seul aspect de cette cause, qui à mon sens doit suffire pour en disposer. Je me dispenserai donc de considérer les autres questions soumises.

La *Loi de la Protection des Eaux Navigables* (R.S.C. 1927, c. 140), impose au propriétaire du navire, au capitaine, ainsi qu'à la personne qui en était en charge au moment du sinistre, une nouvelle obligation, inconnue du droit commun, et confère à la Couronne un droit, qu'avant

l'entrée en vigueur de ce statut, elle ne possédait pas. (*Anderson* v. *The King* (1)), (*Arrow Shipping Co.* v. *Tyne Improvement Commissioners* (2).

Dans la première de ces deux causes, M. le Juge Anglin dit à la page 387:

> We are required to place a construction on sections 17 and 18. The latter section confers on the Crown a right which it did not theretofore enjoy. It subjects the owner of a vessel which founders in a place where it constitutes an obstruction to navigation, who may be entirely free from blame, to what may be a very serious burden. It is only fair to him that any conditions which Parliament has attached to the imposition of that burden should be fulfilled.

Dans la seconde, où la Chambre des Lords avait à interpréter un statut impérial 10 et 11 Vict. c. 27, s. 56, qui autorise le maître du hâvre à enlever toute épave et à réclamer le coût de ses dépenses du propriétaire, et à lui remettre le surplus de la vente de l'épave, Lord Herschell s'exprime ainsi à la page 516:

> Although I am of opinion that in the present case, there being no evidence that the disaster was due to the negligence either of the appellants or their servants, they would be under no liability at common law for damage caused by the obstruction or for the expenses incurred in removing it, yet I am unable to find any valid ground on which the operation of sect. 56, which casts upon the owner the liability to pay for the expenses of removing the obstruction, can be limited to cases in which such liability would exist at common law.

Lord Morris, à la page 533, dit à son tour:

> My Lords, I concur in the judgment proposed. The facts of this case have been so fully stated by your Lordships who have preceded me that it is quite unnecessary I should repeat them. The defendants are under no common law liability of any kind. Their liability is the subject of express enactment:—10 & 11 Vict., c. 27, s. 56, enacts: "The harbour-master may remove any wreck or other obstruction to the harbour, dock, or pier, or the approaches to the same, and also any floating timber which impedes the navigation thereof, and the expense of removing any such wreck, obstruction, or floating timber shall be repaid by the owner of the same, and the harbour-master may detain such wreck or floating timber for securing the expenses, and on non-payment of such expenses on demand may sell such wreck or floating timber, and out of the proceeds of such sale pay such expenses, rendering the overplus, if any, to the owner on demand".

Depuis que la *Loi de la Protection des Eaux Navigables* a été mise en vigueur, le propriétaire du navire qui a sombré, doit libérer le chenal obstrué même si le sinistre est le résultat d'un cas fortuit ou d'une force majeure, et *en certains cas,* il est tenu avec le capitaine et la personne

(1) (1919) 59 S.C.R. 379 at 386. (2) [1894] A.C. 508.

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en charge du navire, de rembourser le Gouvernement s'il entreprend lui-même de faire disparaître l'obstruction. Le cas fortuit et la force majeure, qui impliquent nécessairement l'absence de faute prouvée ou présumée, ont toujours été reconnus comme des fins de non recevoir, parce qu'ils dépassent le contrôle de l'homme. Mais en vertu de la loi sur laquelle se fonde l'intimé pour réclamer des appelants la somme de $18,168.32, cette défense de droit commun n'est plus reconnue. On y voit bien qu'en certains cas la personne qui par sa faute a été la cause de l'obstruction des Eaux Navigables, peut être tenue responsable, mais vis-à-vis la Couronne, le statut ne fait aucune distinction, et la responsabilité de tous est engagée. Dans le cas qui nous occupe, les appelants Sauvageau ont été condamnés parce qu'ils étaient les propriétaires, et la Price Navigation Co. parce que d'après l'honorable Juge au procès, elle avait le contrôle de la barge *Belœil*. La condamnation ne repose nullement sur la négligence des appelants, qui d'ailleurs n'est pas alléguée, et l'on voit apparaître immédiatement avec cette *Loi de la Protection des Eaux Navigables,* une dérogation aux principes du droit commun. C'est dire qu'elle doit être interprétée strictement en faveur de ceux sur qui repose l'obligation nouvelle qui a été créée, et que la partie qui l'invoque doit démontrer que toutes les conditions nécessaires à son application ont été remplies.

En adoptant cette loi, la Législature a évidemment voulu libérer l'État de l'impérieuse obligation qui repose primordialement sur lui d'enlever des Eaux Navigables les obstructions qui les encombrent, afin d'assurer la sécurité du public. On a voulu faire porter sur d'autres une partie du fardeau. Mais malgré cette exorbitante innovation, apparemment basée sur le statut britannique 40-41 Victoria, c. 16, d'ailleurs moins rigoureux, on trouve dans la loi certains tempéraments dont les appelants doivent bénéficier nécessairement. Appliquée avec la rigueur que lui prête l'intimé, la loi conduirait à une injustice notoire.

La prétention de ce dernier est que quand un navire sombre dans les Eaux Navigables du Canada, même comme conséquence d'un cas fortuit ou de force majeure, le Ministre du Transport, après vingt-quatre heures, si l'épave

n'a pas été enlevée, a le droit de la faire enlever ou détruire, et de réclamer la totalité des dépenses encourues du propriétaire ou de la personne en charge de ce navire. L'analyse des textes et de la jurisprudence me conduit à la conclusion que la loi n'a pas toute cette sévérité.

Les articles pertinents à la présente cause sont 14, 15, 16, 17. Ils peuvent être résumés de la façon suivante.

Lorsqu'un navire sombre et que son épave obstrue les eaux navigables, le propriétaire, le capitaine ou la personne en charge du navire, doit *immédiatement* en avertir les autorités. Le propriétaire du navire *doit aussitôt* commencer à enlever cette obstruction, afin de libérer le chenal, mais s'il refuse ou néglige de le faire, le Ministre peut, après vingt-quatre heures, ordonner *l'enlèvement* ou *la destruction* de cet obstacle par les moyens qu'il croit convenable d'employer. Il peut également ordonner que le navire soit *transporté* hors du *chenal pour y être vendu aux enchères, ou de toute autre manière qu'il croit plus avantageuse,* et il peut employer le produit à couvrir les dépenses, et est tenu de remettre tout surplus à ceux qui ont droit de le réclamer.

L'article 17 est à l'effet que quand le Ministre a fait *enlever* une épave, que les frais d'enlèvement ont été payés à même les deniers publics du Canada, et que *le produit net de la vente* ne suffit pas à couvrir les dépenses encourues, le Ministre ne peut réclamer du propriétaire ou de l'individu en charge du navire, l'*excédent* des dépenses sur le produit net de la vente. Quand, ajoute l'article 17, *il n'y a rien à vendre,* le Ministre a droit de réclamer *la totalité des dépenses.*

Conformément à la loi, les autorités compétentes ont été immédiatement averties de l'existence de l'épave par quelques membres de l'équipage, et elles ont en conséquence fait placer des bouées pour indiquer aux navigateurs le danger que présentait cette obstruction dans le chenal, qui au large du Cap Saint-Charles, vis-à-vis Grondines, où le sinistre a eu lieu, n'a que quarante pieds de profondeur. Vu le défaut ou la négligence des appelants d'*enlever,* de *détruire* ou de *transporter* ce navire sombré, qui de l'avis du Ministre rendait la navigation dangereuse, l'intimé a

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procédé à l'enlèvement, et la barge a été déposée en dehors du chenal, où elle ne constituait plus une obstruction que pouvaient craindre les navigateurs. Cette opération a été effectuée au cours du mois de juin 1942, au coût de $18,168.32, et en mars 1943, l'intimé en a réclamé le montant des appelants, sans avoir préalablement procédé *à la vente de l'épave,* dont le crédit aurait bénéficié aux appelants. C'est la prétention de ces derniers que cette vente était une condition préalable et nécessaire à l'existence du droit d'action. Avec respect pour ceux qui partagent une opinion différente, je crois cet argument bien fondé, et qu'il doit en conséquence être accueilli.

C'est en vertu de l'article 17 que le Ministre est investi du droit de poursuivre, et je ne puis arriver à la conclusion qu'il est dispensé de remplir les conditions auxquelles ce droit est subordonné. En dépouillant cet article de ce qui n'est pas pertinent à cette cause, on peut en extraire les droits et obligations qui suivent. Lorsque le Ministre a *fait enlever* une épave, *et* que les dépenses ont été payées à même les deniers publics, *et* que le produit net de la *vente* n'est pas suffisant pour payer les dépenses, il peut réclamer l'excédent, tel qu'expliqué précédemment. *"S'il n'y a rien qui puisse être vendu",* le montant total de ces dépenses est recouvrable. Il me semble que la lecture de cet article révèle bien l'obligation du Ministre de *faire vendre* l'épave afin d'en appliquer le produit au coût des dépenses, et de soulager ainsi le fardeau imposé aux autres personnes, souvent exemptes de toute négligence. Les mots "s'il n'y a rien qui puisse être vendu" complètent l'intention du législateur à l'effet qu'il devra toujours y avoir une vente, sauf dans le cas de défaut d'objet. Cette dernière alternative devait être nécessairement prévue, car on peut facilement supposer le cas de destruction complète de l'épave ne laissant aucun débris, susceptible d'être vendu, et le cas où, tel que la loi l'y autorise, le Ministre réclame les frais de pose et d'entretien de bouées ou de signaux, pour indiquer l'existence d'une obstruction que le courant aurait emportée subséquemment, ou qui aurait été dynamitée. Dans ces derniers cas, il n'y a pas de doute possible que le Ministre peut réclamer la totalité des dépenses.

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Mais dans le cas présent, le navire a été transporté hors du chenal, et repose encore dans le fleuve où il a cessé d'être une obstruction, et la preuve révèle que sa valeur est substantielle. Il y avait donc quelque chose *"qui pouvait être vendu"*, et qui ne l'a pas été. Les appelants peuvent à mon sens, justement se plaindre de l'absence de l'accomplissement de cette obligation, qui repose sur la Couronne, avant qu'elle ne puisse instituer des procédures.

Je ne puis me rendre au raisonnement de l'intimé au sujet des droits facultatifs que le statut confère au Ministre. Théoriquement le Ministre n'est pas tenu de faire transporter une épave, mais il *peut* le faire, et quand il le fait, ajoute l'article, c'est *"pour y être vendue aux enchères"* ou de toute autre manière qu'il juge convenable. En outre, l'article 17 est impératif, et lorsque le Ministre a fait enlever une épave, qu'il en a payé le coût, que le produit de la vente est insuffisant, il peut réclamer l'excédent. Les droits du Ministre ne lui sont pas imposés; il est libre de les exercer, mais ses obligations sont impératives, et sont les conséquences nécessaires de l'exercice de ses droits.

Dans une cause de *Anderson* v. *Le Roi* (1) jugée par M. le Juge Cassels, les faits étaient les suivants:

Anderson, le défendeur et propriétaire de la barge *Empress*, qui avait sombré dans le Barrington Passage, et était devenue une obstruction, a été poursuivi par Sa Majesté le Roi pour les frais encourus par ce dernier pour la destruction et l'enlèvement des débris de la barge. La défense en Cour d'Échiquier était que, Anderson n'était pas le propriétaire de l'épave, le vaisseau ayant été vendu à un nommé Nickerson quelques jours après le sinistre. Anderson prétendait que la réclamation du Gouvernement devait être dirigée non pas contre le propriétaire du navire au temps du sinistre, mais contre le propriétaire de l'épave. M. le Juge Cassels, en se basant sur le chap. 115 des Statuts Revisés du Canada, 1906, art. 13, en est arrivé à la conclusion que le mot "propriétaire" comprenait le propriétaire enregistré d'un navire au moment du sinistre.

Cette cause a été portée devant la Cour Suprême (2). La Cour s'est divisée également de sorte que l'appel a été

(1) (1919) 46 D.L.R. 275. (2) (1919) 59 S.C.R. 379.

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rejeté sans frais, vu que le jugement de M. le Juge Cassels n'a pas été renversé. Mais la division égale des juges ne signifie pas que le jugement de M. le Juge Cassels constitue une autorité qui lie cette Cour (*Stanstead Election Case* (1)). D'ailleurs, l'analyse de Anderson et de Sa Majesté le Roi révèle que la cause a été plaidée devant cette Cour, non pas sur le point décidé par M. le Juge Cassels en Cour d'Échiquier, mais sur un point entièrement différent, et qui ressemble particulièrement à celui qui nous est soumis. Le Ministre de la Marine, (maintenant Ministre des Transports) avait demandé des soumissions pour l'enlèvement de l'épave de la barge *Empress,* et il a été convenu avec le plus bas soumissionnaire qui devait recevoir la somme de $750, qu'il dynamiterait la coque du navire, et qu'il enlèverait tous les débris et tous les accessoires qui deviendraient sa propriété. Quand le Ministre a institué les procédures contre Anderson pour se faire rembourser de ce montant de $750, ce dernier a plaidé devant cette Cour, que les dispositions de la loi n'avaient pas été remplies, et que, vu qu'il n'y avait pas eu de vente préalable, l'action contre Anderson ne pouvait être accueillie.

Trois juges, MM. les Juges Idington, Duff et Anglin, en sont arrivés à la conclusion que, vu que le Ministre n'avait pas rempli les exigences impératives du statut, à savoir qu'il n'y avait pas eu de vente du navire, il ne pouvait pas instituer de procédures. M. le Juge Idington dit entre autres à la page 381:

> The Minister did not direct anything to be conveyed to any place or to be sold by auction. What happened was that he advertized for tenders for the execution of the work and in the advertisement expressly provided as follows:—
>
> > The materials in the obstruction when the removal is satisfactorily completed, but not before, to become the property of the contractor.

Et plus loin, à la page 382:

> That question is reduced solely to the one question of whether or not in this new remedy given the Crown to recover from the unfortunate owners of a wreck the cost of removing it, the steps laid down in the statute giving the remedy, *as a condition precedent thereto, have been observed.* I have come to the conclusion that they have not been observed.

(1) (1891) 20 S.C.R. 12 at 20.

M. le Juge Duff, à la page 385, s'exprime ainsi: Il réfère à des numéros différents, mais la loi est tout de même identique à celle d'aujourd'hui:

> Now when section 18 is read in connection with section 17, (maintenant 17 et 16) it becomes apparent that "sale under this part" in section 18 refers to the sale authorized by section 17, and section 18 provides, if not in explicit terms, at least by plain implication, that *if there is anything which can be sold,* it is only the difference between the net proceeds of the sale of it and the amount of the costs which can be recovered. It is quite clear that there was something of appreciable value which could be sold; ..... And the appellant is entitled to succeed unless the condition of the statute is satisfied that there was a sale of these parts within the meaning of the statute.

M. le Juge Anglin s'exprime de la façon suivante:

> Section 17 imposes such a condition. If after the removal or destruction of a vessel by or at the instance of the Crown under section 16 there should be anything left "which can be sold", *it must then be "sold by auction or otherwise"* under section 17 *before the Minister may invoke the remedy created by section 18* of maintaining an action for the balance of the expenses incurred by the Crown after crediting the proceeds of a sale under section 17.

Comme on peut le voir, ces trois juges en sont arrivés à la conclusion qu'il n'y avait pas eu de vente *de ce qui pouvait être vendu,* et comme cette vente est essentielle au droit de la Couronne de poursuivre, l'action, d'après eux, devait être rejetée. Malgré que la Couronne payait la somme de $750, et que le plus bas soumissionnaire s'engageait à dynamiter l'épave, et à *devenir propriétaire de ce qui restait,* ceci d'après MM. les Juges Idington, Duff et Anglin, n'était pas suffisant pour satisfaire les prescriptions de la loi. Ils décident qu'il est nécessaire qu'il y ait *une vente* préalable par enchères ou autrement.

Le Juge en chef Davies ne dit nulle part que la vente préalable n'est pas nécessaire pour justifier la Couronne d'instituer des procédures. Il arrive à la conclusion que Anderson devait payer parce que, dans son opinion, la preuve avait révélé que la transaction qui était intervenue entre lui et la Couronne constituait une complète observation de la loi. Si la Couronne avait, dit-il, conservé un droit de propriété dans les débris du navire, le montant de la soumission aurait sans doute été plus élevé, et le premier à en souffrir aurait été Anderson. M. le Juge Davies laisse entendre que parce qu'il a soumissionné à meilleur marché, le soumissionnaire a indirectement *acheté les débris.*

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M. le Juge Brodeur ne se prononce pas catégoriquement, et M. le Juge Mignault est le seul à dire clairement "that the sale cannot be a condition precedent to the right of the Crown to recover the cost of removal".

Comme on peut le voir, la cause de *Anderson* v. *Le Roi* (1), loin d'être un obstacle au succès des appelants, confirme plutôt leur prétention.

Dans *Attorney-General of Canada* v. *Brister* (2), la Cour Suprême de la Nouvelle-Écosse a été saisie d'un litige où la même question était soulevée. A la page 55, Sir Joseph Chisholm C.J., avec qui a concouru Hall J., dit ce qui suit:

> From a fair reading of this section, it seems to be the duty of the Minister, if he can find a purchaser to make a sale of the thing which forms the obstruction or of its parts, and the right to sue the owner or other person mentioned in s.-ss. (*a*) and (*b*) depends upon whether or not such duty has been performed.

Et plus loin, à la même page, malgré que son analyse des raisons des Juges Brodeur et Mignault dans la cause Anderson soit inexacte, Sir Joseph Chisholm dit cependant:

> Three learned Judges were of opinion that conditions precedent as to sale were substantially complied with, and three decided that there should be strict compliance with the direction of the statute. All, however, were of opinion that the preliminary conditions should have been observed, and to that extent at least the decision is binding upon us. The Anderson Case has features in common with the present case: the obstruction was destroyed; the agreement with the contractor was that he should have the materials; and there was substantial salvage in each case.

Smiley J., avec qui s'est accordé Carroll J., s'exprime dans les termes suivants:

> There was nothing, under the provisions of s. 16, which in the language of the section could be conveyed to such place as the Minister thought proper and there sold by auction or otherwise as he deemed most advisable. Section 17 provides that the whole cost of removal or destruction is recoverable by the Crown if there is nothing which can be sold under the provisions of s. 16. In my opinion, therefore, the Minister did comply with the statute, as stated by the learned trial Judge, and the first contention urged by counsel for the appellants is untenable.

On voit par ce que dit M. le Juge Smiley que le Ministre avait obéi aux prescriptions de la loi, parce que d'après lui, la preuve révélait *qu'il n'y avait rien à vendre,* laissant entendre que dans le cas contraire, l'action n'aurait pu être maintenue.

J'en arrive donc à la conclusion qu'il était nécessaire que la barge *Belœil* fut offerte en vente "par enchères ou

(1) (1919) 59 S.C.R. 379. (2) [1943] 3 D.L.R. 50.

autrement", avant que naisse le droit du Ministre de poursuivre. Comme cette obligation n'a pas été remplie, l'action doit être rejetée, et les deux appels maintenus avec dépens devant cette Cour, et la Cour de l'Échiquier.

RAND, J. (dissenting): I am unable to interpret section 17 of the *Navigable Waters' Protection Act* as making a sale of the property removed from interference with navigation, whenever it has some net value, a condition precedent to the recovery of the expenses of removal. The basic provision of the statute is that of section 14 which imposes upon the owner the duty to remove the obstruction or danger. That is a positive and unqualified statutory obligation, which in the absence of fault or negligence, certainly at common law, and seemingly by the law of Quebec, did not before exist. It may, no doubt, become an extremely onerous duty, but the policy of it having been decided by Parliament, we must not, in ascertaining the meaning of the statute, be unduly influenced by the possible hardships to owners. Its real effect may be merely to throw the burden of insurance upon the owner rather than the cost of removal upon the public.

When an accident or mishap occurs which brings about an interference with navigation, the Minister, under the authority of section 15, may cause the wreck, vessel or other thing "to be removed or destroyed." Section 16 authorizes the Minister to "transport" and sell and to apply the proceeds towards the cost of removal or destruction. Section 17 permits recovery of the expenses paid out of the public moneys in the removal or destruction to the extent that the net proceeds of the sale are insufficient to cover them, and the whole expense "if there is nothing that can be sold as aforesaid." What is created is a charge on the property for the outlay in favour of the Crown and the Crown is bound to apply the net value in reduction of it.

Whether or not there is anything that can be sold lies obviously in judgment, and to be sold to produce net proceeds depends upon what can be charged against the gross. The word "remove" in section 17 does not conflict with "convey" in section 16; since section 16 allows the Minister to charge the costs of "removal" and sale

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against the proceeds, the costs of "conveyance" are clearly included; and the same meaning is to be attributed to "removal" in section 17. Whether or not, then, the expenses of conveyance are brought in to ascertain "net proceeds", they are ultimately chargeable against proceeds. But the very uncertainty of net proceeds, as at what port or place, and whether $1 or $1,000, in addition to the risk of incurring unnecessary loss through mistaken judgment, excludes, in my opinion, an intention to prescribe sale as a prerequisite to recovery. What the statute deals with is the practical responsibility of keeping navigable waters free from such hazards; and where the owner refuses to discharge the duty imposed on him, as he did here, it enables the Government to perform that duty at his expense. What the owner is entitled to is credit for the salvage value of his property, and it makes no difference to him whether that value is realized by a sale or by valuation.

The officers of the department here decided upon removal only; the wreck was taken from close proximity to the channel and left in shallow water. It was estimated by the witness, Weir, that to bring the barge to a port would have cost an additional $6,000. But that was so by reason of a second operation of bringing it to the surface which the nature of the first made necessary. We have no figures on what the cost of a direct removal and conveyance would have been, but the facts would make it appear that it could not be less than that actually carried out.

Although the barge was purchased at a sheriff's sale for $2,000, there was some evidence, that it might have brought $6,000. Since the Crown has failed to furnish any proof beyond the skeleton facts of the work done and costs, the owner must be given the benefit of matters not clearly established. Taking, then, the estimated cost of direct removal and sale to be at least $18,168.32, I would allow the owners a deduction of $6,000 as the salvage value.

The statute provides that recovery may be made where the removal is directed by the Minister and it is argued that it has not been shown that the Minister has acted at all, that the only evidence adduced was of action taken

by subordinate officials of the Department. Are we entitled to assume, in such a case, that the Minister did in fact authorize the action taken? Considering, in addition to the ordinary departmental practice, that tenders were called for the removal, that the expenditure made was substantial and a statement of it sent to the Auditor General, the case is one for the maxim *omnia rite acta esse praesumuntur,* and the objection fails.

The owners of the tug appeal on the ground that they do not come within the scope of section 17: that they were neither "a person in charge thereof at the time such obstruction or obstacle was occasioned" nor did their act cause or occasion it, and this contention I think well founded. There were two men on the barge, one of whom was the superior: they were the persons in charge of it. To be "in charge of" the vessel or other thing means, in section 17, something more than to be furnishing a service of haulage to it. Nor did any act of the tug occasion the mishap; the towage was, no doubt, one of the conditions out of which the accident arose, but for the "act" aimed at we must look elsewhere.

I would, therefore, allow the appeal of the appellants, Price Navigation Company and dismiss the information, with costs in both courts; and allow in part the appeal of the owners by reducing the judgment to $12,168.32 with costs in this Court.

FAUTEUX, J.:—During the night of the 25th of September 1941, the *Belœil,* one of the three barges towed by the tug *Chicoutimi,* foundered in the St. Lawrence river, on the north side of the channel, near Cape St. Charles. It there and then became an obstacle to the navigation. Viewing the inaction of the interested parties, the Minister of Transport did, during the month of June 1942, cause this wreck to be removed. In the process, the barge was simply displaced from the channel and left elsewhere on the bed of the river. The cost of this removal, undertaken by the Department of Transport, has been defrayed out of the public moneys of Canada and amounted to $18,168.32. The Respondent ultimately took action to recover from the Sauvageau brothers and Price Navi-

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gation Company Limited, registered owners, respectively, of the barge and the tug, and against J. C. Malone and Company Limited, her charterers.

By judgment rendered on the 4th of September 1948, in the Exchequer Court (1), the action was dismissed as against the charterers and maintained as against the appellants, they being jointly and severally condemned to pay to the Respondent the amount above indicated with interest, and costs.

The appeal is against this condemnation only.

The *Navigable Waters' Protection Act,* R.S.C. 1927, c. 140,—part II—, prescribes the rights and obligations of the parties and especially the remedies at the disposal of the Crown in like cases. Section 17 of the *Act* gives to the Crown a right to recover the expenses incurred by reason of such obstruction and its removal, from the owner of the vessel, from the person in charge thereof on the occasion of the disaster, or from any person through whose act or fault or that of his servants such obstruction or obstacle was occasioned or continued.

The relevant part of the section may conveniently be reproduced here:—

17. Whenever, under the Provisions of this Part, the Minister has caused

(*a*) .....

(*b*) to be removed.....any wreck.....by reason whereof the navigation of any such navigable waters was.....obstructed, ...; or

(*c*) .....

and the cost.....of removing.....such.....wreck or other thing has been defrayed out of the public moneys of Canada; and the net proceeds of the sale under this Part of such vessel or its cargo, or the thing which caused or formed part of such obstruction are not sufficient to make good the cost so defrayed out of the public moneys of Canada, the amount by which such net proceeds falls short of the costs so defrayed as aforesaid, or the whole amount of such cost, *if there is nothing which can be sold* as aforesaid, shall be recoverable with costs by the Crown,

(*a*) from the owner of such vessel or other thing, or from the managing owner or from the master or person in charge thereof at the time such obstruction or obstacle was occasioned; or

(*b*) from any person through whose act or fault, or through the act or fault of whose servants such obstruction or obstacle was occasioned or continued.

(1) [1948] Ex. C.R. 534.

In the present instance, the information filed by the Attorney General of Canada rests exclusively on the provisions of this *Act*. And it must further be noted that no fault or negligence of any of the appellants or their servants is alleged therein as a cause of action. The fact that they were owners of the barge, with respect to the Sauvageau brothers, and the fact that the barge was in its charge, with respect to the Navigation Company in the circumstances above indicated, are the sole juridical facts alleged as a "lien de droit" between the respective appellants and the Respondent. It is on the basis of the findings of such facts by the trial Judge (1) that the action was maintained against the appellants.

Apart from individual grounds of appeal, the appellants join in the following legal and factual submissions. As a matter of law, they contend that, if there is something which can be sold, the sale of the wreck is a condition precedent to the exercise of the right of the Crown to recover the costs for its removal. And further submitting, in point of fact, that the steel alone of the barge *Belœil* had a value of about $5,000, that no sale had been made or even attempted, they then conclude that the above statutory condition has not been complied with and that the action should have been dismissed.

A like submission in law has been considered by this Court in *Anderson* v. *The King* (1).

Only the relevant features of that case may be referred to.—A schooner was burned to the water's edge, in Barrington Passage, a public harbour. The Minister advertised by tender for the execution of the work of removal. The contract, eventually let for $750, had a stipulation,—as was intimated in the call for tenders,—prescribing that "...the materials in the obstruction, when the removal is satisfactorily completed, but not before, to become the property of the contractor." Upon the execution of the work, the contractors took the property as their own and, afterwards, sold a part for a sum of $129 and had still some more left. An action was instituted by the Crown to recover from the owner of the wreck the sum of $750, the costs of advertisement and some other incidental expenses.

(1) [1948] Ex. C.R. 534.

(1) (1919) 59 S.C.R. 379.

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The defendant submitted that the sale of the vessel was a condition precedent to the right to recover the expenses of removal and that the Minister had not properly exercised his discretion as to whether the wreck was an obstruction to navigation and as to the manner of its removal. To meet the first part of the defendant's submission, the Crown suggested that the materials thus offered to and accepted by the contractor were part of the consideration for the execution of the work and were thus virtually sold; for without such added consideration, the bid of the contractors would have exceeded $750.

The Anderson case, heard by six members of this Court, was concluded with divided opinions, which opinions were subsequently interpreted and summarized in the case of *Attorney General of Canada* v. *Brister* (1) by Sir Joseph Chisholm, C.J., at page 55, as follows:—

> Three learned Judges were of opinion that conditions expressed as to sale were substantially complied with, and three decided that there should be strict compliance with the direction of the statute. All, however, were of opinion that the preliminary conditions should have been observed and to that extent the decision is binding upon us.

While one may not fully agree with this interpretation or summary of the opinions of members of this Court in the Anderson case (2), I cannot fail to be impressed by the reasons for judgment given by three of the members of this Court who, without any possible ambiguity, affirmed that a sale of the wreck is a condition precedent to the exercise of the right of the Crown to recover the costs for its removal.

Idington, J., at page 382, says:—

> Even if we could find that there was a very trifling sum realized out of the property after its removal, I do not see how that would affect the question involved.
>
> That question is reduced solely to the one question of whether or not in this new remedy given the Crown to recover from the unfortunate owners of a wreck the cost of removing it, the steps laid down in the statute giving the remedy, as a condition precedent thereto, have been observed. I have come to the conclusion that they have not been observed,
>
> "So clear a departure from the terms of the Act should not, I submit, be maintained, no matter how well intentioned the modification made by the Minister or his deputy in carrying into effect the provisions of the Act may have been." I think the appeal should be allowed with costs.

(1) [1943] 3 D.L.R. 50..

(2) (1919) 59 S.C.R. 379.

At page 384 of the report, Duff, J., as he then was, says:—

At common law, the owner of a vessel becoming an obstruction to navigation in the absence of negligence or wilful default of the owner or persons in control of her, is not responsible for the consequences of the obstruction or chargeable with the cost of removing it, and the "Navigable Waters' Protection Act" imposes a new liability upon the owners of ships, which comes into existence in certain defined conditions; a liability which it would be difficult in many cases to describe as just or fair or reasonable.

On well-known principles the party who asserts in a particular case that the conditions of a new statutory liability have come into existence, must establish that proposition strictly and in ascertaining whether that is so or not, the inquiry is: Do the facts established clearly fall within the statutory description of those conditions?

Anglin, J., as he then was, expresses the following views, at page 387:—

The latter section confers on the Crown a right which it did not theretofore enjoy. *Arrow Shipping Co.* v. *Tyne Improvement Commissioners* (A.C. 1894-508), at pp. 527-8. It subjects the owner of a vessel which founders in a place where it constitutes an obstruction to navigation, who may be entirely free from blame, to what may be a very serious burden. It is only fair to him that any conditions which Parliament has attached to the imposition of that burden should be fulfilled. Section 17 imposes such a condition. If after the removal or destruction of a vessel by or at the instance of the Crown under section 16 there should be anything left "which can be sold", it must then be "sold by auction or otherwise" under section 17 before the Minister may invoke the remedy created by section 18 of maintaining an action for the balance of the expenses incurred by the Crown after crediting the proceeds of a sale under section 17.

The legal submission of the appellants herein rests on the combined play of two principles. Affirming the first one Lord Herschell in *Arrow Shipping Co.* v. *Tyne Improvement Commissioners* above quoted says at page 508:—

...I am of opinion that in the present case, there being no evidence that the disaster was due to the negligence either of the appellants or their servants, they would be under no liability at common law for damage caused by the obstruction or for the expenses incurred in removing it...

In *Pasmore* v. *Oswaldtwistle Urban District Council* (1), the second principle is formulated by the Earl of Halsbury, L.C., at page 394:—

The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law. I think Lord Tanterden accurately states that principle in the case of *Doe* v. *Bridges* (1831), 1 B. & Ad. 847, 859 (109 E.R. 1001). He says: "Where an Act creates

(1) [1898] A.C. 387.

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an obligation and enforces the performance in a specified manner, we take it be a general rule that performance cannot be enforced in any other manner.".....The obligation which is created by this statute is an obligation which is created by the statute and by the statute alone.

No argument has been advanced on behalf of the Respondent to successfully challenge the correctness of these principles.

It was suggested, however, that in the circumstances of this case, a sale would, in the result, have brought no advantage to the appellants and that there was, thus, virtually nothing which could be sold within the meaning of the *Act*.

As proof of the premises of this conclusion, the following evidence is invoked by the Respondent, required to say why the *Belœil* was not refloated, J. D. Weir, the officer of the Department of Transport in charge of the operations, answered:—

> This would have cost at least another $6,000—and the Department was not interested in any other part of the work than clearing the channel of an obstruction. That was the reason why the vessel was not raised entirely.

Asked further whether anything could have been sold out of that wreck, he expresses the following opinion:—

> Possibly, but not for any great amount of money, not enough to pay the Department for the extra $6,000—as we have learned by experience on other occasions.

On the other hand, the evidence shows that the *Belœil* had a steel hull and a wooden deck, that when examined by a marine diver, on the occasion of the removal operations, the deck was found to be heavily damaged but the hull seemed to be in good condition. Even Weir does not appear to have then dismissed from his mind the idea of an eventual interest for the owner to refloat the vessel for, at trial, he prompted the following answer:—

> I may say that I offered to leave the slings underneath if the owner wanted to finish the job in calm, clear water, after it was entirely out of the current in nice, calm, dead water.

Again, uncontradicted evidence not only shows that the steel of the hull reduced to scrap had alone, according to the then prevailing market prices, a substantial value—some $4,000 to $5,000—but that there were, at that time, during the war, a great demand and a scarcity of barges.

No attempt was made to sell the vessel in whole or in part. Nor does the evidence indicate that a sale, and much less the arguments now advanced to support the Respondent's contention, were even considered by the Department at the relevant time. Had there been a sale, Weir's opinion—expressed at trial and formed "by experience on other occasions"—might in the result have then been regarded as a successful speculation; but, in the particular circumstances of this case, it cannot amount to evidence adequately supporting the contention of the Respondent that there was virtually nothing which could be sold and much less to evidence meeting this unqualified statutory provision: "if there is nothing which can be sold."

This conclusion dispenses with the necessity of considering what consequence the submission of the Respondent would have in law had it been proved in fact.

Applying the test suggested by Sir Lyman in the Anderson case, I cannot conclude that the facts established in this case clearly fall within the statutory description of the conditions of this new liability.

The action of the Respondent should be dismissed, the two appeals should be maintained with costs before this Court and the Exchequer Court.

Appeals maintained with costs.

Solicitor for Sauvageau: *Léon Méthot.*

Solicitor for Price Navigation Co. Ltd.: *C. Russell McKenzie.*

Solicitor for His Majesty the King: *William Morin.*

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*Mar 15, 16, 17, 20, 21
*June 6

EVELYN McKEE (PLAINTIFF).....APPELLANT;

AND

MARK T. McKEE (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Infant—Custody—Habeas Corpus—Parents and child citizens of foreign State—Infant brought to Ontario by father to evade foreign Court's Order awarding custody to mother—Manner in which general rule as to infant's custody should be exercised—The Infants Act, R.S.O., 1937, c. 215.

Held: (Taschereau, Kellock and Fauteux JJ., dissenting), that in determining the custody of an infant the well established rule in Ontario is that the paramount consideration is the welfare of the infant and the judgment of a foreign Court as to such custody need not as a matter of binding obligation be followed. Where however. as in the case at bar, the infant and both of his parents are citizens of a friendly State in which they are all domiciled and have always resided, and when the Courts of the country to which he belongs and from which he has been improperly removed, have reached a decision that one of the parents is to have custody, and the other parent in breach of his agreement not to remove the infant from the country to which the infant belongs, and in defiance of, and solely for the purpose of evading the order of the Courts of that country, to which he had himself submitted the question of custody, brings such infant into Ontario, any jurisdiction an Ontario Court may have acquired as the result of such conduct should be exercised only for the purpose of returning the child in proper custody to the country whose subject he is.

In re B—'s Settlement [1940] 1 Ch. 54, distinguished, and questioned.

Per: Taschereau, Kellock and Fauteux JJ., dissenting: The appellant under the guise of custody proceedings asks for an order for which there is no authority outside the *Extradition Act* or the deportation provisions of the *Immigration Act.* Even if it could be said such authority resides in the executive, it has not been committed to the courts. *Atty.-Gen. for Canada* v. *Cain* [1906] A.C. 542 at 546.

There is no jurisdiction in the Courts of Ontario or in this Court to make such an order as the appellant seeks or to do otherwise than apply to the circumstances of this case the ordinary law of Ontario as to custody, giving due weight to the California decree. Whatever the position of the respondent, the infant is entitled to rely upon the protection of the court and the law of Ontario relating to infants. To grant what the appellant seeks would be to ignore these rights. *Re Gay,* 59 O.L.R. 40; *Re Ethel Davis,* 25 O.R. 579.

The courts below correctly applied the relevant law, gave proper weight to the California judgment, and the judgment in appeal should not be disturbed.

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

**Reporter's Note*—Petition for special leave to appeal granted by Privy Council July 24, 1950.

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MCKEE v. MCKEE

Cartwright J.

APPEAL from the judgment of the Court of Appeal, Robertson, C.J.O., dissenting (1), dismissing an appeal from an Order of Wells J. (2), made in habeas corpus proceedings, awarding custody of the infant child of the parties to the respondent.

A. G. Slaght, K.C. and *Peter Slaght,* for the appellant.

G. H. Lochead and *G. A. MacKay,* for the respondent.

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

CARTWRIGHT J.:—This is an appeal from the judgment of the Court of Appeal for Ontario dismissing an appeal from an Order of Wells J., made in habeas corpus proceedings, awarding the custody of Terry Alexander McKee, an infant child of the parties, to the respondent.

The appellant is the mother and the respondent is the father of the infant. The respondent is an airlines executive and has been for more than thirty-three years an attorney of the State of Michigan. The appellant and the respondent are American citizens. They were both born in the United States of America and, until the respondent came to Ontario in December 1946 in the circumstances to be mentioned hereafter, had always lived there. They were married in Vermont in 1933. The infant was born in the State of California on the 14th of July 1940. The parties separated in December, 1940 and have not resided together since that date. Under date of the 4th of September 1941, the parties executed an agreement which is referred to in the proceedings as a property settlement agreement. This agreement does not make specific reference to the question of the custody of the infant, but it contains the following paragraph:

> It is further understood and agreed that neither of the parties hereto shall remove TERRY ALEXANDER McKEE, son of the parties hereto, from or out of the United States of America without the written permission of the Party not so removing, or wishing to remove said boy from the United States of America.

On September 18, 1941 the appellant commenced an action for divorce in the Superior Court of the State of California in and for the county of Los Angeles. The

(1) [1948] O.R. 658. (2) [1947] O.R. 819.

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respondent entered a cross-complaint for divorce. After a trial which occupied sixteen days and concluded on November 20, 1942, the Honourable Thurmond Clarke delivered judgment on December 17, 1942 dismissing the appellant's complaint and granting the respondent a divorce on his cross-complaint. This judgment awarded the custody of the infant to the respondent, but directed that the infant should spend three months each summer with the appellant. The judgment also affirmed and approved the agreement above referred to. It was conceded before us that this judgment was valid, and that the Court had jurisdiction to pronounce it.

Subsequently, there were applications by both parties to the Superior Court of the State of California for modification of this Order and certain minor modifications were made.

In May, 1945, the respondent made an application to the same Court in California in the proceedings in which the order of December 17, 1942 as to custody had been pronounced, asking for a modification of the terms of that order as to custody. The appellant delivered a cross-application and the two applications were heard together before the Honourable Ruben S. Schmidt in June 1945. The hearing occupied five days. By order, dated August 1, 1945, the previous orders of the Court were modified to provide that full custody of the infant be awarded to the appellant with the right of reasonable visitation allowed to the respondent. It appears that the infant was not in the State of California in May 1945 when the application for modification was commenced by the respondent, but was in that State while the hearing was proceeding. The order of August 1, 1945 permitted the respondent to have the infant in Port Austin, Michigan until September 1, 1945, on which date it was ordered that the infant be delivered to the appellant in Los Angeles, California. From this order, the respondent appealed to the District Court of Appeals in California and the appeal was dismissed in November 1946. The respondent applied for a re-hearing which was denied, and then applied for leave to appeal to the Supreme Court of California and this application was denied on the 23rd of December 1946. Evidence was given that under the laws

of the State of California these appeals had the effect of staying the operation of the order of August 1, 1945 until the filing of a remittitur, following their final disposition. In the result the order of August 1, 1945 did not become effective until the 13th day of January 1947, so that the infant continued to be in the custody of the respondent except that he spent three months with the appellant during the summer of 1946.

On or about the 24th of December 1946 the respondent who was then residing with the infant at Port Austin, Michigan, received word that his final appeal had failed, and he thereupon proceeded with the child into the Province of Ontario. He did this without the permission or knowledge of the appellant. The appellant was not able to discover the whereabouts of the respondent and the infant until sometime in the month of February 1947. She then instituted habeas corpus proceedings in the Supreme Court of Ontario seeking to have the infant delivered to her. Her application was supported by her own affidavit setting out the relationship of the parties, the place and date of the infant's birth, the delivery of the judgment of the Honourable Ruben Schmidt, and the denial of the respondent's appeal. The affidavit further stated that on or about the 24th day of December 1946, the respondent without any knowledge or consent on the part of the appellant and with intent to deprive her of the lawful custody of the infant had brought him to the city of Kitchener and was there detaining him. A copy of the judgment of the Honourable Ruben Schmidt was made an exhibit to this affidavit.

A Writ of habeas corpus was issued on 21st March 1947 pursuant to the Order of Treleaven J., and the return came before Smily J. on the 25th day of March, 1947.

By way of return to the Writ, the respondent filed a lengthy affidavit. In this he stated that at the date of his marriage to the appellant he was domiciled and ordinarily resident in the State of Michigan and had continued to be domiciled and ordinarily resident there until December 1946 when he had moved to Ontario, and that he intended to make his permanent home in Ontario. He made numerous allegations reflecting on the character of the

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appellant. He questioned her fitness to have the custody of the infant and stated that in his opinion it was better for the infant to be in his custody than in that of the appellant. He claimed that the order of the California Court of the 1st of August 1945 was made without jurisdiction, and would not be enforceable in the State of Michigan. As pointed out by the learned Chief Justice of Ontario, the affidavit contained no denial of the statement in the appellant's affidavit that the respondent without any knowledge or consent on her part and with intent to deprive her of the lawful custody of the infant had brought him to the city of Kitchener.

Smily J., reserved the matter and on 2nd April 1947 gave judgment directing the trial of an issue. The question directed to be tried was "Who is to have the custody of the infant, Terry Alexander McKee, as between the said Evelyn McKee and the said Mark T. McKee?" This order did not in terms refer the final disposition of the proceedings on the Writ of habeas corpus to the judge trying the issue as it might have done under the provisions of Rule 233. An intention to so refer the matter may perhaps be implied from the term in the order providing that the costs of the motion for the Writ of habeas corpus and of the hearing before Smily J., should be disposed of by the Judge trying the issue. Wells J., before whom the issue came on for trial, proceeded as if the final determination of the whole matter had been referred to him. I do not think it necessary to decide whether the practice which was followed was technically correct. I agree with the majority of the Court of Appeal that, the matters in dispute having been fully investigated on the merits, no technical defect in procedure should now be allowed to render the proceedings abortive.

On behalf of the appellant it was urged before Wells J., as it had been before Smily J., that in view of the facts as to the citizenship, domicile and residence of the parties set out above, and as the custody of the infant had been awarded to her by the Courts of California after a full hearing in proceedings instituted by the respondent, and as it was obvious that the respondent had brought the infant to Ontario to avoid compliance with the order of the Court whose jurisdiction he had himself invoked, custody

of the infant should be given to her. Wells J., however, was of the view that he was bound by authority to investigate the whole matter at length and to reach a determination as to what, in his view, would be in the best interests of the infant without being in any way bound by the California judgment, although, as he expressed it, that judgment was entitled to be given the greatest weight.

The trial before Wells J., occupied eleven days. Wells J., reserved judgment and later gave judgment awarding custody of the infant to the respondent, and giving the appellant the right of access once a week. The appellant appealed to the Court of Appeal, and the appeal was heard by Robertson C.J.O., Hogg, and Aylesworth JJ.A. The hearing of the appeal occupied six days. The appeal was dismissed, Robertson C.J.O. dissenting. The appellant then appealed to this Court.

Some of the matters which were fully argued before us appear to present little difficulty. I think that there is no doubt that the Ontario Court had jurisdiction to hear and determine the question as to which of the parties was entitled to the custody of the infant. Indeed, under the circumstances there was no way in which the appellant could obtain the custody of the infant who was in fact physically present in Ontario other than by application to the Ontario Courts. Counsel for the appellant did not question the jurisdiction of the Ontario Court, and there is nothing in the dissenting judgment of the learned Chief Justice of Ontario to suggest that he entertained any doubt that such jurisdiction existed. The question to be determined is how a jurisdiction admittedly existing should have been exercised in this particular case.

Much argument was addressed to us and reference was made to many authorities on the question whether the judgment of the California Court of August 1, 1945 was binding upon and enforceable in the Courts of Ontario. I do not think it necessary to examine the authorities. I think they make it clear that the California judgment is not binding upon the Courts of Ontario in the sense that a judgment for payment of a sum certain in money pronounced by a foreign Court, which according to the rules

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of Private International Law recognized in Ontario had jurisdiction over the parties, will be enforced in an action brought on such judgment in the Courts of Ontario.

In my view, it was rightly held by Wells J., and the Court of Appeal that the judgment of a foreign Court as to the custody of an infant need not as a matter of binding obligation be followed in our Courts, although great weight must be given to it. For this reason it is in my opinion of little importance to discuss whether, according to the rules of Private International Law recognized by the Courts of Ontario, the Superior Court of California had jurisdiction to pronounce the judgment of August 1, 1945; because even if that Court had jurisdiction in such sense, its judgment would not be conclusive in our Courts but only of great persuasive effect.

No doubt in Ontario the well established general rule is that in all questions relating to the custody of an infant the paramount consideration is the welfare of the infant. In my respectful opinion, however, no case to which we were referred is authority for the proposition for which counsel for the respondent was forced to contend; that where, as in the case at bar, an infant and both of his parents are citizens of a friendly foreign State in which they all are domiciled and have always resided, when the question of such infant's custody has been fully litigated in the Courts of such State, and those Courts after full and careful hearings have reached a decision that one of the parents is to have custody, the other parent upon such decision being given, by the simple expedient of taking the child with him across the border into Ontario for the sole purpose of avoiding obedience to the judgment of the Court whose jurisdiction he himself invoked and in breach of his own agreement which had been ratified by such Court, becomes entitled as of right to have the whole question retried in our Courts, and to have them reach a new and independent judgment as to what is best for the infant.

It seems to me that to give effect to such an argument would bring about a state of confusion in matters of custody. It is now our duty after hearings in the Courts of this country which have consumed a total of twenty-two

days to give the custody of this infant to one or other of the parties. If by our judgment we should approve the proposition set out above and the disappointed party should be able, by stealth or otherwise, to carry the child over the border into the Province of Manitoba, the courts of that Province would be bound by our judgment not to order that the child be handed back to the party to whom custody had just been awarded, unless and until, after re-investigating the whole matter, as Wells J., did, from the time of the birth of the infant, they were of opinion that this was the course most likely to advance the infant's welfare. Such a result would mean that any parent, possessing ample financial means and sufficiently lacking in respect for the orders of the Courts and for his own undertakings, could, by moving from Province to Province prolong litigation as to an infant's custody until such infant attained his majority.

I do not mean by anything that I have said that I disagree with the view expressed by Morton J., in *re B—'s Settlement* (1), that the Courts of this country are not bound blindly to follow the judgment of the Court of a foreign State as to the custody of an infant who is a citizen of such State. No doubt cases have arisen in the past and may arise in the future where it would be the duty of our Courts to refuse to follow what had been decided by the Courts of a foreign country as to the proper custody of an infant who is a subject of such foreign country. Nothing would, I think, be gained by suggesting examples of such cases. In my opinion the case at bar is not one of them.

It seems to me that the following considerations are sufficient to dispose the case at bar. The infant and both of his parents are citizens of the United States and have always lived in that country. By an agreement entered into between them, they covenanted that neither of them would remove the child from the United States without the consent of the other. This agreement was confirmed by the Courts of California in a judgment which both parties concede to be a valid one. The Courts of California in 1942 gave the custody of the infant to the respondent, but clearly did not regard the appellant as being an unfit person to have the custody of the child, as she was allowed

(1) [1940] 1 Ch. 54.

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custody during three months in each year. The Courts of the same State, in an application made by the respondent, in 1945, after a full hearing, came to the conclusion, not only that the appellant was a fit person to have the custody of the child, but that it was better for the child that she should have its custody than that it should be left in the custody of the respondent. It appears that in both of these judgments the welfare of the infant was regarded as of primary importance. The respondent does not appear to have suggested in any of the proceedings in the courts of the United States that it is to the advantage of the infant that he should reside and be brought up in Ontario rather than in the United States, the country of which he is a citizen and in which his future would seem to lie, except that up to the present in Ontario the respondent has been able to retain the infant in his custody. It is clear on the evidence that the respondent removed the child to Ontario without intending any benefit to the child, other than the supposed benefit which the child would derive from remaining in the custody of the respondent. Well J. did not find that the appellant is an unfit person to have the custody of the child. After reviewing the evidence including that as to the respondent's business interests and the material prospects of the child, the learned Judge reached the conclusion that the interests of the infant would be best served by leaving him where he is in the custody of the respondent, but there is nothing in his reasons or in the evidence to suggest that the welfare of the child would be endangered by his returning in the custody of his mother to his own country. Wells J., while observing on the practical difficulties of giving effect to such an order, directed that the mother should have access to the infant once a week.

It does not, I think, lie in the mouth of the respondent to suggest that the appellant is not a fit person to have the custody of the child, although he stoutly maintains his own greater fitness. This is shown, in my view, by the letter of the 25th of April, 1947 written by the respondent's solicitors to the solicitors for the appellant while the Ontario proceedings were pending, and which counsel for the respondent introduced in evidence before Wells J. This letter was written in an effort to bring about a settlement

and one of the proposed terms was that the infant should spend the months of July and August in each year with the appellant "at her home in California or at any other place where she may be from time to time," and that she should have the right of access to the infant at all reasonable times during the remainder of the year.

If this litigation had arisen between persons and in respect of a child who had a normal and bona fide residence in Ontario, and a trial judge had reached the conclusion that on weighing up the various advantages and disadvantages it was on the whole more beneficial for the infant to remain with one parent, and this finding had been affirmed by the Court of Appeal, we should, I think, be very hesitant to disturb it. In my opinion however, the matter should be very differently approached when it is obvious that one of the parties has brought the child into this Province in the final moments of a protracted litigation in his own country for the purpose of avoiding obedience to the judgment of its Courts, and in deliberate disregard of his own agreement.

I think there is no difference in principle on the facts of this case from the case, suggested in argument, of a citizen of the United States fleeing that country on the day that a judgment as to custody was pronounced against him, bringing the infant with him and being served with a writ of habeas corpus issued in Ontario on the following day. There was no avoidable delay on the part of the appellant in invoking the aid of the Ontario Courts. The delay which did occur was caused by her inability to discover the whereabouts of the respondent and the infant.

Even apart from these considerations, I would think it gravely doubtful whether the order now in appeal is one which is really for the benefit of the infant. In view of the attitude of the respondent, as shown by his conduct, it would have the effect of virtually exiling the infant from his own country during his minority. It would make it substantially impossible for him to spend any time with his mother, with whom he has spent part of every year since his birth up until the year 1947.

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I respectfully agree with the views expressed by the learned Chief Justice of Ontario when after discussing the cases of *Hope* v. *Hope* (1), *re Harding* (2) and *Nugent* v. *Vetzera* (3), he says:

> The facts of the present case call much more strongly than did the facts of any of the cases I have cited for the question of the custody of the infant being left to the Courts of the country to which he belongs, and from which he has been improperly removed.

and further where he says:

> I cannot too strongly state my opinion that there is grave impropriety in upholding in the Courts of Ontario a claim made to the custody of an infant who is the subject of a neighbouring and friendly country, by one who has brought the infant into this Province in breach of his agreement not to remove the infant from the country to which the infant belongs, and in defiance of, and solely for the purpose of evading the order of the Courts of that country, to which Court respondent had himself submitted the question of custody. Any jurisdiction to deal with the infant that an Ontario Court may have acquired as the result of such conduct, it should exercise only for purpose of returning the child, in proper custody, to the country whose subject he is.

There is no appeal before us from the order of Smily J., but because similar cases may arise in the future I desire, with the greatest respect, to express my opinion that that learned judge should not, in the circumstances of this case as disclosed in the material before him, have directed an issue but should have directed that the child be delivered into the custody of the appellant on her undertaking to return with him to her home in the United States.

I think it desirable to say a few words in regard to the judgment of Morton J., in *re B—'s Settlement, supra.* Counsel for the respondent relied upon this case as supporting the judgment in appeal, and laid particular stress on the following passage, which appears to have been approved by the majority of the Court of Appeal in the case at bar:

> In my view, under s. 1 of the Guardianship of Infants Act, 1925, I am bound to consider first the welfare of the infant, and to treat his welfare as being the paramount consideration. In so doing, I ought to give due weight to any views formed by the Courts of the country whereof the infant is a national. But I desire to say quite plainly that in my view this Court is bound in every case, without exception, to treat the welfare of its ward as being the first and paramount consideration, whatever orders may have been made by the Courts of any other country. If there are any observations in the two cases cited (*Nugent* v. *Vetzera* (4),

(1) (1854) 4 DeG. M. & G. 327.
(2) (1929) 63 O.L.R. 518.
(3) (1866) L.R. 2 Eq. 704.
(4) L.R. 2 Eq. 704.

and *Di Savini* v. *Lousada* (1)) which state or imply a contrary view, these observations ought not, in my view, to be followed at the present day.

In my view the facts in that case are dissimilar from those in the case at bar. The following important differences may be noted. In that case, the mother of the infant was before her marriage a British national. Following divorce proceedings in Belgium she had returned to live in England, and had a bona fide residence there. The order of the Belgian Court granting custody to the father was an interlocutory order. Morton J., laid emphasis on this fact, and stated that he did not know how far, if at all, the matter had been considered by that Court on the footing of what was best for the child or whether it had been regarded as a matter of course that the father being the guardian by the common law of Belgium and the only parent in Belgium, should be awarded custody. This interlocutory order was made on October 5, 1937 at which time the child was apparently already in England, but was not served upon the mother until December 6, 1938, more than a year after it was made. There was no agreement between the parties that the child should not be removed from Belgium. While the report does not set out the findings of fact made by Morton J., and we are left to speculate as to their precise nature, they were such as to move that learned Judge to say: "At the moment my feeling is very strong that even assuming in the father's favour, that there is nothing in his character or habits which would render him unfit to have the custody of the child, the welfare of the child requires in all the circumstances as they exist that he should remain in England for the time being." Morton J. laid considerable stress on the wording of Section 1 of the Guardianship of Infants Act 1925, which differs substantially from that of the corresponding section of the Infants Act of Ontario.

The judgment of Morton J. has been the subject of some comment and criticism (See the Journal of Comparative Legislation and International Law, Vol. 22 Third Series, page 234; 21 British Year Book of International Law pages 204-205; 4 Modern Law Review page 64 and Cheshire on Private International Law 3rd Edition (1947)

(1) 18 W.R. 425.

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pages 537 and 538). In Schmitthoff on Conflict of Laws (1945 at page 285, the judgment is treated as one explaining and depending upon the terms of Section 1 of the Guardianship of Infants Act 1925, referred to above. While, I think that, on the facts, this case is clearly distinguishable from the case at bar, I think it desirable to state my opinion that the proposition laid down in the passage quoted above should not be held to state the law of Ontario applicable to such a case as the one now before us.

I venture to think that neither Wells J., nor the majority of the Court of Appeal attached sufficient importance to the agreement between the parties providing that the child should not be removed from the United States without the consent of both parties. This agreement appears to me to be reasonable as between the parties and in the best interests of the child. As mentioned, it received the approval of the Superior Court in California in a judgment admitted to be valid. I do not think that any case was made out to warrant the Court sanctioning what the learned trial judge properly describes as an obvious and flagrant breach of this agreement on the part of the respondent. I do not find anything in the record to suggest that it was to the advantage of the infant that he should be taken out of the United States of America.

In the result, in my opinion, the appeal should be allowed and an order should be made, reciting the undertakings given by the appellant at the hearing that she will forthwith return with the infant, Terry Alexander McKee, to the United States of America and will keep the respondent fully advised as to his whereabouts and directing that the appellant do have the custody of the said infant and that the respondent do deliver the said infant into the custody of the appellant at the Office of the Registrar of the Supreme Court of Ontario at Osgoode Hall, Toronto, on Wednesday the 14th day of June 1950 between the hours of 10 and 11 o'clock in the forenoon, Eastern Standard Time.

No doubt the respondent should be allowed reasonable access to the infant, but I do not think that any useful purpose would be served by our seeking to define in this

order the terms on which such access shall be had. The primary purpose of the proposed order is that the infant may be taken back to his own country, from which, in my opinion, he ought never to have been removed. No doubt, if the parties cannot agree, the Courts of his own country will make whatever order appears desirable as to access. No reference to access should be made in the formal order of the Court.

The appellant should have her costs throughout, including the costs of the motion to quash the appeal to this Court, the issue and service of the Writ of habeas corpus, the proceedings before Smily J., the issue and execution of the Commission or Commissions to take evidence, and any interlocutory proceedings the costs of which have not already been disposed of other than the appellant's motion to this Court for an order extending the time for completing the appeal as to which there should be no order as to costs. In taxing the costs of the motion to quash, consideration should be given to the fact that at the time that motion was launched the respondent was entitled to move on the ground of delay in completing the appeal.

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

KELLOCK J.:—The appellant seeks to set aside the judgment of the Court of Appeal for Ontario affirming the judgment at trial of Wells J. dismissing her application for judgment awarding her the custody of the infant here in question as against the respondent, the husband and father. Counsel for the appellant, in his argument before this Court, rested his case primarily upon (1) a judgment of the Superior Court of the State of California, dated the 1st of August, 1945, and (2) an agreement of the 4th of December, 1941, made after the parties had separated, in paragraph 5 of which it was agreed that neither of the parties would remove the infant in question out of the United States without the written permission of the other. The findings of the learned trial judge as to where the interests and welfare of the child lay were not and could not, in my opinion, be seriously challenged.

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The position of the appellant is that, because the parties to the proceedings and the infant are citizens of the United States of America and were domiciled and resident therein at all times prior to December, 1946, when the respondent brought his son to Ontario (it is said to avoid the effect of the California judgment affirmed on or about the 23rd of December, 1946, but not effective prior to the 13th of January, 1947), the courts of Ontario, as a matter of comity, ought not to exercise their jurisdiction over the infant further than to ensure his return to "his own country." The actual order which the appellant seeks is one awarding her the custody of the infant on her undertaking that she will forthwith return with him to the United States, and its primary purpose is not that it should be made from the standpoint of the welfare of the child, but merely to effect his removal from Ontario, not necessarily to California, but to one of the states of the Union. The question, therefore, which lies at the threshold of this case is as to whether the courts of Ontario, in the circumstances of this case, have a discretion enabling them in effect simply to deport the child, or whether they must apply the ordinary law of Ontario relating to custody of children.

It is not irrelevant to observe at the outset that the contention put forward on the part of the appellant involves an effect being given to the California judgment which would appear to be beyond the effect which, as stated in *Ruling Case Law,* vol. 9, page 477, sec. 293, would be given to it, in the circumstances here present, in any of the states of the Union even under the full faith and credit clause of the federal constitution of the United States. The authors there point out that the authorities in the United States are in conflict as to the extraterritorial effect of a judgment awarding the custody of the children upon the divorce of the parents (which is the type of judgment in question in the case at bar), some cases holding that, while the judgment is *res judicata* in the state of its rendition and elsewhere *so far as the parents are concerned,* it is not *res judicata* as to the right of some other state where the children may subsequently be to determine the custody of the children as their welfare may require, while other

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authorities sustain the proposition that where a decree of divorce fixing the custody of the children of the marriage is rendered in accordance with the laws of another state by a court of competent jurisdiction, such decree will be given full force and effect in other states so long as the circumstances attending the adoption of the decree remain the same. According to the above text, it is clear on the authorities that, whatever may be the ruling adopted, a foreign decree or order of the character under consideration is not a bar to a subsequent proceeding looking to its modification because of altered conditions since the time of its rendition, where such altered conditions make modification desirable and for the better welfare of the child. A glance at some of the authorities is instructive.

In *Re Bort* (1), the parents were divorced in Wisconsin where they both resided, the father being awarded custody of the children. Pending the proceedings, the wife removed the children to Kansas where the father took habeas corpus proceedings invoking the Wisconsin judgment and the full faith and credit clause of the federal constitution. The judgment of the court was given by Brewer J., later a member of the United States Supreme Court, who pointed out that the claim of the petitioner appeared to rest on the assumption that parents have some property rights in the possession of their children, which doctrine had been repudiated by the courts of Massachusetts. The Court did not put its judgment on that basis, however, but proceeded on the basis that as between the parents, the Wisconsin judgment was a finality, but that

> We undersand the law to be, when the custody of children is the question, that the best interest of the children is the paramount fact. Rights of father and mother sink into insignificance before that * * * In a divorce suit the court is limited to the question: which of the two parents is the better custodian of the children? The decision only determines the rights of the parties *inter se*. But in this proceeding the question is: What do the best interests of the children require?

In *People ex. rel. Allen* v. *Allen* (2), the wife commenced an action for divorce in the Supreme Court of Illinois in which the husband appeared. In the course of the proceedings, the latter was enjoined from keeping the children of the marriage out of the state until the further order of

(1) (1881) 25 Kas. 308.

(2) (1886) 40 Hun. (N.Y.) 611; 105 N.Y. 628.

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the court. The judgment in the action awarded the custody to the mother who subsequently took habeas corpus proceedings in New York to obtain custody of the children. It was found as a fact that when the parties separated, custody of the children remained by agreement with the father upon the understanding that he would not remove them from Illinois without giving the mother notice of his intention so to do and an opportunity to visit them. This undertaking had been violated by the defendant. In the course of his judgment, Haight J. said at page 620:

To our mind, the Constitution covers the question under consideration, and it is our duty to give full faith and credit to the decree of the Illinois court. We do not, however, regard the decree of that court as binding upon the infants, but it is binding upon the parents, the parties to the action. The infants at the time, being of such tender years as to be unable to choose for themselves as to their custodian, became the wards of the court, and it was the duty of the court to choose for them. The court, in choosing for them, was required to consider the best interest and welfare of the children. Its decision became binding upon the children only for the time being, and as soon as the circumstances of the custodian changed, or other circumstances arose which would make it for the best interests of the children that there should be a change, it would be the duty of the court in which the decree was originally made, *or of any court having jurisdiction,* to make such change. But as between the parties to the action, the parents of the children, they are bound by the matters adjudged and determined in the action, and cannot again re-try the question therein determined.

Upon the merits, the mother was awarded custody.

The Court of Appeals dismissed an appeal of the father:

For the reason that the courts below, upon the view of all the existing facts related to the welfare and interests of the infants, exercised their discretion in awarding to the mother the custody of the children; and in so doing, gave to the Illinois decree not the force of an estoppel or the conclusive effect sometimes due to a judgment, but simply regarded it as a fact or circumstance bearing upon the discretion to be exercised without dictating or controlling it.

In *Slack* v. *Perrine* (1), the Court of Appeals of the District of Columbia had to consider a judgment rendered in the Court of Chancery in New Jersey in proceedings instituted at a time when that court had jurisdiction over the parties, but during which proceedings the infants in question had been removed to Washington. The court held that the New Jersey court did not lose jurisdiction merely by the removal, and pointed out that otherwise the court of the District of Columbia itself would lose juris-

(1) (1896) 9 App. D.C., 128.

diction if the children were again spirited away into another state where the same contention would be open. It was therefore held that the judgment of New Jersey was binding but its conclusive effect was limited to the parties. Insofar as the infants themselves were concerned, their rights could not be concluded or prejudiced by it, their welfare being the matter of paramount consideration at all times and under all circumstances.

Coming to the law of Ontario, it is worth noting at the outset, the position of an alien within the King's Dominions. In *Johnstone* v. *Pedlar* (1), Viscount Finlay said at page 273:

> The subject of a State at peace with His Majesty, while permitted to reside in this country, is under the King's protection and allegiance * * *

At page 274:

> Prima facie the subject of a State at peace with His Majesty is, while resident in this country, entitled to the *protection accorded to British subjects* * * *

Viscount Cave, 276:

> But so long as he remains in this country with the permission of the Sovereign, express or implied, he is a subject by local allegiance *with a subject's rights and obligations.*

Lord Sumner, page 291:

> As soon as it is found to be settled, as the law of our Courts, that they are open to aliens as well as to subjects, I think it follows that they are presumably *equally* open, to them so far, that is, as actions are brought in support of such civil rights as are recognized in aliens from time to time.

Lord Phillimore, at page 296:

> But an alien ami is never exlex, he is never subject to the arbitrary dispositions of the King. His rights may be limited, but whatever rights he has he can enforce by law just *as an ordinary subject can.* That is, I believe, both international law and the law of this country. No trace of any other doctrine is to be found in the text books, or in decided cases. The alien ami, once he is resident within the realm, is given *the same rights for the protection of his person and property as a natural born or naturalized subject.*

At page 297:

> *From the moment of his entry into the country,* the alien owes allegiance to the King till he departs from it, and allegiance, subject to a possible qualification which I shall mention, draws with it protection, just as protection draws allegiance.

(1) [1921] 2 A.C. 262.

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In *Porter* v. *Freudenberg* (1), Lord Reading C.J. said at page 869:

> Alien friends have long since been, and are at the present day, treated in reference to civil rights as if they were British subjects, and are entitled to the enjoyment of all personal rights of a citizen, including the right to sue in the King's Courts.

At page 883:

> Once the conclusion is reached that the alien enemy can be sued, it follows that he can appear and be heard in his defence and may take all such steps as may be deemed necessary for the proper presentation of his defence. If he is brought at the suit of a party before a Court of justice he must have the right of submitting his answer to the Court. To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the King's Courts in the administration of justice.

There is not, therefore, one law to be applied to an alien and another to a subject. Both are entitled to the protection of the same law. Appellant, in the present case, by taking proceedings here has invoked that law, and it is the respondent who is sued. As stated by Lord Reading in the case cited, at page 883:

> * * * he is entitled to have his case decided according to law, and if the judge in one of the King's Courts has erroneously adjudicated upon it, he is entitled to have recourse to another and an appellate Court to have the error rectified. Once he is cited to appear he is entitled to the same opportunities of challenging the correctness of the decision of the judge of first instance or other tribunal *as any other defendant.*

In *Hope* v. *Hope* (2), which was a proceeding as to custody, Lord Cranworth L.C., said at 346:

> The reason why such a jurisdiction exists over foreign children in this country is, because foreign children, like adult foreigners, while here are to a certain extent the subjects of the Crown of England, and it has been decided that they are so for many purposes.

At page 347 he said:

> There might be cases in which it would be improper that I should attempt to exercise it, as, for example, where both the parents should be abroad, and there should be no property here; * * * I should in all probability not make an order, because the parties would not be within my control, and they might disobey * * * But here it is to be observed that these circumstances do not exist. The father is within the jurisdiction; the mother, who though living at Paris yet is a party and has appeared * * * and she is therefore, for this purpose, within the jurisdiction, and a person, therefore, whom an order of this Court may reach; and being here, I am not to assume that she will disobey any order that may be made upon her. Therefore, I shall not abstain from making an order upon her merely because she happens to be residing at

(1) [1915] 1 K.B. 857. (2) (1854) 4 DeG. M. & G. 327.

Paris. That no order could be made on a person abroad would be a dangerous principle to recognize in this country, where there are such facilities for travelling, and where a person may in a few hours get out of the jurisdiction by leaving almost any part of the kingdom, and as easily return again.

So far as the Courts of Ontario are concerned, their jurisdiction in matters relating to infants stems from R.S.O. 1897, c. 51, the relevant parts of which read as follows:

26. The High Court shall also, subject as in this Act mentioned, have the like jurisdiction and powers as by the laws of England were on the 4th day of March, 1837, possessed by the Court of Chancery in England, in respect of the matters hereinafter enumerated, that is to say:

* * *

2. In all matters relating to* * * infants * * * and their estates.

27. The rules of decision in the said matters in the last preceding section mentioned shall, except where otherwise provided, be the same as governed the Court of Chancery in England, in like cases on the 4th day of March, 1837.

40. The High Court shall also have jurisdiction—

* * *

3. In respect of * * * infants and their property and estates, as provided by the Act respecting . . . Infants.

(Then R.S.O. 1897 cap. 168; now R.S.O. 1937 cap. 215).

It is well settled that where jurisdiction is conferred, the court is required, rather than merely permitted, to exercise it.

In *The Queen* v. *Bishop of Oxford* (1), Cockburn C.J. referred at page 259 to what had been said by Jervis L.C.J. in *MacDougall* v. *Paterson* (2), as follows:

When a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application.

In *Re Gay* (3), Middleton J.A., in delivering the judgment of the Appellate Division, said at page 43:

The Courts of this country *must always* exercise the jurisdiction conferred upon them in regard to the custody of infants within this jurisdiction, *according to the laws of this country.*

In *Re Kinney* (4), 6 P.R. 245, both parents of the infant there in question were not only citizens, but also resided in the State of Michigan. The child in question had been brought into Ontario for temporary purposes by the husband, and it was alleged by the wife that this had been

(1) (1879) 4 Q.B.D. 245.
(2) 11 C.B. 755.
(3) (1926) 59 O.L.R. 40.
(4) (1873) 6 P.R. 245.

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done in order to place it beyond the jurisdiction of the courts of Michigan in which cross-actions for divorce and custody were then pending between the parties. The proceeding in the Ontario court was a habeas corpus proceeding instituted by the mother. After pointing out that the husband and wife were citizens of a foreign country and that their domicile, including that of the child, was foreign, Wilson J. said at 247:

> And in disposing of this matter I must determine the rights of the parties, and must make my judgment conform to the law which governs these rights, subject to the general principles of our own law. I must ascertain what the law of that country is as applicable to the contested rights before me, and so far adopt that law as part of our own internal law in determining these rights, subject, as before stated, to our own general principles of jurisprudence.

That which is involved in the present case is a matter of custody. The appellant, under the guise of custody proceedings, asks for an order for which there is no authority outside the Extradition Act or the deportation provisions of the Immigration Act. Even if it could be said that such authority resides in the executive, it has not been committed to the courts, *Attorney-General for Canada* v. *Cain* (1). In my respectful opinion, there is no jurisdiction in the courts of Ontario or in this court to make such an order as the appellant seeks or to do otherwise than to apply to the circumstances of this case, the ordinary law of Ontario as to custody, giving due weight, of course, to the California decree.

It is always to be remembered that, whatever the position of the respondent, the infant itself is entitled to rely upon the protection of the court and the law of Ontario relating to custody of infants. In my opinion, to grant what the appellant asks would be to ignore these rights. No vestige of authority has been referred to to substantiate such a course.

Since the case of *Re Ethel Davis* (2), which received the approval of the Appellate Division in Ontario in *Re Gay* (*supra*), it has been authoritatively determined that the motive of a person in coming to Ontario to avoid the results of an anticipated judgment as to custody does not enable the courts of Ontario to refuse to apply to such a case the ordinary law. The question then is as to what

(1) [1906] A.C. 542 at 546. (2) 1894) 25 O.R. 579.

effect is to be given under the law of Ontario to a foreign decree dealing with the custody of children. That law was authoritatively laid down in the Appellate Division by Middleton J.A. in *Re Gay,* already cited, where, in approving of the previous decisions in *Re E.* (1), and *Re Ethel Davis* (*supra*), he said at page 42:

> The kidnapping cases cited by Mr. Greene, e.g. *Rex* v. *Hamilton* (2), do not, as it seems to me, decide anything contrary to what is decided in *Re Ethel Davis.* They decide that when a child is in the custody of the parent to whose custody it has been confided by the court of the domicile of the parents, it is in *lawful* custody, so that it is an offence for the other parent to take it away, but they do not decide that if the parent to whom the custody has been awarded by the foreign court come to the Court in Ontario seeking the enforcement of the foreign judgment the Ontario Court is bound to lend him its aid, even if convinced that if it does so it will not be acting in the best interests of the child* * *
>
> The foreign guardian has no absolute right as such under the judgment of the foreign court in this country. The decree of the foreign court is entitled to great weight in determining the proper custody here.
>
> Also, upon a narrower principle I think the judgment of the Michigan court is not entitled to the effect given it by the judgment in review. It is not in itself, nor upon its face, final * * * No matter what the form, this is necessarily the case in all orders dealing with the custody of children—they are not in their nature final. The Courts of this country must always exercise the jurisdiction conferred upon them in regard to the custody of infants within this jurisdiction according to the laws of this country * * *
>
> Owing to the course adopted in the court below, the question of the welfare of the infants and the conduct of the parents is not ripe for discussion. This must be determined by oral evidence, and the case is remitted to the Surrogate Court to be dealt with upon oral evidence and in accordance with the provisions of the statute (the Infants Act) to which reference has been made.

In *Re Ethel Davis,* the appellant, while formerly resident in Ontario, had gone to Buffalo, New York, in the year 1890. There the husband filed a declaration in 1891 in which he swore that it was his bona fide intention to become a citizen of the United States of America and to renounce forever all allegiance to Her Majesty. In February, 1892, his wife left him, taking with her the child in question, alleging drunkenness and neglect on his part. She lived apart from him with the children until July. 1893, when, during her absence, he possessed himself of the children and placed them in an orphanage in Buffalo. In September, 1893, she instituted proceedings for divorce in the Superior Court at Buffalo upon the ground of his adultery. He appeared in these proceedings and the court

(1) (1921) 19 O.W.N. 534. (2) (1910) 22 O.L.R. 484.

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found all the material facts charged against him as true and granted the wife divorce and custody. Shortly before the judgment was pronounced on December 15, 1893, the husband left Buffalo, taking the infant in question with him into Ontario and it was expressly found by the learned trial judge, Street J., that this was done "with the apparent object of escaping the consequences of the impending judgment." The mother then came to Ontario and instituted habeas corpus proceedings. This was obviously very shortly after the judgment in the Buffalo court as the judgment in Ontario was pronounced on May 18, 1894.

The learned trial judge found that the father had gone to Buffalo intending to reside there permanently and that he was domiciled there. Accordingly, he held that the court in Buffalo had jurisdiction over the parties which it did not lose merely by reason of the father having left with the object of escaping the consequences of the anticipated judgment. He held however, that the foreign guardian had no absolute rights as such under the foreign judgment in Ontario, but the fact of her appointment by the Court in Buffalo was entitled to "great weight in determining the proper custody here." On a consideration of all the circumstances, including the conduct of both spouses throughout, the learned judge held that the interests of the child lay in awarding custody to the mother.

In *Re B's Settlement* (1), the application for custody of the infant there in question was by the father, a Belgian national. The mother had been granted a divorce by the Belgian courts but the judgment was reversed and the father became entitled to custody by the common law of Belgium. The mother, who had gone to live in England, visited Belgium and was, by a stratagem, enabled to obtain possession of the infant in September, 1937, and took him to England. The father instituted divorce proceedings in Belgium and pending the proceedings, on October 5, 1937, was appointed guardian and given custody, the mother being ordered to return the infant within 24 hours of the service of the order on her, which order she did not obey. There was no question in this case, any more than in the case of Ethel Davis, but that the foreign court had jurisdiction over the parties.

(1) [1940] 1 Ch. 54.

The father then came to England and applied for custody, the mother in the meantime having obtained an order making the infant a ward of the Court in England. In these circumstances, Morton J., at page 58 asked himself:

> From what angle ought I to approach the case, and how far is there any restriction imposed upon the course which I should take by reason of the order of the Divorce Court in Belgium of October 5, 1937, giving custody to the father?

With regard to the order of the Belgian Court, the learned judge said at page 62:

> I do not think it would be right for the Court, exercising its jurisdiction over a ward who is in this country, although he is a Belgian national, blindly to follow the order made in Belgium on October 5, 1937.

The learned judge was of the opinion that, since the Guardianship of Infants Act, 1925,

> Whatever may have been the position before the Act of 1925, this Court is *always bound* to exercise a judgment of its own when dealing with the custody of a ward. In my view, under section 1 of the Guardianship of Infants Act, 1925, I am bound to consider first the welfare of the infant, and to treat his welfare as being the paramount consideration. In so doing, I ought to give due weight to any views formed by the Courts of the country whereof the infant is a national.

In considering the weight to be attached to the judgment of the Belgian court the learned judge thought that he could not disregard the fact that it had been made nearly two years before, and he had to deal with the position as it existed at the end of that time. The learned trial judge in October, 1947, had also to deal with the situation existing over two years later than the California decree of May, 1945.

In *Johnstone* v. *Beattie* (1), the House of Lords had to consider an application for the appointment of an English guardian for a Scottish child which had been brought to England after the death of the father for a *temporary purpose* (see 9 H.L.C. at 464, per Lord Campbell). At the time of these proceedings the mother was also deceased. It was held that the Scottish guardians had no authority over the infant in England nor entitled to be confirmed or appointed in England.

In the course of his judgment, Lord Cottenham said at page 113:

> It was urged, that the Court must recognize the authority of a foreign tutor and curator, because it recognizes the authority of the parent of a foreign child. This illustration proves directly the reverse;

(1) (1843) 10 Cl. & F. 42.

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for, although it is true that the parental authority over such a child is recognized, the authority so recognized is only that which exists by the law of England.

And at page 117:

It has been said that if the Court had jurisdiction, it ought not in this case, in its discretion, to have exercised it. This is not very intelligible to those who are accustomed to the proceedings in Chancery. It means, I presume, that the Court ought not to have interfered * * * In truth, however, independently of form, the doctrine of non-interference has no place in the case of an infant, for whose protection no legal right of guardianship in any person in this country exists * * * If there be a father living, or a guardian regularly appointed, (i.e. in England) the Court does not interfere, except to assist the father or guardian, unless in certain cases in which the misconduct of the father or guardian renders interference necessary for the protection of the child.

At page 84, the Lord Chancellor, Lord Lyndhurst, said:

It is proper that I should state, that according to the uniform course of the Court of Chancery—which I understand to be the law of that Court, which has always been the law of that Court—upon the institution of a suit of this description, the plaintiff, the infant, became a ward of the Court—became such ward by the very fact of the institution of the suit; and being a ward of the Court, *it was the duty of the Court* to provide for the care and protection of the infant; and as the Court cannot itself personally superintend the infant, it appoints a guardian, who is an officer of the Court, for the purpose of doing that on behalf of the Court, and as the representative of the Court, which the Court cannot do itself personally. If there be a parent living within the jurisdiction of the Court, or if there be a testamentary guardian within the jurisdiction of the Court, the Court in that case does not interfere for the purpose of appointing a person to discharge the duty, which is imposed upon the Court itself, of taking care of the person of the infant; but the parent or the testamentary guardian is subject to the orders and control of the Court, precisely in the same way as an officer appointed by the authority of the Court, for the purpose of discharging the duties to which I have referred. I apprehend that is clearly the law of the Court of Chancery; and it has always been so, as far as I have been able to understand and comprehend.

At page 146 Lord Langdale said:

An infant whose whole property is alleged to be in Scotland, and whose tutors and curators are usually resident in Scotland, is now resident in England and entitled to the protection of the English laws . . . upon the bill being filed, the infant became a ward of the Court of Chancery; and at the same time it became the *duty of the Court* to protect her interests, or to see that they were duly protected.

In *Stuart* v. *Bute* (1), an infant had been removed to Scotland by one of two guardians appointed in England, who refused to return him, although ordered so to do by the court. Proceedings were then taken in Scotland for

(1) (1861) 9 H.L.C. 440.

an order for delivery of the infant. With respect to the Scottish Court, Lord Campbell L.C. said at page 463:

> The Court of Session had undoubted jurisdiction over the case. By their *nobile officium*, conferred upon them by their Sovereign as *parens patriae, it is their duty* to take care of all infants who require their protection, whether domiciled in *Scotland* or not. But I venture to repeat, what I laid down in this House nearly 20 years ago, "that the benefit of the infant which is the foundation of the jurisdiction must be the test of its right exercise."

The House came to the conclusion upon that principle that it was in the interests of the child that he should be delivered to the English guardian.

In *Nugent* v. *Vetzera* (1), cited by the learned Chief Justice in the court below, Austrian children had been sent to England for educational purposes and their guardians appointed by the Austrian court desired their return in accordance with a decree of that court. This was resisted by a married sister of the children with whom they lived in England. Page-Wood V.C. refused to interfere with the carrying out by the foreign guardian of the return of the infants to Austria. He refused however to discharge the order which had been made appointing guardians in England and it is significant that in the course of his judgment he was careful to say that the right of the foreign guardian should not be interfered with

> except on some grounds which I do not think it necessary to specify, guarding myself, however, against anything like an abdication of the jurisdiction of this Court to appoint guardians.

This was not the case of a parent in England desiring to keep his or her child there. Both parents were in fact deceased. The evidence on the part of the sister was directed merely to establishing that an English education was superior to an Austrian one, and that the children's mother in her lifetime had desired them to be brought up in England. There was no question raised as to the interests of the children from the standpoint of the suitability of the foreign guardian to have their custody or from the standpoint of their health or well-being. Had questions of that sort been disregarded, the decision could not stand with the decisions of the House of Lords already referred to. In the case at bar, the appellant in effect invites the court to shut its eyes to everything except the foreign judgment

(1) (1866) L.R. 2 Eq. 704.

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and the agreement already referred to, because the parties are aliens—in effect to abdicate its ordinary jurisdiction, a thing Page-Wood V.C. in the case last mentioned carefully guarded himself against doing.

In *M'Lean* v. *M'Lean* (1), the proceedings were between a father domiciled in Scotland and a mother living in England, the children being with the latter, who had taken proceedings in the Court of Chancery in England.

Lord Justice-Clerk (Cooper) at page 84 said:

> Before considering what exactly we should do, it is worth recalling that, since these three children are *de facto* resident outside the jurisdiction of this Court, any order that we might pronounce could only be made effective by invoking the aid of the Court of Chancery; and I should imagine that the Court of Chancery would treat our decision with every consideration and respect *but would independently examine the matter from their own standpoint before lending their authority to the enforcement of our order. That is certainly the attitude which this Court would adopt in the converse case* . . . we are not concerned with the relative superiority or inferiority of the rival claims of the two spouses to custody except from one point of view, namely, the welfare of the children, which is the primary and paramount consideration by reference to which our judgment must be guided.

Lord Jamieson at page 90 referred to the decision of Morton J. in *B's Settlement* (2), and said:

> * * * the Court whose assistance is invoked will not just blindly give that assistance, but will first be satisfied, giving of course due weight and consideration to that order made, that such is in the best interests of the child.

In my opinion, the result of all the authorities is correctly summed up in the 3rd Edition of Cheshire at page 539, where the author says:

> The cases already discussed show that whether the foreign guardian shall be allowed to exert his personal authority, as, for example, by removing the ward from England, is conditioned solely by what the Court considers is most calculated to promote the welfare of the infant.

In *Re Harding* (3), Orde J.A., giving the judgment of the court, after referring to *Re Gay* (*supra*), said at 520:

> What was held there was that, whatever the jurisdiction of a foreign court might be over infants within this province, our courts had jurisdiction over them by reason of their *being within this Province.*

In *Johnstone* v. *Beattie* (*supra*), Lord Cottenham said at 114:

> * * * it has before been shown that the rights and duties of a foreign tutor and curator cannot be recognized by the Courts of this country, with reference to a child residing in this country. The result is that such

(1) (1947) S.C. 79.
(2) [1940] Ch. 54.
(3) (1929) 63 O.L.R. 518.

foreign tutor and curator have no right, as such, in this country; and this so necessarily follows from reason, and from the rules which regulate, in this respect, the practice of the Court of Chancery, that it could not be expected that any authority upon the subject would be found.

In *Woodworth* v. *Spring* (1), Bigelow C.J. said with respect to the status of a foreign guardian of an infant, at 323:

He (the child) is now lawfully within the territory and under the jurisdiction of this commonwealth, and has a right to claim the protection and security which our laws afford to all persons coming within its limits, irrespective of their origin or of the place where they may be legally domiciled . . . The question whether a person within the jurisdiction of a state can be removed therefrom depends, not on the laws of the place whence he came or in which he may have his legal domicil, but on his rights and obligations as they are fixed and determined by the laws of the state or country *in which he is found* * * *

Even the parental relation, which is everywhere recognized, will not be deemed to carry with it any authority or control beyond that which is conferred by the laws of the country where it is exerted. At page 325 he said:

It would not do to say that a foreign guardian has no claim to the care or control of the person of his ward in this commonwealth. If such were the rule, a child domiciled out of the state, who was sent hither for purposes of education, or came within the state by stealth, or was brought here by force or fraud, might be emancipated from the control of his rightful guardian, duly appointed in the place of his domicil, and thus escape or be taken out of all legitimate care and custody. But *in such cases,* the foreign guardian would not be regarded here as a stranger or intruder. His appointment in another state as guardian of an infant, with powers and duties similar to those which are by our laws vested in guardians over the persons of their wards, would entitle him to ask that the comity of friendly states having similar laws and usages should be so far recognized and exerted as to surrender to him the infant, so that he might be again restored to his full rights and powers over him, by removing him to the place of his domicil. *And if it should appear that such surrender and restoration would not debar the infant from any personal rights or privileges to which he might be entitled under our laws, and would be conducive to his welfare and promote his interests, it would be the duty of the court to award to the foreign guardian the custody of the person.* This is the doctrine substantially stated by Lord Langdale in *Johnstone* v. *Beattie, ubi supra,* and confirmed in a subsequent judgment in the case of *Stuart* v. *Moore,* in the House of Lords, as reported in 4 Law Times (N.S.) 382.

At 326:

The result is, that neither of the parties to the present proceeding can assert or maintain an absolute right to the permanent care and custody of the infant who is now before the court. But it is for this court to

(1) (1862) 4 Allen (Mass.) 321.

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determine, in the exercise of a sound judicial discretion, having regard to the welfare and permanent good of the child as a predominant consideration, to whose custody he shall be committed.

With respect to the term of the agreement between the appellant and the respondent that the child should not be removed outside the United States without consent, it is worth noting that, while under the judgment of the California court of the 17th of December, 1942, granting the respondent's petition for divorce against the appellant and awarding him custody of the infant with the provision that the latter should spend three months in the summer with the appellant, the separation agreement of 1941 (referred to in the judgment as a "property settlement") was confirmed, at the same time it was provided that during the above-mentioned three months the child should not be removed from California without the consent of the court. In my opinion, there is a great deal to be said for the view that the confirmation of the "property settlement" by the above judgment was limited to the property provisions of that agreement which were substantial, and that it was not intended that such confirmation should extend to the provisions of paragraph 5. It would appear somewhat difficult to contend that the judgment confirmed the agreement that neither party should remove the child from the United States without the consent of the other, and therefore authorized each to have the child anywhere within the Union, and at the same time restrained the appellant from removing the child outside the State of California during the only period of the year when the appellant was at all entitled to have the child with her. It seems a contradiction, therefore, to say that the agreement and therefore paragraph 5 was confirmed by the judgment which itself altered the provisions of that paragraph as against one of the parties.

However that may be, I do not think that under the law applicable in the Province of Ontario, such an agreement, even with the confirmation of a judgment, is to be given any greater effect than a foreign judgment itself, and I have already dealt with that matter. The agreement is a fact for the consideration of the court in determining that which is in the best interests of the child.

In *Re Armstrong* (1), Middleton J., as he then was, held that

> where the welfare of the infant was concerned, that consideration was paramount; and no agreement by the parents could absolve the Court from considering the infant's welfare.

Section 1 subsection (1) of *The Infants Act,* R.S.O. 1937, 215, provides that the court, in making an order as to custody and the right of access thereto of the other party, shall have

> regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary or discharge the order on the application of either parent.

By section 2 subsection (2), it is provided that, unless otherwise ordered by the court, and subject to the provisions of this Act, the father and mother of an infant shall be joint guardians and shall be equally entitled to the custody, control and education of such infant. Subsection (2), which was not in force at the time of the decision in *Re Armstrong* (*supra*), provides that

> Where the parents are not living together, or where the parents are divorced or judicially separated, they may enter into a written agreement as to which parent shall have the custody, control and education of such infant, and in the event of the parents failing to agree, either parent may apply to the court for its decision.

This provision, of course, has nothing to do with an agreement as to a country where an infant is to be kept. It relates to agreements as to custody and if, inferentially, the separation agreement of 1941 is to be regarded as giving the custody to the mother because of the provision for payment by the respondent to the appellant of $125 per month in respect of the infant, that agreement has been already set aside by the judgment of 1942 which awarded custody to the respondent and permitted the appellant to have the child for three months only in each year.

In any event, it was pointed out by Rose J., as he then was, in *Re Allen* (2), after the statute had taken its present form, that the amendments of 1923 left untouched the provisions of section 3, namely,

> In questions relating to the custody and education of infants, the rules of equity shall prevail.

(1) (1915) 8 O.W.N. 567.
(2) (1928) 35 O.W.N. 101

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At page 102, that learned judge also said:

As a result of the amending Act (the amendment being embodied in sections 1 and 2 of the present Act) the Court in this case must concern itself, as heretofore, primarily with the welfare of the infant * * *

This judgment was affirmed on appeal, 36 O.W.N. 222.

In *Re Plewes* (1), also, Robertson C.J.O. at 480, after referring to the amendments, said:

The rules of equity continue to prevail. The welfare of the child is still the paramount consideration * * *

I do not think that section 2 of the statute goes any farther than to authorize an agreement between parents living apart as to the custody of their children, which prior to that statute might have been void on grounds of public policy as explained by Lord Romily M.R. in *Hamilton* v. *Hector* (2).

In my opinion, the bringing of the infant to Ontario, notwithstanding the agreement, is one fact in the respondent's conduct which the court should take into consideration in determining his fitness to have the custody of the child, but as stated by Rose J. in *Re E* (*supra*) at 536, the matter to be determined is "not the proprietary right of either of the contending parties, but the order that ought to be made regarding the custody of the infant, having regard to his welfare and to the conduct of the parents and to the wishes as well of the mother as of the father," as provided by the statute. This is the uniform ratio of all the authorities, domestic and foreign, which I have been able to find, and the situation is the same, even where a provision against removal is contained in the judgment. In *Hardin* v. *Hardin* (3), the court said:

The alleged misconduct of appellee in removing the child from the State of Kentucky beyond the jurisdiction of the McLean circuit court, without its consent or authority, did not in any manner enlarge the right of appellant under the judgment or decree thereof in respect to the custody of the child, but possibly subjected her to be dealt with by such court as in contempt of its authority.

Again, in *Joab* v. *Sheets* (4), the court said at 332:

The alleged misconduct of the appellee in having disregarded, and in planning for the further disregard of some of the provisions in the decree of divorce, concerning the custody of the child, might have

(1) (1945) O.W.N. 479.
(2) (1872) L.R. 13 Eq. 511 at 520, 521.
(3) (1907) 81 N.E. 60 at 62.
(4) (1884) 99 Ind. 328.

afforded some reason for the modification of, or some change in, those provisions in a direct proceeding to that end, but it did not of itself work a forfeiture of any of the appellee's rights or responsibilities under the decree. Conceding the truth of the alleged misconduct on her part, it made the appellee simply and only liable to an attachment for contemptuous disregard of the authority of the court granting the decree of divorce, and to be dealt with as is usual in similar cases of contempt for refusing to comply with orders of court.

In *Thorndyke* v. *Rice* (1), the Supreme Judicial Court of Massachusetts, in dealing with an agreement made after the parents had separated with respect to the custody of their child, said at 21:

> Then there is the agreement of the mother, voluntarily entered into by her, that the father should have his custody. This is of no binding force upon the court as an agreement, but it is evidence to show what the opinion of the mother was then as to the fitness of the father to have such custody.

Coming to the facts in the case at bar, the appellant and respondent were married in the year 1933,, and after residing in the District of Columbia, the State of Wisconsin and the State of Michigan, they took up residence in Los Angeles in the year 1937. Both had had children of previous marriages. The child here in question, Terry, the only child of the marriage of the parties, was born on the 14th of July, 1940. In or about the month of December, 1940, a separation in fact took place, and on the 4th of September, 1941, the separation agreement already referred to was executed.

Almost immediately afterwards, the appellant commenced divorce proceedings in the Superior Court of Los Angeles and the respondent filed a cross-complaint asking similar relief against the appellant. Judgment was delivered on the 17th of December, 1942, the petition of the appellant being dismissed and judgment for divorce being granted in favour of the respondent, the appellant being found guilty of adultery. The respondent was awarded custody of the infant Terry and the provision already referred to was made in this judgment that the child should spend three months in each year with the appellant. It was also found by the judgment that the present respondent was a fit and proper person to have the care, custody and control of Terry; that he had a well-established and proper home in Milwaukee, Wisconsin, and also one in Port Austin,

(1) (1860) The Monthly Law Reporter, 19.

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Michigan; that he was able properly to care for said minor child at either of these two places, and that he was better able to provide for the proper raising and education of said minor child than the present appellant.

Following this judgment the respondent took his son to his home in Milwaukee where he lived with all the members of his family who were not then grown up, excepting one daughter, Cynthia by name, who at all times has adhered to the appellant. During the residence in Milwaukee, which continued for about two years, the family also used the Michigan residence at Port Austin in the summer. In July, 1944, the respondent gave up his Milwaukee residence and removed to the Port Austin home.

In the meantime, the appellant continued through 1943, 1944 and 1945 with proceedings in the California action by way of applications for a new trial and for modification of the terms of the judgment of 1942 as to custody. In January, 1944, she also instituted custody proceedings against the respondent in the Wisconsin courts. In May, 1945, while the Wisconsin action was pending, respondent made application in the California action for an order eliminating the provision under which the child was to spend the three summer months with appellant. She thereupon made a further application by way of cross-proceeding for an order awarding her complete custody to the exclusion of respondent. This resulted on August 1, 1945, in the judgment now relied on by appellant, giving her complete custody.

The considerations which entered into the making of this order (which are of importance in considering the weight to be given to it) included such matters as the accessibility geographically of the Port Austin home, the inclemency of the weather, the fact that the care of the child there was left to aged employees of the respondent during the latter's frequent absences from home, and the lack of school facilities. There is no finding nor suggestion of any change in the fitness of the respondent to have the care or custody of his son, nor is there any suggestion that any consideration in the health of the child called for a change. The latter was then five years of age and was, contrary to the finding in the judgment, attending kinder-

garten in the public school at Port Austin, a fact brought out in the present proceedings by counsel for the appellant.

The respondent appealed from this order and the appeal had the effect of a stay. Final judgment, as previously mentioned, was not given until some time in December, 1946, and under the law of California this did not become effective until the 13th of January, 1947. In the meantime, the respondent, shortly after learning of the judgment in December, left his home at Port Austin with the child and came to Kitchener in the Province of Ontario. In May, 1947, after completion of alterations to a house on a farm owned by the respondent near Kitchener, they took up residence there. The respondent says that he preferred to have his son go to a country school owing to the attention which the boy would receive in a larger centre by reason of the publicity given the present proceedings which the appellant had instituted. When the latter learned of the whereabouts of the respondent, she came to Kitchener toward the end of February, 1947, and commenced these proceedings on the 17th of March following.

The respondent's first wife had originally come from Waterloo county and many of her relatives are still there. The respondent had himself made a great many visits there over the years and in the fall of 1944 he purchased a farm in the county and later two adjoining farms which he operated together. It is on this property that he took up residence with his sister and son.

In my opinion, the learned trial judge determined the matter before him in accordance with the proper principles governing, and came to the conclusion on the evidence before him as to the proper custody of the child that the "boy's best interests and welfare lie in leaving him in his father's custody and training." He found the attacks made upon the respondent by the appellant unfounded, and his conduct throughout that of an honest and upright man.

In weighing the effect to be given to the judgment of the California court, which I accept as having been given by a court having jurisdiction, the learned trial judge said:

* * * on looking at the evidence before me and *on giving the greatest weight to the California decision which I am naturally disposed to do* because it results from a prolonged trial and a consideration of the issues

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between these parties by a court of superior jurisdiction which is entitled to great respect, I am still reluctantly compelled to disagree with the California court's decision and to take a contrary view as to the proper place for the custody of this child. As I apprehend the law in Ontario, even granting the validity of the California judgment of 1945, it is only one of the factors which I must consider and the over-riding factor which must guide me in my final decision is my view on the evidence of the welfare of the infant.

In considering the weight to be given to the judgment of 1945, it is to be observed that while it states that it appears to the court "that it is for the best interests and welfare of said minor child" that he be placed in the custody of the appellant, the enumerated findings, even if accurate —and at least one has been shown by the evidence in the case at bar to be inaccurate—would not be considered sufficient grounds under the law of Ontario for changing the custody, there being no suggestion that the respondent has, since the decree of 1942, become unfit to have the custody of the infant, nor is there any reason given why the appellant, who was adjudged by that judgment to be unfit to have custody for the very adequate reasons given in that judgment, had by 1945 become fit. Giving due weight to the findings in the judgment of 1945, it is impossible, in my opinion, to overrule the decision in appeal on the concurrent findings of the courts below which weighed these findings in the light of all evidence adduced, particularly with respect to circumstances since the date of the 1945 judgment.

It is well to set out certain other parts of the judgment of the learned trial judge in which some of his findings are set forth, namely,

Looking at the matter in a broad way, I think I must agree with Mr. Justice Smily who directed this issue, that in some respects circumstances have changed since the judgment of the courts of California in 1945. For one thing, this child is now seven instead of five years old. He is approaching an age when his father's guidance and assistance may well be of more assistance to him than that of his mother. Looking at the matter in a broad way and regarding Mr. McKee's business life *and private life as I do,* it is very hard to escape the conclusion that in any event and *apart from Mrs. McKee's conduct,* the boy's best interests and welfare lie in leaving him in his father's custody and training. During the course of Mr. McKee's cross-examination, a vigorous attempt, commencing with some of his father's business difficulties when he was fifteen years of age, was made to discredit him in respect of his public and business morals. There were even suggestions of private immorality, but in no case was anything established nor was any evidence adduced which

I believed, which might lead one to believe that Mr. McKee's conduct had been anything but that of an upright and honest man. Mr. McKee in his testimony also indicated that his business affairs were closely integrated into the life of his own children and that of his brother and sisters. If Terry is handed over to the custody of his mother, there will be a breach of that association which in later years may redound very markedly in his favour in a financial way and in the way of the opening of proper business opportunities to him when he is through his education.

* * *

In my view, the evidence did not establish immorality on Mrs. McKee's part but a looseness of public conduct and a lack of personal integrity and dignity which I think might provide a very unhappy background to the proper upbringing of the child. Evidence was also given of Mrs. McKee's behaviour in a small restaurant in Kitchener by one Rita Eckensviller. Mrs. McKee flatly denied this evidence, but I must say in this case, having seen the witness and heard her evidence, I accept it, and *I do not believe Mrs. McKee's denial.* Again the conduct complained of, which was public lovemaking of a reasonably innocuous character, was such which might be understood if not approved in adolescents. It did not tend I think to show immorality as much as a *lack of appreciation of any proper standard of public conduct for one of her years,* on her part. At the conclusion of her evidence I asked Mrs. McKee whether she wanted custody of her son Terry because she felt she could do better for him than his father or did she want to take him from his father because of her animosity toward him. She said in reply: "I hope you believe me. I have no animosity toward him. I have really gotten over that. *I did feel that way in the beginning,* but it is not true any more, and she stated that she knew she could do well for the boy and really wanted him. *One's belief in this statement is somewhat tempered* by the fact that when Mrs. McKee returned to Kitchener to commence the proceedings which culminated in this issue, she visted the Ament home where Terry was being kept by his father, complete with a reporter and news photographer from the Detroit Daily News who took pictures of her Michigan attorney and herself vainly knocking at the door to see her infant child. One would think that this method of publicizing her difficulties would indicate a sense of drama which had perhaps taken possession of her to the exclusion of any real affection for her son, but of course it may be merely that customs and practices in these matters vary. In any event, conduct of this sort and the rather hysterical publicity which she apparently supplied to newspapers in Detroit, Kitchener and Toronto *would tend to shake one's faith in her as a proper person* to bring up a boy of seven whose serious education must now commence and who is entitled to a training inculcating proper standards of morals and decency.

* * *

In her complaint filed in the Milwaukee action, among other things, Mrs. McKee made many allegations of what might be described a scandalous nature against her former husband, including allegations that McKee in the 1942 proceedings had caused his children and an employee named Charles Watt to give perjured evidence in his favour; that he had exercised improper influence through his attorneys on the trial judge; that he had secretly entered into collusion with her own attorneys for the purpose of defeating her rights and also had entered into an

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improper collusive agreement with the trial judge; that he secretly made payments to her attorneys for the purpose of securing the assistance and co-operation of the attorneys, conniving at her defeat; that he committed a fraud on the Superior Court of the State of California and subjected the trial judge to his domination and control and prevailed on him to make findings of fact which were not true.

* * *

Various actions of Mrs. McKee were examined on her cross-examination by counsel for Mr. McKee and one of these was the basis on which she made the serious and scandalous claims in her Wisconsin action againt the court and her own attorneys in California. Whether there was a proper basis for these charges or not is of really very little interest to me, but on her cross-examination I gained a very strong impression that the facts on which she stated she based them would not justify their repetition as idle gossip, let alone as serious allegations of fact in litigation such as she commenced in the State of Wisconsin. Doubtless, the persons accused in this fashion are able to look after themselves, but *it does in my view reflect very seriously on her judgment and capability* that she should make such scandalous charges on so little evidence and such a small basis of fact. This, I think, merely reflects again on the opinion *I must form of her as a proper person to have alone the care* and custody of her infant child apart from the counterbalancing influence of the father, particularly at a time when his education and his proper upbringing become very important and may well shape his whole after life.

The learned trial judge sums up his findings as follows:

Looking at the whole matter, his welfare seems inextricably bound up with the care, advice and education which his father can now give him, and I think his interests will be best served by leaving him where he is, in the custody of Mark T. McKee.

Hogg J.A., delivering the judgment of majority in the Court of Appeal, said:

During the two years which, at the date of the judgment of Wells J., had elapsed since 1945, when the Superior Court of the State of California altered their former judgment and awarded the custody of the child Terry to his mother, the circumstances had changed. Upon a review of the evidence, I have formed the opinion, which coincides with that of the trial judge, the reasons for which he has set out in his well-considered and well-expressed judgment,—that it is in the best interests of Terry, who is over seven years of age, having regard to his welfare, not only from the view point of his present life and education, but as well in the light of his future prospects, that he should be left in the custody of his father.

These concurrent findings with respect to the appellant, like the findings against her in the original judgment in California, are revealing and amply support the judgment in appeal. I think the courts below have correctly applied the relevant law, have given the proper weight to the

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California judgment, and the judgment in appeal ought not to be disturbed. I would therefore dismiss the appeal with costs.

Appeal allowed.

Solicitors for the appellant: *Slaght, Ferguson, Boland and Slaght.*

Solicitors for the respondent: *Sims, Broy, Schofield and Lochead.*

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*June 26

RAYMOND A. MARTIN AND MYRTLE P. MARTIN (RESPONDENTS) ..... APPELLANTS;

AND

LILY AVES DUFFELL, (APPLICANT) ...RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Infant—Adoption, illegitimate child—When mother's consent revocable—Custody, Surrogate Court's jurisdiction—The Adoption Act, R.S.O., 1937, c. 218—The Infants Act, R.S.O., 1937, c. 215—The Surrogate Court Act, R.S.O., 1937, c. 106.

The mother of an illegitimate child a month after its birth surrendered custody of the infant to proposed foster parents and at the same time signed a consent in the form of a statutory declaration headed "In the Matter of The Adoption Act", a printed form supplied by the Department of Public Welfare, which administers the Act, declaring that she of her own free will consented to an Order of Adoption and understood that the effect of such Order would be to permanently deprive her of her parental rights. Some two months later she changed her mind and sought to regain custody of the child from the foster parents.

Held: That the consent required by the Adoption Act must exist at the moment the order of adoption is made. Re Hollyman [1945] 1 All E.R. 290, followed. At any time prior to the making of an order of adoption the wishes of the mother of an illegitimate child as to its custody must be given effect unless very serious and important reasons require that, having regard to the child's welfare, (the first and paramount consideration), they must be disregarded. *Re Fex* [1948] O.W.N. 497 referred to and questioned: *Reg.* v. *Barnado* [1891] 1 Q.B.D. 194; *Barnado* v. *McHugh* [1891] A.C. 388 and *In Re J. M. Carroll* [1931] 1 K.B. 317 followed.

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

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Per: Rand and Kellock JJ.—So far as *Re Fex* may be taken to hold that a consent as given here is irrevocable except only on proof that the foster parents are unfit for the custody, dissented from. In *Re Agar-Ellis* 24 Ch. D. 317; *In Re J. M. Carroll* [1931] 1 K.B. 317 referred to; In *Re Hollyman* [1945] 1 All E.R. 290, approved; *Re Sinclair* 12 O.W.N. 79 and *Re Chiemelski,* 61 O.L.R. 651, distinguished.

Held: Further, that the Surrogate Court of the county in which an illegitimate infant resides has upon the application of the mother of such infant jurisdiction under s. 1 of The Infants Act to deal with its custody.

APPEAL from the judgment of the Court of Appeal for Ontario, (1) reversing the decision of Macdonell J., of the Surrogate Court of the County of York dismissing a mother's application for custody of her illegitimate child.

Arthur Maloney for the appellants.

B. J. Mackinnon for the respondent.

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

CARTWRIGHT J.:—This is an appeal from a unanimous judgment of the Court of Appeal for Ontario reversing the decision of His Honour Judge Macdonell, Judge of the Surrogate Court of the County of York, and awarding the custody of an infant boy to the respondent.

At the opening of the appeal it was submitted by counsel for the appellants that the Surrogate Court was without jurisdiction. It is said that the jurisdiction of the Surrogate Court to deal with the custody of infants is purely statutory being derived from s. 1 of *The Infants Act,* R.S.O. 1937, c. 215 and that, properly construed, this section confers jurisdiction only in the case of a legitimate child.

While ordinarily this Court would hesitate to entertain a ground of appeal raised here for the first time and not taken before the trial Judge or before the Court of Appeal either on the hearing of the appeal or on the motion for leave to appeal to this Court, I think it necessary to consider this objection because if it should prove valid the result might well be that the order now in appeal is a nullity and the rights of the parties remain undecided.

(1) 1950 O.R. 35.

On consideration, I do not think that the objection is well taken. The relevant words of Section 1 of *The Infants Act* are:—

* * * The surrogate court of the county in which the infant resides, upon the application of * * * the mother of an infant, who may apply without a next friend, may make such order as the court sees fit regarding the custody of the infant * * *

I cannot find anything in the rest of the Act to cut down the ordinary meaning of the word "mother" or of the word "infant". It is clear that the infant whose custody is in question was resident in the County of York at all material times and that the respondent who was the applicant in the Surrogate Court is his mother. In my view the Surrogate Court had jurisdiction to deal with the application.

The infant is the illegitimate child of the respondent. He was born at the city of Toronto on March 3, 1948. The home of the respondent is in England. She was visiting Ontario on a holiday in the year 1947, and there met the father of the infant. It appears that there is no intention of the respondent and the father of the infant being married. The respondent came to Toronto some months before the infant was born and secured employment there for a time. She is a comptometer operator and appears to have no difficulty in obtaining employment. The father of the infant gave some financial assistance while the respondent was unable to work. The respondent attended the Yarmey Clinic in Toronto for pre-natal care and was looked after by Doctor Stark who was then a member of the clinic. Mrs. Martin, one of the appellants, was a laboratory technician at the clinic, and she and the respondent became friendly. The respondent had not advised her parents in England of her condition and was in doubt as to whether she should try to keep her baby after it was born or whether she should make arrangements to have it adopted. Before the birth of the baby she had discussions as to this with Doctor Stark and others. The respondent's health was bad for some weeks after the birth, but she completely recovered and is now in good health.

While the respondent was in hospital following the birth, Mrs. Martin visited her and they had some discussion as

(1) [1948] O.W.N. 497.

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to whether the respondent would let Mrs. Martin adopt the boy, the appellants being then anxious to adopt him. On the 31st of March, 1948, the respondent signed a form of consent to the adoption of the infant. This consent is in the form of a statutory declaration headed "In the matter of the Adoption Act", and reads in part as follows:

(1) That I am the unmarried mother of the said unnamed male infant who was born at the Grace Hospital, Toronto, in the County of York on the 3rd day of March, 1948.

(2) That of my own free will and accord I hereby consent to an Order of Adoption with respect to the said child under the provisions of the said The Adoption Act.

(3) That I fully understand the nature and effect of an Adoption Order in that all rights, duties, obligations and liabilities of the parent or parents of the adopted child in relation to the future custody, maintenance and education of the adopted child shall be extinguished, and that the effect of such Adoption Order will be permanently to deprive me of my parental rights in respect to the said child, and that, unless the Adoption Order otherwise provides, the child assumes the surname of the adopting parent.

We were informed by counsel that the original of this declaration is on a printed form which is supplied by the Department of Public Welfare which administers the Adoption Act; but no form of consent is prescribed by that Act or by the regulations made thereunder.

The infant was handed over to Mrs. Martin on April 1, 1948 and has since that date been in the custody of the appellants. It is conceded that they have looked after the infant in an admirable manner, that they are devoted to him, and are in a position to give him a good home and a suitable upbringing.

Not very long after the infant had been given to the appellants, the respondent regretted her decision. On the 18th of June, 1948 she wrote a letter to Doctor Stark, who had advised her from time to time in a friendly way, asking him to use his best efforts to get her baby back for her. She also took the matter up with the officials of the Children's Aid Society. The respondent says that she approached Mrs. Martin in the matter as well as the Children's Aid Society, and while her evidence in this regard is not entirely free from ambiguity I read it as meaning that Mrs. Martin told her that the appellants would give the baby back if the respondent obtained a letter from her parents, with a witness, saying that they

would provide a home for him. The date of this interview is not fixed but it appears to have been in the autumn of 1948. Mrs. Martin gave evidence, but she was not asked anything about this statement either in examination-in-chief or in cross-examination. In the view that I take, it is not of importance to determine whether the suggestion as to obtaining the letter from the respondent's parents was made by Mrs. Martin or by an official of the Children's Aid Society. The respondent did obtain a letter dated the 28th of December 1948, signed by her father and mother and by a witness, stating that her parents wished to adopt the baby.

Following the receipt of this letter, it was ascertained that the appellants were not willing to give up the infant. The application to the Surrogate Court followed. The affidavit of the respondent in support of the application was sworn on the 13th of January, 1949, and the notice of motion is dated the 5th of February 1949. The matter was heard before His Honour Judge Macdonell on the 12th of April 1949.

According to the respondent's evidence, which was accepted by the learned trial judge, the parents of the respondent are about fifty-five years of age. They are both in good health. The father is a retired sergeant of police, is in receipt of a pension and is gainfully employed as a civil servant. They live in a suburb of London in a comfortable home, which they own clear of encumbrance. They are willing and anxious to receive the respondent and infant and to adopt the infant.

At the conclusion of the hearing the learned trial judge dismissed the application, holding himself bound by a passage which he quoted from the judgment of McRuer C.J.H.C. in the case of *Re Fex* (1), at page 499, which was not in terms either rejected or adopted by the Court of Appeal in affirming such judgment. The passage referred to is as follows:

> Where a parent has signed a solemn consent to adoption under the provisions of The Adoption Act and the foster parents have taken the child and assumed their parental duties with a view to fulfilling the probationary requirements of the Act, I do not think that a child is to be restored to the natural parent on the mere assertion of that parent's

(1) [1948] O.W.N. 497.

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right. I think the parent must go further and show that "having regard to the welfare of the child" it should not be permitted to remain with the foster parents.

The learned trial judge interpreted this as laying down the rule that under the circumstances outlined the Court must not deprive the foster parents of the custody of the child unless it be affirmatively shown that it would be detrimental to its welfare to remain with them. His Honour stated that, by reason of the decision in *Re Fex*, it was unnecessary for him to make the difficult choice as to which of the two proposed homes would be better for the infant.

In the Court of Appeal (1), Aylesworth J.A. with whom Bowlby J.A. agreed, did not agree with the interpretation placed by the learned trial Judge upon *Re Fex*. He says:

> I think it is clear from the judgment in that case, of not only the Chief Justice of the High Court before whom it came on to be heard in the first instance, but from the judgment of this Court on appeal, that the welfare of the child is the first and paramount consideration.

Laidlaw J.A. dealt with the matter as follows:

> However, the facts that the mother of a child has voluntarily given the custody of it to others, and has consented of her own free will and accord to an order of adoption under the provisions of The Adoption Act with a full understanding of the nature and effect of an adoption order, do not in every such case prevent her from regaining custody of the child before an adoption order is made by the Court. The Court may, in the exercise of a discretionary power possessed by it, restore the custody of a child to its mother at any time before an adoption order has been made, notwithstanding the fact that she has given the custody of it to others in that manner and under those circumstances. On the other hand, the mother is not entitled in law to an order of the Court restoring the custody of her child to her in such a case upon proof only of the fact that she is the mother of the child. The paramount consideration and the question which the Court must decide in each particular case according to the circumstances is, "What is best for the welfare of the child?"

The Court of Appeal were unanimously of opinion that, although it is a case of great hardship so far as the appellants are concerned, under all the circumstances the welfare of the child will be best served by directing that he be returned to the respondent. I respectfully agree with this conclusion, and observe that the learned trial judge, who has had great experience in such matters, and who had the advantage, denied to the Appellate Courts, of hearing and observing all the parties, did not express any contrary view.

(1) [1950] O.R. 35 at 42.

It is now necessary to examine the argument of counsel for the appellant that even if the court should reach such a conclusion the appeal should nonetheless succeed. It is said that when consideration is given to the provisions of *The Adoption Act* (R.S.O. 1937, c. 218, amended 1949 Statutes of Ontario c. 1) the proper conclusion is that the respondent, by signing the consent of March 31, 1948 referred to above, forfeited any natural rights she might have had to the custody of her child, and contemporaneously with the surrender by her of her natural rights, by this free act of her own volition, new and important rights were acquired by the appellants who assumed their duties as foster parents of the child and were awaiting the expiry of the probationary period prescribed by *The Adoption Act.*

It is urged that the scheme of adoption established in Ontario contemplates a probationary period of two years during which time the conduct of those who apply for custody of a child, with a view to its adoption, and the conditions under which the child is living are under the scrutiny of the Provincial Officer (section 3*e*); that the consent of the respondent, as mother of her illegitimate child, which is required (by section 3*b* (1) and (2) and section 4 (*a*)) before an adoption order can be made, shall be executed before the commencement of the probationary period, and that after the expiration of the probationary period a final order of adoption may be made on the production and filing of such consent.

It is argued that the probationary period is not prescribed for the purpose of enabling a mother who has already executed a valid consent as required by section 3*b*(2) to regain custody of her child or to change her mind about its adoption but rather for the purpose of enabling the proper authorities to determine whether or not the adopting parents, and the conditions under which they live are satisfactory, having regard to the future welfare of the child.

It is said, if upheld, the decision in appeal will endanger the whole scheme of adoption, not only in Ontario but in other provinces in which legislation similar to that in Ontario is in force. Reliance is placed upon the decision in

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Re Fex (*supra*). It is argued that the learned trial judge correctly interpreted that decision and that it should be followed. Reference is made to a passage in the judgment of McRuer C.J.H.C. which follows immediately the passage quoted by the learned trial judge:

> Otherwise, the whole scheme of The Adoption Act may be undermined and persons of good will and affection who are willing to open their homes to unfortunate children may hesitate to do so if, after the adoption agreement has been signed and a child has been with them for nearly two years, the parent still has a paramount right in law to obtain its custody by a mere assertion of a parent's right.

and to the statement of Middleton J. in *Re Sinclair* (1), decided before the enactment of *The Adoption Act*:

> Few would care to adopt a child if it may be taken from them without any fault on their part.

It is, I think, perfectly clear on the evidence, and on the findings of the learned trial judge and of the Court of Appeal that no fault is imputable to the appellants and that the home and upbringing which they are able and anxious to provide for the infant would be eminently satisfactory. If therefore the above argument is well-founded the appellants would be entitled to succeed.

In my opinion the argument must be rejected. It is, I think, well settled that the mother of an illegitimate child has a right to its custody, and that, apart from statute, she can lose such right only by abandoning the child or so misconducting herself that in the opinion of the Court her character is such as to make it improper that the child should remain with her. There is no suggestion in the case at bar that the respondent abandoned the child or that her conduct and character are other than excellent.

It is also clear that the mother of an illegitimate child cannot bind herself by an agreement to deliver up her child to a stranger, and that the Court will, on her application, compel the return of a child delivered pursuant to such an agreement. As stated by Lindley, L.J. in *Regina* v. *Barnardo* (2) at page 211:

> The Court will not interfere with her (the mother) arbitrarily and will support her and give effect to her views and wishes unless it becomes the duty of the Court towards the child to refuse so to do. Taking this view of the mother's rights and of the duty of the Court, I see no reason why a mother should not from time to time change her mind as to where, how, or by whom her child shall be brought up, nor why the Court

(1) (1917) 12 O.W.N. 79. (2) [1891] 1 Q.B. 194.

should interfere with her or refuse to support her, unless circumstances be proved which satisfy the Court that its duty to the infant requires it to act contrary to her wishes.

This judgment was affirmed sub. nom. *Barnardo* v. *McHugh* (1).

As was pointed out by Scrutton L.J. in *In re J. M. Carroll* (2), the circumstances which will move the Court to refuse to support the mother on the ground that her wishes are detrimental to the child must constitute "a matter of essential importance" or be "very serious and important".

It is urged that, in Ontario, these well settled rules are modified by the provisions of *The Adoption Act*, that the mother's consent to adoption once voluntarily given is, in effect, irrevocable, or at all events that her withdrawal of such consent can and should be disregarded by the Court unless it appears to be in the best interests of the child that she should be allowed to withdraw it. Reliance is placed upon the reasoning of the United States Court of Appeals in *In re Adoption of a Minor* (3). The judgment in that case is, I think, distinguishable by reason of certain differences between the wording of the statute there under consideration and that of the Ontario Adoption Act. I prefer to follow the judgment of the Court of Appeal in England in *re Hollyman* (4). The wording of the English Act dealt with in that case is I think similar in all relevant respects to that of the Ontario Adoption Act and I am of opinion, for the reasons stated by the Master of the Rolls, that the consent required by section 4 of the Ontario Act must exist at the moment the order of adoption is made. Of course, as is pointed out in that case, a consent once given remains operative unless revoked. The construction for which the appellants contend would bring about the result that the mother is bound by her consent from the moment of giving it, while the appellants remain free, up to the making of the order of adoption, to change their minds, leaving the obligation of the mother to maintain her child still in existence. The supposed danger of the purposes of *The Adoption Act* being defeated by the construction which I think is the proper one is met to a

(1) [1891] A.C. 388.
(2) [1931] 1 K.B. 317 at 336.
(3) (1944) 144 Fed. 2d. 644.
(4) [1945] 1 All E.R. 290.

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limited extent by the provisions of section 3*d* of *The Adoption Act* which permit the Court to dispense with the consent of the parents of a child if, having regard to all the circumstances of the case, the Court is of opinion that such consent may properly be dispensed with. This will be a safeguard in a case, for example, where a consent voluntarily given at the commencement of the two year probationary period is sought to be capriciously withdrawn at its termination, and there are in the Court's opinion matters of essential importance having regard to the welfare of the infant which require that it be left with the foster parents. Should the view which I have expressed above as to the proper construction of *The Adoption Act* not be in accordance with the true intention of the Legislature such intention could, without difficulty, be expressed as an amendment to the Act. In the present state of the law as I understand it, giving full effect to the existing legislation, the mother of an illegitimate child, who has not abandoned it, who is of good character and is able and willing to support it in satisfactory surroundings, is not to be deprived of her child merely because on a nice balancing of material and social advantages the Court is of opinion that others, who wish to do so, could provide more advantageously for its upbringing and future. The wishes of the mother must, I think, be given effect unless "very serious and important" reasons require that, having regard to the child's welfare, they must be disregarded.

In this case, the question which the Court has to decide is whether the child should remain with his foster parents or return to his mother, when it appears that there is every probability that he will be loved, well cared for and properly brought up in either situation. I agree with the Court of Appeal that the child should be returned to his mother.

Counsel for the respondent stated that in the event of the appeal failing, the respondent would not ask for costs. It is a noteworthy feature of this case that in spite of the very strong desire of both parties to have the child, they have throughout treated each other with the utmost consideration and respect. There has been a complete

absence of recrimination and each has conceded throughout that the child would be well cared for by the opposite party.

Before parting with the matter I would like to express appreciation of the assistance which we received from counsel, both of whom argued the case with great frankness and ability.

The appeal should be dismissed without costs.

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

RAND J.:—I agree with the reasons and conclusion of my brother Cartwright, but I desire to add the following observations to what he has said on the language of McRuer C.J.H.C. in *re Fex* (1), quoted by him. The Chief Justice treats as similar to his own, views expressed by Middleton J. in *re Sinclair* (2), and in *Re Chiemelewski* (3). If his language is intended to mean, as the judge of first instance here thought it did, that after the mother of an illegitimate child, with a view to adoption, has transferred custody to another under a formal declaration of consent to adoption, she must, in order to recover the child, show in effect that the foster parents are unfit for further custody, in other words, treating the preliminary consent as irrevocable; then, with the greatest respect, I must dissent from it. In the settled formula, the welfare of the infant is the controlling consideration: that is, the welfare as the court declares it; but in determining welfare, we must keep in mind what Bowen L.J., in the case of *In re Agar-Ellis* (4), as quoted by Scrutton, L.J. in *In re J. M. Carroll* (5), says: "* * * it must be the benefit to the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can." Only omniscience could, certainly in balanced cases, pronounce with any great assurance for any particular custody as being a guarantee of ultimate "benefit" however conceived. The successful administration of *The Adoption Act* requires, admittedly, an adequate appreciation of the interest of the person proposing to adopt, but in the light of the

(1) [1948] O.W.N. 497 at 499.
(2) (1917) 12 O.W.N. 79.
(3) (1928) 61 O.L.R. 317.
(4) (1883) 24 Ch. D. 317.
(5) [1931] 1 K.B. 317 at 334.

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corresponding law in England, I doubt that the fears expressed are of real dangers. In *Re Hollyman* (1), in which it was held that the consent of the parent to adoption must be operative up to the moment of making the order, and that it might be withdrawn at any time before that, Lord Greene, M.R., uses this language:

> The rules merely provide for the method of proving the consent which under the statute is necessary. If the rules had purported to dispense with the consent which the statute required, they would have been *ultra vires*. They merely provide for the method of proof, and all that the consent exhibited to the affidavit proves, is the fact that consent has been given. Of course, that consent remains operative unless revoked, but in my opinion no rule could have laid it down that the consent once given could not be retracted, for the simple reason that the Act requires, as I have said, that the consent shall be operative at the very moment when the order is made.

Section 3 of that statute provides that the Court making the adoption order must be satisfied, that:

> (*a*) every person whose consent is necessary * * * has consented to and understands the nature and effect of the adoption order for which application is made * * *

That is the substance of the language of the statute of Ontario. The form of consent used in *Re Fex* and here is not statutory: it is departmental; and its effect is no more than evidence of the consent required by the statute when the order is made.

The situation in *Re Sinclair* and *Re Chiemelewski* was different: in them, the child had been given to foster parents by a Children's Aid Society. The distinguishing circumstance is that in such cases the State, for good reasons, has stepped in and asserted its paramount interest: and that the relations of foster parents so arising should not be "lightly disregarded" or "lightly ignored" without fault on their part, to use words of Middleton, J., is undoubted. In this case the State has not stepped in nor can I agree that we can properly assimilate the two situations. The question here is what, in the light of all circumstances, does the benefit of the child, in the broad sense indicated, call for.

Appeal dismissed without costs.

Solicitors for the appellants: *Edmonds and Maloney.*

Solicitors for the respondent: *Hooper and Howell.*

(1) [1945] 1 All E.R. 290.

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CRIMINAL LAW—*Continued*

3.——*Criminal Law—Appeals—Autre fois acquit—Autre fois convict—Conviction for manslaughter on indictment for murder quashed for misdirection but new trial not ordered nor an acquittal directed—Fresh indictment preferred by Crown for manslaughter—Statutory authority given Court of Appeal to direct acquittal or a new trial, mandatory—Failure of court to exercise such authority precludes another trial under s. 873—The Criminal Code, R.S.C. 1927, c. 36, ss. 856, 873, 905-909, 951, 1014 (3).* The Criminal Code provides: "Section 1014 (3). Subject to the special provisions contained in the following sections of this Part, when the court of appeal allows an appeal against conviction it may *(a)* quash the conviction and direct a judgment and verdict of acquittal to be entered; or *(b)* direct a new trial; and in either case may make such other order as justice requires." *Held:* By the majority of the court (Rinfret C.J., Kerwin and Taschereau JJ., dissenting), that the exercise of the statutory authority given to the court of appeal under s. 1014 (3) to direct an acquittal to be entered, or to direct a new trial, and in either case to make such other order as justice requires, is not permissive but mandatory. The right of appeal being such an exceptional right, all the substantive and procedural provisions relating to it must be regarded as exhaustive and exclusive and need not be expressly stated in the Statute. If therefore the court of appeal fails to exercise its authority and refrains from directing a new trial, another trial cannot be had by resorting to s. 873. The powers under that section are not absolute and cannot obtain in all circumstances. Like many others in the Code, they remain subject to qualifications and restrictions implicitly and necessarily flowing from other provisions in the same Act. *Per* Rinfret C.J. and Taschereau J., dissenting. The only competent authority in a case of misdirection to order a new trial is the Court of Appeal, but failure of that court to make such an order does not preclude the Crown from exercising its rights to prefer a fresh bill of indictment under s. 873. The proceedings under the fresh bill of indictment do not constitute a *new* trial, within the meaning of s. 1014, they initiate a *second* trial entirely independent of the first on a new indictment. A "new trial" which alone the court of appeal has the power to order in a criminal prosecution, is the re-examination of a case on the *same information* or *indictment*. It supposes a completed trial, which for some sufficient reason has been set aside, so that the issues may be litigated *de novo*. It is ordered so that the court may have the opportunity to correct errors in the proceedings at the first trial. Such is not the case here, and unless there are valid reasons to prevent the Crown to initiate a *second trial* as it did, this appeal must fail. We have to decide if the incomplete judgment

CRIMINAL LAW—*Continued*

of the Court of Appeal is a bar to the exercise by the Crown of its unquestionable power to prefer a bill of indictment. A solid ground of defence would undoubtedly be a plea of *autre fois acquit* or *autre fois convict*, but this cannot be successfully argued. The appellant has neither been acquitted nor convicted, and it is only in such cases that an accused may say, if he is brought to trial again, on the same charge, that he has been in "jeopardy" twice. *Rex* v. *Ecker and Fry*, 64 O.L.R. 1 at 3. The law does not allow that a man be tried a second time when he has already been convicted, or exposed to be convicted, when he has already been acquitted, but it does not forbid a second trial when the first did not come to a legal conclusion. Only the pleas of *autre fois acquit* or *autre fois convict* could be successfully raised by the appellant in the present case, and as they both fail, the appeal should be dismissed. *Per* Kerwin J., dissenting: The power given to the Court of Appeal under s. 1014 (3) is permissive as indicated by the use of the word "may" and includes the power to allow an appeal and set aside a conviction leaving the Crown free to prefer a new and different indictment, if it sees fit. The powers of the Court of Appeal are not circumscribed as are those of the Court of Criminal Appeal in England and the decisions of that Court are, therefore, of no assistance on the point under review. This appeal is to be decided under the provisions of the *Criminal Code*, *Rex* v. *O'Keefe*, 15 N.S.W.L.R. 1; *Rex* v. *Lee*, 16 N.S.W.L.R. 6, distinguished; *Rex* v. *Welch*, [1948] O.R. 884, *Rex* v. *Pascal*, 95 C.C.C. 288, approved. *Gudmundson* v. *The King*, 60 C.C.C., 332 distinguished. Where an accused upon an indictment for murder is convicted of manslaughter, a court of appeal may properly under s. 1014 (3) allow the appeal and set aside such conviction. If it neither directs a verdict of acquittal to be entered, nor directs a new trial, s. 873 (1) is then wide enough to permit the preferring of a bill of indictment for manslaughter. In provinces where there is no grand jury, subsequent sub-sections of s. 873 take care of the situation. The second ground of the appeal, that, "the accused was entitled in answer to the present indictment to the common law defence that a man should not be put twice in jeopardy for the same matter,"—is not a plea or defence, as the plea of *autre fois acquit* is grounded on the maxim, that a man shall not be brought into danger of his life for one and the same offence, more than once. *Hawkins, Pleas of the Crown*, 8th Ed. Vol. II, c. 35, s. 1. As to the 3rd and 4th grounds of appeal—*(a)* "s. 902 (2) was a bar to the present indictment;" *(b)* "the accused was entitled to succeed on his plea of *autre fois acquit* pursuant to s. 907."—The meaning of s. 907, may be gathered from the use of the word "lawfully" in s. 906 (3), this expresses what

TAXATION— *Assessment — Municipal — Office building partly owner and partly tenant occupied—Actual value—Exchangeable value—Prudent investor—Replacement cost—Commercial value—Non-productive features.* In the municipal assessment of a very large office building in Montreal, which is approximately 50 per cent owner-occupied and the remainder rented, and whose size, design and particular architectural features make it impossible to be compared with any other building in that city, *Held:* That the actual value which the assessors must find pursuant to the city charter is the exchangeable value or what the building will command in terms of money in the open market, tested by what a prudent purchaser would be willing to give for it; and, on an appeal to either the Superior Court or the Court of King's Bench (Appeal Side), by force of the charter of the City of Montreal, these Courts must render "such judgment as to law and justice appertain". Moreover, a municipal valuation for assessment purposes is not to be made in accordance with the rules laid down with regard to the valuation of a property for expropriation purposes. The valuation must be made of the property as it stands and as used and occupied when the assessment is made. *Held:* That the actual value of this building should be determined by giving to the percentage of the replacement cost, after allowing for the extra unnecessary costs of the construction, a figure of no more than 50 per cent. *Held:* On principle, the non-productive features of a building, in so far as they do not add to its actual value ought not to be included among items in the determination of that value for municipal assessment. *Per* Kerwin J.: The formula used by the assessors, having failed to produce the actual value, should be disregarded and the commercial value only should be considered. SUN LIFE v. CITY OF MONTREAL.... **220**

2.——*Assessment and Taxation—Principle to be applied in assessment of timber lands at their "real and true value"—The Rates and Taxes Act, R.S.N.B. 1927, c. 190, ss. 5 (am. 1945, c. 36, s. 2), 78, 124, 125, 126.* *The Rates and Taxes Act*, R.S.N.B., 1927, c. 190, s. 5, (am. 1945, c. 36, s. 2), provides that "Real and personal property shall be rated at its real and true value". The respondents' assessors in assessing timber lands in the Parish, estimated the average price to be $5 an acre and assessed all such lands, including those of the appellants, accordingly. The appellants appealed to the County Court Judge under s. 78 of the Act alleging that its lands had been overrated absolutely or as compared with other properties in the Parish. He dismissed the appeal. An appeal was then made by way of *certiorari* to the Supreme Court of New Brunswick, Appeal Division, on the grounds that the assessors in making the assessment proceeded upon a wrong principle. That appeal was also dismissed. *Held:* The question before this Court is whether on the entire proceedings the assessment appears to have been made on a wrong principle. The Judge in appeal considered the assessment *de novo* in all its aspects. He properly construed the Statute to provide for valuation on a market basis, as between a willing seller and a willing purchaser, each exercising a reasonable judgment, having regard to all elements