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LAW REPORTS

Supreme Court of Canada

Editors

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JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

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

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

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:
The Hon. W. Ross Macdonald, Q.C.

53865—1½

ERRATA
in Volume 1954

Page 34, at line 1, after the word "and" insert "Taschereau".

Page 82, at line 4 of Caption, "R.S.C." should read "R.S.S."

Page 395, at fn., "Cartwright" should read "Fauteux".

Page 398, at line 8, "J. P. Varcoe" should read "F. P. Varcoe".

Page 454, at line 4 of Caption, "ss." should read "s. 96".

Page 558, at line 2, "(2)" should read "(1)".

Page 601, at line 5 from bottom, "(1)" should read "(2)".

Page 657, line 11, "teste" should read "reste".

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.

Baker v. *National Trust Co. and Others* [1953] 1 S.C.R. 95. Appeals dismissed, costs of all parties out of the estates, 19th May, 1955.

W. D. Branson v. *Furness Ltd.* (Not reported). Appeal allowed with costs, 27th July, 1955.

Canada Permanent Mortgage Corporation v. *City of Toronto* [1954] S.C.R. 576. Petition for special leave to appeal granted, 22nd March, 1955.

Nisbet Shipping Company v. *The Queen* [1953] 1 S.C.R. 480. Appeal allowed with costs, 25th July, 1955.

Minister of National Revenue v. *Anaconda American Brass* [1954] S.C.R. 737. Petition for special leave to appeal granted, 22nd March, 1955, and appeal allowed with costs, 13th December, 1955.

Studdert and Skelton v. *Turcott and Kamloops Livestock Company* (Not reported). Petition for special leave to appeal dismissed with costs, 12th January, 1955.

UNREPORTED JUDGMENTS OF THE SUPREME COURT OF CANADA

In addition to the judgments reported in this volume, the Supreme Court of Canada, between the 19th of December, 1954, and the 5th of December, 1955, delivered the following judgments which will not be reported in this publication:—

Anderson v. *Evans, et al* (Ont.) (not reported), appeal dismissed, costs of all parties to be paid out of estate, April 26, 1955.

Attorney-General of Nova Scotia v. *Ship "Canadian Victor"* (Ex.) (not reported), appeal dismissed with costs, December 20, 1954.

Beaudin v. *The Queen* Que. [1954] Q.B. 420, appeal dismissed, June 6, 1955.

Bertrand v. *Brochu* (Que.) (not reported), appeal dismissed with costs, March 8, 1955.

Continental Casualty Co. v. *Chartres* Que. [1954] Q.B. 635, appeal dismissed with costs, March 9, 1955.

Eplett & Sons v. *Minister of National Revenue* [1955] Ex. C.R. 2, appeal dismissed with costs, October 7, 1955.

Fallen & Brown v. *Beattie & Burel-dit-Noel* Que. [1954] Q.B. 585, appeals dismissed with costs, June 15, 1955.

Graham v. *Graham* (Sask.) (not reported), appeal dismissed with costs, October 4, 1955.

Gratton v. *Beauchemin* Que. [1952] Q.B. 405, appeal dismissed with costs, January 25, 1955.

Guay v. *Guay* Que. [1954] Q.B. 412, appeal dismissed with costs, December 20, 1954.

Guilmette v. *Guilmette* Que. [1953] Q.B. 580, appeal dismissed with costs, June 15, 1955.

Hardy Ltd. v. *Orillia Water, Light & Power Commission* [1954] O.W.N. 894, appeal dismissed with costs, October 19, 1955.

International Fruit Distributors v. *Minister of National Revenue* [1953] Ex. C.R. 231, appeal dismissed with costs, October 21, 1955.

Kruschel v. *Kohut* 1954 62 Man. R. 11, appeal dismissed with costs, December 10, 1954.

Lacarte v. *Bd. of Education of Toronto* [1954] 3 D.L.R. 49, appeal dismissed with costs, if demanded, October 19, 1955.

Larson's Dairy & Farm Supply v. *Wood* (Alta.) (not reported), appeal allowed with costs and cross-appeal dismissed with costs, February 8, 1955.

Lounsbury Co. v. *White Cab Ltd. et al* (N.B.) (not reported), appeal dismissed, Locke J. dissenting in part, October 19, 1955.

MacDonald v. *MacDonald* [1954] O.R. 521, appeal dismissed, March 21, 1955.

Menifield v. *DeMille* (Alta.) (not reported), appeal dismissed with costs, February 22, 1955.

Montship Lines Ltd. v. *Minister of National Revenue* [1954] Ex. C.R. 376, appeal dismissed with costs, March 10, 1955.

Murad v. *Beiga* Que. [1954] Q.B. 575, appeal allowed with costs throughout, June 28, 1955.

Onufrejow & Turczyn v. *Grosco* [1955] 15 W.W.R. (N.S.) 169, appeal dismissed with costs, November 3, 1955.

Reliable Leather Sportswear v. *Industrial Tanning Co.* [1953] 4 D.L.R. 522, appeal dismissed with costs, January 25, 1955.

Rogen v. *Thorpe* (Sask.) (not reported), appeal dismissed with costs, November 7, 1955.

Semeniuk v. *Scoyoc* [1955] 1 D.L.R. 850, appeal allowed and judgment at trial restored with costs throughout, October 4, 1955.

Vaillancourt v. *The Queen* Que. [1954] Q.B. 420, appeal dismissed, June 6, 1955.

Wright & Demarco v. *Gifford* (Ont.) (not reported) appeal allowed with costs here and below, Cartwright J. dissenting, November 15, 1955.

Yen Goon Teong v. *Van Raes* (B.C.) (not reported), appeal allowed and judgment at trial restored with costs throughout, June 28, 1955.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA
ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

52713—1

IN THE MATTER OF THE ARBITRATION ACT, R.S.O. 1950, c. 20

1954

*June 1
*June 22, 23
*Nov. 1

STEVEN SZILARD (*Applicant*) .....APPELLANT;

AND

RALPH SZASZ (*Respondent*) .....RESPONDENT.

Arbitration and award—Arbitrator—Possible bias ground for disqualification.

Each party to an arbitration, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs. Where there is a basis for a reasonable apprehension of an arbitrator not acting in an entirely impartial manner, a finding made by him may be set aside. Here when it was established that one of the arbitrators was jointly engaged in a real estate speculation with one of the parties, unknown to the other party —the award was set aside. *Kemp* v. *Rose* 1 Giff. 258; *Walker* v. *Frobisher* 6 Ves. Jr. 70 followed.

APPEAL by the Applicant from an order of the Court of Appeal for Ontario (1) whereby an order of Aylen J. setting aside an award of arbitrators, was set aside.

The appeal came on for argument before this Court on June 1, 1954, when it appearing that the then counsel for the appellant had made an affidavit and had been cross-examined thereon in the course of the proceedings below, the Court announced that it could not continue to hear him and an adjournment was granted to permit the securing of new counsel. On resumption of the hearing Mr. W. B. Williston appeared as counsel for the appellant.

W. B. Williston for the appellant.

S. M. Harris for the respondent.

The judgment of the Court was delivered by:

RAND J.:—The substantial question here is whether one of the arbitrators, Sommer, was disqualified by reason of his business relations with the respondent Szasz. Both the parties to the appeal and the arbitrators are Hungarians, not long in this country. On the representation of Szasz that Sommer was an entirely disinterested person, the

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

(1) [1953] O.W.N. 907.

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appellant Szilard accepted him as one of two named in the submission. It subsequently transpired that Szasz and wife (as joint tenants) with Sommer and wife (as joint tenants) had six months before purchased jointly a large property consisting of three store buildings with dwelling quarters in upper storeys, having all told nine tenancies. The price was approximately $80,000, part of which was secured by a mortgage and the balance paid equally by Szasz and Sommer. The property was purchased as an investment, and as can be seen, would call for some degree of continuing management and consultation. We have no particulars of the mortgage, but the evidence indicates that its obligations are joint on the part of the purchasers. Is that association, with its inevitable personal intimacy, and the mutual interests involved, sufficient to the disqualification claimed?

From its inception arbitration has been held to be of the nature of judicial determination and to entail incidents appropriate to that fact. The arbitrators are to exercise their function not as the advocates of the parties nominating them, and a fortiori of one party when they are agreed upon by all, but with as free, independent and impartial minds as the circumstances permit. In particular they must be untrammelled by such influences as to a fair minded person would raise a reasonable doubt of that impersonal attitude which each party is entitled to. This principle has found expression in innumerable cases, and a reference to a few of them seems desirable.

In *Kemp* v. *Rose* (1), the Vice-Chancellor remarked:

> A perfectly even and unbiased mind is essential to the validity of every judicial proceeding.
>
> Therefore, where it turns out that, unknown to one or both of the persons who submit to be bound by the decision of another, there was some circumstance in the situation of him to whom the decision was intrusted which tended to produce a bias in his mind, the existence of that circumstance will justify the interference of this Court.

In *Walker* v. *Frobisher,* (2) Lord Eldon used this language:

> But the arbitrator swears, it (hearing further persons) had no effect upon his award. I believe him. He is a most respectable man. But I cannot from respect for any man do that, which I cannot reconcile to general principles. A Judge may not take upon himself to say, whether

(1) (1858) 1 Giff. 258 at 264. (2) (1801) 6 Ves. Jr. 70.

evidence improperly admitted had or had not an effect upon his mind The award may have done perfect justice but upon general principles it cannot be supported.

In *Sumner et al* v. *Barnhill* (1), an award was set aside on the ground that one of the arbitrators was disqualified by the fact of having been regularly retained as solicitor of the estate of which the defendant was the executor, although he had not been engaged as counsel or attorney in the matter referred, and did not concur in the award.

In *Race* v. *Anderson* (2), after the evidence had been closed, the matter argued, and one of the arbitrators had written out his view in accordance with which he subsequently made his award, one of the parties who had been examined as a witness sent to him by mail an affidavit explaining some portion of the evidence given. The arbitrator's statement that he was not influenced by this communication was accepted as true, but in setting aside the award Hagarty C.J., speaking for the court, quoted the words of Lord Eldon already mentioned.

In *Conmee* v. *Canadian Pacific Railway Company* (3), the fact that pending the reference and before the finding, one of the arbitrators had received an intimation that the solicitorship of the defendant's company would be offered him and after the finding the offer was made and accepted, was, likewise, held fatal. The authorities were thoroughly reviewed by Rose J. and at p. 654 he quotes from Redman's Law of Awards:

> It cannot be too strongly impressed upon arbitrators that the first great requisite in persons occupying that post is judicial impartiality and freedom from bias.

And from the same work quoting Lord Hardwicke:

> In a matter of so tender a nature, even the appearance of evil is to be avoided.

In *Vineberg* v. *The Guardian Fire Assurance Co.* (4), where one of the arbitrators was a canvassing agent for an agent of the defendants, the award was invalidated.

In *Township of Burford* v. *Chambers* (5), a barrister had acted as counsel for the husband of one of the parties indicted for obstructing an alleged highway claimed by his

(1) (1879) 12 N.S.R. 501.
(2) (1886) 14 O.A.R. 213.
(3) (1888) 16 O.R. 639.
(4) (1892) 19 O.A.R. 293.
(5) (1894) 25 O.R. 663.

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Rand J.

wife to be her property and had written a letter concerning the matter as solicitor for both husband and wife. In an arbitration between the wife and the municipal corporation in which the highway was situated, the barrister was held incompetent.

In *Eckersley* v. *The Mersey Docks and Harbour Board* (1), Lord Esher M.R. at p. 671 said:

> But that cannot be the case here, because both parties have agreed that the engineer, though he might be so suspected (of being biased in favour of the party whose servant he was) shall be the arbitrator. A stronger case than that must, therefore, be shewn. It must, in my opinion, be shewn, if not that he would be biassed, that at least there is a probability that he would be biassed.

In the case of *Albert* v. *Spiegelberg* (2), the Supreme Court held an attorney at law who was an office associate of a party to a submission to be ineligible to act.

In *In re Haig and the L. & N. & G.W. Ry Co.* (3), Wright J. concluded by saying:

> I do feel, however, that it is very desirable that persons who are asked to act as umpires in such cases should inform the parties or their arbitrators of any facts which might prevent their assenting to their acting as umpires.

In *Proctor* v. *Williams* (4), 8 C.B. (N.S.) 386, Erle C.J. said:

> It is of the essence of these transactions that the parties should be satisfied that they come before an impartial tribunal.

Finally, in *R. and A. Clout and Metropolitan Ry Co.* (5), Stephen J. at p. 143 had this to say:

> I do not for one moment say that Mr. Whichcord did anything that was wrong (he had acted as a witness pending the arbitration for one of the parties in other cases of expropriation) and I wish particularly to guard myself against saying anything that might convey that idea, but I think it is unfortunate that his position was not made known. I think Mr. Young would not then have agreed to him as umpire, and I think he would have been quite right.

These authorities illustrate the nature and degree of business and personal relationships which raise such a doubt of impartiality as enables a party to an arbitration to challenge the tribunal set up. It is the probability or the reasoned suspicion of biased appraisal and judgment,

(1) (1894) 2 Q.B. 667.
(2) (1932) 146 (N.Y.) Misc. 811.
(3) [1896] 1 Q.B. 649.
(4) (1860) 8 C.B. (N.S.) 335 at 388.
(5) (1882) 46 L.T.R. (N.S.) 141.

unintended though it may be, that defeats the adjudication at its threshold. Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs.

Especially so is this the case where he has agreed to the person selected. The Court of Appeal took the view that "from that circumstance alone" (the joint ownership of the property) "it is not to be inferred that the arbitrator would not act in an entirely impartial manner, and there is no evidence before us that he did not in fact act in an impartial manner." But as the facts show, it is not merely a case of joint ownership. Nor is it that we must be able to infer that the arbitrator "would not act in an entirely impartial manner"; it is sufficient if there is the basis for a reasonable apprehension of so acting. I think it most probable, if not indubitable, that had the facts been disclosed to Szilard, he would have refused, and justifiably, to accept Sommer.

It is contended that he waived his right to do so by continuing the arbitration after learning of the association, but the evidence does not support this. He had heard a rumour of land dealing between Szasz and Somner but it was vague and quite insufficient to justify repudiation of the proceedings; and he did not learn the actual facts until after the award.

It is likewise impossible to place on Szilard the responsibility for the non-disclosure. He had been assured in effect that Sommer was free from factors that might influence his judgment or cause Szilard to reject him, and it would be asking too much to require him to catechize either Szasz or Sommer in order to verify that assurance. The details of the relationship should have been volunteered by Szasz.

I would, therefore, allow the appeal and restore the judgment of Aylen J. with costs in this Court: the respondent will have his costs of the day on the adjournment of the hearing.

Appeal allowed with costs.

Solicitor for the appellant: *E. J. Isaac.*

Solicitors for the respondent: *Harris & Rubenstein.*

1954

*Mar. 1, 2
*Nov. 1

WALTER G. HUNT (*Defendant*) .....APPELLANT;

AND

ETHEL HUNT (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Judgment—Pleading—Practice—Mutually inconsistent remedies—Judgment on covenant to pay in a mortgage bar to judgment for money had and received thereon.

The respondent sued her husband, the appellant, and the mortgagor in a mortgage of which she was the mortgagee, to secure an accounting of moneys she alleged had been paid by the mortgagor to her husband on account of the mortgage, the purported discharge of which she alleged was a forgery. She also claimed a judgment for the amount of the mortgage and accrued interest against the defendants or such as should be found liable. The appellant pleaded that he himself had advanced the moneys and that the respondent had signed the discharge and received the proceeds which she had invested in a rooming house. By way of counter-claim he alleged that in consideration of the discharge of the mortgage by the respondent he had advanced her the money to purchase an interest in the rooming house and, in the alternative, that if he owed her anything on account of the mortgage then she held such interest subject to a resulting trust in his favour. The mortgagor pleaded that the mortgage was a building mortgage that had been obtained from the appellant and that all dealings with respect to it had been with the appellant and all monies advanced had been repaid to him and that the discharge of the mortgage had been delivered by him. The trial judge found that it was the intention of the appellant to make a gift of the mortgage and the moneys thereby secured to the respondent and that her purported signature to the discharge was a forgery. He directed that the respondent recover from the appellant and the mortgagor the amount advanced on the mortgage and interest; that the mortgagor be entitled to recover by way of indemnity from the appellant any amount the mortgagor might be called to pay upon the judgment, and that the counter-claim be dismissed. In an appeal to the Court of Appeal for Ontario the appellant raised no question as to the judgment for indemnity in favour of the mortgagor and on appeal to this Court did not make the mortgagor a party to the appeal.

Held: That under the circumstances this Court has no jurisdiction to interfere with the respondent's judgment against the mortgagor, or with mortgagor's judgment for indemnity against the appellant, but that the respondent could not have judgment against both the mortgagor and the appellant. By taking judgment against the mortgagor she had of necessity asserted as against him that the moneys paid by him to the appellant were not paid on account of the mortgage, and she could not be heard to assert as against the appellant that they were so paid. *Allegans contraria non est audiendus. M. Brennen & Sons Mfg. Co.* v. *Thompson* 33 O.L.R. 465 at 469 approved.

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

APPEAL from the judgment of the Court of Appeal for Ontario affirming the judgment of the trial judge, LeBel J., maintaining the respondent's action and dismissing the appellant's counter-claim.

O. J. D. Ross for the appellant.

R. E. Holland and *E. B. Lawson* for the respondent.

The judgment of the Court was delivered by:

CARTWRIGHT J.:—This action was brought by the respondent against the appellant, who is her husband, George C. Hunt, who is her son, Charles Rich and Ethel Rich. By an indenture of mortgage, dated 1st of September, 1942, Charles Rich and Ethel Rich mortgaged a property in Toronto, of which they are joint owners, to the respondent. This mortgage is expressed to be made in consideration of $4600 and bears interest at 5 per cent.

The making of the mortgage was arranged between the appellant and Charles Rich and there is a conflict in the evidence as to what amount was actually advanced on the mortgage. The learned trial judge found that a total of $3147 was advanced and this finding was affirmed in the Court of Appeal. Counsel for the appellant contended that this finding is so clearly contrary to the evidence that it should be set aside notwithstanding that there are concurrent findings of fact against the appellant, but for reasons which will appear I do not find it necessary to determine this question.

All the moneys that were advanced on the mortgage were admittedly those of the appellant, but, on conflicting evidence, the learned trial judge has found that it was the intention of the appellant to make a gift of the mortgage and the moneys thereby secured to the respondent. This finding was affirmed in the Court of Appeal and, in my opinion, it cannot be disturbed.

It is established that whatever amount was advanced on the mortgage was repaid in full by Charles Rich to the appellant. While Charles Rich must be taken to have known that the respondent was the mortgagee named in the mortgage he had no dealings with her personally. He dealt only with the appellant. Some time after these repayments had been completed a document, purporting to be a

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discharge of the mortgage signed by the respondent, was delivered to Charles Rich, and was registered. On conflicting evidence the learned trial judge has found that the respondent did not sign this document and that the signature to it is forged. This finding was affirmed in the Court of Appeal and on the evidence it cannot be interfered with.

After discovering that the document purporting to be a discharge had been registered the respondent brought this action. In her Statement of Claim she alleges that Charles Rich and Ethel Rich made the mortgage to her, that she had never executed a discharge, that the appellant and George C. Hunt had conspired to defraud her of the proceeds of the mortgage and to forge her name to the discharge, and that she had at no time received any part of the money secured by the mortgage of which she had always been the owner. In her prayer for relief she claims:

(a) An accounting of the monies paid by the Defendants Charles Rich and Ethel Rich or either of them on account of the Mortgage referred to in paragraph 3 above.

(b) An accounting of the monies received by the Defendants Walter G. Hunt and George C. Hunt or either of them on account of the Mortgage referred to in paragraph 3 above.

(c) For a declaration that the signature purporting to be the signature of the Plaintiff on the Discharge of Mortgage referred to in paragraph 4 above is not the signature of the Plaintiff.

(d) For a declaration that the Defendants Walter G. Hunt and George C. Hunt combined, conspired, confederated and agreed each with the other to defraud the Plaintiff of the proceeds of the said Mortgage and to forge the name of the Plaintiff to the Discharge referred to in paragraph 4 above.

(e) For Judgment for the amount of the said Mortgage and for all interest accrued thereon from the date thereof to Judgment against the Defendants or such of them as are found liable, by this Honourable Court, to the Plaintiff for payment of the amount of the said Mortgage and the said interest as aforesaid.

(f) The costs of this action.

(g) Such further and other relief as to this Honourable Court may seem just and meet.

The appellant and George C. Hunt joined in their defence, pleading that all money advanced on the mortgage was the property of the appellant, that the discharge was in fact signed by the respondent, that the respondent in fact received the proceeds of the mortgage for her own use and invested them in a rooming house at 57 Glen Road,

Toronto, and that the action should be dismissed. The appellant counter-claimed alleging in part:

8. In or about the month of December 1946 the plaintiff applied to this defendant for sufficient money to pay for her interest in said rooming house and in consideration of the discharge of mortgage No. 46109EO this defendant gave her the money.

9. In the alternative the plaintiff used the proceeds of said mortgage and other money given to her by this defendant to purchase her interest in said rooming house, and this defendant did not intend to and did not in fact give her a separate gift of the purchase price for her interest in said rooming house.

10. As a matter of law this defendant says that it is not equitable for the plaintiff to have the proceeds of said mortgage and to retain her interest in said rooming house and that if he owes the plaintiff anything on account of said mortgage then the plaintiff holds and has held her interest in said rooming house subject to a resulting trust in favour of this defendant.

11. In event that it is held that this defendant owes the plaintiff anything upon or with regard to said mortgage, then this defendant claims:

(1) A declaration that the plaintiff holds and has held her interest in 57 Glen Road in trust for him.

(2) An accounting of the rents and profits from the plaintiff's interest in 57 Glen Road from the date when the plaintiff acquired same.

The defendants, Charles Rich and Ethel Rich joined in their defence, pleading that the mortgage was obtained from the appellant, that it was a building mortgage and that all dealings with respect to it were had with the appellant, that all moneys advanced had been repaid to the appellant and that a discharge had been delivered to them by the appellant. Paragraphs 5 and 6 of their Statement of Defence are as follows:

5. In the event that this court should hold that the Defendant Walter G. Hunt was not a proper person to be paid or entitled to receive the monies to obtain the Discharge of the said Mortgage, then these Defendants claim over against the Defendant Walter G. Hunt for the monies so paid.

6. However, in the event that this Court hold that the Discharge of the said Mortgage is for any reason defective, then these Defendants ask that proper Discharge of the said Mortgage should be given to them since the Mortgage monies have been paid in full.

Issue was joined on these pleadings. The record does not indicate that any notice of the claim for indemnity, set out in paragraph 5 quoted above, was issued pursuant to rule 170 of the Ontario Rules of Practice or that any motion was made for directions as to how the question of the appellant's

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liability to indemnify Rich was to be determined; but presumably the proper practice was followed, as no objection seems to have been raised at any stage of the proceedings to this claim being dealt with by the learned trial judge.

At the conclusion of the trial the learned trial judge delivered his judgment directing that the plaintiff recover from the appellant and Charles Rich the sum of $3147 with interest thereon at 5 per cent from the 1st of September, 1942, until the date of the judgment making a total of $4729.98 and costs.

Paragraph 3 of the formal judgment reads as follows:

3. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that if the defendant Charles Rich do pay to the Plaintiff any portion of the plaintiff's judgment for $4,729.98 as aforesaid, or for costs as aforesaid, then the said defendant Charles Rich shall recover by way of indemnity from the defendant Walter G. Hunt any such amount that he has so paid.

The action as against George C. Hunt and Ethel Rich was dismissed without costs and the counter-claim of the appellant was dismissed with costs.

From this judgment the appellant appealed to the Court of Appeal for Ontario. No other party appealed. The notice of appeal was directed to Charles Rich and Ethel Rich as well as to the respondent but it raised no question as to the judgment for indemnity given in favour of the defendant Charles Rich. The appeal was dismissed with costs. The appellant then appealed to this Court but did not make Charles Rich a party to the appeal.

Under these circumstances it would appear that this Court has no jurisdiction to interfere in any way with the respondent's judgment against Rich or with the judgment for indemnity which Rich holds against the appellant. It is for this reason that I do not think that any useful purpose would be served by examining the evidence with a view to determining whether it supports the finding of fact as to the amount of money advanced on the mortgage; and it becomes equally purposeless to consider the propriety of the award of interest. The liability of Rich to pay the $4729.98 to the respondent and that of the appellant to indemnify Rich have become *res judicata* by a judgment from which no appeal has been taken.

We were informed by counsel that the question whether the respondent could hold at the same time a judgment against Rich for payment of all the moneys secured by the mortgage and a judgment against the appellant for the same amount was raised for the first time in this Court. It is dealt with in the following terms in the appellant's factum:

> It is not clear how Walter G. Hunt and Charles Rich can be liable in the same degree. If the husband was the agent of the wife to receive the money then payment to him was good payment. If the husband was not the agent of the wife then payment to him was no payment and the mortgagor is liable to pay again. But if he was not the agent for the wife then the husband has done her no wrong.

This point was argued before us and counsel were given permission to file supplementary memoranda dealing with it. These have now been filed and it is clear that the respondent is maintaining and relying upon her judgment against Rich as she is entitled to do. In the result her mortgage remains a valid charge and she will be entitled to collect the amount of the judgment from Rich who, in turn, will be entitled to collect indemnity from the appellant. While the formal judgment at the trial did not so provide, the respondent will, of course, be bound to give a discharge of the mortgage upon receiving payment in full of her judgment against Rich.

In my view the respondent cannot have judgment against both Rich and the appellant. This is not on the theory that all her rights of action are merged in her judgment against Rich. Her cause of action (if any) against the appellant is not the same as her cause of action against Rich. Her cause of action against the latter is, as set out in paragraph (*e*) of her prayer for relief quoted above, for payment pursuant to the covenant in the mortgage. This she has successfully maintained for the full amount of the moneys advanced on the mortgage and interest. Having done so, I find it difficult to discern any cause of action remaining in her against the appellant.

In his supplementary memorandum counsel for the respondent submits that she has a right of action against the appellant for conversion of the mortgage. Leaving aside the question whether a mortgage is capable of being converted, this submission fails on the facts. The respondent

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holds the mortgage as security on the lands of Rich and has judgment against him for all the moneys thereby secured. She has suffered no damage by the alleged conversion. Alternatively, it is suggested that she has a right of action against the appellant to recover the moneys paid to him by Rich in purported payment of the moneys secured by the mortgage as money had and received. In my view it was open to the respondent to assert such a cause of action against the appellant upon the facts, as they have been found, that she was the owner of the mortgage, that the appellant received from Rich moneys intended by the latter to be payments on the mortgage and retained such moneys. But the respondent by taking the judgment in this action which she holds against Rich has of necessity asserted as against him that the moneys which Rich paid to the appellant were not paid on account of the mortgage, and she cannot be heard to assert as against the appellant that they were so paid. *Allegans contraria non est audiendus.* The respondent having taken and maintained the position that no moneys have been paid on account of the mortgage cannot maintain an action against the appellant for having had and received such moneys. It is only if the moneys paid by Rich are regarded as paid on account of the mortgage that the appellant can be said to have received them to the use of the respondent. If they are treated, as the respondent treats them, as not being paid on account of the mortgage, then the appellant has received them, not to her use, but to that of Rich, and it is Rich who has the right of action against the appellant for the moneys so had and received by him. This right of action Rich asserted in his claim for indemnity and he has been granted judgment on it.

An alternative way of expressing the matter is that, on learning the facts, the respondent was entitled to affirm or deny that the appellant had received the moneys from Rich as her agent; if she so affirmed then the payments extinguished the mortgage; if she denied the agency then the mortgage remained unaffected. By taking her judgment against Rich she adopted the latter course.

The principle which, in the circumstances of this case, prevents a court allowing a judgment against both Rich and Hunt is stated by Riddell J.A., giving the unanimous judgment of the Court of Appeal of Ontario, in *M. Brennen & Sons Mfg. Co* v. *Thompson* (1):

> . . . As they (i.e., the causes of action) are different, the judgment on one does not merge the other; if and when the one *transit in rem judicatam,* the other is wholly unaffected. It is not on the principle of merger that the Court would not allow a judgment against both, but on the principle that the Court could not allow a plaintiff to have two judgments based on two contradictory and inconsistent sets of facts.

In my view the respondent's judgment against the appellant in the action cannot stand.

As to the counter-claim I do not find it possible, on the evidence, to interfere with the concurrent findings of fact below that the moneys paid by the appellant to the respondent to be used by her in connection with her rooming house venture were gifts to her; and consequently the appeal so far as it relates to the counter-claim fails.

There remains the question of costs. In my view the respondent was entitled to proceed against both the appellant and Charles Rich as the latter took the position that the payments made by him to the appellant were, in the circumstances, payment to the respondent. She had alternative claims, one against Rich and one against the appellant, and was entitled under the rules to join them in one action. When, however, the litigation reached the point of judgment I think that the respondent was bound to choose against which of the two she would take judgment and it is now plain that, if she cannot have judgment against both, she has decided to maintain her judgment against Rich. In my view, the Court should, of its own motion, have refused to give a judgment against both of these parties and there is no doubt that the point should have been raised by the appellant at an earlier stage. On the whole, I think the proper course is to allow the respondent her costs of the action up to the conclusion of the trial and that otherwise the costs should follow the event.

The appeal in so far as it relates to the judgment in the action should be allowed and the action, as against the appellant, dismissed. The respondent is entitled to recover

(1) (1915) 33 O.L.R. 465 at 469.

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from the appellant her costs of the action up to the conclusion of the trial in so far as they were increased by the appellant being made a defendant. The appellant is entitled to recover his costs in the Court of Appeal and in this Court, so far as they relate to the action, from the respondent. The dismissal of the counter-claim is affirmed and the respondent is entitled to her costs in the Court of Appeal and in this Court in relation thereto.

Appeal allowed and action as against appellant dismissed.

Counter-claim dismissed.

Solicitors for the appellant: *Kennedy & Ross.*

Solicitors for the respondent: *Hughes, Agar, Amys & Steen.*

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*Nov. 5, 8
*Dec. 9

OVILA BOUCHER .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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

Criminal law—Murder—Alleged misdirection on doctrine of reasonable doubt and circumstantial evidence—Alleged inflammatory language by Crown counsel to jury—Criminal Code, ss. 1014(2), 1025.

The appellant was found guilty of murder. His appeal to the Court of appeal was unanimously dismissed. He now appeals to this Court, by special leave, on grounds of misdirection with reference to reasonable doubt, circumstantial evidence and inflammatory language used by Crown counsel in his address to the jury.

Held (Taschereau and Abbott JJ. dissenting), that the appeal should be allowed, the conviction quashed and a new trial ordered.

1. There was no misdirection in the trial judge's charge with respect to the doctrine of reasonable doubt.

Per Kerwin C.J., Kellock, Estey, Locke, Cartwright and Fauteux JJ.: Difficulties would be avoided if trial judges would use the well known and approved adjective "reasonable" or "raisonnable" when describing that doubt which is sufficient to require the jury to return a verdict of not guilty.

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

2. There was misdirection by the trial judge with reference to the rule as to circumstantial evidence. Neither the language of *Rex v. Hodge* ((1838) 2 Lewin C.C. 227) nor anything remotely approaching it was used.

Per Kerwin C.J. and Estey J.: Even though expressions other than the ones used in the *Hodge* case are permissible, a trial judge should use the well settled formula and so obviate questions arising as to what is its equivalent.

3. Crown counsel exceeded his duty when he expressed in his address by inflammatory and vindictive language his personal opinion that the accused was guilty and left with the jury the impression that the investigation made before the trial by the Crown officers was such that it had brought them to the conclusion that the accused was guilty.

It is improper for counsel for the Crown or the defence to express his own opinion as to the guilt or innocence of the accused. The right of the accused to have his guilt or innocence decided upon the sworn evidence alone uninfluenced by statements of fact by the Crown prosecutor, is one of the most deeply rooted and jealously guarded principles of our law.

4. Per Kerwin C.J., Rand, Kellock, Estey, Cartwright and Fauteux JJ.: It could not be safely affirmed that had such errors not occurred the verdict would necessarily have been the same.

Per Locke J.: There was a substantial wrong and consequently s. 1014(2) of the *Code* had no application.

Per Taschereau and Abbott JJ. (dissenting): As the verdict would have necessarily been the same there had been no substantial wrong or miscarriage of justice.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), affirming the appellant's conviction on a charge of murder.

A. E. M. Maloney, Q.C. and *F. de B. Gravel* for the accused.

P. Miquelon and *P. Flynn* for the respondent.

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

THE CHIEF JUSTICE:—The first question of law upon which leave to appeal to this Court was granted is:—

(1) Were the jury misdirected by the learned trial judge with reference to the doctrine of reasonable doubt?

The trial judge, in my view, did not misdirect the jury, but the difficulties occasioned by what he did say would not arise if trial judges would use the well-known and

(1) Q.R. [1954] Q.B. 592.

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approved word "reasonable" or "raisonnable" when describing that doubt which is sufficient to enable a jury to return a verdict of not guilty.

There was clear misdirection by the trial judge with respect to the second question of law which the appellant was permitted to raise:—

(2) Were the jury misdirected by the learned trial judge with reference to the rule as to circumstantial evidence?

The evidence against the appellant was entirely circumstantial. "In such cases", as this Court pointed out in *The King* v. *Comba* (1), "by the long settled rule of the common law, which is the rule of law in Canada, the jury, before finding a prisoner guilty upon such evidence, must be satisfied not only that the circumstances are consistent with a conclusion that the criminal act was committed by the accused, but also that the facts are such as to be inconsistent with any other rational conclusion than that the accused is the guilty person". This, of course, is based upon the decision in *Rex* v. *Hodge* (2); and, while we stated in *McLean* v. *The King* (3), "There is no single exclusive formula which it is the duty of the trial judge to employ. As a rule he would be well advised to adopt the language of Baron Alderson or its equivalent.", in this case neither that language, nor anything remotely approaching it was used. Even though, according to the judgment in *McLean,* other expressions might be permitted, the experience of the Courts in Canada in the last few years justifies a further warning that a trial judge should use the well settled formula and so obviate questions arising as to what is its equivalent. Because of the misdirection in this case, the conviction cannot stand, unless the Court, exercising the power conferred upon it by s.s. 2 of s. 1014 of the *Criminal Code,* considers that there has been no substantial wrong or miscarriage of justice.

Before dealing with that problem, it is well to set out the third question of law which the appellant was allowed to argue:—

(3) Was the appellant deprived of a trial according to law by reason of the fact that the crown counsel used inflammatory language in his address to the jury?

(1) [1938] S.C.R. 396. (2) (1838) 2 Lewin C.C. 227.
(3) [1933] S.C.R. 688 at 690.

It is the duty of crown counsel to bring before the Court the material witnesses, as explained in *Lemay* v. *The King* (1). In his address he is entitled to examine all the evidence and ask the jury to come to the conclusion that the accused is guilty as charged. In all this he has a duty to assist the jury, but he exceeds that duty when he expresses by inflammatory or vindictive language his own personal opinion that the accused is guilty, or when his remarks tend to leave with the jury an impression that the investigation made by the Crown is such that they should find the accused guilty. In the present case counsel's address infringed both of these rules.

I now turn to s.s. 2 of s. 1014 of the *Code*. The test to be applied was laid down in *Schmidt* v. *The King* (2): "that the onus rests on the crown to satisfy the Court that the verdict would necessarily have been the same". While I am inclined to the view that that test has been met, I understand that several members of the Court think otherwise and, therefore, under the circumstances of this case, I will not record a dissent.

The judgment of Taschereau and Abbott JJ. (dissenting) was delivered by:—

TASCHEREAU, J.:—L'appelant a été accusé d'avoir assassiné un nommé Georges Jabour Jarjour, à St-Henri, comté de Lévis, le 3 juin 1951, et a été trouvé coupable de meurtre à la suite d'un procès devant le jury, présidé par l'honorable Juge Albert Sévigny. La Cour du Banc de la Reine (3) a unanimement confirmé ce verdict. Après avoir obtenu la permission de l'honorable Juge Kellock de la Cour Suprême du Canada, l'appelant a inscrit la présente cause devant cette Cour. Ses griefs d'appel sont les suivants:—

1. Le juge dans son adresse aux jurés, ne les a pas légalement instruits sur la doctrine du doute raisonnable.

2. La règle qui doit être suivie dans le cas de preuve circonstantielle n'a pas été suffisamment expliquée.

3. L'accusé n'a pas obtenu un procès équitable eu égard aux faits de la cause, étant donné que l'avocat de la Couronne, dans son adresse aux jurés, a fait usage d'un langage enflammé.

(1) [1952] 1 S.C.R. 232. (2) [1945] S.C.R. 438 at 440.
(3) Q.R. [1954] Q.B. 592.

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Je suis d'opinion que le premier motif d'appel n'est pas fondé. Un résumé de ce que le président du tribunal a exprimé à maintes reprises sur le doute que peuvent entretenir les jurés, se trouve dans l'extrait suivant de son adresse:—

> Si la Couronne ne prouve pas le fait, le crime, de façon à établir une certitude morale, une certitude qui donne la conviction à l'intelligence, une certitude qui satisfait la raison et dirige le jugement à rendre, et que les jurés ont un doute sérieux sur la culpabilité de l'accusé, c'est leur devoir et ils sont obligés de donner *le bénéfice de ce doute à l'accusé* et de le déclarer non coupable.

Évidemment, le jury a nécessairement compris par ces mots, qu'il devait être satisfait de la culpabilité de l'accusé, au delà d'un doute raisonnable. Sinon, ce dernier devait en avoir le bénéfice et être déclaré non coupable.

Le second grief est plus sérieux. Depuis au delà de cent ans, la règle concernant la direction qui doit être donnée aux jurés lorsqu'il s'agit de preuve circonstantielle, a été posée dans la cause de *Hodge* (1). S'adressant aux jurés, le Baron Alderson s'est exprimé ainsi:

> That before they could find the prisoner guilty they must be satisfied, not only that those circumstances *were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.*

Cette jurisprudence a depuis été suivie, et il suffit de référer aux causes suivantes pour se convaincre qu'elle a été constante:—(*Wills on Circumstantial Evidence* (7th ed. pp. 320 and 321) *Rex.* v. *Natanson* (2), *Rex.* v. *Francis and Barber* (3), *Rex.* v. *Petrisor* (4), *MacLean* v *The King* (5).

Malgré que les tribunaux se sont montrés très sévères sur la nécessité qu'il y a d'instruire le jury dans le sens indiqué dans la cause de *Hodge,* il ne s'ensuit pas que la formule soit sacramentelle, et que l'accusé aura droit à un nouveau procès si les termes exacts ne sont pas employés. (*MacLean* v. *The King supra*) Ce serait exiger un trop grand formalisme, et le droit criminel ne va pas jusque là. Il faut cependant retrouver dans les paroles du juge au procès, au moins l'équivalent, qui fera comprendre aux jurés que dans

(1) (1838) 2 Lewin CC. 227.
(2) (1927) 48 C.C.C. 171.
(3) (1929) 51 C.C.C. 351.
(4) (1931) 56 C.C.C. 390
(5) [1933] S.C.R. 690.

une cause comme celle qui nous occupe, où la preuve est circonstantielle, pour trouver un accusé coupable, ils doivent être satisfaits non seulement *que les circonstances sont compatibles avec sa culpabilité,* mais *qu'elles sont aussi incompatibles avec toute autre conclusion rationnelle.*

Malheureusement, l'équivalent de cette directive qui doit être nécessairement donnée, ne l'a pas été. Le savant président du tribunal a bien attiré l'attention du jury sur la preuve circonstantielle; il leur a bien dit qu'elle devait être forte et convaincante, mais il n'a pas, à mon sens, expliqué la véritable doctrine que j'ai citée plus haut et qu'exige la loi.

L'appelant prétend enfin que la procureur de la Couronne, au cours de son adresse au jury, a fait usage d'un langage enflammé en faisant appel à leurs passions, avec le résultat qu'ils auraient été entraînés à ne pas juger cette cause comme des hommes raisonnables.

La situation qu'occupe l'avocat de la Couronne n'est pas celle de l'avocat en matière civile. Ses fonctions sont quasi-judiciaires. Il ne doit pas tant chercher à obtenir un verdict de culpabilité qu'à assister le juge et le jury pour que la justice la plus complète soit rendue. La modération et l'impartialité doivent toujours être les caractéristiques de sa conduite devant le tribunal. Il aura en effet honnêtement rempli son devoir et sera à l'épreuve de tout reproche si, mettant de côté tout appel aux passions, d'une façon digne qui convient à son rôle, il expose la preuve au jury sans aller au delà de ce qu'elle a révélé.

Je suis donc d'opinion qu'en ce qui concerne les directives du président du tribunal, relatives à la preuve circonstantielle, il y a eu erreur de droit. Je crois également, après avoir analysé l'adresse au jury du procureur de la Couronne, qu'il y a eu exagérration de langage. Mais je ne crois pas que ces deux motifs soient suffisants pour ordonner un nouveau procès. L'article 1014 du *Code Criminel* est ainsi rédigé, et je pense que dans les circonstances de cette cause, il doit trouver toute son application:

1014. A l'audition d'un pareil appel d'un jugement de culpabilité, la cour d'appel doit autoriser le pourvoi, si elle est d'avis

a) Qu'il y a lieu d'infirmer le verdict du jury pour le motif qu'il est injuste ou non justifié par la preuve; ou

b) Qu'il y a lieu d'annuler le jugement du tribunal à cause d'une décision erronée sur un point de droit; ou

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c) Que, pour un motif quelconque, il y a eu déni de justice; et

d) Dans tout autre cas, la cour doit renvoyer l'appel.

2. La cour peut aussi renvoyer l'appel si, malgré son avis que l'appel pourrait être décidé en faveur de l'appelant, pour l'un des motifs susmentionnés, elle est aussi d'avis qu'il ne s'est produit aucun tort réel ou déni de justice.

Il ne me paraît pas utile d'analyser les faits que la preuve a révélés au cours du procès. Il sera suffisant de dire qu'à sa lecture, je me suis convaincu que même si la directive du juge eut été conforme à la loi, et si le procureur de la Couronne eut fait usage d'un langage plus modéré, le verdict aurait été *nécessairement le même*. Je suis satisfait qu'il n'y a eu aucun déni de justice et que l'accusé n'a subi aucun tort réel. *Gouin* v. *The King* (1); *Stirland* v. *Director of Public Prosecutions* (2); *Schmidt* v. *The King* (3).

Je rejetterais l'appel.

RAND J.:—Three grounds of appeal were taken: an error in the charge as it dealt with the burden of proof on the Crown; a failure to give an instruction on the test required for circumstantial evidence; and certain statements of Crown counsel in his address to the jury.

The first ground can be disposed of shortly. The words objected to were "hors de tout doute sérieux". Whatever difference there is between this and the usual formula was swept away by subsequent language with which the jurors were at least more familiar: they must have "une absolue certitude de la vérité de l'accusation qu'ils ont à juger"; other expressions were to the same effect. The instruction, as a whole, was more favourable to the accused than is customary.

The rule as to the sufficiency of proof by circumstances is that the facts relied on must be compatible only with guilt and admittedly no instruction of that nature expressly or in substance was given. The purpose of the rule is that the jury should be made alive to the possibility that the material facts might be given a rational explanation other than that of items plotting the course of guilty action. I think it should have been given, and I cannot say that the charge as a whole supplied its omission.

(1) [1926] S.C.R. 539. (2) [1944] A.C. 315.
(3) [1945] S.C.R. 440.

There are finally the statements of counsel, which I confine to those dealing with the investigation by the Crown of the circumstances of a crime:

> C'est le devoir de la Couronne, quand une affaire comme celle-là arrive, n'importe quelle affaire, et encore plus dans une affaire grave, de faire toutes les recherches possibles, et si au cours de ces recherches avec nos experts on en vient à la conclusion que l'accusé n'est pas coupable ou qu'il y a un doute raisonnable, c'est le devoir de la Couronne, messieurs, de le dire ou si on en vient à la conclusion qu'il n'est pas coupable, de ne pas faire d'arrestation. Ici, c'est ce qu'on a fait.
>
> Quand la Couronne a fait faire cette preuve-là, ce n'est pas avec l'intention d'accabler l'accusé, c'était avec l'intention de lui rendre justice.

Many, if not the majority of, jurors acting, it may be, for the first time, unacquainted with the language and proceedings of courts, and with no precise appreciation of the role of the prosecution other than as being associated with government, would be extremely susceptible to the implications of such remarks. So to emphasize a neutral attitude on the part of Crown representatives in the investigation of the facts of a crime is to put the matter to unsophisticated minds as if there had already been an impartial determination of guilt by persons in authority. Little more likely to colour the consideration of the evidence by jurors could be suggested. It is the antithesis of the impression that should be given to them: they only are to pass on the issue and to do so only on what has been properly exhibited to them in the course of the proceedings.

It is difficult to reconstruct in mind and feeling the court room scene when a human life is at stake; the tensions, the invisible forces, subtle and unpredictable, the significance that a word may take on, are sensed at best imperfectly. It is not, then, possible to say that this reference to the Crown's action did not have a persuasive influence on the jury in reaching their verdict. The irregularity touches one of the oldest principles of our law, the rule that protects the subject from the pressures of the executive and has its safeguard in the independence of our courts. It goes to the foundation of the security of the individual under the rule of law.

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel

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have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

The answer of the Crown is that notwithstanding these objectionable features, there has been no substantial miscarriage of justice; that the proof of guilt is overwhelming and that the jury, acting judicially, must necessarily have come to the same verdict.

Sec. 1014(2) of the *Criminal Code* provides that the Court

> may also dismiss the appeal if, notwithstanding that it is of opinion that on any of the grounds above mentioned the appeal might be decided in favour of the appellant, it is also of opinion that no substantial wrong or miscarriage of justice has actually occurred.

By sec. 1024 this Court, on an appeal, shall

> make such rule or order thereon in affirmance of the conviction or for granting a new trial, or otherwise, or for granting or refusing such application, as the justice of the case requires . . .

It will be seen that under the former section the Court is to exercise its discretion in the light of all the circumstances. Appreciating to the full the undesirability, for many reasons, of another trial, I find myself driven to conclude that nothing short of that will vindicate the fundamental safeguards to which the accused in this case was entitled.

The conviction, therefore, must be set aside and a new trial directed.

LOCKE J.:—I have had the advantage of reading the reasons to be delivered in this matter by my brother Cartwright. I agree with what he has said in regard to the first and second questions of law. The failure to direct the jury upon what may be called the rule in *Hodge's* case appears to me to be directly contrary to the unanimous decision of this Court in *Lizotte* v. *The King* (1).

(1) [1951] S.C.R. 117.

Upon the third question, I have this to say. It has always been accepted in this country that the duty of persons entrusted by the Crown with prosecutions in criminal matters does not differ from that which has long been recognized in England.

In *Regina* v. *Thursfield* (1), counsel for the Crown stated what he considered to be his duty in the following terms:

> that he should state to the jury the whole of what appeared on the depositions to be the facts of the case, as well those which made in favour of the prisoner as those which made against her, as he apprehended his duty, as counsel for the prosecution, to be, to examine the witnesses who would detail the facts to the jury, after having narrated the circumstances in such way as to make the evidence, when given, intelligible to the jury, not considering himself as counsel for any particular side or party.

Baron Gurney, who presided, then said:

> The learned counsel for the prosecution has most accurately conceived his duty, which is to be assistant to the Court in the furtherance of justice, and not to act as counsel for any particular person or party.

In *Regina* v. *Ruddick* (2), decided just after the passage of Denman's Act, Crompton J. said (p. 499):

> I hope that in the exercise of the privilege granted by the new Act to counsel for the prosecution of summing up the evidence, they will not cease to remember that counsel for the prosecution in such cases are to regard themselves as ministers of justice, and not to struggle for a conviction, as in a case at Nisi Prius—nor be betrayed by feelings of professional rivalry—to regard the question at issue as one of professional superiority, and a contest for skill and preeminence.

An article entitled "The Ethics of Advocacy", written by Mr. Showell Rogers, appears in Vol. XV of the Law Quarterly Review at p. 259, in which the cases upon this subject are reviewed and discussed. Speaking of the principles above referred to, the author says:

> Any one who has watched the administration of the criminal law in this country knows how loyally—one might almost say how religiously—this principle is observed in practice. Counsel for the Crown appears to be anything rather than the advocate of the particular private prosecutor who happens to be proceeding in the name of the Crown. When there is no private prosecutor, and the proceedings are in the most literal sense instituted by the Crown itself, the duty of prosecuting counsel in this respect is even more strictly to be performed.

These are the principles which have been accepted as defining the duty of counsel for the Crown in this country.

(1) (1838) 8 C. & P. 269.

(2) (1865) 4 F. & F. 497.

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In *Rex* v. *Chamandy* (1), Mr. Justice Riddell, speaking for the Ontario Court of Appeal, put it this way (p. 227):

> It cannot be made too clear, that in our law, a criminal prosecution is not a contest between individuals, nor is it a contest between the Crown endeavouring to convict and the accused endeavouring to be acquitted; but it is an investigation that should be conducted without feeling or animus on the part of the prosecution, with the single view of determining the truth.

In the last Edition of Archbold's Criminal Pleading, Evidence and Practice, p. 194, the learned author says that prosecuting counsel should regard themselves rather as ministers of justice assisting in its administration than as advocates.

It is improper, in my opinion, for counsel for the Crown to express his opinion as to the guilt or innocence of the accused. In the article to which I have referred it is said that it is because the character or eminence of a counsel is to be wholly disregarded in determining the justice or otherwise of his client's cause that it is an inflexible rule of forensic pleading that an advocate shall not, as such, express his personal opinion of or his belief in his client's case.

In an address by the late Mr. Justice Rose, which is reported in Vol. XX of the Canadian Law Times at p. 59, that learned Judge, referring to Mr. Rogers' article, pointed out a further objection to any such practice in the following terms:—

> Your duty to your client does not call for any expression of your belief in the justice of his cause . . . The counsel's opinion may be right or wrong, but it is not evidence. If one counsel may assert his belief, the opposing counsel is put at a disadvantage if he does not state that in his belief his client's cause or defence is just. If one counsel is well known and of high standing, his client would have a decided advantage over his opponent if represented by a younger, weaker, or less well known man.

In my opinion, these statements accurately define the duty of Crown counsel in these matters.

An extract from one of the passages taken from the address of counsel for the Crown by my brother Cartwright reads:—

> C'est le devoir de la Couronne, quand une affaire comme celle-là arrive, n'importe quelle affaire, et encore plus dans une affaire grave, de faire toutes les recherches possibles, et si au cours de ces recherches avec nos experts on en vient à la conclusion que l'accusé n'est pas coupable ou

(1) (1934) 61 C.C.C. 224.

qu'il y a un doute raisonnable, c'est le devoir de la Couronne, messieurs, de le dire ou si on en vient à la conclusion qu'il n'est pas coupable, de ne pas faire d'arrestation. Ici, c'est ce qu'on a fait.

These are statements of fact and not argument and, in making them, counsel for the Crown was giving evidence. The matters stated were wholly irrelevant and, had the counsel in question elected to go into the witness box to make these statements on oath, the proposed evidence would not have been heard. In this manner, however, these facts were submitted to the jury for their consideration.

The statements were calculated to impress upon the jury the asserted fact that, before the accused had been arrested, the Crown, with its experts, had made a thorough investigation and was satisfied that he was guilty beyond a reasonable doubt. Introduced into the record in this manner, there could be no cross-examination to test their accuracy.

The address of Crown counsel to the jury ended in this manner:—

On voit tous les jours des crimes encore plus nombreux que jamais, des vols et bien d'autre chose, au moins celui qui vole à main armée ne fait pas souffrir sa victime comme Boucher a fait souffrir Jabour. C'est un crime révoltant d'un homme dans toute la force de l'âge, d'un athlète contre un vieillard de 77 ans qui n'est pas capable de se défendre. J'ai un peu respect pour ceux qui volent quand au moins ils ont donné une chance à leur victime de se défendre, mais j'ai aucune sympathie, aucune et je vous demande de n'en pas avoir, aucune sympathie pour ces lâches qui frappent des hommes, des amis. Jabour n'était peut-être pas un ami, mais c'était un voisin, du moins ils se connaissaient.

Lâchement, à coups d'hache.—Et, si vous rapportez un verdict de coupable, pour une fois ça me ferait presque plaisir de demander la peine de mort contre lui.

The Crown prosecutor, having improperly informed the jury that there had been an investigation by the Crown which satisfied the authorities that the accused was guilty, thus assured them on his own belief in his guilt and employed language calculated to inflame their feelings against him.

In *Nathan House* (1), where a conviction was quashed on the three grounds of misreception of evidence, misdirection and the conduct of counsel, Trevethin, L.C.J., referring to the fact that counsel for the Crown had made an appeal to religious prejudice in his address to the jury, said that

(1) (1921) 16 C.A.R. 49.

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the language complained of was highly improper and that it was impossible to say that it could not have influenced the jury.

In delivering the judgment of the House of Lords in *Maxwell* v. *Director of Public Prosecutions* (1), Lord Sankey, L.C. said in part (p. 176):—

> . . . it must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues.

The right of the accused in this matter to have his guilt or innocence decided upon the sworn evidence alone, uninfluenced by statements of fact by the Crown prosecutor bearing directly upon the question of his guilt, and to have the case against him stated in accordance with the foregoing principles, were rights which may be properly described, to adopt the language of the Lord Chancellor in *Maxwell's* case, as being two "of the most deeply rooted and jealously guarded principles of our criminal law."

The infringement of these rights was, in my opinion, a substantial wrong, within the meaning of section 1014 (2) of the *Criminal Code,* and accordingly that provision has no application to this case: *Makin* v. *Attorney General for New South Wales* (2); *Allen* v. *The King* (3); *Northey* v. *The King* (4).

I would allow this appeal, set aside the judgment of the Court of Appeal and the verdict at the trial and direct that there be a new trial.

The judgment of Kellock, Cartwright and Fauteux JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a unanimous judgment of the Court of Queen's Bench, Appeal Side (5), pronounced on the 15th day of June, 1954, dismissing the appeal of the appellant from his conviction on a charge of murder at his trial before Sevigny C.J. and a jury on the 15th of January, 1954.

(1) (1934) 24 C.A.R. 152.
(2) [1894] A.C. 69, 70.
(3) (1911) 44 Can. S.C.R. 341.
(4) [1948] S.C.R. 135.
(5) Q.R. [1954] Q.B. 592.

The appeal is brought pursuant to leave granted by my brother Kellock. The questions of law upon which leave to appeal was granted are as follows:

(i) Were the jury misdirected by the learned trial judge with reference to the doctrine of reasonable doubt?

(ii) Were the jury misdirected by the learned trial judge with reference to the rule as to circumstantial evidence?

(iii) Was the appellant deprived of a trial according to law by reason of the fact that the crown counsel used inflammatory language in his address to the jury?

As to the first question, I am of opinion that when all that was said by the learned Chief Justice in his charge to the jury as to the onus resting upon the Crown and as to the accused being entitled to the benefit of the doubt is considered as a whole it cannot be said that there was misdirection on this point. I do, however, venture to make the respectful suggestion that it would be well if trial judges when describing to the jury the doubt the existence of which prevents them from returning a verdict of guilt would refrain from substituting other adjectives for the adjective "reasonable" which has been so long established as the proper term to employ in this connection.

As to the second question of law on which leave to appeal was granted, it is common ground that the evidence against the appellant was wholly circumstantial. It is clear that throughout his charge the learned Chief Justice failed to direct the jury that before they could find the appellant guilty on such evidence they must be satisfied not only that the circumstances proved were consistent with his having committed the crime but also that they were inconsistent with any other rational conclusion than that the appellant was the guilty person. The rule requiring the giving of such a direction to the jury, usually referred to as the rule in *Hodge's Case* (1), has been long established and it is necessary to refer only to the following authorities. In *McLean* v. *The King* (2), the following passage in the unanimous judgment of the Court appears at page 690:

> It is of last importance, we do not doubt, where the evidence adduced by the Crown is solely or mainly of what is commonly described as circumstantial, that the jury should be brought to realize that they ought not to find a verdict against the accused unless convinced beyond a reasonable doubt that the guilt of the accused is the only reasonable explanation of the facts established by the evidence. But there is no

(1) (1838) 2 Lewin C.C. 227. (2) [1933] S.C.R. 688.

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single exclusive formula which it is the duty of the trial judge to employ. As a rule he would be well advised to adopt the language of Baron Alderson or its equivalent.

In *The King* v. *Comba* (1), Duff C.J. giving the unanimous judgment of the Court said at page 397:

It is admitted by the Crown, as the fact is, that the verdict rests solely upon a basis of circumstantial evidence. In such cases, by the long settled rule of the common law, which is the rule of law in Canada, the jury, before finding a prisoner guilty upon such evidence, must be satisfied not only that the circumstances are consistent with a conclusion that the criminal act was committed by the accused, but also that the facts are such as to be inconsistent with any other rational conclusion than that the accused is the guilty person.

It is however desirable to point out, as was done by Middleton J.A. in *Rex* v. *Comba* (2), that the rule in *Hodge's* case is quite distinct from the rule requiring a direction on the question of reasonable doubt.

On this point I do not find it necessary to quote from the charge of the learned Chief Justice in the case at bar as I understand that all members of the Court agree that there was a failure to give the necessary direction.

As to the third question of law on which leave to appeal was granted, it appears that in the course of his address to the jury counsel for the Crown said:

Le docteur nous dit au sujet du sang,—on nous a fait un reproche messieurs parce que nous avons fait faire une analyse du sang. Mais la Couronne n'est pas ici pour le plaisir de faire condamner des innocents.

C'est le devoir de la Couronne, quand une affaire comme celle-là arrive, n'importe quelle affaire, et encore plus dans une affaire grave, de faire toutes les recherches possibles, et si au cours de ces recherches avec nos experts on en vient à la conclusion que l'accusé n'est pas coupable ou qu'il y a un doute raisonable, c'est le devoir de la Couronne, messieurs, de le dire ou si on en vient à la conclusion qu'il n'est pas coupable, de ne pas faire d'arrestation. Ici, c'est ce qu'on a fait.

Counsel for the Crown concluded his address to the jury as follows:

On voit tous les jours des crimes encore plus nombreux que jamais, des vols et bien d'autre chose, au moins celui qui vole à main armée ne fait pas souffrir sa victime comme Boucher a fait souffrir Jabour. C'est un crime révoltant d'un homme dans toute la force de l'âge, d'un athlète contre un vieillard de 77 ans qui n'est pas capable de se défendre. J'ai un peu respect pour ceux qui volent quand au moins ils ont donné une chance à leur victime de se défendre, mais j'ai aucune sympathie, aucune et je vous demande de n'en pas avoir, aucune sympathie pour ces lâches qui frappent des hommes, des amis. Jabour n'était peut-être pas un ami, mais c'était un voisin, du moins ils se connaissaient.

(1) [1938] S.C.R. 396. (2) (1938) 70 C.C.C. 205 at 227.

Lâchement, à coups d'hache.—Et, si vous rapportez un verdict de coupable, pour une fois ça me ferait presque plaisir de demander la peine de mort contre lui.

There are a number of other passages in the address of this counsel to the jury which I do not find it necessary to quote as I think they can be fairly summarized by saying that counsel made it clear to the jury not only that he was submitting to them that the conclusion which they should reach on the evidence was that the accused was guilty, a submission which it was of course proper for him to make, but also that he personally entertained the opinion that the accused was guilty.

There is no doubt that it is improper for counsel, whether for the Crown or the defence to express his own opinion as to the guilt or innocence of the accused.

The grave objection to what was said by counsel is that the jury would naturally and reasonably understand from his words first quoted above that he, with the assistance of other qualified persons, had made a careful examination into the facts of the case prior to the trial and that if as a result of such investigation he entertained any reasonable doubt as to the accused's guilt a duty rested upon him as Crown counsel to so inform the Court. As, far from expressing or suggesting the existence of any such doubt in his mind, he made it clear to the jury that he personally believed the accused to be guilty, the jury would reasonably take from what he had said that as the result of his investigation outside the court room Crown counsel had satisfied himself of the guilt of the accused. The making of such a statement to the jury was clearly unlawful and its damaging effect would, in my view, be even greater than the admission of illegal evidence or a statement by Crown counsel to the jury either in his opening address or in his closing address of facts as to which there was no evidence.

I conclude that in regard to both the second and third questions on which leave to appeal was granted there was error in law at the trial and that accordingly the appeal should be allowed unless this is a case in which the Court should apply the provisions of section 1014 (2) of the *Criminal Code*.

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The subsection mentioned has often been considered in this Court and, in the view that I take of the evidence, it is sufficient to refer to the judgment of Kerwin J., as he then was, in *Schmidt* v. *The King* (1):

> The meaning of these words has been considered in this Court in several cases, one of which is *Gouin* v. *The King*, from all of which it is clear that the onus rests on the Crown to satisfy the Court that the verdict would necessarily have been the same if the charge had been correct or if no evidence had been improperly admitted. The principles therein set forth do not differ from the rules set forth in a recent decision of the House of Lords in *Stirland* v. *Director of Public Prosecutions*, i.e., that the proviso that the Court of Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict.

As there is to be a new trial, I will, in accordance with the established practice of the Court, refrain from discussing the evidence and will simply state my opinion that it cannot be safely affirmed that the jury, had they been properly directed as to the rule in *Hodge's* case and had the improper remarks of Crown counsel not been made, would necessarily have convicted the appellant. This makes it unnecessary for me to consider the submission of counsel for the appellant, that even if the Court should be of opinion that had the trial been free from the errors in law dealt with above the jury would necessarily have convicted the appellant the conviction should nonetheless be quashed because these errors were of so fundamental a character that the appellant was deprived of his right to the verdict of a jury following a trial according to law and such deprivation is of necessity a substantial wrong, an argument which would have required a careful examination of the judgments in such cases as *Allen* v. *The King* (2) and *Northey* v. *The King* (3).

Having concluded that there was error in law at the trial in regard to both the second and third questions on which leave to appeal was granted and that this is not a case in which it can be said that had such errors not occurred the verdict would necessarily have been the same it follows that the conviction must be quashed.

(1) [1945] S.C.R. 438 at 440. (2) (1911) 44 Can. S.C.R. 331.
(3) [1948] S.C.R. 135.

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

Appeal allowed; conviction quashed; new trial ordered.

Solicitor for the appellant: *A. Maloney.*

Solicitor for the respondent: *P. Miquelon.*

NORMAN ARCHER .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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*Dec. 1

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*Jan. 25

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Motor vehicles—Driving—"Without due care and attention or without reasonable consideration for other persons using the highway"—Whether two offences—The Highway Traffic Act, R.S.O., 1950, c. 167, s. 29 (1)—The Summary Convictions Act, R.S.O. 1950, c. 379, s. 3 (1)—the Criminal Code—ss. 710 (3), 723 (3), and 725.

The appellant in proceedings taken under *The Summary Convictions Act,* R.S.O. 1950, c. 370, was charged with having driven a motor vehicle "without due care and attention or without reasonable consideration for other persons using the highway" contrary to s. 29 (1) of *The Highway Traffic Act,* R.S.O. 1950, c. 167. He was acquitted of the charge by a magistrate but on appeal by the Crown, a conviction was entered by the County Court judge whose judgment was affirmed by a majority of the Court of Appeal for Ontario.

Held: that two separate offences were created by s. 29 of *The Highway Traffic Act* (Ont.) and the appellant having been charged with two offences in the alternative contrary to s. 710 (3) of the *Criminal Code,* the conviction was invalid.

The King v. *Surrey Justices* [1932] 1 K.B. 450 followed.

Gatto v. *the King* [1938] S.C.R. 423, distinguished.

Appeal by the accused, by special leave, from the judgment of the Court of Appeal for Ontario which by a majority judgment, Aylesworth and F. G. Mackay JJ.A. dissenting, dismissed the accused's appeal from a judgment of Shaunessy, County Court Judge by which, on an appeal by the Crown, he was found guilty of the offence charged of which he had been acquitted by a magistrate.

E. P. Hartt for the appellant.

W. E. Bowman, Q.C. for the respondent.

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

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The judgment of Kerwin C.J. and Estey, Fauteux and Abbott JJ. was delivered by:—

The CHIEF JUSTICE:—The appellant was charged with having driven a motor vehicle on Russell Street, in the City of Sarnia, "without due care and attention or without reasonable consideration for other persons using the highway", contrary to s-s. (1) of s. 29 of *The Highway Traffic Act,* R.S.O. 1950, c. 167. This subsection reads as follows:—

> Every person who drives a vehicle on a highway without due care and attention or without reasonable consideration for other persons using the highway shall be guilty of an offence and shall be liable to a penalty of not less than $5 and not more than $100, or to imprisonment for a term of not more than one month, and in addition his licence or permit may be suspended for a period of not more than six months.

The proceedings were taken under *The Summary Convictions Act,* R.S.O. 1950, c. 379, and by s-s. (1) of s. 3 thereof, except when inconsistent with the Act, Part XV of the *Criminal Code* applies. In that Part there are the following enactments to be considered:—

> 710 (3) Every complaint shall be for one matter of complaint only, and not for two or more matters of complaint, and every information shall be for one offence only, and not for two or more offences.
>
> 723 (3) The description of any offence in the words of the Act or any order, by-law, regulation or other document creating the offence, or any similar words, shall be sufficient in law.
>
> 725. No information, summons, conviction, order or other proceeding shall be held to charge two offences, or shall be held to be uncertain on account of its stating the offence to have been committed in different modes, or in respect of one or other of several articles, either conjunctively or disjunctively.

The question to be determined is whether or not one offence only is created by s-s. (1) of s. 29 of *The Highway Traffic Act.* If the answer is in the affirmative the information is sufficient, but, if more than one offence is created, the provisions of s-s. (3) of s. 723 of the Code do not apply so as to restrict the application of s-s. (3) of s. 710. S-s. (3) of s. 723 speaks of *any* offence and s. 725 is restricted to the case where the information charges only one offence but which is alleged to have been committed in alternative ways.

Opinions have differed in the Courts below, but upon consideration I am of opinion that two offences are created by s-s. (1) of s. 29 of *The Highway Traffic Act,* as was decided by the Court of Criminal Appeal, upon a similar

enactment, in *The King* v. *Surrey Justices* (1), one of which is driving without due care and attention and the second of which is driving without reasonable consideration for other persons using the highway. There is nothing inconsistent with this conclusion and the decision of this Court in *Gatto* v. *The King* (2). The fact that there the proceedings were by way of indictment does not affect the matter, but the important point is that the Court decided that the gist of the offence was assisting or being concerned in smuggling contrary to a provision of the Customs Act and the accused were not charged with having committed any of the specific acts in which they were concerned.

The appeal should be allowed and the conviction quashed.

RAND J.:—I agree that there are two offences stated in s. 29(1) of *The Highway Traffic Act* of Ontario from which it follows that the conviction is bad.

The appeal must then be allowed.

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

KELLOCK J.:—I agree with the opinion of Aylesworth J.A., upon the construction of s. 29 of *The Highway Traffic Act,* R.S.O. 1950, c. 167, as creating two offences. This is the view taken in England upon a similar statute by the Court of Criminal Appeal in *The King* v. *Surrey Justices,* (1). At p. 452, Avory J. said:

> On consideration of this section, however, I have come to the conclusion that it contemplates two separate offences: (1) driving without due care and attention, and (2) driving without reasonable consideration for other persons using the road. It is not necessary to give illustrations of how a man may be driving with due care and attention, so far as his own safety is concerned, and yet driving without reasonable consideration for other persons, but, if a person may do one without the other, it follows as a matter of law that an information which charges him in the alternative is bad.

The majority in the Court of Appeal distinguished this decision upon the ground that the court in the *Surrey Justices* case had not to discuss the effect of statutory provisions such as are contained in ss. 723(3) and 725 of the *Criminal Code.* It is quite true that there appears to be no English legislation applicable to summary convictions in

(1) [1932] 1 K.B. 450. (2) [1938] S.C.R. 423.

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the terms of s. 725 of the *Code*, but s. 39(1) of the English Summary Jurisdiction Act, 1879, c. 49, is identical with s. 723(3).

In my opinion, however, the existence of s. 725, as enacted by 1947-48, c. 39, s. 24, does not constitute a valid ground for distinction in that it does no more than authorize the stating of "the offence" as having been committed in different modes but it does not thereby authorize the charging of two different offences, a matter prohibited by s. 710(3). S. 725 can operate in the case of a statutory offence only where, on a proper construction of the statute, it can be said that only one offence is thereby described. Accordingly, s. 725 provides no assistance with respect to the primary problem of construing the statutory provision from the standpoint as to whether one or more than one offence is thereby stated.

With respect to the decision of this court in *Gatto* v. *The King* (1), it is first to be observed that the proceeding there in question was by indictment rather than under Part XV of the *Code*, which deals with summary convictions. S. 854 was accordingly the applicable section which, although by s-s. (2) of s. 855 made subject to ss. 852 and 853, is not in the same words as the sections in Part XV already referred to.

I do not think, in any event, that the court in *Gatto's* case intended to lay down any general principle which would practically eliminate the application of s-s. (3) of s. 853 in the case of all statutory provisions attaching criminal consequences to conduct of varying descriptions so long as the acts described are expressed disjunctively.

The decision in that case was based upon the judgment of Doull J., although only a small portion of that judgment is reproduced in the judgment of this court. There are other passages in the judgment of the learned judge which are illuminating with respect to what was in the mind of this court when construing the section of the *Customs Act* there in question. Doull J., also said:

> In my opinion, it was not the intention of Parliament, under this section, to make persons, who were part of the gang employed to unship, land, remove, transport or harbour, which were *being carried out as a*

(1) [1938] S.C.R. 423.

continuous operation, guilty of several offences but to enact that any person, who is concerned in any part of such performance, is guilty of an indictable offence.

The italics are mine.

Again, the learned judge said:

> In the present case, I think that the gist of the offence is "assisting or being concerned in" smuggling. The particular elements of the smuggling operation, which might themselves be substantive offences, are only different stages of the process, at any one or at all of which this offence may occur. I do not think that any of the cases cited are in principle opposed to this opinion.

Included in the cases to which the learned judge refers are *Rex* v. *Surrey Justices, ubi cit; R.* v. *Molloy* (1) and *R.* v. *Disney* (2). Neither Doull J., nor this court therefore, intended to depart from the principle of these decisions.

In *Gatto's* case the court took the view that the offence created by the statute consisted not in "importing", "unshipping", "landing" or any of the other specific acts mentioned, but in "assisting or being otherwise concerned in" any of them. The court considered that a charge of "assisting or being otherwise concerned in" fell within the language employed in s. 854 of the *Code,* as charging "in the alternative several different matters, acts, or omissions which are stated in the alternative in the enactment describing any indictable offence or declaring the matters, acts, or omissions charged to be an indictable offence."

Coming to s. 29 of *The Highway Traffic Act,* it is plain that is not constructed upon the same footing as the section of the *Customs Act* in question in *Gatto's* case. It does not say, as Middleton J.A., considered he could read the statute in question in *Rex* v. *Rousseau* (3), that

> If any person drives improperly either by driving without due care and attention or without reasonable consideration for other persons using the road

he shall be guilty of an offence. So to read the statute is, in my opinion, to supply words which are not there. I do not think that such a construction finds any support in anything decided in the case of *Gatto.*

For these reasons I would allow the appeal and quash the conviction.

(1) (1921) 15 Cr. App. R. 170; [1921] 2 K.B. 364.
(2) (1933) 24 Cr. App. R. 49.
(3) [1938] O.R. 472.

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LOCKE J.:—The charge laid against the appellant was in the following terms:—

> At the City of Sarnia, on or about the 26th day of September, 1952, Norman Archer, 261 Essex Street, at about 1.55 p.m. did drive motor vehicle bearing Licence No. B-59226, north on Russell Street in the City of Sarnia, without due care and attention or without reasonable consideration for other persons using the highway, contrary to section 29(1) of the Highway Traffic Act.

Of this charge he was acquitted by the Magistrate but, on an appeal by the Crown, His Honour Judge Shaunessy, of the County Court of the County of Lambton, found the appellant guilty of the offence charged. He then appealed to the Court of Appeal and, by a judgment delivered by the Chief Justice of Ontario, with whom Roach and Hope JJ.A. agreed, the appeal was dismissed. Aylesworth J.A., with whom F. G. Mackay J.A. agreed, dissented and would have allowed the appeal. This appeal comes before us by special leave granted by an order of this Court made on May 10, 1954.

S. 29(1) of *The Highway Traffic Act* (R.S.O. 1950, c. 167) reads:—

> 29. (1) Every person who drives a vehicle on a highway without due care and attention or without reasonable consideration for other persons using the highway shall be guilty of an offence and shall be liable to a penalty of not less than $5 and not more than $100, or to imprisonment for a term of not more than one month, and in addition his licence or permit may be suspended for a period of not more than six months.

The point to be decided is as to whether the charge laid against Archer and of which he has been convicted was of having committed one or more than one offence.

The learned Chief Justice of Ontario, agreeing with an earlier decision of the Court of Appeal for Ontario in *Rex* v. *Rousseau* (1), was of the opinion that s. 29(1) creates one offence only, being one which might be committed in two ways and adopted as the description of that offence a statement from Mazengarb on Negligence on the Highway (2nd Ed. at p. 270) reading:—

> The desirability of ensuring safety upon the roads has also resulted in the creation of a statutory offence: that of driving without due care and attention, or without reasonable consideration for other persons using the road.

Being of this opinion, he considered that the conviction was in a form permitted by s. 725 of the *Code*.

(1) [1938] O.R. 472.

The proceedings against the appellant were taken under the provisions of the Summary Conviction Act (c. 379, R.S.O. 1950) and Part XV and the sections of the *Criminal Code* referred to in s. 3 of that Act, to the extent there mentioned, apply. The following provisions of the Code contained in that part must be considered:—

710. (3) Every complaint shall be for one matter of complaint only, and not for two or more matters of complaint, and every information shall be for one offence only and not for two or more offences.

723. (3) The description of any offence in the words of the Act or any order, bylaw, regulation or other document creating the offence or any similar words shall be sufficient in law.

725. No information, summons, conviction, order or other proceedings shall be held to charge two offences, or shall be held to be uncertain on account of its stating the offence to have been committed in different modes, or in respect of one or other of several articles, either conjunctively or disjunctively.

S. 710(3), with an addition which does not affect the matter to be considered, appeared as s. 845(3) of the *Criminal Code* of 1892 and was taken apparently from s. 10 of *The Summary Jurisdiction Act, 1848* (c. 43 Imp.). That section appears to have been a codification of the law, as decided in the early cases (See *R.* v. *Sadler* (1); *R.* v. *North* (2); *R.* v. *Pain* (3).)

S. 725, as it read prior to the amendment of 1948, appeared as s. 907 of the *Code* of 1892. This was, in turn, taken from s. 107 of the *Summary Convictions Act* (c. 178, R.S.C. 1886) and first appeared as s. 4 of c. 49 of the statutes of that year. It does not appear that there was any counterpart of this section in England.

S. 12(1) of *The Road Traffic Act,* 1930 (Imp.) (20-21 Geo. V, c. 43) reads:—

If any person drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road, he shall be guilty of an offence.

The description of the offence or offences in s. 29(1) of *The Highway Traffic Act* is the same.

In *The King* v. *Surrey Justices* (4), the charge laid under s. 12 of *The Road Traffic Act* was that the accused had driven:

without due care and attention or without reasonable consideration for other persons using the road.

(1) (1787) 2 Chitty 519.
(2) (1825) 6 Dowl. & Ry, 143.
(3) (1826) 7 Dowl. & Ry. 678.
(4) [1932] 1 K.B. 450.

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and a conviction was made by the Justices in these terms. A rule *nisi* for a writ of *certiorari* required them to show cause why the conviction should not be quashed upon the grounds that two offences appeared in the information and in the conviction, contrary to the terms of s. 10 of the *Summary Jurisdiction Act, 1848.*

The report of the argument shows that it was contended for the Justices that s. 12(1) created only one offence, although it was expressed in the alternative, but this was rejected. Avory J., who delivered the judgment of the Court, after saying that the only question was as to whether the section in question could be read as comprising two separate offences, or whether it created only one, said that they had been invited to construe its language as if it read:—

> If any person drives a motor vehicle on a road without due care and attention *and* without reasonable consideration for other persons using the road he shall be guilty of an offence.

After then saying that it was not necessary to give illustrations of how a man might be driving with due care and attention, so far as his own safety is concerned, and yet driving without reasonable consideration for other persons, he pointed out that, if a person may do one without the other, it follows as a matter of law that an information which charges a person in the alternative is bad, saying (p. 452):—

> It is an elementary principle that an information must not charge offences in the alternative, since the defendant cannot then know with precision with what he is charged and of what he is convicted and may be prevented on a future occasion from pleading *autrefois convict.*

R. v. *Jones* (1) and *R.* v. *Wells* (2), were referred to as illustrating the distinction which is to be drawn between charging offences in the alternative and charging that a man may, by one act, have committed two offences. In the first of these cases it was held that a man might properly be convicted under the *Motor Car Act, 1903* of driving "recklessly and at a speed which is dangerous to the public", since the act of driving was one indivisible act: in the second, the accused was charged under the same Act of driving "at a speed *or* in a manner which was dangerous to the public" and the conviction was held to be bad for duplicity because he had been charged in the alternative.

(1) [1921] 1 K.B. 632. (2) (1904) 68 J.P. 392.

In the reasons for judgment delivered by the learned Chief Justice of Ontario reference is made to the decision of this Court in *R.* v. *Gatto* (1). The prosecution in that case was by indictment for an offence or offences against s. 193(3) of the *Customs Act* (R.S.C. 1927, c. 42). The count in the indictment and the conviction read that the accused:—

did assist or were otherwise concerned in the importing, unshipping, landing or removing or subsequent transporting or in the harbouring of goods liable to forfetiture under the Customs Act.

On an equal division of the Supreme Court of Nova Scotia *in Banco,* the attack on the indictment and conviction for multiplicity was dismissed. On the appeal to this Court, Sir Lyman Duff C.J., by whom the judgment of the Court was delivered, adopted a passage from the judgment of Doull J. which contained the statement that the section of the *Customs Act* created one offence and not several, as contended on behalf of the accused. Doull J. had held that s. 854 of the *Code* applied and that, accordingly, if the acts or omissions are stated in the alternative in the enactment describing an indictable offence, a count is not objectionable if it charges these matters alternatively. The decision of the Court of Appeal in *R.* v. *Molloy* (2), where the proceedings were by indictment, and Rule 5 of *The Indictment Act, 1915* (5 & 6 Geo. V, c. 90), the terms of which are at least as wide as those of s. 854, was considered as insufficient to support the conviction, and while referred to by Doull J. is not mentioned in the reasons for judgment delivered in this Court.

The proceedings in the present matter not being for an indictable offence, s. 854 has no application and the decision in *Gatto's* case, if relevant in determining it, is of importance only as deciding that a conviction in the language of s. 193 of the *Customs Act* is for one offence only. As to this, the argument addressed to the Supreme Court of Nova Scotia *in Banco* and, so far as may be judged from the reasons delivered, to this Court, was not directed to the point as to whether to "assist" or "to be otherwise concerned" in the importing etc. of goods described two separate offences, but rather whether "importing", "unshipping", "landing", "removing", "subsequent transporting"

(1) [1938] S.C.R. 423. (2) [1921] 2 K.B. 364.

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and "harbouring" were distinct offences. It was the latter contention that was rejected by Doull J. in the passage approved in the judgment of this Court. The former does not appear to have been considered in either Court.

There can be no doubt, in my opinion, that the conviction in the present matter cannot be upheld, unless by virtue of s. 723(3) and s. 725 of the *Criminal Code*. It appears to me equally clear that neither of these sections support the contention of the Crown if s. 29(1) of *The Highway Traffic Act* creates two offences and not merely one.

S. 723(3) merely says that to describe *any offence,* in the words of the Act creating it, shall be sufficient in law, but if two offences are created by the Act it cannot follow that charging them in the alternative is permissible, since this would directly conflict with s. 710(3). S. 725 speaks of the information or conviction stating *the offence* to have been committed in different manners and is, of necessity, applicable only if one offence only is created.

Upon this aspect of the matter, I can see no answer to the reasoning of Avory J. in the *Surrey Justices* case. As was said in that case, a person may be driving with due care and attention, so far as his own safety is concerned, and yet driving without reasonable consideration for other persons on the highway. To drive "without due care and attention" is an offence under the section subjecting a person guilty of such conduct to the prescribed penalty; to drive "without reasonable consideration for other persons using the highway" is a distinct offence punishable in like manner. If a person were to be convicted for the first of these offences and be later prosecuted for the second, in respect of the same act would a plea of *autrefois convict* be a defence? The answer to that question is, in my opinion, in the negative.

I would allow this appeal and set aside the conviction.

Appeal allowed and conviction quashed.

Solicitor for the appellant: *G. A. Martin.*

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

ATTORNEY GENERAL OF SASKATCHEWAN (*Defendant*) ..... } APPELLANT;

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*Mar. 10, 11, 12
*Nov. 16

AND

WHITESHORE SALT AND CHEMICAL COMPANY LIMITED AND MID-WEST CHEMICALS LIMITED (*Plaintiffs*) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law—Crown land—Mining leases of Saskatchewan lands issued by Dominion prior to transfer of natural resources—Leases replaced before expiration by provincial leases—Whether previous leases surrendered—Whether present leases subject to Natural Resources Agreement, 1930.

In 1930, the respondents were the holders of sixteen alkali mining leases issued by the Dominion prior to the passage of the National Resources Agreement, 1930, between the Province of Saskatchewan and the Dominion providing for the transfer of the natural resources from the Dominion to the Province. Section 2 of the Agreement provided that the Province agreed to carry out the obligations of the Dominion under contracts such as the ones held by the respondents and not to alter any of their terms except with the consent of all parties other than the Dominion. The lease in question provided for a 20-year term with the right of renewal.

In 1931, prior to their expiration, the leases were replaced by two licences granted for eighteen years by the Province, which included some four hundred acres of new land, and which, in turn, were replaced in 1937 by two leases each for a term of twenty years. Both the licences and the new leases provided for the right of renewal.

The trial judge and the Court of Appeal held that the new leases were subject to s. 2 of the Agreement and that, consequently, the Province could not change the royalty payable under the leases.

Held: (Estey and Locke JJ. dissenting), that the appeal should be allowed.

Per Kerwin C.J., Kellock and Fauteux JJ.: The doctrine of surrender, which is not limited to cases of landlord and tenant and which does not depend upon intention, applies in the case at bar. The new licences which were accepted in 1931 could not have been granted by the Province unless the original leases had been surrendered. There could be no renewal of the terms of the original leases prior to the expiration of the existing terms, and the instruments did not purport to be renewals.

As to the intention of the parties, it cannot be contended that the four hundred acres of new land ever became subject to the terms of the old Dominion regulations or to the Dominion-Provincial agreement,

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

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if for no other reason than that the provincial Minister, who granted the new licences, had no power under the Mineral Resources Act to do so.

Nothing done in 1937 in the surrender of the 1931 licences and the granting of new leases can assist the respondents. Accordingly, s. 2 of the Agreement ceased to be applicable to the respondents whose rights became subject to the provincial law.

Per Estey J.(dissenting): The new licences issued in 1931 were but consolidations and renewals of the original leases and remained subject to the provisions of the Agreement. The changes and additions in the licences appear to have been made under s 2 of the Agreement without any intention to surrender or cancel the leases in the sense that the parties would not be subject to the Agreement. If the licences leave that issue in doubt, an examination of the circumstances supports the conclusion that the parties intended to consolidate and to make alterations and additions.

There was no surrender by operation of law as there was no basis for an estoppel and as the parties had no other intention than to consolidate and renew the former leases.

The 1937 leases cannot be construed as expressing the intention that Regulations adopted afterwards varying or fixing a new royalty should become part of such leases. Consequently, there was no consent within the meaning of the Agreement.

Per Locke J. (dissenting): The correspondence leading to the 1931 licences showed clearly that both parties intended that the licences were granted in the exercise of the right of renewal and that only the rights of the lessee in respect of the unexpired term of the previous leases were surrendered together with the instruments. There appears to be no room for doubt that this was the intention of the parties. The case of *Lyon* v. *Reed* ((1884) 13 M. & W. 285) does not support the contention that where a lessee accepts a renewal of a lease before the expiration of the term, not only is the right to the unexpired portion of the term extinguished but also the benefit of all other collateral covenants, even though, as in this case, the parties intended and stated their intention that such rights should be preserved.

For the same reasons, all that was surrendered in 1937 were the unexpired terms of the 1931 licences and possession of the instruments.

By signing the 1937 leases, the respondents did not waive their right to insist that the rates of rentals and royalties could not be changed during the currency of the leases.

APPEAL from the judgment of the Court for Saskatchewan (1), affirming the decision of the trial judge and declaring that certain provincial legislation was not applicable to the respondents' leases.

M. C. Shumiatcher, Q.C., R. S. Meldrum, Q.C. and *M. H. Newman* for the appellant.

G. H. Steer, Q.C. and *E. C. Leslie, Q.C.* for the respondents.

(1) [1952] 4 D.L.R. 51.

The judgment of Kerwin C.J. and Kellock and Fauteux JJ. was delivered by:—

KELLOCK J.:—This is an appeal from the Court of Appeal for Saskatchewan (1) dismissing an appeal from the judgment at trial in an action brought by the respondents for a declaration that certain provincial legislation is ultra vires, or, in the alternative, inapplicable with respect to certain alkali mining leases held by them. As there is no question as to any rights as between the respondents, I shall not differentiate between them.

The respondents became the holders of sixteen mining leases granted by the Dominion at various dates between 1926 and 1930 prior to the Natural Resources Agreement between the Dominion and the Province of Saskatchewan, which became effective on October 1, 1930. These leases were (to use a neutral expression) given up by the respondents in 1931 and replaced by certain licences granted by the province, which, in turn, were replaced in 1937 by other leases. The respondents contend, and that contention has been upheld in the courts below, that by virtue of s. 2 of the Resources Agreement, the legislation in question is ineffective in so far as the royalties payable by the respondents are concerned.

Section 2 of the Agreement, in so far as material, is as follows:

> The province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown lands, mines or minerals any interest therein as against the Crown and further agrees not to affect or alter any term of any such contract to purchase, lease or other arrangement by legislation or otherwise, except either with the consent of all parties thereto other than Canada . . .

The effect of this legislation was to bring about a statutory novation under which the province became substituted for the Dominion; Re *Timber Regulations* (Manitoba) (2).

It is the contention of the appellant that what occurred in 1931, and again in 1937, was a surrender of all rights of the respondents under the instruments then existing, and that accordingly, s. 2 above ceased to be applicable, the rights of the respondents becoming, in all respects, subject to provincial law. The respondents take the position, in the first place, that there could be in law no surrender

(1) [1952] 4 D.L.R. 51. (2) [1935] A.C. 184.

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either in 1931 or 1937 and that, in any event, there was no surrender, all that occurred being the arranging of new terms to which the provisions of s. 2 still applied.

With respect to the first ground, the respondents contend that the relation subsisting under the original leases was not that of landlord and tenant, and that the operation of the doctrine of surrender is confined to such a relationship.

With respect to the second, McNiven J.A., who delivered the judgment in the court below, was of opinion that the operation of a surrender was limited to the term granted and that in all other respects,

> the question as to whether or not there has been a surrender of rights (all or any) under the initial leases depends upon the intention of the parties in entering upon the new agreement.

He was further of the opinion that any surrender of the respondents' rights to be effective "should be clearly expressed and should not be left to implication of either fact or law." It was accordingly held that

> It was the intention of the parties in 1931 to negotiate a consolidation of the Dominion leases and that any rights which accrued to Whiteshore under section 2 of the Natural Resources Agreement were not surrendered. The present leases are merely renewals of the 1931 leases.

The doctrine of surrender is not limited to cases of landlord and tenant as contended for by the respondents. As stated by Parke B. in *Lyon* v. *Reed* (1):

> This term is applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender.

Merely as an example, the learned Baron referred to the case of a lessee for years accepting a new lease from his lessor, in which case, as the lessor could not grant the new lease unless the prior one had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former.

The doctrine of surrender by operation of law, as Baron Parke points out, does not depend upon intention:

> The surrender is not the result of intention. It takes place independently, and even in spite of intention. Thus . . . it would not at all alter the case to shew that there was no intention to surrender the particular estate, or even that there was an express intention to keep 'it unsurrendered'.

(1) (1844) 13 M. & W. 285 at 306.

Where a lease is validly surrendered "the lease is gone, and the rent is also gone," to employ the language of Bramwell L.J., as he then was, in *Southwell* v. *Scotter* (1). This principle is not affected by the fact that the lessee remains liable for breaches of covenant committed prior to the surrender; *Richmond* v. *Savill* (2); including rent then accrued due. The landlord similarly remains liable; *Brown* v. *Blake* (3).

In *ex parte Glegg* (4), the lessees of a brickfield, with liberty to dig and carry away the earth and clay in consideration of certain rents and royalties, became bankrupt. The trustees, who disclaimed the lease, claimed the right to remove the buildings and machinery erected by the lessees, pursuant to a clause in the lease enabling the lessees so to do "at any time or times during the continuance of the said term, or within twelve months from the expiration or other sooner determination thereof, but not afterwards."

S. 23 of the Bankruptcy Act, 1869, which authorized the trustees to disclaim, provides that the lease should, upon disclaimer, "be deemed to have been surrendered" from the date of the adjudication in bankruptcy. It was held that the right to remove the buildings and machinery had perished with the lease. Jessel M.R., at p. 16, said:

> A surrender of the lease must be a surrender of the whole lease, not merely of the demise, but also of the license to remove the buildings and fixtures, and of every provision in it, whether beneficial to the tenant or onerous. The whole lease is gone.

See also the same learned judge in *Ex parte Dyke* (5).

In my opinion this principle applies in the case at bar. The new licenses which were accepted in 1931 could not have been granted by the province unless the original leases had been surrendered. There could be no "renewal" of the terms of the original leases prior to the expiration of the existing terms, and the instruments did not purport to be renewals. They were for a new term of eighteen years from October 1, 1930, which bore no relation to anything for which provision was made in the original instruments.

(1) (1880) 49 L.J., Q.B. 356 at 359.
(2) [1926] 2 K.B. 530.
(3) (1912) 47 L. Jo. 495.
(4) (1881) 19 Ch. D. 7.
(5) (1882) 22 Ch. D. 410 at 425-6.

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As to the intention of the parties, it is to be observed that the new licences, which were issued on the 28th of September, 1931, included some four hundred acres of *new* lands which had never been included in the old Dominion leases. It cannot be contended that this new acreage ever became subject to the terms of the old Dominion regulations or to the Dominion-Provincial Agreement of 1930, if for no other reason than that the Minister of Natural Resources of Saskatchewan, by whom the new licences were granted, had no power under the *Mineral Resources Act,* 1931, c. 16, to do so; *Rex* v. *Vancouver Lumber Company* (1). To maintain the contrary is to say that the Minister had authority to subject any provincial lands to an arrangement which even the Legislature itself could not subsequently affect. The utmost authority which the statute gives to the Minister, is the provision in s. 6 authorizing the grant *under the provincial Act* of mineral lands to applicants who, at the time of the coming into force of the statute, had complied with the Dominion regulations and had an application pending with the Dominion.

The licences of 1931 make no attempt to differentiate with respect to any of the lands included therein. It is therefore impossible to sever any part of the lands from any other part and to say that while the old Dominion regulations did not apply to the one they nevertheless applied to the other. Moreover, the only authority vested in the Minister to deal with mineral leases formerly granted by the Dominion under the *Dominion Lands Act* and regulations was by the Provincial Lands Act, 1931, c. 14, s. 67(1). But the licences of 1931 were not and did not purport to be granted under that Act but by virtue of the authority vested in the Minister by "The Mineral Resources Act", which statute deals exclusively with mineral resources subject, in the hands of the province, to no outstanding interest created by the Dominion.

This being so, nothing done in 1937 in the surrender of the 1931 licences and the granting of new leases can assist the respondents.

When, therefore, in 1947, s. 27 of the *Mineral Resources Act* was amended by c. 21, s. 4, providing that notwithstanding anything contained in the amending Act or any other

(1) [1920] 1 W.W.R. 255.

Act or in any regulations, or in any lease or licence, whether granted by the Dominion or by the province, such lease or licence should be deemed to contain a covenant by the lessee or licensee that he should pay to the province such royalties as might from time to time be required by the regulations, this legislation was effective with respect to the leases held by the respondents.

I would therefore allow the appeal and dismiss the action with costs throughout.

ESTEY J. (dissenting):—The administration of the Crown's interests in the natural resources within Saskatchewan was transferred from the Government of Canada to the Government of that Province under the terms of the Natural Resources Agreement of March 20, 1930 (hereinafter referred to as the Natural Resources Agreement). This was ratified by the Legislature of Saskatchewan (S. of S. 1930, c. 87), by the Parliament of Canada (S. of C. 1930, c. 41) and by the Parliament of Great Britain (1930, 20-21 Geo. V. c. 26, Gr. Br.). By a subsequent agreement of August 7, 1930, this transfer became effective as of October 1, 1930 (S. of S. 1931, c. 85; S. of C. 1931, c. 51).

Upon the latter date (October 1, 1930) the respondent Whiteshore Salt and Chemical Company Limited (hereinafter referred to as the respondent) was lessee under sixteen alkali leases covering approximately 3130 acres granted by His Majesty, as represented by the Minister of the Interior of Canada, under the Alkali Mining Regulations established by Order-in-Council P.C. 1297 of April 20, 1921, and amended November 20, 1923, and January 5, 1926. These leases (hereinafter referred to as original leases) were not all made at the same time and under the provisions thereof would have expired at different dates in the years 1946 to 1950 inclusive.

After the resources were transferred, and under date of September 28, 1931, the sixteen leases, prior to the expiration of any of them, were replaced by two licenses granted by the Minister of Natural Resources of the Province of Saskatchewan to the respondent. These were numbered A1372 and A1373 and were each for a period of eighteen years from October 1, 1930. Then, before the date of their

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expiration, these latter licences were replaced, on April 16, 1937, by two leases each for a term of twenty years to be computed from the first day of October, 1936.

The Attorney General, as appellant, contends that the alkali mining leases A1372 and A1373 effected a surrender, by operation of law, of the original sixteen leases, or, in any event, by these two licences the parties disclosed an intention to and did effect a surrender or termination of the original sixteen leases, and that thereafter the two licences were now agreements between the parties hereto, unaffected by the provisions of the agreement under which the Province took over the administration of the natural resources and, therefore, subject only to provincial legislation.

The respondent contends that these new licences were but consolidations or renewals of the original sixteen leases and, therefore, remain subject to the provisions of the Natural Resources Agreement and that it was, therefore, beyond the competence of the Province, by legislation, to increase the fees and royalties provided for in the original sixteen leases.

The Natural Resources Agreement placed the Province of Saskatchewan "in the same position as the original Provinces of Confederation are in virtue of Section one hundred and nine of the British North America Act, 1867" with respect to "the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province . . . subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same . . ." In reality this agreement placed the administration of the interests of the Crown in the natural resources within the Province under the provincial government. The relevant portions of the agreement are paras. 2 and 3, which read as follows:

> 2. The Province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown lands, mines or minerals and every other arrangement whereby any person has become entitled to any interest therein as against the Crown, and further agrees not to affect or alter any term of any such contract to purchase, lease or other arrangement by legislation or otherwise, except either with the consent of all parties thereto other than Canada or in so far as any legislation may apply generally to all similar agreements relating to lands, mines or minerals in the Province or to interests therein, irrespective of who may be the parties thereto.

3. Any power or right, which, by any such contract, lease or other arrangement, or by any Act of the Parliament of Canada relating to any of the lands, mines, minerals or royalties hereby transferred or by any regulation made under any such Act, is reserved to the Governor in Council or to the Minister of the Interior or any other officer of the Government of Canada, may be exercised by such officer of the Government of the Province as may be specified by the Legislature thereof from time to time, and until otherwise directed, may be exercised by the Provincial Secretary of the Province.

The sixteen leases granted by the Government of Canada to the respondent are described as "alkali leases" and provide in part:

His Majesty doth grant and demise unto the lessee, the full and free and sole, the exclusive license and authority to win and work all the alkali deposits and accumulations of alkali as defined in the said regulations on or in the said lands, that is to say,

The provincial licenses Nos. A1372 and A1373 dated September 28, 1931, are each entitled "alkali mining license" and provide in part:

. . . in consideration of the fees and royalties hereinafter reserved, grant unto . . . (Whiteshore) hereinafter called the licensee . . . full right, power and the sole, the exclusive license, subject to the conditions hereinafter mentioned and contained in the Mineral Resources Act and Regulations thereunder, and the amendments thereto, to win and work all the deposits and accumulations of Alkali on or in the following lands, that is to say:

In both the leases and the licenses the foregoing provisions are followed by a paragraph reading:

Together with full and exclusive license and authority for lessee and his agents, servants and workmen to search for, dig, work, mine, procure and carry away the said alkali wherever the same may be found in or on the said lands, and to construct and place such buildings and erections, machinery and appliances on the said lands as shall from time to time be necessary and proper for the efficient working of the said mines and accumulations of alkali and for winning, removing and making fit for sale the alkali on and in the said lands.

Under the original leases the lessee paid an annual rent and under the licenses an annual fee of 25 cents per acre and a royalty of 25 cents per ton of alkali taken from the leased lands with, in each case, a proviso not material hereto. The respondent has extracted quantities of alkali and performed all the covenants on its part under all of the leases and licenses, although since the increase in royalties by Order-in-Council 1303 dated August 20, 1947, and varied by Order-in-Council 1060 dated August 28, 1949, the payments of royalties have been made under protest.

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The general purpose of the leases and licenses was the same throughout. The terms of the original leases had not expired and, in fact, would have continued to various dates between 1946 and 1950 inclusive. The licenses were each for a period of eighteen years from October 1, 1930. Certain of the provisions were identical in language with those of the leases, while others, though expressed in different words, remained essentially to the same effect. The rent or fee and royalties were unchanged. The acreage of 3130 was varied by deleting 100 acres included under the original leases and adding 400 acres, making a total of 3430 acres under the licenses. The right of the lessee to recover the alkali in solution was not continued under the licenses. The lessor was given, under the licenses, the right to distrain for the arrears of fees and royalties and the lessee the right to remove his equipment within a period of six months from the termination of the leases.

The licenses differ in that they were granted by the Province and made subject to the provincial Mineral Resources Act and the Regulations thereunder, whereas the original leases were granted, as already stated, through the Minister of the Interior of Canada and under the Regulations of 1910 and 1911. After the Natural Resources Agreement a lessee such as the respondent could look only to the Province for the performance of obligations assumed on behalf of the Crown. Lord Asquith of Bishopstone, referring to that agreement and its statutory confirmation, stated: "These provisions have been described as constituting a 'statutory novation,' the province stepping into the shoes of the Dominion, and succeeding to its rights." *Huggard Assets Ltd.* v. *The Attorney-General of Alberta et al* (1); *Refund of Dues under Timber Regulations* (2).

Throughout the licenses no reference is made to the Natural Resources Agreement, confirmed as it was by the legislative bodies already mentioned. In the consolidation here effected, if the parties had intended that they would no longer be subject to the provisions of that agreement, it must be presumed that they would have expressed such an intention in the consolidated agreements.

(1) [1953] 8 W.W.R. (N.S.) 561 at 563.
(2) [1935] A.C. 184 at 198.

There are, throughout the licenses, no words of surrender, cancellation or consolidation. Therefore, when these changes and additions are considered in relation to the power given to the parties under para. 2 of the Natural Resources Agreement to effect alterations in the original leases, the changes and additions included in the licenses would appear to be made under that provision without any intention to surrender or cancel the original leases in the sense that the parties carrying on under the licenses would not be subject to the provisions of the Natural Resources Agreement. If, however, it be suggested that the agreements leave the issue so much in doubt that regard should be had to the circumstances under which the parties executed the leases, an examination of these circumstances, in my view, definitely supports the foregoing conclusion that the parties intended to consolidate the leases and to make alterations and additions thereto. The initial suggestion was made on June 20, 1931, by the respondent's solicitor's letter to the Department of Natural Resources, reading, in part, as follows:

> Under the circumstances it would be a great deal more convenient if the leases were consolidated, and one lease was issued for the full area. It would simplify payment of rent by the company, and simply the work in your office. I would suggest that a new lease be prepared of all of the area covered by the above leases, the new lease to be for a term of twenty (20) years from any date that would appear to be fair, the company to surrender all the leases now held by it.

The reply on behalf of the Department acknowledges the request for consolidation, accepts the fact that the sixteen leases would be cancelled and suggests two leases instead of one. The respondent then returns the sixteen leases "to be cancelled" and presumes "that the new leases will be in the same form or a similar form to the leases being cancelled." The words "surrender," as here used by the respondent, and "cancellation," as used by both the parties, when construed, as it seems they must be, in relation to the word "consolidation," mean no more than that the documents would be cancelled and their places taken by those embodying similar terms to be now styled licenses.

Then follows correspondence dealing, inter alia, with the term of eighteen years and the deletion and addition of acreage. Eventually the licenses were forwarded to the respondent for execution and were returned, duly executed,

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to the Department, under date of October 15, 1931. The solicitor for the respondent had, in the earlier correspondence, requested that it be recited in the licenses that the work required by the lessee under para. 12 of the original leases had been complied with. He now, however, requests that this certificate refer to Clause 1(i) of the licenses, rather than to para. 12 of the original leases. This supports the view that the parties were but consolidating the leases and it was, therefore, appropriate to refer to the clauses as included in the new licenses.

It may also be added that the witnesses on behalf of both parties made it clear that in the execution of the licenses they were but effecting a consolidation, with only such alterations and additions as were agreed upon.

The respective Governments, when adopting the language of the Natural Resources Agreement, had in mind all types of then current agreements with the Government of Canada in relation to the natural resources, and in particular the many leases that were for periods varying from one to many years. What is perhaps of even greater importance is that, because of the nature of the work and expenditures made by a lessee in developing a natural resource, it was usual to include in the leases a clause for successive renewals thereof. In these circumstances it ought not to be concluded that para. 2 of the Natural Resources Agreement would not apply to successive renewals.

Moreover, from time to time an enterprise, in the course of developing a natural resource, may find changes desirable or even necessary. No doubt for this reason there was included in para. 2 a provision that the parties might agree in a manner that would "affect or alter" the terms of any agreement. Certainly one of the likely possibilities would be that the lessee, finding an acreage of little or no use while another nearby acreage was desirable, would endeavour to acquire the latter. This was precisely the position which confronted the parties and they, in the licenses, have made the necessary adjustment in acreage.

The nature and character of respondent's business are equally important when construing the intent and purpose of the parties in effecting the consolidations and renewals of September 28, 1931.

The 400 additional acres in the licenses of September 28, 1931, were part of the lands transferred to the Province as of October 1, 1930, under the Natural Resources Agreement. In anticipation of this transfer, the Provincial Legislature enacted *The Administration of Natural Resources (Temporary) Act,* 1930, (S. of S. 1930, c. 12), effective as of April 10, 1930.

The following year the Provincial Legislature enacted both *The Provincial Lands Act,* 1931 (R.S.S. 1931, c. 16), and *The Mineral Resources Act,* 1931 (R.S.S. 1931, c. 14), effective as of March 11, 1931. Both of these statutes were in relation to the natural resources and enacted consequent upon the Province assuming the responsibility for the administration thereof on and after October 1, 1930. The licenses were made under the authority of the latter statute. It would appear that, by virtue of the Natural Resources Agreement and these statutes, the power of the Province was sufficiently wide and comprehensive to permit of it placing the additional 400 acres under the licenses upon the same terms as the lands originally and now remaining thereunder. Whether the Province could, upon the expiration of these licenses, have insisted that the 400 acres be no longer included need not here be considered.

With great respect to those who hold a contrary opinion, the parties hereto set out to consolidate and renew the original leases. In the course of their negotiations they agreed upon certain changes which were no more than that contemplated by para. 2 of the Natural Resources Agreement. In fact, and again with great respect, it would seem that, throughout, the parties consistently intended no more than to consolidate and renew these original leases, which they accomplished by the execution of the two licenses of September 28, 1931, and, as already intimated, these licenses remained subject to the provisions of para. 2 of the Natural Resources Agreement.

That consolidations and renewals do remain subject to para. 2 of the Natural Resources Agreement would appear to have been the decision of this Court in *Anthony* v. *The Attorney-General for Alberta* (1). That is a decision after the transfer of the natural resources to the Province of

(1) [1943] S.C.R. 320.

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Alberta under an agreement in all material respects to the same effect as that with Saskatchewan. At p. 330 it is pointed out that

> The appellants after the transfer each year for nine successive years applied for, received and accepted licenses from the Provincial Government and thus formally and definitely accepted its jurisdiction and agreed to abide by its regulations and paid the fees imposed by the Provincial Government.

Mr. Justice Hudson, writing the judgment of the Court, stated at p. 331:

> I do not think that the plaintiffs' acceptance of the licenses can be taken as a consent to any alteration in the agreement which would vest in the province a right to destroy or nullify indirectly the contract which he had with the Dominion Government.

The appellant, however, contends that by the execution of the licenses of September 28, 1931, being A1372 and A1373, irrespective of whether the parties intended to consolidate and renew, the original leases were surrendered by operation of law. This contention is largely based upon certain statements of Baron Parke in *Lyon* v. *Reed* (1):

> It takes place independently, and even in spite of intention . . . it would not at all alter the case to show that there was no intention to surrender the particular estate, or even that there was an express intention to keep it unsurrendered.

This language must be read and construed in relation to its context, the material portion of which reads:

> . . . what is meant by a surrender by operation of law. This term is applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. . . . an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist. The law there says, that the act itself amounts to a surrender. In such case it will be observed there can be no question of intention. The surrender is not the result of intention. It takes place independently, and even in spite of intention.

The respondent does not contest the validity of any act such as the execution of the licenses of September 28, 1931. The original leases have, in the respondent's view, been consolidated and renewed. This the appellant does not dispute either in pleading or proof. In its defence it is alleged that these original leases were surrendered with the "concurrence

(1) (1844) 13 M. & W. 284 at 305.

and consent" of the respondent and that consequent upon the surrender and termination of the original leases the licenses of September 28, 1931, were issued granting "new and modified rights" to the respondent. The evidence does not suggest that the respondent, by act, word, or other conduct, has either misled or caused the appellant to suffer any prejudice. There can, therefore, be no basis for an estoppel and as, in the circumstances of this case, that is the only basis suggested for a surrender by operation of law, it cannot be concluded that such a surrender has been effected.

Moreover, the rule of surrender by operation of law was not developed to effect ends in opposition to the intention of the parties, but rather to defeat contentions contrary to their presumed intention. No authority has been cited where it has been applied in a case such as this where the essential problem is to determine whether the parties, by the licenses of September 28, 1931, entered into entirely new agreements. If the latter is the true construction of what the parties effected, the licenses are not subject to the Natural Resources Agreement. No express provision to that effect is contained in the licenses and such must, therefore, be determined from the language adopted as construed in relation to the circumstances in which they were prepared. When regard is had to the nature and character of an undertaking with respect to natural resources, the importance of the renewal provisions, the manner in which the negotiations were initiated, the similarity of the provisions in the licenses with those of the leases and the provisions of the Natural Resources Agreement which contemplated alterations, it would appear, with great respect to those who hold a contrary opinion, that the parties had no other intention than to consolidate and renew the former leases.

The position is here, in principle, the same as in the *Anthony* case, *supra*. There they were renewing under renewal clauses, while here they were consolidating and renewing the leases, with such changes as were within the contemplation of para. 2.

In *Mathewson* v. *Burns* (1), the lessee for a term expiring April 30, 1913, in March of that year accepted and

(1) (1914) 50 Can. S.C.R. 115.

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signed a new lease for a year from May 1, 1913. The former contained an option to purchase at any time before the expiration of the lease, but this provision was omitted in the second lease. Before the expiration of the old lease the lessee accepted the option. It was contended that the acceptance of this new lease was an acknowledgment of an absolute title in the lessor and that the new lease for a year without the option was inconsistent with her right to accept the option and thereby defeat the second lease. It was held by a majority of this Court that her acceptance of the option was valid, notwithstanding her acceptance of the new lease. Sir Charles Fitzpatrick C.J. at p. 117 stated:

> There is no evidence that in consideration of the new lease she agreed to abandon her option, and taking a new lease in anticipation of a possible failure to exercise an option to purchase is not conduct evidencing an intention to abandon the right to the option when, as in this case, the lease was to begin to run only at the expiration of the option period.

Mr. Justice Idington and Mr. Justice Duff (later C.J.) adopted the reasons of Chancellor Boyd who stated:

> There is no evidence of any waiver by the plaintiff of the option to purchase. The taking of a new lease to begin at the termination of the other was merely a provident act in case she did not think fit to purchase. Had she elected to purchase during the former lease, that would ipso facto have determined the relation of landlord and tenant, and a new relation of vendor and purchaser would have arisen. None other follows in regard to the second lease; it did not become operative, on the plaintiff electing to purchase at the end of the first term. (1).

These authorities would appear to support the view that when there has been no estoppel that which has been effected by the parties must be determined by the ascertainment of their intention as expressed in their agreement.

That the two leases of April 16, 1937, were renewals of the two licenses of September 28, 1931, and were so accepted by both parties does not appear to admit of any doubt. The initial request for the renewal in 1937 came from the respondent and for a reason that so often happens in the development of natural resources—that the company was now prepared to invest a large sum of money in plant and equipment and desired to know its position over a longer period of years than the term of the existing leases. It was for that reason, under date of February 22, 1937, the respondent applied to the Department for a "renewal of

(1) 30 O.L.R. 186 at 190.

Alkali Mining Licenses Nos. A1372 and A1373" and in support thereof set out "that these leases have been running since 1926" and that the respondents "have not had any revenue from the leases" but were now prepared "to build a plant at a cost of about $200,000.00 and enter into a contract for the supply of sodium sulphate under a contract extending over a term of years." As a result of this request renewal leases (the Province now adopting the word "lease" instead of "license") were prepared and signed by the parties for a term of twenty years from the first day of October, 1936. These 1937 leases were forwarded to the respondent under date of April 16, 1937, together with "a copy of the Regulations under which these renewals were issued."

The Regulations here referred to are those passed by Provincial Order-in-Council 198 dated February 18, 1936, and are the first Regulations passed by the Province under The Mineral Resources Act, 1931.

These Regulations reduced the royalties and under the leases of April 16, 1937, the respondent was given the advantage thereof. This Court, in the *Anthony* case, *supra,* decided that the Province may, within certain limits, by regulation, change the royalties effective in respect to renewals made after the adoption of such regulations. Their Lordships of the Judicial Committee, in *Attorney-General for Alberta* v. *West Canadian Colleries Ltd.* (1), pointed out that under the legislation ratifying the Natural Resources Agreement "the terms of pre-1930 Dominion leases and grants shall be scrupulously honoured by the Province," but, in declaring s. 8 of the Alberta legislation (S. of A. 1948, c. 36) ultra vires because it constituted "a naked assertion that the terms of such instruments can be wholly disregarded," did not overrule the decision in the *Anthony* case.

The contention of the appellant that because the 1936 Regulations, as did the Dominion Regulations adopted by the Province which they superseded, provided that "The term of the lease shall be twenty years, renewable for a further term of twenty years . . . " the Province could not effect the renewals of 1937, suggests an interpretation that restricts the power of the Province in a manner that would

(1) [1953] A.C. 453.

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not be expected and the language used is capable of a more liberal construction. *Rex* v. *Vancouver Lumber Company* (1), cited by the appellant in support of the foregoing, is quite distinguishable in that there, before the alterations agreed upon were binding, an Order-in-Council was required which was not produced and the evidence did not establish it had ever existed.

The leases of 1937, being but renewals of the licenses of 1931, and but for the provisions relative to royalties were to the same effect, continued subject to the terms of the Natural Resources Agreement.

In 1947 the *Mineral Resources Act* (R.S.S. 1940, c. 40) was amended (S. of S. 1947, c. 21) under s. 4 of which s. 27 of the 1940 statute was repealed and the following, so far as relevant, enacted in lieu thereof:

27(1) Notwithstanding anything contained in this or any other Act or in any regulations under this or any other Act or in any lease or license whereby the Crown whether in the right of Canada or Saskatchewan has granted any mining right to any person, every such lease or license whether it was made or issued before, on or after the first day of October, 1930, shall be deemed to contain a covenant by the lessee or licensee that he will pay to the Crown in the right of Saskatchewan at the times and in the manner required by the regulations such royalties as may from time to time be required by the regulations to be paid by persons to whom mineral rights of the kind mentioned in the lease or license are granted.

.....

(3) If and in so far as any of the provisions of this section are at variance with any of the provisions of the agreement between the Government of Canada and the Government of Saskatchewan, set forth in the schedule to chapter 87 of the statutes of 1930, as amended, the provisions of the said agreement, as amended, govern, but this section shall nevertheless stand and be valid and operative in all other respects.

This amendment was assented to on April 1, 1947, and on August 20 of that year, by Order-in-Council 1303, s. 18 of the 1936 Regulations was cancelled and a new s. 18 passed, providing for a royalty to vary with the market value of the products subject to such royalties. This Order-in-Council 1303 was, on May 28, 1949, cancelled and a further new s. 18 passed by Order-in-Council 1060, which continued the principle that the royalty should vary with the market value of the products subject thereto.

The effect of these two Orders-in-Council (1303 and 1060) was to substantially increase the royalties and thereafter the respondent made payment thereof under protest

(1) [1920] 1 W.W.R. 255.

and expressly asks in this litigation that s. 4 of C. 21 of the Statutes of 1947 be declared either ultra vires of the Province or inapplicable to respondent's leases and that Orders-in-Council numbered 1303 and 1060 be also declared ultra vires or inapplicable to the respondent's leases and licenses. On the basis that the 1937 leases are renewals and subject to the Natural Resources Agreement, counsel for the appellant contends that the parties in these leases consented, within the meaning of para. 2 of the Natural Resources Agreement, to provisions under which the Minister of Natural Resources might, in his discretion, change the royalties.

Each of the 1937 leases provides that it is "subject to the conditions hereinafter mentioned and contained in the Mineral Resources Act and regulations thereunder, and the amendments thereto . . . " The words "the amendments thereto" in that collocation would ordinarily mean the amendments already made. In this instance neither the *Mineral Resources Act* nor the Regulations had been, at that time, amended. However, that in itself would not justify a construction of these words which would include amendments made after the date of the leases. That the parties did not intend these words should include future amendments to the Regulations is supported by the omision of these, or words to the same effect, in para. 1(c) of the lease, which provides: "this lease is granted upon and subject to the additional provisos, conditions, restrictions and stipulations, that is to say, that the lessee will: . . . (c) observe and perform all obligations and conditions in the said The Mineral Resources Act or Regulations, imposed upon such lessee." It is also pointed out that each of these leases contains provisions for renewals thereof and provides that this right of renewal is subject to the lessee complying "fully with the conditions of such lease and with the provisions of the said Mineral Resources Act and regulations and such amendments thereto as shall have been made from time to time . . ." A similar provision was construed in *Spooner Oils Limited and Spooner* v. *The Turner Valley Gas Conservation Board and The Attorney General of Alberta* (1). In that case Sir Lyman Duff, after pointing

(1) [1933] S.C.R. 629.

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out that the view the appellant here suggests would permit one party, without consultation with the other, to alter and, indeed, to substitute new terms for those "explicitly set forth in the document executed by the parties," goes on to point out that, as the provision is restricted to the renewal clause, the extraordinary result is arrived at that, while in the body of the lease the lessee is not bound by regulations adopted after the date of the lease, it would be when it came to the question of a renewal, which would be a situation the parties could not have intended to create. Then at p. 641 Sir Lyman Duff continues:

> But to us it seems clear that, if it had been intended to incorporate, as one of the terms of the lease a stipulation that all future regulations touching the working of the property should become part of the lease as contractual stipulations, that intention would have been expressed, not inferentially, but in plain language.

The foregoing are the clauses in the lease upon which the appellant based its contention. It follows, therefore, that the parties have not, in the language of the lease, expressed an intention that Regulations adopted after its date varying or fixing a new royalty should become part of the lease.

The foregoing is sufficient to dispose of the appellant's contention that by the provisions of the 1937 lease the parties had consented that the Minister of Natural Resources might, in his discretion, change or alter the royalties as fixed in the lease. However, the view here expressed finds further support by reference to the provisions of para. 18 of the Regulations which the appellant relied upon as giving the Minister of Natural Resources authority to alter or change the royalty. In para. 18 the royalty is fixed at $12\frac{1}{2}$ cents per ton. Notwithstanding that fact, this provision is expressly embodied in the lease. Para. 18 also provides that "the royalty shall be payable quarterly from the date on which operations commence . . ." Upon this point instead of repeating words to the same effect in the lease it is therein provided that the "royalty shall be payable in the manner in the said regulations provided . . ." Para. 18 further provides: "The lessee shall furnish the department with sworn returns quarterly . . ." This provision is expressly set out in para. 1(*b*) of the lease. Indeed, the only portion of para. 18 which is not either

embodied in the lease or specifically referred to and adopted therein is the concluding sentence thereof reading: "The royalty shall be subject to change in the discretion of the minister." When regard is had to how the other provisions of para. 18 were incorporated in the lease, the omission of any reference to this last sentence leads only to the conclusion that the parties did not intend that it should be a term of the lease.

If the parties had intended that any such provision should apply to the lease it would surely have been expressed in clear terms. In my view the language of Mr. Justice Hudson, speaking on behalf of the Court, is appropriate:

> The real question in the appeal is whether or not the provisions of the patent were such as to reserve to the Crown a right to impose new royalties in the future. I think that if the Crown, like any other vendor, wishes to reserve such rights, such reservations must be expressly stated.
>
> Parliament and the Legislature within its jurisdiction, of course, have power to impose new taxes, but the imposition of a royalty on lands or goods of a subject by Executive order could be justified only by the clearest and most definite authority from the competent legislative body.

Attorney-General for Alberta v. *Majestic Mines Ltd.* (1).

In view of the foregoing it is unnecessary to consider what, if any, is the effect of the fact that the provision permitting the Minister, in his discretion, to change the royalties was not carried forward in the new para. 18, as passed by Order-in-Council 1303 or 1060, in both of which the royalty is fixed as therein set out.

When full effect is given to the provisions of the 1937 leases, the appellant's contention that the parties therein agreed that the Minister might, in his discretion, change the royalties cannot be maintained.

Para. 3 of s. 4 in the 1947 legislation would appear to protect a party in the position of the lessee. However, upon the basis that the leases of 1937 were not subject to the terms of the Natural Resources Agreement, the Department sought to collect from the respondent the increased royalties fixed under Orders-in-Council 1303 and 1060, which justifies the respondent's request that s. 4 be declared inapplicable to its leases.

(1) [1942] S.C.R. 402 at 405.

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The judgment of the Court of Appeal, affirming the judgment of the learned trial judge, declaring "that Section 4 of the Statutes of Saskatchewan 1947, Chapter 21, the Order-in-Council of the Lieutenant-Governor of Saskatchewan in Council No. 1303 of 1947, and the Order-in-Council of the Lieutenant-Governor of Saskatchewan in Council No. 1060 of 1949, are inapplicable to the Leases and Licenses issued to the Plaintiffs or either of them," should be affirmed.

The appeal should be dismissed with costs.

LOCKE J. (dissenting):—By the terms of what were described as alkali leases granted by the Crown in the right of Canada to the Whiteshore Company and to various lessees whose interests were by assignment vested in that Company, the full and free and sole licence and authority to win and work all the alkali deposits, as defined in regulations made theretofore by the Governor General in Council, were granted and demised unto the respective lessees, together with a full and exclusive licence to mine and carry away the said alkali and to construct such buildings and appurtenances on the land as should be necessary and proper for the efficient working of the mines and accumulations of alkali and removing the same. The term of each of the said leases was twenty years from its date:—

> renewable for a further term of twenty years, provided the lessee will furnish evidence satisfactory to the Minister to show that he has complied fully with the conditions of such lease and with the provisions of the said regulations and such regulations in amendment thereof as shall have been made from time to time by the Governor in Council and subject to renewal for additional periods of twenty years on such terms and conditions as may be prescribed by the Governor in Council.

The rental reserved was 25 cents per acre and a royalty at the rate of 25 cents per ton on all products, raw or refined, taken from the property leased, subject to a reduction under certain defined circumstances and if the product was shipped in solution a royalty of 2 cents per gallon in lieu of the aforementioned rate per ton. A term of the leases required the lessees to observe and abide by all the provisions of the regulations referred to.

The Alkali Mining Regulations were established by Orders-in-Council made under the provisions of the *Dominion Lands Act* in the years 1921, 1923 and 1926 and

applied, inter alia, to all Dominion lands in the Province of Saskatchewan. These provided for the privilege of renewal and successive renewals for additional periods of twenty years in the manner stated in the leases. The maximum area of an alkali mining location was declared to be 1920 acres and the regulations provided generally for the manner in which such locations might be made and applied for and the rental and royalty were fixed in the amounts stipulated for in the leases. Regulation 16 provided that the Minister might permit a lessee who had acquired by application, assignment or otherwise more than one lease comprising adjoining locations and containing a total area of 9 square miles or less, to consolidate his operations and expenditure on one or more of the locations described in the leases affected. Regulation 17 required the lessee to expend in actual development or improvements upon the leased property, or, with the consent of the Minister of the period, in experimental work for the benefit thereof, the sum of $10,000 for each lease or group of leases, not less than $2,500 of this amount to be expended in each of the first two years and $5,000 during the third year.

The Whiteshore Company had either leased or acquired the interest of the various other lessees in all of these properties prior to March 20, 1930, when the agreement for the transfer of the Natural Resources was entered into between the Government of the Dominion of Canada and the Government of the Province of Saskatchewan.

The terms of the agreement which provided, inter alia, that Canada shall not be liable to account to the Province for any payment made in respect of any lands, mines, minerals or royalties before it came into force, read in part as follows:—

> And whereas the Government of the Province contends that, before the Province was constituted and entered into Confederation as aforesaid, the Parliament of Canada was not competent to enact that the natural resources within the area now included within the boundaries of the Province should vest in the Crown and be administered by the Government of Canada for the purposes of Canada and was not entitled to administer the said natural resources otherwise than for the benefit of the residents within the said area, and moreover that the Province is entitled to be and should be placed in a position of equality with the other Provinces of Confederation with respect to its natural resources as from the fifteenth day of July, 1870, when Rupert's Land and the North-Western Territory were admitted into and became part of the Dominion of Canada:

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And whereas it has been agreed between Canada and the said Province that the said section of the Saskatchewan Act should be modified and that provision should be made for the determination of the respective rights and obligations of Canada and the Provinces as herein set out.

The agreement was ratified by the Dominion and the Province and by the British North America Act 1930 (c. 26, 20-21 Geo. V) was confirmed by the Parliament of Great Britain and declared to have the force of law, notwithstanding anything in the *British North America Act 1867* or any Act amending the same or any Act of Parliament of Canada, or in any Order-in-Council or conditions of Union made or approved under any such Act.

The effect of the legislation was to substitute the Crown in the right of the Province for the Crown in the right of Canada as the lessor under the leases in question, as of the date the legislation became effective.

As it is the contention of the appellant that whatever rights the Whiteshore Company had under the Dominion leases, which were preserved to it by the agreement and the legislation in question, were either surrendered by operation of law or waived by its conduct at the time that new licences or leases were entered into in respect of the property in question between the Province and that company, it is necessary to consider closely the nature of those rights. By paragraph 2 of the agreement, the Province agreed to carry out the obligations of the Crown under contracts of this nature and not to alter any term of any such arrangement, except with the consent of all the parties thereto other than the Dominion or, in so far as any legislation might apply generally to all similar agreements relating to minerals. The respondent was, therefore, entitled to renewals of these leases for further terms of years upon the conditions defined, upon furnishing evidence that the conditions of the lease and the applicable regulations had been complied with. Since these mineral properties would thereafter be subject to the general jurisdiction of the Province, paragraph 3 provided that the power to make regulations relating to them reserved to the Governor in Council or the Minister of the Interior or other officer of the Government of Canada, might be exercised by such officer as might be specified by the Legislature from time to time.

The leases in question had been granted on various dates and accordingly the respective terms would end at different times. The regulations required the lessee under each of the leases to expend a sum of $10,000 for development work or improvements or experimental work within a period of three years from its date and the privilege of consolidation given by Regulation 16 was accordingly a valuable concession to a lessee such as the respondent.

It was apparently for these reasons that the negotiations were opened by the solicitor for the company, Mr. Alder Brehaut, Q.C. with the Department of Natural Resources of the Province in the year 1931 which, the Province claims, resulted in a surrender of all of the rights of the respondent under the Dominion leases and the legislation. At the outset, Mr. Brehaut wrote to the Department on June 20, 1931, referring to sixteen of the existing leases from the Dominion, saying that the Whiteshore Company had arranged to give to a company then in process of formation operating rights under the leases, with an option to purchase the rights of the lessee, and further that:—

> Under the circumstances it would be a great deal more convenient if the leases were consolidated, and one lease was issued for the full area. It would simplify payment of rent by the company, and simplify the work in your office. I would suggest that a new lease be prepared of all of the area covered by the above leases, the new lease to be for a term of twenty (20) years from any date that would appear to be fair, the company to surrender all the leases now held by it.
>
> The application is made to simplify bookkeeping matters for the company, and for your department. It does not make any particular difference whether this application is granted or not, except for the convenice of all parties.

The correspondence then ensued which is set out at length in the judgments of the learned trial Judge and of Mr. Justice McNiven, who delivered the unanimous judgment of the Court of Appeal, and it is unnecessary to repeat it. I respectfully agree with the conclusion of the learned judges who have considered this matter that this correspondence carried on in the year 1931 showed clearly that both parties intended that the instruments referred to as licences which the Province granted to the Whiteshore Company, in which the properties described in the sixteen leases were consolidated, were granted in exercise of the right of renewal to which the Whiteshore Company would have become entitled at the time the respective terms expired under its leases

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from the Dominion, paragraph 2 of the agreement and the legislation and that, while the word "surrender" was used in some of the letters written by Mr. Brehaut and by the Supervisor of Mines and the latter informed the solicitor that the former leases had been "cancelled" in the records of the Department, all that was meant by this was that, in consideration of the renewal of the leases granted, any rights of the lessee in respect of the unexpired term of the various leases from the Dominion were surrendered together with the written instruments granted by the Dominion.

That this was the understanding of the Supervisor is, in my opinion, made perfectly clear by the letters written by him before the new licences were delivered. Thus, on June 30, 1931, he advised the solicitor that the Department was agreeable to permit the consolidation of the claims and that when the present leases were returned for cancellation new leases would be prepared and forwarded for the term of eighteen years. Mr. Brehaut asked that in the new leases there be an acknowledgment that the Whiteshore Company had complied with the requirements of the Dominion leases as to expenditures for development work and this was subsequently done. When the Dominion leases had been received by the Department, the Supervisor wrote to say that they had been "cancelled in the records of this office" and that:

a new lease is being issued for the rights comprised therein.

Thereafter, on July 17, 1931, he wrote explaining why the new licences were to be for eighteen years rather than the twenty year period of renewal provided for in the Dominion leases, the reasons assigned being that since the old leases expired at various dates the eighteen years was considered a fair compromise. The licences when granted, however, while, expressed to be for the term of eighteen years provided, as in the case of the Dominion leases, for renewals for the term of twenty years. It is further the case that there was no mention made of the question of further renewals of the licences or leases to be granted, it being taken as a matter of course by both parties that this right given by the Dominion leases and preserved by the agreement and the legislation persisted.

The appellant, however, contends that not merely the unexpired portion of the terms of each of the Dominion leases was surrendered but, as well, all other rights of the Whiteshore Company as lessee under them, and this apparently irrespective of the intention of the parties. If this position could be sustained, it would, of course, follow that the respondents could not rely upon paragraphs 2 and 3 of the agreement and the legislation referred to.

As to what was the intention of both parties to the transaction, there appears to be no room for doubt. The respondent was entitled to renewals of its leases for successive twenty year periods upon the conditions of those leases, subject to this that the terms to be imposed at the time of such renewals and the regulations governing the working of the property were to be those prescribed by the Province rather than the Dominion, and further to the extent such rights might be affected by legislation which applied generally to all similar agreements relating to lands, mines or minerals in the Province, irrespective of who might be the parties thereto. As the correspondence shows, the Province recognized this right in the respondent without discussion and agreed in the correspondence to the consolidation of the claims into two licences and to the granting of the term of eighteen years with the right to further renewals for twenty year periods and formally incorporated this in the agreement. Far from intending that these rights of the respondent were being surrendered or waived, both parties recognized that such rights continued unaffected, the position being the same as if the Whiteshore Company had waited until the expiration of the terms of the various leases and demanded renewals of each for the twenty year period to which it was entitled.

Certain passages from the judgment of Parke B. in *Lyon* v. *Reed* (1), are relied upon to support the appellant's contention. In that case, the acts relied upon as amounting to a surrender by operation of law of the rights of a lessee, within the meaning of section 3 of the Statute of Frauds, were those of a lessee in possession who was not the lessee named in the particular lease which, it was contended, had been surrendered and it was held that this did not amount

(1) (1844) 13 M. & W. 284.

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to a surrender by operation of law. In the course of dealing with this issue, however, Baron Parke made certain general statements as to what amounts to a surrender by operation of law, in which the following passages appear: (p. 306)

> This term is applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former (13 M. & W. 306).

As to this, it may be said that this amounts to nothing more than to state the long established principle that a tenant is estopped from denying his landlord's title by the taking of the lease and that, since the new term and the unexpired portion of the prior term could not conceivably co-exist, the latter is deemed to be extinguished or surrendered by operation of law. Continuing, Baron Parke said that:

> . . . all the old cases will be found to depend on the principle to which we have adverted, namely an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist. The law there says, that the act itself amounts to a surrender. In such case it will be observed there can be no question of intention. The surrender is not the result of intention. It takes place independently, and even in spite of intention. Thus, in the cases which we have adverted to of a lessee taking a second lease from the lessor, . . . it would not at all alter the case to show that there was no intention to surrender the particular estate, or even that there was an express intention to keep it unsurrendered. In all these cases the surrender would be the act of the law, and would prevail in spite of the intention of the parties.

In Williams on Landlord and Tenant (2nd Ed.) p. 420, the learned author dealing with the meaning in law of the term "surrender" thus defines it:—

> A surrender is the yielding up of an estate for life or years to him who has the immediate estate in reversion or remainder wherein the estate for life or years may drown by mutual agreement; it may be express—that is by act of the parties—or implied—that is by operation of law.

This is a restatement of the definition in Coke upon Littleton, 337b. In the present matter, the surrender of the right to the unexpired portion of the respective terms was

express and made upon the terms disclosed by the correspondence and the new licences granted as renewals of the sixteen leases. Since the licensee's right to the terms created by these licences could not co-exist with its right to the unexpired portions of the terms of the respective leases, the latter was, to adopt Coke's term, "drowned" in the reversion but this was by agreement of the parties. Had there been no discussion as to the terms upon which the surrender was made and a renewal licence taken before the expiry of the term of the former leases, the right to the unexpired portion of the term would, of necessity, be extinguished for the reasons stated in the first of the passages from *Lyon* v. *Reed* above quoted—and this by "operation of law", which is merely another way of saying that, as a matter of law, that was the necessary consequence of the lessee accepting the new estate.

The appellant's argument, put bluntly, is this, that where a lessee accepts a renewal of a lease before the expiration of the term limited by the lease, not only is the right to the unexpired portion of the term extinguished but the benefit of all other collateral covenants of the lessor contained in the instrument, and this even though, as in this case, the parties intend, and state in writing their intention, that such rights should be preserved. *Lyon* v. *Reed* does not, of course, support any such contention.

By chapter 16 of the Statutes of Saskatchewan for the year 1931 the Legislature enacted the Mineral Resources Act to provide for the administration of the rights obtained by the Province under the agreement of 1930. By this Act the Lieutenant Governor in Council was authorized to make such regulations not inconsistent with the Act as were necessary to carry out its provisions. The first of such regulations by the Province were established by an Order-in-Council made on February 18, 1936, and were designated Alkali Mining Regulations. These contained provisions very similar to those enacted by the Dominion prior to the transfer of these rights. The annual rental to be paid under leases of alkali rights was fixed at 25 cents an acre, as in the case of the Dominion Regulations, but by Regulation 18 the royalty was fixed at 12½ cents per ton

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of products taken from the leased property, in place of 25 cents, the amount stipulated in those of the Dominion. Regulation 18 concluded with the following sentence:—

the royalty shall be subject to change in the discretion of the Minister.

The Whiteshore Company, which had apparently continued to operate the leased properties in the manner required by the Dominion Regulations since the year 1931, no doubt desiring to take advantage of the reduced royalty applied for further renewals of their existing licences for a term of twenty years. The term of these licences would not have expired until the year 1948 and the lessee was not under their terms entitled to renewals until that time. The reason for the request was stated in a letter from Mr. Brehaut to the Supervisor of Mines dated February 22, 1937, as follows:—

. . . for the reasons discussed with yourself and the Ministers in Regina last week, namely—that these leases have been running since 1926, that since the commencement of the leases we have spent a great deal of money in making experiments and in building plants and have not had any revenue from the leases, and we are now prepared to build a plant at a cost of about $200,000.00 and enter into a contract for the supply of sodium sulphate under a contract extending over a term of years.

In the reply from the Supervisor dated March 24, 1937, it is made clear that what had been discussed between the parties was a renewal of the existing leases for a period of twenty years. A passage in the letter from the Supervisor reads:—

By separate letter you have requested on behalf of Whiteshore Salts & Chemicals Limited that a renewal of Alkali Licences A1372 and A1373 be issued for a period of 20 years, at the rental mentioned of 25c. per acre, and 12½c. per ton on production, which items are covered by the present Alkali Mining Regulations.

When the new documents which were designated as leases rather than licences were forwarded by the Supervisor to Mr. Brehaut on April 16, 1937, a copy of the regulations "under which these renewals were issued" were enclosed and Mr. Brehaut was asked to return the original copies "of the leases which these are replacing".

It is to be remembered that the provision for renewals contained in the leases from the Dominion and in the Dominion Regulations was that they would be granted for additional periods of twenty years on such terms and conditions as might be prescribed by the Governor in Council.

This, in my opinion, enabled the Crown to stipulate for higher rentals and royalties at the time the leases were renewed, though not to alter the amount of either during the term of the lease, as was decided by the judgment of this Court in *Spooner Oils Ltd.* v. *Turner Valley Gas Conservation Board* (1). By paragraph 3 of the transfer agreement, any power or right reserved to the Governor in Council or to any other officer of the Government of Canada might be exercised by such officer of the Government of the Province as might be specified by the Legislature thereof from time to time. In accordance with this arrangement, the Mineral Resources Act of 1931 authorized the regulations to which I have referred above, which enabled lessees from the Dominion to obtain successive renewals upon certain conditions. The licences of 1931 contained a provision regarding renewal similar to that of the Dominion leases, namely that further renewals for twenty year periods would be granted on such terms and conditions as might be prescribed.

For the reasons which lead me to the conclusion that the only rights which were surrendered by the Whiteshore Company in 1931 were to the unexpired terms of the various Dominion leases and the possession of the written leases, it is my opinion that all that was surrendered by that company when the new leases were taken in 1937 were the unexpired terms of the 1931 licences and possession of the written instruments which evidenced them. This was manifestly the intention of both parties.

While the terms of the agreement amounted in effect to a limitation of the Province's jurisdiction to legislate made effective by the amendment to the *British North America Act,* and accordingly the Province could not by legislation have deprived the Whiteshore Company of its rights to the successive renewals of its leases, this does not, of course, mean that the rights of that company could not be bargained away. The difficult question to be determined in this matter is as to whether by entering into the leases of 1937 the Whiteshore Company has not waived the right which it had under the Dominion leases and regulations to insist that the scale of rentals and royalties could be changed only when renewals of the leases or licences were granted.

(1) [1933] S.C.R. 629.

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The question is one of construction of the lease granted by the Province on April 16, 1937, and which was executed and delivered by the Whiteshore Company, and of the regulations to the extent that they are by reference incorporated in that document. In the recital it is said that the grant is made:

> subject to the conditions hereinafter mentioned and contained in the Mineral Resources Act and Regulations thereunder and the amendments thereto.

The provision for the renewals is included in the same paragraph which fixes the rentals, the lessee being obligated to pay during each year of the term .25cts per acre of the land comprised in the grant and .12½cts per ton on all products taken from the property, with a provision for a reduction of this amount in certain circumstances. Nothing is said in this paragraph as to any increase either in rental or royalty. Paragraph 1 provides that one of the conditions upon which the lease is granted is that the lessee shall pay to the Minister at Regina the fees and royalties thereby preserved. A further condition is that the lessee shall:

> observe and perform all obligations and conditions in the said the Mineral Resources Act or Regulations imposed upon such lessee.

At the time this lease was made, the rental and the royalties prescribed by the 1936 Regulations were those stated in the lease.

In 1947, by chapter 21, the Legislature enacted an amendment to the *Mineral Resources Act* which provided that, notwithstanding anything contained in that Act or any other Act or in any lease or licence whereby the Crown, whether in the right of Canada or Saskatchewan, has granted any mining right to any person, every such lease or licence, whether issued before or after October 1, 1930, shall be deemed to contain a covenant by the lessee that he will pay to the Crown such royalties as may be prescribed by the regulations. To this was added what was apparently intended as a saving clause, providing that, in so far as any of the provisions of the section were at variance with any of the provisions of the transfer agreement, the provisions of that agreement should govern.

In 1947 Regulation 18 was repealed by an Order-in-Council and the royalties payable substantially increased. The provision in Regulation 18 that the royalty might be changed, in the discretion of the Minister, was not repeated in the 1947 Order.

In 1949 the regulations were further amended altering the royalty rates still further.

I do not consider that the decision in the *Spooner Oil* case decides the present issue. There was nothing in the Dominion Regulations corresponding to the concluding sentence of Regulation 18 of the Provincial Regulations of 1936. It necessarily follows from what was said by Sir Lyman Duff in that case, in delivering the judgment of the Court, that under the form of lease which was there considered and the regulations under which it was granted the Crown could not during the term of any lease or any renewal of any lease alter the rate of royalty to the detriment of the lessee. It was one of the rights of the Whiteshore Company, preserved to it by the terms of the transfer agreement and of the legislation, to be in the same favourable position as that of the lessee in the Spooner case in this respect, so that, other than by its consent, the rental and royalty rates could not have been changed during the currency of a provincial lease. If the Whiteshore Company did not by signing the 1937 lease waive this right, the provisions of the statute of 1947 are, in my opinion, wholly ineffective as against that company as being contrary to the agreement.

The 1937 lease and the 1936 regulations must be read together. The lessee has engaged to pay a fixed rental and defined royalties by an instrument which contains no suggestion that the obligation so assumed might be increased at the will of the lessor. The term of Regulation 18 that the royalty might be changed in the discretion of the Minister is susceptible of the meaning that this refers to changes in the rate which might be made at the time a renewal of the lease was applied for, as well as meaning that it might be changed during the term. In my opinion, it is the former of these meanings which is to be assigned to this term of the

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regulation when read together with the lease. I consider there was no power effectively reserved by the Province to alter the scale of royalties during the term.

I would dismiss this appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Shumiatcher and McLeod.*

Solicitors for the respondents: *MacPherson, Leslie and Tyerman.*

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*June 1, 2, 3
*Dec. 9

THE CORPORATION OF THE CITY OF OSHAWA (*Defendant*) ..... APPELLANT;

AND

BRENNAN PAVING COMPANY LIMITED (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Construction of street—Payment for materials to be by weight and engineer's certificate condition precedent to payment—Effect of engineer's failure to comply with prescribed conditions.

A contract entered into by the appellant municipality with the respondent provided that as to the gravel and asphalt to be supplied by the latter, payment should be by weight, and that possession of an estimate or certificate signed by the appellant's engineer should be a condition precedent to the right of payment. The respondent complied with the provisions of the contract but the appellant's engineer refused to certify for the materials by weight and arrived at the amounts to be paid for each by his own methods of calculation.

Held: That when the engineer refused to certify, as called for by the contract, he abdicated his proper function thereunder and the appellant, having concurred in the position he took, brought itself within the principle of *Panamena* v. *Leyland* [1947] A.C. 428. The respondent was thus absolved from the requirement with respect to the final certificate and the construction of the contract became in the circumstances entirely a matter for the court.

Appeal dismissed and judgment of the Court of Appeal for Ontario [1953], O.R. 578, affirmed but varied by deducting $1,305.02, the value of 160·125 tons of asphalt, supplied in excess of the estimate.

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

APPEAL by defendant from the judgment of the Court of Appeal for Ontario (1) affirming the judgment of the trial judge, McRuer C.J.H.C., (2) in favour of the plaintiff.

J. J. Robinette, Q.C. and *G. K. Drynan* for the appellant.

P. B. C. Pepper for the respondent.

The judgment of the court was delivered by:

KELLOCK J.:—With respect to the claim for gravel, Mr. Robinette relies only on the absence of a final certificate from the engineer. As to the asphalt, his position is two-fold: (1) that the claim for any amount over the 3000 tons mentioned in the specifications is irrecoverable for lack of an "order from the engineer in writing" as required by clause M of the General Conditions of Contract; and (2) that as to the remainder, it is in the same position as the gravel, namely, irrecoverable for lack of the engineer's certificate.

With respect to the gravel, it is provided by the specifications that the "basis of payment for this material shall be per ton, all material being weighed on the city weigh-scales by the city weigh-master and checked on the job by the inspector designated by the engineer." The engineer, in his final certificate, however, entirely disregarded this provision. What he did is thus described in the judgment of Roach J.A., who delivered the judgment of himself, Hogg and Gibson JJ.A.:

> He took the total surface area and multiplied it by 6 inches (the depth of gravel called for) and determined the total number of cubic yards. Then by adopting what someone told him was the weight of a cubic yard of gravel, he determined the quantity by weight of the total cubic yards. To that amount he added *something* as an allowance for gravel used in filling the voids in the rubble that was used to fill soft spots. How he could determine the quantity of gravel that was used in these soft spots I am totally unable to understand. He did not know the depth or area of the soft spots or the size of the voids.

This, of course, was not in accordance with the contract, and its construction is, in the circumstances, entirely a matter for the court. Clause F of the General Conditions upon which some reliance is put by the appellant has no bearing. It reads as follows:

> Work mentioned on the plans or specifications shall be performed as though shown on both. In the event of dispute, the decision of the engineer as to the meaning or intent of the plans and specifications shall be final.

(1) [1953] O.R. 578; 3 D.L.R. 17. (2) [1952] O.R. 540; 4 D.L.R. 81.

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While the gravel was being furnished to the job and worked into it, there was no dispute whatever as to what was called for. The gravel was supplied to the job as directed by the inspector who was the representative of the engineer. Accordingly when the engineer refused to certify for the gravel by weight as called for by the contract, but adopted a method of his own, he abdicated his proper function under the contract. His refusal to certify in accordance with the contract was completely arbitrary and illegal. The appellant has concurred in the position taken by the engineer and has maintained this position down to the present, thus bringing itself within the principle of the decision in *Panamena* v. *Leyland* (1). In that case, when the surveyor insisted on matters outside the quality and quantity of the work, which alone he was by the terms of the contract authorized to take into consideration, and this was concurred in by the appellant, the respondent was absolved from the requirement with respect to a final certificate. The same applies in the case at bar.

By the terms of the contract the respondents covenated to

> Do the whole of the works herein mentioned with due expedition and in a thoroughly workmanlike manner, in strict accordance with the provisions of this Agreement, and the said Plans, Specifications and General Conditions therein referred to . . .

The appellant on its part covenanted with the respondents:

> That if the said work including all extras in connection therewith, shall be duly and properly executed as aforesaid, and if the said Contractors shall observe and keep all the provisos, terms and conditions of this Contract, they, the said City, will pay the said Contractors therefor the sum of $112,282.32 (more or less) according to the schedule of unit prices in the Form of Tender, upon Estimates or Certificates signed by the Engineer.
>
> Provided that no money shall become due or be payable under this Contract unless and until an Estimate or Certificate therefor shall have been signed by the Engineer as herein provided the possession of which is hereby made a condition precedent to the Contractors' right to be paid or to maintain any action for such money or for any part thereof.
>
> Provided also that the said City shall not be liable to pay for work rejected or condemned by the said Engineer, or to pay any money upon any Estimate or Certificate until the work so rejected or condemned has been replaced by new material and workmanship to the written satisfaction of the said Engineer . . .

(1) [1947] A.C. 428.

It cannot, in my opinion, be doubted that the "Estimate or Certificate", the possession of which is made a condition precedent to payment, is one covering the work as to quality and quantity at the appropriate rate called for according to the prices stipulated in the contract. In departing from the area thus marked out the engineer rendered his certificate no more essential to the respondent's right of action than it would have been in *Panamena's* case had the surveyor in that case, issued his certificate for a reduced amount by reason of his view of the economical manner in which performance of the work had been carried out, a matter entirely outside the scope of his authority to consider.

The lack of an order in writing for the quantity of gravel in excess of the estimate of 2600 tons is not an obstacle in the way of the respondent, and, as already pointed out, Mr. Robinette does not rely upon this point. That estimate was for the 6" gravel course only and did not include the gravel used in filling the soft spots. It has not been shown what the respective amounts required for the gravel course and the soft spots respectively, were, and therefore it is not shown that the 2600 tons for the gravel course was exceeded. It was, no doubt, for this reason that Mr. Robinette took the position he did on this point.

With respect to the asphalt, the relevant provisions of the original contract, as amended by the later contract, as well as the specifications, are as follows. The original "Information to Bidders", after providing for the removal of the existing pavement and sub-structure, went on to state:

> It is then proposed to fill the space formerly occupied by the ties with compacted asphaltic concrete base course, and also to build up the shoulders of the present concrete base with the same material, after which it is proposed to spread the consolidated asphaltic concrete wearing surface, *varying the thickness from 1" to 2"*. In making this consolidation of the asphaltic concrete wearing surface, it is proposed that the engineer should set grades at intervals not exceeding 50 feet, which will effect a parabolic cross sectional contour on the finished pavement.
>
> Attention is drawn to the fact that this *contour must be carefully followed,* in order to strengthen the bearing value of the pavement, and in order to *partially eliminate the excessive crown* which is apparent on the existing street.

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Item 327 of the original specification has the following:

The surface course shall consist of coarse aggregate sand and mineral filler uniformly mixed with asphalt cement and shall be laid upon the previously prepared pavement base to a minimum thickness of one inch and a maximum finished depth of two inches, as directed by the Engineer.

Clause G. of the General Conditions provides that no work shall be done without lines, levels, and instructions having been given by the engineer, "or without the supervision of an inspector." It is provided by the specification, under the heading "Method of Payment", that:

All hot-mix, hot-laid asphalt mixtures supplied and incorporated into the work will be paid for at the price tendered per ton.

The Owner will provide and place a man at the Contractor's weigh scale for the purpose of weighing the mixtures incorporated into the work, and the net weights so determined will be the only basis for payment.

The specification under the amending contract under the heading "Scope of Work" provides:

Remove existing concrete base.

Excavate the material thereunder to a depth to provide a 6" crushed gravel base course and new concrete sub-base 8" thick and a minimum of 3" binder and asphaltic top.

Provide 6" crushed gravel base course and 8" concrete base and minimum of 2" of asphaltic binder and 1" of asphaltic top.

The engineer interpreted, for purposes of his final certificate, the later specification as to the wearing surface, as providing for a thickness of 1 inch only. In his view, "minimum" in the second paragraph of the amending specification under the heading "Scope of Work" above, was confined to the 2 inches of asphaltic binder and did not apply to the 1 inch of asphaltic top. He therefore entirely disregarded the actual quantity of asphalt delivered and arrived at a theoretical figure by taking the superficial area on the footing of 1 inch in depth and ascertaining the weight by that means.

It has been expressly found in the courts below, that in executing the work after the amending contract was entered into, the respondent continued the practice it had previously followed and laid a minimum thickness of 1 inch and a maximum thickness of 2 inches, under the specific instructions of the inspector on the job. Both the respondent and the inspector considered that in so doing they were

carrying out the terms of paragraph G. of the General Conditions of Contract. No one suggested that there was any ambiguity in the terms of the contract in this respect until the completion of the work when the engineer, Meadows, did so, as above mentioned. When the question of a final certificate came up Meadows had himself up to that time, issued progress certificates for asphalt on the basis of tonnage actually delivered, and the respondent had received payment.

The appellant again places reliance upon clause F. of the General Conditions already quoted above and contends that Meadow's decision as embodied in his final certificate, governs.

In the language of Roach J.A. the answer is:

> That *during the progress of the work* there was no dispute between the plaintiff and Meadows as to the thickness of the asphaltic wearing-surface called for by the plans and specifications. The plaintiff's interpretation of the plans and specifications as they related to that item differed from the interpretation Meadows now says he intended they should bear, but the parties were not disputing about it. The plaintiff did not know that there was any difference between their respective interpretations.

Roach J.A. also says:

> Meadows saw the plaintiff proceeding with the work in compliance with the understanding of its superintendent, but never communicated any objection to the plaintiff. At the trial Meadows stated that on one occasion he objected and in substance warned the superintendent against laying down a greater thickness than 1 inch of asphaltic wearing-surface. The superintendent in his evidence denied any such discussion and the trial judge accepted the superintendent's evidence.
>
> Meadows must have known that the plaintiff, in laying down a thickness of asphaltic top in excess of 1 inch, was doing so because its superintendent interpreted the plans and specifications as permitting it and requiring it where to do so was necessary for proper drainage. If he felt—and he now says he did—that the plaintiff was thereby exceeding the thickness authorized, he should have interfered at the time. To stand by and do nothing about it was to acquiesce. Even more important than the foregoing is the fact that Courtlee specifically instructed the superintendent to proceed as he did. To my mind it is idle to say that Courtlee thereby exceeded his jurisdiction. He was on the job to see that the work, as it progressed, had that standard of excellence agreed upon between the parties. He gave those instructions, not for the purpose of varying the plans and specifications, but for the purpose of requiring the contractor to live up to them.

In my opinion the engineer has in this instance also, abdicated his function under the contract. The asphalt, like the gravel, was to be paid for by weight. This was the

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"only basis of payment" provided for by the contract. The same principle, therefore, applies as in the case of the gravel save as to the excess over the estimate of 3000 tons as to which the lack of an order in writing is, in my opinion, fatal.

Accordingly the appeal should be dismissed with costs but the judgment should be varied by deducting $1,305.02, the value of 160.125 tons of asphalt which is the amount in excess of the estimate. In the circumstances, this variation should not affect the costs.

Appeal dismissed with costs and judgment of the Court of Appeal affirmed subject to a variation.

Solicitors for the appellant: *Creighton, Fraser, Drynan & Murdoch.*

Solicitors for the respondent: *McMillan, Binch, Wilkinson, Stuart, Berry & Dunn.*

1954

*Nov. 3

*Dec. 9

ELIZABETH BALZER and HENRI BALZER (*Applicants*) ..... APPELLANTS;

AND

THE REGISTRAR OF MOOSOMIN LAND REGISTRATION DISTRICT and JOHN FREDERICK LEESON CLEMENTS, sole surviving Executor of the Estate of Eliza Jane Clements, deceased, and the ATTORNEY GENERAL OF SASKATCHEWAN ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Real Property—Land Titles—Mines and Minerals—Unauthorized entry by Registrar on Certificate of Title—Application to cancel "Minerals in the Crown" and substitute "Minerals Included"—The Land Titles Act, R.S.C. 1953, c. 108, ss. 2 (1), (10), 65, 66, 82.

The appellants made application under s. 82 (*b*) of *The Land Titles Act*, R.S.S. 1953, c. 108, for an order directing the respondent Registrar to cancel the notation "Minerals in the Crown" appearing on the certificate of title to certain lands held by them and to substitute therefor

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

"Minerals Included". The lands in question were originally "Dominion Lands" as defined by *The Dominion Lands Act*, R.S.C. 1886, c. 54, and the grant from the Crown contained no reservation as to minerals but on the certificate of title issued to the original grantee on Dec. 23, 1889, there was endorsed the words "Minerals Included". Subsequent conveyances contained no reservation as to minerals and by virtue of a final order of foreclosure of mortgage, title was vested in one Eliza Jane Clements. By a certificate of title issued to her Dec. 20, 1928, there was entered thereon "Minerals in the Crown". Following her death the land was transferred to her executors and by the survivor of them to the present appellants. Certificates of title were issued the transferees on each occasion bearing a similar notation.

Held: There was no authority under *The Lands Title Act* (Sask.) for the notation "Minerals in the Crown" made by the Registrar of Land Titles on the certificates of title issued to Eliza Jane Clements, to her executors, or to the appellants, and the application of the latter so far as it asked for the cancellation thereof should be granted. The substituted notation asked for should not be allowed.

Judgment of the Court of Appeal for Saskatchewan (1954) 11 W.W.R. (N.S.) 469, reversed.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), McNiven J.A. dissenting, dismissing an appeal from the judgment of Davis J. (2) by which an application by the appellants for an order directing the respondent Registrar to cancel a notation on the certificate of title to certain lands and to amend the same by substituting another endorsement was dismissed.

E. C. Leslie, Q.C. for the appellant.

No one *contra.*

The CHIEF JUSTICE:—By notice of motion dated April 29, 1953, and returnable May 12, 1953, before the presiding judge in chambers of the Court of Queen's Bench of the Province of Saskatchewan, Judicial District of Regina, the appellants moved, under what is now s. 82 of *The Land Titles Act*, R.S.S. 1953, c. 108, for an order directing the respondent, the Registrar of the Land Titles Office, Moosomin Land Registration District, to cancel the notation "Minerals in the Crown" on certificate of title No. IG 239 of record in the Moosomin Land Registration District Land

(1) (1954) 11 W.W.R. (N.S.) 469; [1954] 2 D.L.R. 495.

(2) (1953) 9 W.W.R. (N.S.) 652.

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Kerwin C.J.

Titles office and substitute therefor the notation "Minerals Included". S. 82 reads as follows:

82. A judge of the Court of Queen's Bench may, upon such notice as he deems fit or, where in his opinion the circumstances warrant, without notice:

(a) make a vesting order and may direct the registrar to cancel the certificate of title to the lands affected and to issue a new certificate of title and duplicate thereof in the name of the person in whom by the order the lands are vested;

(b) direct the registrar to cancel any instrument or any memorandum or entry relating thereto or to amend any instrument in such manner as the judge deems necessary or proper. 1951, c. 34, s. 4.

We are concerned with (b) only.

While the only named respondent was the Registrar, the notice of motion was addressed to and served upon the Attorney General of Saskatchewan. By order of May 29, 1953, Mr. Justice Graham adjourned the motion to June 23, 1953, and directed that notice of the application and the adjourned date of hearing be given to John Frederick Leeson Clements, the surviving executor of the estate of Eliza Clements, deceased. As exhibits to the affidavit supporting the application were an historical abstract of the lands involved and a certified copy of the original Crown grant, dated July 8, 1889. Mr. Justice Graham ordered that the applicants file a certified copy of a certain mortgage on the lands registered as instrument No. K 218.

The application came before Mr. Justice Davis, after service on John Frederick Leeson Clements. Neither he nor the Attorney General appeared, but a letter from the Deputy Attorney General was filed in which it is stated that it was not the intention of his Department to appear on the motion. The application was dismissed and an appeal to the Court of Appeal was also dismissed, the hearing thereof having been adjourned so that the appellants might comply with the direction of the Court of Appeal to serve notice of the appeal, judgments and material on Mr. Clements. Mr. Justice Proctor delivered reasons on behalf of the majority, while Mr. Justice McNiven dissented.

The historical abstract of title commences with a certificate of title issued by the Registrar to Archibald Bartleman, under date of December 23, 1889, and under the column "Remarks" appear the word "Marked 'Minerals Included' ". The certified copy of the original grant from

the Crown in the right of the Dominion of Canada for the said land shews that the original was duly registered in the Land Titles Office for the Assiniboia Land Registration District on December 23, 1889. The grant is dated July 8, 1889, and recites that the lands are part of the lands known as Dominion lands and mentioned in *The Dominion Lands Act,* which was c. 5, R.S.C. 1886. By s. 48 of that Act it was provided that, unless expressly mentioned, mines of gold and silver did not pass in a grant of Crown lands. The grant itself conveys the lands, saving and reserving to Her Majesty only certain rights of navigation, fishery and fishing.

A transmission having occurred, a certificate of title was issued on July 7, 1916, to the administratrix of the estate of the original patentee, and in the "Remarks" column it is stated that this is "not marked as to minerals". A further transmission having occurred, the next certificate of title of October 8, 1921, was issued without being marked as to minerals. The new owner transferred the lands to Howard P. Bartleman, to whom a certificate of title was issued on October 8, 1921, and it was not marked as to minerals. Bartleman executed a first mortgage to Eliza Jane Clements (being the one produced by order of Mr. Justice Graham), including all his estate, title and interest in the lands. Other mortgages were granted, but ultimately a final order of foreclosure was granted to Eliza Jane Clements of all the right, title and interest in the lands, of the defendants in the foreclosure action. A certificate of title was granted to Eliza Jane Clements on December 20, 1928, and was marked "Minerals in the Crown". This was the first time that an endorsement to this effect was made.

Another transmission having occurred, a new certificate of title was issued on December 23, 1947, to Clifford Gibson Clements and John Frederick Leeson Clements, the executors of Eliza Jane Clements, and it is marked "Minerals in the Crown". Then followed the transfer from John Frederick Leeson Clements, the surviving executor, to the present appellants and a certificate of title was issued, dated March 7, 1953, registered as No. IG-239 and endorsed "Minerals in the Crown". It is this endorsement that the appellants seek to have removed.

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Kerwin C.J.

In my opinion there is no authority in the Saskatchewan Land Titles Act for the endorsements on the certificates of title to Eliza Jane Clements and to her executors and to the appellants, and, therefore, the application should be granted to cancel the notation "Minerals in the Crown" on certificate of title No. IG 239. However, the remaining part of the application should not be allowed, which was for an order that the Registrar substitute therefor the notation "Minerals Included". The Courts below seemed to have been fearful that if the relief, to which I think the appellants are entitled, was granted it might be argued that there had been a determination as between the appellants and some one not a party to these proceedings. Such, in my view, is not the result, as nothing is said beyond ordering the Registrar to remove from a certificate of title an endorsement for which no authority can be found.

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

KELLOCK J.: This is an appeal from the Court of Appeal for Saskatchewan (1) dismissing an appeal from an order or judgment of Davis J. (2), in turn dismissing an application by the appellants for an order directing the respondent to cancel a notation on the certificate of title to certain lands and to amend the same by substituting another endorsement. None of the respondents appeared in the courts below and the appeal to this court was unopposed. The facts out of which these proceedings have arisen are as follows:

On December 23, 1889, following a Crown grant of the lands, a certificate of title thereto was issued to one Bartleman, on which certificate there was endorsed in the Land Titles Office the words "minerals included". Counsel for the appellant submitted that the words quoted were of no effect in view of the definition of "land" which he said was contained in the statute in force at the time the Crown grant was made and which was said to be in terms similar to s. 2(1)(10) of *The Land Titles Act*, R.S.S. 1953, c. 108. The statute referred to is, no doubt, *The Territories Real Property Act* of 1886, R.S.C., c. 51, s. 3(1). S. 48 of *The*

(1) (1954) 11 W.W.R. (N.S.) 469.

(2) (1953) 9 W.W.R. (N.S.) 652.

Dominion Lands Act, R.S.C. 1886, c. 54, provides that unless expressly mentioned, mines of gold and silver do not pass in a grant of Crown lands. For reasons which will appear, however, I do not think this court is required to pass upon the question as to what, if any, minerals were vested in the original patentee or in any succeeding owner.

The lands ultimately became vested in one Eliza Jane Clements by virtue of a final order of foreclosure of the 18th of December, 1928, registered on the 20th of that month, upon which day a certificate of title issued to the grantee. Upon this certificate there was endorsed in the Land Titles Office the words "Minerals in the Crown". This endorsement was unauthorized as it is not suggested that there had occurred anything between the original Crown grant and the final order of foreclosure upon which an endorsement could be founded.

Subsequently, on the death of Eliza Jane Clements, a new certificate of title was issued to her personal representative and, upon the sale and transfer of the lands to the appellants, a certificate of title was issued to the latter. Both certificates also bore the above mentioned notation. We were told that in each case this was effected by means of a rubber stamp.

While the transfer from the personal representative of Eliza Jane Clements to the appellants was of "all my estate and interest in the said piece of land" without any reservation, the effect of the decision in the courts below is that the mere notation on the certificate of title of December 20, 1928, issued to the late Eliza Jane Clements, created an estate in the minerals in the Crown and that all that could be transferred thereafter to the appellants was the land without the minerals. Reference is made in the judgment to a clause in the agreement for sale between the personal representative and the appellants under which the vendor covenanted to transfer the land to the purchaser subject to "the *conditions* and *reservations* contained in . . . the certificate of title hereto under the said Act subsisting on the day of the date hereof."

Even if the agreement for sale could be said to be a relevant document after the execution and delivery of the transfer in absolute terms, I do not think it can be said

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Kellock J.

that the minerals were the subject of any "condition" or "reservation" contained in the certificate of title. The notation or endorsement was completely unauthorized and can have no more effect than had the Registrar written his name on the certificate. It could not have the effect of creating an estate in the minerals in the Crown. There is no suggestion that any other person not a party to the proceedings has acquired any rights against the appellants on the faith of any of these endorsements.

The appeal should be allowed, the judgments below set aside and an order made directing the Registrar to cancel the endorsement in question. As already mentioned, the court, in so doing, does not pass upon the question of the ownership of the minerals in the lands but merely directs the cancellation of an unfounded endorsement on the certificate of title.

ESTEY J.:—This is an appeal from a judgment of the majority of the Court of Appeal in Saskatchewan (1) affirming (Mr. Justice McNiven dissenting) the dismissal of the appellants' application by Mr. Justice Davis.

The appellants (applicants), as registered owners under Certificate of Title No. BG-3853, dated March 7, 1953, of SE 4-14-33 W1st, made the application under s. 82(*b*) (then s. 77(*a*)) of *The Land Titles Act* (R.S.S. 1953, c. 108, s. 82(*b*)) for a direction to the Registrar of the Moosomin Land Registration District to correct the notation upon their Certificate of Title to read "Minerals Included" rather than, as it now reads, "Minerals in the Crown." Section 82(*b*) reads:

> 82. A judge of the Court of Queen's Bench may, upon such notice as he deems fit
>
> * * *
>
> (*b*) direct the registrar to cancel any instrument or any memorandum or entry relating thereto or to amend any instrument in such manner as the judge deems necessary or proper.

The original grant from the Crown to Archibald Bartleman, dated July 8, 1889, contained no reservation as to minerals and upon its registration Certificate of Title No. 4-48, dated December 23, 1889, was issued to the said Archibald Bartleman. This grant was prior to September 17, 1889, and, therefore, under the legislation (R.S.C.

1886, c. 54, s. 48) in effect at that time, the transferee from the Crown received the mines and minerals, except precious metals. The Registrar noted on the Certificate of Title, when issued, "Minerals Included."

Subsequent conveyances did not reserve the mines and minerals and the Certificates of Title issued consequent upon the registration thereof did not contain any notation with respect to minerals until the Registrar, in issuing Certificate of Title No. M-5452, dated December 20, 1928, to Eliza Jane Clements, consequent upon a final order dated December 18, 1928, made in foreclosure proceedings under a mortgage registered against the property, made a notation "Minerals in the Crown."

When Eliza Jane Clements died, upon an application by her executors for transmission, a new Certificate of Title No. GP-129, dated December 23, 1947, was issued to her executors, again with the notation "Minerals in the Crown."

The executors of her estate sold this land to the appellants, under an agreement for sale, upon the performance of which a transfer was issued to the appellants, and a new Certificate of Title No. IG-239, dated March 7, 1953, was issued in their name, with the notation "Minerals in the Crown." It is this notation that the applicants ask to be corrected.

Their application, as directed by Mr. Justice Graham, has been served upon the surviving executor of the estate of Eliza Jane Clements and again the notice of appeal to the Court of Appeal, by order of that Court, was served upon the surviving executor, who did not appear before Mr. Justice Davis, the Court of Appeal or this Court. The Attorney General of Saskatchewan was notified of these proceedings and, as a consequence, the Deputy Attorney General wrote a letter advising that he would not appear upon this application.

The mortgage foreclosed was the first encumbrance upon the land and the final order directed "that the Title to the said lands be vested in the Plantiff free from all right, title or interest or equity of redemption on the part of the Defendents or any of them or any person or persons claiming through or under them or any of them." I respectfully agree with Mr. Justice McNiven that this final order is an

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"instrument", as defined in s. 2(8), which, when registered, transferred the land to Eliza Jane Clements "according to the tenor and intent thereof" (s. 65(2)). This final order contained no reservation of mines and minerals and, therefore, as "land" was then defined (R.S.S. 1920, c. 67, s. 2(11)), now s. 2(10), these passed to Eliza Jane Clements.

The notation, therefore, cannot be justified by any provision in the final order, nor, in fact, has any document been disclosed which would, at that time, support such a notation as "Minerals in the Crown." All of the learned judges in the Courts below have concluded that this notation was placed upon the Certificate of Title by virtue of an error in the Land Titles Office. It would seem, therefore, that such an error should be corrected, unless third parties have acquired some right, under *The Land Titles Act*, by virtue of its presence on the Certificate of Title.

There is no reservation of minerals contained in the application for transmission and, therefore, the same reasoning would apply if it were suggested this notation might be justified upon the basis of that application.

Moreover, the transfer made by the surviving executor to the appellants contained no such reservation and, therefore, it cannot be suggested that the notation can be founded thereon.

In the Court of Appeal a majority of the learned judges emphasized a provision in the agreement for sale from the executors of Eliza Jane Clements, dated December 24, 1927, and which contained the following:

> . . . on payment of all sums payable hereunder by the purchaser, the vendor covenants, . . . to transfer the said land . . . to the purchaser, by a transfer under the provisions of *The Land Titles Act*, but subject to the conditions and reservations contained in the original grant of the said land from the Crown, and in the Certificate of Title thereto under the said Act, subsisting on the day of the date hereof, . . .

Mr. Justice Procter, writing the judgment for the majority of the Court, stated:

> Under the agreement the purchasers did not acquire the mineral rights in the land as the reservation "Minerals in the Crown" was endorsed on the title and the agreement provided that the transfer was to be subject to this reservation.

In my view it is unnecessary here to consider the effect, if any, of the provision in the agreement for sale as, in my

view, it was merged in the transfer dated February 23, 1953, and given by the surviving executor to the appellants which contained no such provision, but, on the contrary, provided:

> . . . transfer to the said Elizabeth Balzer and Henri Balzer, all my estate and interest in the said piece of land.

That this agreement for sale was merged in the transfer must follow from the decision of *Knight Sugar Co. Ltd.* v. *Alberta Railway and Irrigation Co.* (1), where, under the Alberta Land Titles Act, it was held that the agreement merged with the transfer. Lord Russell of Killowen, speaking for the Privy Council, at p. 238 stated:

> There can be no question in their Lordships' view that, so far as parcels were concerned, the parties in the present case intended that the provisions of the sale agreement should be performed by the transfer and the subsequent certificate of title, and that accordingly, subject to a point next to be mentioned, the real contract as regards parcels is to be found not in the executory agreement but in the completed transaction.

He then dismissed the contention that a transfer under the Alberta Land Titles Act was nothing more than an order to the Registrar to cancel an existing Certificate of Title and to issue a new Certificate and, dealing particularly with the transfer, he stated at p. 239:

> From the language used in these sections it seems clear that each of the transfers was a document prepared (and prepared it cannot be doubted in a form approved by both transferor and transferee) in order that, when registered, it should become operative according to the tenor and intent thereof, and should thereupon transfer the land mentioned therein. It is the transfer which, when registered, passes the estate or interest in the land; and it appears, for the purpose of the application of the doctrine in question, to differ in no relevant respect from an ordinary conveyance of unregistered land.

The language of the Alberta sections which Lord Russell had under consideration are, in all relevant particulars, to the same effect as ss. 65 and 66 of the Saskatchewan statute. It is true the words "except as against the person making the same," found in s. 65 of the Saskatchewan Act, are not in the Alberta statute, but these have no reference to the effect of an instrument when registered, but rather to its effect as against a party making same quite apart from registration. Whatever may be the effect of these words in an appropriate case, they are not of significance here, as neither party to the agreement is relying upon them.

(1) [1938] 1 W.W.R. 234.

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Estey J.

That portion of the Alberta statute of particular importance is contained in s. 51 and is to the same effect as s. 65(2) in the Saskatchewan statute, which reads:

* * *

65. (2) Every instrument shall become operative according to the tenor and intent thereof when registered and shall thereupon create, transfer, surrender, charge or discharge, as the case may be, the land, estate or interest therein mentioned.

The "tenor and intent" both of the final order and the transfer to the appellants conveyed the "land" which, at the relevant times, was defined as in s. 2(10) and, therefore, included the minerals. With great respect to those who hold a contrary opinion, the notation here in question had no validity or effect when first made and, even if it were possible that it might, by virtue of subsequent circumstances, acquire some validity, such are not disclosed in this record.

In my view, and with great respect to the learned judges who entertain a contrary opinion, the application should be granted and the notation "Minerals in the Crown" should be cancelled and the Title amended accordingly, as provided under s. 82(*b*). The notation "Minerals Included", which the appellants ask to have endorsed on the Certificate, does not, upon this record, appear to be necessary and no order should be made in regard to it.

The appeal should be allowed.

CARTWRIGHT J.:—I agree that this appeal should be allowed, that the notation "Minerals in the Crown" on the Certificate of Title should be cancelled and that the application to have the words "Minerals included" endorsed on the Certificate should be refused. Counsel for the appellant having stated that he does not ask for costs there should be no order as to costs in this Court or in the courts below.

Appeal allowed.

Solicitors for the appellants: *MacPherson, Leslie & Tyerman.*

IN THE MATTER OF the last Will of REBECCA BARRETT.

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*June 3
*Dec. 9

NAOMI BEARD, BEATRICE G. PARKER, executrix of the last Will and Testament of Unia Gaunt Barrett, deceased and CAROLINE R. McCULLOCH ..... APPELLANTS;

AND

EDITH GEORGINA CONSTANCE BARRETT, trustee of the Estate of Rebecca Barrett, deceased, ROBERT JAMES GROWCOCK, executor of the last Will of Helena Augusta Mossom, deceased, HELENA ADELE SALE, IRENE ELAND CHRISTIE and ANNETTE GROWCOCK ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Wills—Annuities—Payable out of rents and profits of designated property—Continuing charge on income—Right of annuitant to Arrears—To accumulation of surplus income to meet actual or contemplated deficiencies.

A testatrix by her will gave to her husband a life interest in her whole estate and directed the payment of annuities out of the rents and profits of a certain property to her surviving daughters and a granddaughter. By a residuary gift the rest of her estate went to all her sons and daughters to be equally enjoyed by them during the terms of their natural lives, and after their deaths to their heirs and assigns forever. The testatrix died in 1893 and her husband in 1913. Following his death the annuities were paid out of the profits of the property charged with their payment and the surplus distributed under the residuary clause. Between 1932 and 1945 the revenue from the property fell below the amount required to meet the charges, and the advice of the court was sought, as to whether the deficiency arising in any year was payable out of the rents and profits of any other year or years. Judson J., to whom the application was made, held that it was, and his judgment was affirmed by the Court of Appeal for Ontario.

Held: By Rand, Estey, Locke and Fauteux JJ.—That any existing deficiency in a share of the gross annuity was in the first instance to be made up out of that portion of the rents and profits corresponding to that share, and so far might be paid in priority to the payment of the current annuity attributable to that portion, but this was not

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

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to affect the payment of the share of the gross annuity out of the appropriate portion of the rents and profits in relation to which there was no deficiency. In any year a deficiency prevented payment in full of the annuity recourse could be had to the rents and profits accrued during the lifetime of the annuitant in the first instance in the proportion set out above. Any deficiency existing at the death of the last person entitled to the annuity to cease to be payable out of the rents and profits earned after the death of such person.

The appeal was therefore allowed in part and the judgment amended accordingly.

Kerwin C.J. would have dismissed the appeal *in toto* as he agreed with the conclusions of the trial judge and the Court of Appeal.

Held: Further, that the costs in this court and in both of the courts below should be payable out of capital.

Judgment of the Court of Appeal for Ontario [1953] O.R. 897 affirmed, subject to a variation.

Appeal by three of the residuary beneficiaries of the estate of Rebecca Barrett, deceased, from an Order of the Court of Appeal for Ontario (1) dismissing an appeal from an Order of Judson J. (2), made on an application for the construction of Rebecca Barrett's will.

T. Sheard, Q.C. and *J. W. F. Goodchild* for the appellants.

J. L. Lewtas for all the respondents except E. C. G. Barrett.

J. S. Boeckh and *S. P. Webb* for E. G. C. Barrett.

The CHIEF JUSTICE:—The first point on behalf of the appellant was that the net rents and profits in each year should be distributed annually and that after the annuitants received payment of their annuities in any year the surplus income in that year should be distributed under the residuary clause and not applied to make up any deficiency in payment of annuities in past years. I agree with Chief Justice Pickup, speaking on behalf of the Court of Appeal for Ontario, that, on the proper construction of Mrs. Barrett's will, this contention cannot be upheld. Mr. Sheard sought to gain comfort from the reasons of Middleton J. on the earlier application to the Court for advice: *re Rebecca Barrett* (3) and (4). As a matter of fact all the Court was there concerned with was whether the gift to the daughters of the testatrix was of annuities charged upon the rents, or

(1) [1953] O.R. 897.
(2) [1953] O.W.N. 779.
(3) (1914) 5 O.W.N. 807.
(4) (1914) 6 O.W.N. 270.

whether they took the property in the income in fee-tail. However, it may be pointed out that Middleton J. had decided that the vesting in the residuary beneficiaries was "subject to these annuities"; and I think it is put quite accurately in Mr. Lewtas' factum—

> The fact that the residuary beneficiaries have a present vested interest in everything to which the annuitants are not entitled does not derogate from the rights conferred upon the annuitants by the gift of the annuity.

I agree that there was no laches or any acts on the part of the annuitants that would bar them. Something might be said about s. (1) of *The Accumulations Act,* R.S.O. 1950, c. 4, since, I understand, it was mentioned for the first time in this Court. By it, any accumulations for the purpose of meeting subsequent instalments were prohibited after August 2, 1914, being the expiry of twenty-one years after the death of the testatrix and, therefore, any standing by of the annuitants in the distribution of surplus income under the residuary clause during the period from the death of the husband of the testatrix on October 2, 1913, down to and including the year 1931, cannot be construed in any way as a waiver of their right to have arrears of annuity made up out of subsequent surplus income.

I also agree with Chief Justice Pickup that, as the property in the income vested within the period prescribed by the rule against perpetuities, the rule itself has no application. The decision of the Privy Council in *Belyea* v. *McBride* (1), was not referred to in the Courts below. That was an appeal from a decision of this Court and, while the amount of the arrears at the time of the death of the testatrix and the persons to receive them were determined, the gift was dependent upon a contingency that might not arise within the prescribed period (the contingency being that dividends should be declared by the directors of the company).

Judson J. decided that the charge continues until the arrears are paid, notwithstanding the death of the last annuitant, and the Court of Appeal agreed with him. In Williams on Wills, at pp. 187-188, it is stated that "Where a testator desires that an annuitant shall be paid out of income only, he will probably also desire that deficiencies

(1) [1942] 3 D.L.R. 785.

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in any year shall be made up out of surpluses in other years, but he will probably intend that, on the death of the annuitant, all liability for the annuity shall cease and, in so far as it has not then been paid out of income, it shall to that extent fail and that unpaid arrears shall not be payable either out of future income or corpus". Whatever a testator intends or desires is, of course, to be gathered from a reading of the entire will and, in fact, in the notes to the sentence in Williams that follows the one quoted there appears a reference to several cases, including the one relied upon by the respondents, *In re Rose* (1), where, at p. 25, Sargant J. points out that "when once an annuity has been held to be cumulative at all, it would seem necessarily to follow that those who claim that it is cumulative to a limited extent only are bound to point out and establish the limits of its cumulativeness. And this appears to be the result of the authorities". He refers to the earlier cases in some of which, on the construction of the documents there under consideration, a different result was arrived at. The matter is discussed at length in Bowles' Testamentary Annuities at pp. 118 *et seq.* Upon consideration of the terms of the will before us, I am of opinion that the Judge of first instance and the Court of Appeal arrived at the correct conclusion.

The appeal should be dismissed, but subject only to a variation whereby the costs in both Courts below shall be payable out of capital. All parties are entitled to their costs in this Court out of capital, those of the trustee as between solicitor and client.

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

RAND J.:—The question in this appeal is whether the bequest of an annuity for life payable out of the rents of a specific property is limited to rents accruing in each year severally or is continuing and as to arrears is charged upon those accruing during the life or indefinitely after the death of the annuitant.

(1) (1915) 85 L.J. Ch. 22.

After providing a life interest to her husband in all her real and personal estate the testatrix proceeded:

I give and bequeath out of the rents and profits payable from all and singular the Real Estate at present owned by me, under and by virtue of the demise in that behalf, contained in the Will of my late father, Lardner Bostwick, and consisting of fifty two feet of land on King Street, in the said City of Toronto, wherein are erected the Adelaide Buildings, the annual sum of six hundred and fifty four pounds. The six hundred pounds, to be equally divided between my daughters. The fifty four pounds to Edith Emily daughter of my son Frederick Albert Barrett for life, provided always that at the expiration of the present Lease and when a new Lease is granted that the rent should the same be increased Edith Emily's share shall be increased to 6 hundred dollars a year for life free from the control of any husband they or either of them my said daughters or Granddaughter may at any time marry for and during the term of their natural lives.

And after the death of my said daughters or any or either of them, then to their lawful issue, such issue to take the share or shares of their respective mothers.

And should any of my said daughters die without leaving lawful issue then the share of such daughter or daughters so dying without lawful issue, to go to the survivors of my said daughters equally, for and during the term of their natural lives, and after their or either of their deaths leaving lawful issue then such issue absolutely . . .

And that all my dear children may live in peace and love and as to the rest of my Real Estate and Personal, whether in possession or expectancy, I give the same to each and every of my dear children, sons and daughters, to be equally enjoyed by them during the term of their natural lives, and after their death, to their heirs and assigns forever . . . .

In matters of this nature there is a tendency to state pertinent considerations in the form of rules or canons of construction; but it must be kept in mind that we are interpreting an instrument, in this case a will, and that the paramount object is from the language the testator has used and the circumstances in which he used it to gather his intention. Apart, then, from definite constructions put on words or sets of words, considerations canvassed or applied in decided cases, in the light of which the questions raised are to be examined, while of much assistance, are, at most, aids to that ascertainment and they must yield to basic facts in each situation with which they clash: *Birch* v. *Sherratt* (1), Lord Cairns at p. 647.

When an annuity is, without more, to be paid out of a source or fund, obviously it is charged upon that fund. If, as here, the bequest is made directly out of the rents and

(1) (1867) L.R. 2 Ch. 644.

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profits of a specified property, then that continuing source is the fund, subject to the determination of the time during which, as such fund, it is to continue. Had the bequest to the daughters and the granddaughter Edith been given *simpliciter* with the whole property passing as residue, even though not expressly made subject to the annuities, it would seem to be clear that, apart from any question of a charge on the corpus, the charge on the rents and profits and consequently the fund would, in point of time, be indefinite, and that arrears would be a continuing liability after the death of the annuitants: *In re Coller's Deed Trusts: Coller* v. *Coller* (1). The inquiry, then, is whether what would otherwise be a prima facie implication is, in the circumstances, rebutted.

The testatrix died in 1893 leaving four daughters: the husband died in 1913. The will was apparently drawn by her in her own handwriting and, as can be seen, is inartificial and presents aspects of difficulty. But we are relieved from several of them by a previous judgment of the Court of Appeal rendered in 1914. The gifts to the daughters were defined in these words:

> . . . that the said daughters of the said deceased are each entitled to receive one-fourth of the said sum of £600 or one-fourth of $2,400.00 during her lifetime; that on the death of each daughter her children are entitled to take for life the share of the deceased parent in equal shares and should any daughter die without leaving any child or children her surviving the share of the daughter so dying is to go for life to the surviving daughters equally (the child or children of a deceased daughter to take the share which the deceased parent would have taken if living).

The residue of the King Street property was declared to be vested in the children "subject to a charge thereon for the payment of the said annuities."

The "charge" in this context was not discussed on the argument before us, but from the questions put to the Court for determination I do not understand that the judgment in the use of this word is to be taken as declaring the annuities to be charged upon the corpus of the property; on that view the present application would seem to be to little or no purpose. The answer given to question No. 5, which introduces the circumstance of the payment of a mortgage on the property out of the rents "is the deficiency

(1) [1939] 1 Ch. 277.

payable . . . out of the corpus of the King Street property", in which the court, holding the future rents to be charged, stated that it was not necessary that the question should "at this time" be answered, to which no objection was taken before us, seems to be conclusive. But, in any event, the judgment does not determine the period of the rents and profits out of which the annuities are payable, and that, in the conclusion at which I have arrived, is sufficient for the purposes of the appeal.

The appeal has been brought by several of the residual beneficiaries who are concerned with the answer of the courts below that arrears in the annuity attributable to the daughters are an indefinite continuing first charge on the fund. Mr. Sheard's contention is that each year's annuity payment is to be made out of the annual rents and profits for that year only, from which it follows that there can be no arrears to be carried as a charge on the income of any other year. Assuming the ordinary rule that a simple annuity payable out of income is, prima facie, a charge on the income until paid in full, he submits that the direction to increase the amount payable annually to the grandchild Edith up to the sum of $600, to the extent that surplus income in any year permits it, is incompatible with such a charge and that all annual surplus must be distributed among the residuary beneficiaries: In *re Coller's Deed Trusts*: *Coller* v. *Coller* (*supra*). On this contention I agree with Pickup C.J.O., who, speaking for the Court of Appeal, viewed the increase as no more than a limited augmentation of the portion bequeathed to the grandchild: the surplus, in the sense of Coller's Trust, lies beyond that limit and the question of charge is unaffected.

He argues further that as the corpus of the property out of which the income arises has immediately vested in all the children in fee simple, as the King Street property is the most substantial item of the estate, and as the testatrix, assuming a continuing sufficiency of rents, contemplated an annual distribution of residual income, it would defeat her intention if the annual surplus could be retained for the security of the annuity or if the arrears remained charged on the income indefinitely. This depends on the language of the gift over. The word used in the general clause is

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Rand J.

"rest" rather than "residue" but in substance these are equivalents, and I am unable to agree that the general words creating the annuity are cut down by this clause.

But it will be seen that a second series of annuities in remainder is provided to the children of the daughters who, in each case, upon the death of their mother, are to take her share. What is the nature and scope of this gift? There is no qualification in the language conferring it which I construe to mean that the share to a grandchild is of coordinate rank with, is as original and effective, and bears the same incidents, as that to a daughter; that it does not include the right to arrears due the mother at her death has, by all parties, been assumed.

That share becomes, in turn and to the same extent as that of the mother, a charge on the fund out of which it arises, which is the rents and profits accruing from the moment of the mother's death. The charge, related to that fraction of the total income corresponding to the share in the gross annuity must be taken to be as exclusive as the mother's; and the only manner in which that can be made so is to restrict it in each case to the income arising during the lifetime of each annuitant. When the annuitant dies, arrears die with her: Williams on Wills, 3rd Ed. Vol. 1, pp. 187-8 in which the following observation would seem to state accurately the mind of a testator in the ordinary case:

> Where a testator desires that an annuitant shall be paid out of income only, he will probably also desire that deficiencies in any year shall be made up out of surpluses in other years, but he will probably intend that, on the death of the annuitant, all liability for the annuity shall cease and, in so far as it has not then been paid out of income, it shall to that extent fail and that unpaid arrears shall not be payable either out of future income or corpus.

If, as held by the Court of Appeal, all arrears, including those of the deceased mother, remained prior in charge to the annuity in remainder, a grandchild might never personally receive any part of its share, a result in frustration of the clear intention of the testatrix. To attribute a concurrent charge either coordinate with, or senior or junior to that of the current annuity, involving as it must the current shares of the grandchildren and any living daughter, and the charges for arrears of both the grandchildren and living daughters and the estates of deceased daughters;

would necessarily contradict the express provision of the will. The controlling fact is the primary charge on the proportionate amount of the income in each case, for current annuity payments; that is exclusive in the case of the mother and must be taken to be equally so in that of her children.

A final consideration on the first question remains to be examined. It appears that, prior to 1932, the surplus income, with the consent of the daughters, had been distributed under the residuary clause and that the daughters, among the beneficiaries, had received a sum greater than the total arrears of the annuities. It was argued that it would be patently unjust to allow the surviving daughter and the representatives of her deceased sisters, now to assert a claim for the arrears against the descendants of the sons without taking into account the money so received. But I am unable to appreciate the force of this contention. If the surplus rents had been impounded and later used to make up the deficiencies in the rents, upon the arrears ceasing, the surplus now required for them would be available to the residual beneficiaries. That means simply that instead of receiving them prior to 1932 the same parties or persons standing in their shoes would receive them subsequently, say, to 1945. It is not to the point that children have died and are now represented by descendants because these latter take only what their parents would now be entitled to. Since the latter could not object to the payments out prior to 1932 neither can persons claiming through them.

The period of the continuing fund and the charge on it is, then, the life of each annuitant; upon death, interest in the income is at an end and the annuity, including arrears, drops. The arrears here which on this view still remain outstanding are those only of the surviving daughter, Edith Georgina. These continue a charge during her lifetime on that fraction of the annual income represented by her present share of the gross annuity. One daughter died on January 14, 1946, another on November 3, 1947 and a third on July 3, 1951. Adjustments in the distribution of arrears enuring to these daughters out of income accrued during their lives, are to be related to those dates.

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Rand J.

We were asked to say whether costs in the Court of Appeal and on the application before Judson J., are to be paid out of the rents and profits or out of capital. Since the interest chiefly concerned in the question raised is that of the residuary estate to which surplus rents ultimately go, I should say that they ought to be paid out of the capital.

I would therefore allow the appeal to the extent of modifying certain of the answers as follows:

Q. 1. If the net rents and profits earned in any year from the King Street property referred to in the will are insufficient to enable payment in full of the annuity payable in respect of that year, is the deficiency payable out of the rents and profits of any other year or years?

A. Yes, but only out of the rents and profits accrued during the lifetime of the annuitant in the first instance in the proportion specified in the answer to question 3.

Q. 3. If the answer to question 1 is "yes", if in any year there is an existing deficiency, is it to be made up in priority to the payment of the annuity for that year?

A. An existing deficiency in a share of the gross annuity is in the first instance to be made up out of that portion of the rents and profits corresponding to that share, and so far may be paid in priority to the payment of the current annuity attributable to that portion, but this is not to affect the payment of the share of the gross annuity out of the appropriate portion of the rents and profits in relation to which there is no deficiency.

Q. 4. If the answer to question 1 is "yes", does any deficiency existing at the death of the last person entitled to the annuity cease to be payable out of the rents and profits earned after the death of such last person?

A. Yes.

The costs of all parties in all courts, those of the trustee as between solicitor and client, will be payable out of residual capital.

Appeal allowed to extent of modifying answers to certain questions.

Solicitors for the appellants Beard and Parker: *MacKenzie, Wood & Goodchild.*

Solicitor for the appellant McCulloch: *V. M. Howard.*

Solicitors for the respondent Barrett: *Mason, Foulds, Arnuk, Walter & Weir.*

Solicitors for the Respondents other than the trustee: *Arnoldi, Parry & Campbell.*

SUELEEN O. M. WALKER (*Plaintiff*) .....APPELLANT; 1954

*Oct. 27, 28
*Dec. 20

AND

JESS ENDERS (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL

Automobiles—Action by Gratuitous Passenger—Jury's finding set aside by Court of Appeal—"Gross Negligence" question of fact for jury—Where evidence will support such finding, it should not be disturbed.

The appellant, a gratuitous passenger, sued the respondent to recover damages for injuries suffered by her when an occupant of a motor car owned and driven by the respondent and arising out of a collision between the respondent's motor car and a motor truck. The accident occurred in winter time on the curve of a narrow mountain road with an icy, slippery surface. A jury having found negligence on the part of both drivers and that of the respondent to have amounted to gross negligence, judgment was entered against the respondent and the action against the other driver dismissed. The British Columbia Court of Appeal by a majority decision set the judgment aside on the grounds that the finding of the jury was perverse.

Held: Whether conduct falls within the category of gross negligence is a question of fact for the jury. Here there was evidence upon which a jury, if they chose to believe it, might find negligence on the part of the respondent and hold that this was very great negligence, in the circumstances.

Studer v. *Cowper* [1951] S.C.R. 450; *City of Kingston* v. *Drennan* 27 Can. S.C.R. 46; *Holland* v. *City of Toronto* [1927] S.C.R. 141 and *McCulloch* v. *Murray* [1942] S.C.R. 141, referred to.

Judgment of the Court of Appeal for British Columbia (1953-54), 10 W.W.R. (N.S.) 602, reversed and judgment at trial restored.

APPEAL by the plaintiff from the judgment of the Court of Appeal for British Columbia (1), Sidney Smith J.A. dissenting, which set aside the judgment of Wood J. (2) on a jury trial.

J. L. Farris, Q.C. for the appellant.

D. McK. Brown for the respondent.

The judgment of the Court was delivered by:—

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal of British Columbia which, by a decision of the majority, set aside the judgment entered following

*PRESENT: Taschereau, Kellock, Estey, Locke and Abbott JJ.

(1) (1953-54) 10 W.W.R. (N.S.) 602.

(2) (1953) 9 W.W.R. (N.S.) 378.

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the trial of the action before Wood J. and a jury. Sidney Smith J.A. dissenting from the opinion of the majority, would have dismissed the appeal.

The appellant, a young married woman, was on February 27, 1952, driving with the respondent in his motor vehicle as a gratuitous passenger, en route from Avola, B.C. to Kamloops. She was sitting in the front seat to the right of the driver with her small child beside her.

The respondent left Avola at about 8.30 in the morning and had driven some 45 or 50 miles when the accident which gave rise to the action occurred. The road was narrow, winding and hilly, running approximately north and south. The snow had been removed by snow clearing equipment, the surface being, according to all of the evidence, icy and very slippery in spots. At the place where the accident occurred, the travelled or cleared portion of the highway was 14 ft. 8 ins. in width. As the car approached the brow of a hill where the road curved to the right, an oil truck proceeding in the opposite direction which was 8 ft. in width and 24 ft. long was coming up the hill and a collision occurred in which the appellant suffered personal injury. When the driver of the truck observed the respondent's car coming down the hill, he endeavoured to draw over to the extreme right of the travelled portion of the road and had brought his vehicle practically to a stop when the collision occurred. The respondent, on his part, observing the oncoming truck at a distance which he estimated at about 100 ft., attempted to pull over to the right and stop his car. There were icy ruts in the roadway from 3 to 5 inches deep and, according to him, the wheels of his car were in them and, while he put on the brakes, he was unable to bring the vehicle to a halt.

The evidence as to the speed of the respondent's car as it reached the top of the hill is conflicting and unsatisfactory. According to the appellant, they were travelling at about 30 miles per hour when the truck came into sight, but this was clearly merely a rough estimate on her part. An officer of the Mounted Police, who attended the scene of the accident after the cars had been removed, said that the marks found at the place of the collision indicated that the front wheels of the truck had been driven into the bank of snow on the east side of the road and that the right rear

dual wheels were up against the snow bank. He found the hill to have been very slippery. Asked as to the distance at which the drivers of vehicles approaching in opposite directions could see each other, he estimated this as about 150 ft, and said that, travelling at the rate of 15 miles an hour under the existing conditions, he considered a car going down the hill could be brought to a stop in 150 ft. Asked by the learned trial Judge if, after viewing the damage to the respondent's car, he could estimate the speed at the time of the collision, he expressed the view that it had been 25 miles an hour at least.

It was shown that the respondent was familiar with the road, having driven on it on several occasions, and that he was aware that large vehicles like the truck might be met along the way. According to his evidence, he had put his car into second gear as he approached the hill and the speed on the hill had not exceeded 15 miles when he saw the oncoming truck. He had then put on the brakes and put the car into low gear, but it had skidded in the ruts and he had been unable to avoid the collision. He admitted that the road was in a dangerous condition and said that he thought that he should not have been driving on it with the woman and her child.

Both the respondent and the driver of the truck were found by the jury to have been guilty of negligence which contributed to the accident. In the case of the former, the negligence found was "failure to have his car under proper control" and this they held to have been gross negligence.

The learned trial Judge upon the jury's findings directed that judgment be entered against the respondent but dismissed the action against the owner and the driver of the truck. The present appellant appealed to the Court of Appeal from that portion of the judgment dismissing the action as against the last named defendants but that Court dismissed the appeal and they are not parties to the present appeal.

Section 82 of the *Motor Vehicle Act* of British Columbia R.S.B.C. 1927, c. 227, provides that no action shall lie against either the owner or driver of a motor vehicle by a person who is carried as a passenger for any damage sustained by reason of the operation of the vehicle, unless there

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has been gross negligence on the part of the driver which has contributed to the damage in respect of which the action is brought. The exceptions in the case of a person transporting a passenger for hire and in the case of a person to whose business the transportation of passengers is normally incidental do not apply in the present case where the respondent was carrying the appellant without reward.

In *Studer* v. *Cowper* (1), the meaning to be attributed to the expression "gross negligence" in *The Vehicles Act, 1945* of Saskatchewan was considered and the cases reviewed in the judgments delivered. While the section of the British Columbia statute does not include the words "or wilful and wanton misconduct" after the words "gross negligence" as does s. 141(2) of the Saskatchewan Statute, I think the same meaning is to be assigned to the words "gross negligence" in each.

In *City of Kingston* v. *Drennan* (2), Sedgwick J., delivering the opinion of the majority of the Court, construed the expression as it appeared in the Consolidated Municipal Act of Ontario as very great negligence, and in *Holland* v. *City of Toronto* (3), Anglin C.J.C. said that this was a paraphrase which, for lack of anything better, had been generally accepted.

In *McCulloch* v. *Murray* (4), Sir Lyman Duff C.J.C. said that he did not consider that it was any part of the duty of this Court in applying the provisions of *The Motor Vehicle Act* of Nova Scotia to define gross negligence and that it was undesirable to attempt to replace by paraphrases the language which the Legislature had chosen to express its meaning. Having said this, he continued by saying that the expression implied conduct in which there was a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually governed themselves. I think this view is the same as that expressed in *Drennan's* case and in *Holland's* case.

In the present matter, there was evidence upon which the jury might find, if they chose to believe it, that the respondent had driven his car to the brow of the hill at a speed of from 25 to 30 miles an hour at a time when the narrow winding road was partially covered by ice, rendering

(1) [1951] S.C.R. 450.
(2) (1896) 27 Can. S.C.R. 46.
(3) [1927] S.C.R. 242.
(4) [1942] S.C.R. 141.

it impossible for him to control his car and bring it promptly to a halt in the event of a truck or other large vehicle being met upon the hill. In *McCulloch's* case, the learned Chief Justice said that he considered it to be entirely a question of fact for the jury whether conduct falls within the category of gross negligence, a conclusion with which I respectfully agree.

The finding of the jury that the negligence of the respondent was the failure to have his car under proper control should, in view of the nature of the evidence given at the trial, be construed as meaning that that failure was due to the excessive speed at which the car was being driven as it commenced the descent of the hill. There was evidence, in my opinion, upon which the jury might properly find negligence on the part of the respondent and hold that this was very great negligence, in the circumstances.

I think the judgment entered at the trial should not have been set aside and I would allow this appeal with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *E. G. Silverton.*

Solicitors for the respondent: *Russell & Dumoulin.*

BRIAN FARAH *(Defendant)* .....APPELLANT;

AND

MAYER A. BARKI *(Plaintiff)* .....RESPONDENT.

1954
*Dec. 15
1955
*Jan. 25

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Action to enforce written agreement dismissed—Whether trial judge's finding one of fraud and supported by the evidence—Duty of appellate court in dealing with finding.

The appellant signed a document in the belief that as drafted by the respondent it was in accordance with a prior discussion between the parties whereby the appellant had agreed to act for the respondent in the sale of certain stock. The document in fact recorded the sale of the stock by the respondent to the appellant. An action to recover the purchase price set out in the agreement was dismissed on the ground that it appeared to have been obtained by a trick on the part

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

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of the respondent. The decision was reversed by the court of appeal who found that the trial judge had not made a finding of fraud and, in any event, that there was no evidence of fraud.

Held: that the finding of the trial judge was to be interpreted as a finding of fraudulent misrepresentation which warranted the repudiation of the agreement by the appellant. *Max* v. *Platt* [1900] 1 Ch. 616 at 623; *Blay* v. *Pollard* [1930] 1 K.B. 628 at 633, referred to.

Judgment of the Court of Appeal for Ontario reversed and judgment at trial restored.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario which reversed the judgment at trial of Wilson J. who dismissed the respondent's action to recover the sum of $6,500 he alleged due him under a written agreement signed by the appellant.

J. J. Robinette, Q.C. for the appellant.

G. T. Walsh, Q.C. and *D. R. Walkinshaw, Q.C.* for the respondent.

THE CHIEF JUSTICE:—The Court of Appeal for Ontario reversed the judgment at the trial which had dismissed the action of the respondent to recover the sum of $6,500 alleged to be due by the appellant to the respondent under a written document dated March 8th, 1951, for the purchase of six hundred and fifty (650) shares of Joy Heating and Equipment Co. Ltd. The judgment at the trial also ordered the appellant to assign to the respondent that contract.

The duty of an Appellate Court in dealing with the finding of a trial judge was considered by this Court in *Lawrence* v. *Tew* (1). The principles set forth by Lord Sumner in the opinion of the House of Lords in SS. *Hontestroom (Owners)* v. SS. *Sagaporack (Owners)* (2), had been reiterated by Lord Wright in *Powell* v. *Streatham Manor Nursing Home* (3), and were adopted by this Court in the *Laurence* case. A reference was there made to a decision of the Privy Council in *Caldeira* v. *Gray* (4). In effect, the same views were subsequently expressed by the House of Lords in *Watt or Thomas* v. *Thomas* (5). The principles stated by Lord Sumner are as follows:

(1) Does it appear from the President's judgment that he made full judicial use of the opportunity given him by hearing the viva voce evidence?

(1) [1939] 3 D.L.R. 273.
(2) [1927] A.C. 37 at 40.
(3) [1935] A.C. 243 at 264.
(4) [1936] 1 All E.R. 540.
(5) [1947] A.C. 484.

(2) Was there evidence before him, affecting the relative credibility of the witnesses, which would make the exercise of his critical faculties in judging the demeanour of the witnesses a useful and necessary operation?

(3) Is there any glaring improbability about the story accepted, sufficient in itself to constitute "a governing fact, which in relation to others has created a wrong impression", or any specific misunderstanding or disregard of a material fact, or any "extreme and overwhelming pressure" that has had the same effect?

In the present case the Court of Appeal concluded that the trial judge had not made a finding of fraud on the part of the respondent. With respect, I am unable to agree, in view of the tenor of his reasons and particularly his statement:

> . . This contract of March the 8th looks to me to be very much like a smart trick by which he endeavoured to recompense himself for a bad investment.

and his further remarks that the appellant's "friendship and the service which he has voluntarily rendered to the plaintiff should not be taken advantage of if there is a legal ground upon which he can be excused". If, as I consider, these are findings of fraud, then none of the other questions raised in argument need be considered because I am also unable to agree with the Court of Appeal that there was no evidence of fraud.

The subsequent actions of the appellant are explained by the evidence and referred to in the reasons for judgment of the trial judge. He accepted, as he was entitled to do, that explanation. Certainly he accepted the evidence of the appellant rather than that of the respondent, and his following comment as to the latter is revealing:

> In the witness box the plaintiff had to be asked simple questions a number of times before he would give a direct answer; such a question, for example, as to who called the meeting of March 8. On perfectly simple questions his answers were evasive. Only the persistence of counsel finally elicited the answer that he had called the meeting. His answers indicated that he is a man who dominates a conversation and talks other people down, rather than answering what is asked of him.

His judgment meets the tests set out above and the appeal should be allowed with costs here and in the Court of Appeal and the judgment at the trial restored.

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RAND J.:—The key to the explanation of the conduct of Farah is contained in the language of Wilson J. at the trial when he remarks upon personal characteristics of the plaintiff Barki:

> In the witness box the plaintiff had to be asked simple questions a number of times before he would give a direct answer; such a question, for example, as to who called the meeting on March 8. On perfectly simple questions his answers were evasive. Only the persistence of counsel finally elicited the answer that he had called the meeting. His answers indicated that he is a man who dominates the conversation and talks other people down, rather than answering what is asked of him.
>
> This contract of March the 8th looks to me to be very much like a smart trick by which he endeavoured to recompense himself for a bad investment.

On the other hand he indicates his conclusion that Farah was, as a friend, voluntarily undertaking services for Barki in relation to which he was induced to sign a document which meant to him something entirely different from that now asserted by Barki.

Notwithstanding that Laidlaw J.A., speaking for the Court of Appeal, declined to treat the language I have quoted, read with the rest of the reasons, and the judgment rendered, as a finding of fraud, I am unable to give them any other interpretation; and a perusal of the material evidence shows that it was amply justified. Barki's conduct implied an assurance that the document prepared and handed over by him to be signed by Farah was merely to put the latter in a position to act as his substitute, while he was out of Canada, in disposing of his shares. Both of them, for some time, had been trying to do that. But Barki knew there was no intention on the part of Farah to enter into a contract such as the document on its face purports to set out. It was the not uncommon situation of a cunning coercive personality, presuming on another's friendship, "tricking him", in the language of the court, into believing that the document related to what the other had in mind. Protesting the unique confidence between "Eastern peoples", he resorted to characteristic persuasiveness for an act seemingly innocent which the more susceptible person, vaguely hesitant and doubtful, was rushed into doing before he could bring himself to introduce the discordant note of asking for a clear understanding of what was meant. Once this deceit became evident, the way to a remedy became unobstructed.

I would allow the appeal and restore the judgment at trial with costs in this Court and in the Court of Appeal.

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

KELLOCK J.:—In these proceedings the respondent brought action against the appellant to recover the price of certain shares of stock pursuant to an agreement in writing between the parties dated the 8th of March, 1951.

The appellant and the respondent were friends of some years' standing. The latter had desired to assist a son-in-law to get into business and, to that end, having been introduced by the appellant to one Joy, who carried on a furnace business, arranged with Joy in December, 1949, for the latter to turn over the business to a company which the respondent caused to be incorporated, in consideration of the issue to Joy of 350 shares of a par value of $10 each. The respondent received 650 shares in consideration of his investing $6,500 in cash.

Joy carried on the active management of the business, but it did not prosper. By August, 1950, the company's funds had dwindled to some $200, whereupon the respondent refused to allow Joy to draw further salary. As a result, relations between the respondent and Joy became strained and the appellant, at the respondent's request, became the means of communication between them.

The respondent, in carrying on his own business of an importer, had to be abroad frequently for long periods and in the condition in which the business found itself, he desired to salvage what he could of his interest. Joy appears to have been the only prospective purchaser but had little or no funds. In February, 1951, however, he had arranged financing with one Petico and an agreement of sale of the respondent's shares to Joy and Petico was drawn up for $6,500, of which $3,000 was payable on the signing of the agreement but the balance was made payable out of dividends. This sale fell through.

Joy then endeavoured to make other arrangements but had not succeeded in doing so by the early part of March. The respondent was leaving on an extended trip to the Far

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East on the 10th of March and he proposed to the appellant, as the latter testified, that the shares should be transferred to the appellant and that the appellant should act for him in controlling the company and carrying out a sale to Joy if that should prove possible. This was the position of matters as found by the learned trial Judge when the appellant, at the respondent's request, went to the latter's office with Joy on the 8th of March.

The respondent testified that on that occasion Joy was still unable to buy. The respondent's proposal to the appellant, as outlined above, was discussed and the respondent then wrote out a document which he passed over to the appellant, which the latter read and signed. This document, Exhibit I, is the document sued on and is as follows:

8th March, 1951

I hereby declare having sold today to Mr. Bryan Farah 650 shares of Joy Heat and Equipment Company for the price of $6,500 payable by Mr. Farah on the 15th of December, 1951.

M. BARKI

The appellant testified, and his evidence throughout was accepted by the learned trial judge in preference to that of the respondent, that while he read the document, he did not appreciate that he was thereby personally becoming the purchaser of the shares but had it in mind that it was in accordance with the previous discussion, by which he was to be agent for the respondent. He considered that the document was a short form agreement in the nature of a power of attorney to sell the shares on the terms mentioned and that a subsequent formal document would have to be drawn. The appellant says there was no discussion with the respondent whatever in accord with the document as it was in fact drawn. The evidence of the respondent that the appellant had agreed to purchase the shares was not supported by Joy and was expressly rejected by the learned trial judge.

As the appellant was aware of the financial straits of the company itself and of Joy's lack of funds and his difficulty in securing finances, it would have been a matter of surprise if the appellant, a builder, who had also had an unfortunate experience as a purchaser of one of the furnaces, was willing to purchase the shares at any figure and, more especially,

at their full par value in cash. The future of the company depended entirely upon Joy and the appellant had no cause at the time to consider that the future would be any better than his experience of the past.

The respondent also testified that while the appellant and Joy were in his office, the appellant had telephoned Mr. Kilgour, his solicitor, who was also acting for the respondent in connection with the company, telling him that he had purchased the shares from the respondent and instructing him to draw minutes of a meeting covering the respondent's resignation as president and the transfer of the shares. This was denied by the appellant.

Mr. Kilgour was called on behalf of the appellant and he testified that it was the respondent who had telephoned him advising him that the respondent "had agreed to transfer his shares to the appellant" upon terms "which they had apparently agreed upon", and that the respondent instructed him to prepare the resignation, the endorsement of the share certificates and the minutes. Mr. Kilgour's letter of the 14th of March, 1951, to the respondent's solicitor expressly so states. It also states that

> I also suggested to him that it would be necessary to have a formal agreement regarding the transfer of the shares. He said that this was unnecessary at the present time as he and Farah were in agreement and they *could settle* the terms between them.

Following the meeting of the 8th of March, the appellant became concerned as to the nature of the document he had signed and on the evening of the following day, he telephoned the respondent telling him he wanted the matter clarified and a "proper" agreement drawn. The respondent agreed to attend a meeting in Mr. Kilgour's office the following morning. When that time arrived, however, the respondent did not appear but instructed his solicitor to telephone Mr. Kilgour stating that he "was taking" the stand that the appellant was the purchaser of the shares.

The learned trial judge expressly found that the shares were worthless at the time, although Joy seemed to think they were worth $2,500 and perhaps more in his hands. He was also of the view that "this contract of March 8th looks to me to be very much like a smart trick by which he (the

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respondent) endeavoured to recompense himself for a bad investment." Without further elaborating the legal considerations involved, he dismissed the action. The judgment at trial was, however, set aside in the Court of Appeal upon the view that the findings of the learned trial judge did not amount to fraud and that, in any event, there was no evidence of fraud.

The appellant expressly pleaded that he was induced to sign the agreement as the result of fraudulent misrepresentation on the part of the respondent as to the true nature of the document. It is quite clear that this was the issue at the trial as counsel for the respondent stated to the learned trial judge in opening that

> my friend alleges he signed an agreement under the fraudulent misrepresentation that it was some other document. The whole question at issue is whether it is a good contract or not.

In my view, there was no escape on the evidence from this issue.

In these circumstances, I think the finding of the learned trial judge is to be interpreted as a finding of fraudulent misrepresentation on the part of the respondent as to the nature of the document which he asked the appellant to sign, and which he trusted he would sign, as he did, under the influence of the previous discussion without appreciating the real nature of the document, understanding that it was to be followed by a more formal document. The question therefore arises as to whether or not in such circumstances the appellant can successfully resist an action upon the document.

Winfield in his 13th Edition of *Pollock on Contracts*, at 384, quotes the language of Lord Chelmsford, Lord Chancellor in *Wythes* v. *Labouchere* (1) at 601, namely:

> It may be said generally that a man of business who executes "an instrument of a short and intelligible description" cannot be permitted to allege that he executed it in blind ignorance of its real character.

Winfield goes on to state that

> Strictly this may be an *inference of fact* rather than a rule of law; but under such conditions the inference is irresistible.

(1) (1858) 3 De G. & J. 593.

This puts the point too rigidly. As stated by Farwell J. in *May* v. *Platt* (1), fraud "unravels everything." The cases, however, such as that presently before the court, in which a man may escape from a short and clear document, which he admits reading before signing, must be few. But that is not impossible. Farwell J. refers, *inter alia,* to *Garrard* v. *Frankel* (2), which case he considers is to be supported only on the ground of fraud. In that case the defendant signed an agreement to take from the plaintiff a lease of a house at a rent of £230 on the terms of a lease on which the agreement was written, which, however, erroneously stated the rental to be £130. A lease was afterwards executed, in which the rent was stated to be £130. That this was due to error on the part of the lessor was proved and the court considered that the lessee must have perceived the discrepancy between the amount of rent previously stated by the plaintiff and specified in the agreement, and that reserved by the lease. It was held that the proper relief was to give to the lessee the option of taking the reformed lease or of rejecting it, paying, in the latter case, occupation rent.

In *Blay* v. *Pollard* (3), where fraud was not pleaded, Scrutton L.J., in the course of his judgment, said p. 633:

> As a general rule mistake as to the legal effect of what you are signing, when you have read the document, does not avail: see per Lord Romilly M.R., in *Powell* v. *Smith* (4). It would be very dangerous to allow a man over the age of legal infancy to escape from the legal effect of a document he has, after reading it, signed, in the absence of an express misrepresentation by the other party of that legal effect.

The learned Lord Justice continued, however, quoting from *Fry* on *Specific Performance* as follows:

> It equally follows that the mistake of one party to a contract can never be a ground for compulsory rectification, so as to impose on the second party the erroneous conception of the first. The error of the plaintiff alone may, however, where (but, it is conceived, only where) there has been fraud or conduct equivalent to fraud on the part of the defendant, be a ground for putting the defendant to elect between having the transaction annulled altogether or submitting to the rectification of the deed in accordance with the plaintiff's intention. See also per Farwell J. in *May* v. *Platt.* (1). This rests on unilateral mistake in one party, fraud or conduct equivalent to fraud in the other party.

(1) [1900] 1 Ch. 616 at 623.
(2) 30 Beav. 445.
(3) [1930] 1 K.B. 628.
(4) (1872) L.R. 14 Eq. 85.

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I think, therefore, that the judgment of the learned judge on the facts as he found them is to be supported upon the authorities. That the appellant subsequently carried out a sale of the shares to Joy which proved as abortive as the projected sale to Joy and Petico does not, in the circumstances, affect the appellant's right to have the action dismissed. Its evidentiary effect upon the question as to whether or not the writing of March 8th represented the real agreement between the parties was not overlooked by the learned trial judge.

I would therefore allow the appeal with costs here and below.

Appeal allowed with costs.

Solicitors for the appellant: *Arnoldi, Parry & Campbell.*

Solicitors for the respondent: *Roebuck, Walkinshaw & Trotter.*

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*Oct. 5
*Nov. 11

JOSEPH ALBERT ARCAND .....APPLICANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT;

AND

LOUIS-PHILIPPE LACROIX .....RESPONDENT.

MOTION FOR LEAVE TO APPEAL

Appeal—Jurisdiction—Judgment for less than $500 in favour of Her Majesty—Automobile accident—Exchequer Court Act, R.S.C. 1927, c. 34, ss. 82, 83.

When no appeal lies without leave under ss. 82 and 83 of the *Exchequer Court Act,* a judge of the Supreme Court of Canada has no jurisdiction to grant leave in an action arising out of a motor vehicle accident and in which the applicant was ordered to pay to Her Majesty a sum not exceeding $500.

The words "any sum of money" in s. 83(*b*) must be construed as *ejusdem generis* with the preceding words and limited in their meaning to a sum payable to Her Majesty of the same kind as a fee of office, duty, rent or revenue, and cannot be construed as including a claim for damages suffered by the Crown as a result of negligent driving.

*PRESENT: Cartwright J. in Chambers.

The difference in the wording of s. 30(*d*) and that of s. 83(*b*) is too marked to permit a conclusion that the words "an action relating to a sum of money payable to Her Majesty" are intended to describe an action in tort for unliquidated damages suffered by the Crown.

Motion for leave to appeal from a judgment of the Exchequer Court of Canada.

G. Perley-Robertson for the applicant.

P. M. Ollivier for Her Majesty The Queen.

H. St-Jacques, Q.C. and *Redmond Quain, Q.C.* for the respondent Lacroix.

CARTWRIGHT J. (In Chambers):—This is an application by Joseph Albert Arcand for leave to appeal from a judgment of Fournier J. pronounced on June 7, 1954, recommending to Her Majesty to pay to Louis-Philippe Lacroix $423.80 and giving judgment in the third party proceedings in favour of Her Majesty against the applicant for the said sum of $423.80.

It is conceded that the actual amount in controversy does not exceed $500 and that under sections 82 and 83 of the *Exchequer Court Act* no appeal lies without leave.

On December 11, 1950, a collision occurred between two motor vehicles, one owned and driven by the applicant and the other by Lacroix. In this action Lacroix sought damages from Her Majesty alleging that the collision was caused by the negligence of the applicant while acting within the scope of his duties as servant of the Crown. Two other actions were also commenced arising out of the same collision. In action 56135, Antoinette Houle, as suppliant, sought damages, on her own behalf and in her quality as tutrix of her two minor children, for the death of her husband who was killed in the collision and Her Majesty claimed over against the applicant and Lacroix as third parties. In action 64658 Her Majesty as plaintiff claimed damages from the applicant for expenses for hospital costs, pay and allowances and similar disbursements paid during the period that members of Her Majesty's forces were disabled as a result of the collision.

Pursuant to an order of Cameron J. consolidating these three actions they were tried together.

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Cartwright J.

In action 56135 Antoinette Houle was awarded $20,000 and Her Majesty was awarded judgment against the applicant for $6,000 and against Lacroix for $14,000 and an appeal to this Court has been launched and is now pending.

In action 64658 Her Majesty has obtained judgment against the applicant for $307.74 and in that action also the applicant seeks leave to appeal.

As the three actions all arise out of one collision and were tried together and in one of them an appeal lies as of right and has been launched, leave should be granted almost as a matter of course in the other two if there is jurisdiction to grant it. Indeed no question as to the propriety of granting leave if there is jurisdiction to do so was raised by any counsel.

For the applicant it is first contended that there is jurisdiction to grant leave under section 83 (*b*) of the *Exchequer Court Act* in that the action relates to a "sum of money payable to Her Majesty." The words "payable to Her Majesty" in clause (*b*) of section 83 appear to me to qualify the preceding phrase "fee of office" and nouns, "duty", "rent" and "revenue" as well as the phrase "any sum of money". This view is strengthened by the French version of the Act in which the corresponding words are "Ne se rapporte à un honoraire d'office, droit, rente, revenu ou autre somme d'argent payable à Sa Majesté." In my opinion the phrase "any sum of money" must be construed as *ejusdem generis* with the preceding words and limited in its meaning to a sum payable to Her Majesty of the same kind as a fee of office, duty, rent or revenue. I am accordingly unable to construe it as including a claim for damages suffered by the Crown as a result of negligent driving.

Apart altogether from the application of the *ejusdem generis* principle, I would not think that the words "an action relating to a sum of money payable to Her Majesty" were apt to describe an action in tort for unliquidated damages suffered by the Crown. The construction of clause (*b*) of section 83 for which the applicant contends would bring about the result that jurisdiction exists to grant leave to appeal, although less than $500 is in controversy, in the case of all actions in which jurisdiction is conferred on the Exchequer Court under clause (*d*) of section 30, provided a

claim is made for the payment of money by way of unliquidated damages or otherwise. The clause referred to reads as follows:—

> 30. The Exchequer Court shall have and possess concurrent original jurisdiction in Canada
>
> (*d*) in all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner.

The difference between the wording of section 30 (*d*) and that of section 83 (*b*) is too marked to permit such a conclusion.

The applicant alternatively contends that the application falls within the words of clause (*b*) of section 83:—"relates to . . . any matter or thing where rights in future might be bound." The only right in future which it is suggested might be bound are the rights of the parties in action 56135 referred to above. The answer to this is that it is clear that those rights will not be bound. The fact that no appeal lies in actions 57656 and 64658 does not permit the judgments in those actions to be raised as a bar to the prosecution of the pending appeal in action 56135.

For the above reasons I have concluded that I have no jurisdiction to grant this application or the similar application made in action 64658. I think this regrettable as should the judgment in action 56135 be varied on appeal it will result in inconsistent judgments having been given in actions arising out of the same occurrence.

This application will be dismissed with costs. It was suggested that if the application failed Lacroix should receive two sets of costs because he is represented by different solicitors in this action and in action 56135 and both of these solicitors were served with notice of this application and both appeared. In my view, in spite of this fact, Lacroix should be awarded only one set of costs.

Leave refused with costs.

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*Dec. 8, 9, 20
*Dec. 22

GEORGES HEBERT .....APPELLANT

AND

HER MAJESTY THE QUEEN .....RESPONDENT

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

Criminal law—Murder—Charge to jury—Plea of insanity—Possible verdicts—Alleged illegal cross-examination of accused—Whether miscarriage of justice—Criminal Code, ss. 1014(2), 1025.

The appellant was convicted of murder. His appeal was unanimously dismissed by the Court of Appeal. He now appeals to this Court, by leave granted under s. 1025 of the *Criminal Code*, on grounds that the trial judge erred (*a*) in his instructions as to the possible verdicts and in omitting to mention the possibility of a disagreement, and (*b*) in his instructions as to the plea of insanity and in his statement of the evidence in support thereof. Subsequently, of its own motion, the Court ordered a new hearing on a point dealing with an alleged improper cross-examination of the accused as to statements made to the police but not proved to have been voluntarily made.

Held (Locke, Cartwright and Fauteux JJ. dissenting), that the appeal should be dismissed.

Per Kerwin C.J., Taschereau, Rand, Estey and Abbott JJ.: There is no obligation upon a trial judge to explain to the jury that they may disagree.

The trial judge had adequately presented the issue of insanity and the evidence in support thereof.

Per Kerwin C.J., Taschereau and Abbott JJ.: Assuming that the cross-examination was improper, there was no duty on the trial judge in the circumstances to point out to the jury that this was not evidence. There had been no substantial wrong or miscarriage of justice, even if the trial judge should have gone into the matter.

Per Rand J.: Assuming that the statements were inadmissible, there had been no miscarriage of justice since the remaining evidence was so overwhelming and conclusive.

Per Kellock J.: Such a statement could not be used even in cross-examination until its voluntary nature had been established. However, no substantial wrong or miscarriage of justice had occurred since the cross-examination simply brought out in more detail what was involved in the evidence not objected to.

Per Estey J.: Assuming that the cross-examination was improper, there had been no miscarriage of justice since any of the suggestions made in the course of the cross-examination were either contained in or directly implied in statements already in evidence.

Per Locke and Fauteux JJ. (dissenting): The right to disagree was not excluded in the trial judge's charge.

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

The trial judge had adequately presented the issue of insanity, but not the medical theory of the defence.

Per Locke, Cartwright and Fauteux JJ. (dissenting): The trial judge should not have permitted the statements to be used in cross-examination without first having decided as to their free and voluntary character. The avowed purpose of the cross-examination was to destroy the factual basis, i.e. the lack of memory of the accused, upon which the medical expert for the defence mainly rested his opinion as to the insanity of the accused. It is impossible to affirm that had this illegal cross-examination not taken place, the jury would necessarily have convicted the appellant.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), affirming the conviction of the appellant on a charge of murder.

L. Corriveau for the appellant.

N. Dorion Q.C., P. Miquelon Q.C. and *P. Flynn* for the respondent.

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

The CHIEF JUSTICE:—The appellant was convicted of having murdered one of his children and his appeal to the Court of Queen's Bench (Appeal Side) for the Province of Quebec (1) was dismissed unanimously. By leave granted by Mr. Justice Estey under s. 1025 of the *Criminal Code* he was given permission to appeal to this Court on the following points of law:—

(*a*) Did the learned trial judge err in his instructions relative to the possible verdicts the jury might render and, in particular, in omitting to mention the possibility of their disagreeing?

(*b*) Did the learned trial judge err in his instructions relative to the plea of insanity and his statement of the evidence in support thereof?

There appears to be no doubt that he killed not only the one child referred to, but his other three children. The defence was insanity and the accused gave evidence on his own behalf and also called Dr. Moffatt.

(1) Q.R. [1954] Q.B. 594.

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As to the first point,—The learned trial judge in a careful charge explained that any verdict had to be unanimous and also that there were four possible verdicts:—

(1) Coupable;
(2) Coupable d'homicide involontaire;
(3) Non coupable;
(4) Non coupable pour cause de folie.

Reliance was placed upon what was said in this Court in *Latour* v. *The King* (1). In that case a new trial was directed for certain reasons and then the judgment continued with the following obiter dictum at p. 30:

> The other matter in which comments may be added, although the point was not raised by the appellant, is related to the following direction given to the jury:
>
> *This is an important case and you must agree upon a verdict. This means that you must be unanimous.*
>
> This is all that was said on the subject. If one of the jurors could have reasonably understood from this direction—and it may be open to such construction—that there was an obligation to agree upon a verdict, the direction would be bad in law. For it is not only the right but the duty of a juror to disagree if, after full and sincere consideration of the facts of the case, in the light of the directions received on the law, he is unable conscientiously to accept, after honest discussion with his colleagues, the views of the latter. To render a verdict, the jurors must be unanimous but this does not mean that they are obliged to agree, but that only a unanimity of views shall constitute a verdict bringing the case to an end. The obligation is not to agree but to co-operate honestly in the study of the facts of a case for its proper determination according to law.

The terse manner in which the trial judge in that case had referred to the matter is to be noted. In the present instance the trial judge made it quite clear to the jury what were their duties. He stated, more than once, that they must be unanimous and again, more than once, explained the various conclusions at which they could unanimously arrive. These conclusions are the verdicts enumerated above. To give effect to the appellant's argument would mean that a trial judge should invite a jury to disagree. This is a far different matter from an intimation, veiled or otherwise, that, notwithstanding the views of one or more jurors, it was necessary that one of certain defined conclusions be arrived at, or verdicts returned. After going over the trial judge's charge in its entirety, I am satisfied that there is no basis for the argument on the first point.

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

The second ground of appeal is divisible into two parts, the first of which is: Did the trial judge err in his instructions relative to the plea of insanity? Our attention was called to what was said in the charge at p. 617 of the record,—

> Et, ici encore, la defense doit apporter une preuve qui vous satisfasse raisonnablement par sa prépondérance, que l'accusé était en somme dans cet état d'esprit exigé par l'article 19.

and objection is raised to the words "par sa prépondérance". As to this, reliance was placed upon the following statement of Anglin J. in *Clark* v. *The King* (1):

> No doubt, however, "proved" in subsecticon 3 of section 19 of our Code must mean "proved to the satisfaction of the jury", which, in turn, means to its reasonable satisfaction.

and to this extract from the reasons of Mignault J. at p. 632:

> I would therefore think that a proper direction would be to call the attention of the jury to the legal presumption of sanity and to inform them, the onus being on the accused, that insanity must be proved by him to their satisfaction. Further than that I would not go.

However, at p. 626, Anglin J. stated that he found nothing "to warrant requiring evidence of greater weight than would ordinarily satisfy a jury in a civil case that a burden of proof had been discharged—that, balancing the probabilities upon the whole case, there was such a preponderance of evidence as would warrant them as reasonable men in concluding that it had been established that the accused when he committed the act was mentally incapable of knowing its nature and quality, or if he did know it, did not know that he was doing what was wrong." And earlier on the same page of his reasons (632), Mignault J. had stated that proof in ordinary matters did not suppose that the evidence removed all doubt; "it is the result", he continued, "of a preponderance of evidence, or of the acceptance on reasonable grounds of one probability in preference to another, and, in the case of insanity, the evidence generally is largely a matter or expert opinion". Duff J., with the concurrence of Brodeur J., referred to the burden of proof resting upon a party to establish a given allegation of fact in civil proceedings as being merely to produce such a preponderance of evidence as to shew that the conclusion he

(1) (1921) 61 Can. S.C.R. 608 at 625.

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seeks to establish is substantially the most probable of the possible views of the facts, (referring to *Cooper* v. *Slade* (1)). We were also referred to the commencement of the reasons for judgment in *Smythe* v. *The King* (2), delivered by Sir Lyman Duff on behalf of the Court:

> It was settled by the decision of this Court in *Clark* v. *The King* (1921) 61 S.C.R. 608, that where a plea of insanity is advanced on a trial for murder the law does not require the accused, in order to succeed upon that issue, to satisfy the jury that insanity has been proved beyond all reasonable doubt; it is sufficient in point of law if insanity is proved to the reasonable satisfaction of the jury.

However, it is to be noted that Sir Lyman later referred to Best on Evidence as to a mere preponderance of probability in civil proceedings being sufficient and then continued:

> It is the rule that prevails generally in civil cases, as this Court decided in the case above mentioned (the Clark case).

I am satisfied that the objection taken to the judge's charge in this case on the first part of the second ground is without foundation.

The next part of the second ground was whether the trial judge erred in his charge to the jury in his statement of the evidence in support of the plea of insanity. Upon this branch of his argument counsel for the accused quite properly pointed out that what was sought to be shown was that the appellant was insane at the time of the killing of the children. Two doctors gave evidence on behalf of the Crown and counsel for the accused admitted that one of these, Dr. Larue, did distinctly state that, in his opinion, the accused at that time was not insane. It is contended, however, that the other doctor called by the Crown Dr. Martin, related his opinion not to that event but to the time, or times, when he examined the accused some days later. This might appear to be so if one looks only at that part of the latter's evidence referred to by counsel, but a reading of what immediately precedes, and other parts of Dr. Martin's evidence, makes it quite clear that he had not so confined his opinion and, therefore, the trial judge was not in error when, in his resume of the evidence of the two Crown doctors, he stated that they (meaning both Crown

(1) 6 H.L. 646. (2) [1941] S.C.R. 17.

doctors) had testified that Hébert knew what he was doing at the moment of the crime and was able to distinguish right from wrong.

The final part of the second ground of appeal is that the trial judge incorrectly stated the evidence of Dr. Moffatt, called on behalf of the accused. For the trial judge to have charged the jury in the manner suggested by counsel for the appellant would have entailed his repeating a great part not only of the examination in chief, but also of the cross-examination of the doctor, since it was apparently difficult to determine exactly what Dr. Moffatt's conclusions were. Undoubtedly they were based upon the presumption that the story of the accused as told in the witness box (and which Dr. Moffatt said was the same as the accused had previously told him) was a true version of what had actually occurred. The questions put by jurors to the doctor showed that they were alive to the nature of the problem they were to decide and, of course, as the trial judge told them, they were not bound to accept the evidence of any witness, either in whole or in part. The evidence included that of the accused and there was put in a letter, or note, by him, although it was uncertain when it had been written. It was made clear to the jury that they were the judges of the facts and that they were not bound in any way by the judge's recollection of the testimony. After reading Dr. Moffatt's evidence and the judge's charge, I conclude that the appellant has failed to substantiate this final branch of the second ground of appeal.

What has been said was sufficient to dispose of the only questions raised before us on the original argument when judgment was reserved. During consideration of the matter a point arose and later we heard whatever Counsel had to say with respect to it, which is whether Crown Counsel improperly cross-examined the appellant as to the statements allegedly made by him to Captain Matte, or other police officers, and whether the trial judge's charge was proper in relation thereto. In order to avoid any difficulty Mr. Justice Estey granted leave to appeal on this point.

The particular statement emphasized is one allegedly made by the accused to Captain Matte and put down in writing. This was not referred to in the evidence given on the voir dire, although oral statements made by the accused

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to Captain Matte and Officers Pettigrew and Fontaine were put in evidence. In the presence of the jury the accused was cross-examined as to what is supposed to be in the writing made by or at the instance of Captain Matte. For the purposes of this appeal I assume that this cross-examination was not proper.

It is said that in three respects the alleged written statement goes beyond what was said orally by the accused to the other two officers: (1) There was no mention of the drinking of beer by the accused; (2) there was no statement that the accused started his operations in the first room of his house; (3) there was no statement that he killed René first. It is then said that the trial judge should have explicitly pointed out to the jury that nothing suggested by Crown Counsel in that part of his cross-examination was evidence, and that they should bear in mind that the three matters mentioned were not included in the oral statements made by the accused. In my opinion, having told the jury that they were to be bound by the evidence given at the trial, and having placed the issues in relation to that evidence before them, there was no obligation on the trial judge under all the circumstances to refer to the matter in the manner suggested.

As to the cross-examination itself, I am of opinion that there was no substantial wrong or miscarriage of justice and that even if the trial judge, contrary to my opinion, should have gone into the other matter as suggested, that defect, if any, also would come under the saving provisions of s-s. (2) of s. 1014 of the *Criminal Code*.

The appeal should be dismissed.

RAND J.:—The harrowing facts of this case cannot be permitted to becloud the issue. What is urged is that the defence was not adequately placed before the jury. That defence was this. The circumstances of the life of the accused, aggravated latterly by those of his marriage, had gradually generated emotional pressures of such despair and frustration that they finally overwhelmed the will in an orgy of killing and contemplated suicide. In the throes of the paroxysm a temporary blackout of the mind made it impossible for the accused to appreciate the nature of what he was doing or that it was morally or legally wrong. No

attempt was made to analyse or portray his mental state during this physical convulsion, that is, the nature of the intellectual, volitional or sense activity which directed the actions, or whether there was no such direction and the actions were, in some manner, involuntary.

The fact that men sometimes yield to such tensions is as old as humanity and nothing is added by dignifying its manifestation as a theory or describing it as a "réaction dépressive accompagnée par un état de confusion, ou de panique". But treating it as it was advanced and describing it as specifically as its nebulous and elusive nature could be gathered from the evidence of the expert called by the defence, it was fairly and fully transmitted to the jury by the trial judge From the record of the proceedings, it is obvious that they were keenly alive to what was being suggested. With this on the one side and the mass of factual evidence against it, largely given by the accused himself, on the other, carefully placed in juxtaposition in the course of the charge, they had before them every significant factor to the determination they were called upon to make.

On the renewed argument the further ground was stressed that in cross-examination of the accused he was questioned on statements he had made to a police officer on the day following his arrest which were apparently reduced to writing. If they were inadmissible because of a presumed influence of favour or fear arising from the circumstances in which they were made, then I agree that neither s. 10 nor 11 of The Canada Evidence Act permits cross-examination on them. For the purposes of evidence they are tainted with untrustworthiness and the reasons that exclude them from direct introduction prevent their being slipped in the back way by cross-examination: *Rex* v. *Treacy* (1): *Rex* v. *Scory* (2). I am by no means satisfied that they were not admissible, but it is unnecessary to decide that and I will assume that they were, and that the trial judge should have directed the jury to dismiss from their minds any implication from the questions asked or the answers given.

A confession had been made before there was any suspicion even that a crime had been committed. The accused was obviously tortured in mind and conscience and

(1) (1944) 60 T.L.R. 544. (2) [1945] 2 D.L.R. 248.

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he sought relief by not only volunteering all of the essential facts of the tragedy but by going to his home and there giving a graphic confirmation of them while the officers seemingly were still somewhat incredulous. The statements could have done little, if anything, more than to supply a few minor details of the circumstances or the order or course of the events. Up to this time there had been no suggestion by the accused that he could not remember any detail and no question on cross-examination of any of the officers went to such a point. Only when the defence was being adduced was the so-called blackout brought up. But there was before the jury a writing found on the table in the house and admittedly made by the accused which, whether written immediately before or after the crime, was conclusive against the existence of this phenomenon.

The only other ground urged calling for an observation is based on the reference in the judgment of this Court in *Rex* v. *Latour* (1) to the unanimity of a verdict. But the language used there must be read in relation to the facts of that case. There was obviously no intention of suggesting that a verdict was obligatory or that a trial judge must bring to the minds of the jury the fact that they could disagree.

Notwithstanding what I assume to have been improper cross-examination, the remaining evidence before the jury was so overwhelming and conclusive that, acting judicially, they must have brought in the verdict they did.

I would, therefore, dismiss the appeal.

KELLOCK J.:—I do not find it necessary to refer to any of the points originally raised on behalf of the appellant. After reserving judgment however, the court, of its own motion, raised a question not argued by counsel for the appellant, and leave being given to argue the point, the argument has now been heard.

According to evidence not in any way objected to, it appears that the killing occurred some time during the night of Tuesday, April 21, 1953. The appellant says that following the killing, he remained at home until Thursday, the 23rd, when, having invented a story that his children had met death in a railway accident, he went to the morgue to

(1) [1951] S.C.R. 19 at 30.

make burial arrangements. After the appellant had left, the police were notified of the visit and the witnesses Pettigrew and Fontaine were despatched from police headquarters to investigate.

From the description they had received of the appellant they were able to identify him on the street and he agreed to go with them to the police station. During the course of this trip, he told them voluntarily that he had had trouble with his wife, that he was tired of life, that he had killed his four children, that if they did not believe him they could come to his home and see for themselves and that he knew he would be hung but that he had done it just the same. He added that he had intended to take the lives of three other people. The appellant repeated the substance of these statements to Police Captain Matte at the station and then accompanied the three police officers to his home.

On arrival, he opened the door for them and showed them throughout, conducting Captain Matte to the bathroom where he produced an axe saying to Captain Matte "c'est avec ca".

In the kitchen Matte found on the table a note which the appellant admitted he had written. This speaks of the difficulty he had with his wife, that she had desired separation and custody of the children, but that he had promised she would never get them. It includes the statement: "moi sest féni je vas êtres pandu mais je vas maurire avec mais anfant". Whether the appellant wrote the note before or after the deaths of the children is not established.

The three police officers were duly called by the Crown and deposed as above. The appellant gave evidence on his own behalf, testifying that he did not remember the killing having fallen asleep and wakened up after the event, when he attempted suicide. There was some evidence of bleeding at the neck when the police first met him. During cross-examination, Crown counsel proceeded to examine the appellant with relation to a statement made to Captain Matte on the morning of April 24 after he had been arrested. Although objected to, the cross-examination was allowed by the learned trial judge in the view that it was proper with relation to credibility. In my view, this ruling

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was erroneous, the law being well settled that a statement of this character cannot be used even in cross-examination until its voluntary nature has been established.

The question is, therefore, as to whether or not a new trial ought to be directed or whether, in the circumstances, it can properly be said that notwithstanding this error and the failure of the learned judge to refer to the matter at all in his charge, "no substantial wrong or miscarriage of justice has actually occurred"; s. 1014(2) of the *Criminal Code*. In my opinion, in the circumstances of this case, the subsection ought to be applied.

It is to be observed that at no time during April 23 did the appellant suggest that he had suffered from any failure of memory. How long afterwards this suggestion was put forward does not appear. On the contrary, the appellant had no difficulty whatsoever in telling what had occurred as above. He himself produced the axe and, unlike his evidence at the trial when he said that he had concluded from the presence of the axe beside him he must have committed the deed, he told the police that it was with it he had done the killing.

Again, whether the note of the appellant was written by him before or after the killing is immaterial. If before, it would evidence a clear intention to commit the deed; if after, it indicates clearly that the deed had been knowingly done. In these circumstances, the jury, in my opinion, must necessarily have come to the conclusion that the defence of loss of memory was an afterthought. I am fortified in this view by the circumstance that this must also have been the view of the professional advisers of the appellant as they did not raise the point but argued it only after it had been raised *proprio motu* by the court. The cross-examination simply brought out in more detail what was involved in the evidence not objected to. While, as I have said, the course followed by Crown counsel was wrong, I feel obliged in the circumstances to say that the subsection should be applied and that the appeal should be dismissed.

ESTEY J.:—The appellant submits that the learned trial judge erred, when instructing the jury as to the possible verdicts they might render, in that he failed to mention the possibility of their disagreeing. This submission is founded

upon a dictum in *Latour* v. *The King* (1), to the effect that a judge ought not to tell the jury they must agree upon a verdict in a manner that precludes disagreement. The observations in that case were prompted by the imperative and unqualified language used in directing the jury. It does not suggest that a trial judge must point out to the jury that they may disagree. A juror is bound by his oath to decide according to the evidence and if, after a careful and complete consideration of all the facts and circumstances, his conclusion is different from that of the other jurors it is his duty to disagree. The learned trial judge in the present case discussed the issues, the relevant law and facts and pointed out that there were four possible verdicts—murder, manslaughter, not guilty, or not guilty because of insanity. He then discussed the difference between murder and manslaughter and, if they concluded the appellant had committed murder or manslaughter, they might find him not guilty because of insanity. Then, after referring to certain matters relative to the verdict not material to this discussion, the learned trial judge stated:

> Vous devrez maintenant, messieurs, vous rappeler que le verdict que vous rapporterez, quel qu'il soit, doit être un verdict unanime, c'est-à-dire que tous les douze, vous devez être de la même opinion et rapporter le même verdict.

The learned trial judge, throughout this portion of his charge, was discussing the possible verdicts that the jury might render and impressed upon them that in order to arrive at a verdict they must be unanimous. A verdict, as stated in the Oxford Dictionary, is "the decision of a jury in a civil or criminal cause upon an issue which has been submitted to their judgment." A disagreement is not a verdict. It exists only because of the inability of the jury to arrive at a decision and, therefore, a verdict. In this context the jury would understand that he was discussing a verdict as a decision and not in any way referring to the possibility of a disagreement or denying their right to disagree. There is no obligation upon a judge to explain to a jury they may disagree. In fact, a trial judge does not accept a disagreement until he is satisfied that there is no reasonable possibility of the jury arriving at a unanimous decision.

(1) [1951] S.C.R. 19 at 30.

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The second submission is in relation to the learned trial judge's instructions relative to the plea of insanity and his statements of the evidence in support thereof. In the course of his charge the learned trial judge explained the law relative to insanity as a defence in a manner that no exception has been taken thereto. The burden of proving this plea rests upon the defence, but is not, as he explained, a burden such as the Crown must discharge before a jury would be justified in finding an accused guilty of the offence as charged, but that it was sufficient if, upon the evidence, they were reasonably satisfied that the appellant was insane, they would find him not guilty because of insanity. Counsel for the appellant objected to the word "prépondérance" as used by the learned trial judge on several occasions and more particularly because, as the Crown had called two experts and the defence but one, the jury might, because of the use of this word, be led to give greater weight to the evidence of two rather than one. In addressing juries learned judges have often stated that a jury may be reasonably satisfied if the weight or preponderance of, or if upon a balance of probabilities, the evidence directs them to a certain conclusion or decision. It would appear that the learned trial judge was using the word "prépondérance in this sense and that it would be so understood by the members of the jury, who would not be led to give effect to the number of witnesses rather than the evidence. This conclusion is supported by the learned trial judge's pointing out:

> Vous n'êtes pas tenus de croire ou d'accepter ces témoignages ou leurs opinions, pas plus qu'il s'agissait des autres témoins. Vous pouvez les rejeter en bloc, vous pouvez vous en servir pour juger. Le rôle de l'expert consiste à éclairer, à vous guider, mais leurs dires et leurs opinions ne vous lient pas, et vous devez considérer non seulement leurs témoignages, vous en tenez compte si vous voulez, non seulement leurs témoignages, mais l'ensemble de la preuve, pour vous former une opinion quant à l'état d'esprit de l'accusé. Vous avez votre bon sens, vous avez votre jugement, alors les faits qui ont été rapportés par d'autres témoins dans la preuve, la conduite de l'accusé, son comportement, ses écrits, ses déclarations, son attitude dans la boîte aux témoins, tout cela, messieurs, ça constitue de la preuve et ça doit servir à vous guider pour vous demander si c'est l'accusé qui a fait ce qu'on lui reproche et si c'est lui qui l'a fait, savait-il, pouvait-il savoir à ce moment-là ce qu'il faisait.

Moreover, counsel for the accused contended the learned trial judge had dealt more fully with the evidence of the experts for the Crown than he had with that of the expert

called on behalf of the defence. It is the duty of a trial judge to define the issues and discuss the evidence in relation thereto. He need not, however, review the evidence in detail. In the course of his charge he stated:

> L'expert de la défense a eu des entrevues avec Hébert. Il a étudié les renseignements qu'il a obtenus, relatifs à son passé, sa vie conjugale et, en supposant que ce que Hébert a dit était vrai, il a diagnostiqué chez l'accusé, ce qu'il a appelé "une réaction dépressive accompagnée par un état de confusion ou de panique." Il en conclut qu'au moment où Hébert aurait fait ce qu'on lui reproche, que c'est lui qui l'a fait, il ne pouvait connaître à ce moment-là la différence entre le bien et le mal.

Later the learned trial judge returned to the early life of the accused, his marital difficulties and their possible effect upon his mentality and again impressed upon the jury that it was their duty to give such effect thereto as they, in their judgment, might see fit. The learned trial judge did not, as the jury would no doubt understand, attempt to review in detail the evidence for either the Crown or the defence. In my view it cannot be said that the learned judge has not fully presented the issue of insanity or that he has emphasized the evidence for the Crown more than that for the defence.

The third submission on behalf of the accused is that Crown counsel, in cross-examination of the appellant, referred to a statement, that appellant had made to the police and which had not been proved to have been voluntarily made, in a manner that constituted error in law. The appellant made statements to Lieutenant Pettigrew and Constable Fontaine on his way to the police station and immediately upon his arrival made a further statement to Captain Matte. These were all proved to have been voluntarily made and placed in evidence by the Crown. It appears that later Captain Matte, upon a number of occasions, had him brought to his office where at least one statement made by the appellant was recorded by a stenographer. No effort was made in the course of the Crown's case to place this statement in evidence, nor was it proved to have been voluntarily made. Counsel for the Crown, however, in the course of his cross-examination of the appellant, while not showing to him the statement, did ask questions as to a portion of its contents and in the course thereof suggested that the appellant had consumed liquor on the night of, and prior to, the murder of his children;

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that he had started at the first room and that René was the first to have died; further, that he had reflected upon his position of having four children without money to buy the necessities of life and his wife's mode of living and decided to murder his children. The appellant replied throughout this portion of his examination that Captain Matte had, upon these occasions, asked him questions, but that he did not remember his replies, as he had not cared what he then said because he had made up his mind to die with his children.

A cross-examination upon such a statement, by the great weight of authority in our provincial courts, as well as in the court of criminal appeal in England, has been condemned. However, it is unnecessary to determine this point here, as, upon the assumption that this was an improper examination, it would appear that, having regard to the facts and the circumstances of this case, there has been no miscarriage of justice within the meaning of s. 1014(2) of the *Criminal Code*.

Tuesday night, when the appellant and his four infant children were the only persons in his house, the latter were all put to death. Thereafter appellant remained in the house with the doors locked and the curtains drawn until Thursday afternoon, when he went to Marceau's undertaking parlour, where the manager, Pouliot, was the first person to whom he had spoken since the death of the children.

Some time before leaving for Marceau's the appellant wrote, in his own handwriting, a statement which reads:

> Ma femme est partie et je lui ai ôté mes enfants et j'ai promis qu'elle aurait jamais les enfants à elle, ça dépend de ma belle-mère et ma belle-sœur qui garde ma femme, moi j'aime mieux mourir tout de suite avec mes enfants que rester sur la terre et toujours pâtir. J'ai eu un téléphone qu'elle voulait une séparation et garder les enfants, mais c'est fini, j'aime mieux être pendu, moi je vais mourir avec mes enfants; ma femme est partie dépenser l'argent des enfants, elle est venue chercher le chèque, nous autres nous avons pas d'argent, elle va se rappeler leur avoir ôté le manger dans la bouche des enfants; tout ça dépend de ma belle-mère et me belle-sœur de garder ma femme.

The first portion of this statement, as filed in court, would seem to read as follows:

> Ma femme est partie et veut m'ôter mes enfants et j'ai promis qu'elle n'aurait jamais les enfants.

It was so read to Dr. Moffatt in the course of his cross-examination.

At Marceau's undertaking parlour appellant explained to Pouliot that the four children had been killed in a railway accident and that he desired to make arrangements for their funeral. Pouliot immediately communicated with the police and it was shortly thereafter that the appellant was asked by Lieutenant Pettigrew and Constable Fontaine to accompany them to Captain Matte's office. As they proceeded in the police automobile the accused made a number of voluntary statements which were placed in evidence. As to these statements Lieutenant Pettigrew stated, in part:

C'est tout ce qu'il a dit, qu'il était tanné de la vie que sa femme faisait et que c'était pour cette raison qu'il avait tué ses quatre enfants.
.....

Il a dit qu'il avait tué ses enfants, qu'il savait qu'il était pour être pendu et qu'il le faisait pareil. A part ça....
.....

Alors, il aurait dit: "Vous m'arrêtez en temps parce que j'en avais trois autres à tuer."

Constable Fontaine stated:

Il a dit que c'était parce que ça allait pas bien avec sa femme et qu'il aimait ses enfants.

They proceeded to Captain Matte's office and there the appellant repeated much of what he had said in the automobile and that if they did not believe him he could show to them the four bodies. Captain Matte, with others and the appellant, proceeded to the latter's home. There appellant unlocked the door, showed the four infant bodies to the police, then went into the bathroom, where he picked up an axe, handed it to the police and said: "C'est avec ca." It was during this visit that the above statement, written by the accused, was found upon the kitchen table, as to which Captain Matte deposed:

Alors que j'accompagnais l'accusé, nous sommes arrivés à la table, il a fait un geste pour s'emparer de ce papier là et d'un crayon qui était avec, le crayon ici.

The appellant, at the trial, stated his wife had been away since Saturday night and, as a consequence, he had been forced to remain at home and, therefore, not to go to his work on Monday and Tuesday; that on the Tuesday night, after preparing the children for bed and while they were playing, he had informed them that he would have to place

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them in homes. The two older protested. When they had gone to bed he had reflected upon the conduct of his wife, his financial position and his responsibility to his children; that he wept and went to sleep. Later he woke up and found an axe beside him, his children all dead and a scratch about three inches long on his own throat.

The real issue at the trial was whether the appellant had no knowledge of what he was doing as he put his children to death. The two experts called on behalf of the Crown, who had submitted the appellant to a physical examination and had conversed with and questioned him upon four occasions between April 25 and November 6 inclusive, were of the opinion that the appellant did, at the time his children died, know what he was doing and understood the nature and quality of the act which he had committed. These experts were of the opinion that there are only two types of individuals who may be unconscious for a short time and recover, as the appellant did after the death of his children. First, a person who receives a blow upon the head or suffers a shock in an accident may be unconscious for a time and recover. The second is a person who suffers from epilepsy.

The expert called on behalf of the appellant deposed that he had conversed with and questioned the appellant upon three occasions between November 3 and 6, and, having regard to his history and his conduct on the night in question, he stated:

. . . j'ai porté le diagnostic de réaction dépressive, qui était accompagnée par un état de confusion, un état de panique.

Dr. Moffatt did not describe nor did he explain the symptoms of "réaction dépressive." He was questioned at length with regard to the effect of being depressed. After explaining that "dépression" was not of itself a mental illness, he stated it was a symptom and might lead to a mental illness. He was asked:

Q. Vous donnez le symptôme le plus caractéristique?

R. Chez d'aucun oui, chez d'autres, non. Peut-être l'anxiété aurait causé un état dépressif quelconque. Quand le dépression est assez avancée, elle cause une psychose, une maladie mentale, le refus de manger, l'incapacité de dormir le soir.

There was no evidence suggesting that he had ever refused to eat, or suffered difficulty with respect to his appetite or his ability to sleep.

That the jury fully appreciated this issue is evidenced by the questions which their members asked the experts. It is significant that, when a juryman asked if it was possible that one who puts others to death and remains living himself may be able to forget completely all that he did in putting the others to death, Dr. Moffatt replied:

> Certainement, tout dépend de l'état où il était au moment où il a commis son meurtre. S'il est dans une confusion, dans un état de confusion mentale, de choc émotionnel, une confusion de panique, c'est possible. J'ai moi-même vu, au cours d'accident, sortir quelqu'un d'une machine, quelqu'un qui n'avait aucune blessure, absolument rien, mais dont l'état d'émotion était tellement aggravé, tellement évident, qu'on leur demandait leurs noms, leurs adresses et qu'ils ne s'en rappelaient pas.

Dr. Moffatt here illustrates his point of view by referring to a person who suffers a shock much like that described by the psychiatrists called for the Crown.

The burden of establishing, to the reasonable satisfaction of the jury, that the accused was insane, as that term is applied and understood in *McNaghten's Case* (1), at the time he put the children to death rested upon the defence. The appellant's written statement, his false version at the undertaking parlour, his verbal and voluntary statements to the police, as well as his conduct when he and the police were present at his house, were all, in effect, contrary to the contention that he did not know the nature and quality of his act or what he was doing upon the night in question. Moreover, when analyzed, the evidence of the experts for the Crown, who examined the appellant as to both his physical and mental condition, supports their conclusions with reasons that could not but impress the jury.

While Dr. Moffatt, called on behalf of the defence, refers to the life of and his interviews with the appellant, he does not indicate, in a direct and specific manner, what it was in the conduct or conversation that led him to conclude that the appellant, in committing the acts we are here concerned with, did not appreciate the nature and quality of his acts

(1) 10 Cl. & F. 200.

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and was unable to distinguish between right and wrong. In this regard the language of Lord Chief Justice Reading is appropriate:

> The tests in McNaghten's case must be observed, and it is not enough for a medical expert to come to the Court and say generally that in his opinion the criminal is insane. There must be some evidence of insanity within the meaning of the rule in McNaghten's case. *Holt* v. *The King* (1).

Then as to the possible effect upon the jury of any of the suggestions made by counsel for the Crown in the course of the cross-examination here objected to, it should be observed that they were either contained in or directly implied in statements already in evidence. It is not, therefore, a case in which entirely new facts were so introduced, but, rather, circumstances which, in relation to the whole of the evidence, would be but a repetition of that which would already be present to the minds of the jury.

When all of the evidence is considered, this becomes a case in which it may well be said, in the language of my Lord the Chief Justice (then Kerwin J.) in *Schmidt* v. *The King* (2), "that the verdict would necessarily have been the same" even had the cross-examination here objected to not taken place. This case is quite distinguishable from *Allen* v. *The King* (3), where counsel for the Crown sought, through cross-examination, to place in evidence that given by a witness at the preliminary who was not called at the trial. In the course of his reasons for judgment Fitzpatrick C.J., as well as Mr. Justice Anglin (later C.J.), referred to the fact that there was other sufficient evidence to support the conviction. In the case at bar the evidence is such, apart from the cross-examination objected to, as would leave no doubt in the minds of a reasonable jury that the appellant was, at the time he committed the crime, not insane as that word is applied and understood in law.

It is also distinguishable from *Markadonis* v. *The King* (4), where a young man of eighteen was charged with the murder of his sister. No motive was established and the revolver used to commit the crime was not produced and apparently was never found. Evidence was given at the trial to the effect that in the middle of the second night after the murder the accused was taken from his cell and,

(1) (1920) 15 C.A.R. 10 at 12.
(2) [1945] S.C.R. 438 at 440.
(3) (1911) 44 Can. S.C.R. 331.
(4) [1935] S.C.R. 657.

along with three police officers, taken out to a road to search for the revolver. The accused was cross-examined upon the incidents of that trip and his answers were made the basis for rebuttal evidence. Mr. Justice Davis, at p. 664, stated:

> The whole course of conduct and conversation of the accused on that trip was clearly inadmissible in the absence of any proof that the statements made were voluntary and upon proper warning.

In the circumstances of that case, as reported, such evidence added to the facts already in evidence and could not but be prejudicial to the defence.

The facts and circumstances of this case are so very conclusive that the language in *Stirland* v. *The Director of Public Prosecutions* (1) is appropriate. When referring to a proviso in the English statute similar to that of s. 1014(2) of our *Criminal Code,* it is stated:

> . . . if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict.

This passage is quoted with approvel in *Schmidt* v. *The King, supra.*

In my opinion the appeal should be dismissed.

LOCKE J. (dissenting):—I agree with my brothers Cartwright and Fauteux and would quash the conviction in this matter and direct that there be a new trial.

CARTWRIGHT J. (dissenting):—In this case I find it necessary to deal with only one of the questions which were argued before us, i.e., whether Crown counsel improperly cross-examined the appellant as to certain statements allegedly made by him to Captain Matte.

It is not necessary to go into the facts at any length. The appellant was convicted of the murder of one of his children. At the trial it was not seriously questioned that he had killed this child and his three other young children. The main issue was as to whether or not he was insane at the time of such acts.

Doctor Moffatt, called as a witness for the defence, testified that in his opinion the appellant at the time of the killing was by reason of mental illness unable to appreciate

(1) [1944] A.C. 315.

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the nature and quality of his acts or to know that they were wrong. Doctor Martin and Doctor Larue called as witnesses by the Crown testified that they were of the contrary opinion.

It is clear that Doctor Moffatt founded his opinion in part on the assumption that the accused had in fact no memory as to what occurred at the time of the killing, and, as Mr. Miquelon very properly stated, the question whether or not the accused did have such memory was of vital importance on the issue of insanity.

In giving his evidence in chief the appellant deposed that he had no memory as to what happened during the critical period. In cross-examination he was asked a number of questions by Crown counsel who then held in his hands what purported to be a transcript of a number of questions put to the accused by Captain Matte and of the answers given by the accused to such questions. This interrogation was said to have taken place at about eleven p.m. on the Thursday following the killing, some hours after the appellant had told the police officers that he had killed his children and had been taken into custody on a charge of murder. The answers which the accused was said to have given during this interrogation indicated that he was able at that time to recall the details of the killing of his children and so tended to discredit his evidence given at the trial as to his having no memory of that occurrence.

Counsel for the appellant objected to the use of the transcript and to any cross-examination in regard to it but the learned trial judge overruled the objection. I think it clear that the learned trial judge should not have permitted any use to be made of the transcript in question without first hearing evidence in the absence of the jury with a view to determining whether or not the appellant's answers had been given voluntarily. The learned judge appears to have been of opinion that although not admissible as part of the Crown's case the questions said to have been put to the accused and the answers said to have been made by him could be put to him in cross-examination. In this, in my respectful opinion, he was in error.

In *Rex* v. *Wilmot* (1), Ford J.A. with whom MacGillivray J.A. agreed said:—

> It is conceded that the statements, if made at all, were made to a person in authority and that the Crown could not prove their voluntary character so as to make them admissible. This being so, in my opinion not only should the Crown be not permitted to prove them in rebuttal any more than in chief, but that it is improper to permit cross-examination as to them. Indeed they should, in my opinion, be treated for all purposes as non-existent or as having no probative value of any kind, either as going to the credit of the accused as a witness or otherwise.

This view of the law was adopted by the Court of Appeal for British Columbia in *Rex* v. *Byers* (2) and by the Court of Appeal for Saskatchewan in *Rex* v. *Scory* (3). A similar view was expressed by Langlais J. in *Rex* v. *Heroux* (4).

In *Rex* v. *Scory* (*supra*) Mackenzie J.A., who gave the unanimous judgment of the Court, after referring to *Rex* v. *Wilmot*, *Rex* v. *Byers* and *Rex* v. *Heroux* continued, at page 323:—

> In a still more recent case involving the same question, *R.* v. *Treacy* (1944) 60 T.L.R. 544, the Court of Criminal Appeal in England rendered the same view. Thus in delivering the judgment of the Court, Humphreys J., said (p. 545): "In our view, a statement made by a prisoner under arrest is either admissible or not. If it is admissible, the proper course for the prosecution is to prove it, and give it in evidence, and to let the statement, if it is in writing, be made an exhibit, so that everybody knows what it is and everybody can inquire into it and do what they think right about it. If it is not admissible, nothing more ought to be heard of it, and it is wrong to think that a document can be made admissible in evidence which is otherwise inadmissible simply because it is put to a person on cross-examination."
>
> Having regard to the protection which our criminal law in accordance with its well-known policy *in favorem vitae* casts about every accused person to protect him on his trial against the introduction of his own involuntary statements, the above decisions on counsel's last contention should, in my opinion, be followed not only because of their obvious authority but also because they are logically sound.

I have carefully considered the reasons of Campbell C.J. who expressed a contrary opinion in *Rex* v. *Jones* (5) and in *Rex* v. *Essery* (6) and the reasons of Harvey C.J. who dissented in *Rex* v. *Wilmot* (*supra*) but, with the greatest respect for these views, I am of opinion that the passage quoted above from the judgment of Mackenzie J.A. correctly states the law.

(1) (1940) 74 C.C.C. 1 at 19.
(2) (1941) 77 C.C.C. 164.
(3) (1944) 83 C.C.C. 306.
(4) (1943) 80 C.C.C. 348.
(5) (1944) 84 C.C.C. 299.
(6) (1944) 84 C.C.C. 304.

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It is argued for the respondent that even if this cross-examination was illegal no substantial wrong or miscarriage of justice has occurred and the appeal should be dismissed. With the greatest respect for all those who hold the contrary view, I find it impossible to affirm that had this illegal cross-examination not taken place the jury would necessarily have convicted the appellant.

It was open to the jury to believe the appellant's evidence as to his having no memory of the period in which the killings occurred and, if they did believe it, it was for them to say whether they accepted Doctor Moffatt's opinion in preference to that of the two medical witnesses called by the Crown. All three of these doctors were men of high standing in their profession and it is scarcely necessary to observe that a jury may act upon the evidence of one witness although it is in conflict with the evidence of two or more other witnesses. But the opinion of Doctor Moffatt depended in large measure upon the assumption that the appellant had in fact no memory of the period in which the children were killed. The reason that the jury did not act upon Doctor Moffatt's opinion may well have been that they did not find that the appellant was without memory of the critical period and their failure to so find may well have been the result of the illegal cross-examination.

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

FAUTEUX J. (dissenting):—Suivant des admissions extra-judiciaires, jugées libres et volontaires, l'appelant a reconnu, sans toutefois en donner aucune circonstance, avoir, dans le cours du mois d'avril 1953, tué ses quatre jeunes enfants pour lesquels, cependant, il n'entretenait, suivant la preuve, que des sentiments d'affection. Accusé du meurtre de l'un d'eux, il plaida qu'au moment de ces actes, il était incapable d'en juger la nature et la gravité et de se rendre compte qu'ils étaient mal. Le bien-fondé de ce plaidoyer fut affirmé par un expert de la défense et nié par deux experts de la poursuite. Trouvé coupable, il logea un appel devant la Cour du Banc de la Reine (1), lequel fut rejeté par jugement unanime. Hébert obtint alors, en vertu de l'article

(1) Q.R. [1954] Q.B. 594.

1025 du *Code Criminel*, l'autorisation d'en appeler devant cette Cour sur des questions de droit formulées comme suit:—

(*a*) Did the learned trial Judge err in his instructions relative to the possible verdict the jury might render and in particular in omitting to mention the possibility of their disagreeing?

(*b*) Did the learned trial Judge err in his instructions relative to the plea of insanity and in his statement of the evidence in support thereof?

Au soutien du premier moyen (*a*), on a invoqué, de la décision de cette Cour dans *Latour* v. *The King* (1), un passage apparaissant à la page 30 où l'on exprime l'opinion que, des instructions du Juge au procès, les jurés pouvaient raisonnablement déduire que le droit à un désaccord était exclu dans la cause. Dans *Frank Frederick Creasey* (2), Lord Goddard, Juge en chef de la Cour d'Appel d'Angleterre, signale bien que de similaires directives ont déjà, dans le passé, reçu la désapprobation des tribunaux d'appel, telle, par exemple, la suivante: "It is essential that you should give a verdict". C'est, cependant, en regard de toute l'adresse du Juge que la question doit être appréciée. Ainsi considérée, je ne crois pas qu'on puisse, en l'espèce, dire que le droit à un désaccord ait été exclu.

Au second moyen (*b*), il y a deux griefs. J'écarterais le premier, ayant trait aux directives sur le plaidoyer de folie, et ce, pour les raisons données par l'honorable Juge en chef. Je retiens, cependant, le second, savoir:—

Did the learned trial Judge err . . . in his statement of the evidence in support thereof? (i.e., au soutien du plaidoyer de folie).

grief dans la considération duquel il convient d'inclure un point soulevé lors du délibéré et subséquemment discuté au cours d'une réaudition, après que, au cas où nécessaire, permission d'appeler ait été donnée, savoir:—

Whether Crown counsel improperly cross-examined the appellant as to the statements allegedly made by him to Captain Matte or other police officers and whether or not the trial Judge's charge was proper in relation thereto.

La véritable—pour ne pas dire l'unique—question qui se posait devant le jury était de savoir si, au moment où l'accusé tuait ses quatre jeunes enfants, il était dans un état mental le rendant incapable de juger la nature et la gravité de ses actes et de se rendre compte qu'ils étaient mal. Il était donc de capital importance que l'exposé de la preuve

(1) [1951] S.C.R. 19. (2) (1953) 37 C.A.R. 179.

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sur ce point soit fait adéquatement; c'était toute la cause. Cette preuve soumise aux jurés et qu'il nous faut maintenant considérer pour juger du mérite de ce grief, portait sur deux points:—(i) la théorie médicale soumise par le docteur Moffatt, l'expert de la défense, et (ii) les faits, gestes et declarations de l'accusé, surtout celles dont la véracité—assumée par le docteur Moffatt pour fins de son opinion—fut mise en question par la Couronne et ses experts.

La théorie médicale de la défense. Le docteur Moffatt a conclu qu'au moment de l'acte, l'appelant était incapable de distinguer le bien du mal parce qu'il était alors affecté d'un trouble mental qu'il désigne techniquement comme "une réaction dépressive accompagnée par un état de confusion ou de panique". Cette conclusion, il la motive comme suit:—A raison d'événements particuliers qui se sont produits au cours de l'enfance, aussi bien qu'au cours de l'adolescence et, ensuite, de la vie conjugale de l'appelant, ce dernier souffrait de mélancolie, mais non dans le sens précis qu'on donne en psychiatrie à la maladie mentale classifiée sous ce nom; il avait ainsi développé une instabilité émotionnelle affectant sa résistance et l'empêchant d'avoir, sur ses facultés intellectuelles, un contrôle normal, offrant en conséquence, et à l'occasion d'une crise émotionnelle, un terrain propice à la naissance et l'action d'un trouble mental. De plus, l'accusé ayant affirmé, au cours d'examens par le docteur Moffatt, et juré, dans son témoignage à l'audition, qu'il n'avait aucune mémoire des circonstances dans lesquelles les actes reprochés avaient été commis, l'expert de la défense déduisit du fait de cette carence de mémoire qu'au moment où l'accusé tuait ses quatre jeunes enfants, il était dans un état de confusion mentale et de panique. Le docteur Moffatt a bien précisé qu'il ne prétendait pas que l'accusé souffrait de cette maladie mentale classifiée en psychiatrie comme mélancolie et que l'état de confusion dont il parlait était un trouble mental reconnu par les auteurs anglais, américains et allemands et, comme tel, différent de la confusion mentale, résultant d'une cause organique, dont parlent les auteurs français. En somme, mise en contraste avec l'opinion des experts de la Couronne, celle du docteur Moffatt s'inspire d'une théorie médicale différente dans sa conception et son

expression de celle exposée par les experts de la Couronne et se fonde, en l'espèce, principalement sur l'hypothèse de la véracité des affirmations de l'accusé quant à cette carence de mémoire. Nous n'avons pas à départager les médecins et à décider d'une préférence pour l'une ou l'autre des théories par eux exposées; ceci était du ressort exclusif des jurés et la difficulté qu'ils pouvaient avoir à ce faire rendait encore plus impérative l'obligation d'une adéquate exposition de ces théories et, particulièrement, de celle de la défense. A la vérité, et au cours de l'audition de la preuve médicale, l'un des jurés manifesta ouvertement son inquiétude à rencontrer l'obligation que lui et ses collègues avaient de départager les experts. Pour dissiper cet état d'esprit, on les rassura en les informant que des directives appropriées leur seraient données au cours de l'adresse du Juge. En tout respect, cependant, je dois dire qu'en ce qui concerne la théorie médicale de la défense, on s'est contenté, dans l'adresse, d'indiquer uniquement la conclusion précitée du docteur Moffatt sans signaler ce qui divisait les experts dans la conception et l'expression de leurs théories médicales respectives et sans aucunement rappeler les motifs sur lesquels s'appuyait la théorie exposée en défense. L'opinion d'un expert n'a que la valeur des motifs sur lesquels elle se fonde. Je suis d'avis que la théorie médicale de la défense au soutien du plaidoyer de folie n'a pas été exposée comme elle aurait dû l'être et que, pour cette première raison, ce grief de l'appelant est bien fondé.

Outre la théorie médicale de l'expert de la défense, la preuve apportée au soutien du plaidoyer de folie et qui devait être exposée aux jurés comportait, entre autres faits, les déclarations de l'accusé et, particulièrement, son affirmation sous serment relative à son absence de mémoire, affirmation dont la véracité, comme déjà indiqué, fut assumée par le docteur Moffatt pour les fins de son expertise, mais mise en question par la Couronne et ses experts. D'où l'on voit que dans l'exposé de cet aspect particulier de la preuve, il était de singulière importance, pour permettre aux jurés de se prononcer justement sur le point, de ne pas les inviter virtuellement, comme il a été fait, à décider de la véracité de cette affirmation, en la considérant avec les déclarations ci-après qui la contredisent, lesquelles furent—ainsi qu'il appert ci-après—illégalement admises au

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dossier, à l'initiative de la Couronne, et ce, tel que déclaré par les deux procureurs la représentant à la réaudition, dans le but d'attaquer la crédibilité de l'accusé et, plus précisément, de détruire, en démontrant le contraire de l'affirmation ci-dessus, le véritable fondement de l'opinion émise par le docteur Moffatt.

Le dossier révèle que le capitaine Matte, officier de la Sûreté en charge de la cause, a plusieurs fois au cours de la détention de l'appelant, questionné ce dernier afin d'en obtenir une relation des circonstances dans lesquelles il avait tué ses enfants, circonstances que ne comportaient aucunement ses aveux extrajudiciaires jugés libres et volontaires et admis au dossier. Il appert, de plus, que les questions et réponses, faites au cours de ces examens conduits par cet officier de police, avaient été sténographiées et qu'au procès, un document les rapportant était entre les mains du procureur de la Couronne et utilisé par lui pour le contre-interrogatoire de l'accusé. Dès la première tentative de la Couronne d'introduire une telle preuve au dossier, le procureur de la défense s'objecta comme suit:—

Objecté:—

D'abord, je voudrais savoir si réellement cet aveu-là a eu lieu et dans quelles conditions cet aveu-là a eu lieu et quel était également l'état mental de cet homme-là à ce moment-là.

Ce à quoi la Couronne répondit:—

On est aussi bien de vider le problème, j'ai bien l'intention d'entrer dans les déclarations qu'il a faites pour le contredire.

L'objection de la défense fut renvoyée et c'est alors qu'entre autres questions et, en substance, on a demandé à l'accusé s'il n'était pas vrai:—qu'il avait déclaré au capitaine Matte avoir consommé quatre ou cinq bouteilles de bière avant de tuer ses enfants (p. 259); qu'il lui avait raconté en détails ce qui s'était passé chez lui (p. 284); qu'il lui avait raconté qu'il s'était assis sur une chaise, s'était bercé un peu, avait pensé à tout et que c'est alors qu'il s'était décidé à faire les actes reprochés (p. 290); qu'il avait commencé par la chambre d'en avant, qu'il avait commencé par tuer René. (p. 291). A la vérité, non seulement on lui a posé ces questions, mais, en les formulant, on a indiqué les réponses incriminantes que l'accusé était supposé avoir données au détective Matte. Enfin, par ce procédé, on a réussi à faire entrer au dossier des déclarations dont la substance allait à

contredire le témoignage de l'appelant et, particulièrement, sa déclaration dont la véracité avait été assumée par le docteur Moffatt pour les fins de son expertise.

Dans quelles conditions furent conduits ces interrogatoires et furent données ces réponses que le capitaine Matte, d'une part, trouva nécessaire de faire consigner par un sténographe et que la Couronne, d'autre part, jugea essentiel au succès de sa cause de porter à la connaissance des jurés, le dossier est silencieux. Aucun voir dire, aucun examen de tous les témoins qui, suivant les exigences de la jurisprudence de cette Cour (*Sankey* v. *The King* (1); *Tiffault* v. *The King* (2)), devaient être entendus pour permettre au Juge de décider si, oui ou non, ces déclarations pouvaient, à la lumière des principes reconnus en la matière, être admises devant les jurés. Dans *Gach* v. *The King* (3), cette Cour, à la page 255, approuvait la proposition suivante formulée par le Juge Sankey, tel qu'il était alors, dans *Rex* v. *Crowe and Myerscough* (4):

> If a police officer has determined to effect an arrest or if the person is in custody, then he should ask no questions which will in any way tend to prove the guilt of such person from his own mouth.

Aussi bien, la Couronne, au procès comme devant cette Cour, n'a-t-elle cherché à justifier l'introduction de cette preuve au dossier que par les dispositions des articles 10 et 11 de la *Loi de la preuve,* lesquelles autorisent d'attaquer la crédibilité d'un témoin en le contre-interrogeant sur ses déclarations antérieures incompatibles avec son témoignage. Le point de savoir si dans le contre-interrogatoire d'un accusé entendu comme témoin, il est loisible à la Couronne de référer à des déclarations faites par lui à la police alors que le caractère libre et volontaire de ces déclarations n'a pas été décidé, a été considéré dans plusieurs causes. Dans ses notes, mon collègue le Juge Cartwright, réfère à ces décisions et, comme lui, je suis d'opinion que la Couronne ne peut davantage, sur cette base, justifier, en l'espèce, la position prise par elle au procès et devant cette Cour. L'introduction de cette preuve était donc totalement illégale et d'une illégalité qui, je crois, aurait justifié, sinon commandé, la mise à fin du procès comme *mistrial.* Aussi bien, et le procès s'étant continué, était-il impératif que

(1) [1927] S.C.R. 436.
(2) [1933] S.C.R. 509.
(3) [1943] S.C.R. 250.
(4) (1917) 81 J.P. 288.

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dans l'exposé de cet aspect de la preuve faite au soutien du plaidoyer de folie, les jurés, au lieu d'être invités, comme ils l'ont été, à considérer toutes les déclarations de l'accusé, sans distinguer celles qui avaient été prouvées légalement de celles illégalement introduites au dossier, reçoivent la direction la plus claire et la plus solennelle d'écarter totalement de leur considération les dernières pour juger de la véracité de l'affirmation relative à la perte de mémoire. Ce n'était pas satisfaire à l'obligation qu'il y avait de faire un exposé légal de la preuve, faite en défense au soutien du plaidoyer de folie, que d'inviter les jurés, pour en juger, à faire entrer dans leur considération des preuves illégalement admises. Pour cette seconde raison, je crois donc que le grief de l'appelant est fondé.

Sur la loi relative à l'obligation d'exposer adéquatement la théorie de la défense, il suffit, je crois, de référer à quelques passages des deux dernières décisions de cette Cour sur le point. Dans *Kelsey* v. *The Queen* (1), on a rappelé comme suit, à la page 227, le principe d'où découle cette obligation:—

> The rule is simple and implements the fundamental principle that an accused is entitled to a fair trial, to make a full answer and defence to the charge, and to these ends, the jury must be adequately instructed as to what his defence is by the trial Judge.

De la décision d'*Azoulay* v. *The Queen* (2), la considération des passages suivants est pertinente:—

> The pivotal questions upon which the defence stands must be clearly presented to the jury's mind. (p. 498).
>
> Three experts, two of which were called by the appellant, gave very elaborate explanations on medical matters, and their respective opinions on the result of the autopsy that was performed on the body of the deceased woman. It was, I think, the duty of the trial judge, in summing up this highly technical and conflicting evidence, to strip it of the non-essentials, and as O'Halloran, J.A. said in *Rex* v. *Hughes* 78 Can. C.C. 1, to present to the jury the evidence in its proper relation to the matters requiring factual decision, and direct it also to the case put forward by the prosecution and the answer of the defence, or such answer as the evidence permitted. Unfortunately, this has not been done, and the explanations and grounds of defence have not adequately been put before the jury. (p. 499).
>
> The authorities contemplate that in the course of his charge a trial judge should as a general rule, explain the relevant law and so relate it to the evidence that the jury may appreciate the issues or questions they must pass upon in order to render a verdict of guilty or not guilty. Where, as here, the evidence is technical and somewhat involved, it is particularly

(1) [1953] 1 S.C.R. 220. (2) [1952] 2 S.C.R. 495.

important that he should do so in a manner that will assist the jury in determining its relevancy and what weight or value they will attribute to the respective portions. (p. 503).

Reste à considérer la suggestion de la Couronne d'appliquer, en l'espèce, les dispositions de l'article 1014 (2) édictant que même si les griefs soulevés par l'accusé sont bien fondés, la Cour peut renvoyer l'appel s'il n'y a pas eu de tort réel ni de déni de justice. A raison de la gravité des violations ci-dessus relatées, il me paraît impossible d'accéder à cette demande. Rendant le jugement pour le Comité Judiciaire du Conseil Privé dans *Makin* (1), Lord Herschell, à la page 70, dit:—

The evidence improperly admitted might have chiefly influenced the jury to return a verdict of guilty, and the rest of the evidence which might appear to the court sufficient to support the conviction might have been reasonably disbelieved by the jury. Their Lordships do not think it can properly be said that there has been no substantial wrong or miscarriage of justice, where on a point material to the guilt or innocence of the accused the jury have, notwithstanding objection, been invited by the judge to consider in arriving at their verdict matters which ought not to have been submitted to them. In Their Lordships' opinion substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence, and there were substituted for it the verdict of the court founded merely upon a perusal of the evidence.

Dans *Maxwell* v. *Director of Public Prosecutions* (2), Lord Sankey, L.C., parlant pour lui-même, Lord Blanesburgh, Lord Atkin, Lord Thankerton et Lord Wright, dit à la page 176:—

But it must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed. Hence the great care which has always been shown by the Court in applying the proviso to section 4 of the Criminal Appeal Act, 1907, and refusing to quash a conviction. It is often better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of criminal prosecutions should be disregarded and discredited.

Ces principes exprimés par la Chambre des Lords se passent de commentaires et leur application, au Canada, est d'autant plus justifiée que la loi canadienne, contrairement à la loi anglaise, autorise la tenue d'un nouveau procès au lieu d'un acquittement.

(1) [1894] A.C. 57.

(2) (1934) 24 C.A.R. 152.

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Ajoutons que, pour bénéficier des dispositions de l'article 1014 (2), la Couronne doit établir que, sans cette preuve illégale au dossier, le verdict eut été le même. Et c'est là la position qu'elle prend. Devant les jurés, cependant, elle considéra l'affaire bien autrement, puisqu'alors, elle jugea essentiel à l'avancement de sa cause de porter à leur connaissance cette preuve illégale. Et même devant nous, en cherchant à se justifier de l'avoir introduite, ses deux procureurs ont plaidé avec vigueur les propositions suivantes que l'un d'eux avait couchées par écrit, avant d'en donner communication verbale à cette Cour, à la fin de l'argument de la Couronne:—

1. The issue was whether the accused was telling the truth when he testified that he did not remember the circumstances.

2. The object of this evidence was to show that he could not be believed.

3. This evidence was most relevant to the issue, in view of what Doctor Moffatt had said.

La Couronne a bien raison d'affirmer que la crédibilité de l'accusé constituait le principal problème soumis aux jurés. Mais, précisément pour cette raison, la Couronne ne peut maintenant demander de considérer comme négligeable cette preuve illégale qu'elle a jugé essentiel d'introduire sur cette question cruciale que les jurés avaient à déterminer. Les deux positions sont manifestement irréconciliables. Aussi bien m'est-il impossible de conclure que l'intimée a établi, comme elle en avait le fardeau, que, sans la présence de cette preuve, le verdict eut été le même.

Je maintiendrais l'appel, annulerais le verdict et ordonnerais un nouveau procès.

Appeal dismissed.

Solicitor for the appellant: *Lawrence Corriveau.*

Solicitors for the respondent: *Noël Dorion and Paul Miquelon.*

MAGDA BOYKOWYCH and ALBERT GADZIALA (*Defendants*) ..... } APPELLANTS;

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*Dec. 6, 7
1955
*Jan. 25

AND

MICHAEL BOYKOWYCH (*Plaintiff*) ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Divorce—Evidence—Adultery—Standard of Proof required in Ontario—Criminal Conversation—Admission by one alleged adulterer not in presence of other—Admissibility against latter where no objection raised by him.

In a suit by a husband for divorce, joined with a claim against the co-respondent for damages for alienation of his wife's affections and for criminal conversation, the husband testified his wife had admitted to him having committed adultery with the co-respondent. The allegation was denied by both defendants. The jury found adultery to have been committed and assessed damages. On appeal it was contended that the trial judge had not properly instructed the jury as to the degree of proof necessary to prove adultery; that in an action for criminal conversation an even heavier onus rested upon the plaintiff than in an action for divorce; that the trial judge should have instructed the jury that any admission, even if made, was no evidence against the co-respondent and, in any event, that it was not evidence of the truth of the statement allegedly made.

Held: 1. That the standard of proof required in proceedings brought under the *Divorce Act (Ontario)* R.S.C. 1952, c. 85, as to the commission of a marital offence, where no question of the legitimacy of offspring arises, is the same as in other civil proceedings, that is a preponderance of evidence, and the trial judge's charge complied with the rule laid down in *Smith* v. *Smith and Smedman* [1952] 2 S.C.R. 312.

2. That since counsel for the co-respondent had not objected that evidence as to the alleged admission by the wife was not admissible as against his client, he could not be heard on appeal to complain of non-direction on that point. *Nevill* v. *Fine Art and General Insurance Co.* [1897] A.C. 68 at 76 applied.

Per Kerwin C.J. and Cartwright J.: No substantial wrong or miscarriage of justice occurred in connection with the alleged admission of the wife.

Per Locke J.: In view of the position adopted by counsel for the co-respondent at the trial it was not open to him to complain of the admission of the evidence. *Scott* v. *Fernie Lumber Co.* 11 B.C.R. 91 at 96 approved in *Spencer* v. *Field* [1939] S.C.R. 36 at 42.

APPEAL by defendants from the judgment of the Court of Appeal for Ontario (1) affirming the judgment of

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

(1) [1953] O.R. 827.

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BOYKOWYCH AND GADZIALA v. BOYKOWYCH

Anger J. on the answers of a jury, in an action for divorce and damages for alienation of affections and criminal conversation.

R. F. Wilson, Q.C. for the appellant, Magda Boykowych.

J. J. Robinette, Q.C. for the appellant, Albert Gadziala.

G. T. Walsh, Q.C. and *W. C. Cuttell* for the respondent.

THE CHIEF JUSTICE:—The respondent Michael Boykowych brought an action in the Supreme Court of Ontario for the dissolution of his marriage with his wife Magda and, by an order of a member of that Court, joined in the action a claim against Albert Gadziala for damages (*a*) for alienation of his wife's affections and (*b*) for criminal conversation with his wife. The action was tried with a jury who, in answer to questions submitted to them, found that adultery had been committed between the defendants and fixed the damages at $2,500. Having answered the first two questions dealing with these matters, the jury, by reason of the trial judge's direction, did not make any finding as to alienation of affections or damages therefor. In accordance with these findings a judgment *nisi* was pronounced dissolving the marriage and the respondent was awarded $2,500 damages and the costs of the action as against Gadziala.

Appeals by the defendants were dismissed by the Court of Appeal for Ontario on September 18, 1953. Gadziala immediately served notice of appeal to this Court and an order was made approving his security for costs. The defendant wife took no steps to appeal or to ask leave to appeal, apparently considering that she was barred from so doing under the decision in *Harris* v. *Harris* (1).

By order dated November 9, 1953, the judgment *nisi* for divorce was made absolute and the marriage dissolved. On December 3, 1953, the wife's appeal from that order was dismissed by the Court of Appeal who, however, gave her leave to appeal therefrom to this Court. Her appeals and Gadziala's appeal from the Court of Appeal order of September 18, 1953, came on for argument together before us when it was pointed out that the wife's appeal from the

(1) [1932] S.C.R. 541.

judgment of December 3, 1953, would raise merely the question as to whether that judgment was the order the Court of Appeal should have made. As our powers would be limited to deciding that point, it was deemed advisable that we should exercise the jurisdiction given us by s-s. (1) of s. 41 of the *Supreme Court Act* to give leave to appeal from any final "or other judgment" and which jurisdiction was conferred by an amendment in 1949 subsequent to the decision in the *Harris* case. Such leave was thereupon granted.

In *Smith* v. *Smith & Smedman* (1) this Court decided that by virtue of the *English Law Act,* R.S.B.C. 1948, c. 111, the law in force in British Columbia in divorce and matrimonial causes is *The Divorce and Matrimonial Causes Act, 1857* (Imp.), as amended by 21-22 Vict. c. 108, and that under that law proceedings in divorce in that province are civil and not criminal in their nature and the standard of proof of the commission of a marital offence, where no question affecting the legitimacy of offspring arises, was the same as in other civil actions, i.e., a preponderance of evidence. The same rule applies in Ontario under the *Divorce Act (Ontario)* R.S.C. 1952, c. 85.

Applying that test to the present appeal, the trial judge charged the jury that the onus or burden of proof was upon the plaintiff to establish that adultery took place by a preponderance of credible evidence. His subsequent remarks contain nothing to detract from that statement and in fact he added that "caution is always necessary before finding that it was committed". In my opinion the trial judge's charge was correct and therefore the wife's appeals to this Court should be dismissed with the usual order as to costs in the case of a married woman.

An additional question was raised by the appellant Gadziala. The plaintiff testified that his wife had admitted to him having committed adultery with Gadziala. This was denied by the wife, but the point is made that the trial judge should have instructed the jury that any admission, even if made, was no evidence against Gadziala, and, in any event, that it was not evidence of the truth of the statement allegedly made. The trial judge did neither of these. The decision of this Court in *Welstead* v. *Brown* (2) was relied

(1) [1952] 2 S.C.R. 312.
(2) [1952] 1 S.C.R. 1.

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upon by the respondent, but in the view I take of the matter nothing need be said about it except that it must not be pressed too far. Having considered all the evidence, I am of opinion that the provisions of s-s. (1) of s. 28 of The Judicature Act, R.S.O. 1950, c. 190, apply since there was no substantial wrong or miscarriage of justice. The appeal by Gadziala should be dismissed with costs.

RAND J.:—This is an appeal by both the respondent and the co-respondent in an action for divorce and criminal conversation. For the respondent the substantial ground urged was that the charge was inadequate as to the degree of proof necessary to establish adultery. I agree with the reasons given by Roach J.A., speaking for the Court of Appeal, in his rejection of that ground. Although the charge, in this respect, was somewhat spare, what was stated was accurate and, if anything, more favourable to the respondent than was required.

The respondent's appeal must, therefore, be dismissed, but I think it desirable to add a few observations on the criticism by Roach J.A. of certain language in the judgment of Dixon J. (now C.J.) in *Briginshaw* v. *Briginshaw* (1), quoted in part in *Smith* v. *Smith and Smedman* (2), to this effect:—

> Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

Roach J.A. comments in these words:—

> With respect I prefer to state the proposition thus, that the nature of the fact in issue rather than the gravity of the consequences flowing from a finding that the fact has been proved is the determining factor which requires the tribunal to be charged as Cartwright J. says, and as I agree, it should be charged. The proposition thus stated avoids what I respectfully suggest would appear to be a conflict between the proposition as stated by Cartwright J. and the fundamental principle that the tribunal in reaching its decision should be guided by the evidence alone and not by the results of its finding.

(1) (1938) 60 C.L.R. 336. (2) [1952] 2 S.C.R. 312 at 332.

But what is the "nature" of the fact in issue? That fact may have physical, religious, moral, ethical, social, legal or other characteristics and implications and its "nature", in the sense in which acts are weighed and judged by a community, cannot escape the influence of most of these constituent senses of the civilized human intelligence by which judgment is made. The physical act in question here, in the absence of the other qualifying factors, would be denuded of its significance to the law; and it is only in relation to these norms and the consequential effects of their operation that its character or nature can be fully apprehended. Our everyday judgments are reached after weighing circumstances on the scales of experience, but in the presence of these characterizing consequences; and the heavier they are, the clearer must be the evidence to tip the scale into persuasion. This is by no means the same as permitting one's decision on a fact to be affected by a belief, say, as to the nature of a particular punishment annexed to it or by taking into account the latter as itself an item of the circumstances. But to say that the degree of social consequence does not indirectly reflect the quality and characteristics of the act given it by these factors and thus influence the degree of proof we demand for decision seems to me to contradict our daily experience.

The ground raised on behalf of the co-respondent is that certain oral admissions by the respondent which the husband testified to have been made to him and which, admissible against the wife, were not evidence against him, had not been the subject of a direction to the jury to that effect. To this there are two answers: a repetition of the evidence of these statements was brought out in cross-examination of the husband by counsel for the co-respondent; and no request was made to the trial judge to give any such direction, although ample opportunity had been afforded counsel to do so. On this latter point it is sufficient to cite *Thompson* v. *Fraser Companies Ltd.* (1) following what was said in *Nevill* v. *Fine Art & General Insurance Co.* (2), by Halsbury, L.C. at p. 76; and there are no circumstances here calling for a discretionary indulgence to the co-respondent.

(1) [1930] S.C.R. 109 at 118. (2) [1897] A.C. 68.

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Rand J.

It seems to be uniformly accepted that such admissions cannot be used against the co-respondent: *Harris* v. *Harris* (1); *Morton* v. *Morton et al.* (2). In *Welstead* v. *Brown* (3), Cartwright J., speaking also for Taschereau and Locke, JJ., on the authority of the *Aylesford Peerage* case (4), held similar statements by a wife to be admissible and this was referred to by Roach J.A. as supporting the admission of those made in this case. But there, the wife, as a witness, had confirmed her admissions, which thereupon became evidence of consistency and so far corroborative. I do not take that decision as an authority here. I may observe, also, that it should be kept in mind that to the hearsay rule there are special exceptions in pedigree cases and that it is unsafe to rely upon them in other proceedings.

The appeal of the co-respondent must, likewise, be dismissed, and in both cases, with costs.

KELLOCK J.:—In my opinion, the charge of the learned trial judge is not open to the objection that it does not comply with the decision of this Court in *Smith* v. *Smith and Smedman* (5). I therefore think that the appeal of the female appellant fails.

As to the appeal of Gadziala, what is complained of is failure on the part of the learned trial judge to charge the jury on that issue with respect to the evidence of the respondent as to admissions made to him by his wife, in respect of which counsel for Gadziala cross-examined. Whether or not counsel went beyond what is allowable within the principle followed in *Gabriel* v. *Eliatamby* (6), need not be determined, as no objection was made on behalf of Gadziala to the learned judge's charge. In the light of the judgment of Lord Halsbury L.C., in *Nevill* v. *Fine Art and General Insurance Company* (7), at 76, the appellant is not entitled to a new trial. The appeal should be dismissed with costs.

LOCKE J.:—In this action the respondent claimed a divorce from his wife on the ground of her adultery with the appellant Gadziala and damages against the latter for

(1) [1931] 4 D.L.R. 933.
(2) [1937] P. 151.
(3) [1952] 1 S.C.R. 1.
(4) (1885) 11 App. Cas. 1.
(5) [1952] 2 S.C.R. 312.
(6) [1926] A.C. 133.
(7) [1897] A.C. 68.

alienation of her affections and for criminal conversation. The joinder of these causes of action was authorized by an *ex-parte* order made under the powers conferred by Rule 1 of the Matrimonial Causes Rules. Upon the issues raised by the pleadings, the jury found in favour of the respondent and the appeals made to the Court of Appeal were dismissed.

There was ample evidence upon which, if they chose to believe it, the jury might properly find that the wife had committed adultery with the appellant Gadziala.

The appeal of Gadziala is based upon the failure of the learned trial judge, when charging the jury, to instruct them as to the admissibility and the relevance of evidence given by the respondent at the hearing as to admissions made to him by his wife.

The respondent gave evidence that she had orally admitted to him that she had committed adultery with Gadziala and had referred to the latter as her real husband. The wife and the appellant Gadziala were each represented by counsel and while, of course, there could be no objection to the evidence on behalf of the wife, counsel for Gadziala did not object that it was either wholly inadmissible as against Gadziala or at least admissible only for a limited purpose. The respondent, a Ukrainian who spoke broken English, was thereafter cross-examined by counsel for Gadziala and was asked what he had intended to do with the room in his house which had been occupied by Gadziala up to the time when the latter moved elsewhere, and to this question the answer made was:—

> My wife moving one back (sic) in his same place, and I say "what is the idea?", and my wife says, "I am going to sleep in the same place where my true husband sleep", and I said, "Who is your husband?" and she said, "Albert Gadziala."

Later the respondent was questioned, apparently on the issue of alienation, whether he had been happy with his wife until the time the respondent had moved away, to which he answered:—

> I am not happy because my wife say I am not husband; Albert Gadziala her husband. How am I going to be happy that time? (sic) My life is broke—breaking to pieces.

No objection was made to either of these answers as being not responsive to the question.

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Both of the appellants gave evidence, both denying the allegations of adultery, and the wife denied having made the admissions to which reference has been made above.

When the learned trial judge delivered his charge to the jury, he commenced by informing them as to the nature of the issues which they were required to consider. In charging them upon the issue between the respondent and his wife as to his right to a divorce, he said, referring to the evidence, that the respondent relied in part on his wife's admission that she had slept with Gadziala and that she had said that the latter was her husband. After reviewing the evidence directed to that issue, he charged the jury upon the issue of criminal conversation and alienation of the wife's affections. In the course of this portion of the charge no reference was made to the admission of the wife.

After the jury had withdrawn, counsel were asked if they had any objections to the charge. Counsel for Gadziala objected to part of the charge but said nothing on the question of the admissibility or the effect of the admissions by the wife to which I have referred.

In a situation such as arose at the trial, it was an obvious disadvantage to the appellant Gadziala that the causes of action asserted against him should be tried together with that asserted against the wife. There is, however, nothing in the record to suggest that any application was made prior to the hearing for a severance or a direction that there be separate trials. Any risk that the joinder entailed was assumed by the appellant Gadziala. I think that the proper inference to be drawn from the course of the trial and the failure to draw the attention of the trial judge to what is now complained of as non-direction is that counsel for Gadziala was willing to have the issues against the latter decided upon the evidence as it stood, relying upon the denials of both appellants as to the truth of the alleged admissions.

In these circumstances, it is, in my opinion, not open to the appellant Gadziala to complain of the alleged non-direction. I think the principle to be applied is that referred to by Duff J. (as he then was) in *Scott* v. *Fernie Lumber Co.* (1) at p. 96 where, referring to the long standing rule

(1) (1904) 11 B.C.R. 91.

which holds a litigant to a position deliberately assumed by his counsel at the trial, that learned judge said:—

> The rule is no mere technicality of practice; but the particular application of a sound and all important maxim—that litigants shall not play fast and loose with the course of litigation—finding a place one should expect, in any enlightened system of forensic procedure.

The rule thus stated was approved in the judgment of the majority of this Court in *Spencer* v. *Field* (1).

As the objection on the part of the appellant Gadziala is as to non-direction, the principle stated by Lord Halsbury L.C. in *Nevill* v. *Fine Art and General Insurance Company* (2), is, in my opinion, also applicable.

I would dismiss these appeals with costs.

CARTWRIGHT J.:—The nature of this action and the orders granting leave to appeal to the appellant Magda Boykowych are described in the reasons of my Lord the Chief Justice.

The grounds of appeal relied upon in the Court of Appeal (3) are summarized in the reasons of Roach J.A. as follows:—

> 1. That the learned trial judge erred in his charge to the jury as to the degree of proof necessary to prove adultery.
>
> 2. That there was insufficient evidence to prove adultery, and the jury's finding of adultery was perverse.
>
> 3. That evidence of admissions of adultery made by the wife, not in the presence of the defendant Gadziala were not admissible as against him, and the trial judge erred in not so directing the jury.

Before us counsel for the appellants relied chiefly upon the first and third of these grounds.

As to the first ground of appeal, the applicable law is concisely stated in the following paragraph in the judgment of my brother Locke, speaking for the majority of the Court in *Smith* v. *Smith and Smedman* (4) at 330:—

> The question we are to determine in the present matter is restricted to the standard of proof required in divorce proceedings in British Columbia, where the issue is as to whether adultery has been committed. No question affecting the legitimacy of offspring arises. The nature of the proof required is, in my opinion, the same as it is in other civil actions. If the court is not "satisfied" in any civil action of the plaintiff's right to recover, the action should fail. The rule as stated in *Cooper* v. *Slade* (5), is, in my opinion, applicable.

(1) [1939] S.C.R. 36 at 42.
(2) [1897] A.C. 68 at 76.
(3) [1953] O.R. 827 at 829.
(4) [1952] 2 S.C.R. 312.
(5) (1858) 6 H.L.C. 746.

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Cartwright J.

In my opinion there is no difference between the law of British Columbia and that of Ontario in this matter, and the fact that in the case before us a claim for damages for criminal conversation was joined with that for divorce does not alter the standard of proof required. The charge of the learned trial judge in so far as this first point is concerned appears to me to have been a sufficient statement of the law.

As to the second ground of appeal, the relevant evidence is summarized in the reasons of Roach J.A. and I agree with his conclusion that it was sufficient to support the jury's finding that adultery had been committed.

As to the third ground of appeal, the respondent testified:—(i) that after he had given Gadziala notice to quit and Gadziala had moved out, the respondent's wife went to sleep alone in the room which Gadziala had previously occupied and said to the respondent:—"Don't bother me no more. You are not my husband. My husband is Albert Gadziala"; (ii) that on the same occasion she said:—"I lay down and I put my back in the same place as my husband sleep—Albert Gadziala"; (iii) that after his wife had gone to live in the same house with Gadziala she telephoned him and said:—"I want to tell you something. Don't bother me any more because my husband be Albert Gadziala. I live with him and I sleep with him like man and wife." The appellant wife denied having made any of these statements. The appellant Gadziala was not present when they were said to have been made.

The evidence of the respondent that these statements were made was, of course, admissible for all purposes as against the appellant wife. In my opinion, it was admissible against the appellant Gadziala but for a limited purpose only, that is as forming part of the *res gestae* and constituting relevant items of circumstantial evidence accompanying and of assistance in explaining the acts of the appellant wife in leaving her husband's bed and in leaving his home and going to live in that of Gadziala. The evidence appears to me to fall within the reasoning of the judgment of the majority of the Court in *Welstead* v. *Brown* (1), at pages 19 and 20, dealing with the first of the

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

two grounds on which the statement of the plaintiff's wife in that case was held to be admissible although made in the absence of the defendant.

As this evidence was, as against Gadziala, admissible for this limited purpose only, it was the duty of the learned trial judge to make this clear to the jury and particularly to point out to them that if they believed the statements were made they were not to take them as direct evidence of the truth of the statement of fact that the appellant wife had slept with Gadziala. With the greatest respect, I am unable to agree with the view of Roach J.A. that the learned trial judge adequately performed this duty. However, notwithstanding the failure to give a proper direction on this point, on a consideration of the whole record, I agree with the conclusion of my Lord the Chief Justice that there was no substantial wrong or miscarriage.

I would dispose of these appeals as proposed by my Lord the Chief Justice.

Appeals dismissed with costs.

Solicitors for the appellant, Magda Boykowych: *Day, Wilson, Kelly, Martin & Morden.*

Solicitors for the appellant, Albert Gadziala: *Chappell, Walsh & Morrison.*

Solicitors for the respondent: *Jackson & Cuttell.*

THE STEEL COMPANY OF CANADA LIMITED *(Defendant)* ..... APPELLANT;

AND

HER MAJESTY THE QUEEN *(Plaintiff)* ..... RESPONDENT.

1954
*Oct. 6

1955
*Jan. 25

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Sales tax—Meaning of term "F.O.B. Hd. of Lakes"—Whether delivery of the goods—Whether property passed to purchasers—Special War Revenue Act, R.S.C. 1927, c. 179, s. 86(1)—Sale of Goods Act, R.S.M. 1940, c. 185, ss. 18, 20, 33(1).

The appellant, a Montreal manufacturer, received orders for the purchase of unascertained goods from buyers in Western Canada. The orders

*PRESENT: Kerwin C.J. and Taschereau, Locke, Fauteux and Abbott JJ.

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had been placed and accepted at the sales office of the appellant at Winnipeg. In accordance therewith, the goods were delivered to a steamship carrier at Montreal for shipment. The invoices showed that they were to be shipped from Montreal by the carrier to the head of the lakes when navigation opened and by rail from there to their destination. The freight was to be collect, but the invoices were marked "F.O.B. Hd. of Lakes" and showed that the freight from Montreal to the head of the lakes was to be deducted from the sale price. The bills of lading, obtained by the appellant and forwarded to the purchasers, showed that the goods were appropriated to the several contracts. The goods were destroyed by fire while in the carrier's possession in Montreal awaiting shipment.

The Crown's claim for sales tax on the price of the goods was based on s. 86(1)(*a*) of the *Special War Revenue Act*, R.S.C. 1927, c. 179, which provided that sales tax was payable in respect of goods when they were delivered to the purchasers or when property in them passed to the purchasers. The Exchequer Court maintained the Crown's claim.

Held (Abbott J. dissenting), that the appeal should be allowed.

Per Kerwin C.J. and Fauteux J.: The presence in the invoices of the words "F.O.B. Hd. of Lakes" brings the case within the opening part of s. 20 of the *Manitoba Sale of Goods Act*, R.S.M. 1940, c. 185 which applies to the contracts between the appellant and its customers: "Unless a different intention appears . . .". The circumstances do not take it out of the general rule, as stated in the 8th edition of Benjamin on Sale page 691, that the property passes only when the goods are put on board.

Even if it could be said that there had been no physical delivery, the second proviso of s. 86(1) of the *Special War Revenue Act* does not apply, since the property did not pass to the purchasers.

Per Taschereau and Locke JJ.: Liability for the tax would attach only when the goods were delivered in accordance with the contracts or the property in them passed to the purchasers and they became liable to payment of the purchase price. Here there was no delivery and the purchasers had not become liable. The evidence adduced by the Crown proved that the sales were made F.O.B. Port Arthur or Fort William, terms which have an accepted legal meaning: *Wimble* v. *Rosenberg* (1913) 3 K.B. 743, Benjamin on Sale, 8th Ed. p. 691: *Maine Spring Co.* v. *Sutcliffe* (1917) 87 L.J.K.B. 382. In view of the terms of the contracts the matter was not affected by s. 33(1) of the *Manitoba Sale of Goods Act*.

Per Abbott J. (dissenting): The delivery by the appellant to the carrier was a delivery to such carrier as agent of the buyer within the meaning of s. 86(1)(*a*) of the *Special War Revenue Act*. The use of the term "F.O.B.", in this case, merely conditioned one of the constituent elements in the sale price.

APPEAL from the judgment of the Exchequer Court of Canada, Thorson P. (1), maintaining the Crown's claim for sales tax under the *Special War Revenue Act*, R.S.C. 1927, c. 179.

(1) [1953] Ex. C.R. 200.

H. Hansard, Q.C. for the appellant.

J. A. Prud'Homme, Q.C. for the respondent.

The judgment of Kerwin C.J. and Fauteux J. was delivered by:—

THE CHIEF JUSTICE:—The respondent claims from the appellant, The Steel Company of Canada, Limited, a sales tax on the sale price of certain goods manufactured by the appellant in Montreal and delivered by it to Canada Steamship Lines Limited for shipment to various companies beyond the Head of the Lakes. While in the possession of the Steamship Company in Montreal the goods were destroyed by fire and the appellant contends that no tax became payable under the relevant statutory provision, s. 86(1) of *The Special War Revenue Act,* R.S.C. 1927, c. 179, as amended by c. 45 of the Statutes of 1936:—

86. (1) There shall be imposed, levied and collected a consumption or sales tax of eight per cent on the sale price of all goods,—

(*a*) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof.

Provided that in the case of any contract for the sale of goods wherein it is provided that the sale price shall be paid to the manufacturer or producer by instalments as the work progresses, or under any form of conditional sales agreement, contract of hire-purchase or any form of contract whereby the property in the goods sold does not pass to the purchaser thereof until a future date, notwithstanding partial payment by instalments, the said tax shall be payable *pro tanto* at the time each of such instalments falls due and becomes payable in accordance with the terms of the contract, and all such transactions shall for the purposes of this section, be regarded as sales and deliveries.

Provided further that in any case where there is no physical delivery of the goods by the manufacturer or producer, the said tax shall be payable when the property in the said goods passes to the purchaser thereof.

The records of the appellant were destroyed in the usual course of business, so that the orders for the goods in question could not be produced at the trial. However, from the examination for discovery of C. E. Taggart, the appellant's Divisional Supervisor of Invoices and Claims, and his letter, which, by consent, is to be treated as part of his examination, it appears that all the goods were ordered by the various purchasers from the office of the appellant at Winnipeg, Manitoba, and there accepted by it. S. 18 and

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the relevant parts of s. 20 of *The Sale of Goods Act*, R.S.M. 1940, c. 185, must therefore be considered:—

18. Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

20. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

(*e*) Rule 5.—Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. The assent may be express or implied, and may be given either before or after the appropriation is made. Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

The contracts for sale were for unascertained goods, such as nails, etc., but all such goods were appropriated to the several contracts by the appellant, since, as appears by an admission filed at the trial, all the goods were identified by marks, tags, or otherwise, as being the goods, wares and merchandise consigned to the consignees named in the bills of lading and they were taken to the premises of the Steamship Company, where the latter's forms of bills of lading, which had been filled in by the appellant, were signed by the Steamship Company. The bills of lading were non-negotiable and were issued in the names of the several purchasers as consignees. The Steamship Company kept one and delivered two to the appellant which retained one and sent the other to the purchaser with the appropriate invoices.

In the invoices in addition to showing the name of the purchaser, there was inserted in typewriting under ROUTE (which was printed), "C.S.L. WHEN NAVIGATION OPENS", or something similar thereto. Under the printed heading F.O.B. was typed "HD. of LAKES" or words to the same effect. Under the printed heading FREIGHT was typed the word "COLLECT". The body of the invoice, after showing the prices charged, credited an allowance for freight, being the freight charged by Canada Steamship

Lines, Limited, from Montreal to the Head of the Lakes, leaving a net amount upon which the 8% sales tax was computed and charged to the purchasers.

I agree with the contention on behalf of the appellant that, while it might have been argued that the goods were unconditionally appropriated to the contracts by the marks, or tags, and by the delivery of them to the carrier, if "F.O.B. HD. OF LAKES" had not appeared in the invoices, the presence of these words brings the case within the opening part of s. 20 of The Manitoba Sales of Goods Act "Unless a different intention appears". The authorities justify the statement in the 8th edition of Benjamin in Sale, p. 691:—

> The meaning of these words (F.O.B.) is that the seller is to put the goods on board at his own expense on account of the person for whom they are shipped; delivery is made, and the goods are at the risk, of the buyer, from the time when they are so put on board.

This does not mean that in all F.O.B. cases the property in the goods contracted to be sold passes only when the goods are so put on board, but the circumstances in the present instance do not take it out of the general rule. The duty of the appellant to pay the freight to the Head of the Lakes is one that would usually accompany the obligation to put the goods Free on Board.

Even if it could be said that there had been no physical delivery of the goods, the second proviso in s-s. (1) of s. 86 of *The Special War Revenue Act* does not apply, because the property in the goods did not pass to the purchasers. The appeal should be allowed and the action dismissed with costs throughout.

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

LOCKE J.:—This is an appeal from a judgment delivered in the Exchequer Court (1) by which the claim of the Crown for sales tax and penalties under the provisions of section 86(1) of the *Special War Revenue Act* (R.S.C. 1927, c. 179) as finally amended by section 5 of chapter 45 of the Statutes of 1936, was allowed.

The claim was advanced in respect of the sale of merchandise manufactured by the appellant at or near

(1) [1953] Ex. C.R. 200.

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Montreal in March and April 1944 to the J. H. Ashdown Hardware Co. Ltd., described as being of Winnipeg, to Marshall Wells Co. Ltd. of Port Arthur, Winnipeg and Calgary, and Northern Hardware Co. Ltd. of Edmonton. It was alleged in the information that delivery was made to the respective purchasers on or prior to May 5, 1944, in Montreal, by delivering the merchandise to Canada Steamship Lines Ltd. as a public carrier for the account of the purchasers, that bills of lading made to the order of the purchasers were issued by the steamship company and forwarded by the defendant to the purchasers and that the property in the goods and merchandise passed to the purchasers at or prior to their delivery to it at Montreal. Other than the allegations that the purchasers were not licensed manufacturers or wholesalers, within the meaning of Part XIII of the *Special War Revenue Act,* all of these allegations were put in issue by the Statement of Defence. The appellant alleged that the merchandise referred to was destroyed by fire on May 5, 1944, at the warehouse of the Steamship Company. It was further alleged that all of the merchandise had been sold upon terms that physical delivery would be made by the appellant at specified points f.o.b. and that no such delivery had been made at the time the goods were destroyed. By way of reply, the respondent denied that it was a term of the sale that delivery of the merchandise should be made at specified points f.o.b.

It was upon this record that the action went to trial. Contrary to the practice of this Court, the proceedings at the trial do not form part of the case filed and we are accordingly without any record of what took place before the learned President. The matter is of some importance since findings of fact were made in the judgment delivered which are not supported by the material contained in the Case, which consists merely of what appears to be the complete transcript of the examination for discovery of C. E. Taggart, who described himself as Divisional Supervisor "over invoices, claims, etc." of the appellant company, an admission that the goods in question were destroyed by fire at Montreal as aforesaid, that the practice of the Winnipeg sales office of the appellant when orders were received was to acknowledge them, either by a postcard or letter, and that the goods had been marked with identifying marks

when delivered by the appellant to the steamship company and copies of the invoices and bills of lading issued by the steamship company in respect of the goods.

It was, in the state of the pleadings, an essential part of the case for the Crown to show the terms upon which the goods had been sold to these three companies and in determining the law applicable in the interpretation of the respective contracts to show the place where the respective agreements were made. From the meagre evidence available, it appears that the Ashdown Company's main place of business is in Manitoba; the Marshall Wells Company apparently carries on business in Port Arthur, Winnipeg and Calgary and the Northern Hardware Company at Edmonton. Taggart had not taken any part in obtaining any of the orders and was unable to produce any written orders for the goods, if such were given, by any of the companies and there is no evidence as to where the orders of the Marshall Wells and the Northern Hardware companies were given or accepted. As to the Ashdown Company, it appears to have been assumed by him that they were given either orally or in writing to the sales office of the appellant in Winnipeg but, as to this, it is clear that he had no first hand knowledge.

In the judgment of the learned President it is said that the orders for the goods were placed with the defendant's sales office in Winnipeg. As Taggart said that he could not swear that this was so in the case of the orders of the Ashdown Hardware Company and there is no evidence at all on the point in the case of the other two purchasers, I must assume that these facts were admitted by counsel for the appellant at the trial.

The only evidence as to the terms of the contract between the appellant and these purchasers is that afforded by the invoices, copies of which were filed as part of the case of the Crown, and the inferences, if any, which are to be drawn from the manner in which the bills of lading for the various shipments were issued by Canada Steamship Lines Ltd.

In the case of the Ashdown Hardware Company, each of the invoices shows that the goods were to be consigned to it at Winnipeg, the freight to be collected from the consignee, the terms of sale being 2%—30 days and under the designation F.O.B. there appeared the words "Hd. of

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Lakes." In the body of each of the invoices filed there appeared either the words "allce. freight" or the words "allce. freight Montreal to Head of Lakes", and it is common ground that the figures shown under this designation were for the freight charges of the Canada Steamship Company for transporting the goods from Montreal to either Fort William or Port Arthur. In connection with the shipments to the Ashdown Company, six bills of lading were issued by the Steamship Company, each of which acknowledged receipt of the goods consigned to the Ashdown Company in the case of one of the shipments at Port Arthur, one at Fort William and four at Winnipeg. In connection with the last named, the route was shown either "C.S.L. Port Arthur and C.N.R." or "C.S.L. Fort William and C.P.R.". It appears from the evidence of Taggart that these respective bills of lading were prepared in the office of the appellant for the purpose of expedition and signed in the offices of the Steamship Company.

In the case of the sales to Marshall Wells Ltd. one invoice shows the address of that company at Port Arthur and that point was given as the destination of the shipment. As in the case of the shipments to the Ashdown Company, the freight was shown as being collect, the terms being the same and "F.O.B. Hd. of Lakes" appearing in like manner. As against the price of the goods there was shown an allowance for freight, apparently to the Head of the Lakes. The second shipment to that company showed the destination as Calgary and the route Canada Steamship Lines to Fort William and C.P.R. to destination. Part of this shipment was wire and there was endorsed at the foot of the invoice the words "Wire F.O.B. Hd. of Lakes, balance F.O.B. Montreal."

The bills of lading issued in respect of the Marshall Wells shipments showed the destination of part of the goods as Port Arthur, part as Winnipeg and part as Calgary. No invoice was put in evidence as to the Winnipeg shipment.

In the case of the sale to the Northern Hardware Co. Ltd. of Edmonton, the invoice showed the destination as the latter place, the freight to be collect, the terms 2% 30 days and a credit was given on the amount of the total invoice under the heading of "Wire allce. freight Montreal to Hd of Lakes." In the space below the letters F.O.B. in the

invoice, the words "see below" appeared and, at the foot of the invoice, the following appeared "calks F.O.B. Montreal, wire F.O.B. Hd. of Lakes." The bills of lading issued in respect of this shipment showed the destination as Edmonton and the route "C.S.L. to Fort William and C.P.R. to destination."

No question arises as to the portions of the shipments consigned to Marshall Wells Limited and the Northern Hardware Co. Ltd. which were sold F.O.B. Montreal, since the liability to sales tax in respect of these goods was admitted: the only question concerns the liability in respect of the goods sold F.O.B. at the head of the Lakes.

It was shown that the goods required to fulfill the orders were delivered to the Steamship Company's dock in parcels addressed to the consignees and were there awaiting shipment when the fire took place which destroyed them.

Section 86(1) of the *Special War Revenue Act* as amended by c. 45 of the Statutes of 1936, in so far as it affects the present matter, reads as follows:—

86. (1) There shall be imposed, levied and collected a consumption or sales tax of eight per cent on the sale price of all goods,—

(*a*) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof.

.....

Provided further that in any case where there is no physical delivery of the goods by the manufacturer or producer, the said tax shall be payable when the property in the said goods passes to the purchaser thereof.

The section appeared in the *Special War Revenue Act,* Part XIII, under the heading "Consumption or Sales Tax." As it appeared in c. 179, R.S.C. 1927, clause (*a*) read:—

(*a*) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the sale thereof by him.

The section did not include the second sentence above quoted from the 1936 amendment. It was thus made perfectly clear, if there could have been any doubt on the subject, that delivery of the goods or the passing of the property to the purchaser was a pre-requisite to liability for the tax.

The tax is a sales tax and not a tax upon contracts of sale which are not carried out. Liability does not, in my

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opinion, attach unless and until the goods sold are delivered or the property in them passes to the purchaser and the latter becomes liable to payment of the purchase price.

In the present matter the purchasers did not, in my opinion, become liable to pay the purchase price. The sections of the *Manitoba Sale of Goods Act*, which are referred to in the judgment appealed from as to the time when the property in unascertained goods which are the subject of sale passes, are prefaced by the words "unless a different intention appears." Here a different intention does appear. The intention of the parties is made manifest by the terms of the contract and the Steel Company as vendor could have no claim for the purchase price from any of the purchasers until its part of the bargain was carried out.

As it is pointed out by Hamilton L. J. (afterwards Lord Sumner) in *Wimble* v. *Rosenberg* (1), the mercantile meaning of the words "free on board" has long been settled. It is unnecessary, in my opinion, to refer to the decided cases in which this has been done since the result of them appears to me to be accurately stated in the following passage appearing at page 691 of the 8th Edition of Benjamin on Sale:—

> In many mercantile contracts it is stipulated that the seller shall deliver the goods "f.o.b.," i.e., "free on board". The meaning of these words is that the seller is to put the goods on board at his own expense on account of the person for whom they are shipped; delivery is made, and the goods are at the risk, of the buyer, from the time when they are so put on board.
>
> In a contract of sale "ex ship," the seller makes a good delivery if when the vessel has arrived at the port of delivery, and has reached the usual place of delivery therein for the discharge of such goods, he pays the freight, and furnishes the buyer with an effectual direction to the ship to deliver.

In Kennedy's work on Contracts of Sale C.I.F., at page 9 the learned author says in part:—

> The c.i.f. contract is to be distinguished from other forms of contract for the sale of goods sent overseas. Of these the most common are the f.o.b. (free on board), "ex ship" and "arrival" contracts. Under the normal f.o.b. contract the seller has to put the goods on ship at his own expense, whereupon the seller's contractual liability ceases, delivery is complete, and the property and risk in the goods (unless by the special terms of the contract they have already passed) pass to the buyer, who becomes responsible for freight and all subsequent charges.

(1) (1913) 3 K.B. 743 at 759.

In the case of two of the parcels of goods consigned to the Ashdown Company and two of those to Marshall Wells Ltd., the obligation of the Steel Company of Canada, according to the documents, was to deliver them f.o.b. at either Port Arthur or Fort William, which would have required that company at the time of the arrival of the goods at that port to furnish the buyer with an effectual direction to the ship to deliver. In the case of the remaining shipments to these two companies and of the shipment to the Northern Hardware Company, the seller's obligation was to deliver the shipments f.o.b. the designated rail carriers at one or other of these ports. Had any of the shipments been lost while being carried from Montreal to the Head of the Lakes, the loss would have fallen upon the Steel Company.

The claim of the Steel Company against these purchasers, if it had been necessary to resort to action, would have been for goods sold and delivered. The delivery, in order to sustain the cause of action, would have to be at the point designated by the contracts in the absence of any arrangement altering the terms. Any such action by the Steel Company against any of the purchasers would necessarily fail since there was no such delivery, the carrying out of the sale being frustrated by the destruction of the goods at Montreal.

As pointed out by Bailhache, J. in *Maine Spinning Co.* v. *Sutcliffe* (1), a term of a contract for the sale of goods as to the mode of delivery is not entirely for the benefit of either party to the contract, and neither can waive it without the consent of the other; it is a part of the contract which has to be fulfilled by the seller making delivery at that particular place and by the buyer receiving delivery there. In that case, where by the terms of the contract the goods were to be delivered f.o.b. Liverpool, the buyer contended that he was entitled to waive this term and take delivery before they were received at Liverpool, or at Liverpool on rail instead of on board ship. Bailhache, J., holding that one party to such a contract could not waive a term of the contract without the consent of the other, dismissed the action. This decision, which has been repeatedly referred to and the accuracy of which has never been

(1) (1917) 87 L.J.K.B. 382.

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doubted, would be an answer, in my opinion, to any claim by the purchasers in the present matter if they had sought to compel delivery at Montreal, a claim which might be properly asserted by them if the argument which succeeded in this matter at the trial were to be sound. Since a purchaser cannot compel a delivery elsewhere than at the place specified for delivery in an f.o.b. contract, is it to be said that the vendor, on his part, can enforce payment otherwise than after delivery in accordance with its terms?

While the case for the Crown, proven by the documents to which I have referred, showed that the sales were f.o.b. Head of Lakes, we have been asked to infer that, in reality, this was not so and that there was simply an arrangement between the parties whereby the seller absorbed part of the freight charges, the balance to be paid by the purchasers. But this would be mere speculation with nothing to support it. It is not the function of this Court to indulge in speculation as to the nature of the contracts which the parties intended to enter into, but rather to construe the contracts which, it was proved, they in fact made.

As to the argument based on section 33(1) of the *Sale of Goods Act*, it is sufficient to say that its provisions must be applied subject to the express terms of the contracts of sale. To do otherwise would be to fail to give effect to any f.o.b. contract which provided for delivery elsewhere than at the place where the carriage commenced.

I am unable, with respect, to agree with the opinion of the learned trial Judge that the *Sale of Goods Act* of Manitoba, assuming it applies, affected either the question as to whether delivery had been made or the property had passed since those questions depend upon the construction of the contracts put forward by the Crown as those between the seller and the purchasers.

I would allow this appeal, with costs, and dismiss the action.

ABBOTT J. (dissenting):—This is an action by the Crown to recover consumption or sales tax on the price of certain nails and other metal goods manufactured by the appellant and sold to various purchasers in Western Canada.

The facts are fully set forth in the judgment of the President of the Exchequer Court (1) and are not in dispute.

Appellant had received orders from certain hardware firms in Western Canada for nails and other supplies to be manufactured and shipped from its Montreal plant. The orders were accepted, the goods were manufactured, appropriated to the orders in question, packaged, and delivered by appellant to the Canada Steamship Lines at Montreal to be shipped via that line to the head of the Lakes and thence by rail to the various destinations in Western Canada. The goods were destroyed by fire while in the possession of Canada Steamship Lines and before they had left Montreal.

The Steamship Company, at the time of receiving the goods from appellant, issued non-negotiable bills of lading in the name of the purchasers, kept one copy, delivered two others to the appellant, which kept one copy and sent the third with the invoice to the consignees in Western Canada. Details of the sales are set out in invoices dated from March 14, 1944, to April 14, 1945.

Under the heading "Route" the invoices carried the following notations, namely, "CSL when navigation opens" or "Canada Steamship Lines Ltd." or "Canada Steamship Lines" or "CSL & Rail" or simply "CSL". All the goods were to be shipped when navigation opened. Under the heading "F.O.B.", the invoices carried the notation "Hd. of Lakes" and in addition two of them carried the notation "Montreal" with respect to a certain class of merchandise included in those two invoices. All the invoices called for the freight to be "collect" but there was also an item in each providing for freight allowances under various captions, namely, "Allce. Freight Montreal to Head of Lakes" or simply "Allce. Freight". In each case the amount of the allowance was deducted from the price of the goods. Sales tax was calculated on the net amount after making such deduction. It must be assumed therefore that such net amount represented the sale price of the goods. In one of the invoices where a portion of the goods covered by that invoice was stated to be sold "F.O.B. Montreal", a freight

(1) [1953] Ex. C.R. 200.

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allowance covering freight to Winnipeg was deducted while, in the other, no freight allowance was given with respect to the goods covered by that part of the invoice.

The trial judge found that the contracts between appellant and the customers were made in Winnipeg and that the law applicable to them is the law of Manitoba as found in *The Sale of Goods Act*, R.S.M. 1940, chapter 185. This finding appears to have been accepted by both parties.

The Crown claimed tax under section 86(1) of the *Special War Revenue Act* (now the *Excise Tax Act*, R.S.C. 1927, c. 179, as amended in 1936, Statutes of Canada, 1936, c. 45), the relevant part of which reads as follows:—

86(1) There shall be imposed, levied and collected a consumption or sales tax of eight per cent on the sale price of all goods,—

(*a*) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof.

Provided that in the case of any contract for the sale of goods wherein it is provided that the sale price shall be paid to the manufacturer or producer by instalments as the work progresses, or under any form of conditional sales agreement, contract of hire-purchase, or any form of contract whereby the property in the goods sold does not pass to the purchaser thereof until a future date, notwithstanding partial payment by instalments, the said tax shall be payable pro tanto at the time each of such instalments falls due and becomes payable in accordance with the terms of the contract, and all such transactions shall for the purposes of this section, be regarded as sales and deliveries.

Provided further that in any case where there is no physical delivery of the goods by the manufacturer or producer, the said tax shall be payable when the property in the said goods passes to the purchaser thereof.

The Crown contended that delivery of the goods by the appellant to the Canada Steamship Lines as carrier was delivery of the goods to the purchaser within the meaning of paragraph (*a*) of said section 86(1), or, alternatively, that the property in the goods had passed to the purchaser, and that consequently the second proviso to section 86(1) was applicable.

Appellant contested the claim for tax on the ground that under the terms of the contracts in question, and in particular as a result of the inclusion of the term "F.O.B. Hd. of Lakes" in the invoices, delivery of the goods was to take place at the head of the Lakes; that the goods having been destroyed by fire while in the shed of Canada Steamship Lines at Montreal, there was never any delivery of the

goods to the purchaser, and that it was a condition of the contract that the property in the goods should not pass to the purchaser until they had been delivered at the head of the Lakes.

This interpretation of the term "F.O.B. Hd. of Lakes" was rejected by the trial judge and I think he was right in doing so. The learned judge took the view, however, that in the circumstances of the case, delivery to the carrier, while delivery to the purchaser, was a constructive or "deemed" delivery within the meaning of section 33(1) of the *Manitoba Sale of Goods Act,* which is in identical terms to section 32(1) of the *Sales of Goods Act,* 1893, in England.

On this assumption that the delivery of the goods to Canada Steamship Lines was a constructive or deemed delivery, and relying upon the decision of the Privy Council in *The King* v. *Dominion Engineering Company, Limited* (1), the learned judge held that there was no physical delivery of the goods to the purchaser within the meaning of paragraph (*a*) of section 86(1) of the said *Act.*

He held however, that the property in the goods referred to had passed from the appellant to the several purchasers, at the latest, at the time of delivery of the goods to Canada Steamship Lines, and that the appellant was therefore liable for the tax claimed, under the terms of the second proviso to the said section 86(1).

Since I am of opinion that there was actual physical delivery of the goods in question to the purchaser, it follows that in my view the decision of the Privy Council in *The King* v. *Dominion Engineering Company, Limited* is not applicable.

With respect I do not agree with the view expressed by the trial judge that delivery to a carrier within the terms of section 33(1) of the Manitoba Act constituted a constructive delivery. Under that section there is merely a presumption created, which may be rebutted, that delivery to a carrier is delivery to such carrier as agent of the buyer; See Benjamin on Sale, 8th ed. pp. 737-8.

In the case at bar, therefore, unless this presumption was rebutted, delivery to Canada Steamship Lines was delivery to the buyer. The learned trial judge found that it had not been rebutted and I share his view as to this.

(1) [1947] 1 D.L.R. 1.

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Appellant's case really turns upon the construction to be placed upon the term "F.O.B. Hd. of Lakes". As to this I am in agreement with the conclusions reached by the learned trial judge. The term "F.O.B." at specified point does not necessarily imply that delivery is to take place and the property in the goods to pass at such point. See *Winnipeg Fish Company* v. *Whitman Fish Company* (1) and *Stephens Bros.* v. *Burch* (2).

As Hamilton L.J. said in *Wimble, Sons & Co.* v. *Rosenberg & Sons* (3):

> It is well settled that, on an ordinary f.o.b. contract, when "free on board" does not merely condition the constituent elements in the price but expresses the seller's obligations additional to the bare bargain of purchase and sale, the seller does not "in pursuance of the contract of sale" or as seller send forward or start the goods to the buyer at all except in the sense that he puts the goods safely on board, pays the charge of doing so, and, for the buyer's protection but not under a mandate to send, gives up possession of them to the ship only upon the terms of a reasonable and ordinary bill of lading or other contract of carriage. There his contractual liability as seller ceases, and delivery to the buyer is complete as far as he is concerned.

In my view the words "F.O.B. Hd of Lakes" used in the invoices under consideration "merely condition the constituent elements in the price", to borrow the phrase used by Hamilton L.J. which I have just quoted.

If this were not the case, I do not consider that appellant was justified in deducting the allowance for freight before arriving at the sale price upon which sales tax was computed.

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *McMichael, Common, Howard, Ker & Cate.*

Solicitor for the respondent: *J. Alex. Prud'homme.*

(1) (1909) 41 Can. S.C.R. 453 at 460.

(2) (1909) 10 W.L.R. 400 at 401.

(3) (1913) 3 K.B. 743 at 757.

LUDGER CHARPENTIER *(Petitioner)* ..APPELLANT;

AND

HER MAJESTY THE QUEEN *(Defendant)* ..... RESPONDENT.

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*Oct. 6
1955
*Jan. 25

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Petition of right—Sale of land to Crown—Crown's liability for municipal taxes—Former owner claiming reimbursement for taxes paid.

On April 27, 1949, by a deed of sale, to which was attached the order-in-council authorizing the purchase, the Crown bought a property in Montreal from the appellant. The deed provided that the Crown would pay all the taxes "à compter du 1er avril courant (1949)". The order-in-council authorized the payment of the purchase price "together with such amount as may be legally due by the Crown in respect of taxes or other adjustments . . .".

The Crown reimbursed the appellant one twelfth of the municipal taxes for the year 1948-49. In October 1949, the municipality claimed payment from the appellant of the municipal taxes which were due for the year commencing May 1, 1949. The by-law imposing that tax had been adopted in March 1949.

Upon threat of legal action by the municipality, the appellant paid the tax and claimed from the Crown, by petition of right, the reimbursement of it. The Exchequer Court dismissed the appellant's claim.

Held: The appeal should be dismissed.

The taxes for which reimbursement was sought were not those which the Crown had consented to pay. By the terms of the order-in-council, the only obligation assumed in this respect by the Crown was to pay the taxes legally due by it, and the Crown is not liable for municipal taxes other than those levied for municipal services, which was not the case here.

The representative of the Crown could not bind the Crown to make a payment which was not authorized, nor could or did the Minister, through the mandate given to the Crown's representative, intend or undertake to ratify such an obligation. Indeed, at the time of the contract, the taxes were not due from anyone.

APPEAL from the judgment of the Exchequer Court of Canada, Thorson P., dismissing the appellant's petition of right.

R. Reeves, Q.C. for the appellant.

A. J. Campbell, Q.C. for the respondent.

*PRESENT: Kerwin C.J. and Taschereau, Kellock, Fauteux and Abbott JJ.

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The judgment of the Court was delivered by:—

FAUTEUX J.:—Les faits donnant lieu à ce litige peuvent substantiellement se résumer comme suit:—Aux termes d'un acte notarié, fait et signé à Montréal, le 27 avril 1949, Sa Majesté aux droits du Canada, agissant par le Ministre des Travaux Publics représenté à l'acte par Roland Simard, achetait de l'appelant un immeuble, rue Notre-Dame, en la cité de Montréal, et assumait entre autres obligations, celle

> De payer les taxes, tant municipales que scolaires et toutes impositions foncières auxquelles peut ou pourra être assujetti ledit immeuble à compter du 1er avril courant (1949).

En fait, l'appelant fut, à la signature du contrat, remboursé du douzième des taxes payées par lui pour l'exercice commençant le 1er mai 1948 et se terminant le 30 avril 1949. De cet ajustement, les parties parurent satisfaites et rien ne se produisit jusqu'au 1er octobre 1949 alors que l'appelant reçut, de la cité, un compte de taxes s'élevant à la somme de $7,803.60. Le paiement de cette taxe foncière était exigé des contribuables en vertu d'un règlement adopté par la cité le 14 mars 1949,—par conséquent, antérieurement à la vente,—décrétant qu'une contribution foncière générale représentant un dollar et trente-trois cents et demi pour chaque cent dollars de la valeur des immeubles imposables telle que portée au rôle d'évaluation, était imposée et devait être prélevée pour l'année commençant le 1er mai 1949 et se terminant le 30 avril 1950, et statuant de plus que cette contribution foncière constituait une charge grevant les immeubles imposés et en rendant le propriétaire personnellement responsable. Sur réception de ce compte, l'appelant invoqua la clause précitée du contrat, refusa de payer, chercha ensuite mais vainement à faire acquitter ces taxes par l'intimée et dut, éventuellement, pour éviter d'être poursuivi par la cité, se résoudre à en faire lui-même le paiement.

C'est alors que, s'appuyant toujours et uniquement sur la clause précitée du contrat, il se retourna contre l'intimée pour lui réclamer, par pétition de droit, le remboursement de cette somme payée par lui à la cité. En défense, la Couronne plaida n'avoir jamais assumé ou reconnu l'obligation de payer cette taxe, ni autorisé l'appelant à ce faire et qu'au surplus, l'immeuble, étant devenu sa propriété pour

être occupé par ses services, n'était pas soumis à la contribution foncière imposée en vertu du règlement. Le Juge de première instance décida que cette obligation apparaissant au contrat était, dans ses termes, limitée au paiement des taxes dont, en fait, l'appelant avait été remboursé lors du contrat et, pour cette raison qui était décisive, la pétition de droit fut renvoyée avec dépens. D'où l'appel à cette Cour.

En tout respect, je ne puis me rendre à l'interprétation donnée par le Juge de première instance. La clause précitée impose à l'acheteur l'obligation de prendre à sa charge le paiement de toutes impositions foncières auxquelles l'immeuble vendu était assujetti le 1er avril 1949, ou pouvait le devenir subséquemment. Ajoutons incidemment que cette date du 1er avril s'explique assez bien du fait qu'avant de faire l'acquisition de cet immeuble, l'intimée l'occupait déjà et que ce n'est que jusqu'à cette date du 1er avril que le vendeur exigea du loyer de la Couronne, ainsi qu'il appert aux annexes du contrat. Le procureur de l'intimée a d'ailleurs concédé à l'audition qu'il ne pouvait concourir dans l'interprétation apparaissant au jugement *a quo* et, sur cette base, le supporter.

Ceci, toutefois, ne dispose pas de l'appel, la Couronne ayant plaidé n'avoir jamais assumé le paiement de cette taxe, plaidoyer qu'il faut examiner à la lumière des termes de l'arrêté ministériel C.P. 1790 autorisant l'achat de cet immeuble et dont copie, signée et paraphée par les parties et le notaire, est annexée à la minute du contrat. Suivant ce décret ministériel, le Ministre des Travaux Publics est autorisé à payer le prix d'achat y mentionné *"together with such amount as may be legally due by the Crown in respect of taxes or other adjustments . . ."*. Ainsi devient-il manifeste que l'obligation que la Couronne a consenti d'assumer relativement aux taxes n'est pas, tel qu'apparaissant au contrat "de payer les taxes, tant municipales que scolaires et toutes impositions foncières auxquelles peut ou pourra être assujetti ledit immeuble à compter du 1er avril courant (1949)", mais de payer, s'il en était à l'occasion des ajustements qu'il y avait à faire lors du contrat, tout montant de taxes légalement dû par la Couronne. Au moment où devaient se faire ces ajustements prévus dans l'arrêté ministériel, les taxes que la Couronne était susceptible de légalement devoir, pouvaient être celles imposées relativement

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à l'usage des services municipaux, telle la taxe d'eau, dont la Couronne est responsable, ainsi qu'il a été décidé dans *Minister of Justice for Canada* v. *City of Levis* (1), ou encore des taxes qui ne lui sont pas imposables à raison des dispositions de l'article 125 de l'*Acte de l'Amérique Britannique du Nord,* mais que, par convention avec l'appelant, la Couronne aurait pu, dans l'exercice de la prérogative royale, convenir lui payer ou lui rembourser. Or, les parties sont d'accord que les taxes qui font l'objet du présent litige ne sont pas imposées pour l'usage des services municipaux et l'unique convention invoquée par l'appelant, suivant laquelle la Couronne aurait consenti de les payer, est précisément celle qui fait l'objet du présent litige, laquelle, en ce qui concerne l'obligation de la Couronne à payer les taxes, va au-delà des termes du consentement donné par elle dans l'arrêté ministériel autorisant cette convention. A la vérité, et au moment du contrat, ces taxes imposées pour une année fiscale qui n'était pas encore commencée, n'étaient dues par personne. Mais, dit l'appelant, suivant le mandat donné par le Ministre des Travaux Publics à son représentant à l'acte, Roland Simard, mandat dont copie est annexée à l'acte de vente après avoir été signée et paraphée par les parties et le notaire, le Ministre a ratifié d'avance et s'est engagé à ratifier les actes de son mandataire. Cette clause du mandat se lit comme suit:—

> Hereby ratifying and agreeing to ratify all that my said attorney *may lawfully* do in the premises.

Il est évident, pour les raisons ci-dessus, que Simard ne pouvait en droit donner à cette clause du contrat l'assentiment qu'il a donné en fait et que le Ministre lui-même ne pouvait, pas plus qu'il n'entendait, dans ces termes du mandat, ratifier ou s'engager à ratifier l'obligation de faire un paiement que l'arrêté ministériel n'autorisait pas. Aussi bien cet argument doit-il être écarté.

Etant d'opinion que les taxes dont l'appelant demande le remboursement ne sont pas de celles que la Couronne avait consenti à payer, il en résulte que le recours de

(1) (1919) 45 D.L.R. (P.C.) 180.

l'appelant ne peut être maintenu sur l'unique base sur laquelle il se fonde, i.e., la convention du 27 avril 1949.

Je renverrais l'appel avec dépens.

Appeal dismissed with costs.

Solicitor for the appellant: *Rene Reeves.*

Solicitor for the respondent: *Paul Dalme.*

ALFRED FORTIER *(Plaintiff)* .....APPELLANT;

AND

WILFRID POULIN *(Defendant)* .....RESPONDENT;

AND

OVILA POULIN .....MIS-EN-CAUSE.

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

Appeal—Jurisdiction—Creditor of $430 seeking to have conveyance by debtor to wife set aside—Conveyance made through intermediary—Action paulienne—Test of this Court's jurisdiction.

Where a debtor is not in bankruptcy nor in liquidation, this Court is without jurisdiction to entertain an appeal in the action of a creditor holding a judgment for $430 to set aside a conveyance made by the debtor to his wife through an intermediary. The test of this Court's competency is the value of the appellant's interest in the appeal, which, in this case, is below the required amount.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), dismissing the appellant's appeal from a judgment of the Superior Court in an action paulienne.

E. Veilleux, Q.C. for the appellant.

G. Roberge for the respondent.

R. Beaudoin, Q.C. for the mis-en-cause.

*PRESENT: Taschereau, Rand, Locke, Fauteux and Abbott JJ.

(1) Q.R. [1953] Q.B. 666.

1954

FORTIER v. POULIN

The judgment of the court was delivered by:—

RAND J.:—This is an action brought by a creditor holding a judgment against the respondent Wilfrid Poulin for $430 and costs to set aside or to have declared void a transfer of an immovable alleged to have been fraudulently conveyed by Poulin to his wife, the respondent Yvonne Poulin, through the intermediation of the mis-en-cause. The debtor is not in bankruptcy, nor is there present any form of judicial liquidation, although he is claimed to be insolvent. The question of the jurisdiction of this Court therefore arises.

It is a settled rule that in these circumstances the benefit of a judgment recovered in an *action paulienne* enures solely to the creditor who is a party to it: Dalloz J.G (1925) R.P. prem. partie, p. 223, notes 1, 2 and 3. On the other hand, treating the two conveyances as constituting a transfer from the husband to the wife and therefore void, the interest of the appellant is obviously limited to the judgment which he seeks to realize.

Although, then, the immovable may be worth more than $2,000, the test of our competency to hear the appeal is the value of the appellant's interest in it: *City of Sydney* v. *Wright* (1); and since that value is below the required amount, we are without jurisdiction.

The appeal must be quashed with costs as of a motion to that effect.

Appeal quashed with costs.

Solicitors for the appellant: *Veilleux & Peloquin.*

Solicitors for the respondent: *Talbot & Roberge.*

Solicitor for the mis-en-cause: *Rosaire Beaudoin.*

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(1) [1945] S.C.R. 131.

THE UNITED STATES OF AMERICA ..APPELLANT; 1955 *Mar. 7

AND

WALTER H. LINK AND HARRY H. GREEN ..... } RESPONDENTS.

MOTION FOR LEAVE TO APPEAL

Appeal—Jurisdiction—Extradition—Refusal of judge to issue warrant of committal under Extradition Act, R.S.C. 1952, c. 322, s. 18—Whether judgment within Supreme Court Act, R.S.C. 1952, c. 259.

The refusal of a judge of the Superior Court of the Province of Quebec to issue a warrant of committal under s. 18 of the *Extradition Act*, R.S.C. 1952, c. 322, is not a judgment within the meaning of s. 41 of the *Supreme Court Act*, R.S.C. 1952, c. 259. Consequently, this Court has no jurisdiction to grant leave to appeal from such refusal.

T. H. Montgomery for the applicant.

M. Gross for the respondent Link.

M. Gaboury, Q.C. for the respondent Green.

D. H. W. Henry for the Attorney General of Canada.

G. Hill, Q.C. for the Attorney General of Quebec.

This was an application under s. 41 of the *Supreme Court Act*, R.S.C. 1952, c. 259, for leave to appeal from the refusal of Chief Justice Scott, of the Superior Court of the Province of Quebec, to issue a warrant for the committal of the respondents under s. 18 of the *Extradition Act*, R.S.C. 1952, c. 322.

The Court requested Mr. Montgomery to deal first with the question of the jurisdiction of this Court to grant leave. At the conclusion of his argument Counsel for the Attorney General of Canada and for the Attorney General of Quebec stated that they took no position with reference to that question. Without calling on Counsel for the respondents the Chief Justice announced that the Members of the Court were unanimously of the opinion that there was no jurisdiction, as the refusal of Chief Justice Scott was not a judgment, as defined by s. 2(*d*), within the meaning of s. 41 of the *Supreme Court Act*.

Application refused.

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

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THE ROYAL TRUST COMPANY and ROBERT W. McMURRAY, Executors of the Estate of William Marr Crawford, deceased *(Plaintiffs)* ..... APPELLANTS;

CATHERINE McLEAN CRAWFORD *(Defendant)* ..... APPELLANT;

AND

CATHERINE GRAHAM CRAWFORD and others *(Defendants)* ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Wills—Residuary estate consisting of unauthorized securities—Trust for conversion with power to postpone—Rights of Tenant for life—Enjoyment in specie.

A testator gave the residue of his estate upon trust to convert with power to postpone conversion and directed his trustees to pay the income of his residuary estate to his widow for life and upon her death to set aside sufficient of the residue to yield certain annuities and subject thereto to divide the residue among the testator's nephews and nieces then alive. The major part of the residue consisted of shares in a company, a type of security in which trustees were not by law authorized to invest. At the date of death the company had built up a large surplus which it proceeded to distribute to shareholders as a dividend. This raised the question as to whether the widow was entitled to enjoy the dividends in specie or whether an order similar to that in *In re Chaytor: Chaytor* v. *Horn* [1905] 1 Ch. 233 should be made.

Held (Estey and Cartwright JJ. dissenting): That upon a proper construction of the will it was to be presumed that the testator intended that the residue was to be enjoyed by different persons in succession and applying the rule in *Howe* v. *Dartmouth (Earl)* 7 Ves. 137, a duty rested on the trustees to convert. The rule might have been excluded if the will disclosed an intention either by express direction or necessary implication that the property should be enjoyed in specie but the onus of showing this had not been met.

Per Estey and Cartwright JJ. (dissenting): By clause IV (*b*) of the will a power was conferred upon the trustees to retain until the trusts were completely executed. By clause IV (*e*) the testator gave to his widow the net annual income of all the securities representing the residue of his estate including income from unconverted property subject only to payment of specified annuities thereby excluding the rule in *Howe* v. *Dartmouth, Earl, supra. Re Thomas* [1891] 3 Ch. 482 at 486 approved in *In Re Chaytor, Chaytor* v. *Horn* [1905] 1 Ch. 233 at 238 referred to.

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

Judgment of the Court of Appeal for British Columbia (1953-54) 10 W.W.R. (N.S.) 433 affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) affirming a judgment of Macfarlane J. (2) determining certain questions raised on originating summons by the executors of the Estate of William Marr Crawford, deceased.

C. K. Guild, Q.C. and *C. C. Locke* for the appellant C. M. Crawford.

P. R. Brissenden for the appellant executors.

R. H. Tupper, Q.C. and *D. K. Macrae* for the remainder-men, respondents.

THE CHIEF JUSTICE:—There can be no dispute as to the rule in *Howe* v. *Lord Dartmouth* (3), the statement of which in the 4th edition of Hanbury's Modern Equity was approved in *In re Lennox Estate* (4):—

> Where residuary personalty is settled on death for the benefit of persons who are to enjoy it in succession, the duty of the trustees is to convert all such parts of it as are of a wasting or future or reversionary nature, or consist of unauthorized securities, into property of a permanent and income-bearing character.

It was pointed out by this Court that the rule does not proceed on any presumed intention of the testator that the property should be converted, but is based upon the presumption that he intended it to be enjoyed by different persons in succession.

The *Lennox* judgment also recognized that the rule might be excluded if a will disclosed an intention either by an express direction or necessary implication that the property should be enjoyed in specie, and held that the onus of showing that the words in any particular will exclude the rule lies on those who submit it should not be applied. *Macdonald* v. *Irwine* (5), had endeavoured to put an end to refinements of construction, but some of the later decisions of single Judges in England, referred to in the Courts below and in argument before us, if correct, would go very far towards effecting the extinction of a salutary

(1) (1953-54) 10 W.W.R. (N.S.) 433; [1954] 1 D.L.R. 362.
(2) (1953) 8 W.W.R. (N.S.) 519, [1953] 4 D.L.R. 851.
(3) (1802) 7 Ves. 137; 32 E.R. 56.
(4) [1949] S.C.R. 446.
(5) (1878) 8 Ch. D. 101.

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Kerwin C.J.

rule. However, the problem is always one of construction and, in the present case, I agee with the conclusions of the Judge of first instance and of the Court of Appeal that the rule has not been excluded.

The appeal should be dismissed and the costs of all parties paid out of the estate, those of the executors as between solicitor and client.

RAND J.:—This appeal arises out of the administration of the estate of a testator who died in 1942 and the question is whether a dividend of $450,555.71 less taxes of $124,206.18, representing accumulated earnings at the end of 1939 of a stevedoring company, 1934 of the 2334 issued shares of the capital stock of which were owned or controlled by the testator and now by the trustees, goes as income to the life tenant widow or is to be treated as capital. The estate was valued at $680,818.73, with $529,746.76 representing the interest in the company. The latter is largely a servicing organization, the physical assets of which are relatively of small value. The testator had been the directing force within the company and its good will and position in the shipping life of Vancouver were largely his creation.

The dividend was at the rate of $193.04 on each share against a valuation of $256.70 for succession duty purposes and as is seen the abstraction of these earnings in 1947 reduced that value by approximately 75%. The company had before and has since the death paid ordinary dividends and since 1939 has added further accumulations to the reserves.

The original executors and trustees were the appellants Trust Company and McMurray and the widow; but the latter retired in 1950, and appeals as a beneficiary.

By the will, after a legacy of $10,000 and of furniture, household effects and other personal articles to his wife, the testator gives all the residue of his property to the trustees upon trust, first, to allow his wife to keep and use the home until her death and then

> to sell, call in and convert into money all the remainder of my estate not consisting of money at such time or times, in such manner and upon such terms and either for cash or credit or for part cash and part credit as my trustees may in their discretion decide upon, with power and discretion to postpone such conversion of such estate or any part or parts thereof for such length of time as they may think best, and I hereby declare that my trustees may retain any portion of my estate in the

form in which it may be at my death (notwithstanding that it may not be in the form of an investment in which trustees are authorized to invest trust funds and whether or not there is a liability attached to any such portion of my estate) for such length of time as my trustees in their discretion deem advisable; and my trustees shall not be held responsible for any loss that may happen to my estate by reason of their so doing.

After paying his debts, expenses, duties and taxes, the trustees are directed

to keep the residue of my estate invested and to pay the net annual income thereof until the death of my wife as follows:—

> In the event of the same not exceeding the sum of Six Thousand Dollars ($6,000), the whole net annual income shall be paid to my wife by quarterly instalments.

Out of the excess beyond that sum annuities were to be paid to certain relatives, and

any surplus income over and above what is required to pay the aforesaid annuities shall be paid to my wife.

Upon the death of his wife, the trusts run to nephews and nieces and their issue, in life and remainder, as hereafter set forth.

The trustees are authorized from time to time to make advances to the widow out of prospective income or

to pay to or for her benefit such part of the capital of my estate as my trustees in their uncontrolled discretion may deem necessary or advisable for her proper support, maintenance and comfort and to advance to and for the benefit of any of my nephews or nieces or their issue such part or parts of the capital of the prospective shares of nephews or nieces or their issue or of the share of my estate for the time being held for the benefit of such nephews or nieces as in their uncontrolled discretion my trustees may deem advisable.

He directs that should any company in which he or his estate holds shares or other interest increase its capital, the trustees may take up and out of the estate moneys pay for the proportions of the increased capital to which the estate may be entitled or may sell the rights thereto. In the interest of the estate, they may purchase additional shares in any such company and join in any plan for its reconstruction, reorganization or amalgamation or for the sale of its assets, and accept shares or securities in lieu of or in exchange for the shares or other interest held by the estate. They may also enter into any pooling or other agreement in connection with the shares or interest. He declares that

in giving to my trustees the foregoing powers, it is my intention to give my trustees power and authority to deal with my interest in any such company or corporation in which I may be interested at the time of my death to the same extent and as fully as I could do if I were alive.

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Finally he designates his wife to be the preferred beneficiary of all life and accident insurance policies except those expressly allocated to administration purposes; the proceeds are to be invested upon trust to pay to her the net income and from time to time so much of the principal as she may require to enable her to live and to keep herself in comfortable circumstances. Any balance remaining at the date of her death is to be held for such persons as she may by will appoint, in default of which it is to be divided among her next of kin as in the case of intestacy. The amount of insurance within this clause exceeds $225,000 but most of it is claimed by the company. This provision is of significance in negativing any implication that other capital is to be placed in effect within the appointment of his wife or is otherwise to go to her relatives.

A wide discretionary authority has thus been conferred on the trustees and they are in control of the company. They decide whether the shares in the company should be sold or the accumulation left in the reserve or distributed in the form of new stock or in cash. They could sell during the first or any succeeding life tenancy. On the contention made, there would be three interests to which, depending on how and when it was dealt with, the dividend might go: if in cash, to one of the two sets of life interests; if in stock, as capital in remainder. Continuing the shares as an investment would inevitably work to the advantage of one or other of the beneficiaries as compared with the benefits following an immediate conversion. But subject to that scope of discretion, the duty to convert remains an underlying responsibility.

As between interests of this kind, in the absence of a clear authorization to prefer one interest over another, the duty of a trustee is to act impartially. When property is to be enjoyed successively, the testator normally contemplates its preservation for that purpose. It is the fulfillment of this overriding intention that underlies the rule of apportionment through actual or constructive conversion of wasting or hazardous into permanent investments. This principle has been elaborated in a long line of decisions not altogether reconcilable with each other, but in its main

features exemplified in *Howe* v. *Earl of Dartmouth* (1); *Dimes* v. *Scott* (2); *In re Chaytor* (3) and *Re Parry* (4).

We have in this case the risks to that impartiality not only of the power to postpone conversion, which, identical with that to retain, is not here an independent means to benefit or prejudice a particular interest but an ancillary incident to conversion; but also the fact that the trustees, through control of the company, determine when and in what amounts dividends shall be declared. Unless, then, it is evident that the testator intended to subject the bequests to the fortuitous or designed accidents or contingencies of such an administration, and it is his intention to be gathered from the will and the surrounding circumstances which must prevail, the situation is one for the application of the rule.

Does the will classify existing investments as authorized and throw the entire hazard of discretionary action, instigated by whatever motives, directly on one or more of the interests created? Since capitalizing or distributing the earnings must necessarily be an immediate and foreseen benefit to one interest and, as contended, a corresponding detriment to one or both of the others, are the latter as to their quantum to be treated as a function of that discretion? In substance this would mean that to a high degree the trustees could determine the benefits conferred not through any specific authority, as in appropriating capital, but, in acting as shareholders or directors, in the course of ordinary administration. There is no special authority conferred for these offices, and to permit the trustees so to affect the competing interests would enable them to proceed on what they considered to be the deserts or merits of the different legatees. At least it would be impracticable to challenge any action taken whatever might have been the motive behind it. They could in large measure defeat the ultimate remainders by eviscerating the company, during the life tenancies, of all income including accumulations. Considering the will as a whole this is no more understandable in the case of the widow than in that of the nephews and nieces. The annuity of $6,000 to the former is some indication of

(1) 7 Ves. 137; 32 E.R. 56.
(2) (1828) 4 Russ. 195; 38 E.R. 778.
(3) [1905] 1 Ch. 233.
(4) [1946] 2 All. E.R. 412.

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what the testator had in mind. With these foreseeable possibilities, can it be said that his object included enabling the trustees to work havoc with the elaborate provisions in which he has expressed himself, especially with the widow, holding the largest life interest, acting as one of them?

These possibilities do not appear to have been explored by the testator. One purpose made clear was that his wife should be secured in the enjoyment of that comfort and station to which she had become accustomed, even to the appropriation of capital. But the latter power runs to the benefit of the nephews and nieces and their issue as well; and it is significant that the appropriation in the former case is for "her proper support, maintenance and comfort", and in the others, as the trustees "deem advisable". This general provision emphasizes the assumption of the conservation of the capital which is to be trenched upon only in the exercise of special and specific powers; it implies also the ordinary conception of income as moneys periodically received.

The residue other than the interest in the company and the insurance consisted of land and mining, industrial, transportation, power and miscellaneous stocks approximating $75,000 in value, plus $50,000 in Canadian government bonds. On the death of the widow, the trustees are to set aside sufficient of the residue to yield the life annuities already mentioned and, subject thereto, "to divide the residue . . . into as many equal parts as shall exceed by one the number of nephews and nieces of mine then alive", treating, for that purpose, the deceased parent of issue then living as being still alive, and to pay "the net income respectively derived therefrom" to each nephew or niece for life. This implies that issue in the case of a deceased parent would at once be entitled to a share of the corpus. Upon death the trustees hold the share in trust for the issue in such proportions and on such terms and conditions as the parent beneficiary may by will direct. If the latter leaves a widow or widower surviving the whole or part of the income of the share may be directed to such person until death or remarriage. In default of direction, the share is to be held for the surviving issue, and should there be no issue, it is to be added to the shares of the other nephews and nieces or their issue. In the case of nephews surviving

the testator but predeceasing the widow and leaving issue then living, the trustees are to "set aside" the appropriate shares and to "keep such shares or share invested" for the benefit of the issue until they become of age when they or the survivors become entitled to them. It would be inconsistent with the intent of this language that the unauthorized investments should be so divided. How, in that case, could equality in the shares be maintained? To mix up land with mining and similar stocks in such a division and to retain any part of them in specie would be in conflict with the settlement intended. The case of a share vesting in the issue of a deceased nephew with life interests still existing would further complicate any equal division by changing the destination of a special dividend and thus affecting the value of the capital. The income is related to the share. Equality of shares assumes for the life tenants a real or notional conversion and division. Equality is contemplated under the primary duty of the trust, and it necessitates a corresponding actual or notional division with an equality of income and principal to each beneficiary of the same class. This would be impossible by a division in specie on the death of the widow of the transmitted investments, and if that is so, the powers are equally subject to a notional conversion from the death of the testator. The income of the widow, as to quality, was intended to be the same as to the nephews and nieces.

I am unable, therefore, to agree that the direction to pay the widow the "income" of the residue requires the special dividend to go to her, representing as it does, a value which at the death was largely the substance of the estate. In *Brown* v. *Gellatly* (1), similar language was used, "to pay the income", but Lord Cairns found no difficulty in holding that the "income" from the ships which were to be sold as and when the executors thought proper did not extend to the actual profits of the interim business which they carried on, but only to the interest on a constructive sale value. The circumstances and the distribution here are incompatible with the interpretation that the widow or the other life tenants are to take the income in specie; and applying the principle there laid down, the former is not entitled to

(1) (1867) 2 Ch. App. 751.

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receive this dividend as income; she is entitled to interest on an estimated value of the stock as provided by the judgment appealed from.

The appeal should be dismissed with costs to all parties out of the estate, those of the trustees as between solicitor and client.

KELLOCK J.:—By paragraph IV of the will here in question, the testator devised and bequeathed "all the rest and residue" of his property to trustees upon trust to permit his wife the use of certain real property, and, by sub-paragraph (*b*), to sell, call in and convert into money "all the remainder" of his estate not consisting of money at such time as his trustees might, in their discretion, decide, with power to postpone conversion. He also empowered them to retain any portion of his estate in the form in which it might be at his death, notwithstanding that it might not be in the form of trustee investments, without being responsible for any loss that might happen "to my estate" by reason of so doing. The sub-paragraph reads as follows:

> (*b*) To sell, call in and convert into money all the remainder of my estate not consisting of money at such time or times, in such manner and upon such terms, and either for cash or credit or for part cash and part credit as my Trustees may in their discretion decide upon, with power and discretion to postpone such conversion of such estate or any part or parts thereof for such length of time as they may think best, and I hereby declare that my Trustees may retain any portion of my estate in the form in which it may be at my death (notwithstanding that it may not be in the form of an investment in which Trustees are authorized to invest trust funds and whether or not there is a liability attached to any such portion of my estate) for such length of time as my Trustees in their discretion deem advisable, and my Trustees shall not be held responsible for any loss that may happen to my estate by reason of their so doing.

The testator then provided for payment of debts and succession duties, and the sum of $10,000 to his wife. By sub-paragraph (*e*) he directed the trustees to "keep the residue of my estate invested" and to pay "the net annual income thereof" so that his wife should receive during her life at least $6,000 annually and, in addition, any surplus remaining after payment of certain annuities.

The question in this appeal is as to whether or not the income payable to the widow includes certain substantial dividends received by the trustees from two companies in which the testator held the controlling interest, the

dividends having been declared following upon the amendment of the *Income War Tax Act* in 1945, which enabled the distribution within a limited time of accumulated profits on terms more favourable to shareholders than formerly had been the case. The testator's estate consisted largely of company shares and particularly of the shares in these companies which were not investments in which, by law, trustees are authorized to invest.

The applicable rule is thus expressed by Baggallay, L.J., in *Macdonald* v. *Irvine* (1), as follows:

> . . . the rule as laid down by Lord Eldon in *Howe* v. *Earl of Dartmouth* (2), and as explained by subsequent decisions, and particularly by Lord Cottenham in *Pickering* v. *Pickering* (3), amounts to this, that where there is a residuary bequest of personal estate to be enjoyed by several persons in succession, a Court of Equity, in the absence of any evidence of a contrary intention, will assume that it was the intention of the testator that his legatees should enjoy the same thing in succession, and, as the only means of giving effect to such intention, will direct the conversion into permanent investments of a recognised character of all such parts of the estate as are of a wasting or reversionary character, and also all such other existing investments as are not of the recognised character and are consequently deemed to be more or less hazardous.
>
> But it must be borne in mind that the rule when acted upon is based upon an implied or presumed intention of the testator, and not upon any intention actually expressed by him, and Courts of Equity have consequently always declined to apply the rule in cases in which the testator has indicated an intention that the property should be enjoyed in specie, though he may not in a technical sense have specifically bequeathed it.

The sole question between the parties is as to the application of this rule in the present instance.

It is settled upon the authorities that where there is a direction to convert with power to postpone and to retain existing investments, it is not necessarily to be implied that the life tenant is to be paid the actual income pending conversion. The real point in such cases is as to whether the power to retain is to be construed as a power to retain permanently, or only until the trustees can sell advantageously; or, in other words, whether the power to postpone and the power to retain are merely ancillary or subsidiary to the trust for conversion. If the latter, it is necessary to find some other indication in the will to that effect before it is possible to say that the life tenant is entitled to the income in specie.

(1) 8 Ch. D. 101 at 112. (2) 7 Ves. 137.
(3) 4 My. & Cr. 289.

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The extreme narrowness of the point is well illustrated by contrasting the will in question in *Inman's* case (1), with that under consideration in *In re Thomas* (2). In the former, Neville J., considered that the clause authorizing retention was an independent power rather than one ancillary or subsidiary to the trust for conversion, whereas in *Thomas's* case, Keckewich J., considered it necessary to seek for the intention of the testator beyond the provisions of the will directing conversion at the discretion of the trustees with power to retain for such period or periods as they should think fit "without being answerable for any loss which might be occasioned thereby."

In the case at bar, I am of the opinion that the power to retain is not a power to retain permanently but merely until the trustees can sell advantageously. This power is, in my opinion, directed only toward protecting the trustees against "any loss that may happen to my estate" by reason of its exercise in any particular case.

In my view this construction is strengthened by paragraph VII of the will, which authorizes the trustees, should any company in which the testator might hold shares, increase its capital, to subscribe for and take up the estate's proportion of the increased capital, or to sell the rights. Also, if the trustees should think it in the interest "of my estate" to do so, they are authorized to purchase additional shares in any such company. They are also authorized to join in any plan of reconstruction, reorganization or amalgamation of any such company or in the sale of the assets thereof and, in pursuance of any such plan, to accept any securities in exchange for existing securities. The trustees are also authorized to enter into any pooling agreement in connection with any such company. The testator provided that in giving his trustees these powers, it was his intention to give them power and authority to deal with his interest "in any such company or corporation" to the same extent and as fully as he could had he been alive.

It is to be observed that the powers given by paragraph VII are limited to companies in which the testator held securities at the date of his death or, in which securities might be subsequently acquired by his estate. In the latter case such securities would of necessity be trustee securities. All the powers given by this paragraph are expressly given

(1) [1915] 1 Ch. 187. (2) [1891] 3 Ch. 482.

"in the interest of my estate" and do not, in my view, afford any argument that the power to retain contained in sub-paragraph (*b*) of paragraph IV is a power to retain permanently. That power is therefore not to be construed as having been given for the benefit of the tenant for life. This was the view of both courts below.

It is, however, contended that even though the will is to be construed as above, the direction in sub-paragraph (*e*) of paragraph IV to keep "the residue of my estate" invested and to pay the "net annual income" thereof in the manner indicated, is a sufficient expression on the part of the testator of an intention that his widow shall have the actual income of investments pending conversion. For the consideration of this argument I turn to later provisions of the will.

By paragraph IV(*f*) the testator directs his trustees, upon the death of his widow, to "set aside" sufficient of the residue of his estate to yield certain annuities and, subject thereto, to "divide the residue" into as many *equal* parts as shall exceed by one the number of nephews and nieces of his then living. (The significance of the extra share is irrelevant for present purposes). Nephews or nieces who should be then dead having left issue are to be considered as living. The trustees are then directed to pay the net income derived from the respective shares to the nephews and nieces for life and upon death to hold the share of capital in trust for their issue on such terms as they may have directed by will, and in default of such direction, in trust for such issue. Under these provisions issue of a deceased nephew or niece would be entitled, immediately on the death of the widow, to capital.

I agree with my brother Rand, whose judgment I have had the benefit of reading, that these provisions do not contemplate the division *in specie* of unauthorized investments. The stipulated equality of shares can be effected only by an actual, or pending an actual, by a notional conversion.

This becomes even more clear when one considers paragraph VIII of the will, which contemplates that lands or leaseholds may form part of the estate of the testator at his death. When the time for division arrives, it might well be impracticable, even though otherwise unobjectionable, to

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make the division called for, owing to the existence in the estate of assets of a varied character. Even assuming for the moment that the power to postpone conversion could still be said to be applicable, there would clearly have to be a notional conversion if an actual one should be either not feasible or improvident. If that be so, there is nothing in these provisions to indicate that in paragraph IV(*e*) the testator has intended that the "income" there directed to be paid to the widow is to be actual income.

I do not think it necessary to deal particularly with any of the authorities cited. The principles are well settled, it being a question in each case as to whether or not the testator has indicated a sufficient intention that actual income shall be paid to the persons entitled to life interests pending the conversion he has directed. In the case at bar, I can find no sufficient intention and would dismiss the appeal. The costs of all parties should be taxed and be paid out of the estate, those of the trustees as between solicitor and client.

The judgment of Estey and Cartwright JJ. (dissenting) was delivered by:—

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia affirming a judgment of Macfarlane J. determining certain questions raised on originating summons by the executors of the late William Marr Crawford, hereinafter referred to as the testator.

The question involved is whether upon the true construction of the will of the testator there is sufficient evidence of his intention that his widow should enjoy the income of his unconverted residuary personal estate in specie to exclude the operation of the rules of equitable apportionment which are commonly referred to collectively as the rule in *Howe* v. *Lord Dartmouth* (1), and of which that case and the case of *Dimes* v. *Scott* (2), furnish familiar illustrations.

The testator died on May 20, 1942, leaving a will dated June 24, 1937, and two codicils dated January 10, 1938, and January 14, 1938. In the affidavit filed on behalf of the executors under the provisions of The Succession Duty Act the estate of the testator was valued at $680,818.73. This

(1) 7 Ves. 137. (2) 4 Russ. 195.

total was made up in part of 1,054 shares of the capital stock of Empire Stevedoring Company Limited, hereinafter referred to as Empire, valued at $270,561.80 and 2,450 preferred shares and 50 common shares of the capital stock of Marr Estates Limited valued at $259,184.96. The last-mentioned company is a private company which the testator caused to be incorporated in 1927 to act generally as an investing and holding company and its only shareholders are the executors of the testator and their nominees. At the date of the testator's death and at the date of the application to Macfarlane J. this company held 880 shares of Empire. The authorized capital of Empire consists of 2,500 shares, 1,934 of which the executors control either directly or through Marr Estates Limited. The testator also owned at the time of his death shares in twenty-two other companies which were valued at a total of about $66,000. None of the shares above referred to are securities in which trustees are authorized to invest trust-money under the laws of British Columbia.

We were informed by counsel that at the date of the hearing of this appeal the executors still retain the shares of Empire and of Marr Estates Limited which the testator owned at the date of his death, that Empire has continued in business, has operated profitably through the years, has paid dividends over the years since the testator's death and has, in addition, accumulated a considerable sum of undistributed profits.

Towards the end of the year 1947, pursuant to Part XVIII of the *Income War Tax Act* as enacted by Statutes of Canada, 1945, 9-10 Geo. VI, c. 23, Empire distributed accumulated undistributed income by way of dividend of which the executors received $177,855.49 directly from Empire and $148,494.04 through Marr Estates Limited.

The questions raised before Macfarlane J. were whether these sums are capital or income in the hands of the executors and (by an amendment of the originating summons to which all parties consented) whether if such sums are income it is income to which the testator's widow is entitled and if not entitled in whole then to what extent if any. Macfarlane J. held (i) that the sums in question constituted income, and (ii) that the widow was not entitled to such income in specie but that it was to be dealt with under the

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rules of equitable apportionment referred to above. The first ruling of the learned judge is not questioned by any party but the widow and the executors appeal against the second and ask that it be declared that the widow is entitled to the whole of the sums in question. We were informed by counsel that if it should be held that the learned judge was right in holding that the rule in *Howe* v. *Lord Dartmouth* applies no question is raised as to the manner in which he has directed the apportionment of these sums between the life-tenant and the remaindermen.

The will so far as relevant may be summarized as follows:—

Paragraph I revokes former wills.

Paragraph II appoints executors.

Paragraph III bequeaths certain personal articles to the widow.

Paragraph IV opens with the words:—

I give, devise and bequeath all the rest and residue of my property of every nature and kind and wheresoever situate, including any property over which I may have any power of appointment, to my Trustees upon the following trusts, viz.,

And continues:—

(*a*) to provide a residence for the widow during her life.

(*b*) To sell, call in and convert into money all the remainder of my estate not consisting of money at such time or times, in such manner and upon such terms, and either for cash or credit or for part cash and part credit as my Trustees may in their discretion decide upon, with power and discretion to postpone such conversion of such estate or any part or parts thereof for such length of time as they may think best, and I hereby declare that my Trustees may retain any portion of my estate in the form in which it may be at my death (notwithstanding that it may not be in the form of an investment in which Trustees are authorized to invest trust funds and whether or not there is a liability attached to any such portion of my estate) for such length of time as my Trustees in their discretion deem advisable, and my Trustees shall not be held responsible for any loss that may happen to my estate by reason of their so doing.

(*c*) to pay all debts and succession duties.

(*d*) To pay to my said wife as soon as possible after my death, the sum of Ten Thousand Dollars ($10,000.00);

(*e*) To keep the residue of my estate invested and to pay the net annual income thereof until the death of my wife as follows:—in the event of the same not exceeding the sum of Six Thousand Dollars ($6,000.00) the whole net annual income shall be paid to my wife by quarterly instalments but in the event of any excess over the sum of Six Thousand Dollars ($6,000.00) such excess up to the equivalent of Three

Hundred Pounds (£300) sterling shall be divided equally between my three sisters Catherine Graham Crawford and Helen Marr Morton, both of Glen Villa, Charleston, Fifeshire, Scotland, and Agnes Mary Henderson of the United Free Church Manse, Beith, Ayrshire, Scotland, and payable to them semi-annually. If any of my said three sisters should predecease me, or surviving me should predecease my wife, I DIRECT that the excess of income herein directed to be paid shall be reduced so that the maximum annual income received by the survivors of my said three sisters shall be a sum equivalent to One Hundred Pounds (£100) Sterling each. In the event of such net income exceeding the said sum of Six Thousand Dollars ($6,000.00) payable to my wife and the annuities not exceeding Three Hundred Pounds (£300) Sterling payable to my said sisters, I DIRECT that the sum of Two Hundred Dollars ($200.00) per month be paid to EMILY HUNTER SMITH of the said City of Vancouver, presently employed with me as my Secretary in the Empire Stevedoring Company Limited, until her death. Any surplus income over and above what is required to pay the aforesaid annuities shall be paid to my wife.

(*f*) Upon the death of my said wife to set aside sufficient of the residue of my said estate as will yield an annuity to each of my said three sisters as shall then be alive of one hundred pounds (£100) Sterling during their respective lifetime and an annuity to the said Emily Hunter Smith of Two Thousand Four Hundred Dollars ($2,400.00) during her lifetime. Subject to the said annuities, to divide the residue of my estate into as many parts as shall exceed by one the number of nephews and nieces of mine then alive and I DIRECT that if any nephew or niece of mine shall then be dead who shall have left issue him or her surviving and then alive, such deceased nephew or niece of mine shall be considered as alive for the purpose of such division.

(*g*) My trustees shall set aside two of such equal shares for my nephew WILLIAM MARR CRAWFORD, son of my brother Alexander Ogston Crawford of the said City of Vancouver, and one of such equal shares for each of my other nephews and nieces.

My Trustees shall pay the net income respectively derived therefrom to and for each such nephew or niece during his or her lifetime and upon his or her death shall be held by my Trustees in trust for the issue of such deceased nephew or niece, or some one or more of them in such proportions and subject to such terms and conditions as he or she may by his or her last Will direct, provided that if such nephew or niece should leave a widow or widower him or her surviving, he or she may by his or her last will direct the whole or any part of the income of such share to be paid to his widow or her widower until the death or remarriage of such widow or widower, whichever first occurs. In default of direction by such nephew or niece, or insofar as the same shall not extend or take effect, such share shall be held by my Trustees in trust for the issue of such nephew or such niece as survive him or her in equal shares per stirpes. If such nephew or niece should leave no issue him or her surviving, then such share, subject to any provisions which may be made by such nephew for his widow or such niece for her widower in accordance with the terms of this paragraph, shall be added to the shares in this my Will directed to be held for my other nephews or nieces or their issue, as the case may be.

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My Trustees shall set aside two of such equal shares for the issue of my said nephew William Marr Crawford if he shall have survived me but predeceased my said wife leaving issue him surviving and then alive, and one of such equal shares for the issue of any other nephew or niece of mine who shall have survived me but predeceased my said wife, leaving issue him or her surviving, and then alive, and shall keep such shares or share invested and shall use so much of the income and capital thereof as they may consider necessary or advisable for the benefit of such issue of such deceased nephew or niece until they respectively attain the age of twenty-one years when each shall be entitled to receive an equal proportion of such shares or share or all to one if only one should attain the age of twenty-one years.

* * *

V. Notwithstanding anything in this my Will contained I expressly authorize my Trustees at any time and from time to time to make advances to my wife out of prospective income or to give to or for her benefit such part of the capital of my estate as my Trustees in their uncontrolled discretion may deem necessary or advisable for her proper support maintenance and comfort and to advance to and for the benefit of any of my nephews or nieces or their issue such part or parts of the capital of the prospective shares of such nephews or nieces or their issue or of the share of my estate for the time being held for the benefit of such nephews or nieces as in their uncontrolled discretion my trustees may deem advisable.

* * *

VII. Should any company or corporation in which I or my estate may hold shares or other interest increase its capital, I authorize my Trustees to subscribe for and take up the proportions of such increased capital to which as holders of shares or other interest in such company or corporation they may be entitled, and to pay for the same out of the moneys of my estate, or in the alternative to sell their rights to such allotment; and I further authorize my Trustees if in their opinion it would be in the interest of my estate so to do, to subscribe for and pay for or purchase additional shares in any such company or corporation. I further authorize my Trustees to join in any plan for the reconstruction, reorganization or amalgamation of any such company or corporation or for the sale of the assets of any such company or corporation or any part thereof, and they may in pursuance of any such plan accept any share or securities in lieu of or in exchange for the shares or other interest held by my estate in such company or corporation. I further authorize my Trustees if in their discretion they consider it in the best interest of my estate so to do, to enter into any pooling or other agreement in connection with my interest in such company or corporation and in case of sale thereof to give any options they may consider advisable. In giving to my Trustees the foregoing powers, it is my intention to give to my Trustees power and authority to deal with my interest in any such company or corporation in which I may be interested at the time of my death to the same extent and as fully as I could do if I were alive.

* * *

IX. If at the time of my death I am liable as endorser, guarantor, surety or otherwise for any liability of any company, person or persons, I authorize and empower my Trustees to renew

from time to time in their discretion the bills, notes, guarantees or other securities or contracts evidencing such liability, and for that purpose to enter into new bills, notes, or other securities or contracts for and on behalf of my estate. My intention in conferring upon my Trustees the powers and discretions by this clause conferred is to give them such powers and authorities as will enable them to assist in the gradual liquidation of the liabilities which I may be under in order that the companies or persons for whom I may be liable as aforesaid may not be unduly embarrassed.

* * *

The effect of the codicils is merely to vary the amount of the share provided for the testator's nephew, William Marr Crawford, and to increase the amount of the annuities given to the testator's sisters. It was not suggested that the codicils or any parts of the will other than those set out above have any bearing on the matter in dispute.

The general rules applicable to the problem before us have often been stated and the question we have to decide is not what these rules are but how they are to be applied to the will now under consideration.

The underlying rule is stated in the following words in *Macdonald* v. *Irvine* (1), by Baggallay L.J. who differed from the other Lords Justices as to whether the rule applied in that case but not as to the nature of the rule. At pages 112 and 113 he said:—

The rule as laid down by Lord Eldon in *Howe* v. *Earl of Dartmouth* (2) and as explained by subsequent decisions, and particularly by Lord Cottenham in *Pickering* v. *Pickering* (3) amounts to this, that where there is a residuary bequest of personal estate to be enjoyed by several persons in succession, a Court of Equity, in the absence of any evidence of a contrary intention, will assume that it was the intention of the testator that his legatees should enjoy the same thing in succession, and, as the only means of giving effect to such intention, will direct the conversion into permanent investments of a recognised character of all such parts of the estate as are of a wasting or reversionary character, and also all such other existing investments as are not of the recognised character and are consequently deemed to be more or less hazardous.

But it must be borne in mind that the rule when acted uopn is based upon an implied or presumed intention of the testator, and not upon any intention actually expressed by him, and Courts of Equity have consequently always declined to apply the rule in cases in which the testator has indicated an intention that the property should be enjoyed in specie, though he may not in a technical sense have specifically bequeathed it.

The real question, therefore, in all cases similar to that under consideration, is, whether the testator has with sufficient distinctness indicated his intention that the property should be enjoyed by his wife in specie.

(1) 8 Ch. D. 101. (2) 7 Ves. 137.
(3) 4 My. & Cr. 289.

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A great number of authorities have been cited in the course of the argument before us for the purpose of illustrating the principles upon which Courts of Equity have from time to time acted in deciding whether expressions or indications of intention, more or less distinct, have or have not been sufficient to exclude the adoption of the rule. These authorities, for the most part, turn upon the special circumstances of the particular cases under consideration, but they nevertheless, upon the whole, shew an inclination on the part of successive Judges to allow small indications of intention to prevent the application of the general rule.

In the case at bar the two matters chiefly relied upon as sufficiently indicating an intention that the widow should enjoy the income in specie are the wide power to retain unauthorized securities contained in paragraph IV (*b*) of the will and the comprehensive words of gift of the income in paragraph IV (*e*).

In speaking of the effect of a power of retention following a direction for conversion of personal estate, Kekewich J. said, *In re Thomas* (1):—

> I am not prepared to hold that where there is a direction for conversion of personal estate, followed by a power of retention of existing securities in the absolute discretion of the trustees, and then there are trusts for tenants for life, and afterwards for remaindermen, the power of retention necessarily gives the tenants for life the enjoyment in specie of the securities retained by the trustees in the exercise of their discretion.

This passage is quoted with approval by Warrington J. in *In re Chaytor* (2), at 238, and appears to me to correctly state the law so far as it goes. The question, however, immediately arises as to what, in such a case, are the indicia to lead the court of construction to the testator's true intention. After a consideration of all the authorities to which reference was made during the argument I think that their effect is accurately summarized in the following passage in Theobald on Wills, 10th Edition at page 380:—

> It is, however, a question of construction in each case whether the power to postpone or retain is merely ancillary to the trust for conversion or is a power to continue or retain permanently. In the latter case the inference is that it is for the benefit of the tenant for life, and if what is given to him is the income of the converted and unconverted property or the income of the securities representing the estate, he will be entitled to the income of securities retained.

In my opinion the words of clause IV (*b*) of the will confer upon the trustees a power to retain permanently, by which I mean until the trusts in the will are all completely executed. It is true that there is an apparent contradiction

(1) [1891] 3 Ch. 482 at 486. (2) [1905] 1 Ch. 233.

between the trust to sell and convert with which the clause opens and the power to retain indefinitely but the direction to convert is qualified by a power to postpone the conversion of the whole estate or any part or parts thereof for such length of time as the trustees may think best and there is added the express declaration:—

> . . . and I hereby declare that my Trustees may retain any portion of my estate in the form in which it may be at my death (notwithstanding that it may not be in the form of an investment in which Trustees are authorized to invest trust funds and whether or not there is a liability attached to any such portion of my estate) for such length of time as my Trustees in their discretion deem advisable, and my Trustees shall not be held responsible for any loss that may happen to my estate by reason of their so doing.

It is difficult to think of words by which the testator could have more clearly authorized the indefinite retention of the shares with which we are concerned. The will must be construed as of the date of the testator's death and I have not been influenced in construing this clause by the fact that the trustees are still retaining the shares and no counsel has suggested that they are not acting wisely and within the terms of the will in so doing.

While the power to retain these shares permanently permits an inference that the power is given for the benefit of the life tenant this is not conclusive and it is next necessary to examine the words in which the gift of income is made to her. It is in those words that the distinction between the will before us and that in *In re Chaytor* (*supra*) is to be found.

The words by which the income is given to the widow for life are in clause IV (*e*). The opening words are:—"To keep the residue of my estate invested and to pay the net annual income thereof until the death of my wife as follows:—" The direction "To keep invested" is complied with *pro tanto* just as fully by the retention of investments which under clause IV (*b*) the trustees are authorized to retain as by the investment of the proceeds of such securities as they decide to convert and the words "The net annual income thereof" describe the net income arising in each year from the residue of the estate kept invested. I can find no reason for reading these words as meaning "the net annual income of the investment of the proceeds of the conversion of the residue of my estate" and in my view on its proper

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construction clause IV (*e*) disposes of the income not only of those parts of the residue which are converted and reinvested but also of those parts retained unconverted by the trustees. The testator in the following words of clause IV (*e*) disposes of all this net annual income. The first $6,000 goes to the widow, annuities are then provided for the testator's sisters and his secretary and the clause concludes with the words:—"Any surplus income over and above what is required to pay the aforesaid annuities shall be paid to my wife". I conclude that the testator has given to his widow by the words of clause IV (*e*) the net annual income of all the securities representing the residue of his estate including the income from unconverted as well as converted property, subject only to the payment of the annuities mentioned above.

In reaching this conclusion I have not overlooked the argument founded on paragraph VII of the will. For the respondents it was said that the use of the words "if in their opinion it would be in the interest of my estate" and "if in their discretion they consider it in the best interest of my estate so to do" in paragraph VII furnish an indication that the powers of postponement and retention given in IV (*b*) were not for the benefit of the life tenant; but it appears to me that the fact that such words while used in paragraph VII were not used in IV (*b*), in so far as it has any bearing on the question, assists the view of the appellants rather than that of the respondents.

The courts below regarded the wording of the relevant portions of the testator's will as indistinguishable from that under consideration in *In re Chaytor* (*supra*); but if it be granted that there is no difference of substance between the words imposing the trust for sale and giving the powers of postponement and retention, there appears to me, as already indicated, to be a very real difference between the words of gift of the income in the two cases. In *In re Chaytor* Warrington J. construed the words of gift as relating only to the income from such investments as represented the proceeds of conversion and could find nowhere in the will either an express or implied gift of the income of items of property forming part of the testator's estate during postponement of conversion. This appears clearly at pages 238 and 239 of the report.

While, as in all questions of construction, the matter must be determined on the words of the will before us and a comparison with the more or less similar words used in wills construed in other cases is of only limited assistance, it appears to me that the present case falls within the decision in *In re Thomas* (*supra*) rather than that in *In re Chaytor* (*supra*). *In re Thomas* was approved and followed by Warrington J. in *In re Godfree* (1).

I can find no substantial difference between the relevant words in the will in the case at bar and those in the will considered in *In re Aste* (2), in which Eve J. says at page 660:—

> I do not think on a fair reading of the whole will the testator can be said to have restricted the expression "my said residuary estate" to the proceeds of conversion and the investments for the time being representing the same. Had he done so, the tenant for life, according to the authorities, and notwithstanding the powers to postpone conversion and retain investments, would not have been entitled to the full income of unconverted residue. But the testator does, I think, intend to include in "my said residuary estate" and "my residuary estate" the whole residue in whatever form of investment it may be from time to time, and does not limit the income of which he is disposing to the income of proceeds of conversion. It is to be observed that he does not, as many testators do after the trust for investment of the proceeds of conversion add "hereinafter referred to as my said residuary estate" in which case the gift of the income would necessarily be correspondingly restricted, and when he comes to the gift of income he does not say "of the said investments" or "of the trust premises", but uses an expression wide enough to include the income of the whole estate, however invested, and rather cumbersome if he really intended to confine it to the estate when converted.

For the above reasons, I would allow the appeal and would vary the judgment of Macfarlane J. by striking out paragraphs numbered 3, 4, 5, and 6 thereof and substituting therefor the following paragraph:—

> 3. That subject to the terms of the will and codicils in relation to the payment of annuities referred to therein the defendant Catherine McLean Crawford is entitled to the whole of the said sums of $177,855.49 and $148,494.04.

The said sums may of course be resorted to by the trustees for the payment of any costs or trustees' compensation which may be properly chargeable against them.

There remains the question of costs. In both courts below it was ordered that the costs of all parties as between solicitor and client be paid out of the estate of the deceased.

(1) [1914] 2 Ch. 110. (2) (1918) 87 L.J. Ch. 660.

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We were informed by counsel that such an order is not unusual under the practice in British Columbia particularly where counsel have been appointed to represent parties to whom it would be difficult to resort for payment of the difference between costs as between party and party and as between solicitor and client. The case appears to be one to which the following words used by Lord Blanesburgh in *Patton* v. *Toronto General Trusts Corporation* (1) at page 639 are applicable:—

> As to the costs in the Court of first instance, it appears to their Lordships that this was pre-eminently a case in which the difficulty being caused by the testator himself, and the question being raised by the executors in the most inexpensive form, an order for the costs of all parties to be paid out of the estate, and even as between solicitor and client, was, in any event, almost a matter of course.

In the somewhat unusual circumstances of this case, I think that the orders as to costs in the courts below should stand and that the costs of all parties in this Court should also be paid out of the estate those of the executors as between solicitor and client.

Before parting with the matter I wish to call attention to the following point. I do this with diffidence as it was not raised before us, does not appear to affect the question with which we have to deal and may well have been considered by the parties concerned. It will be observed that the residuary estate is settled (subject to the annuities to the sisters and secretary of the testator) (*a*) upon the widow for life; (*b*) upon her death upon the nephews and nieces of the testator *then surviving* in equal shares for their lives; (*c*) upon the death of each nephew or niece, as he or she may appoint under a special power to appoint by will which includes a power to appoint to a surviving widow or widower for life. As the nephews or nieces who will take for their lives on the death of the widow are not limited to nephews and nieces alive at the death of the testator and, in contemplation of law, further nephews and nieces might be born after the death of the testator and before the death of the widow, and as nephews or nieces of the testator, themselves born after his death, might marry persons born after the testator's death and appoint to such persons for

(1) [1930] A.C. 629.

life, I venture to suggest that the parties should give consideration to the effect of the rule against perpetuities upon the validity of the trusts which are directed to take effect following the death of the testator's widow.

Appeal dismissed with costs.

Solicitor for the Plaintiffs (Appellants): *R. A. C. Douglas.*

Solicitor for the Defendant (Appellant): *W. S. Lane.*

Solicitor for the representative defendant Class 3: *J. K. Macrae.*

Solicitor for the representative defendant Class 4: *G. E. Housser.*

DAME CORINNE DUCHESNEAU *(Defendant)* ..... APPELLANT;

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*Nov. 19

1955
*Mar. 7

AND

WELLIE COOK *(Plaintiff)* .....RESPONDENT;

AND

AURELE LECLERC .....MIS-EN-CAUSE.

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

Contract—Married woman separate as to property—Civil capacity—Right to purchase immoveables—Sale with right of redemption—Reserved property used for purchase—Whether authorization necessary—Civil Code, Articles 177, 210, 1422.

Desirous to borrow an amount of $3,000, the respondent sold, for a like sum, a group of contiguous immoveables to the appellant. In the premises, the latter, a married woman separate as to property, was unauthorized or unassisted. The sum of $3,000 which she paid at the signature of the deed of sale was her own property and was made up as follows:—$500 savings, $2,000 insurance indemnity for moveables destroyed by fire and $500 borrowed from her father; the validity of the latter loan has not been questioned. The majority of these immoveables were sold subject to a right of redemption in favour of the respondent; and all of them were, already, subject to a mortgage

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

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as to which the appellant assumed no personal obligation. The sale was declared null and void by the trial judge and this judgment was affirmed by a majority in the Court of Appeal.

Held: The appeal should be allowed.

The law of 1931 (21 Geo. V, c. 101) has, to a certain measure, enlarged the civil capacity of a married woman separate as to property to act without any authorization and has formally recognized her right to dispose freely of her moveable property but does not, however, justify the conclusion that she has been entirely released from the rule of relative incapacity affecting generally married women. A Legislature is not presumed to have had the intention to make substantial and radical changes to the law it modifies beyond what is explicitly declared, either in express terms or by clear implication. Thus it cannot be said that because Article 1422 C.C. does not forbid her to purchase immoveable property without authorization or assistance, she is for that reason alone free to do so without it.

The authorities, however, support the proposition that the appellant, in the present case, had the right to purchase without authorization, as an investment, the immoveable rights in question by making a cash payment in full out of these moneys she had the right to freely dispose of.

The purchaser's consent to the inclusion of a right of redemption in a deed of sale is not a covenant to alienate. The clause of *remere* is an expressed resolutive condition subject to which the vendor has consented to sell and according to which it has been agreed that it would be within his sole power to dissolve the contract. Such condition, when accomplished, effects of right the dissolution of the contract and replaces things in the same state as if the contract had not existed; the purchaser is then deemed to have never been the owner and the vendor to have never ceased to be the owner. Furthermore, the obligation imposed upon the purchaser of an immoveable sold with the right of redemption to give to the vendor, once the latter has exercised his right, a deed of retrocession is totally foreign to the juridical factors conditioning the right of the vendor to take back the property sold. Such deed of retrocession is not a conveyance of property but an acknowledgment of the retrocession *pleno jure* of the contract.

As to the mortgage, neither the surrender of the immoveables nor their adjudication to another person, should they take place, would constitute the contractual alienation prohibited by the law. The law forbids the married woman from alienating her immoveables without authorization or assistance but does not impose upon her the obligation to conserve them.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), affirming, Marchand and Gagné JJ.A. dissenting, the annulment pronounced by the trial judge of a contract of sale, with right of redemption, of an immoveable to an unauthorized married woman separate as to property.

(1) Q.R. [1954] Q.B. 333.

Jean Turgeon, Q.C. for the appellant.

Pierre Letarte, Q.C. for the respondent.

TASCHEREAU J.:—Le demandeur-intimé allègue que le 15 octobre 1948, il a emprunté de la défenderesse-appelante une somme de $3,000, et que pour garantir cet emprunt, il a consenti une vente à réméré de certains immeubles situés aux Saules, près de la Cité de Québec. Au contrat intervenu devant le Notaire de La Bruyère Fortier, l'appelante a représenté qu'elle était la veuve de Maurice Lasnier, quand en réalité, ce dernier vivait encore. L'intimé prétend que le contrat est nul d'une nullité absolue, pour défaut d'autorisation, et après avoir offert la somme de $3,000 et fait autoriser par la Cour, l'appelante à ester en justice, il a institué une action où il demande la nullité du contrat.

Il soumet qu'une femme mariée sous le régime de la séparation de biens, n'a pas la capacité requise pour prendre les engagements qui sont intervenus, et qu'elle ne peut pas davantage contracter validement sans l'autorisation de son mari ou d'un juge, lorsqu'elle utilise des biens qui ne proviennent pas exclusivement de son travail ou de ses économies.

La Cour Supérieure a maintenu l'action, a annulé le contrat, et ce jugement a été confirmé par la Cour d'Appel (1), Messieurs les Juges Marchand et Gagné dissidents.

Les articles qu'il est nécessaire de considérer pour arriver à la détermination de cette cause, sont les articles 177, 210 et 1422 du *Code Civil*. L'article 177 est ainsi rédigé:—

Art. 177. La femme, même non commune, ne peut donner ou accepter, aliéner ou disposer entre vifs, ni autrement contracter, ni s'obliger, sans le concours du mari dans l'acte, ou son consentement par écrit, sauf les dispositions contenues dans l'acte de la 25ième Vict., chap. 66.

Si cependant elle est séparée de biens sa capacité d'agir civilement est déterminée par les articles 210 et 1422, suivant le cas.

L'article 210 C.C. qui s'applique uniquement dans le cas où la femme est séparée de corps, la rend capable de tous les actes de la vie civile, et supprime la nécessité de l'autorisation maritale, même lorsqu'il s'agit de transactions immobilières. Mais lorsque la femme est séparée de biens, son statut juridique est déterminé par l'article 1422 C.C. qui est conçu en ces termes:

Art. 1422. Lorsque les époux ont stipulé, par leur contrat de mariage qu'ils seront séparés de biens, la femme conserve l'entière administration

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de ses biens meubles et immeubles, la libre jouissance de ses revenus et le droit d'aliéner, sans autorisation, ses biens meubles.

Elle ne peut, sans autorisation, aliéner ses immeubles ni accepter une donation immobilière.

On voit donc que la femme mariée sous le régime de la séparation, a l'entière administration de ses biens *meubles et immeubles,* et la *libre jouissance de ses revenus.* Elle a évidemment le droit d'investir ses revenus sans autorisation maritale en valeurs mobilières ou en immeubles vu qu'il s'agit, comme dans le cas qui nous occupe, *d'actes d'administration.* La prohibition de l'article 1422 C.C. ne s'applique qu'à l'aliénation des immeubles, ou à l'acceptation de donations immobilières.

L'intimé a également soumis qu'en vertu de la vente à réméré qu'elle a consentie, l'appelante a contracté l'obligation de *revendre l'immeuble,* sur paiement d'une somme déterminée au contrat. Je ne crois pas que la clause de rétrocession dans le cas de vente à réméré constitue une revente de l'immeuble qui serait frappée, quant à la femme mariée, de la prohibition prévue à l'article 1422 C.C. La clause à réméré est en effet une clause résolutoire qui, lorsqu'elle s'opère, anéantit le contrat, et qui ne constitue pas pour le vendeur une nouvelle acquisition. C'est simplement le terme à une aliénation, et chaque partie reprend son bien, comme si le contrat n'avait jamais existé. C'est par le seule volonté du vendeur qui remplit les conditions du contrat qu'il entre en possession de son héritage, et l'acheteur qui rétrocède n'a pas de consentement à donner. Il n'aliène donc pas.

Enfin, je ne puis pas admettre la prétention que l'appelante a commis un acte interdit parce qu'elle a assumé une obligation hypothécaire. Celle-ci en effet n'a assumé aucune responsabilité personnelle. Elle ne peut être contrainte qu'au délaissement qui ne comporte que l'abandon de l'occupation ou de la détention (2079 C.C.). C'est par l'adjudication que le nouvel acquéreur obtiendra son titre et non par une aliénation volontaire de l'ancien détenteur.

A cause de la conclusion à laquelle je suis arrivé, il est inutile d'examiner la question de savoir si, dans cette transaction, l'appelante pouvait avec des biens réservés, contracter comme elle l'a fait.

J'ai eu l'occasion de lire les raisons de mon collègue M. le Juge Fauteux auxquelles je souscris entièrement. Comme lui, je suis d'opinion que l'appel doit être maintenu avec dépens de toutes les cours.

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

FAUTEUX J.:—Les faits essentiels de ce litige ne sont pas contestés. Ayant besoin d'un montant de trois mille dollars, l'intimé Cook sollicita l'appelante de lui prêter cette somme. Contractuellement séparée de biens mais ayant, depuis nombre d'années, cessé la vie commune avec son époux, l'appelante s'était, par son travail et ses activités, procuré les choses nécessaires à la vie, avait économisé et avait alors en disponibilité, une somme de deux mille cinq cents dollars, dont cinq cent en économies et deux mille, réalisation d'une police d'assurance sur un mobilier qu'elle s'était acquis et qui avait été détruit par incendie. Son père lui prêta cinq cents dollars pour parfaire le montant du prêt recherché par l'intimé. A la suite de négociations, les parties arrêtèrent leurs conventions dans un contrat signé le 15 octobre 1948, dont la substance, pertinente à la détermination de la controverse divisant les parties sur le droit, se résume comme suit:—Pour une somme de trois mille dollars, à lui payée comptant, Cook vendait à l'appelante un groupe d'immeubles contigus avec résidences d'été y construites, se réservant toutefois la faculté de reprendre, à l'expiration de trois ans, la majeure partie des immeubles ainsi vendus, sur remboursement de cette somme de trois mille dollars, et autres conditions. Ces immeubles étaient déjà hypothéqués pour une somme de onze cents dollars; à cet égard, cependant, l'appelante n'assuma aucune obligation personnelle. Plus de deux ans après, soit au mois de mars 1951, Cook, invoquant le fait que l'appelante, inexactement décrite au contrat comme veuve, y avait ainsi consenti sans autorisation, lui intenta une action pour en faire déclarer la nullité. Il avait préalablement, sur requête, obtenu qu'elle soit autorisée à signer un acte reconnaissant cette nullité, à accepter le remboursement de cette somme de trois mille dollars et, à défaut, à ester en justice pour se défendre à l'action. Sur signification de la requête, l'appelante fit une déclaration devant

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notaire en laquelle, admettant l'exactitude du fait invoqué comme motif de nullité, elle affirmait que les fonds utilisés pour cette acquisition provenaient du prix de son travail, de ses économies personnelles, soit de ses biens réservés et qu'en droit, elle avait la capacité d'agir seule à ce contrat. Après institution de l'action, elle reconnaissait, toutefois, que partie des fonds en constituant le prix d'achat, soit cinq cents dollars, provenait du prêt à elle consenti par son père; prêt dont la validité, ainsi que signalé aux raisons de jugement de M. le Juge Gagné, de la Cour d'Appel (1), n'est pas mise en question dans le présent litige.

Le Juge de première instance en est arrivé à la conclusion qu'en droit, la femme séparée de biens ne peut en principe faire l'acquisition d'un immeuble sans autorisation et que si, par exception, et comme toute femme mariée, elle peut ce faire en utilisant ses biens réservés pour constituer le prix d'achat, elle n'est plus dans l'exception lorsque les fonds formant ce prix ne proviennent pas exclusivement du patrimoine de ses biens réservés. En conséquence, et vu les dispositions de l'article 183 C.C., le contrat fut déclaré d'une nullité absolue. Par une décision majoritaire, la Cour du Banc de la Reine confirma ce jugement. D'où le pourvoi devant cette Cour.

Au soutien de son appel, l'appelante, invoquant la loi de 1931 (21 Geo. V c. 101) intitulée "Loi modifiant le code civil et le code de procédure civile relativement aux droits civils de la femme", soumet deux propositions:—(i) La femme séparée de biens peut, sans autorisation, faire l'acquisition d'un immeuble; (ii) Subsidiairement, l'acquisition, en l'espèce, étant faite par l'utilisation de biens provenant en majeure partie du patrimoine de ses biens réservés, le contrat doit être tenu comme permis par les dispositions des articles 1425(*a*) et suivants.

Première proposition. Suivant l'article 1482 C.C., "la capacité d'acheter ou de vendre est déterminée par les règles générales concernant la capacité de contracter contenue dans le premier chapitre du titre Des Obligations". Cette disposition nous renvoie particulièrement à l'article 985 formulant le principe que:—

Art. 985. Toute personne est capable de contracter, si elle n'en est pas expressément déclarée incapable par la loi.

(1) Q.R. [1954] Q.B. 333.

Il est vrai que l'article suivant déclare que:—

Art. 986. Sont incapables de contracter:— . . . Les femmes mariées, excepté dans les cas spécifiés par la loi . . .

On reconnaît toutefois que cette disposition ne fait généralement que l'énumération ou le classement des incapables et que c'est aux diverses dispositions de la loi qu'il faut référer pour constater les cas où, quant à la femme mariée en particulier, il est fait exception au principe général de la capacité de contracter édicté par l'article 985. A la vérité, cette interprétation se justifie du fait que dans ces autres dispositions pertinentes à la question, le Code ne formule pas, par exception, la capacité de la femme mariée—comme il faudrait s'y attendre si le principe de son incapacité était déjà posé par l'article 986 et qu'il faille en rechercher ailleurs les exceptions—mais prononce plutôt et par exception à la règle de l'article 985, son incapacité. C'est ainsi qu'au titre du Mariage, chapitre des Droits et Devoirs des époux, le Législateur, à l'article 177, sans toutefois y épuiser la question, établit et conditionne, quant à la femme mariée, l'exception au principe de l'article 985.

Au même temps que bien d'autres, cet article 177 a été modifié par la loi 1931. Avant cet amendment, il se lisait comme suit:

Art. 177. La femme, même non commune, ne peut donner ou accepter, aliéner ou disposer entre vifs ni autrement contracter, ni s'obliger, sans le consentement du mari dans l'acte ou son consentement par écrit, sauf les dispositions contenues dans l'acte de la 25 Vict., chap. 66.

Si, cependant, elle est séparée de biens, elle peut faire seule tous les actes et contrats qui concernent l'administration de ses biens.

Ainsi donc, le premier paragraphe de cet article établissait le principe de l'incapacité de la femme mariée, agissant seule, en matière contractuelle; à ce principe, le second paragraphe apportait une exception en faveur de la femme séparée de biens mais ce, seulement quant aux actes et contrats concernant l'administration de ses biens, meubles ou immeubles, peu importe, la loi ne distingue pas. Et comme, lorsqu'on n'est pas dans l'exception, on est dans le principe, la femme séparée de biens demeurait assujettie pour tous les cas non prévus dans l'exception établie en sa faveur au second paragraphe de cet article, aux incapacités dont la femme mariée y était frappée au premier. Le tout sujet évidemment à toutes autres dispositions de la loi.

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Depuis la loi de 1931, cet article se lit comme suit:

Art. 177. La femme même non commune, ne peut donner ou accepter, aliéner ou disposer entre vifs, ni autrement contracter, ni s'obliger, sans le concours du mari dans l'acte, ou son consentement par écrit, sauf les dispositions contenues dans l'acte de la 25 Vict., chap. 66.

Si cependant elle est séparée de biens, sa capacité d'agir civilement est déterminée par les articles 210 et 1422, suivant le cas.

Cet amendement n'apporte aucun changement au premier paragraphe. On a donc retenu cette règle de l'incapacité de la femme mariée, agissant seule, en matière contractuelle; règle établie par exception aux dispositions de l'article 985. Le second paragraphe de l'article 177 est de rédaction nouvelle. Et dès lors, on se pose la question de savoir si, comme le soumet l'intimé, la femme séparée de biens demeure, comme avant l'amendement du second paragraphe, assujettie à la règle d'incapacité posée par le premier, sauf dans la mesure où les articles auxquels nous réfère le second y font exception; ou si, suivant la prétention de l'appelante, ce nouveau texte du second paragraphe exclut complètement le cas de la femme séparée de biens de l'opération de l'article 177 et, en conséquence, de la règle d'incapacité y établie.

Au soutien de la prétention de l'appelante, on argumente comme suit. Statuant que "la capacité d'agir civilement de la femme séparée de biens est déterminée par les articles 210 et 1422", fatalement on statue que cette capacité n'est plus affectée par aucune des dispositions de l'article 177. Et dès lors, excluant totalement la femme séparée de biens de l'opération de ce dernier article, on la libère de la règle d'incapacité dont elle y était frappée avant l'amendement; et comme l'article 1422 ne lui défend pas d'agir seule pour faire l'acquisition d'un immeuble, cette seule raison suffirait pour adopter la prétention de l'appelante.

D'autre part, on appuie comme suit les vues de l'intimé. Dans le changement résultant de la loi 1931, on a retenu le premier paragraphe de l'article 177 établissant la règle de l'incapacité de la femme mariée; dans le nouveau comme dans l'ancien texte du second paragraphe, le Législateur ne fait qu'attribuer une capacité à la femme séparée de biens et ce, en fonction de et par exception à la règle d'incapacité posée par le premier paragraphe de l'article; le seul fait que ces exceptions soient formulées dans les articles 210 et 1422, auxquels le nouveau texte réfère, au lieu de l'être, comme

antérieurement, dans le cadre même de l'article 177, ne saurait, sauf dans la mesure où elle a pu le devenir par les dispositions de ces articles 210 et 1422, justifier de déduire que la femme séparée de biens a été émancipée de la règle d'incapacité dont elle était frappée, avant l'amendement, par l'article 177.

En toute déférence pour les Juges dissidents de la Cour du Banc de la Reine qui, sur ce point, ont adopté la prétention de l'appelante, je dois dire qu'à mon avis, l'interprétation de l'intimé doit prévaloir. Sans doute, un statut doit recevoir "une interprétation large, libérale, qui assure l'accomplissement de son objet et l'exécution de ses prescriptions suivant leurs véritables sens, esprit et fin". (S.R.Q. c. 1. art. 41). Mais à moins qu'il ne s'en soit exprimé en des terms exprès ou qu'il en résulte irrésistiblement des dispositions nouvelles, le Législateur n'est pas présumé avoir eu l'intention de faire des changements substantiels et radicaux à la loi qu'il modifie. (Maxwell, On Interpretation of Statutes, 9e éd., p. 84, "Presumption against implicit alteration of law"). Les dispositions des articles 210 et 1422, telles qu'amendées, ne sont, pas plus que la nouvelle disposition de l'article 177, dans leur forme ou substance, aptes à supporter la conclusion que la femme séparée de biens est désormais, sauf évidemment dans la mesure où elle peut l'être par ces articles, exclue de la règle d'incapacité retenue en l'article 177. Les dispositions des articles 210 et 1422 ont également été amendées en 1931. Le premier n'est d'aucune application à cette cause mais, décrétant que la séparation de corps "rend la femme capable de tous les actes de la vie civile et supprime la nécessité de l'autorisation maritale ou judiciaire", le Législateur apportait, quant à la femme séparée de corps, un changement substantiel et radical à la loi, changement manifesté dans des termes inéluctables. Le second se lit comme suit:

> Art. 1422. Lorsque les époux ont stipulé, par leur contrat de mariage qu'ils seront séparés de biens, la femme conserve l'entière administration de ses biens meubles et immeubles, la libre jouissance de ses revenus *et le droit d'aliéner, sans autorisation, ses biens meubles.*
>
> *Elle ne peut, sans autorisation, aliéner ses immeubles, ni accepter une donation immobilière.*

La partie non soulignée reproduit intégralement l'ancien texte de l'article et la partie soulignée, les additions qu'on y a faites. Si, par la loi de 1931, on entendait libérer la

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femme séparée de biens de la règle d'incapacité affectant la femme mariée, en matière contractuelle, on n'a guère manifesté cette intention en référant, par le deuxième paragraphe de l'article 177, à cette partie du texte non modifiée de l'article 1422, texte dont la substance implique d'elle-même l'idée d'une capacité limitée. De plus, et dans les additions faites à l'ancien texte de l'article 1422, qu'a-t-on changé de la substance de la loi? On a d'abord formellement reconnu à la femme séparée de biens le droit d'aliéner sans autorisation ses biens meubles; on disposait ainsi finalement d'une controverse sur l'existence de ce droit. On a ajouté qu'elle ne pouvait, sans autorisation, aliéner ses immeubles, ce qui était déjà couvert, non seulement en l'article 177 mais également en l'article 1424, en lequel, également amendé en 1931, on a retenu cette prohibition. Enfin, on a ajouté que la femme séparée de biens ne pouvait accepter une donation immobilière; l'article 763, qui n'a pas été modifié, défendait généralement à la femme mariée d'accepter une donation mobilière ou immobilière. Sans doute on a, dans le résultat, disposé de la controverse sur le droit de la femme séparée de biens d'aliéner sans autorisation ses meubles et étendu la mesure de sa capacité, mais je ne crois pas qu'on puisse s'autoriser de ce fait pour conclure que la femme séparée de biens a été libérée de la règle générale d'incapacité de l'article 177, comme le Législateur l'a fait clairement par l'article 210, au bénéfice de la femme séparée de corps.

Cette conclusion, toutefois, ne dispose pas de la question de droit beaucoup plus limitée qui se pose en cette cause et qui réduite à ses justes dimensions, est de savoir si l'appelante pouvait, en payant comptant, avec les fonds que l'on sait, faire l'acquisition des droits immobiliers précisés à la convention attaquée. J'écarte, pour l'instant, de la considération, la clause de réméré et le fait que ces immeubles achetés étaient déjà affectés d'une hypothèque. Je ne puis me convaincre que dans le champ de la capacité accordée à la femme séparée de biens, laquelle, tel que déjà indiqué, conserve, comme avant le mariage, l'entière administration de ses biens meubles et immeubles et qui, à cet égard, peut faire tous actes et contrats, qui a, de plus, la libre jouissance de ses revenus, le droit d'aliéner, à titre gratuit ou onéreux, ses biens meubles, il n'y ait de place pour le droit d'acquérir

sans autorisation des droits immobiliers, des immeubles aussi bien que des meubles, en remploi de meubles ou de deniers dont elle peut librement disposer. Dans les raisons de jugements des Cours inférieures, aussi bien qu'à l'argument devant nous, aucune décision citée ne lui nie ce droit. Par ailleurs, et dans *Dame Sadosky* v. *René-T. Leclerc Incorporée* (1), M. le Juge Surveyer, allant plus loin qu'il n'est besoin en la présente cause, exprime l'avis que "de l'ensemble des dispositions du Code, semblables à celles du Code Napoléon, relatives à la femme séparée de biens, il résulte qu'elle peut disposer sans autorisation de son capital mobilier et même acquérir des immeubles, l'aliénation seule des immeubles étant interdite à la femme séparée de biens non autorisée." En France, et avant l'émancipation de la femme mariée, on formulait sur la question les vues suivantes:

Dalloz, Répertoire Pratique, Tome II, p. 782, No. 736:

La femme séparée de biens peut-elle faire des acquisitions de meubles ou d'immeubles en remploi de ses propres? L'affirmative est admise par les auteurs, qui soutiennent que la femme séparée de biens a le droit de disposer de son mobilier sans aucune restriction. Il a été jugé, en ce sens: que le fait d'acheter "pour faire emploi de ses revenus ou pour placer un capital mobilier qui est remboursé" est un acte d'administration que les administrateurs de biens d'autrui peuvent faire, et qui doit être permis aussi à la femme séparée de biens.

Juris-Classeur Civil, 2e éd., (1926) article 1449, nos 120, 121 et 122:—

120. On admet tout d'abord et sans conteste, que la femme peut faire des acquisitions mobilières ou immobilières pour faire emploi de ses revenus ou de ses économies.

121. On admet encore généralement que le femme peut, à condition que ce soit au comptant, faire toutes espèces d'acquisitions mobilières ou immobilières, avec les deniers provenant de la rentrée de ses capitaux.

122. Quant aux acquisitions qui seraient faites à crédit ou à découvert, elles constituent des obligations que la femme ne peut contracter sans autorisation.

Ces autorités supportent la proposition qu'en l'espèce l'appelante avait droit de faire, à titre de placement, l'acquisition, sans autorisation, des droits immobiliers précisés en la convention attaquée en en payant comptant et intégralement le prix avec des argents dont elle avait le droit de disposer.

(1) Q.R. (1934) 72 S.C. 105.

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Mais, objecte l'intimé, achetant sous condition de réméré des immeubles qui, au surplus, étaient hypothéqués, l'appelante s'obligeait (i) au cas de l'exercice de la faculté de réméré par le vendeur, à lui réaliéner la majeure partie des immeubles et (ii) demeurant, de toutes façons, propriétaire d'une partie des immeubles vendus, à payer la créance hypothécaire ou délaisser l'immeuble. En somme, conclut-on, par son contrat, elle assume l'obligation d'aliéner ses immeubles, ce qu'elle ne peut faire sans autorisation.

Sur le réméré. S'appuyant sur ces décisions déclarant que, dans une vente à réméré et *pendente conditione*, l'acheteur a un *jus in re* et le vendeur un *jus ad rem* sur la chose faisant l'objet du contrat, on en déduit que, lorsque la faculté de réméré est exercée, l'acheteur réaliène au vendeur l'objet de la vente. En toute déférence, je dois dire qu'à mon avis, cette conclusion ne découle pas de la prémisse sur laquelle elle s'appuie, car ce droit de propriété à la chose acquise par cette vente, ce *jus in re*, garde virtuellement, *pendente conditione*, le germe de sa résolubilité; résolubilité qui s'accomplit en plénitude à l'exclusive faculté du vendeur et par le seul fait que dans l'exercice de son droit, il satisfait aux obligations conditionnant cet exercice. L'acheteur n'ayant, en l'espèce, aucun acte juridique à poser, on ne peut dire qu'il a consenti, dans ce contrat où il fait l'acquisition d'un droit sous la condition que ce droit peut lui être retiré, à faire une aliénation quand le vendeur le lui retire. Suivant Pothier:—

> La clause de réméré est une clause résolutoire sous laquelle la vente a été faite et par laquelle il a été convenu qu'il serait au pouvoir du vendeur de résoudre le contrat. Le réméré est *distractus potius quam novus contractus* et chacun, en conséquence, doit reprendre, de part et d'autre, ce qu'il a donné. Ce principe que le réméré est plutôt *distractus potius quam novus contractus* n'est pas douteux dans notre droit français. (Pothier, 3e éd., Bugnet, vol. 3, no 411).

Et Pothier ajoute au no 429:—

> L'effet du réméré, lorsque la clause du réméré est portée par le contrat de vente, est d'opérer pour l'avenir la résolution du contrat de vente. Le vendeur qui, en exécution de cette clause, rentre dans l'héritage qu'il avait vendu, ne l'acquiert pas proprement de nouveau; le réméré est plutôt une résolution et une cessation de l'aliénation qu'il en a faite, qu'une nouvelle acquisition.

Cette doctrine de Pothier est la doctrine suivie par les commentateurs du Code Napoléon lesquels, critiquant comme étant de mauvaise terminologie, les expressions "faculté de

réméré" ou "faculté de rachat", notent opportunément que, dans sa substance, la loi ne dit pas que la vendeur *rachète,* mais qu'il *reprend* sa chose, qu'il *rentre dans son héritage* par l'exercice du réméré. On remarquera que si nos propres codificateurs ont gardé, comme dans les articles du Code Napoléon, d'où ceux de notre Code sont tirés, l'expression "faculté de réméré", ils ont retranché, ce qui est significatif, l'expression "faculté de rachat". Dans la substance de notre loi, ils ont, comme au Code Napoléon, retenu les expressions "droit de reprendre" (1546), "rentre dans son héritage" (1547), "le reprend" (1547), "reprend la chose" (1550-a), "reprend également la chose" (1550-b).

Précisant le caractère juridique de la faculté de réméré, Baudry-Lacantinerie (Tome 19, Traité de droit civil, No. 605) s'exprime comme suit:—

> C'est une vente sous condition résolutoire: la condition résolutoire consiste dans la faculté de rachat que s'est réservée le vendeur; celui-ci a vendu sous la condition que la vente sera résolue s'il exerce le rachat dans le délai convenu. Cette condition vient-elle à défaillir, ce qui arrive quand le vendeur laisse passer le délai fixé sans user du pacte de rachat, l'acheteur devient propriétaire incommutable (art. 1662).
>
> Au contraire, la condition se réalise-t-elle, le vendeur ayant usé du pacte dans le délai fixé, tout est alors remis au même état que si la vente n'avait jamais eu lieu (arg. art. 1183 et 1673): l'acheteur est donc censé n'avoir jamais été propriétaire, et le vendeur n'avoir jamais cessé de l'être.
>
> Par où l'on voit que les expressions *vente avec faculté de rachat,* ou *vente à réméré,* sont assez impropres. Empruntées au droit romain, où le pacte *de retrovendendo* donnait au vendeur une action pour obtenir que l'acheteur lui revendît la chose vendue, elles donneraient à entendre que, lorsque le vendeur use du pacte de rachat; la propriété de la chose vendue lui revient en vertu d'une revente consentie par l'acheteur, d'une rétrocession: ce qui aurait notamment pour conséquence d'entraîner le paiement d'un deuxième droit de mutation. Or les choses se passent tout autrement, ainsi que nous venons de l'expliquer. Loin de donner naissance à un nouveau contrat, l'exercice du droit de rachat détruit l'ancien: il y a *distractus,* et non pas *contractus novus,* idée que rendait fort bien l'expression *retrait conventionnel,* employée dans notre ancien droit pour désigner ce que nous appelons aujourd'hui la faculté de rachat.

Laurent (Tome 24, Droit civil, No 381) s'exprime ainsi sur la question:—

> Tous les auteurs remarquent que le terme de *rachat* ou de *réméré* est inexact. Il suppose que le vendeur *rachète* la chose, ce qui constituerait une seconde vente; tandis que l'exercice de la faculté de rachat opère la résolution de la vente, et la vente résolue est censée n'avoir jamais existé. Que tel soit le caractère du rachat, cela n'est pas douteux, puisque la loi le dit. L'article 1658 porte que le contrat de vente peut être *résolu* par l'exercice de la faculté de rachat; l'article 1659, qui emploie la mauvaise expression de *rachat* ou de *réméré,* ne dit cependant pas que le

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vendeur se réserve de *racheter* la chose vendue, il dit qu'il se réserve de la *reprendre,* ce qui suppose la résolution de la vente, car le vendeur *reprend* en vertu du pacte; tandis que s'il *rachetait,* il ne pourrait acquérir qu'en vertu d'un nouveau contrat. Enfin l'article 1673 prouve que le rachat opère résolution de la vente.

. . . . . .

. . . . . .

Qu'est-ce donc que le pacte de rachat? C'est une vente faite sous condition résolutoire. Cette condition est expresse, puisqu'elle est stipulée par le contrat; c'est donc une condition résolutoire expresse.

Ajoutons que notre article 1088 édicte que:

Art. 1088. La condition résolutoire, lorsqu'elle est accomplie, opère de plein droit la résolution du contrat. Elle oblige chacune des parties à rendre ce qu'elle a reçu et remet les choses au même état que si le contrat n'avait pas existé; en observant néanmoins les règles établies dans l'article qui précède relativement aux choses qui ont péri ou ont été détériorées.

En somme, on n'aliène pas ce qu'on n'a pas. En 1938, la Législature de Québec, aux articles 1550(a) et 1550(c), a, dans le cas où le vendeur d'un immeuble vendu à réméré a satisfait aux exigences lui donnant droit de reprendre l'immeuble vendu, imposé à l'acheteur l'obligation de consentir au vendeur un acte de rétrocession. L'intimé invoque ces dispositions au soutien de sa prétention. A mon avis, cette obligation est totalement étrangère aux facteurs juridiques conditionnant en plénitude le droit du vendeur à la reprise de la chose. A la vérité, l'examen attentif des textes révèle que cette obligation de l'acheteur ne naît que lorsque le droit du vendeur à la reprise de l'immeuble vendu est, par l'exercice du réméré et la satisfaction aux exigences qui le conditionnent, déjà intégralement acquis au vendeur. Cet acte de rétrocession n'est donc pas un acte translatif de propriété mais recognitif du fait accompli de la résolution *pleno jure* du contrat et, en conséquence, du fait accompli de la reprise par le vendeur de la chose vendue. Et il suffit bien, je crois, de constater que cet amendement ne s'applique que dans le cas d'une vente d'immeuble et non de meuble, pour en déduire que cette obligation imposée à l'acheteur de signer un acte de rétrocession n'affecte pas le caractère juridique de la clause de réméré mais qu'elle est imposée en fonction de la publicité qu'il convient de donner, par enregistrement, à la résolution du droit de l'acheteur. Sans doute, si la faculté de réméré est exercée, l'appelante sera tenue de satisfaire à cette obligation résultant de la loi et

non de la convention c'est-à-dire de signer cet acte de rétrocession. La question de savoir si elle devra y être autorisée pourra alors se poser. La détermination de cette question est, à mon avis, étrangère à la décision du présent litige. Et rien ne nous justifie de présumer que, si véritablement il y a lieu d'être autorisé pour l'accomplissement d'un acte formellement prescrit par la loi, la loi ne sera pas respectée.

Reste la suggestion que l'appelante ne pouvait, sans autorisation, faire l'acquisition de biens déjà hypothéqués. Le contrat d'hypothèque n'est pas au dossier et nous restons dans l'ignorance du détail de ses termes et conditions. Ce qui est certain c'est qu'en son contrat d'acquisition, l'appelante n'a pris et ne s'est engagée à prendre, à l'égard de cette créance hypothécaire, aucun engagement personnel. Mais, suggère-t-on, elle s'est déjà, par sa convention, mise dans la position de ne pouvoir faire que l'un ou l'autre de deux actes, s'obligeant ainsi pour l'avenir: soit à délaisser les immeubles, ce qui équivaudrait à une aliénation d'immeubles, ou, à défaut, à payer la dette hypothécaire. Assumant qu'au jour de l'exigibilité de la créance hypothécaire, l'appelante soit encore propriétaire,—ce qui demeure problématique,—le moins que l'on peut dire c'est que la convention qu'elle a signée la laissera libre ou de payer la dette, avec et en remploi de ses propres, ou de délaisser. Réduite à cette dernière alternative, il faut noter que ni le délaissement, ni la vente en justice de ses immeubles à une autre personne, ne constituera en l'espèce, de sa part, cette aliénation envisagée par l'interdiction de la loi. Par le délaissement, le détenteur ne fait aucun acte d'aliénation puisqu'il conserve la propriété de l'immeuble jusqu'à ce qu'elle soit adjugée à une autre personne (2079 C.C.; voir aussi Mignault, Droit civil canadien, tome 9, p. 173 et s.; Langelier, Cours de droit civil tome 6, p. 313 et s.; Delorimier, Bibliothèque du Code civil, vol, 18, p. 1 et s.). Et la vente en justice que poursuivrait, en l'espèce, le créancier hypothécaire, pas plus d'ailleurs que la convention d'hypothèque y donnant lieu, ne procédera du consentement de l'appelante laquelle, dans le résultat, pourra, au pis-aller, perdre, en tout ou en partie, des argents dont elle était libre de disposer. La loi lui défend d'aliéner ses immeubles sans autorisation mais ne lui impose pas l'obligation de les conserver.

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DUCHESNEAU v. COOK

Fauteux J.

Pour toutes ces raisons, je suis d'avis qu'en l'espèce, l'appelante pouvait consentir, sans autorisation, le contrat dont la validité est attaquée. Et cette conclusion me dispense de considérer la deuxième proposition de l'appelante basée sur les dispositions de la loi relatives à l'utilisation des biens réservés.

Je maintiendrais l'appel avec les dépens de toutes les Cours.

ABBOTT J.:—J'ai eu l'avantage de lire les notes de mon collègue, M. le Juge Fauteux. Je partage entièrement les vues qu'il a exprimées d'une façon si claire et, par conséquent, je maintiendrais l'appel avec dépens de toutes les Cours.

Appeal allowed with costs.

Solicitors for the appellant: *Lesage, Turgeon and Bienvenue.*

Solicitors for the respondent: *Letarte and Ferland.*

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*Oct. 28

1955

*Jan. 25

BRITISH COLUMBIA HOTEL EMPLOYEES' UNION, LOCAL 260 (*Intervenor*) ..... APPELLANT;

AND

BRITISH COLUMBIA HOTELS ASSOCIATION (*Prosecutor*) ..... RESPONDENT.

AND

HOTEL AND RESTAURANT EMPLOYEES' UNION, LOCAL 28 (*Intervenor*) ..... RESPONDENT;

AND

LABOUR RELATIONS BOARD (BRITISH COLUMBIA)

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Labour—Trade Unions—Collective Bargaining—Whether a group, a fractional part of a larger unit already certified, the majority of whom favour continuance of existing bargaining authority, may be certified—Industrial Conciliation and Arbitration Act, R.S.B.C. 1948, c. 155, ss. 10, 12, 13, 47, 58.

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

The respondent Local was certified by the respondent Labour Relations Board and entered into a collective agreement with the respondent Association in respect of 31 hotels for a period ending April 30, 1953. The appellant made application to the Board on April 26, 1953 to be similarly certified for three units composed of the employees of three of the hotels included in the above-mentioned 31 hotels. The respondent Association supported by the respondent Local thereupon made application for a writ of prohibition directed to the said Board prohibiting certification. An order *nisi*, granted by Wood J., was discharged by Manson J. The order of the latter was reversed by the Court of Appeal for British Columbia. On appeal from that judgment.

Held: that the appeal should be allowed and the order of Manson J. restored.

Per Kerwin C.J., Estey and Cartwright JJ.: The Act contemplates that, in the main, a collective agreement negotiated under its provisions will remain in force for the period therein specified. It was apparent to the Legislature however that circumstances might develop which would make that impossible or undesirable and provision was made for its termination under s. 47, its cancellation under s. 12 (7), and the replacement and revocation of a bargaining authority under ss. 10 and 13. While therefore cancellation was provided for only under s. 12 (7), it would seem that the provisions of ss. 10 and 13 contemplate the making of an application such as that here in question prior to, and quite independent of, cancellation under s. 12 (7).

Per Rand J.: The provisions of the Act enable the Board, within the conditions laid down, to certify a group as a unit appropriate for bargaining purposes even though the group may be a fractional part of a larger unit already certified the majority of employees in which are in favour of continuing the existing bargaining authority.

Per Locke J.: It was the duty of the Board upon receiving the application to consider whether the proposed unit was one appropriate for collective bargaining, a decision involving the exercise of a discretion as to which the determination of the Board was conclusive by reason of the term of s. 58 (1). Had the proceedings halted by the writ been proceeded with and the unit found appropriate it would have been the obligation of the Board to certify the appellant.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) allowing an appeal, Sidney Smith J.A. dissenting, from the judgment of Manson J. (2)

A. B. Macdonald and *Maurice Wright* for the appellant.

A. C. DesBrisay, Q.C. for the respondent Hotels Ass.

J. L. Farris, Q.C. for the respondent Local 28.

J. J. Urie for the Labour Relations Board (B.C.).

(1) (1954) 11 W.W.R. (N.S.) 685; 3 D.L.R. 85.

(2) (1954) 11 W.W.R. (N.S.) 76.

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

ESTEY J.:—The respondent, Hotel and Restaurant Employees' Union Local 28 (hereinafter referred to as Local 28), was certified the bargaining authority for the employees by the Labour Relations Board (British Columbia) (hereinafter referred to as the Board) and had a collective agreement with the respondent, British Columbia Hotels Association (hereinafter referred to as the Association), in respect to 31 hotels for a period of two years ending April 30, 1953.

The appellant, British Columbia Hotel Employees' Union, Local 260 (hereinafter referred to as Local 260), on April 28, 1953, made three applications to the Board to be certified the bargaining authority for three units to be composed of the employees of the Georgia, Niagara and Marble Arch Hotels respectively, all three of which were included in the above-mentioned 31 hotels. These applications were considered by the Board on May 15, 1953, when it directed that votes be taken in the three hotels to ascertain the wishes of the employees.

These votes were not taken and the three applications were allowed to remain in abeyance because Local 28 had commenced *certiorari* proceedings in respect to the Alcazar Hotel, which raised questions as to the construction of provisions in the statute relevant to the consideration of the three applications.

On December 10, 1953, Mr. Justice Clyne rendered judgment in the Alcazar *certiorari* proceedings, affirming the Board's disposition of that application, and on January 6, 1954, the Board notified Local 260 that a vote would be taken at the Georgia Hotel and, it may be assumed, at the Niagara and Marble Arch Hotels.

On January 7, 1954, the Association applied to Mr. Justice Wood, who granted an order *nisi* for the issue of a writ of prohibition directed to the Board prohibiting the certification of Local 260 as the bargaining authority for the three hotels and the taking of votes therein. Local 28 intervened and has supported the Association throughout.

The order *nisi* was discharged by Mr. Justice Manson (1) February 2, 1954. On March 26, 1954, the order of the latter was reversed by the Court of Appeal for British Columbia, Mr. Justice Sidney Smith dissenting. (2)

Subsequently, the Court of Appeal granted leave to Local 260 to appeal to this Court and in the proceedings thereupon taken Labour Relations Board (British Columbia) was made a respondent. This Board had been established under *Industrial Conciliation and Arbitration Act* (R.S.B.C. 1948, c. 155). This Act was repealed by c. 17 of the Statutes of 1954, assented to April 14, 1954, but which, according to s. 87, was to come into force only upon proclamation of the Lieutenant Governor. Such a proclamation was made on June 15, 1954, whereby the Act came into force on June 16, 1954. Under the 1954 Act the Board is known as Labour Relations Board. Upon notice a motion was made by it at the opening of the argument before us for an order extending the time for appealing and giving it leave to appeal from the judgment of the Court of Appeal of March 26, 1954. This motion was granted.

The Respondents' contention is that, the Board having certified Local 28 to be the bargaining authority for the employees of the 31 hotels, that certification remains effective until cancelled under the provisions of s. 12(7) of the *Industrial Conciliation and Abitration Act* and, therefore, it has no jurisdiction to hear an application such as that here made by Local 260 in respect of the employees in three of the 31 hotels.

This issue must be resolved upon the language of the statute, the primary purpose of which, as its title indicates, is to give the employees the right to organize and provide for "Mediation, Conciliation, and Arbitration of Industrial Disputes." It contemplates that, in the main, a collective agreement negotiated under its provisions will remain in force for the period therein specified. However, that circumstances may develop which would make that impossible or undesirable was apparent to the Legislature and, therefore, provision was made for its termination under s. 47, its cancellation under s. 12(7) and the replacement and revocation of a bargaining authority under ss. 10 and 13.

(1) (1954) 11 W.W.R. (N.S.) 76. (2) (1954) 11 W.W.R. (N.S.) 685.

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Estey J.

Section 10(1) (*c*) provides that "a labour organization claiming to have as members in good standing a majority of employees in a unit that is appropriate for collective bargaining may apply to the Board to be certified as the bargaining authority for the unit" in three cases numbered (*a*), (*b*) and (*c*), of which (*a*) and (*c*) are relevant to this discussion:

> (*a*) Where no collective agreement is in force and no bargaining authority has been certified for the unit:
>
> * * *
>
> (*c*) Where a collective agreement is in force, and where ten months of the term of a collective agreement have expired.

The application of Local 260 was made under s. 10(1)(*c*). Not only throughout this section is there no mention of s. 12(7), but it would appear that if the cancellation contemplated by the latter was a condition precedent to the application of s. 10(1)(*c*) the ten-month period would appear inappropriate and unnecesary. That these sections, as their language would suggest, contemplate independent applications is emphasized by the fact that under s. 12(7) the Board may grant the application at any time after certification, if it is satisfied "that the labour organization has ceased to be a labour organization, or that the employer has ceased to be the employer of the employees in the unit . . . ." While, therefore, cancellation is provided for only under s. 12(7), it would seem that the provisions of ss. 10 and 13 contemplate the making of an application such as that of Local 260 here in question prior to and quite independent of cancellation under s. 12(7).

Local 260 made its application under s. 10(1)(*c*) after the expiration of the ten-month period of the then current collective agreement. It is said, in support of the respondents' contention, that even if the application of Local 260 may be made under s. 10(1)(*c*), the Board can, upon such an application, only determine whether "the majority of the employees in the unit are members in good standing of the labour organization." This contention accepts the prior certification as precluding the Board from considering, upon such an application, whether "the unit is appropriate for collective bargaining." Under this legislation s. 10 sets forth the various circumstances under which a labour organization may apply for certification and s. 12 specifies what must be found by the Board in order that certification

may be directed. With great respect, the language of these sections does not support the respondents' contention. On the contrary, it would seem that s. 12 requires, upon every application, that the Board must decide both whether "the unit is appropriate for collective bargaining" and whether "the majority of the employees in the unit are members in good standing of the" applicant labour organization.

Moreover, the word "unit," as first used in s. 10(1), is preceded by the indefinite article "a." It is "a unit" that a labour organization has itself selected and in respect to the employees in which it asks certification as the bargaining authority that the Board must, upon each application, consider. There are no words in s. 10(1) that in any way limit or restrict the unit or, indeed, which would exclude an application in respect of a part of an existing unit. It is of some significance that thereafter throughout the subsection the phrase is "the unit," which refers back to "a unit" in the earlier part of the subsection.

Neither does the language in s. 13 support the respondents' contention, as expressed in the factum of Local 28, that "the unit referred to in s. 13 can only be the unit which has been approved by the Board as a unit appropriate for collective bargaining." It will be observed that not only in s-s. (1) of s. 10, but also in s-s. (2) thereof and in s-ss. (1) and (2) of s. 12 and in s. 13 the phrase first used is "a unit" and thereafter it is "the unit." It is apparent that in each case the latter phrase refers back to "a unit" as first used in the above-mentioned sections and subsections. Moreover, I do not think "a unit," as used in s. 13, means a unit that has in some earlier application been determined to be "a unit appropriate for collective bargaining." As already pointed out, ss. 10 and 12 provide under what circumstances application may be made and what must be determined in order that certification may be directed. Then follows s. 13 which deals with the replacement and revocation of the former bargaining unit and the taking over by the new bargaining unit. Section 13(*b*) deals specifically with the possibility of a bargaining authority previously certified for "the unit." If that phrase referred to the unit as previously decided to be appropriate for collective bargaining the concluding words "in respect of such employees" would be without meaning, or mere surplus. In my view they are

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Estey J.

essential, as "the unit" refers back to the phrase "a unit" which the Board, upon an application such as here made by Local 260, has certified under s. 12(2) as a bargaining authority.

The definition of the word "unit" in s. 2(3) does not assist in the determination of this issue. It may well be that in another section or subsection of this statute the word "unit" refers to the existing or current bargaining unit, as, indeed, it may well be in s. 12(7). That, however, does not detract from its meaning as I have construed it in ss. 10(1) and (2), 12(1) and (2) and 13.

It is suggested that the foregoing construction may undermine the stability and peace the statute is intended to attain. With great respect, it would seem that this suggestion overlooks that the attainment of that end rests upon the acceptance of and satisfaction with wages, working conditions and their bargaining authority on the part of the employees. If the statute is to be permanently effective, the collective agreements made must, in the main, be adhered to and carried out according to their terms and, in particular, for the period specified. Where, however, exceptional circumstances develop which make that impossible, the Legislature has enacted provisions that are intended to enable the Board to deal with them as they develop and thereby restore those factors that make for peace and stability.

I agree with the learned Chief Justice that "the Act contemplates changing conditions." This appears evident not only in the sections already mentioned, but, indeed, throughout the Act, and particularly in s. 58(2) where the Board may "reconsider any decision or order made by it under this Act." It is, however, submitted that under s. 12(2) the phrase "shall certify the applicants as the bargaining authority," being a statutory direction to the Board, is not a "decision or order" of the Board within the meaning of s. 58(2). The statute directs the Board to determine whether the two factors mentioned in s. 12(1) and (2) are present and, in reality, the only order made by the Board is that certification contemplated in s. 12(2). It is that certification that is subject to cancellation under s. 12(7) and it is that certification which is revoked in s. 13(*b*). Moreover, I do not think the Legislature con-

templated that if, after certification, the unit is inappropriate for collective bargaining, or the employees in the unit are not members in good standing of the labour organization, except for limitations as to the making of certain applications provided in the Act, this certification should continue. With great respect it would seem to me that to give the limited construction here suggested would, in certain circumstances, defeat the object of the Act.

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Estey J.

Counsel agreed with the observation of Mr. Justice Davey in *United Steel Workers of America* v. *Labour Relations Board* (1), at 106, that the word "or" in what is now s. 12(2) inadvertently remained in the course of its amendment (S. of B.C. 1948, c. 31, s. 28) and that the meaning thereof is clear without that word. We also agree with that view and have construed the section as if the word "or" had been deleted.

The appeal should be allowed and the order of Mr. Justice Manson restored. The appellant should have its costs in this Court and in the Court of Appeal against the Association and Local 28. There should be no order as to costs for or against either Board, including the motion of the new Board for leave to appeal.

RAND J.:—I agree that the provisions of the *Industrial Conciliation and Arbitration Act* of British Columbia enable the Labour Relations Board, the intervenor, within the conditions laid down, to certify a group as a unit appropriate for bargaining purposes even though the group may be a fractional part of a larger unit which is already certified and the majority of employees in which are in favour of continuing the existing bargaining authority. The analyses of those provisions by Manson J. on the motion, (2) Smith J.A. in the Court of Appeal (3) and by my brothers Estey and Locke, JJ., are in substantial agreement, and I will not add anything to what they have said.

I would, therefore, allow the appeal and restore the trial judgment with costs in this Court and in the Court of Appeal.

(1) (1953-54) 10 W.W.R. (N.S.) 97; [1953] 4 D.L.R. 563.
(2) (1954) 11 W.W.R. (N.S.) 76.
(3) (1954) 11 W.W.R. (N.S.) 685.

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LOCKE J.:—This is an appeal from a judgment of the Court of Appeal of British Columbia whereby the judgment of Manson J., setting aside a writ of prohibition issued on the ex-parte application of the British Columbia Hotels Association directed to the Labour Relations Board of British Columbia and the members of that body, was set aside. Sidney Smith J.A. dissented and would have dismissed the appeal.

The British Columbia Hotel Employees' Union, Local 260, and the Hotel and Restaurant Employees' Union, Local 28, are labour organizations, within the meaning of that term as used in the *Industrial Conciliation and Arbitration Act* of British Columbia (R.S.B.C. 1948, c. 155). The British Columbia Hotels Association is a society organized under the provisions of the *Societies Act* of the Province and is an employers' organization, within the meaning of the said Act. The Labour Relations Board (British Columbia) is established under the provisions of the Act for the purpose of exercising the functions thereby assigned to it. Hereinafter, I will refer to these parties respectively as Local 260, Local 28, the Association and the Board.

The occurrences which give rise to the present litigation are set out in detail and in chronological order in the reasons for judgment delivered by Manson J. and it is unnecessary to repeat them.

The sections of the Act which affect the matter appear to me to be as follows:

Section 2(3) provides:

> For the purpose of this Act, a "unit" means a group of employees, and "appropriate for collective bargaining" with reference to a unit means appropriate for such purposes, whether the unit is an employer unit, craft unit, professional unit, plant unit, or a sub-division of a plant unit, or any other unit, and whether or not the employees therein are employed by one or more employers.

Section 10 reads in part:

> (1) A labour organization claiming to have as members in good standing a majority of employees in a unit that is appropriate for collective bargaining may apply to the Board to be certified as the bargaining authority for the unit in any of the following cases:—
>
> (*a*) Where no collective agreement is in force and no bargaining authority has been certified for the unit:
>
> * * *
>
> (*c*) Where a collective agreement is in force, and where ten months of the term of a collective agreement have expired.

(2) A labour organization claiming to have as members in good standing a majority of employees in a unit that is appropriate for collective bargaining, and the employees in which are employed by two or more employers, may make application under this section to be certified as bargaining agent for the unit.

Section 11 makes provision for the appointment of craft unions whose members comprise only part of the employees as bargaining agents for their members in defined circumstances.

Section 12 reads in part:

12. (1) Where a labour organization applies for certification as the bargaining authority for a unit, the Board shall determine whether the unit is appropriate for collective bargaining, and the Board may, before certification, include additional employees in, or exclude employees from, the unit.

(2) When, pursuant to an application for certification by a labour organization, the Board has determined that a unit of employees is appropriate for collective bargaining if the Board is satisfied that the majority of the employees in the unit are members in good standing of the labour organization; or the Board shall certify the applicants as the bargaining authority of the employees in the unit; but if the Board is not so satisfied, it shall refuse the application.

* * *

(7) If, at any time after a labour organization has been certified as bargaining agent for a unit of employees, the Board is satisfied after such investigation as it deems proper that the labour organization has ceased to be a labour organization, or that the employer has ceased to be the employer of the employees in the unit, it may cancel the certification. If ten months have elapsed after the certification of a labour organization and the Board is satisfied after such investigation as it deems proper that the labour organization has ceased to represent the employees in the unit, it may cancel the certification.

Section 13 reads:

13. Where a bargaining authority is certified for a unit:—

(*a*) That bargaining authority shall immediately replace any other bargaining authority for the unit, and shall have exclusive authority to bargain collectively on behalf of the unit and to bind it by a collective agreement until the certification is revoked:

(*b*) If another bargaining authority had previously been certified for the unit, the certification of the last-mentioned bargaining authority shall be deemed to be revoked in respect of such employees; and

(*c*) If, at the time of certification, a collective agreement binding on the unit is in force, that agreement shall remain in force, but any rights and obligations that were thereby conferred or imposed upon the bargaining authority whose certification has been revoked shall cease so far as that bargaining authority is concerned, but shall be conferred or imposed on the new bargaining authority.

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Locke J.

Section 58 defines certain of the powers of the Board and, so far as it is necessary to consider it, reads:

> 58. (1) If a question arises under this Act as to whether:—
>
> * * *
>
> (*g*) A group of employees is a unit appropriate for collective bargaining:
>
> * * *
>
> the Board shall decide the question, and its decision shall be final and conclusive for all the purposes of this Act except in respect of any matter that is before a Court.
>
> (2) The Board may, if it considers it advisable so to do, reconsider any decision or order made by it under this Act, and may vary or revoke any such decision or order.

By the terms of a collective agreement dated June 26, 1951, made by Local 28 on behalf of the employees with the Association, it was provided, *inter alia,* that all employees covered by it should, within thirty days from its date, make application and complete membership in the union and any employees employed during the term of the agreement should apply for membership and complete the same within thirty days after the date of their employment, and that such union membership should be maintained during the agreement as a condition of employment. The term was expressed to be from May 1, 1951, to April 30, 1953, and thereafter from year to year, subject to the right of either party to terminate it by giving sixty days' written notice.

A schedule forming part of the agreement showed the owners of the Alcazar, Niagara, Georgia and Marble Arch Hotels as being among those on whose behalf the Association executed the agreement.

Prior to the expiration of the term of this agreement, an application had been made to the Board by the Alcazar Hotel Employees' Mutual Benefit Association to be certified as the bargaining authority for the employees of that hotel. On April 1, 1953, this organization had been certified by the Board and proceedings were taken by Local 28 by way of *certiorari* to quash the order of the Board. The application for the writ was ultimately dismissed by Clyne J. on December 10, 1953 (see *In re Hotel and Restaurant Employees' International Union, Local 28 et al* (1).

This litigation was in progress when on April 28, 1953, Local 260 applied to the Board for certification as bargaining agent for the employees of the Niagara, Georgia and

(1) (1954) 11 W.W.R. (N.S.) 11; 1 D.L.R. 772.

Marble Arch Hotels. Since the action of the Board in granting a separate certification for the employees of the Alcazar Hotel had been made the subject of litigation, the Board notified the employees of the three hotels last mentioned that, when the Alcazar Hotel litigation was terminated, the Board would proceed to take a vote of the employees concerned if its action was upheld by the Court.

In the meantime, however, the Association and Local 28 had commenced to negotiate a new agreement to replace the one which had expired on April 30, 1953, and this resulted in a new agreement dated July 1, 1953, and made operative as of that date. In making this agreement the Association acted, *inter alia,* for the owners of the Niagara, Georgia and Marble Arch Hotels.

The point to be determined is whether the Act vests in the Board power to approve as a unit of employees appropriate for collective bargaining a group of employees who at such time are included in another unit, except in the events provided for in subsection (7) of s. 12. In the present matter, Local 28 had not ceased to be a labour organization and the employers had not ceased to employ the employees in the unit which had been determined to be appropriate for collective bargaining on the application of Local 28 on February 28, 1952, when the application of Local 260 was made.

The learned Chief Justice of British Columbia, with whom Bird J.A. concurred, (1) has expressed the opinion that while the Board may determine that a proposed new unit, which includes members of an existing unit, is appropriate for collective bargaining and certify a bargaining authority for it, this can only be done if the Board is first satisfied that the majority of the members in the existing unit are no longer members in good standing of the labour organization certified as its bargaining authority. It is further said in the reasons for judgment delivered that "once the majority creates the bargaining authority for the unit the majority of the unit must agree before the unit can be represented by another bargaining authority, either in whole or in part."

(1) (1954) 11 W.W.R. (N.S.) 11.

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Locke J.

I am unable, with great respect, to agree with either of these conclusions.

A unit appropriate for collective bargaining, according to the language of the definition, may be "a subdivision of a plant unit or any other unit and whether or not the employees therein are employed by one or more employers." It was the duty of the Board upon receiving the application of Local 260 to determine whether the proposed unit was one appropriate for collective bargaining, a decision involving the exercise of a discretion and as to which the determination of the Board was conclusive by reason of the term of s. 58(1). In the present case that decision has not been made, the proceedings having been halted by the writ of prohibition, but had the matter proceeded and the proposed unit found appropriate for that purpose it would have been the obligation of the Board—and not a matter of discretion—to certify the local as the bargaining agent. In deciding whether the proposed unit was one appropriate for that purpose, the fact that some or all of the employees to be included in it then formed part of an existing unit would, of course, be a factor to be considered by the Board.

The Board had earlier decided that the unit in respect of which the certificate dated February 27, 1952, was given, was one that was appropriate for collective bargaining. Express authority to vary that decision by excluding these employees from that unit is to be found in s. 58(2), and to constitute them a separate unit in s. 12. In my opinion, the steps proposed to be taken by the Board upon the application of Local 260 were within its statutory powers.

I would allow this appeal and restore the order of Manson J. The appellant should have its costs in this Court and in the Court of Appeal against the Association and Local 28. I would make no order as to costs for or against the Board.

Appeal allowed and order of Manson J. restored.

Solicitor for appellant: *A. B. Macdonald.*

Solicitors for B.C. Hotels Association: *Bourne, Desbrisay and Bourne.*

Solicitors for Hotel and Restaurant Employees' Union, Local 28: *Farris, Stultz, Bull and Farris.*

STOCK EXCHANGE BUILDING CORPORATION LIMITED ..... APPELLANT

AND

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

1954
*Nov. 1, 2, 3

1955
*Jan. 25

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income Tax—Deductions—Borrowed capital used in the business to earn income—Borrower-lender relationship essential—Interest allowed only on amount actually so used—Depreciation allowance in Minister's discretion—The Income War Tax Act, R.S.C., 1927, c. 97, ss. 5 (1) (b), 6 (1) (n).

By s. 5 (1) (*b*) of the *Income War Tax Act,* R.S.C. 1927, c. 97, "Income" as hereinbefore defined shall for the purpose of this Act be subject to the following deductions: (*b*) Such reasonable rate of interest on borrowed capital used in the business to earn income as the Minister in his discretion may allow . . . .

The appellant in 1929 financed the erection of an office building by an issue of debentures secured by a deed of mortgage and trust bearing interest after as well as before maturity and after as well as before default. The debentures after discount and brokerage charges netted $90 per $100 bond. The appellant defaulted on the interest payments but, in its annual income tax returns, deducted the interest payable, including interest on interest, as a charge against operating revenue. In assessing the appellant in 1946, '47 and '48 the Minister disallowed the deductions of interest on unpaid interest and also interest on $10 of each $100 debenture issued and disallowed part of the depreciation claimed on the building.

Held: 1. that the interest in default upon which, by the terms of the mortgage, the borrower was obligated to pay interest was not "borrowed capital used in the business to earn income" within the meaning of s. 5 (1) (*b*) of the *Income War Tax Act.* The relation of borrower and lender necessary to justify the allowance was absent.

2. that the borrowed capital referred to in s. 5 (1) (*b*) is the amount of money borrowed, not the extent of the obligation incurred in order to borrow it. The appellant was able to borrow 90% of the face amount of the debentures and it was that amount alone which was used in the business and upon which interest was allowable as a proper deduction from income. *Montreal Light Heat & Power Consolidated* v. *Minister of National Revenue* [1942] S.C.R. 89, followed.

3. that the amount of depreciation to be allowed in computing the amount of profits to be assessed was such amount as the Minister in his discretion may allow and there was no evidence adduced to establish that the Minister failed to exercise the discretion vested in him in good faith and upon proper principles.

Decision of the Exchequer Court of Canada [1954] Ex. C.R. 230, affirmed.

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

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APPEAL from the judgment of the Exchequer Court of Canada, Thorson P. (1) dismissing the appellant's appeal and allowing the respondent's cross-appeal from the judgment of the Income Tax Appeal Board. (2)

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

A. H. J. Swencisky and *T. Z. Boles* for the respondent.

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

LOCKE J.:—This is an appeal from a judgment of the President of the Exchequer Court, by which the appeal of the present appellant from a judgment of the Income Tax Appeal Board was dismissed and the cross-appeal of the Minister from that decision allowed.

The appellant is the owner of the Stock Exchange Building, situate at the corner of Howe and Pender Streets in Vancouver. The building was constructed in the year 1929 at a cost of approximately $875,000., its construction being financed in part by moneys realized from the sale of debentures issued by the appellant and secured by a deed of mortgage and trust in favour of The Toronto General Trust Corporation. These bore interest at the rate 6% per annum, payable semi-annually, and interest on overdue interest was payable at the same rate.

The debentures were either underwritten or sold by a firm of investment bankers. The price to the public was $99. for each $100. debenture but the amount received by the appellant from the underwriters in respect of each was only $90. As an investment the venture proved to be unsuccessful and, for a long period of years, the appellant was unable to pay the interest charges in full. As of December 31, 1945. debentures in the principal amount of $534,400. were outstanding and interest was in arrear in an amount approximating $421,000.

The appeals concern assessments made in respect of the taxation years 1946, 1947 and 1948. In 1946 the appellant claimed in its return, as an expense of operation, debenture interest in the sum of $56,459.87, this including interest upon interest in default in the amount of $24,395.87. For

(1) [1954] Ex. C.R. 230; [1954] C.T.C. 62; 54 D.T.C. 1033.

(2) 7 Tax A.B.C. 199; 52 D.T.C. 379.

the year 1947 it claimed a deduction for interest in the amount of $59,898.31, which included $27,834.31 compound interest. For the year 1948 the amount claimed as a deduction was $62,477.30 for debenture interest, which included $28,382.58 compound interest. The amounts claimed as deductions for compound interest were in each case disallowed.

During each of these years the appellant also claimed, as a deduction from income, interest on the face amount of the debentures and this deduction was allowed only on the principal amount of $90. for each $100. debenture, being the amount received by the company as the proceeds of their sale.

The Minister disallowed the claim for a deduction in respect of the compound interest which became payable in each of the years in question, on the ground that it was not interest on borrowed money used in the business to earn the income, within the meaning of paragraph (*b*) of subsection (1) of section 5 of the *Income War Tax Act*. The appeal against this portion of the assessment was dismissed by the Income Tax Appeal Board and by the judgment of the Exchequer Court. The Appeal Board, however, allowed the appeal as to the principal amount upon which the appellant was entitled to reckon interest as a deduction, finding that the company was entitled to compute simple interest on $99. for each $100. debenture issure, being the amount at which they were sold to the public. The learned President has allowed the cross-appeal of the Minister in respect to this portion of the assessment.

Dealing first with the claim for the allowance of the compound interest as a deduction, the right to this must be based upon section 5(1)(*b*), referred to by the Minister, which reads:

> 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 notwithstanding the rate of interest payable by the taxpayer, but to the extent that the interest payable by the taxpayer is in excess of the amount allowed by the Minister hereunder, it shall not be allowed as a deduction and the rate of interest allowed shall not in any case exceed the rate stipulated

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for in the bond, debenture, mortgage, note, agreement or other similar document, whether with or without security, by virtue of which the interest is payable.

In my opinion, the appellant was entitled to claim as of right such rate of interest on borrowed capital used in the business as the Minister in his discretion might allow. That discretion was exercised by allowing the rate fixed in the mortgage to the extent that it was payable upon the principal amount which the company received as the proceeds of the sale of its debentures. The question to be determined is whether the interest in default upon which, by the terms of the mortgage, the borrower was obligated to pay interest is "borrowed capital used in the business to earn the income", within the meaning of the language of the subsection. In my opinion it was not. The section appears to me to contemplate the allowance of the interest on capital borrowed for the purpose of enabling the enterprise of the taxpayer to be carried on and, in respect of such moneys, to justify the allowance the relation of borrower and lender must be created at the outset between the taxpayer and the person to whom the interest is payable. In the present matter, there was no such borrowing of the interest in default: it was merely a debt which became payable by reason of the inability of the borrower to pay the interest as it fell due. It was not, in any sense, capital used in the business to earn the income, within the meaning of the subsection.

The second question to be determined is whether the appellant was entitled to deduct simple interest upon the face amount of the outstanding debentures or upon 90% of that amount, being the sum actually received by it and used in its business.

It is not clear from the evidence whether the debentures were bought outright by the underwriters at 90% of their face value, or whether the underwriters agreed to purchase and did purchase such of the debentures as were not purchased by the public at that rate. At the trial, the Crown were without information on the point and counsel for the appellant contented himself with saying that he agreed with a statement appearing in the reasons for judgment of the Income Tax Appeal Board, to the effect that the underwriters were paid $9. out of every $99. received from the

public to cover its charges of underwriting the issue. While this would not be underwriting in the generally accepted meaning of that term, I think, for the decision of the point in issue, that it makes no difference whether it was the one or the other.

It was shown by the evidence of the appellant's accountant that in the year 1929 the appellant, by its return, sought to write off $18,333.34 as part of what was called "bond discount" and further portions of the total discount of $55,000. in the years 1931 to 1934 and that all of these claims were disallowed by the Department.

The ruling of the Department at that time appears to me to be in accordance with what was later decided in this Court in the case of *Montreal Light, Heat and Power Consolidated* v. *Minister of National Revenue* (1). Expenses of the same general nature were there disallowed as proper deductions from income. Sir Lyman Duff, C.J. and Kerwin, J. (as he then was) considering them to have been payments on account of capital within the meaning of that expression in section 6(1) (*b*) of the Act, and this view was not dissented from in the judgment of the Judicial Committee (2). These are expenditures of a capital nature which, in a properly prepared balance sheet, may be amortized out of income only after taxation and cannot be deducted in computing income.

It is my opinion that the borrowed capital referred to in section 5(1) (*b*) is the amount of money borrowed and not the extent of the obligation incurred in order to borrow it. In this case, on the security of these debentures, the appellant was able to borrow 90% of their face amount and it was that amount alone which was used in the business and upon which interest may be allowed as a proper deduction from income.

The facts upon which the appellant bases its claim in respect of allowances for depreciation of the building and the equipment are set forth in detail in the judgment appealed from. I respectfully agree with the conclusion of the learned President that the question of the propriety of the allowances made by the Department for depreciation

(1) [1942] S.C.R. 89. (2) [1944] A.C. 127 at 134.

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between the years 1929 and 1945 cannot be considered in the present appeal, which is concerned only with the allowances for the years 1946, 1947 and 1948.

Claims for depreciation of buildings or equipment as a deduction from income must be based upon the provisions of section 6(1) (*n*) of the *Income War Tax Act* which, so far as relevant, reads:

> 6. (1) In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
>
> * * *
>
> (*n*) depreciation, except such amount as the Minister in his discretion may allow.

I find no evidence in this record to support a contention that, in respect to the three years in question, the Minister failed to exercise the discretion vested in him in good faith and upon proper principles.

The appeal should be dismissed with costs.

ESTEY J.:—The appellant submits that in the computation of its income tax for the years 1946, 1947 and 1948 it is entitled to a deduction for payments made on account of (*a*) compound interest; (*b*) interest on the face value of the bonds in the sum of $100., though only $90. was received by it; (*c*) a larger amount by way of depreciation.

Incorporated under the laws of British Columbia in 1928 with a capital of $500,000., divided into 2,500 preference shares and 2,500 common shares of $100. each, the appellant acquired, in Vancouver, certain lots and erected thereon an office building. The construction of the latter was financed in part by the sale of $550,000. First Closed Mortgage 6% Fifteen Year Sinking Fund Gold Bonds issued under the terms of an Indenture of Mortgage and Trust dated the first day of February, 1929. This Indenture contained the following:

> The Bonds shall bear interest at the rate of 6% per annum (after as well as before maturity and after as well as before default and interest on overdue interest at the said rate) payable semi-annually on the 1st days of February and August in each year during the currency of the bonds upon surrender of the coupons attached thereto.

Appellant commenced to operate the building on July 1, 1929, and by December 1, 1932, the payment of interest was in arrears and has remained so at all times material hereto.

The consequent items of compound interest disallowed by the Minister were in 1946, $24,395.87, in 1947, $27,834.31 and in 1948, $31,482.10.

The bonds were in denominations of $100. each, but were sold at a discount of $1. and a brokerage fee of $9. per bond was charged. The appellant, therefore, realized only $90. in cash from the sale of each bond. The Minister, under the provisions of s. 5(1) (*b*) of the *Income War Tax Act* (R.S.C. 1927, c. 97) allowed a deduction of simple interest at 6% on the $90., but disallowed the above amounts of compound interest.

Section 5(1) (*b*) provides:

> 5 (1) "Income" as hereinbefore defined shall for the purposes 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 notwithstanding the rate of interest payable by the taxpayer, but to the extent that the interest payable by the taxpayer is in excess of the amount allowed by the Minister hereunder, it shall not be allowed as a deduction and the rate of interest allowed shall not in any case exceed the rate stipulated for in the bond, debenture, mortgage, note, agreement or other similar document, whether with or without security, by virtue of which the interest is payable.

That the "interest on overdue interest" provided for under the Indenture and here referred to as compound interest is a payment for a "retention . . . of a sum of money" and, therefore, as the appellant submits, interest as defined in *Halsbury's Laws of England,* 2nd Ed., Vol. 23, p. 174, para. 253, and as such it is often provided for in agreements for the lending of money, may be readily accepted. It can also be conceded that interest may be deducted in the computation of income as, indeed, under s. 5(1) (*b*) the Minister has here allowed a deduction of simple interest. It is the contention of the appellant that the amounts of compound interest should have been allowed as a deduction upon the same basis. This submission is made upon two basis: (*a*) that the Minister, in the exercise of his discretion, having allowed interest at 6% upon the amount realized from the sale of the bonds, should have allowed it upon the overdue interest, as the statute makes no difference between simple and compound interest; (*b*) that in reality there is here, by virtue of the above provision

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in the Indenture of Mortgage and Trust, a loan by the bondholders of this unpaid interest upon which the company, under the terms of that Indenture, must pay 6% per annum. It was particularly emphasized that the interest had, in fact, here been capitalised.

The appellant cited *In re Morris* (1). There the mortgage provided for the payment "of 40,000 pounds with compound interest for the same at the rate of 4 pounds 10s. Od. per cent. per annum . . . " The issue turned upon whether the overdue interest was capitalised and became part of the capital or remained as interest. It was held that the interest was not capitalised. After pointing out that as a matter of practice or of bookkeeping it would be treated as capital and in fact was "commonly and conveniently spoken of as capitalising the interest," Lord Sterndale stated at p. 192:

> I do not think that these words "compound interest with yearly rests" at all necessarily show, or indeed do show, that the mortgagors intended that any unpaid interest should become capital for all purposes, . . . I think that the word "capitalisation" used in many of the books quoted is a convenient word, but for the purposes for which it has been used in the argument before us it is a fallacious word, because it is taken as referring to capitalisation for all purposes, income tax and otherwise. I do not think that is the meaning of the word. I think, not to beg the question, that when these sums come to be paid, at the end of the time when payment off of the mortgages is made, although interest has been charged upon them, and although as a matter of bookkeeping, they have been from time to time added to the capital, they do not cease to be interest on money; that is to say, they are overdue interest upon which interest has been paid.

It is not suggested that this so-called capitalisation effected a payment of the interest and, in fact, it would seem that the parties intended no more by this provision than to add to the obligation of the appellant a liability to pay interest upon overdue interest. The position upon this point is similar to that described by Lord Thankerton:

> In my opinion there was no discharge of the debtor's liability for the overdue interest and the result of the arrangement was the improvement of the security, and an increased liability for interest by the overdue interest being made to carry interest. *Inland Revenue Commissioners* v. *Oswald* (2).

The Indenture of Mortgage and Trust, with respect to the interest as it becomes due and unpaid, does not, either by

(1) (1922) 91 L.J. Ch. 188. (2) [1945] A.C. 360 at 369.

express terms or necessary implication, provide that while it remains unpaid the bondholders should be lenders and the appellant a borrower thereof.

It is because of the absence of this relationship of lender and borrower, essential to the application of s. 5(1) (*b*), that the appellant's submission must fail. It is true there is a covenant to pay interest upon overdue interest in the Indenture, but that covenant becomes operative only on a default of a payment of interest on the principal sum.

There is, with respect to the principal sum of $550,000., the relationship of lender and borrower, but, as to the interest, it is difficult to find any other relationship than that of debtor and creditor, particularly as the language in the Indenture goes no further than to say "and interest on overdue interest at the said rate." In the circumstances, there is not here present that relationship of lender and borrower contemplated in s. 5(1) (*b*). *Minister of National Revenue* v. *T. E. McCool Ltd.* (1).

The appellant further submits that this item of compound interest ought to be allowed as a deduction under s. 6(1) (*a*), the relevant portions of which read:

> 6(1) In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
>
> (*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income;
>
> (*b*) any outlay, loss or replacement of capital or any payment on account of capital or any depreciation, . . .

In *Minister of National Revenue* v. *The Dominion Natural Gas Co. Ltd.* (2), this Court disallowed a deduction for legal expenses incurred in defending its right to supply natural gas to the inhabitants of a portion of the City of Hamilton. Sir Lyman Duff C.J., with whom Davis J. concurred, was of the opinion it was a capital expenditure, while Crocket J., Hudson J. and Kerwin J. (now C.J.) held that this expenditure could not be allowed as a deduction because it did not come within the scope of the test applied in *Robert Addie & Sons' Collieries Ltd.* v. *Commissioners of Inland Revenue* (3):

> What is "money wholly and exclusively laid out for the purposes of the trade" is a question which must be determined upon the principles of ordinary commercial trading. It is necessary, accordingly, to attend to

(1) [1950] S.C.R. 80. (2) [1941] S.C.R. 19.
(3) (1924) S.C. 231 at 235.

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the true nature of the expenditure, and to ask oneself the question, Is it a part of the Company's working expenses; is it expenditure laid out as part of the process of profit earning? Or, on the other hand, is it a capital outlay; is it expenditure necessary for the acquisition of property or of rights of a permanent character, the possession of which is a condition of carrying on its trade at all?

In the Addie case the taxpayer had, under a lease for mining the coal, the right of access and passage over the land and to dump thereon debris. It was also contemplated that the removal of the coal might cause damage to the surface. For all of these compensation was to be paid under the terms of the lease. The amount thereof in the sum of 6,104 pounds was not allowed as a deduction within the foregoing test. In referring to the first item of access and passage the Lord President stated at p. 236:

> In any case, the expenditure was made for the acquisition of an asset in the form of the means of access and passage, which was part of the capital establishment of the Company, and, accordingly, it cannot be treated as other than a capital expense.

Lord Davey in another case spoke as follows:

> It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits. *Strong & Co., Ltd.* v. *Woodifield* (1).

Not only was there no borrowing of this interest, as already pointed out, but, on the contrary, the compound interest was payable because of the provision of the Indenture of Mortgage and Trust already quoted. The provision for its payment is part of the consideration promised by the appellant in order to secure its capital. As such, it is an expense incurred in the acquisition of capital, rather than an expenditure to earn income—a "payment on account of capital" within s. 6(1) (*b*), rather than a disbursement "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" under s. 6(1) (*a*).

The cases cited by the appellant are distinguishable on their facts. In *Reid's Brewery Co.* v. *Male* (2), the taxpayer had loaned not as a permanent investment but, as stated in para. 6 of the Statement of Facts, "only in connection with the current dealings and transactions of the customer with the" taxpayer. The taxpayer was allowed to deduct such portion thereof as he eventually wrote off as

(1) [1906] A.C. 448 at 453. (2) [1891] 2 Q.B. 1.

bad debts as "money wholly or exclusively laid out or expended for the purposes of such trade, manufacture, adventure or concern."

In *Vallambrosa Rubber Co.*, v. *Farmer* (1), the taxpayer had an estate for the production of rubber and asked a deduction of 2,022 pounds paid out for "superintendence, allowances, weeding, and so on." That a portion of such should be allowed as an expenditure of "money wholly or exclusively laid out or expended for the purposes of such trade . . ." was not disputed. The real issue turned upon the contention of the taxing authority that but one-seventh thereof should be allowed because the revenue in the taxation year was derived from one-seventh of the land. This contention was rejected.

In *British Insulated and Helsby Cables, Ltd* v. *Atherton* (2), the taxpayer decided to set up a superannuation fund for its employees and as part of its contribution thereto paid 31,784 pounds as a basis or a nucleus for the fund. This payment was not allowed as "money wholly and exclusively laid out or expended for the purpose of such trade, manufacture, adventure or concern," but was, in fact, described as a payment in the nature of a capital expenditure.

In *Morgan (Inspector of Taxes)* v. *Tate & Lyle, Ltd.* (3), the taxpayer expended the sum of 15,339 pounds in financing a campaign in opposition to nationalisation. Lord Morton of Henryton, at p. 417, stated:

> . . . the only purpose for which this money was expended was to prevent the seizure of the business and assets of the company, . . .

and at p. 431 Lord Reid stated:

> The respondent company's expenditure was wholly and exclusively laid out to prevent their business and assets being taken from them, . . .

Counsel for the appellant stressed the fact, as set forth in his factum, that "without the moneys which were loaned by the Bondholders there would have been no office building and therefore no profits or gains," from which fact he concludes: "It follows that the disbursements required to pay interest on the borrowed moneys were wholly, exclusively and necessarily laid out or expended for the purpose of earning the income." His statement of facts or premises

(1) (1910) 5 T.C. 529. (2) [1926] A.C. 205.
(3) [1954] 2 All E.R. 413.

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is quite accurate and the amount received by the appellant from the sale of its bonds has been accepted by the Minister as "borrowed capital used in the business to earn the income" and interest at 6% has been allowed thereon under s. 5(1) (*b*). The position is quite different with respect to the compound interest, with which we are here concerned. It is not upon borrowed capital to earn income, but rather as a payment provided for under the Indenture of Mortgage and Trust only after the appellant, as borrower, has been in default in the payment of interest. It is, therefore, a payment consequent upon the appellant's default in the payment of a debt. Moreover, the provision for the payment of this interest does not nor does it purport to prevent the bondholders taking proceedings consequent upon the nonpayment of the interest. It was not, therefore, an expenditure directed to save the property in any sense analogous to the money expended in the *Morgan* case *supra.*

Counsel for the appellant submitted that the compound interest could be allowed under s. 3, notwithstanding the provisions of ss. 5 and 6. He pointed out that s. 5 does not enumerate all of the deductions that are accepted in commercial accounting and by the Minister under the *Income War Tax Act.* He also emphasized the absence in our legislation of a provision similar to that in s. 159 of the *English Income Tax Act,* 1842 (5 & 6 Vict., c. 35) (s. 209 of the *English Income Tax Act,* 1918, 8 & 9 Geo. V, c. 40) :

> In arriving at the amount of profits or gains for the purpose of income tax (*a*) no other deductions shall be made than such as are expressly enumerated in this Act.

Income, as defined under s. 3, is arrived at upon the accepted principles of commercial accounting, subject to the provisions of the statute. While, therefore, all deductions are not specified in the statute, it follows that in so far as it contains specific provisions relative thereto they must be given effect. Even if it be accepted that the compound interest is a payment of interest on capital, it could not be allowed, as it comes within the specific prohibition of s. 6(1) (*b*), already quoted, which prohibits a deduction of "any payment on account of capital." This general prohibition is subject to an exception contained in s. 5(1) (*b*), but, as already pointed out, in respect to this compound

interest there is not here present that relationship of lender and borrower essential to bring it within this section (5(1) (*b*)). The omission of any such provision as found in the English Act above quoted does not affect the foregoing or assist the appellant.

The appellant also contends that the discount of $1.00 and the brokerage charge of $9.00 were expenses chargeable to capital and, therefore, that it should be allowed interest thereon as the Minister did allow interest on the 90% of the face value of the bonds under s. 5(1) (*b*).

In principle there does not appear to be, so far as this case is concerned, any difference between the discount and the commission. They were both expenses incurred in the acquisition of capital rather than in the earning of income and, as such, they were not different in character from the expenses incurred in the refunding or refinancing of the capital indebtedness in *Montreal Coke and Manufacturing Co.* v. *Minister of National Revenue* (1), where, at p. 134, Lord Macmillan stated:

> It was conceded in the courts in Canada, and, in any event, it is clear, that the expenses incurred by the appellants in originally borrowing the money represented by the bonds subsequently redeemed were properly chargeable to capital and so were not incurred in earning income. If the bonds had subsisted to maturity the premiums and expenses then payable on redemption would plainly also have been on capital account. Why, then, should the outlays in connexion with the present transactions, compendiously described as "refunding operations," not also fall within the same category? Their Lordships are unable to discern any tenable distinction.

These items of discount and commission being capital expenditures made for the purpose of obtaining capital, interest thereon cannot be allowed by the Minister under s. 5(1) (*b*), where he is restricted by the provisions thereof to allowing interest upon "borrowed capital used in the business to earn income." This distinction is emphasized by Lord Macmillan in the *Montreal Coke* case, *supra,* where, at p. 134, he states:

> The statute, in s. 5(*b*), significantly employs the expression "capital used in the business to earn the income," differentiating between the provision of capital and the process of earning profits.

Moreover, these items having been capital expenditures for the acquisition of capital, interest thereon could not be

(1) [1944] A.C. 126.

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classified as a disbursement "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" within the meaning of s. 6(1) (*a*).

The foregoing is not affected by the fact that the appellant filed income tax returns throughout the period 1929 to 1948 inclusive. It may be, as the appellant contends, that under a statutory provision which permits of two or more constructions that should be preferred which is in accord with long established practice. However that may be, the present provision is sufficiently clear that once these expenditures were made for the acquisition of capital, in order that the building might be constructed, interest thereon could not be allowed.

The appellant further contends that the Minister has failed to deduct a sufficient amount for depreciation. An allowance for depreciation is provided for in s. 6(1) (*n*). In making the assessment, of which the appellant received notice under date of March 6, 1950, the Department reviewed the depreciation as computed by the company in making its income tax returns from 1929 to date, but applied the provisions of Ruling Number 15 dated January 4, 1929, only from the year 1943. It is not disputed that had the provisions of Ruling Number 15 been applied throughout the entire period larger deductions for depreciation would have been made in the relevant years. It is, therefore, the appellant's contention that "the Respondent has, by his review of depreciation since 1929, opened the entire matter and that the Appellant has a legal right to have its depreciation reviewed in the light of Ruling No. 15."

Under s. 6(1) (*n*) only such an amount may be allowed by way of depreciation as the Minister, in his discretion, may allow. As, therefore, the Minister has exercised his discretion, in order for the appellant to succeed it must show either that the Minister has acted "manifestly against sound and fundamental principles," (*Pioneer Laundry and Dry Cleaners, Ltd.* v. *Minister of National Revenue* (1), or, as otherwise stated, he has failed to exercise his discretion "bona fide, uninfluenced by irrelevant considerations and not arbitrarily or illegally" (*D. R. Fraser and Company, Limited* v. *Minister of National Revenue* (2).

(1) [1940] A.C. 127.

(2) [1949] A.C. 24 at 36.

The Minister in this case reviewed the depreciation allowances asked by the appellant throughout the entire period of its existence and has, in computing the depreciation allowance for the relevant years, accepted the appellant's computation thereof for the earlier years and applied Ruling Number 15 in the later years. The suggestion is that this discloses he has acted in an arbitrary or discriminatory manner. It is not suggested that the Minister has not taken all relevant circumstances into account and, apart from evidence in support thereof, it would appear that the mere fact that he has so determined depreciation does not establish that he has exercised his discretion in any arbitrary, discriminatory or illegal manner. In this connection it is important to observe that Ruling Number 15 is not a statutory provision, but rather a circular to provide direction and assistance to the officials of the Department. In the *Pioneer Laundry* case, *supra,* the taxpayer had computed depreciation in accord with the provisions of certain circulars and contended that the Minister had, in the preparation of these circulars, exercised his discretion. Their Lordships of the Privy Council disposed of this contention at p. 134 as follows:

> The amount of depreciation claimed by the appellant company in its statutory return was in conformity with the rates stated in certain circulars issued by the respondent to local officers of the department (Exhibits 3, 4, 5 and 6), and the appellants sought, because of their being made available to the public, to have them treated as an exercise by the respondent of his statutory discretion as to depreciation. Their Lordships agree with the view of Crockett and Hudson JJ. that these departmental circulars are for the general guidance of the officers, and cannot be regarded as the exercise of his statutory discretion by the respondent in any particular case.

It would seem that rigid adherence to such a circular would defeat the intention of Parliament in enacting s. 5(1) (*a*), which contemplates that each taxpayer is entitled to have the Minister allow such an amount for depreciation as, after an examination of all relevant factors, he may, in the particular case, in the exercise of his discretion determine.

In the foregoing case the Minister disallowed certain items of depreciation, in referring to which their Lordships of the Privy Council, at p. 137, stated:

> . . . the reason given for the decision was not a proper ground for the exercise of the Minister's discretion, and that he was not entitled, in

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Estey J.

the absence of fraud or improper conduct, to disregard the separate legal existence of the appellant company, and to inquire as to who its shareholders were and its relation to its predecessors.

The other cases referred to by counsel for the appellant are all distinguishable from that here under consideration on the basis either that the Minister had failed to make any allowance and, therefore, to exercise any discretion, or that he had erred in relation to the facts. In the present case the Minister has admittedly reviewed the depreciation and, in the exercise of his discretion, decided that Ruling Number 15 should not be applied to the entire period. As already intimated, this does not justify a conclusion that he has acted in either an arbitrary or a discriminatory manner.

The judgment of the Exchequer Court should be affirmed and the appeal dismissed with costs.

CARTWRIGHT J.:—The judgment of the learned President of the Exchequer Court from which this appeal is taken dealt with the income tax assessments of the appellant for the taxation years 1945, 1946, 1947 and 1948, but no argument was addressed to us in regard to the first of such years.

I agree with the conclusions of the learned President on all the points raised as to the taxation years 1946, 1947 and 1948. I also agree with his reasons except as follows. The learned President gives as a second ground for holding that the respondent was right in disallowing the deductions of compound interest claimed by the appellant that such interest had not in fact been paid. This ground was not dealt with in argument before us. In view of my agreement with the learned President in regard to the first ground on which he based his judgment on this branch of the case it becomes unnecessary for me to consider this second ground and I express no opinion in regard to it.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *D. M. Clark.*

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

JEAN BRUCE an infant under the age of twenty-one years by ROY BRUCE her next friend and ROY BRUCE *(Plaintiffs)* ..... APPELLANTS;

1954
*Dec. 1
1955
*Jan. 25

AND

DONALD W. McINTYRE *(Defendant)* ..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Motor cars—Collision—Both drivers at fault—No clear line between fault of the one or the other—Apportionment—The Negligence Act, R.S.O. 1950 c. 252, s. 5 applied—The rule in Davies v. Mann, considered.

Where in an action for damages for negligence both parties are found to be at fault and no clear line can be drawn between the fault of the one and the other the rule in *Admiralty Commissioners* v. *S.S. Volute* [1922] A.C. 129 at 144 applies. In the circumstances of this case s. 5 of *The Negligence Act,* R.S.O. 1950 c. 252, should be applied and the parties found equally at fault.

In an action in damages arising out of the collision of two motor cars it appeared that the male appellant, on a bright moonlight night, turned his car into a laneway on the east side of a highway running north and south and then turned it out again facing southward so that part of it projected into the highway so as to obstruct north-bound traffic. He then turned on a small parking light on the right front of the car. While seated in the car with his fiancé and co-appellant, he saw the respondent's car approaching from the south a quarter of a mile distant but did nothing further to give notice of the position of his own car. The respondent, proceeding at some 45 m.p.h., did not see the stationary car until an instant before the collision.

The trial judge found both parties negligent but held that the negligence of the respondent was the sole cause of the collision. The Court of Appeal for Ontario varied the judgment by finding both parties equally to blame.

Held: that the appeal should be dismissed.

Per Rand J.: The rule in *Davies* v. *Mann* 10 M. & W. 546 does not contemplate a case in which one of the parties becomes aware in time to avoid the negligence of the other. *The Eurymedon* [1938] P. 41 at 49; *Davies* v. *Swan* [1949] 291 at 311; *Boy Andrew* v. *St. Rognvald* [1948] A.C. 140 at 149 and *Sigurdson* v. *B.C. Electric Ry. Co.* [1952] A.C. 291 at 302, applied. *McKee and Taylor* v. *Malenfant and Beetham* [1954] S.C.R. 651 distinguished.

Decision of the Court of Appeal for Ontario [1954] O.R. 265 affirmed.

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

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APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) whereby the judgment at trial was varied by finding the two parties to the action equally to blame.

C. L. Dubin, Q.C. and *William Schreiber, Q.C.* for the appellants.

G. N. Shaver, Q.C. for the respondent.

RAND J.:—Mr. Dubin puts his case on the application of the rule in *Davies* v. *Mann* (2), and cites a statement of that rule given in *Brown* v. *B. & F. Theatres* (3). I take that statement to be in the terms of the general acceptation of the rule for upwards of 100 years following the decision. The language of Anglin J. (in the Supreme Court of Ontario) in *Brenner* v. *Toronto Ry. Co.* (4), quoted at length in *B.C. Electric* v. *Loach* (5) is to the same effect.

But within the last score or so of years a qualification has made its appearance. Its first expression seems to have been in the case of *The Eurymedon* (6) in which Greer L.J. said:—

> If, as I think was the case in *Davies* v. *Mann, one of the parties in a common law action actually knows from observation the negligence of the other party,* he is solely responsible if he fails to exercise reasonable care toward the negligent plaintiff.

This was quoted with approval by Bucknill L. J. in *Davies* v. *Swan* (7). Evershed L.J. at p. 317 concurred:—

> In that case the plaintiff's negligence or fault consisted in placing the donkey upon the highway, *but it having been observed in due time by the defendant,* the defendant by colliding with it was treated as the person responsible for the accident, since by the exercise of ordinary care he could perfectly easily have avoided it: in other words, the negligence of the plaintiff had really ceased to be an operating factor in the collision.

In *Boy Andrew* v. *St. Rognvald* (8), Viscount Simon, speaking of *Davies* v. *Mann,* says:—

> The negligence of the absent donkey-owner, serious as it was, created a static position where nothing that he could do when collision threatened would have avoided the result, whereas the negligence of the driver of

(1) [1954] O.R. 265; 2 D.L.R. 799.
(2) (1842) 10 M. & W. 545; 152 E.R. 588.
(3) [1947] S.C.R. 486 at 489.
(4) (1907) 13 O.L.R. 423.
(5) [1916] 1 A.C. 719; 23 D.L.R. 4; 20 C.R.C. 309.
(6) [1938] P. 41 at 49.
(7) [1949] 2 K.B. 291.
(8) [1948] A.C. 140 at 149.

the vehicle continued right up to the moment when the collision became inevitable. As by driving more carefully he could have avoided hitting the donkey, his negligence was the sole cause.

I am unable to distinguish this from the language of the Judicial Committee in *Loach* and of Anglin J. in *Brenner*.

In *Sigurdson* v. *B.C. Electric Ry. Co.* (1), Lord Tucker, delivering the judgment of the Judicial Committee, dealt with the proposition urged by the respondent that where one party (A) actually knows of the dangerous situation created by the negligence of another (B) and fails by the exercise of reasonable care thereafter to avoid the danger, A is, generally speaking, solely liable, but that if A, by reason of his own negligence did not actually know of the danger, or by his own negligence or deliberate act has disabled himself from becoming aware of the danger, he can only be held liable for a proportion of the resulting damage. On this Lord Tucker observed:—

> No authority was cited to their Lordships for such a far-reaching proposition, which, if created, would seem to provide the respondent in such a case as the present with a means of escaping its 100% liability by relying on the failure of its motorman to keep a proper lookout . . . Moreover, the proposition is directly contrary to the second rule propounded by Greer L.J. as useful tests in *The Eurymedon,* although it is true to say that it is not altogether easy to reconcile rules 2 and 4 as there stated.

I find it no easier to reconcile this statement of the rule with that made by Greer L.J. and by Evershed L.J. If the circumstance of knowledge had in fact been present in *Davies* v. *Mann,* it could scarcely have escaped mention as it would have presented a situation essentially different from what the report indicates, and one so simple as not to justify treating the decision as laying down a "rule" of any sort.

On the argument Mr. Shaver, distinguishing the basis of that decision from what has been called the "last chance", contended that both had been superseded by the Contributory Negligence law, but the decision of this Court in *McLaughlin* v. *Long* (2), is to the contrary. Other facts of the situation here, however, put the case beyond the scope of either of these formulas, assuming them to have appreciable distinguishing features. An essential element in the former is that the plaintiff should have been unable

(1) [1953] A.C. 291 at 302. (2) [1927] S.C.R. 303.

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at the critical time to take any action that might have avoided the accident and that was not the case here. The oncoming car had been seen for a quarter of a mile away by the plaintiff who when at any distance beyond one hundred and fifty feet could have switched on his headlights and averted the crash.

That circumstance itself is a sufficient distinction; but I think it desirable to examine the case in the light of the provisions of the Motor Vehicle law. The appearance of automobiles upon our highways has obviously created crowding dangers and hazards undreamt of in 1840. The speed and the momentum of these vehicles and the complexity of their operations are such that it has become necessary to place every person concerned with or who may be affected by them under a greatly heightened exercise of care and imagination to stimulate awareness and anticipation. The elaborate and detailed requirements that are now set out in the statutes dealing with speed, lights, signals, positions, parking and other details of management and operation combine to create more than a mere duty of abstention from affirmative action which may cause damage or injury to others; they may require action either by way of precautionary warning or by removing one's self or property from a range of danger which theoretically the prudent conduct of others would make unnecessary. They give rise to a responsibility for greater foresight than the mere first stage of minimum or formal measures of one's own proper conduct: they are intended to promote reciprocal, even overlapping, precautions. Always depending on the surrounding circumstances and subject to other demands of safety, they bind us to contemplate carelessness or oversight in others regardless of their duty under the rules of the road, and they require us to act within the limits of alerted reasonableness to ensure, in the interest of the public, the practicable maximum of generalized and mutual protection against injury to person and damage to property. The scandal of the ravages of our holidays from this cause is the more than sufficient justification for the insistence on the drastic measures to which our highway authorities have been aroused.

The object of the rule forbidding parking on the highway is to protect against the risks of excessive speed and the imperfections or carelessness of lookout chiefly in conditions of limited visibility. The toll of disaster has been too great to leave any doubt about the hazards in fact bound up with stationary cars of which the prohibition is a legislative recognition. Most of the plaintiff's car must be taken to have been on the highway with only one weak dull amber parking light showing and he was not justified in relying wholly upon the oncoming driver to see his car in time to avoid it where by the most ordinary and common sense action on his part the risk could have been eliminated. He had placed himself in a wrongful position which, without serious fault on the part of others, might not be appreciated either because of the physical conditions, the shadows of the trees, for example, the merging of the weak light in that of the moonlight, the nearness of the car to the right edge and the absence of red lights, or casualness in watching the road empty of traffic; he could and in fact did foresee the danger of being parked on the wrong side without a signal of his presence; and the duty arose to make use at least of the sufficient means of warning and precaution immediately at his hand. He did not do this and his failure became negligence which played an effective part in producing the collision.

The case of *McKee and Taylor* v. *Malenfant and Beetham* (1), a judgment of this Court, was cited, the facts in which were somewhat similar to those here. But there the trial judge found that the plaintiff saw the stopped truck in sufficient time to enable him to avoid collision. There were also the circumstances that the truck was not parked within the meaning of the statute, that it was facing in its proper direction, that the required lights were showing and that the stopping was in the course of the legitimate purpose of gathering up equipment used in work along the highway. Although the external conditions may objectively be the same, a legitimate use of the highway may excuse where a forbidden one will not. The situation was, there-

(1) [1954] S.C.R. 651; 4 D.L.R. 785.

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fore, essentially different, and like the ordinary citation of authority in negligence controversies, it gives little help to the solution of the question here.

I would, therefore, dismiss the appeal with costs.

KELLOCK J.:—I agree with my brother Locke as to the position of the appellants' vehicle in the highway at the time of the collision. In so leaving his vehicle insufficiently lit, the appellant was in breach of s. 10(1) of *The Highway Traffic Act*. His failure to use the other means of illumination at hand which, if used, would have constituted compliance with the statute and given adequate warning of the presence of his vehicle in the highway to approaching vehicles such as that of the respondent, of which he was fully aware, constituted, in my opinion, negligence.

It was undoubtedly the respondent's contention at the trial that the appellant's vehicle was completely unlit and that a light of some sort appeared on it immediately prior to the collision, but I do not think, with respect, that the respondent's evidence is quite what the learned trial judge understood it to be. The respondent testified that if there had been "any" parking lights or light on "a vehicle" on the road, he would have been able to see it and have prevented an accident by swerving. He also testified that if he "had seen" even the small light which the appellants testified was in fact burning, he would have been able to avoid the appellant's vehicle.

The respondent further testified that he could easily, that night, pick up an object in his lights ahead at 150 yards. When asked as to his explanation for not seeing the appellant's vehicle, assuming there were no lights on it, when he was even 200 feet from it, he said he could give no explanation "unless he (the appellant) was sitting in the shade of the trees." His answer to the question

> If the car had one light on that was burning, would you expect that *under ordinary circumstances* you would have been able to see that before the lights of your car would pick it up?,

was:

> It depends how strong it was.

He did not say, as the learned trial judge appeared to think, that the "only" reason he could give for not picking up the other car was because he was not looking. What he

said was that "if" he had not been looking that would be an explanation for not seeing the car. He testified, however, that in fact he had been keeping a good look-out.

In these circumstances, I find myself unable to disagree with the view of the Court of Appeal that a clear line cannot be drawn between the negligence of the appellant Roy Bruce and that of the respondent.

I would dismiss the appeal with costs.

ESTEY J.:—I agree that the appeal should be dismissed with costs.

LOCKE J.:—This is an appeal in a motor car accident case from a judgment of the Court of Appeal of Ontario, whereby a judgment for damages awarded to the appellants at the trial was varied by finding the respondent and the appellant Roy Bruce equally to blame.

The Guelph Line Road, a gravelled highway the travelled portion of which was 22 ft. in width, runs south from Haltonville. The farm of the father of the appellant Jean Bruce, lies to the east of the highway and a lane some 13 ft. in width leading westerly from the farm house, after broadening out to a width of 19 ft., connects with it. At about 7.30 in the evening of October 12, 1951, the appellant Roy Bruce, accompanied by his fiancee, to whom he has since been married, drove his 1937 Chevrolet automobile south from Haltonville along the highway and, when he approached the point where the lane joined the highway from the east, drove into the entrance to the lane and stopped partly in the lane and at least partly down the gravelled portion of the highway itself. According to him, the car was stopped facing in a south westerly direction: the appellant Jean Bruce, when examined for discovery, said that it was facing south down the road. Having stopped the car, Bruce said that he turned off the head lights and turned on the parking lights. There was only one of these in the front end of the car and this he described as a dull amber light, something like a flash light, placed inside the right head light and which, he said, pointed downward towards the road. There was no parking light in the left front head light.

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Bruce's evidence is that he and his companion remained seated in the car in this position for some three to five minutes. She intended to walk down the lane to her father's house while he intended to continue along the highway to his home. While sitting in the car, he saw the respondent's car approaching from the south at a high rate of speed about a quarter of a mile distant and while, on his own admission, at least part of his own car was on the travelled portion of the highway, he did not turn on the head lights of his car which would have given clear notice to the approaching car of its position. The respondent's car continued on its way and a collision took place.

The respondent was driving a 1941 Dodge Sedan, with sealed beam standard head lights which were turned on. According to him, he was driving at a speed of 45 miles an hour to the right of the center of the road, with the right wheels of his car about a foot and a half from the easterly limit of the travelled portion. While he said that the head lights would enable him to pick up objects at a distance of 150 yards, he did not detect the presence of Bruce's car or see any light until an instant before the collision, when he said that he saw a sudden flash of light. The cars collided in a manner which resulted in the principal damage being done to the right front portion of each. Bruce's car was driven to the north by the impact and stopped, facing westerly, partly in the ditch which ran along the east side of the highway. The respondent's car stopped in a position straddling the road some 65 feet to the north of the point where the cars had collided and some 20 feet to the north of Bruce's car.

To the east of the highway, growing in a north and south line some 16 or 17 feet from the travelled portion of the road, were large maple trees. These grew both to the north and to the south of the lane and along the north side of the lane itself leading in to the farm. While it was bright moonlight, it was shown by the evidence that there were shadows cast by these trees across the lane and highway which would contribute to the difficulty of seeing a car such as that of the appellant Bruce, which was dark blue in colour.

There was a conflict of evidence as to the position in which Bruce's car was standing as the appellant approached from the south. The trial Judge found that it was then

facing in a south-westerly direction, with about 5/6ths of the rear portion off the main highway. The Chief Justice of Ontario, with whom Hope J.A. agreed, came to a different conclusion, finding that about 5/6ths of the rear portion of the car was on the travelled portion of the highway.

The only evidence relating to this question was that of the appellant Bruce and of Harold Pollard, an engineer who specializes in the investigation of motor vehicle accidents. Bruce's evidence was that the front right wheel of his car was within 3 or 4 inches of the easterly limit of the travelled portion of the highway, though he was not sure that the rest of the car was entirely clear of it. It was shown that to the north of the point where the north side of the lane joined the highway there was a mail box upon a post about one or two feet north of the lane and one foot to the east of the travelled portion of the highway. Bruce had said when examined for discovery that the left rear fender of his car was the part of it closest to the post carrying the mail box and was a foot or two feet distant from it and to the south of it. At the trial, he said that the right rear corner of his car was about one foot south of the post.

Pollard, whose evidence on this point was accepted by the learned Chief Justice, said that it was impossible that this could be true since the mail box and post were not touched by Bruce's car as it recoiled to the north after the impact. Having examined Bruce's car which was 65 inches in width and being informed as to the position in which it had stopped after the collision, he said that, in his opinion, to the extent of 57 inches of its width at least, Bruce's car must have been standing upon the travelled portion of the highway. I respectfully agree with the conclusion of the Chief Justice on this aspect of the matter.

The learned trial Judge, while finding that Bruce had been negligent in parking his car in the position referred to, found that this was not an effective or contributing cause of the accident. The respondent's car was properly equipped with head lights which, he had said, lit up the road to a distance of 150 yards ahead of him but, admittedly, he had not seen Bruce's car nor the small parking light until an instant before the collision and had expressed the opinion that if he had seen the car when it was 100 feet or even

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50 feet distant he could have avoided the accident. In these circumstances, the learned Judge considered the respondent to be wholly at fault.

The negligence found against the plaintiff at the trial was "in stationing or parking his car in the position where he placed it." The reasons delivered did not particularize further and it is accordingly not clear whether the conduct of the appellant Bruce was found to have been a breach of the provisions of s. 43(1) of the *Highway Traffic Act* (R.S.O. 1950 c. 167).

The learned Chief Justice, after reviewing the facts, referred to the finding of negligence against the respondent as being that he should have seen Bruce's car before he did and, being unable to say that the learned trial Judge was wrong in this finding, considered that it should be affirmed.

The respondent has not appealed against this finding and, accordingly, the sole matter to be determined is whether the appellant Bruce was at fault or negligent and, if so, whether this "caused or contributed" to the accident, within the meaning of s. 2 of *The Negligence Act* (R.S.O. 1950, c. 252).

The Highway Traffic Act, by s. 10(1), requires that every motor vehicle on a highway after dusk shall carry three lighted lamps in a conspicuous position, one on each side of the front which shall cast a white, green or amber coloured light only, and one on the back of the vehicle which shall cast from its face a red light only. Subsection 14 of that section further provides that a motor vehicle, while standing upon any highway at such times as lights are required by this section for the vehicle may, in lieu of the above mentioned lighting equipment show one light carried on the left side of the car in such a manner as to be clearly visible to the front and rear for a distance of at least 200 feet and to show white to the front and red to the rear of the vehicle.

Section 41 deals with the rules of the road. These do not contain any provision directing vehicles to drive upon the half of the highway which is to the right of the center, except when meeting another vehicle going in the opposite direction. A driver is then required to turn out to the right from the center of the road, allowing to the vehicle so met one half of the road free (s-s. 8).

Section 43 (1), so far as it is necessary to consider it, provides that:—

> No person shall park or leave standing any vehicle, whether attended or unattended, upon the travelled portion of a highway, outside of a city, town or village, when it is practicable to park or leave such vehicle off the travelled portion of such highway.

Subsection 9 of that section provides that notwithstanding the other provisions of the section:—

> No person shall park or leave standing any vehicle whether attended or unattended upon any highway in such a manner as to interfere with the movement of other traffic.

The reasons for judgment delivered in the Court of Appeal do not specifically deal with the question as to whether Bruce's car was parked upon the highway, within the meaning of that term in s. 43(1) of the Highway Act. While it is unnecessary to decide the point for the purpose of disposing of this appeal, it is my opinion that the vehicle was parked and that, as it was practicable at the place in question to park it off the highway, there was a clear contravention of the provisions of the section. Apart, however, from this, persons driving upon the highway at night are, I think, entitled to proceed on the assumption that the drivers of other vehicles will comply with the provisions of the Highway Act and that any vehicle, either parked or temporarily stopped on the highway, will exhibit a red light at the rear (*Toronto Railway* v. *King*, (1), Lord Atkinson at p. 269). This, of course, does not relieve any driver of the obligation to exercise due care in driving so as to avoid injury to himself and others. The statute does not, it is true, provide that when vehicles are stopped or parked, they must be placed on or to the right of the roadway along which they are proceeding, but it is a matter of common knowledge that this is practically the universal practice. In my opinion, in the present case the respondent was entitled to assume that any other vehicle standing upon the highway or parked off the highway would be facing to the north and would exhibit the red light required by the Act. While Bruce said that he turned on the parking light when he stopped his car, and it was found as a fact in the judgment at the trial that the parking light was on, there is no finding as to the time in relation to the time of the arrival of the respondent's car at the point of collision when the light

(1) [1908] A.C. 260.

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was turned on, and the fact that he did not see any light until just before the impact may have been for the reason that it was not turned on until a very short space of time before the impact. It is further to be noted that Bruce had seen the respondent's car approaching when it was over 400 yards away and if, instead of exhibiting the small amber parking light, he had turned on the head lights of his car, the collision would clearly have been averted.

These several acts and defaults of the appellant Roy Bruce were, in the circumstances of this case, faults or negligence within the meaning of s. 2(1) of *The Negligence Act* which, in my opinion, contributed to the occurrence of the accident.

I respectfully agree with the opinion of the learned Chief Justice of Ontario that this is a case where the principle stated by Viscount Birkenhead in *Admiralty Commissioners* v. *S.S. Volute* (1), is applicable as no clear line can be drawn between the negligence of Bruce and that of the respondent. I am further of the opinion that this is a case in which s. 5 of *The Negligence Act* should be applied and these parties found to be equally at fault.

The appeal should be dismissed with costs.

CARTWRIGHT J.:—The facts of this case are stated in the reasons of my brother Locke.

Except on one point, the learned Chief Justice of Ontario accepted for the purposes of his judgment all the findings of fact made by the learned trial judge as to how the collision, out of which this action arises, occurred. The point to which I refer is as to the extent to which the stationary automobile of the appellant was obstructing the travelled portion of the highway. If it were necessary to choose between the conflicting views on this question, I would, for the reasons given by my brother Locke and by the learned Chief Justice, prefer the view of the latter to that of the learned trial judge. I do not, however, find it necessary to express a final opinion on this point as it is clear, as was pointed out by the learned Chief Justice, that, on either view, the appellant's vehicle was obstructing the travelled portion of the highway to such an extent that it would be

(1) [1922] 1 A.C. 129 at 144.

struck by an automobile proceeding northerly in a proper position on the highway unless the driver of such automobile saw it in time to avoid striking it.

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The question whether on the findings of fact made by the learned trial judge as to how the collision occurred the negligence of the respondent was the sole cause or only a contributing cause of the collision, while itself a question of fact, is one with which the Court of Appeal was in as good a position to deal as was the learned trial judge. Where two parties have been negligent the question whether a clear line can be drawn between the negligence of the one and the other is frequently so difficult as to give rise to differences of judicial opinion. In the case at bar I agree with the conclusion expressed in the penultimate paragraph of the reasons of my brother Locke.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *William Schreiber.*

Solicitors for the respondent: *Shaver, Paulin & Branscombe.*

DONATO MASELLA *(Petitioner)* .....APPELLANT

1954
*Nov. 17

AND

1955
*Mar. 7

J. M. LANGLAIS *(Defendant)* .....RESPONDENT

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

Immigration—Habeas Corpus—Entry in Canada—Visa irregular—Immigrant detained then freed on bail—Whether order of deportation can be reviewed—Whether immigrant entitled to writ of habeas corpus—Immigration Act, R.S.C. 1927, c. 93, ss. 3(i), 13, 19, 23, 40—Code of Civil Procedure, Art. 1114.

The appellant, an Italian subject, was allowed to enter Canada as an immigrant. He had obtained what purported to be a visa from a Canadian officer in Naples, authorized to issue such documents, but, in fact, the issue of that visa had been irregular and the usual medical and other examinations required of an immigrant by the *Immigration Act,* R.S.C. 1927, c. 93 and regulations thereunder had not taken

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

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place. Subsequently, a complaint, under s. 40 of the Act, to the effect that he was a prohibited immigrant under s. 3(i) of the Act, was lodged. He was taken into custody and appeared and was represented by counsel before a Board of Inquiry, who ordered that he be detained and deported. He was released on bail and undertook in writing to report in person once a week to an immigration officer. Upon appeal, the order of the Board was confirmed by the Minister. While thus at liberty, the appellant obtained the issue of a writ of *habeas corpus ad subjiciendum*. The writ was quashed by the trial judge and this judgment was affirmed by a majority in the Court of Appeal.

Held: The appeal should be dismissed.

Per Taschereau J.: When, as was the case here, the order of the Board of Inquiry, confirmed by the Minister, seems to have been made in accordance with the provisions of the *Immigration Act*, the courts cannot intervene: s. 23 of the *Immigration Act*. The courts cannot decide if in fact an immigrant is or not a desirable person.

Per Taschereau and Abbott JJ.: The legality of the appellant's entrance to Canada was subject to question at any time until he had acquired Canadian domicile, and, consequently, his contention that because he was allowed to land in Canada on the strength of a visa and a certificate of medical examination assumed to have been legally issued, no complaint to the Minister could be validly laid under s. 40 of the Act, cannot be sustained. Immigration to Canada is a privilege and not a matter of right. In this case, it was established to the satisfaction of the Board of Inquiry that the requirements of the Act and regulations had not been met. Furthermore, by virtue of s. 23 of the Act, it is clear that where a board of inquiry has taken evidence in good faith and has otherwise complied with the provisions of the statute, as was done here, a court has no jurisdiction to substitute its judgment for that of the board.

Per Locke, Cartwright and Fauteux JJ.: The writ of habeas corpus, by its terms and its very nature, is inapplicable to a situation where the person is at liberty on bail and is not confined or restrained of his liberty. The language of Article 1114 of the *Code of Civil Procedure* is to be construed in the same manner as similar language in the statutes to which it owes its origin. In the present case, the immigration officer to whom the writ was directed had neither the custody or control of the appellant, either at the time the writ was issued or when it was served or when he made his return to the writ and the contention that he was restrained of his liberty within the meaning of Art. 1114 C.P.C. was without foundation. Consequently, the appellant was not entitled to the remedy of a writ of habeas corpus and as no proceeding by way of certiorari was taken, this was fatal to the appeal. *Reg* v. *Cameron*, (1898) 1 C.C.C. 169 and *de Bernonville* v. *Langlais*, Q.R. [1951] S.C. 277 disapproved.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), affirming, Gagné and Rinfret JJ.A. dissenting, the quashing by the trial judge of a writ of *habeas corpus ad subjiciendum*.

(1) Q.R. [1954] Q.B. 667.

A. H. Malouf and P. V. Shorteno for the appellant.

G. Adam Q.C., L. A. Couture and E. Trottier for the respondent.

TASCHEREAU J.:—Il s'agit dans la présente cause d'un bref *d'habeas corpus ad subjiciendum* que le requérant-appelant a fait émettre contre le défendeur-intimé, qui exerçait à Montréal la fonction d'officier d'Immigration.

L'appelant allègue qu'il est un citoyen italien par naissance, et qu'après qu'une application eut été faite par son frère résidant et domicilié à Montréal, et après enquête du Ministère de la Citoyenneté et de l'Immigration, il a été informé vers le 3 novembre 1950, de la permission qui lui était accordée d'entrer au Canada.

L'appelant prétend en outre que vers le 25 mai 1951, un officier de l'Ambassade Canadienne à Naples a estampé son passeport avec le sceau du Ministère de la Santé Nationale et du Bien-Être Social, et a émis un visa en faveur de l'appelant lui permettant d'entrer au Canada pour y établir une résidence permanente. Le 18 juin 1951, il a reçu une lettre, alors qu'il était encore en Italie, de l'Ambassade Canadienne à Rome lui demandant de se présenter au bureau canadien, et là il a produit ses passeport, visa et autres documents, et il a été informé qu'il pouvait partir pour le Canada quand il le désirerait.

Pour faire suite à ces autorisations, l'appelant est parti pour le Canada, est arrivé à Halifax le 27 juin 1951, d'où il se rendit immédiatement à Montréal et où, depuis ce temps, il est employé par une compagnie, la "Liquid Carbonic Canadian Corporation Limited".

Le 11 octobre 1951, l'appelant s'est présenté au bureau de l'Immigration du Ministère de la Citoyenneté à Montréal, afin de faire application pour l'admission permanente au Canada de son épouse qui était restée en Italie, et sur présentation de ses passeport et preuve de son entrée au Canada, le requérant a été arrêté, détenu et incarcéré par un officier du Ministère.

Un conseil d'enquête constitué aux termes de l'article 13 de la *loi de l'Immigration* a décrété l'expulsion de l'appelant, et a émis un ordre suivant les dispositions de la *Loi de l'Immigration,* chapitre 93, des Statuts Revisés du

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Canada, telle qu'amendée. L'appel qu'il a interjeté devant l'honorable Ministre de l'Immigration a été rejeté, et l'appelant prétend qu'il est privé de sa liberté au Canada depuis le 11 octobre 1951, et qu'il est sous la surveillance continuelle de l'intimé qui agit pour la Division de l'Immigration du Ministère de la Citoyenneté. Et depuis le 11 octobre, l'appelant est obligé, après avoir donné un cautionnement de $500.00, de se présenter tous les samedis à la Division de l'Immigration, à Montréal.

C'est là prétention de l'appelant que cet ordre d'expulsion est illégal vu que toutes les formalités nécessaires ont été remplies, et que le Ministère de la Citoyenneté et de l'Immigation du Canada a accepté son application, et qu'il est entré au pays avec la permission des autorités compétentes.

L'honorable Juge Ferland de la Cour Supérieure à Montréal a autorisé l'émission du bref le 2 avril 1952. Après audition, l'honorable Juge Perrier de la Cour Supérieure de Montréal a cassé et annulé le bref. La Cour du Banc de la Reine (1), les honorables Juges Gagné et Rinfret dissidents, a confirmé ce jugement.

Le Juge Perrier a été d'opinion que l'article 23 (maintenant article 39) de la *Loi de l'Immigration* devait trouver son application. Cet article est ainsi rédigé:—

> 23 (39). Nulle cour, nul juge ou fonctionnaire d'une cour, n'a compétence pour reviser, annuler, infirmer, restreindre ou autrement entraver une procédure, une décision ou une ordonnance du Ministre, du sous-ministre, du directeur, de la commission d'appel de l'immigration, d'un enquêteur spécial ou d'un fonctionnaire à l'immigration, intentée, rendue ou décernée sous l'autorité et en conformité des dispositions de la présente loi relatives à la détention ou à l'expulsion d'une personne, pour quelque motif que ce soit, à moins que cette personne ne soit un citoyen canadien ou n'ait un domicile canadien.

La majorité de la Cour d'Appel en est arrivée à la même conclusion. Evidemment, et la jurisprudence est unanime sur ce point, cette disposition de la loi ferme la porte à l'intervention des tribunaux, à condition cependant que la *décision et l'ordonnace soient rendues conformément aux dispositions de la loi.* Si le comité d'enquête a suivi les prescriptions qu'ordonne le statut, il est clair que les tribunaux ne peuvent pas intervenir. C'est d'ailleurs ce qui

(1) Q.R. [1954] Q.B. 667.

a été décidé par cette Cour dans la cause de *Samejima* v. *Sa Majesté le Roi* (1). A la page 641, Sir Lyman Duff s'exprime de la façon suivante:—

> The chief question I desire to discuss is the effect of section 23 of the *Immigration Act*. The words,
>
> had, made or given under the authority and in accordance with the provisions of this Act relating to the detention or deportation of any rejected immigrant, passenger or other person, upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile
>
> are an essential part of this section; and its disqualifying provisions obviously can only take effect where the conditions expressed in these words are fulfilled. In particular, the phrase "in accordance with the provisions of this Act" cannot be neglected; their meaning is plain. The "order" returned as justifying the detention must be "in accordance with the provisions of this Act." It must not, that is to say, be essentially an order made in disregard of some substantive condition laid down by the Act. This applies to the order of the Minister, as well as to the order of the Board of Inquiry.

Dans la cause de *de Marigny* v. *Langlais* (2), M. le Juge Kellock dit à la page 159:—

> In proceedings such as this the court is precluded from reviewing the findings of fact made by the Board of Inquiry; section 23; *Samejima* v. *The King* (1932) (SCR 640 at 650), per Lamont, J., at 650. But equally the applicant for a writ of habeas corpus may show that the proceeding of which he complains "has not been had, made or given in accordance with the provisions of the Act".

Et à la page 165, M. le Juge Rand émet l'opinion suivante:—

> In the administration of the "Immigration Act", what is to be looked for and required is a compliance in substance with its provisions. The case of *Samejima* v. *Rex* shows that this Court will not hesitate to condemn "hugger-mugger" proceedings, as Sir Lyman Duff called them, or proceedings in which a defect in substance appears.

Le même principe a été décidé dans la cause de *Leong Ba Chai* v. *La Reine* (3). Dans cette cause, l'officier d'Immigration avait refusé d'exercer sa juridiction parce qu'il croyait que celui qui faisait l'application n'était pas l'enfant légitime d'un Chinois aux termes de la loi. Cette Cour a jugé qu'il y avait eu une erreur de droit en arrivant à cette conclusion, et qu'en conséquence, il devait exercer sa jurisdiction et prendre en considération l'application qui lui était faite.

(1) [1932] S.C.R. 640. (2) [1948] S.C.R. 155.
(3) [1954] S.C.R. 10.

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Ce sont ces principes qui doivent nous guider dans la détermination de la présente cause. Je ne crois pas qu'il soit utile d'analyser davantage les faits. Il me sera suffisant, je pense, de dire que l'ordonnance du comité, confirmée par le Ministre, me paraît avoir été émise en conformité des dispositions de la loi de l'Immigration, et qu'il n'appartient pas aux tribunaux d'intervenir et de décider si en fait un immigrant est désirable ou ne l'est pas.

Je partage entièrement les vues de mon collègue M. le Juge Abbott, et particulièrement les observations qu'il fait au sujet de la légalité du visa, de l'examen médical qu'a subi l'appelant, de la révocation de la permission qui lui a été donnée d'entrer au Canada, et du droit qu'il peut avoir au bénéfice du bref d'habeas corpus.

L'appel doit être rejeté avec dépens.

LOCKE J.:—On October 1, 1951, a written complaint was made to the Minister of Citizenship and Immigration by an Immigration Officer at Ottawa under the provisions of s. 40 of *The Immigration Act* (R.S.C. 1927, c. 93) that the appellant, a person other than a Canadian citizen or person having Canadian domicile, was a prohibited immigrant under s. 3, s-s. (i) of that Act, in that he did not fulfill, meet or comply with the conditions and requirements of Orders in Council P.C. 2744 and P.C. 2856. On October 10, 1951, the appellant was taken into custody at Montreal and detained for examination and an investigation of the facts alleged in the complaint upon the order of the Deputy Minister of Citizenship and Immigration.

On October 12, 1951, a Board of Inquiry constituted under the provisions of the Act heard the complaint. The appellant was present and was represented by counsel and gave evidence. The decision of the Board that he be detained and deported from Canada was in the following terms:—

> Mr. Donato Masella, this Board of Inquiry has established that you are not a Canadian citizen, or a person having Canadian domicile, and that you come within the undesirable classes as defined in Section 40 of the Immigration Act; that you are a prohibited immigrant under section 3 s.s. (i) of the *Immigration Act,* in that you do not fulfil, meet or comply with the conditions and requirements of Orders in Council P.C. 2744, in that your passport does not contain a valid immigrant visa, and P.C 2856,

in that you do not otherwise comply with the provisions of the *Immigration Act,* the said Orders in Council P.C. 2744 and P.C. 2856 which, for the time being, are in force and applicable to you.

Therefore, this Board of Inquiry hereby orders that you be detained, and deported to the country whence you came to Canada, or to the country of your birth or citizenship.

On the same date, the appellant gave written notice of his intention to appeal to the Minister under the provisions of s. 19 of the Act and, on that date, he was released from custody upon depositing with the Immigration Officer at the Port of Montreal the sum of $500 and signing a written undertaking which read as follows:—

I, the undersigned, agree that I, Donato Masella, will report in person to the Canadian Immigration Inspector in Charge at 901 Bleury Street, Montreal, on Saturday, the twentieth day of October, 1951, at eleven o'clock in the morning and every Saturday thereafter at the same hour or at any other time that I may be called upon to do so until such time as my case has been disposed of.

In default of which I agree to forfeit to the Consolidated Revenue Fund of Canada the moneys deposited as shown on above receipt.

The decision of the Minister by which the appeal was dismissed was made on January 17, 1952. In the interval between the date upon which the deportation order had been made and the date of the dismissal of the appeal, the appellant had been employed at a trade in the vicinity of Montreal. While thus at liberty, the appellant, by petition dated March 3, 1952, asked that a writ of *habeas corpus* issue, to be addressed to the respondent Immigration Officer

lui enjoignant d'amener le Requérant, Donato Masella, sans délai devant l'un des Juges de ce Tribunal.

This application, which was made *ex parte,* was granted and the issue of the writ directed by Ferland J. on April 2, 1952.

The writ issued was in the customary form of a writ of *habeas corpus ad subjiciendum,* commanding the respondent to produce the body of the appellant at the Court House in the City of Montreal on April 7, 1952, at 10 a.m. On that date, the respondent made his return to the writ. Of the matters set forth in that document, there is first to be considered the statements in paragraphs 1 and 2 that, neither at the time of the filing of the petition for the writ nor at the time of its issue or presentment, was the appellant detained by the respondent.

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By a judgment delivered on September 15, 1953, by Perrier J. it was directed that the writ of *habeas corpus* issued be quashed. An appeal taken from that judgment to the Court of Queen's Bench was dismissed on April 26, 1954, Gagné and Rinfret JJ. dissenting (1).

Throughout the progress of this litigation the appellant has been at liberty, carrying on his customary occupation, subject only to the obligations assumed by him in his written undertaking of October 12, 1951. There is, first, to be determined the question as to whether, in these circumstances, the appellant was entitled to the remedy of a writ of *habeas corpus*.

The relief afforded by the writ of *habeas corpus* is in England a common law right and not one created by statute (Re Besset (2)). In Bacon's Abridgment (Vol. 4, p. 113 *Habeas Corpus* (A), the nature of the writ of *habeas corpus ad subjiciendum* is thus stated:—

> Wherever a person is restrained of his liberty by being confined in a common gaol, or by a private person, whether it be for a criminal or civil cause, he may regularly by *habeas corpus* have his body and cause removed to some superior jurisdiction, which hath authority to examine the legality of such commitment, and on the return thereof either bail, discharge, or remand the prisoner.

On the return of the writ pending the hearing, the prisoner is detained not under the authority of the general warrant but under the authority of the writ of *habeas corpus* and he may be bailed or remanded, in the discretion of the court (*R.* v. *Bethel* (3)).

In *Barnardo* v. *Ford* (4), Lord Watson said in part:—

> The remedy of *habeas corpus* is, in my opinion, intended to facilitate the release of persons actually detained in unlawful custody, and was not meant to afford the means of inflicting penalties upon those persons by whom they were at some time or other illegally detained. Accordingly, the writ invariably sets forth that the individual whose release is sought, whether adult or infant, is taken and detained in the custody of the person to whom it is addressed, and rightly so, because it is the fact of detention, and nothing else, which gives the Court its jurisdiction.

In *Secretary of State for Home Affairs* v. *O'Brien* (5), the Earl of Birkenhead referred to the purpose of the writ in these terms:—

> It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases

(1) Q.R. [1954] Q.B. 667.
(2) (1844) 6 Q.B. 481.
(3) (1697) 5 Mod. 19.
(4) [1892] A.C. 326 at 333.
(5) [1923] A.C. 603 at 609.

of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward 1. It has through the ages been jealously maintained by Courts of Law as a check upon the illegal usurpation of power by the Executive at the cost of the liege.

In *Re Isbell* (1), a person who had been arrested in Ontario on a criminal charge and released on bail made application for a writ of *habeas corpus* to Rinfret J. (as he then was) and that learned Judge in refusing the application said in part (p. 65):—

> In my view, in order to make a case for *habeas corpus* in criminal matters, there must be an actual confinement or, at least, the present means of enforcing it. A person may apply for the writ while in the custody of a constable, immediately upon being arrested, and need not wait until he is actually incarcerated. But a person at large on bail is not so restrained of his liberty as to entitle him to the writ.

The language of *The Habeas Corpus Act* of Ontario which affected the matter (R.S.O. 1927, c. 116, s. 1) read: "where a person . . . is confined or restrained of his liberty."

We have not been referred to any case, and my own researches have not discovered any, in which in England where the right to the remedy originated, a writ of *habeas corpus* was granted to a person who was at liberty on bail. I would assume the reason for this is that the writ, by its terms and by its very nature as above described, is inapplicable to such a situation. It is my understanding of the practice in this country that if a person who has been under detention, either under criminal or civil process, and set at liberty on bail or on his own recognizance, wishes to test the jurisdiction of the court which has ordered him to be detained, he surrenders himself into custody and make the application when thus under restraint.

As it is pointed out in *Re Isbell,* the matter has, however, been considered in a number of American cases. In *Respublica* v. *Arnold* (2), it was held that *The Habeas Corpus Act of Pennsylvania,* the provisions of which were taken from the English Statute 31 Car. 2, c. 2, applied in criminal matters only to persons in actual custody of some officer of justice and not to one at liberty on bail.

In *Wales* v. *Whitney* (3), an application for a writ of *habeas corpus* had been made to the Supreme Court of the District of Columbia on behalf of a medical officer in the

(1) [1930] S.C.R. 62. (2) (1801) 3 Yeates 263.
(3) (1884) 114 U.S. 564.

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American Navy, against whom charges had been laid which were to be heard by a court martial. Pending the hearing, he was notified by the Secretary of the Navy that he was placed under arrest and was required to confine himself to the limits of the City of Washington. The application was denied and, on appeal to the United States Supreme Court, it was held that no restraint of liberty was shown to justify the issue of the writ. Mr. Justice Miller, who delivered the opinion of the court, referred with approval to the decision in *Dodge's Case* (1) to the same effect and, referring to the decision in *Respublica* v. *Arnold* with approval, said:—

> The court held that the Statute of Pennsylvania, which was a reenactment of the *Habeas Corpus Act* of 31 Car. 2, c. 2, spoke of persons committed or detained and clearly did not apply to a person out on bail.

The only decisions to the contrary to which we have been referred are two cases in the Province of Quebec. The legislation which has affected the exercise of the right of *Habeas corpus* in that province is referred to in the judgment of our brother Taschereau in *Re Storgoff* (2).

In *Reg.* v. *Cameron* (3), a physician residing in British Columbia was arrested in that province and brought into Quebec on a charge of having written and published a defamatory libel. When committed for trial, he was admitted to bail to appear at the November sittings of the Court of Queen's Bench and, at that time as no indictment was preferred against him, he applied for a writ of *habeas corpus*. Wurtele J. considered that the rights of the applicant were to be determined under the provisions of c. 95 C.S.L.C. (1860) and said that (p. 170):—

> Bail is custody and he is constructively in gaol; and he has the same right to be released from this custody as he would have to be released from an imprisonment.

In *de Bernonville* v. *Langlais* (4) an application was made for the issue of such a writ against the Inspector in charge of the Bureau of Immigration by a person against whom a deportation order had been made who had been released upon bail, on terms requiring him to report monthly to the Immigration Office at Montreal. The

(1) 6 Martin (La.) 569.
(2) [1945] S.C.R. 526 at 569.
(3) (1898) 1 C.C.C. 169.
(4) Q.R. [1951] S.C. 277.

charge not being a criminal charge, Article 1114 of the *Code of Civil Procedure* applied which, so far as it is necessary to consider it, reads:—

> Any person who is confined or restrained of his liberty . . . may apply to any one of the Judges of the Court of King's Bench, or of the Superior Court, for a writ addressed to the person under whose custody he is so confined or restrained . . .

The words "confined or restrained of his liberty" were taken apparently from s. 20 of *An Act respecting the Writ of Habeas Corpus* (C.S.L.C. 1860, c. 95). In the Act of Car. 1 (c. 10 1640), which related to imprisonment in criminal proceedings, the opening words of the recital in the first paragraph are:—

> Whereas by the Great Charter many Times confirmed in Parliament, it is enacted, That no Freeman shall be taken or imprisoned, or disseised of his Freehold or Liberties, . . . but by lawful Judgment of His Peers . . .

and in s. 8, which defines the circumstances in which the writ may issue, the opening words are:—

> . . . That if any Person shall hereafter be committed, restrained of his Liberty, or suffer Imprisonment.

In the Act of Car. 11 (c. 2, 1677), referring also to imprisonment in criminal matters, the applicant for the writ is referred to as "the party so committed or restrained."

In Lower Canada by c. 1, Geo. III (1784), an Ordinance of the Captain General and Governor in Chief of the Province, it was declared that all persons who should be or stand committed or detained in any prison for any criminal or supposed criminal offence should be entitled to demand the issue of a writ of *habeas corpus* in the same manner and for the same purposes as His Majesty's subjects within the Realm of England.

In 1812, by c. 8 of the Statutes of Lower Canada, being an Act extending the powers of His Majesty's Courts of law as to writs of *habeas corpus ad subjiciendum,* it was provided that "when any person shall be confined or restrained of his or her liberty otherwise than for some criminal or supposed criminal matter" such a writ might issue. In this respect, the Act of 1816 relating to civil matters in England (56 Geo. 111, c. 100) is in the same terms.

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The language of Article 1114 of the *Code of Civil Procedure* is to be construed, in my opinion, in the same manner as similar language in the statutes to which it owes its origin.

In *de Bernonville's case,* after the order for deportation was made, he was released upon furnishing a bond effective for a limited period of time but which was renewed for successive periods, the condition of which was that he would report at stated times to the Inspector of Immigration at Montreal. The bond expired on March 15, 1951, and on that date de Bernonville, being at liberty, applied for a writ of *habeas corpus.* Brossard J. in directing the issue of the writ, after referring to the judgment in *Re Isbell* and distinguishing it, held that on the expiry of the bond, since the Inspector had the order for deportation at his command under which de Bernonville might immediately have been taken into custody, the remedy was available to him. The learned Judge, amongst other reasons for his conclusion, pointed out that the remedy of *habeas corpus* was granted in cases where the custody of children was in issue, even though there was no forceable detention.

It is my opinion that de Bernonville's case, upon which Ferland J. relied was wrongly decided. If the principal ground assigned by Brossard J. for his opinion, namely, that the fact that there was an order for deportation outstanding under which the applicant might be taken into custody, afforded ground for the issue of the writ, any accused person for whose arrest a warrant has been issued but which has not been executed might apply by *habeas corpus* for his discharge. I know of no authority for any such proposition.

The learned Judge, in coming to this conclusion, relied partly upon the fact that in the reasons delivered by Rinfret J. (as he then was) in *Re Isbell* he had said that:—

> In order to make a case for *habeas corpus* in criminal matters, there must be an actual confinement or, at least, the present means of enforcing it.

The concluding words of this passage appear to me to have been taken from the judgment of the Supreme Court of the United States in *Wales* v. *Whitney.* What was meant

by "the present means of enforcing it" was explained by Miller J. in that case in the next sentence of his judgment which read (p. 572):—

> The class of cases in which a sheriff or other officer, with a writ in his hands for the arrest of a person whom he is required to take into custody, to whom the person to be arrested submits without force being applied, comes under this definition.

That it was in this sense that the expression was used in *Re Isbell* is made clear by the sentence in the reasons which followed the language quoted, which reads (p. 65):—

> A person may apply for the writ while in the custody of a constable, immediately upon being arrested, and need not wait until he is actually incarcerated.

It is undoubted that in the case of infants where, as pointed out by Lord Esher M.R. in *R.* v. *Barnardo (Jones' case)* (1), the question is one not of liberty but of nurture and education, the writ may issue commanding the person in possession of the child to produce it. The reason for this is accurately expressed, in my opinion, in the last edition of Eversley on Domestic Relations (6th Ed. 339), as follows:—

> The issue of a writ of *habeas corpus* proceeds on the fact of an illegal restraint, and the person entitled to the legal custody of the infant, whether the father, mother, or other guardian, may sue out this writ without making any previous demand for the possession of the child. If the possession is found to be illegal, and the applicant is entitled to custody, the Court will make an order to that effect; but if neither the applicant nor the custodian is entitled to the custody, the writ will not be confirmed; the Court will either restore the infant to the custody from which it was taken, or discharge it from that custody, with liberty to return to it. Where the legal custody of the infant is shown to exist, the Court must order it to be delivered over to or remain in that custody. Though the father has at common law *prima facie* the right to the custody of his child, and so is entitled to his writ of *habeas corpus*, yet since the *Judicature Act, 1873* (which provides that the rules of equity in relation to the custody of infants shall prevail), and the *Infants' Custody Act, 1873*, the Court has a discretion to refuse the father this writ in order to remove a child of tender years from the custody of the mother, and other relations, whose conduct with regard to the child is impeached.

I am quite unable to understand how the fact that a writ may issue under these circumstances, where the person to whom it is directed has the actual custody of the infant, supports the view that in the circumstances of *de Bernonville's case* the remedy was available to him.

(1) (1890) 7 T.L.R. 109.

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In *Re Isbell,* the decision in *Reg.* v. *Cameron,* upon which Brossard J. partly relied in *de Bernonville's case,* is referred to and it is pointed out that it was a term of the granting of the bail that Cameron should appear at the November term of the Court of Queen's Bench "and in the meantime not to depart the Court without leave." I assume the meaning to be assigned to the language quoted is that it was a term of his release that he should not go beyond the jurisdiction of the Court. The point is academic in considering the present matter since there was no such condition of the recognizance given by Masella but, if it were necesary to decide the point, it is my opinion that no such restriction entitled Cameron to the remedy of *habeas corpus* when, as the case shows, he was at liberty on bail.

There can, of course, be no pretence in the present matter that the Immigration Officer to whom the writ of *habeas corpus* was directed had either the custody or control of Masella, either at the time the writ was issued or when it was served or when he made his return to the writ, and the contention that he was restrained of his liberty within the meaning of Article 1114 is, in my opinion, quite without foundation.

No proceedings by way of *certiorari* were taken in this matter and the objection that the remedy by way of writ of *habeas corpus* was not available to the appellant is fatal to his appeal, in my opinion. I refrain from expressing any opinion as to whether, had a writ of *certiorari issued,* the Court would have been at liberty to examine the evidence in such proceedings in the Province of Quebec, or as to the application of the decision of the Judicial Committee in *Rex* v. *Nat Bell Liquors Ltd* (1) to any such proceedings.

The appeal should be dismissed, with costs.

CARTWRIGHT J.:—For the reasons given by my brother Locke I agree with his conclusion that the remedy by way of writ of *habeas corpus* was not available to the appellant and that consequently the appeal fails.

The objection to the form of the proceedings was made in the courts below and although, as Rinfret J. points out in his reasons, it was not pressed in argument before the

(1) [1922] 2 A.C. 128.

Court of Queen's Bench it does not appear to have been abandoned. It was re-asserted before us and we are compelled to give effect to it.

I regret this result not only because the time of counsel, of the courts below and of this Court has been taken up in a full discussion of matters with which, owing to the fact that the appellant was not in custody at the time of the issue or return of the writ, the courts could not deal in these proceedings but also because had the matter been properly before us it would have been my view that the conclusion arrived at by Rinfret J. and concurred in by Gagné J. was right.

I would dismiss the appeal with costs.

FAUTEUX J.—En première instance, devant la Cour d'Appel et devant cette Cour, l'une des prétentions de l'intimé fut que, dans les circonstances de cette cause, l'appelant n'était pas dans les conditions requises pour se pourvoir par voie d'*habeas corpus*. Comme mes collègues, MM. les Juges Locke et Cartwright, je suis d'avis que cette prétention de l'intimé est bien fondée. Je renverrais l'appel avec dépens.

ABBOTT J.:—The issue raised in this appeal is one which has frequently been before the Courts. It relates to the validity of a deportation order made against the appellant under the provisions of the *Immigration Act*.

The appellant is an Italian citizen whose brother had applied here in Canada for his admission to this country as a "sponsored immigrant". The brother in Canada was advised in writing by the Immigration authorities in Montreal to inform appellant that he would be called for examination at the Canadian Immigration Office in Rome and, if he satisfied the requirements of the Immigration authorities there, would be given a visa to enter Canada.

Without going into the facts in detail, it seems clear that while the appellant obtained what purported to be a visa, from a Canadian officer in Naples, authorized to issue such documents, in fact the issue of such a visa was irregular and the usual medical and other examinations of the appellant required by the *Immigration Act* and regulations thereunder had not taken place.

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When appellant arrived in Canada on June 18, 1951, appellant's passport, the visa stamped on it, and the certificate of prior medical examination appearing to be in order, the Immigration Officer at the port of entry stamped appellant's passport "Landed Immigrant", and he was allowed to enter Canada and proceed to Montreal.

Subsequently, on September 12, 1951, when he presented himself at the immigration office in Montreal to find out what must be done in order to bring his wife to Canada, his passport was examined and inquiries made to ascertain whether his entry to Canada has been obtained as a result of an irregular visa. As a result of these inquiries a complaint was made to the Minister pursuant to s. 40 of the Act, that appellant was "a prohibited immigrant under section 3 subsection (i) of the *Immigration Act* in that he does not fulfil, meet or comply with the conditions and requirements of Orders-in-Council P.C. 2744 and P.C. 2856 which for the time being are in force and applicable to the said immigrant." Following the lodging of this complaint an order was issued under s. 42 of the Act for the detention of the appellant and the setting up of a board of inquiry to investigate the facts alleged in the complaint.

After a hearing, at which appellant was present, testified, and was represented by counsel, the Board ordered his deportation. Appellant, who had been released after six days' detention, upon furnishing security, then appealed to the Minister, as he was entitled to do under the provisions of the Act, and the Minister in due course confirmed the decision of the Board. *Habeas corpus* proceedings followed in which the validity of the deportation order was challenged.

The only ground with which I find it necessary to deal is that urged by appellant on the hearing before this Court to the effect that since the Immigration authorities had allowed him to land in Canada, the burden of proof was on the Department to establish that he was not eligible to enter this country as an immigrant and that in consequence a complaint could not be validly laid under s. 40 of the Act.

The relevant part of that section is as follows:—

> 40. Whenever any person, other than a Canadian citizen or person having Canadian domicile, ...
>
> .....
>
> enters or remains in Canada contrary to any provision of this Act, it

shall be the duty of any officer cognizant thereof, and the duty of the clerk, secretary or other official of any municipality in Canada wherein such person may be, to forthwith send a written complaint thereof to the Minister, giving full particulars.

Counsel for the Attorney General of Canada took the position that a prerequisite to a legal entry into this country as an immigrant is the compliance by such immigrant with the requirements of the *Immigration Act* and the regulations made thereunder, including compliance with the requirements with respect to medical and other examinations and the issue of a valid visa; that these not having been complied with, it is immaterial whether or not the failure to so comply was due to some act or omission on the part of the employees of the Department, the admission to Canada of an immigrant being subject to review by the Minister in accordance with the provisions of the Act.

Counsel for respondent further submitted that even assuming for the purposes of this case the appellant was in perfect good faith, since he had not in fact complied with the requirements of the *Immigration Act* and the regulations made thereunder and was not a Canadian citizen or a person having acquired Canadian domicile, he was therefore a prohibited immigrant under s. 3(1)(i) of the Act, which reads as follows:

3(1) No immigrant, passenger, or other person unless he is a Canadian citizen, or has Canadian domicile, shall be permitted to enter or land in Canada, or in case of having landed in or entered Canada shall be permitted to remain therein, who belongs to any of the following classes, hereinafter called "prohibited classes":—

.....

(i) Persons who do not fulfil, meet or comply with the conditions and requirements of any regulations which for the time being are in force and applicable to such persons under this Act.

The Orders in Council made under the provisions of the Act, which were applicable to appellant, are P.C. 2744 and P.C. 2856, the relevant parts of which read as follows:—

P.C. 2744

From and after the date hereof (June 2, 1949), every person seeking to enter or land in Canada shall be in possession of an unexpired passport issued by the country of which such person is a subject or citizen; Provided:

1. That this Regulation does not apply to:

(here follow exempting provisions which are inapplicable to appellant)

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2. That the passport of every alien other than defined in paragraph (*b*) of section 1 of this Regulation sailing directly or indirectly from Europe shall carry the visa of a Canadian Immigration Officer stationed in Europe; Provided that this section shall not apply to the non-immigrant nationals of any country with which Canada has a reciprocal agreement abolishing visas.

3. That the passport of every alien immigrant not included in section 2 of this Regulation shall carry the visa of a British diplomatic or consular officer or of a Canadian diplomatic or consular officer in the country of issue, as may be required by the Minister of Mines and Resources (now Minister of Citizenship and Immigration).

P.C. 2856

From and after the 1st July, 1950, and until such time as otherwise ordered, the landing in Canada of immigrants of all classes and occupations is prohibited, except as hereinafter provided:

The Immigration Officer-in-Charge may permit any immigrant who otherwise complies with the provisions of the Immigration Act to land in Canada, if it is shown to the satisfaction of such Officer-in-Charge that such immigrant is:

4. A person who satisfies the Minister, whose decision shall be final, that:

(*a*) he is a suitable immigrant having regard to the climatic, social, educational, industrial, labour, or other conditions or requirements of Canada; and

(*b*) is not undesirable owing to his peculiar customs, habits, modes of life, methods of holding property, or because of his probable inability to become readily adapted and integrated into the life of a Canadian community and to assume the duties of Canadian citizenship within a reasonable time after his entry.

The appellant was in possession of a valid passport issued by the Italian Government and endorsed with what purported to be a visa signed by one George G. Wilson, a Canadian Immigration Officer entitled to issue visas in Italy.

As I have already mentioned, evidence adduced at the court of inquiry indicated that this visa had been issued improperly and that appellant had not been medically examined by an officer of the Canadian Government although a stamped entry on the passport falsely indicated that such examination had taken place.

It also seems clear from this evidence that no examination of appellant took place in Italy in order to ascertain his suitability to enter Canada as an immigrant.

In my view appellant's contention, that because he was allowed to land in Canada on the strength of a visa and a certificate of medical examination assumed to have been legally issued no complaint to the Minister could be validly

laid under s. 40 of the Act, cannot be sustained. The legality of his entrance to Canada was subject to question at any time until he had acquired Canadian domicile within the meaning of the Act.

Immigration to Canada by persons other than Canadian citizens or those having a Canadian domicile is a privilege determined by statute, regulation or otherwise, and is not a matter of right.

In the *Immigration Act,* Parliament has set up the machinery for the control of immigration to this country and for the selection of prospective immigrants. To accomplish this purpose, very wide discretionary powers are given under the Act, to the Governor-in-Council and to the Minister, and perhaps it is necessary that this should be so. An example of these wide discretionary powers is to be found in s-s. 4 of Order in Council P.C. 2856 above quoted, in virtue of which the Minister is given in effect an absolute discretion to determine who is, or who is not, a suitable immigrant.

In order to provide for the effective administration of an Act such as this, it would seem not unreasonable that the Immigration authorities should be in a position to insist upon strict compliance abroad with the requirements of the Act or regulations concerning medical and other examinations in order to determine the suitability of a proposed immigrant whether from a medical standpoint, an internal security point of view, or otherwise. In this case it was established to the satisfaction of the board of inquiry that these regulations had not been met.

In my opinion the proceedings before the board of inquiry were regularly taken and a proper investigation made of the subject-matter of the complaint in accordance with the provisions of the Act. As to the application of s. 23, the effect of that section has been considered by this Court on a number of occasions: See *Samejima* v. *The King* (1) and *De. Marigny* v. *Langlais* (2). It is clear that under that section, where a Board of inquiry has taken evidence in good faith and has otherwise complied with the provisions of the statute, a court has no jurisdiction to substitute its judgment for that of the board.

(1) [1932] S.C.R. 640.
(2) [1948] S.C.R. 155.

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In view of the conclusion that I have reached, I do not find it necessary to deal with the issue as to whether in the circumstances of this case the appellant was entitled to the remedy of *habeas corpus*, which was raised in respondent's factum but was not argued before this Court.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *A. H. Malouf.*

Solicitor for the respondent: *E. Trottier.*

1955

*Mar. 10
*Mar. 17

ROMEO PARADIS (*Defendant*) .....APPELLANT;

AND

DAME ALPHONSINE LEMIEUX (*Plaintiff*) .....RESPONDENT.

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

Divorce—Obtained by husband—Adultery of wife—Whether husband can oppose demand of wife for partition of common property—Civil Code, Art. 209.

The husband, who obtained a Canadian parliamentary divorce on the ground of the adultery of his wife, cannot, in an action subsequently instituted by the latter for partition of the common property, allege in defence the fact of this misconduct in order to have a judgment declaring, under Art. 209 C.C., that she has for that reason forfeited her right to demand partition. Such a divorce dissolves the juridical tie of marriage and this dissolution operates the dissolution of the community of property.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec, affirming the judgment of the trial judge in an action for partition of common property taken by a divorced wife against her husband.

Yves Laurier, Q.C. for the appellant.

Marin Dion for the respondent.

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

The judgment of the Court was delivered by:—

FAUTEUX J.:—L'appelant se pourvoit contre un jugement unanime de la Cour du Banc de la Reine confirmant le jugement de première instance et décidant que le mari, qui a obtenu du Parlement un divorce motivé par l'adultère de sa femme, ne peut opposer à la demande de partage de la communauté, subséquemment institutée par cette dernière, le fait de cette inconduite pour obtenir un jugement prononçant la déchéance autorisée par l'article 209 C.C. dans le cas de séparation de corps.

Les Juges de la Cour d'Appel ont pertinemment rappelé que ce divorce parlementaire a emporté comme conséquence la rupture du lien juridique résultant du mariage des parties et que de cette dissolution du mariage résulte inévitablement la dissolution de la communauté légale jusqu'alors existant entre elles. La justesse de ces vues a été reconnue par l'appelant à l'audition devant nous.

Dès lors, et dans cette situation des parties, sur quelle règle de droit peut-on fonder l'ajournement de la poursuite du partage des biens de cette communauté dont le principe même, le lien juridique du mariage, a été, et à jamais, dissous par la loi? Par quelle exception l'intimée peut-elle désormais être contrainte à demeurer temporairement dans l'indivision? Comment justifier le prononcé de la déchéance d'un droit quand les conditions dans lesquelles ce prononcé est recherché ne sont pas celles fixées par le texte de la loi l'autorisant?

Partageant les raisons exprimées aux notes supportant le jugement *a quo,* nous sommes tous d'opinion de rejeter cet appel avec dépens.

Appeal dismissed with costs.

Solicitor for the appellant: *Y. Laurier.*

Solicitors for the respondent: *Levesque & Dion.*

1954
*Dec. 13
1955
*Feb. 23

ROBERT STANLEY DILWORTH and FREDERICK CHARLES FREEMAN (*Plaintiffs*) ..... APPELLANTS;

AND

THE CORPORATION OF THE TOWN OF BALA and THE ROYAL BANK OF CANADA (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Appeal, lack of substance—Municipal Corporation—Ratepayer—Right of latter to appeal from judgment rendered against municipality where latter decides not to appeal therefrom.

The appellants as ratepayers brought action against the Town of Bala and the Royal Bank of Canada in which they sought a declaration that a contract entered into by the Town for the installation of a water and sewer system and for the borrowing of money from the Bank to finance the scheme be declared *ultra vires*. Subsequently separate actions were brought by the Bank and by the contractor to recover the money they respectively claimed due them. The three actions were not consolidated but were tried together and the Town in its defence denied allegations of improper purposes in the action taken, or that the scheme was fraudulent, discriminating and illegal as against the majority of the ratepayers and, as to the alleged illegality, submitted itself to the jurisdiction of the court; otherwise it adopted all the argument of the present appellants. The trial court dismissed the first action and gave judgment for the Bank and the contractor in the other two. From these judgments appeals were taken to the Court of Appeal, were argued together and were dismissed, the Town again supporting the present appellants. The Town did not appeal further and before this Court asked that the appeal taken from the first judgment be dismissed.

Held: The question of *ultra vires* was raised in the courts below where the Town supported the present appellants. The question having been decided against the Town and it having refused to appeal further, it would be improper to permit the appeal to continue.

Per Rand, Kellock and Cartwright JJ.: The right of a ratepayer to bring a municipal corporation into court as a means of asserting the illegality of corporate action arises from the delinquency of the corporation. If the corporation, of its own accord, has taken appropriate action, the basis of the interposition by a ratepayer, a breach of duty, does not arise. *Paterson* v. *Bowes*, 4 *Grant* 170 at 191 distinguished.

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

APPEAL from the judgment of the Court of Appeal for Ontario (1) dismissing an appeal from the judgment of Smily J. (2). At the opening of the appeal the Court *ex proprio motu* questioned the right at law of the appellants to appeal in view of the judgment of The Royal Bank of Canada against the Town. To permit counsel to consider the point and submit supplementary factums the hearing was adjourned to the January term. At that term on the conclusion of argument, Kerwin C.J., speaking for the Court, dismissed the appeal and stated reasons for judgment would be handed down later.

H. E. Manning, Q.C., David Mundell, Q.C. and *R. F. Reid* for the appellants.

J. J. Robinette, Q.C. and *W. G. C. Howland, Q.C.* for The Royal Bank of Canada.

G. H. Aiken, Q.C. for the Town of Bala.

The judgment of Kerwin C.J. and Taschereau J. was delivered by:—

THE CHIEF JUSTICE:—This is an appeal by the plaintiffs from a judgment of the Court of Appeal for Ontario affirming the judgment at the trial of Smily J. and dismissing the action. The appellants issued their writ on December 10, 1951, on behalf of themselves and all other ratepayers of the Town of Bala against the Town and the Royal Bank of Canada. In that action they sought a declaration that no sums of money were owing to any person in respect of any work done or materials supplied or services rendered in respect of a certain water and sewer system, and that no valid contracts existed binding the Town to proceed therewith; a declaration that certain resolutions were inoperative and ineffectual to give rise to any authority or obligation; a declaration that no money was owing to the Bank in respect of certain loans and credits advanced and made by the Bank to the Town; an injunction restraining the Town, its officers, servants and agents from paying any sum of money to any person in respect of any alleged work done, services rendered, or obligation incurred in connection

(1) [1953] O.R. 787; 4 D.L.R. 122.

(2) [1952] O.R. 703; 4 D.L.R. 281.

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Kerwin C.J.

with the said water and sewer system; an injunction restraining the Town from creating or issuing any debentures to pay for anything in connection with the system.

On April 16, 1952, the Royal Bank of Canada issued a writ against the Town of Bala to recover a sum of money advanced by the Bank in connection with the said system, together with interest. A third action was instituted against the Town by Malvern Construction Co. Ltd., to recover a sum of money due upon a contract in connection with the same work. These three actions were not consolidated but were tried at the same time. Judgment was given for the plaintiffs in the action by the Malvern Company and in the action by the Royal Bank. At the trial the then counsel for the Town in the present action and in the Royal Bank action adopted all the arguments of counsel for the present appellants. Appeals by the losers in the three actions were dismissed by the Court of Appeal for Ontario, before which Court the Town again supported the position of the appellants. The Municipal Council of the Town has not authorized any appeal from the Court of Appeal by the Town in any of the actions and it has instructed Counsel to ask that this appeal be dismissed.

Upon it coming on for argument, this Court *ex proprio motu* raised the question as to whether, in view of the judgment of the Royal Bank against the Town, the appeal was without substance and ought not to be permitted to proceed further. *Duhamel* v. *Coutu* (1). The hearing was adjourned to permit counsel to consider the matter and to submit supplementary factums. After a complete argument on the point, we announced that the appeal was dismissed with costs and that reasons would be given later.

It was first contended on behalf of the appellants that the plea of *ultra vires,* relied upon in this action, had not been raised by the Town in the action brought against it by the Royal Bank of Canada. Reading the pleadings in that action in the light of the evidence adduced at the joint trial and of the position taken at the trial and before the Court of Appeal by counsel for the Town, it is clear that, as to all branches thereof, that question had been before the courts below and was decided by them.

(1) [1954] S.C.R. 279.

Irrespective of any proceedings the appellants might or might not have been able to take in the Ontario Courts, it would be improper to permit this appeal to continue. In the two actions the Town aided the appellants, so that it cannot be said that they are prosecuting any claim the Town declined to put forward and support since it was only after two judgments against it that it refused to appeal. Furthermore, there appears to be no reason that the Bank could not enforce its judgment by appropriate action under the Ontario *Execution Act,* R.S.O. 1950, c. 120. Finally, s. 15 (*f*) of the *Ontario Judicature Act,* relied upon by the appellants, has no relevancy to the case before us.

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

RAND J.:—This action was commenced in December, 1951. It was brought by the appellants as ratepayers of the Town of Bala against the corporation and the Royal Bank of Canada in respect of certain action taken by the corporation in the way of carrying out what purport to be mandatory orders of the Department of Health for Ontario to construct water and sewage works, in relation to which contracts had been entered into and moneys borrowed from the Bank to pay for the work as it proceeded. The relief claimed included a declaration that the steps taken, the contracts entered into and the borrowing from the Bank were *ultra vires* of the Town because of non-compliance with the provisions of the applicable statutes.

The defence of the Town, except as to allegations of improper purposes in the action taken, of representations made to an agent of the Health Department, and that the scheme was "fraudulent, discriminating and illegal" as against the majority of the ratepayers, either admitted what was set up in the statement of claim or supplied further particulars or corrections; and as to the alleged illegality submitted itself to the judgment of the court.

In April, 1952, the Bank brought what I shall call the second action against the Town for the recovery of advances amounting to $85,000 and interest. The claim sets forth in detail the preliminary steps and acts done and taken by the Department of Health and the Town as necessary to the authority of the Town to undertake the works and to

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Rand J.

borrow the money. In its defence the Town pleaded the invalidity of the orders of the Department, of the by-laws of the Town and of the contract of loan with the bank, raising in substance the allegations made in the action before us.

A third action was brought by the contractor for the pumping station and connecting works, Malvern Construction Co. Ltd., against the corporation which was contested and in which judgment was recovered for $10,500. The pleading are not before us, but I gathered from the argument that the position taken by the Town was the same as in the second action.

The issues in the three proceedings were tried together. The trial court dismissed the first and gave judgment for the plaintiffs in the other two. From these judgments appeals were taken which were argued together and dismissed by the Court of Appeal. Before both courts the Town supported the present appellants.

But the Town did not take steps to bring the judgments in the second and third actions to this Court, and when the argument opened the question of their effect on this appeal was raised. As counsel were not then prepared to argue that question, the hearing was adjourned. Subsequent argument was heard, and at the conclusion the appeal was dismissed *in limine*.

The right of a ratepayer to bring a municipal corporation into court as a means of asserting the illegality of corporate action affecting its property or civil rights, and indirectly the interests of ratepayers, is not challenged. It assumes that the organ of the corporation created to speak and act for all who are comprised within it is disregarding its duty: and the purpose and effect of the proceeding is to compel the execution of that duty. The right of the ratepayer arises from the delinquency of the corporation and its essence is of a coercive nature against the corporation and only mediately against third parties. If the corporation, of its own accord, has taken appropriate action, the basis of the interposition by a ratepayer, a breach of duty, does not arise. It is the primary right and duty of the corporation itself to repudiate *ultra vires* action and it is this right and duty which are brought before the Court for enforced

action. The right of the ratepayer is thus accessory to that of the corporation; the substantive matter remains in the relation between the corporation and the third person.

This is to be distinguished from a direct or personal right asserted when action is taken against a ratepayer and is resisted as being illegally founded within corporate action alone, not involving third persons. The ratepayer may, in such a case, raise questions of substance between himself and the corporation. A direct determination *in rem,* by means furnished by the statute, of illegality, such as the setting aside of a by-law, will bind all ratepayers. It is so far similar in this action: the appellants are acting on behalf of all the ratepayers; and a decision that the action challenged is *intra vires* would bind all as between themselves and the corporation as well as between the corporation and the third parties in the proceeding.

The judgments recovered in the second and third actions have merged the causes of action arising out of the contracts made under the impugned procedure and they conclude the question as between the corporation and the claimants. The contractual right of the Royal Bank so adjudicated is that challenged in this appeal and a successful issue of this appeal would mean that the claim now transmuted into judgment never, in law, existed. A declaration to that effect would be futile because it could not nullify the efficacy of the judgment. It cannot now be made because the cause of action upon which it rests no longer in fact exists. If, in some manner so far not made clear, a declaratory judgment could be the basis for a perpetual stay of proceedings in the second action, it would be equivalent to a compulsory appeal; but counsel conceded that the bona fide decision of the corporation not to appeal could not, at least in the absence of extraordinary circumstances not present here, be overridden. The Legislature has confided in the Council the authority and responsibility to make such decisions and there is no power in the courts to interfere with them when made or to transfer authority from the council to the courts through the intermediation of individuals. The appeal assumes the challenged matter in its broadest sense to be still subject to determination, but that is not now the case; it has become definitively determined and there is no existing subject-matter upon which

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Rand J.

the judgment of the court can operate: what was matter of fact is now of record. Viewed from another angle, the appeal raises only an academic question which, in the event of dismissal, would but confirm the existing judgment, and of allowance, would create a nugatory conflict.

Mr. Manning conceded that if he was unsuccessful in showing that the issue of *ultra vires* had not been litigated, he was left with only a distinction between the right of the corporation and that of the ratepayer in relation to the substantial matter in controversy. He could furnish us with no authority in support of this distinction except certain language used by Spragge V.C. in *Paterson* v. *Bowes* (1). In that case money was alleged to have been illegally appropriated by the mayor of Toronto and the council had refused to act. The bill was brought against both the City and the mayor. A demurrer was pleaded on two grounds, that only the Attorney General could bring such a suit, and that the plaintiffs, suing on behalf of themselves and all other inhabitants (including ratepayers) of the City, showed no sufficient interest to maintain the bill. After citing the cases of *Cohen* v. *Wilkinson* (2) and *Carlisle* v. *The South Eastern Railway Company* (3), the Vice-Chancellor proceeded:—

> The corporation in such case would sue in respect of a right common to every individual rate-payer; and if the corporation may sue but will not, I think that individual rate-payers may. The refusal of the governing body to assert the right cannot, I think, extinguish the right of the rate-payers who dissent from them, or prevent their asserting it, when, as in this case, they sustain a pecuniary loss by the act complained of.

Notwithstanding the fact that the right is spoken of as arising from the wrongful refusal of the governing body to act, it is argued that this means a right running from each ratepayer directly against the third person, a primary right not affected by a judgment on the same originating matter against the corporation. The Vice-Chancellor, immediately before that paragraph, was considering whether the plaintiffs had shown sufficient interest to bring the action which he found by reason of the fact that,

> by the misapplication complained of in the bill all the rate-payers were injured, as more money must necessarily be collected from them than would otherwise have been required of them.

(1) (1853) 4 Gr. 170 at 191. (2) 1 McN. & G. 481; 41 E.R. 1351.
(3) 1 McN. & G. 689; 41 E.R. 1432.

But the bill prayed that the mayor be ordered to pay back the money to the City. It was undisputed that the right to claim the money was in the City and it was only because the funds were under a quasi-trust that equity would interpose its action at the instance of quasi-beneficiaries of a public administration. The equitable right to sue was to bring the corporation into court and to compel the payment to it by the mayor, to enforce the legal right of the City against the mayor which improperly the corporation had itself refused to do.

The remaining question is as to a general claim to restrain the Town from acting upon contracts, purporting to be made under the authority questioned, with third persons not parties to this or any other action. This is consequential relief based on primary grounds that have been rejected in the two private actions by the Court of Appeal. Since the council has unimpeachably decided to accept those judgments, it would be acting within its competence in concluding the matters outstanding necessary to the completion of the works. The allowance of the appeal would produce only the same futile conflict as in the other instances. The right of a rate-payer is not absolute; it depends upon the equity of his position vis-à-vis the corporation and the existing state of things. The basis of the appellants' intervention has thus disappeared, and with it their interest in this appeal.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Manning, Mortimer, Mundell & Reid.*

Solicitor for the respondent Town: *G. H. Aiken.*

Solicitors for the respondent Bank: *McMillan, Binch, Wilkinson, Stuart, Berry & Dunn.*

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*Jan. 28, 31
Feb. 1

*Mar. 7

HER MAJESTY THE QUEEN .....APPELLANT;

AND

MICHAEL KUZMACK .....RESPONDENT.

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

Criminal law—Murder—Defence of accident or self-defence—No charge to jury as to manslaughter—Whether there was material to call for charge with respect to manslaughter—Criminal Code, s. 259 (a), (b).

The respondent was convicted of the murder of a woman. He and the deceased were alone in a house when the occurrence took place. His defence was accident or self-defence in a struggle over a knife said by the respondent to have been in the hand of the victim. Apart from his evidence, there was nothing to show the particulars of what took place. There was evidence that the respondent and the deceased had agreed upon marriage and that there had been prior dissension between them over the mode of life led by the deceased. Shortly before the fatal act, they were heard quarrelling.

The trial judge did not charge the jury as to manslaughter. The Court of Appeal ordered a new trial and the Crown appealed to this Court.

Held (Locke J. dissenting): that the appeal should be dismissed.

Per Kerwin C.J., Taschereau, Rand, Kellock, Estey, Cartwright, Fauteux and Abbott JJ.: The circumstances were sufficient to call for the trial judge to charge the jury with respect to manslaughter. If the jury concluded upon the evidence that the homicide was culpable, it was necessary for them to decide as a fact, with what intent the respondent had inflicted the fatal wound. If they had a reasonable doubt that he possessed the intent required by s. 259 (*a*) or (*b*) of the *Criminal Code*, the prisoner must be given the benefit of that doubt, and the jury should then consider the offence of manslaughter.

Per Locke J. (dissenting): There was no material before the jury to justify a direction that they should consider a possible verdict of manslaughter.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), quashing, O'Connor C.J.A. and Cairns J.A. dissenting, the respondent's conviction on a charge of murder and ordering a new trial.

H. J. Wilson, Q.C. and *J. J. Frawley, Q.C.* for the appellant.

M. E. Moscovich, Q.C. for the respondent.

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

(1) 110 C.C.C. 338.

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The judgment of Kerwin C.J. and Taschereau, Rand, Kellock, Estey, Cartwright, Fauteux and Abbott JJ. was delivered by:—

THE CHIEF JUSTICE: The Attorney General of Alberta appeals from a judgment of the Appellate Division of the Supreme Court (1) directing a new trial where the accused was charged with and convicted of the murder of a woman. The substantial point is whether there was evidence sufficient to call for an instruction to the jury that they might find manslaughter.

The deceased and the accused were alone in a house when the occurrence took place. The defence was accident or self-defence in a struggle over a knife said by the accused to have been in the hand of the victim. Apart from his evidence, there is nothing to show the particulars of what took place. Two witnesses, the occupant of the house and his wife, then a short distance away from the house, heard a scream and saw the woman come staggering out. To the wife she cried "get me to a hosp . . ." and then she collapsed.

There was evidence that the accused and the deceased had agreed upon marriage and that there had been prior dissension between them over the mode of life being led by the deceased. That morning, shortly before the fatal act, they were heard quarrelling. At some stage a knife came into play which pierced the woman's neck to cut the jugular vein and she died in a few minutes from loss of blood.

These, and other circumstances unnecessary to mention, were sufficient to call for the learned trial judge to charge the jury with respect to manslaughter. In *Mancini's* case (2), Viscount Simon, after referring to the rule laid down in *Woolmington's* case (3), that the prosecution must prove the charge it makes beyond reasonable doubt, and consequently that if on the material before the jury, there is a reasonable doubt, the prisoner should have the benefit of it, pointed out that this is a rule of general application in all charges under criminal law. His Lordship continued at p. 279:

> Thus, when a prisoner is charged with murder and felonious homicide is proved against him, if the jury, when considering the evidence as a whole at the conclusion of the case, are left in reasonable doubt as to whether the homicide proved is not manslaughter, they should return a verdict of manslaughter.

(1) 110 C.C.C. 338.
(2) [1941] 3 A.E. 272.
(3) [1935] A.C. 462.

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Kerwin C.J.

If the jury concluded upon the evidence that the homicide was culpable, it was necessary for them to decide as a fact, with what intent the accused had inflicted the fatal wound. If they had a reasonable doubt that he possessed the intent requisite under 259(*a*) or (*b*) of the *Code* the prisoner must be given the benefit of that doubt, and the jury should then consider the offence of manslaughter.

The appeal should be dismissed.

LOCKE J. (dissenting):—My consideration of the proceedings in this matter leads me to the same conclusion as that expressed at the trial by the learned Chief Justice of the Trial Division and in the Appellate Division by the learned Chief Justice of Alberta (1).

As there is to be a new trial, I make no further reference to the evidence other than to say that, in my opinion, there was no material before the jury which would justify a direction that they should consider a possible verdict of manslaughter.

I would allow this appeal.

Appeal dismissed.

Solicitor for the appellant: *H. J. Wilson.*

Solicitors for the respondent: *Moscovich, Moscovich & Spanos.*

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*Mar. 15
*Apr. 6

LOUIS H. MARCOTTE (*Plaintiff*) .....APPELLANT;

AND

LA SOCIÉTÉ COOPERATIVE AGRICOLE DE STE. ROSALIE (*Defendant*) ..... RESPONDENT.

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

Mandamus—Contract between member and Agricultural Co-operative Society—Member expelled from Society for breach of contract—No allegation in pleadings that member was not heard or summoned before expulsion—Whether court can act proprio motu—Co-operative Agricultural Association Act, R.S.Q. 1941, c. 120, ss. 13, 14.

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

(1) 110 C.C.C. 338.

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The appellant was a shareholder member of the respondent agricultural co-operative, which was organized under the *Co-operative Agricultural Association Act*, R.S.Q. 1941, c. 120. In common with other members, he had entered into a contract with the respondent, providing that each member should purchase from the respondent all his required feed, seed grain and chemical fertilizer, that if a member committed a breach of his contract, the respondent might claim stipulated damages and the board of directors was authorized to strike off such member from the list of members.

For breach of contract by the appellant, the directors passed a resolution declaring him to be no longer a member. He applied for a mandamus to have the resolution declared illegal, null and void, alleging that he had fulfilled all the terms of the contract and that the respondent had acted unjustly, arbitrarily and illegally.

The trial judge and the majority in the Court of Appeal dismissed his application. The dissenting judgments in the Court of Appeal held that the directors should have heard the appellant before adopting the resolution and that, whether pleaded or not, the court itself was entitled to raise the doctrine of *audi alteram partem*.

Held: The appeal should be dismissed.

1. The trial judge was not required nor entitled to act *proprio motu* on the doctrine of *audi alteram partem*, which had not been pleaded by the appellant before the trial judgment was rendered. Assuming that the directors were acting in a quasi-judicial capacity, the failure to hear or summon the appellant before adopting the resolution was a question of fact which should have been expressly pleaded if the appellant wished to rely upon it in his action.

2. On a true interpretation of the obligations of the appellant, there was ample evidence to show that the decision of the directors was not unjust, arbitrary and illegal.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), affirming, Barclay and McDougall JJ.A. dissenting, the judgment of the trial court which had dismissed the writ of mandamus.

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

V. Pager, Q.C. and *E. Tousignant* for the respondent.

The judgment of the Court was delivered by:—

ABBOTT J.:—The respondent is a co-operative agricultural association organized under the provisions of the *Co-operative Agricultural Associations Act*, R.S.Q. 1941, c. 120. Appellant was a member of the said Association and the holder of ten shares of the value of $10 each.

In common with other producer shareholders, appellant had entered into a contract with the association for a period of five years from February 1, 1944, and this contract was

(1) [1954] Q.B. 393.

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renewed for a further period of five years, terminating on the 1st February, 1954. The said contract, authorized by s. 13 of the Act, provided, among other things, that each member should purchase from the Association all feed, seed grain and chemical fertilizer which he might require. The contract further provided that if a member committed a breach of his obligations under the contract, the Association might claim and recover from such member, as stipulated damages, a sum equivalent to thirty percent of the value of all such merchandise purchased elsewhere. In the event of a breach, aside from any claim which the Association might make for damages, under the terms of the said contract, and in virtue of s. 14 of the Act, the board of directors was authorized, if deemed expedient, to strike off such shareholder member from the list of members and convert his ordinary shares into preferred shares.

On October 18, 1950, on the ground that appellant had neglected and refused to carry out his obligation to purchase from the association his requirements of feed, seed grain and fertilizer, the Directors of the Association passed a resolution in the terms of which they declared the appellant no longer a member, converted his ordinary shares into preferred shares and authorized the immediate repayment of the said shares. No attempt appears to have been made to assert any claim for stipulated damages.

On October 20, 1950, respondent wrote appellant advising him of the terms of the said resolution and forwarded a cheque for $100, the par value of his shares, which appellant refused to accept.

On October 28, 1950, appellant applied for the issue of a writ of mandamus. In his petition he alleged that during the whole period of the original contract and its renewal, he had fulfilled all the terms of the said contract, had carried out all his obligations as a producer shareholder, both under the law and the by-laws of the said Association, that he had been illegally struck off the list of members, and that the action thus taken by respondent, relying upon an alleged breach of contract by appellant, was unjust, arbitrary and illegal. With his petition for the writ he tendered and deposited the cheque in the amount of $100 above referred to and in his conclusions asked that the resolution adopted by the Directors of the Respondent Association on

October 18, 1950, be declared illegal, null and void; that it be declared that he had been illegally removed from the list of members, and that the respondent be ordered to restore him as a producer member of the Association.

The learned trial judge and a majority of the Court of Appeal (1) held that it was clearly established on the evidence that the appellant had committed a breach of his obligations under his contract with the Association, that in consequence, the Directors were justified in adopting the resolution removing him from the list of producer members, converting his shares into preferred shares and repaying the said shares.

Mr. Justice Barclay, with whom Mr. Justice McDougall concurred, without passing upon the question as to whether or not appellant had committed a breach of his contract, was of the opinion that before the Board of Directors could validly adopt a resolution removing him as a member, appellant was entitled to be heard. Since in his view the appellant had been removed *ex parte* without being given any chance to be heard, and applying the well known principle *audi alteram partem,* the learned judge held that the resolution of the Board was illegal, null and void. He also held that whether pleaded or not, the Court itself was entitled to raise this issue.

I shall deal first with the merit of the argument based on the doctrine of *audi alteram partem.*

The appellant did not complain in his pleadings or at any time before judgment was rendered in the Court of first instance, that he had not been heard or at least duly summoned by the Board of Directors before action was taken to remove him as a member. The question appears to have been raised for the first time before the Court of Appeal. It is true that at the trial there was evidence which might have supported a complaint that appellant had not been heard or at least summoned before the Board. Had this question been pleaded, however, respondent might have been able to adduce evidence indicating that appellant had either been heard or was unwilling to appear. I should add that the mere existence of a contract between the parties would not constitute an answer to a complaint by appellant

(1) Q.R. [1954] Q.B. 393.

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that he had not been given a hearing by the Board before it acted: *Lapointe* v. *L'Association de Bienfaisance de la Police de Montreal* (1).

With the greatest respect for the learned judges of the Court below who expressed a contrary view, I do not share their opinion that in the case at bar the trial Court was required or entitled to act *proprio motu*.

Assuming that the Board of Directors of the Association was acting in a quasi-judicial capacity, the failure to hear or to summon the appellant before adopting the resolution in question was in my opinion a question of fact which should have been expressly pleaded if appellant wished to rely upon it in his action. On this branch of the appeal, therefore, the appellant cannot succeed.

As to the merits of the action, on a true interpretation of the obligations of appellant, there was ample evidence, as found by the two Courts below, to show that the decision of the Board of Directors was not unjust, arbitrary and illegal as contended by the appellant.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Philippe Pothier.*

Solicitor for the respondent: *Eugene Tousignant.*

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*Mar. 11, 14
*Apr. 26

ALFRED LEBEL *(Plaintiff)* ..... APPELLANT

AND

LES COMMISSAIRES D'ECOLES POUR LA MUNICIPALITÉ DE LA VILLE DE MONTMORENCY *(Defendant)* ..... RESPONDENT

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

Contract—Undertaking by School Board to buy immoveable—Resolution adopted by board but not published—Refusal by Superintendent of Education to authorize purchase—Action to claim purchase price—No offer of signed deed and titles—Whether authorization of provincial

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

(1) [1906] A.C. 535.

authority necessary—Whether lack of publication annuls resolution—Education Act, R.S.Q. 1941, c. 59, ss. 29, 236, 291, 307—Civil Code, Arts. 1025, 1065, 1472, 1491, 1492.

By a written instrument, the respondent undertook to purchase an immoveable from the appellant for a sum of $25,000, of which $4,000 was to be paid within thirty days so that the property could be freed from an existing mortgage. A few days later, the respondent adopted, but did not publish, a resolution ratifying the undertaking and authorizing a notary to obtain the title-deeds and to prepare the deed of sale. Subsequently the Superintendent of Education refused to approve the purchase because the property was not of the size required by regulations. The Superior Court dismissed the action taken by the appellant and this judgment was affirmed by the Court of Appeal.

Held: The appeal should be dismissed.

Per Taschereau, Locke, Fauteux and Abbott JJ.: In an action to recover the price of sale, the would-be purchaser does not have to carry out his obligation to pay the purchase price before the would-be seller has carried out his own obligations to deliver and warrant the thing sold. Consequently, since the appellant has at no time tendered a deed of sale, prepared in conformity with the contract and signed by him, and his title-deeds, his action cannot succeed.

The purchase of an immoveable for the erection of a school must be ratified by the provincial authority. The powers conferred on the school board by s. 236 of the *Education Act* are clearly subordinated to the regulations adopted by the Committee of the Council of Education.

It is doubtful if the lack of publication of the resolution did not render it null, but at all events it was not in force at the time of the institution of the action because it only takes effect thirty days after its publication.

Per Kellock J.: The resolution never became operative as such a resolution does not come into force until thirty days after publication, and there was no publication here.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), affirming the judgment at trial which had dismissed the action.

Guy Hudon Q.C. and Guy Dorion Q.C. for the appellant.

Louis A. Pouliot Q.C. and Jean Blais Q.C. for the respondent.

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

TASCHEREAU J.:—L'appelant allègue dans sa déclaration que le 29 mars 1952, la Commission Scolaire pour la Municipalité de la Ville de Montmorency, se serait engagée à acheter un terrain, avec bâtisses dessus construites, pour la

(1) Q.R. [1954] Q.B. 824.

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somme de $25,000.00. Dans un délai de trente jours un acompte de $4,000.00 devait être versé afin que l'appelant puisse payer une hypothèque due à la Caisse Populaire. Le vendeur s'engagea également à fournir des titres clairs.

Le 3 avril de la même année, la Commission Scolaire passait une résolution ratifiant l'entente intervenue entre l'appelant et M. Hormidas Marceau, président de la Commission, et s'engagea par conséquent à acheter la propriété pour la somme de $25,000.00, mais la résolution ne fait pas mention du montant de $4,000.00 payable dans un délai de trente jours. M. le Notaire Gustave Guay a été, en vertu de cette résolution, autorisé à faire les démarches nécessaires pour se procurer tous les titres à la propriété, et préparer l'acte de vente que le président et le secrétaire ont été autorisés à signer pour et au nom de la Corporation Scolaire.

En vertu des dispositions du Code Scolaire, et des règlements du Comité de l'Instruction Publique, les Commissaires ou les Syndics d'écoles ont le pouvoir d'acquérir les terrains nécessaires pour les emplacements des écoles (article 236 Code Scolaire). Ces pouvoirs cependant sont restreints par les articles 27 à 31 des règlements du Comité Catholique approuvés par Ordre en Conseil. En vertu de ces règlements dont la passation est autorisée par l'article 29 du Code Scolaire, aucune école ne peut être construite à moins que ce soit sur un terrain sec, élevé, où il est possible de se procurer de l'eau potable, et le terrain doit être préalablement examiné et accepté au point de vue sanitaire par le Ministère de la Santé, et le choix doit être ratifié par le Surintendant. De plus, l'emplacement de l'école doit avoir au moins 20,000 pieds carrés pour les écoles d'une classe, et 5,000 pieds carrés pour chaque classe supplémentaire, à moins d'une autorisation spéciale du Surintendant.

Après que la résolution eut été adoptée par les Commissaires d'Ecoles, les officiers de cette Commission se sont mis en communication avec les autorités provinciales afin d'obtenir l'autorisation requise pour légaliser l'achat qu'ils se proposaient de faire au nom de la Corporation. Ces démarches verbales ont duré durant quelques mois, mais ce n'est que le 20 août suivant que le Surintendant de l'Instruction Publique a avisé par écrit les procureurs de

la Commission, que la transaction ne pouvait pas être autorisée par le Département vu que le terrain en question ne rencontrait pas les exigences de l'article 30 du chapitre 2 des règlements du Comité Catholique. Comme dans la ville de Montmorency le projet était de construire une école de huit classes, nécessitant un terrain d'environ 55,000 pieds carrés, et que le terrain en question n'a pas 10,000 pieds carrés en superficie, le refus fut donc définitivement confirmé.

A cause des négociations verbales qui indiquaient que l'autorisation ne serait pas accordée, le secrétaire-trésorier de la Commission Scolaire ne s'est pas conformé aux dispositions des articles 291 et 307 concernant l'affichage des résolutions adoptées dans le cas où les Commissaires décident d'acquérir un emplacement, de construire, d'agrandir ou de réparer une maison d'école ou ses dépendances.

Le demandeur a intenté une action dans laquelle il conclut à ce qu'il soit déclaré qu'un contrat d'achat est intervenu entre le demandeur et la Corporation défenderesse pour l'accquisition de la propriété du demandeur, pour un montant de $25,000.00. Il demande également que la Corporation défenderesse soit condamnée à signer, devant le Notaire Gustave Guay, le contrat d'achat de cette propriété dans les trente jours du jugement à intervenir, et à ce qu'à défaut par la Corporation défenderesse de signer le contrat en question, le jugement de la Cour soit considéré un titre d'acquisition en faveur de la Corporation défenderesse, et à ce que cette dernière soit condamnée à payer au demandeur la somme de $25,000.00.

En Cour Supérieure, l'honorable Juge Lacroix a rejeté cette action pour divers motifs. Il en est arrivé en premier lieu à la conclusion que le défaut de publication de l'avis de résolution prévu par l'article 307, n'annule pas la résolution, mais n'en retarde que la mise en vigueur. Il s'est appuyé sur un jugement de la Cour d'Appel (*Neville* v. *The School Trustees of New Glasgow* (1)) et a préféré cette décision à celle de la même Cour, rendue en 1939 (*St-Edouard* v. *Bisaillon et Girard et al* (2)) qui est à l'effet que le défaut de publication régulière d'une résolution dans le délai stipulé au Code entraîne la nullité de cette résolution.

(1) Q.R. (1922) 33 K.B. 140. (2) Q.R. (1939) 67 K.B. 399.

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Il a conclu que si la résolution de la défenderesse n'est pas nulle, il n'en reste pas moins vrai qu'elle n'était pas en vigueur, car elle ne devait avoir son effet que trente jours après la publication des avis requis qui n'ont jamais été publiés. Le principal motif sur lequel s'appuie le juge de première instance est que le demandeur n'a jamais, avant l'action, offert à la defenderesse un contrat signé par lui, et qu'il n'a pas offert avec l'action aucun titre à sa propriété, et il n'a pas déposé un contrat conforme à l'entente intervenue et, il a jugé que, dans ces circonstances, le tribunal ne pouvait condamner la défenderesse à payer $25,000.00, alors que le demandeur n'offre pas ses titres et n'effectue pas lui-même la délivrance de la propriété dont il réclame le prix.

La Cour d'Appel (1) a unanimement confirmé ce jugement. M. le Juge Bissonnette a été d'opinion que le vendeur ne peut exiger le prix de vente sans offrir un titre. Selon lui, l'action telle que rédigée ne pouvait être maintenue, car le jugement aurait pour effet de contraindre l'intimée à remplir toutes ses obligations tandis que l'appelant ne serait pas soumis aux articles 1491 et 1492 C.C. concernant la délivrance de la chose vendue.

M. le Juge Gagné a approuvé les raisons de M. le Juge Bissonnette sur ce point, mais a ajouté qu'il fallait nécessairement l'autorisation du Surintendant pour valider le contrat. Il croit qu'il faut donner effet à cette disposition de la loi qui dit que cette autorisation est impérative. Il ajoute avec raison que lorsque la décision dans *Hébert* v. *Les Commissaires d'Ecoles de St-Félicien* (2) a été rendue par la Cour Suprême en 1921, le règlement qui existe actuellement n'existait pas à cette époque. Tout ce que la Cour a décidé dans cette cause, c'est qu'une Commission Scolaire peut acheter les immeubles dont elle a besoin, sans obtenir l'autorisation du Lieutenant Gouverneur en Conseil, et que cette autorisation n'est requise que si la Commission doit recourir à un emprunt pour solder le prix d'achat. On voit donc que la cause ci-dessus est entièrement différente de la présente cause et que les faits ne sont pas identiques. MM. les Juges Casey, Hyde et Marchand concourent dans ces vues.

(1) Q.R. [1954] Q.B. 824.

(2) (1921) 62 Can. S.C.R. 174.

Devant cette Cour, les procureurs de l'appelant ont encore invoqué les trois moyens suivants. Ils prétendent en premier lieu que, s'étant désistés oralement devant la Cour d'Appel de deux paragraphes de leur conclusion, dans lesquels ils demandaient que la Corporation défenderesse soit condamnée à signer, devant le Notaire Gustave Guay, le contrat d'achat de cette propriété dans les trente jours du jugement à intervenir, et à ce qu'à défaut par la Corporation de signer le contrat en question, le jugement à intervenir constitue un titre d'acquisition en faveur de la défenderesse. Il en résulterait qu'il s'agit non pas d'une action en passation de titre où il faut offrir un titre dûment signé, mais bien d'une action en réclamation d'un prix de vente, comme conséquence d'un contrat validement signé. Les procureurs du demandeur appelant ont réaffirmé devant cette Cour leur désir d'abandonner ces conclusions. La seconde prétention est que ni l'article 307 de la loi ni l'article 30 des règlements adoptés sous l'autorité de l'article 29 de la loi n'affecte l'acquisition faite en vertu de l'article 236 du Code Scolaire. Enfin, on soumet que le défaut d'affichage de la résolution ne l'entache pas de nullité.

Je ne crois pas que la première prétention du demandeur puisse prévaloir. Il est certain qu'en vertu des dispositions de l'article 1472 C.C. la vente est parfaite par le consentement des parties, mais comme conséquence de cette vente, des obligations réciproques naissent entre les parties. L'acheteur doit payer le prix, et le vendeur a deux obligations essentielles, soit de délivrer la chose qu'il a vendue et de garantir cette même chose. De ces obligations réciproques il résulte que l'acheteur n'est pas obligé de remplir son obligation avant que le vendeur ne remplisse la sienne. Il peut demander, en vertu de l'article 1065, que l'acheteur exécute son obligation, mais il doit en même temps exécuter la sienne.

Dans le cas qui nous occupe, l'obligation de la Corporation Scolaire était de payer le prix de $25,000.00, si véritablement elle était liée par l'entente intervenue entre l'appelant et son président, ratifiée par résolution. L'obligation du vendeur était de délivrer l'immeuble et de fournir ses titres. Or, ceci n'a pas été fait. L'appelant devait conclure à ce que l'intimée fût condamnée à signer un acte de

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vente dûment préparé dont les termes auraient été clairs, complets et précis. L'acte de vente doit être au dossier; il doit être signé par le vendeur ou l'acheteur selon le cas, et les conclusions doivent être à l'effet que la partie adverse soit tenue de signer cet acte à défaut de quoi, le jugement équivaudra à cette signature. C'est la jurisprudence constante de la province de Québec. Le vendeur, comme dans le cas qui nous occupe, doit en premier lieu mettre l'acheteur en demeure de signer un acte dûment préparé, et si ce dernier refuse de signer, il doit lorsqu'il prend son action en passation de titre, renouveler ses offres. Si la mise en demeure n'a pas été faite, l'action évidemment équivaut à une mise en demeure, mais l'acheteur pourra confesser jugement, consentir à signer l'acte qui lui est offert par l'action, mais serait dispensé alors de payer les frais. S'il conteste et s'il faillit dans sa contestation, sur lui tombera évidemment l'obligation de payer les frais. C'est la jurisprudence unanime de la province. Comme le dit Marler (Law of Real Property) page 438:—

> The would-be seller before taking action to recover the price must put the debtor, the would-be purchaser, in default. He should tender a deed, prepared in strict conformity with the contract and signed by him, and his title-deeds showing him to be the owner of the property. He should offer his title-deeds and certificate of search and offer to amend the deed tendered to make it conform more nearly, if possible, with the terms of the promise, and require the debtor to sign it at some indicated place within a reasonable delay.

Evidemment, il y a eu une jurisprudence contradictoire en ce qui concerne l'obligation du vendeur d'offrir un certificat de recherches, mais il n'y a pas de différence d'opinion sur l'obligation de mettre en demeure et d'offrir un titre dûment signé par le vendeur. Vide: *Archambault* v. *Deslandes* (1), *Chercuitte* v. *Cummings* (2), *Désy* v. *Larivière* (3), *Trudel* v. *Marquette* (4), *Gendron* v. *Huart* (5), *Fortin* v. *Turcotte* (6).

Comme le dit la Cour de Revision confirmant une décision de la Cour Supérieure (*Chercuitte* v. *Cummings supra*):—

> Le vendeur ne peut exiger le prix de vente, sans en même temps, faire la délivrance de la chose vendue . . . La délivrance d'un immeuble se

(1) Q.R. (1928) 66 S.C. 346.
(2) Q.R. (1916) 51 S.C. 63.
(3) Q.R. (1916) 26 K.B. 11.
(4) Q.R. (1915) 24 K.B. 219.
(5) Q.R. (1922) 34 K.B. 120.
(6) Q.R. (1928) 45 K.B. 275.

consomme par le délaissement qu'en fait le vendeur, avec la remise des titres de la propriété,—remise nécessaire pour opérer la tradition en matière de vente d'immeuble.

La remise des titres au Notaire Guay n'est pas suffisante. Il fallait de toute nécessité renouveler l'offre et les consigner avec l'action.

Il me semble clair que dans le cas qui nous occupe, le vendeur n'a pas rempli son obligation de délivrance et qu'en conséquence il ne peut demander à la Municipalité de remplir la sienne. Comme le dit Baudry-Lacantinerie (Obligations N° 693):—

> Etant donné un contrat synallagmatique la partie poursuivie en paiement peut, si, de son côté, le demandeur n'a pas encore payé, refuser de s'exécuter.

C'est la doctrine de *NON ADIMPLETI CONTRACTUS* qui veut que chaque contractant soit autorisé à considérer ce qu'il doit, comme une garantie de ce qui lui est dû, et tant que l'une des parties refuse d'exécuter son obligation, l'autre partie peut agir de même.

Planiol (Taité Elémentaire de Droit Civil, Vol, 2, p. 329, N° 949) s'exprime ainsi:—

> Malgré le silence de nos textes, nous pouvons donc formuler cette règle: Dans tout rapport synallagmatique, *chacune des deux parties ne peut exiger la prestation qui lui est due* que si elle offre elle-même d'exécuter son obligation . . . Les contrats synallagmatiques doivent donc, dans la rigueur du droit, être exécutés, selon notre expression populaire "donnant, donnant".

Dans *Desbiens* v. *Bluteau* (1), la Cour Supérieure en est venue à une conclusion différente et a dit qu'il était suffisant que le vendeur dans son action déclarât son consentement à signer un titre. Cette décision cependant est isolée, et ne peut faire jurisprudence dans la province de Québec.

Ce défaut de l'appelant d'offrir ses titres comme il aurait dû le faire, est suffisant pour faire rejeter l'appel. Malgré qu'il ne soit pas nécessaire pour la détermination de cette cause, par suite de la conclusion à laquelle je suis arrivé sur le premier point soulevé, de discuter les autres objections, je suis d'opinion que l'autorisation de l'autorité provinciale était essentielle. Les pouvoirs d'acquérir des immeubles conférés à la Commission Scolaire par l'article 236, me semblent clairement subordonnés aux règlements 27 et 30

(1) Q.R. (1929) 36 R.L. (N.S.) 201.

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du Comité Catholique du Conseil de l'Instruction Publique, lesquels règlements sont autorisés par l'article 29 du Code Scolaire. En effet, la santé des enfants, les conditions sanitaires dans lesquelles ils doivent vivre, se récréer, recevoir leur instruction, sont sûrement des questions d'organisation, d'administration et de discipline. Le local de l'école, l'état de la bâtisse, de même que l'étendue du terrain me semblent des questions dont la réglementation est autorisée par l'article 29. Ces règlements se lisent ainsi:—

Article 27: Pour la construction d'une école, il faut choisir un terrain sec, élevé, d'un accès facile et où il est possible de se procurer de l'eau potable, soit à un aqueduc, soit en creusant un puits. Ce terrain devra être examiné et accepté au point de vue sanitaire par le Ministère de la Santé et le choix devra en être ratifié par le Surintendant.

Article 30: L'emplacement de l'école sera nivelé, drainé, planté d'arbres et clôturé. Il devra avoir au moins *vingt mille pieds carrés* pour les écoles d'une classe, et *cinq mille pieds carrés* additionnels pour chaque classe supplémentaire, à moins d'une autorisation spéciale du Surintendant.

Le pouvoir d'acquérir des immeubles pour fins scolaires, conféré à la Commission par l'article 236 du Code, n'est pas absolu. Il faut nécessairement que l'autorisation requise soit donnée, tel que la prévoit la loi. Il serait en effet étrange que le législateur ait conditionné l'autorité des Commissions Scolaires à l'obtention de l'autorisation du Surintendant, qu'il les ait frappées de cette incapacité absolue d'acquérir à moins que les conditions requises ne soient remplies, et que cependant les achats qu'elles pourraient effectuer seraient quand même valides, même sans autorisation. Je ne crois pas que ce soit là le texte ni l'esprit de la loi.

On a prétendu que ni le contrat, ni la résolution ne révèle le but poursuivi par l'intimée dans l'achat de l'immeuble en question. Il n'est pas nécessaire que la destination de l'immeuble apparaisse en termes formels, ni dans un contrat, ni dans la résolution. La Cour d'Appel dans une cause de *Les Commissaires d'Ecoles de St-Félicien* v. *Hébert* (1) a jugé en ce sens, et la Cour Suprême a confirmé unanimement ce jugement (*Hébert* v. *Les Commissaires d'Ecoles de St-Félicien* (2)). En outre, il appert clairement au dossier, et surtout par la correspondance échangée, que c'était bien pour des fins scolaires que l'intimée désirait acquérir l'immeuble de l'appelant.

(1) Q.R. (1921) 31 K.B. 458. (2) (1921) 62 Can. S.C.R. 174.

Dans ces conditions, vu le défaut d'autorisation manifesté clairement dès le début des négociations entre la Corporation et le Department, il est raisonnable que le secrétaire-trésorier n'ait pas affiché la résolution tel que le prescrit l'article 307 du Code Scolaire. Je m'accorde entièrement avec le raisonnement de M. le Juge Lacroix qui a exprimé l'opinion que si le défaut de publication de la résolution ne la frappe pas de nullité, ce qui est douteux, il n'en reste pas moins qu'elle n'était pas en vigueur lors de l'institution de l'action, et ce n'est que trente jours après sa publication qu'elle produit ses effets. (*Neville* v. *The School Trustees of New Glasgow* (1)) (*Commissaires d'Ecole pour la Municipalité de St-Edouard* v. *Bisaillon et al* (2)).

Enfin, si cette vente, comme je le crois, n'a pas été autorisée, l'argument de l'appelant à l'effet qu'il aurait à tout événement droit à au moins $4,000.00, montant stipulé payable dans les trente jours, ne peut être accueilli. Si le contrat est nul, il est nul pour le tout et ne peut pas subsister pour une partie seulement.

L'appel doit être rejeté avec dépens.

KELLOCK J.:—The appellant relies upon the instrument of the 29th of March, 1952, as having operated, by force of Art. 1025 of the *Civil Code*, to constitute the respondent the owner of the premises here in question. That contention depends in turn upon the question as to whether or not the said instrument was ever authorized by the respondent, whose powers could be exercised only by resolution as provided by Art. 120 of the *Education Act*. It is true that on the 3rd of April, 1952, a resolution to that effect was passed, but it is necessary to consider the effectiveness of this resolution in the light of other provisions of the statute.

While Art. 236 imposed upon the respondent the duty of selecting and acquiring the land necessary for school sites, as well as the building and repair of schoolhouses, Art. 307(1) required that notice of such a resolution as that here in question should be posted up in accordance with the provisions of Art. 291. S-s. 2 of Art. 307 provides that such a

(1) Q.R. (1922) 33 K.B. 140. (2) Q.R. (1939) 67 K.B. 399.

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resolution is not to come into force until thirty days after publication as above. In the case at bar there was no publication.

Acting under the power given by Art. 29, par. 1, the provincial committee had passed the following regulations:

Article 27: Pour la construction d'une école, il faut choisir un terrain sec, élevé, d'un accès facile et où il est possible de se procurer de l'eau potable, soit à un aqueduc, soit en creusant un puits. Ce terrain devra être examiné et accepté au point de vue sanitaire par le Ministère de la Santé et le choix devra en être ratifié par le Surintendant.

Article 30: L'emplacement de l'école sera nivelé, drainé, planté d'arbres et clôturé. Il devra avoir au moins vingt mille pieds carrés pour les écoles d'une classe et cinq mille pieds carrés additionnels pour chaque classe supplémentaire, à moins d'une autorisation spéciale du Surintendant.

Approval of the site was, in the present case, refused on the ground that the property was not of the size required by the above Art. 30, and the respondent was verbally notified of this decision before action was brought.

Had notice of the resolution of April 3 been posted up as required, it was open to any ratepayer to appeal to the Magistrate's Court under the provisions of Art. 508, and that court, as provided by Art. 515, was authorized to render such decision as the respondent commissioners ought to have rendered.

The refusal of the superintendent, if known to the commissioners before the resolution was passed, would have prevented approval of the purchase and formed ample ground for the court on appeal to set aside the resolution. In my opinion, therefore, it is not open to the appellant to contend that the resolution of April 3, 1952, ever became operative. It was rather the duty of the commissioners to rescind the resolution upon the refusal of approval and the appellant cannot, in my opinion, be in any better position although the commissioners did not do so and did not give notice of the resolution which they had passed.

In *Neville* v. *School Trustees of New Glasgow* (1), attention was called to the language of Art. 307(2) which provides that no resolution "passed under the provisions of" s-s. 1 shall come into force. The view was there expressed that this language is inappropriate to effect its evident purpose, for the reason that par. 1 does not authorize passing of any resolution.

(1) Q.R. (1922) 33 K.B. 140.

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In my view this objection ought not to be given effect. While it is true that the resolution here in question was passed under Art. 236, it was a resolution "adopted" in one of "the following cases" provided for by Art. 307(1). I think that par. 2 is to be read as referring to resolutions which, although passed under Art. 236, were so passed or "adopted" in one of the cases set out in par. 1.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Dorion, Dorion and Doyon.

Solicitors for the respondent: Rivard, Blais, Gobeil and Rivard.

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*Oct. 21, 22

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*Apr. 6

ISADORE JOSEPH KLEIN, ALBERT LOFTUS McLENNAN, GEORGE W. NORGAN, UNITED DISTILLERS OF CANADA LIMITED, UNITED DISTILLERS LIMITED, DUNCAN HARWOOD & COMPANY LIMITED, JOHN DUNBAR & COMPANY LIMITED and JOHN ADAMS & COMPANY LIMITED, (*Defendants*) ..... APPELLANTS;

AND

NETTA BELL, ANGELA BELL, JACK BELL and NATHAN INVESTMENTS LIMITED (in voluntary liquidation) (*Plaintiffs*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Discovery, Examination for—Witness—Privilege against self-crimination —Validity of s. 5, Evidence Act (B.C.)—Order 31A, r. 370 (c) matter of practice and procedure—Application of common law rule—Evidence Act (B.C.)—Evidence Act (Can.)—Court Rules of Practice Act (B.C.) ss. 2, 4(3).

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

(*See Reporter's note at end of case.)

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S. 5 of the *Evidence Act*, R.S.B.C. 1948, c. 113 provides:

"No witness shall be excused from answering any question upon the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person: Provided that if with respect to any question the witness objects to answer upon the ground that his answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this section the witness would therefore have been excused from answering the question, then, although the witness shall be compelled to answer, yet the answer so given shall not be used or receivable in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place other than a prosecution for perjury in giving such evidence."

In an action for damages for fraud and deceit each of the individual appellants and an officer of the United Distillers of Canada Ltd., the appellant corporation, on their respective examinations for discovery refused to answer certain questions, or to produce certain documents, on the ground that such answers might tend to criminate him. Upon an application for an order directing the individuals to answer the questions and produce the documents in question the general objections were upheld by Clynne J. but his order was reversed by the majority of the Court of Appeal for British Columbia.

Held: (Affirming the Court of Appeal):—

1. Examinations for Discovery under Order 31A, r. 370 (*c*) of the British Columbia Supreme Court Rules are covered by s. 5 of the *Evidence Act*.
2. This rule does not go beyond the power contained in s. 2 of the *Court Rules of Practice Act*, R.S.B.C. 1948, c. 293, and its predecessors and s. 4(3) thereof enacts that r. 370 (*c*) is a matter of practice and procedure.
3. "Criminal proceedings" in s. 5 of the *Evidence Act* is not confined to what are known as provincial crimes. *Staples* v. *Isaacs and Harris* 55 B.C.R. 189 overruled.

Held: further, on a point taken for the first time in this court, that s. 5 of the *Evidence Act* is *ultra vires* the Provincial Legislature as the proviso may not be disregarded. The common law rule that no one was obliged to criminate himself applies as well to an officer taking the objection on behalf of his company as to an individual litigant. In both cases, however, the objection must be made on the oath of the person under examination that to the best of his belief his answers would tend to criminate him, or the company, as the case may be. He must pledge his oath in his belief that his answers to particular questions *seriatum* would so tend. *Power* v. *Ellis* 6 Can. S.C.R. 1, applied. The officer may claim the privilege on behalf of his company, either as to answers to questions or as to documents, but the latter cannot hide behind any claim advanced by the officer on his own behalf in respect of documents. If he is put forward as the proper person on behalf of a company to make an affidavit on production he is not entitled to make a claim for personal privilege in respect of documents.

APPEAL by special leave from a judgment of the Court of Appeal for British Columbia (1), Sloan C.J.B.C. dissenting, reversing the order of Clynne J. (2) and holding that the individual defendants and an officer of the appellant corporation were not entitled to refuse to answer questions, or to produce documents on examination for discovery, on the ground that such answers might tend to criminate them.

J. W. deB. Farris, Q.C. and *F. A. Sheppard, Q.C.* for the appellants.

D. H. W Henry for the Attorney General of Canada.

L. A. Kelley, Q.C. for the Attorney General of British Columbia.

R. H. Barron, for the respondents.

The judgment of Kerwin C.J. and of Taschereau, Estey and Fauteux JJ. was delivered by:—

THE CHIEF JUSTICE:—Reversing the order of Clyne J. the Court of Appeal for British Columbia held that the individual defendants, Klein, McLennan and Norgan, were not entitled to refuse to answer questions, or to produce documents on examination for discovery, on the ground that such answers might tend to criminate them. One, Norman Harold Peters, had also attended for examination for discovery as an officer of the appellant, United Distillers of Canada, Limited, and he had taken the same objection on behalf of his company. Peters died before the decision of the Court of Appeal. The judgment of the latter provides that upon the continuation of their respective examinations for discovery Klein, McLennan and Norgan shall answer all questions which they respectively refused to answer and produce all documents which they respectively refused to produce on their examinations for discovery held on September 10, 1953, and that upon the examination for discovery of any officer of United Distillers of Canada, Ltd. in the place of Peters such officer shall answer all questions which Peters had refused to answer and produce all documents which he had refused to produce. The defendants now appeal and ask for the restoration of the order of Clyne J.

(1) (1954) 12 W.W.R. (N.S.) 272; [1954] 4 D.L.R. 273.

(2) (1953-54) 10 W.W.R. (N.S.) 324; [1954] 1 D.L.R. 225.

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The appellants argued that examinations for discovery are not included in or covered by s. (5) of the *Evidence Act*, R.S.B.C. 1948, c. 113, which is in these terms:

> No witness shall be excused from answering any question upon the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person: Provided that if with respect to any question the witness objects to answer upon the ground that his answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this section the witness would therefore have been excused from answering the question, then, although the witness shall be compelled to answer, yet the answer so given shall not be used or receivable in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place other than a prosecution for perjury in giving such evidence.

Order 31A, Rule 370 (*c*) of the British Columbia Supreme Court Rules provides:

> A party to an action or issue, whether plaintiff or defendant, may, without order, be orally examined before the trial touching the matters in question by any party adverse in interest, and may be compelled to attend and testify in the same manner, upon the same terms, and subject to the same rules of examination of a witness except as hereinafter provided.
>
> (1) In the case of a corporation, any officer or servant of such corporation may, without any special order, and any one who has been one of the officers of such corporation may, by order of a Court or a Judge, be orally examined before the trial touching the matters in question by any party adverse in interest to the corporation, and may be compelled to attend and testify in the same manner and upon the same terms and subject to the same rules of examination as a witness, save as hereinafter provided. Such examination or any part thereof may be used as evidence at the trial if the trial Judge so orders.
>
> * * *

We were not referred to any exception "hereinafter provided" and, in view of the express terms that a party, officer or servant may be compelled to attend and testify "in the same manner, upon the same terms, and subject to the same rules of examination of (or as) a witness", the person being examined is subject to the direction contained in s. (5) of the Act and, of course, is entitled to the privilege. Order 31A is modelled from the Ontario Rules, 1897 and amendments, and in *Chambers* v. *Jaffray* (1), it was so held, although in the Divisional Court the majority apparently did so because they considered themselves bound by *Regina*

(1) (1906) 12 O.L.R. 377.

v. *Fox* (1). Without expressing any opinion as to the latter, the result arrived at in the *Chambers* case is, in my view, the correct one.

It was also contended that the rule went beyond the power contained in s. (2) of the *Court Rules of Practice Act*, R.S.B.C. 1948, c. 293, and its predecessors, by which authority is and was conferred upon the Lieutenant Governor in Council of the Province to make rules for regulating the practice and procedure of the Court. Power is given by s-s. (6) of s. (4) of the Act and was contained in an earlier enactment to add to or vary the rules, (which was done), and Rule 370 (*c*) now appears as above set forth. By s-s. (3) of s. (4) of the Act those rules "shall regulate the procedure and practice in the Supreme Court in the matters therein provided for", and, notwithstanding what was done in connection with the Divorce Rules by s-s. (1) of s. (2) of c. 37 of the British Columbia Statutes, now incorporated in R.S.B.C. 1948, c. 293, s-s. (3) of s. (4) of the latter stands by itself and must receive its full effect. This is a positive enactment that Rule 370 (*c*) is a matter of practice and procedure.

It is now necessary to deal with the point taken by the appellants for the first time in this Court that s. (5) of the *Evidence Act*, R.S.B.C. 1948, c. 113, is *ultra vires* the provincial Legislature. It should be noted that the earliest Evidence Acts of the Canadian Parliament had no provision such as is found in s. (5) of the *Canada Evidence Act*, R.S.C. 1952, c. 307. The forerunner of that section first appeared in c. 31 of the Statutes of 1893 and read as follows:

> 5. No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any other person: Provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence.

This Act was amended by c. 36 of the Statutes of 1901 by adding thereto the following as s-s. (2) of s. (5):

> 2. The proviso to subsection (1) of this section shall in like manner apply to the answer of a witness to any question which pursuant to an enactment of the legislature of a province such witness is compelled to

(1) (1899) 18 P.R. 343.

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answer after having objected so to do upon any ground mentioned in the said subsection, and which, but for that enactment, he would upon such ground have been excused from answering.

In the Revised Statutes of Canada, 1906, c. 145, s. (5) of the *Canada Evidence Act* appeared as follows:

5. No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

2. If with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence.

In 1894 the British Columbia legislature revised its Evidence Act and therein enacted verbatim s. (5) of the Canadian Act of 1893 set out above. The provincial statutes were again revised in 1897, when s. (6) of the *Evidence Act*, c. 71, appeared in the same form as s. (5) of the Act of 1894. They were consolidated in 1911 when, for the first time, s. (5) of the *Evidence Act*, c. 78, appeared in practically the same form as the section now before us, R.S.B.C. 1948, c. 113.

It has been pointed out that in 1894 the British Columbia Legislature enacted the same provision as Parliament had passed in 1893. The enactment in 1911 in British Columbia was an endeavour to carry out the idea underlying s. (5) of c. 145 of the Revised Statutes of Canada, 1906. I have no doubt that this was done with the object of taking care of cases where the proper objection to testify was taken in proceedings over which the legislature had jurisdiction and then providing that such evidence might not be used later either in civil cases or a criminal trial. Looking at s. (5) as it appeared in the 1894 provincial enactment and considering its history since then, I am driven to the conclusion that "criminal proceeding" is not confined to what are known as provincial crimes, particularly when that part of the statute is followed by the words "other than the prosecution for perjury". The decision of the British Columbia

Court of Appeal on this point in *Staples* v. *Isaacs and Harris,* (1) (which, in fact, was overruled by the Court of Appeal in the present case) cannot be supported. Canada, of course, could only provide with reference to all proceedings over which it had legislative authority and the provincial legislature with reference to proceedings over which it had such authority, I am unable to agree with the contention on behalf of the respondent and the Attorney General of British Columbia that the proviso in the provincial enactment may be disregarded, because I am unable to hold that even if the constitutional point had been brought to the attention of the Legislature it would have enacted the section without some proviso and it is impossible to say what that proviso would have contained. Reliance was placed by the respondents and the Attorney General of British Columbia upon s. 36 of the *Canada Evidence Act,* which is in these terms:

> 36. In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, subject to this and other Acts of the Parliament of Canada, apply to such proceedings.

This, however, cannot assist, because, if s. (5) of the British Columbia Act is of no effect, it is not part of the provincial law of evidence. S. (5) must, therefore, be declared *ultra vires.* This conclusion is to be regretted, but the situation is not beyond remedy by the legislature.

In the absence of any such remedial legislation the common law applies as well to an officer taking the objection on behalf of his company as to an individual litigant. In both cases, however, the objection must be made on the oath of the person under examination that, to the best of his belief, his answers would tend to criminate him, or the company, as the case may be. Such person is not entitled to object to answer ordinary questions about his residence, place of business, etc., nor is he entitled to rest on a statement that on the advice of his solicitor, or the solicitor for the company, he refuses to answer any questions on the ground that the answers might tend to criminate him, or it. He must pledge his oath in his belief that his answers to particular

(1) (1939) 55 B.C.R. 189; 74 Can. C.C. 204; [1940] 3 D.L.R. 473.

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questions seriatim would so tend: *Power* v. *Ellis* (1). What occurred on the examinations for discovery in this case is not sufficient.

As to documents, each of the appellants, Klein, McLennan and Norgan, made an affidavit on production, but in each the only claim for privilege with respect to what was identified as "brief and confidential memoranda prepared by Counsel, or at the request of Counsel" was that "the said documents are privileged on the grounds of having been prepared confidentially for the purpose of being used in this litigation". A similar claim was made by Peters on behalf of United Distillers of Canada Ltd. We were told that orders had been made for further and better affidavits on production, which have not yet been complied with, but we are not aware that there has been any refusal. There are certain documents which Clyne J. ordered to be produced on the continuation of the examinations for discovery of Klein, McLennan and Norgan, namely, an agreement of July 22, 1947, and all documents mentioned in ss. 107, 108 and 121 (3) of the *Companies Act*, R.S.C. 1952, c. 53. Clyne J. also ordered that certain questions should be answered on the continuation of the examinations for discovery of the three individuals, but reserved for decision the right of the plaintiffs to further question them in relation to the documents referred to.

No objection is taken to these terms, as the appellants seek merely the restoration of that order. It should be so directed, subject to the omission of the reference to Peters and the inclusion of an officer of United Distillers of Canada, Ltd., who is to take his place; and subject to amending paragraph (4) of the order by providing that the refusal is subject to the objection being taken in the proper form as above indicated. The order should also be subject to an alteration to take care of the difference in the positions of an officer of a company and an individual litigant. The officer may claim the privilege on behalf of his company, either as to answers to questions or as to documents, but the latter cannot hide behind any claim advanced by the officer on his own behalf in respect of documents. If he

(1) (1881) 6 Can. S.C.R. 1.

is put forward as the proper person on behalf of a company to make an affidavit on production he is not entitled to make a claim for personal privilege in respect of documents.

Clyne J. gave no costs of the application before him and that provision may stand. There should be no costs in the Court of Appeal, but the appellants are entitled to their costs in this Court as against the respondents. There should be no costs to or against either Attorney General.

RAND J.:—This appeal is concerned with the privilege against crimination on discovery. The judgment of the Court of Appeal was attacked by Mr. Farris on several grounds. Among them was the scope of the word "witness" in s. 5 of the *Canada Evidence Act*. His argument was that a person examined as a party or agent was not within that word notwithstanding marginal rule of court, (B.C.) No. 370(*c*), providing for oral discovery, which declares a party or an agent to be examinable "in the same manner and upon the same terms and subject to the same rules of examination as a witness".

S. 5 expressly prohibits the use of incriminating evidence furnished under the compulsion of provincial legislation. The purpose of this provision is to liberate the disclosure of evidentiary matter. It is non-disclosure which the rule guards and the Act modifies; and the prohibition of use contemplates the entire machinery of the administration of justice in provincial proceedings. A witness, in a broad sense, is one who, in the course of juridical processes, attests to matters of fact; and in the multiplying procedures directed to the elicitation of such matters, the object of the statute, dealing as it does with a basic right, would be defeated by limiting its protection to part only of coerced disclosure. Since, as assumed by all parties, the Province is within its jurisdiction in that compulsion, I have no difficulty in interpreting the challenged word to extend to one of the most effective instruments to the function of litigation. That was the expressed view of Mulock C.J. in *Chambers* v. *Jaffray* (1) and, as I read their reasons, the implied view of the members of the Court of Appeal who affirmed his judgment.

(1) 12 O.L.R. 377.

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Rand J.

Mr. Farris next disputes the validity of rule 370(*c*), to the extent that it affects the privilege, as an encroachment upon a substantive right and consequently beyond the limits of "practice and procedure". But by c. 56 of the statutes of 1943, amending c. 249, R.S.B.C. 1936, it was declared that the present orders and rules should thereafter "regulate the practice and procedure" in the Supreme Court. This categorical enactment dispenses with any enquiry into whether rule 370(*c*) is within "procedure": it has been declared to be so, and in my opinion, that concludes the question.

But the validity of s. 5 of the Provincial Act also is contested. Its language is:

> No witness shall be excused from answering any question upon the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person: Provided that if with respect to any question the witness objects to answer upon the ground that his answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this section the witness would therefore have been excused from answering the question, then, although the witness shall be compelled to answer, yet the answer so given shall not be used or receivable in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place other than a prosecution for perjury in giving such evidence.

This, originally passed in 1894, was given its present form in 1897. In 1893 what is now s. 5 of the *Canada Evidence Act*, in enacting that, in criminal and other proceedings respecting which Parliament has jurisdiction, no person should be excused from answering any question on the ground of crimination, provided that no evidence so given should "be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence." This was the law of Parliament at the time of the enactment of s. 5 of the Provincial Act, and it will be observed that its immunity does not reach one who has been compelled to answer by provincial law. It was not until 1901 that the protection of the Dominion Act was extended to evidence so adduced; and the critical question is, what was the law regarding compulsion to answer, say, in 1898? This depends upon the interpretation of s. 5 of the provincial Act and whether or not the proviso can be severed from the main clause.

The language employed does not vary materially from that of s. 5 of the Dominion Act of 1893. The provincial Act came before the Court of Appeal in the case of *Staples* v. *Isaacs and Harris* (1). The effect of the judgment was that, in both its compulsory and protective features, the section was limited to matters that relate to what are called "provincial crimes", for example, breaches of municipal by-laws or violations of the provincial government Liquor Act. This is made clear in the reasons of Sloan J.A. (now C.J.B.C.). The view expressed was that as the party examined could be afforded no safeguard by the provincial Act in a prosecution under the *Criminal Code,* the legislature could not be taken to have abrogated the privilege generally. At the same time it was held that the word "witness" in s. 5 of the Dominion Act did not extend to a person being examined on discovery.

To attribute such a limited scope to s. 5 of the provincial Act would, of course, dispose of this appeal without more; the matters of incrimination here have nothing to do with provincial offences. But the Court of Appeal has declined to follow *Staples* v. *Isaacs* (*supra*), and it becomes necessary to examine the statutory language more closely. The proviso declares that the answer "shall not be used or receivable in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place other than a prosecution for perjury in giving such evidence." I think it would be distorting the natural meaning of these words to say that they are restricted to provincial crimes. The opening clause of the section is equally broad: the witness is not to be excused from answering any question upon the ground of crimination.

I entertain no doubt that a province cannot exclude from testimony in a criminal prosecution admissions made in the course of discovery or of trial in a civil proceeding; to do so would be to legislate in relation to procedure in criminal matters which is within the exclusive jurisdiction of Parliament. Can the proviso be taken in the sense that the compulsory feature is to be effective where and when under any law the answer is not available for use in criminal proceedings against the person making it? The amendment

(1) 55 B.C.R. 189.

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made in 1901 would in that case feed the proviso and bring into operation the compulsory clause. But the language excludes such a construction. The purpose and intention were to create by force of what was looked upon as effective legislation a protection complementary to the broadest compulsion.

Is the proviso, then, severable? Can it be taken not as a condition bound up with the preceding clause, but as an independent and consequential declaration which may be struck out without affecting it? The Act, as declared in s. 3, undoubtedly includes proceedings over which the legislature has jurisdiction, and a residue can be found in the proviso for purely provincial matters which would leave the general compulsion intact. But if the question had arisen in 1895, can any one doubt what the answer would have been? Considering the obvious purpose of the legislation, in a radical departure from the ancient rule, such an interpretation would be repugnant to the vital considerations the legislature had in mind. The entire section consequently was inoperative *ab initio*.

That being so in 1894, it could not be revived by the amendment of 1901; nor could the general revisions of the Act made since that time furnish any efficacy to the section. It seems quite evident that the significance of the amendment in relation to the provincial Act was not appreciated. The result is unfortunate, but I see no way of escaping it.

The relation of the privilege to the production of documents is also in issue. In the case of the individual defendants the privilege extends to documents in their personal possession which contain incriminating matter and which, accordingly, they may object to produce.

But a distinction must be made in the case of documents of the corporation. The claim of privilege raised on an examination by a company's officer in whose custody its documents may, at any time, be, may be related either to the criminality of the company or to that of himself. In this I take the privilege to be as open to a body corporate as to an individual: *Triplex Safety Glass Co.* v. *Lancegaye Safety Glass (1934) Ltd.* (1). Although a witness may not set up the claim for the benefit of a third person yet since in

(1) [1939] 2 K.B. 395.

an affidavit of documents the privilege may be taken by a corporation acting through its officer, it would be little short of absurd that it could be defeated on the examination of the officer having custody of them. If the custody is that of the corporation for the purposes of production following an affidavit, the custodian to that extent represents the corporation, and if documents are privileged in the one case, they must be also in the other.

But the claim may be that the document may tend to criminate the officer personally. In such a case I can see no sound reason for conceding it when the matter is one of authentication only and he is no more intimately associated with the corporation than as an officer, custodian or recorder of its proceedings, actions or transactions. He may be involved in some of the latter, but to admit the privilege would be to enable the corporation to prevent production on an examination by maintaining him as custodian. His custody is the possession of the company and no inference can be drawn against him from either fact: and if he chooses or is chosen to continue as custodian, he must submit to its incidental consequences. But this does not touch questions arising out of the documents so produced.

Is the corporation, in the circumstances here, bound to produce its books generally? I have no doubt that it is. No allegation or suggestion is made from which it could be reasonably inferred that the production might expose the corporation to criminal or penal proceedings. The only possibility offered is that of liability to penalties under the *Income Tax Act*. But that Act gives to the Income Tax Department the widest powers to require the production of any document belonging to the corporation bearing relation to its income or to a violation of the Act. Among the things sought here are details of liquor sales, i.e. the names of purchasers, prices, etc., made by the corporation during the years in question. The production of such records will effect nothing not already done or open to be done by the Department. And as a prosecution for penalties under that Act can be instituted only under the actual or presumed authority of the Minister, the privilege so far has been effectually abolished.

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The defendants have, by order, been directed to make a further and better affidavit of documents, and when that is done inspection may be made of all books containing matter relating to the issues in the action. Their production by an officer on a further examination can therefore be required and their authentication by him as company documents cannot be the subject of a claim of personal privilege.

Several observations are called for on the mode of procedure followed by the defendants in setting up the protection. In almost every instance counsel first objected to the question and then "instructed" the witness either not to answer or to claim the privilege. This misconceives the nature of what is being considered. The questions were entirely proper since they were relevant to the issues. The privilege can be invoked only after the question is put, and the function of counsel on such an examination does not go beyond informing the witness of his right, if he sees fit, to exercise it; and the examining party may insist that the claim be made in answer to each question severally.

The witnesses declined to pledge their oath that they "believed" their answers might tend to criminate them. I must say that if their statement under oath that their answers "might tend to criminate" is not taken by them to carry an avowal of their belief that it may do so, it so far negatives the good faith of the claim; and a refusal to engage belief should be treated as evidence against them accordingly. It is the witness himself, not counsel, who is concerned with resisting disclosure; and the availability of the privilege assumes the honest belief and genuine apprehension of a possible exposure to prosecution or a penalty. Less than that would be trifling with the security the rule is intended to afford.

The appeal must then be allowed and the judgment of Clyne J., with certain modifications, restored. The reference to Peters will be struck out and the name of an officer of the United Distillers of Canada Ltd. substituted: paragraph 4 will be amended by providing that the claim of privilege shall be made in the form indicated in these reasons; the order will provide, (*a*) that the officer of the company may on the examination claim the privilege on behalf

of the company either in respect of questions asked or documents to be produced; (*b*) that the officer can claim personal privilege against questions put to him but not as against the production of company documents; (*c*) and that no claim for the non-production of company documents can be made on the ground of personal privilege of the officer making the affidavit of documents. There will be no costs in the Court of Appeal but the appellants will be entitled to their costs in this Court against the respondents. There will be no costs to or against the Attorney General.

Appeal allowed and order of trial judge restored subject to a variation.

Solicitors for the appellants: *Guild, Lane, Sheppard & Locke.*

Solicitor for the respondents: *R. H. Barron.*

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*Reporter's Note: Following the handing down of judgment on April 6, 1955, the respondent moved for a re-hearing or in the alternative for alterations. Judgment was reserved, but as the parties agreed that the references in the Order of Clynne J. to s-s. (3) of s. 121 of *The Companies Act,* R.S.C. 1952, c. 53 should have been to s-s. (1), ordered that its judgment be amended accordingly. It appeared that after the argument of the appeal, and before delivery of the judgment of this Court, new Affidavits on Production had been sworn to and therefore in view of the reference to the *Income Tax Act* in the reasons of Clynne J. in relation to the ground of claim of privilege, as to which no pronouncement was made by this Court, that matter was remitted to the Court of Appeal to have that Court pass upon the question if necessary, including any right to inspection of documents that might exist and in order to determine the validity of any claim of privilege by reason of incrimination not covered by the judgment of this Court. It was further ordered that the Order of Clynne J. be amended accordingly but that such amendment was not to affect any documents dealt with by such Order. Nothing

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was said as to the point desired to be argued by the respondents that because United Distillers of Canada Ltd. was incorporated under the Companies Act of Canada, s. 5 of the Canada Evidence Act applies to that company in these proceedings. No costs of the motion were awarded.

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*Nov. 29, 30

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*Mar. 7

HUGH W. SIMMONS LIMITED *(Plaintiff)* ..... APPELLANT;

AND

ALEX FOSTER *(Defendant)* .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND ON APPEAL

Water and Watercourses—Right to float logs—Obstruction to navigable waters—Nuisance—Trespass—Practice—Action claiming declaration—No cause of action at date of writ—Rules of Supreme Court (Nfld.) O. 25, r. 5.

The appellant and respondent operated saw mills on the Colinet River, which is a tidal water for a short distance above the appellant's mill. To enable driving operations to be carried on in the summer when the natural flow alone would not suffice, the appellant built a dam upstream at Ripple Pond and another on a tributary, the Back River. In June 1951 by opening the Ripple Pond dam it brought down its first drive of the season, holding back another drive behind the Back River dam for a later operation, and as required by the salmon regulations, left the Ripple Pond dam open. The respondent requested it be closed but in the absence of permission from the Crown, the appellant refused to act. The respondent then, mistakenly relying on anticipated rainfall, started his drive down the Colinet and his logs became stranded. The appellant brought an action in damages and for an injunction alleging the obstruction of the river by the respondent's logs had prevented it bringing down its second drive and forced it to shut down its mill. It further claimed the respondent had moved a boom placed by the appellant above its mill and had thereby committed a technical trespass. The respondent denied the allegations and counter claimed for a declaration that he was entitled to unrestricted flowage rights on the Colinet to drive his logs. After the issue of the writ the dam was closed and on its opening in August the respondent was able to complete his drive.

Held: 1. That under ss. 82 and 83 of *The Crown Lands Act,* R.S.N. 1952, c. 174, both parties had equal rights to float logs on the Colinet. *Caldwell* v. *McLaren* 9 App. Cas. 392 at 409.

2. That at the time the appellant brought its action it had not suffered damage because of any obstruction in the river and its action therefore could not succeed. *Original Hartlepool Collieries Co.* v. *Gibb,* 5 Ch. D. 713; *Creed* v. *Creed* [1913] 1 I.R. 48; *Eshelby* v. *Federated European Bank Ltd.* [1932] 1 K.B. 254.

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

3. That the appellant's boom was an interference with the respondent's right to float logs to his mill and the latter had a statutory right to move it in the way he did. *Wood* v. *Esson*, 9 S.C.R. 239 at 242.

Per Locke J.: The piers placed in the tidal and navigable waters at the mouth of the river without statutory authority amounted to a public nuisance and no right of action arose by reason of the respondent's interference with them. *SS. Eurana* v. *Burrard Inlet Tunnel and Bridge Co.* [1931] A.C. 300.

4. That as the declaration sought by the respondent would impose a duty upon the appellant which might seriously interfere with its operation and would be of no assistance to the respondent, it should be refused.

Per Locke J.: The rule enabling the Court to make a declaratory decree ought not to be applied where a declaration is merely asked as a foundation for substantive relief which fails. *Hamerton* v. *Dysart (Earl)* [1916] 1 A.C. 57 at 64.

Rand J. would have made the declaration claimed.

APPEAL from a judgment of the Supreme Court of Newfoundland on Appeal (1) reversing by a majority the judgment of Winters J. awarding damages to the plaintiff and dismissing the defendant's counterclaim for a declaration of right on his part, concurrent with the plaintiff, to the undiminished flow of the Colinet River and its tributaries for driving sawlogs and other timber.

J. B. McEvoy, Q.C. and *André Forget, Q.C.* for the appellant.

P. J. Lewis, Q.C. and *G. G. Tessier* for the respondent.

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

ESTEY J.:—The appellant (plaintiff) and respondent (defendant) operate saw mills in the estuary of the Colinet River in Newfoundland. Both cut logs, under saw mill licences from the Crown, and float them down the tributaries of and into the Colinet River and thence to their respective mills.

The learned trial judge found that the respondent's logs, in July, 1951, created an obstruction in the Colinet River and awarded appellant damages in the sum of $995. He dismissed the respondent's counterclaim asking for a declaration that he was entitled "to the unobstructed flowage rights of the waters in the Colinet and its tributaries. . . ."

(1) (1953) 32 M.P.R. 243; [1954] 3 D.L.R. 524.

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Upon an appeal this judgment was reversed and a judgment directed dismissing the appellant's action and granting to respondent "a declaration of right on his part, concurrent with plaintiff-respondent, to the use of the undiminished flow of Colinet River and its tributaries for driving saw logs and other timber . . ."

The Colinet River flows out of Ripple Pond toward the mills of the parties hereto. The tributaries above the mills with which we are here concerned are, first, Tremblett Brook and, farther up, Back River. The learned trial judge found, and the evidence supports his finding, that during the spring and fall freshets logs may be floated down the Colinet and its tributaries, but during the summer, apart from unusual rainfall or construction of dams, such is not possible.

The appellant and its predecessors have, for a long period, carried on lumbering operations along the Colinet and its tributary the Back River. About 1901 the appellant's predecessors constructed, and at all times material hereto appellant has maintained, a dam in the Colinet River at the foot of Ripple Pond for the purpose of impounding water which, when the dam was opened, would float its logs to its mill. Appellant had also, about 1914, constructed, on the Back River, a dam, which it maintained at all times material hereto, for the purpose of impounding water in order that it might assemble logs above the dam and for the floating of same down the Back and Colinet Rivers to its mill. These two dams are about the same size—100 feet long, 8 feet high, at the bottom 18 feet and at the top 12 feet thick, each having two gates 6 feet in width and which could be separately operated.

Appellant, in 1951, had logs above the Ripple Pond dam which it released about June 1 and floated to its mill. Thereafter it left that dam open, as was required by the salmon regulations. It also had logs above the Back River dam which were still there when the writ was issued July 14, 1951. In its claim appellant alleged that on or about July 2, 1951, respondent placed his logs in the Colinet River and thereby "caused such an obstruction that the Plaintiff was and is unable to drive its logs from the Back River Pond to Plaintiff's millsite at Colinet causing a complete shut-down of the Plaintiff's operation." The appellant had,

on July 11, sawed all the logs that it had floated down in the spring from behind the Ripple Pond dam and did not float its logs from behind the Back River dam until the first week in September. As a consequence its mill remained closed from July 11 until some day in the first week of September.

A public right to float logs in streams has been recognized in the legislation of Newfoundland from at least the enactment of *The Crown Lands Act* (S. of N. 1884, c. 2), the relevant provisions of which, with the amendments not material hereto, are now found in s. 83 of *The Crown Lands Act* (R.S.N. 1952, c. 174). This right was expressly enacted in the *Transportation of Timber Act* (S. of N. 1904, c. 13), s. 1 of which reads:

> 1. It shall be lawful for all persons whomsoever to float saw logs and other timber, rafts and draws over all streams and lakes within the colony, when necessary for the descent of such logs or other timber.

It was contended that the Colinet and Back Rivers were brooks or rivulets and, as such, not included within the word "streams" as it is used in s. 1 of the above-quoted 1904 legislation. The purpose and intention of the legislature was to provide assistance to those who had logs to float and that this section should apply to all streams upon which the floating of logs is carried on, at least in any commercial sense. The phrase "all streams" in similar legislation was not given a restricted meaning in *Caldwell* v. *McLaren* (1). It must follow that the Colinet and its tributaries are included in the foregoing section.

The appellant or its predecessors have, for a period of 50 years, floated logs down the Colinet and its tributaries. That, however, as determined in the courts below, does not give to the appellant any rights founded either in prescription or upon the basis of a lost grant. It follows that the parties hereto, as members of the public cutting logs in the area, apart from any right which may be acquired by the construction of dams, have equal rights to float their logs upon the Colinet and its tributaries.

The Crown Lands Act, 1884, particularly ss. 57 and 58, appears to have been enacted upon the further assumption that parties floating logs have a right to build slides, dams, piers or booms to facilitate the descent of timber and saw

(1) (1884) 9 App. Cas. 392 at 409.

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logs. This legislation has, in all relevant particulars, been continued in force and is now ss. 82 and 83 of *The Crown Lands Act* (R.S.N. 1952, c. 174, ss. 82 and 83):

82. (1) No licence or grant of any Crown Land shall give or convey any right or title to any slide, dam, pier or boom or other work for the purpose of facilitating the descent of timber or saw logs, previously constructed on such land, or in any stream passing through or along such land, unless it is expressly mentioned in the licence or grant that such slide, dam, pier or boom or other work is intended to be thereby granted.

(2) The free use of slides, dams, piers, booms or other works on streams to facilitate the descent of lumber and saw logs, and the right of access thereto for the purpose of using the same and keeping them in repair, shall not in any way be interrupted or obstructed by or in virtue of any licence or grant of Crown Land made subsequent to the construction of such work.

83. The free use, for the floating of saw logs and other timber rafts, the descent of timber, and the right of access to such streams and lakes, and the passing and re-passing on and along the land on either side thereof, whenever necessary for use thereof, and over all existing and necessary portage roads past any rapids or falls, or connecting such streams or lakes and over such roads, other than road allowances, as owing to natural obstacles may be necessary for the taking of timber or saw logs from lands, and the right of constructing slides where necessary, shall continue uninterrupted and shall not be affected or obstructed by or in virtue of any licence or grant of such lands, or by virtue of any licence to cut timber held by one person as against any other person holding a licence for the same purpose.

Prior to 1949 it appears that dams might be constructed without reference to the authorities. However, in that year it was provided that dams could not be constructed without the approval, in writing, of the Lieutenant Governor in Council (S. of N. 1949, c. 27, s. 3; now R.S.N. 1952, c. 174, s. 84).

Under the foregoing provisions the respondent, by virtue of his saw mill licence, did not acquire "any right or title to any slide, dam, pier . . . for the purpose of facilitating the descent of timber or saw logs, previously constructed" by the appellant (s. 82(1)). The legislature, however, particularly ensured to the appellant, in respect to the dams which it had constructed, the right of access thereto for the purpose of using and keeping them in repair (s. 82(2)). Then in a general provision (s. 83) the legislature gives to all who have logs to float the right to do so and of access to the streams and lakes for that purpose.

The appellant's claim for damages is based upon the respondent's conduct commencing on July 2, 1951. On that date respondent had two lots of logs—3,000 held by a boom

in the mouth of the Tremblett Brook and 5,000 in the Colinet Pond above the confluence of the Back and Colinet Rivers. On that date he released the boom holding the 3,000 permitting them to float into the Colinet River in which, at the time, there was not sufficient water to float them to his mill. He, however, justified his releasing them upon the basis that his foreman thought the rain, which had commenced that morning, would probably continue and bring sufficient water into the Colinet River. It did not do so and the 3,000 logs, after moving approximately three-quarters of a mile, were stranded. Releasing these logs was found by the learned trial judge to be "all against good logging practice" and this finding is fully supported by the evidence. Some time late in July, upon the permission of the Attorney General, the Ripple Pond dam was closed and, when opened on August 3, it floated the 3,000 logs to respondent's mill and floated the 5,000 which, because of insufficient water, became stranded at or near the place where the 3,000 had been previously stranded.

Even if the 3,000 logs so stranded in the Colinet River constituted an obstruction, and whether that obstruction be attributed to negligent conduct on the part of the respondent or that he thereby created a nuisance, the appellant would not have a cause of action until, because of that obstruction, it suffered damage. *Pollock,* 15th Ed., p. 139. On July 14, when this writ was issued, appellant's logs were above the Back River dam and, as found by the learned trial judge, they could not have then been floated to its mill, not because of any obstruction in the Colinet River, but because there was insufficient water in the Back River dam. It, therefore, follows that the appellant had not suffered damage because of the obstruction at the time that it asserted its cause of action by the issue of the writ. Its action, therefore, cannot succeed. *Original Hartlepool Collieries Co.* v. *Gibb* (1); *Creed* v. *Creed* (2); *Eshelby* v. *Federated European Bank Ld.* (3).

It is contended, however, that the removal of the appellant's piers and the swinging of its boom by the respondent on July 2 constituted a technical trespass. The appellant had, near its mill and in the tidal portion of the Colinet, a

(1) (1877) 5 Ch.D. 713. (2) [1913] 1 I.R. 48.
(3) [1932] 1 K.B. 254.

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boom across the river so constructed as to direct its logs to its mill. For some distance out from its mill this boom was supported by piers based upon the bottom of the river and, beyond that, by movable piers. The respondent moved some four or five of the latter and swung the boom in a manner that permitted his logs to pass down the river to his mill. When his logs had passed he replaced the piers and the boom. This boom was an interference with the respondent's right to float his logs to his mill. He, therefore, had a right to remove the boom in the way in which he did. Chief Justice Ritchie, in *Wood* v. *Esson* (1), stated:

> There can be no doubt that all Her Majesty's liege subjects have a right to use the navigable waters of the *Halifax* harbour, and no person has any legal right to place in said harbour, below low water mark any obstruction or impediment so as to prevent the free and full enjoyment of such right of navigation, and defendant, having been deprived of that right by the obstruction so placed by plaintiffs and specially damnified thereby, had a legal right to remove the said obstruction to enable him to navigate the said waters with his vessels and steamers, and bring them to his wharf.

The respondent moved the boom and piers in the exercise of his statutory right to float his logs and, as, in so doing, he caused no damage to the appellant, it cannot be said that he effected a technical trespass or caused any damage that might serve to give to the appellant a cause of action. The judgment appealed from, dismissing the plaintiff's action, should, therefore, be affirmed.

The respondent, in his counterclaim, asks a declaration, as already stated, relative to the natural flow of the streams. Newfoundland has adopted, as have many of the other provinces, Order 25, Rule 5 of the English Supreme Court Rules under which may be made "declarations of right whether any consequential relief is or could be claimed, or not." Such a declaration may be made, even though a cause of action does not exist, provided the plaintiff is asking for some relief. *Swift Current* v. *Leslie et al* (2); *Kent Coal Co. Ltd.* v. *Northwestern Utilities Ltd.* (3); *Guaranty Trust Co. of New York* v. *Hannay & Co.* (4). In this latter case Bankes L.J., at p. 572, states:

> There is, however, one limitation which must always be attached to it, that is to say, the relief claimed must be something which it would not be unlawful or unconstitutional or inequitable for the Court to grant or contrary to the accepted principles upon which the Court exercises its

(1) (1884) 9 Can. S.C.R. 239 at 242.
(2) (1916) 9 W.W.R. 1024.
(3) [1936] 2 W.W.R. 393.
(4) [1915] 2 K.B. 536.

jurisdiction. Subject to this limitation I see nothing to fetter the discretion of the Court in exercising a jurisdiction under the rule to grant relief, and having regard to general business convenience and the importance of adapting the machinery of the Courts to the needs of suitors I think the rule should receive as liberal a construction as possible.

Notwithstanding this liberal construction of the rule, the authorities repeatedly emphasize that it is a discretionary authority which should be exercised with great care and caution. *Halsbury's Laws of England,* 2nd Ed., Vol. 19, p. 215, para. 512; *Annual Practice 1955,* Order 25, Rule 5, p. 425; *Holmested & Langton,* Ontario Judicature Act, 5th Ed., p. 47.

The appellant, as plaintiff, commenced this action upon the basis that it had superior rights upon the Colinet River and its tributaries by virtue of its and its predecessors' having continually floated logs thereon for a period of at least 50 years. That the appellant possessed no such superior rights, except such as it may have under the statute in respect to the maintenance and use of its dams, has been made abundantly clear in the judgments rendered in all the courts in this action.

The respondent asks a declaration that he "is entitled to the unobstructed flowage rights of the waters of Colinet River and its tributaries for the purpose of driving saw-logs and timber." The record does not disclose that at any time prior to the commencement of this action he made any such request to the appellant, or in any way asserted his right to the natural flow, and probably for the very good reason that it would not have been of any material assistance in the floating of his logs at any relevant time during the summer season of 1951. As already stated, apart from spring and fall freshets and, in the summer, at times of unusually heavy rainfall, the normal flow of these streams is not sufficient to float logs, and it would appear that for a substantial portion of the summer it would not be a material factor in the volume of water necessary to float logs. If, therefore, those engaged in logging operations wish to float logs during the summer, they must, as both the appellant and respondent have done, construct dams for the purpose of impounding the necessary water.

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Moreover, the evidence leads to the conclusion that had the respondent communicated with the Attorney General earlier and exercised more prudence in making arrangements as to how the Ripple Pond dam might have been opened and closed, the difficulties involved in this litigation might never have developed.

Mr. Justice Winters, presiding at the trial, in the exercise of his discretion, refused to grant the declaration and upon further consideration, as a member of the Appellate Court, arrived at the same conclusion. His views, as I have read them, may be summarized: The declaration would impose upon the appellant a duty to release the natural flow when requested by the respondent; that, having regard to the inadequacy of the natural flow, the effect of the imposition of this duty was that "the very doubt is re-introduced which the dam was designed to remove." Moreover, there would, in all likelihood, be disputes between the parties as to what constituted the natural flow at any time the appellant might be called upon to perform this duty. Further, the legislature, in enacting the legislation with respect to dams already referred to, no doubt had in mind the natural flow of streams such as the Colinet and its tributaries and preferred not to legislate with respect thereto, even in general terms, but rather to leave the matter to be determined when one or other of the parties had suffered damage.

Chief Justice Walsh, who, with Mr. Justice Dunfield, granted the declaration, emphasizes the fact that the plaintiff in this action was asserting superior rights which it did not possess. That such rights did not exist is now made abundantly clear and it may be that, the appellant apprised of its error, the parties may adjust matters without further difficulty. Be that as it may, Chief Justice Walsh also states that the respondent has suffered no infringement of any of his rights but that "his rights were being threatened" by the appellant "and that part of the freshet waters ordinarily running off immediately to the sea was being held by the plaintiff (appellant) in spring and summer without regard to these rights." The necessity of constructing dams for the impounding of water has long been recognized and the declaration does not prohibit that practice, but merely declares that if the appellant does impound water behind its dam it must, when requested by the respondent, release sufficient to provide the natural flow.

I respectfully agree with the conclusion arrived at by Mr. Justice Winters that the declaration imposes upon the appellant a duty, the performance of which may seriously interfere with its operations and may not be of material or any assistance to the respondent in the floating of his logs. Under this declaration, the appellant having impounded sufficient water in one of its dams and decided that to-morrow it would open the dam and commence floating its logs, if, before, in fact, the dam was opened it received a request, which it would be required, under the declaration, to comply with, from the respondent to release the natural flow for some period over which it, the appellant, had no control, such would delay the appellant in floating its logs and might seriously interfere with its operations. Even if this be an extreme example, it is indicative of what well might happen and would create a situation which the legislature never intended when it enacted s. 82(2) of *The Crown Lands Act* above quoted. The legislature appears to have contemplated, and still does, that parties floating logs will provide for the impounding of the necessary water. Since 1949 it has permitted the construction of dams only when approved by the authorities. These dams as used, of necessity, interfere with the natural flow. That this natural flow is an unimportant factor, at least during portions of the summer season, must be clear, not only from the evidence adduced in this record, but, more particularly, because the parties apparently so regarded it until after this action was commenced.

It seems to me, with great respect to the learned judges who hold a contrary opinion, that the declaration here requested would neither result in the supply of sufficient water to float logs, nor resolve the difficulties between the parties to an extent that would justify its being granted. Moreover, not only would it not be of material assistance to them in either of the foregoing respects, but would provide a source of irritation and, to that extent, tend to complicate rather than solve such difficulties as existed between the parties in 1951. It, therefore, seems to me that, because the declaration would be so ineffective, its granting would be "contrary to the accepted principles upon which the Court exercises jurisdiction" and that the declaration should be refused.

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I am of the opinion that the judgment of the Supreme Court of Newfoundland should be varied by striking out all that follows after the words "IT IS THIS DAY ADJUDGED that the judgment of the trial judge awarding damages to the plaintiff-respondent" and in lieu thereof inserting the following: "be set aside and his judgment dismissing the respondent's counterclaim for a declaration be affirmed."

In the result, the appellant ought not to have brought the action nor should the respondent have counterclaimed and, therefore, neither should recover any costs at the trial. As a consequence of the trial judgment, however, the respondent was justified in going to the Court of Appeal, where a judgment dismissing the plaintiff's claim was properly made and, therefore, the respondent should have his costs on the main appeal in the Appellate Court, but no costs with respect to his counterclaim. The appellant, because of the judgment in the Appellate Court, was justified in coming to this Court, where it has been partially successful, and should receive one-half of its costs here.

RAND J.:—The parties to this litigation are each engaged in lumbering operations in Newfoundland, including cutting, transporting and sawing logs. The cutting is on Crown lands lying within the watershed of Colinet River and its tributaries which flow ultimately into Colinet harbour and thence into the Atlantic. The lands are extremely rugged and the practicable means of transportation is that of floatage. The river is fed by several streams which have their source in chains of small lakes and ponds extending back some miles into the hinterlands on which the cutting takes place. The branches with which we have to deal here, in their order upstream, are Tremblett Brook, Back River and Ripple Pond. The first two empty into the Colinet from the east about two and five miles respectively north of its mouth. The third is an enlargement of the river itself, approximately three miles above Back River.

The mill of the Simmons Company, the plaintiff in the action, is on the easterly shore of the harbour; that of Foster, the defendant, is on the opposite side but some distance up from the shore; neither is riparian to the river and the harbour is tidal for 200 yards, more or less, above the Simmons mill.

The water available for driving varies greatly with the seasons and the rainfall. On the Colinet proper, the natural flow in July and August, although on occasions adequate, is generally insufficient for driving purposes. The Tremblett is a small stream, and its contribution to the main flow is not important. The Back River has its source in somewhat flat lands, the flow is sluggish and adds little during the months mentioned to the trunk stream.

The result is that, for commercial purposes, the control of the water by dams is virtually imperative. These works serve not only to store what would otherwise be wasted into volumes and heads sufficient to carry logs down to the harbour, but in the case of the Back River, to flood points from which the logs otherwise could not be floated to the dam.

Simmons has a dam both at the mouth of Ripple Pond and on Back River. These are approximately 100 feet in length, eight feet high, with a thickness of 18 feet at the bottom and 12 feet at the top. Two vertically operating gates regulate the flow in each, and by raising them, any desired quantity can be released. An overflow is provided by each gate. The former has been in existence at least from the year 1901 and the latter was built in 1914 and both, for the purposes here, are to be taken as the property of Simmons. The general practice is to lower the gates as soon in the spring as conditions permit, and to make two or three drives beginning in late May or early June and thereafter at times dependent upon the state of the particular stream. The Ripple Pond dam could not be worked during July and August without permission of the government because of fishery regulations requiring the gates to be kept open in that period to enable salmon to go upstream to spawn. Large scale operations on the Colinet has been confined to Simmons until 1950 when Foster entered the field. Each had licenses to cut timber and to operate a sawmill.

That these public resources can be utilized efficiently only by means of the streams as carriers under an artificial control of their flow has long been recognized by the Legislature. In *The Crown Lands Act* of 1884, ss. 57 and 58 deal with both aspects:—

LVII. No license, grant or location ticket, of any Crown Land shall give or convey any right or title to any slide, dam, pier or boom, or other work, for the purpose of facilitating the descent of timber or saw logs,

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previously constructed on such land, or in any stream passing through or along such land, unless it be expressly mentioned in the license, grant or location ticket, that such slide, dam, pier or boom, or other work, is intended to be thereby sold or granted.

(1) The free use of slides, dams, piers, booms or other works, on streams, to facilitate the descent of lumber and saw logs, and the right of access thereto for the purpose of using the same and keeping them in repair, shall not in any way be interrupted or obstructed by or in virtue of any license, grant or location ticket of Crown lands made subsequent to the construction of such work.

LVIII. The free use, for the floating of saw logs and other timber, rafts and draws, of all streams and lakes that may be necessary for the descent of timber from said lands, and the right of access to such streams and lakes, and of passing and re-passing on or along the land on either side thereof, and whenever necessary for such use thereof, and over all existing or necessary portage roads, past any rapids or falls, or connecting such streams or lakes, and over such roads, other than road allowances, as owing to natural obstacles may be necessary for the taking out of timber or saw logs from said lands, and the right of constructing slides where necessary, shall continue uninterrupted and shall not be affected or obstructed by or in virtue of any license, grant or location ticket of such lands, or by or in virtue of any license to cut timber held by one person as against any other person holding a license for the same purpose.

These provisions have been continued in the consolidations of 1896, c. 13, ss. 55 and 56, and of 1916, c. 129, ss. 34 and 35; and in *The Crown Lands Act,* 1930, c. 15, ss. 136 and 137. In c. 13, statutes of 1904, an acting dealing with other matters as well, s. 1 enacts:—

1. It shall be lawful for all persons whomsoever to float saw logs and other timber, rafts and draws over all streams and lakes within the colony, when necessary for the descent of such logs or other timber.

In relation to floatage rights, they are declaratory of the common law which arose out of the necessities of the early settlement of the province. Neither formal license nor title is claimed for the sites of the dam; and the effect of the statutory recognition accorded the works in s. 57 is considered hereafter. The reconciliation of these rights is the issue upon which the controversy hinges.

The immediate facts leading to the proceedings were these. On July 2, 1951, Foster was ready to drive 3,000 logs, then behind a temporary dam on Tremblett Brook, and 5,000 yarded along the bank of the Colinet some distance north of Back River. On that day, mistakenly anticipating a rainfall, the 3,000 were released only to become stranded on the bed of the Colinet about three-quarters of a mile below the Tremblett. A request was

made to Simmons to close the Ripple Pond dam which had been opened in accordance with the regulations but in the absence of permission it was refused. As a result of negotiations, the consent of the department was given on July 25, and the dam was then closed for about eight days. On August 3 the 5,000 logs were rolled into the Colinet and the gates opened. In six hours the 3,000 stranded below the Tremblett had been carried to Foster's boom in the harbour, but the 5,000 lot was left on the stream bed close to where the 3,000 lot had been grounded. These remained there until August 23 when a heavy rainfall carried them through.

In the meantime, on the Back River, Simmons had been storing water to carry down a large number of logs collected there. He was found to have been in a position to float them to his mill not earlier than July 20, but, in his judgment, the stranded logs of Foster made a drive at that time impracticable. By opening the dam the logs would probably have been confused with Foster's and even a separation in mere numbers would have entailed time and expense. The drive was consequently put off and the logs reached the mill in early September. The loss from keeping his mill crew together during part of this period makes up the largest item of what he seeks to recover.

On July 14 the writ was issued endorsed for an injunction and damages. An application for an interlocutory order restraining Foster from maintaining the obstructions in the stream was made, but owing to the important questions involved, the Chief Justice, before whom it was brought, declined to deal with it ex parte. Nothing further in this respect was done on behalf of Simmons.

The first question presented is whether the action was premature. For that, what is to be ascertained is not damages, even though they may be essential to the cause of action, but rather the existence of an *injuria* giving rise to it. Simmons, in exercising his common right to use the stream for driving purposes, was entitled to supplement the flow with the water behind the Back River dam and to bring his logs downstream without unjustifiable interference by Foster. But the parallel rights of these men, in some respects conflicting, must necessarily, in their exercise, be accommodated to each other by reasonable action on both

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sides. The stranding had resulted from an error of judgment, unrealized anticipations, on the part of Foster, but it was not of itself a wrong to Simmons or any one else: what resulted was the unintended obstruction of a public waterway and in the circumstances fault arose only upon an unreasonable delay in removing it: *Maitland* v. *Raisbeck* (1). On the analogy of highways, the inconvenience to which Simmons was subjected was the same as what any member of the public would have suffered and the established rule is that where that is the case the only wrong done is to the public against which only the Attorney General can move. But in the circumstances here I assume that Simmons possessed such a special interest as if infringed would be a personal wrong, and it is necessary to enquire into the conditions in which infringement could arise.

Can it be said that any right of Simmons had been transgressed before he was first in a position to use the Back River water on the 20th of July? The case on the 14th was not one for an injunction; the damages were not irreparable and the obstruction was of a temporary, not of a necessarily continuing, much less permanent, nature. What wrong had been done him before that date? The stream bed was not his: there was no trespass to his property. He may have been apprehensive that the logs would remain in the stream until he was ready to drive, but in the circumstances that was not sufficient. It is an exercise of the right of user that must be interfered with or prevented before it can be said that an *injuria* arises: up to that moment no special interest is affected. I cannot complain today of a private wrong in the obstruction of a street which I intend to use only next week; until then the nuisance, assuming it to exist, as to me, is public; and I see no distinction between that and the case before us. I agree, therefore, with the Chief Justice and Dunfield J. that on the issue of the writ there was, in relation to these matters, no existing cause of action by reason of the stranding.

But it is argued that there was an item of trespass which furnishes a foundation for the action. It appears that Simmons' receiving boom for heading the logs to his own grounds extended across the upper part of the harbour, and

(1) [1944] 1 K.B. 689.

if allowed to remain would, of course, have gathered in those of Foster. The latter, on or about July 2, had therefore moved the end of the boom across to the easterly shore for the purpose of controlling the drive to his own grounds. This, it is claimed, was a trespass to property of Simmons.

When the removal was made, Foster was, in good faith, and within his right, in the course of setting a drive on foot, and he was entitled to see his logs through to their destination. The boom set across the harbour, for which there was no statutory permission, would have prevented that; it was, at that moment and as to him, a nuisance, and he was entitled to abate it. The fact that the logs afterwards stranded did not affect the propriety of that act. No damage resulted and the boom was restored to its original position before the Back River drive was made by Simmons. In the previous year the same thing had been done under agreement with Simmons, but in the meantime they had quarrelled and Foster in this case acted on his initiative. That an individual, specially affected, is entitled to abate to the extent necessary an illegal interference with his exercise of such a right is not open to question: *Mayor of Colchester* v. *Brooke* (1); *Dimes* v. *Petley* (2).

A counterclaim was pleaded which, besides alleging damages, sought a declaration of the rights of the parties. The claim for damages was withdrawn at the trial. In that situation it is contended that a declaratory judgment should not be made. That it can be given in the absence of other relief is within the express language of O. 24, r. 5. Whether it should be or not is a matter of discretion. The court will make no such pronouncement in relation to hypothetical claims, but those in question are not of that character. They are, in fact, in such an important but indefinite context that their clarification is matter of concern as well to the public as to these litigants; and I agree with the view taken by the court in appeal that this is a case for such a judgment.

Two conceptions of the effect of the legislation are advanced. Mr. Forget treats it as conferring rights of user of dams and connecting works on any person properly using the stream for driving purposes. Whether this is to be with

(1) (1845) 7 Q.B. 339 at 377. (2) (1850) 15 Q.B. 276.

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or without compensation, and if yes, on what basis, and how, at what times and in what order the use is to be exercised, whether by the third person or by the owner, are unresolved. The reason is obvious because such a right with its subsidiary privileges, obligations and incidents can be found, if at all, only as an implication of general and uncertain language. But the implication suggested leads at once to the controlling qualification put on it by Mr. Forget: that where there are competing claimants to the use, he who is prior in setting it in exercise is not to be interrupted until his object had been completed. For example, neither the water held by the Back River dam, nor the dam itself, closed from the early spring, would be available to Foster until, in the course of its user Simmons had been able to bring the logs there gathered to his mill. This would in fact mean that the Back River flow would be written off from all users except Simmons. Conceivably one dam could be used co-operatively with another for a single drive and both would then be in the course of use for that object. It would in the particular conditions mean a virtual monopolistic advantage in priority to the owner and, for practical purposes, a substantial deprivation to other persons of the normal flow of the waters generally. Mr. Forget concludes that any other mode of dealing with the works would enable third persons to dominate the user and disrupt Simmons' operations.

The alternative view, embodied in the judgment below and urged by Mr. Lewis, is this: what each operator has in the stream itself is merely the right to use its natural flow for driving purposes. The benefit of water that may be collected from the stream when no floating could take or is taking place, a flow which would otherwise be lost, is not included in that right; it is not claimed by the respondent nor is it within the language of the judgment.

I think it impossible to draw from the statutory provisions such an implication or to interpret the "free use" of the dams as being intended to infringe the general right of floatage. The answer seems to me to be very plain: if that had been intended the legislature would have declared the privileges and the obligations in the clearest language. The statutory recognition of these works on Crown lands appears to me to have created revocable licenses in the persons who built them, but the character of the interest held

is of no moment here. The expression, "the free use", was directed against licensees and grantees of the Crown within the boundaries of whose lands the works might be; and it was made clear that the use then being made of the dams and the appurtenant privileges was not to be affected by any property or license rights conferred upon them. That that use is that of the owners seems indubitable. Instead of the implication suggested, the intention appears rather to have been to preserve the several rights just as they were.

The apprehensions stressed by Mr. Forget are quite unwarranted. By the mere working of these gates, the normal flow of the stream can at any time be restored by raising them sufficiently to maintain the then existing level of the impounded water. It is only the use of that quantity to which Foster or any person in his position is entitled; that is all that is claimed and all that is given by the judgment. There is no right to the water power stored up when not required or when not usable by others; that is within the exclusive benefit of the owner of the dam. The case here is that of exercising rights below the dams. Cases might ocurr in which the situs would be above them and there the considerations pertinent here would lead to an analogous accommodation.

I would, therefore, dismiss the appeal with costs.

LOCKE, J.:—I agree with my brothers Rand and Estey that the plaintiff's claim for damages in respect of the floating of the logs in the Colinet River between the dams erected by the plaintiff and the plaintiff's mill was premature and must fail. As to the claim by reason of the removal by the respondent of the holding piers at the mouth of the River, it was shown that these were not placed in the bed of the River with any statutory authority and, in my opinion, the plaintiff's position is not to be distinguished from that of the owners of the Second Narrows Bridge, whose rights were determined by the Judicial Committee in *SS. Eurana* v. *Burrard Inlet Tunnel and Bridge Co.* (1). In the present matter, the piers constituted a substantial interference with the defendant's right to float his logs in the tidal and navigable waters at the mouth of the River and amounted to a public nuisance.

(1) [1931] A.C. 300.

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In the counterclaim filed by the respondent, in addition to a mandatory order directing the plaintiff to open and keep open the gates of the dam at Big Pond, and damages, the respondent claimed a declaration that he was entitled to unobstructed flowage rights of the waters of Colinet River and its tributaries for the purpose of driving saw logs and timber.

The claim for damages was abandoned at the hearing as well as the claim for the mandatory order which was no longer required since, before that date, the respondent's logs had been floated to his mill boom. Winter J. dismissed the counterclaim, saying that to grant it would be to deprive the appellant of its right to maintain and operate the dams, with the result that no one would build such a dam, knowing that he was exposed to the risk of being compelled to open it at any time at the instance of other persons floating logs down the stream from above the dam.

Walsh C.J., after saying that the right to such a declaration had not been fully argued before them and that a declaration of the rights of the respondent would be "merely a restatement of them as declared by statute for all persons", considered that, as the defendant was threatened by the appellant in the exercise of those rights, the declaration should be made. Dunfield J. agreed with the Chief Justice. Winter J., the remaining member of the Court, adhered to the view which he had expressed in his judgment at the trial.

The formal declaration contained in the judgment of the Court of Appeal reads that:

> judgment be entered for the defendant-appellant for a declaration of right on his part, concurrent with plaintiff-respondent, to the use of the undiminished flow of Colinet River and its tributaries for driving saw logs and other timber.

I have had the advantage of reading the reasons for judgment to be delivered in this matter by my brother Estey and I agree with him that this appeal should be allowed in part by striking out of the judgment of the Court of Appeal the portion to which he refers.

Order XXIV(5) of the Rules of the Supreme Court of Newfoundland is identical in its terms with O. XXV, r.5 of the Rules of the Supreme Court, 1883 (Imp.)

In *Dysart (Earl)* v. *Hammerton* (1) where the action was for a declaration that the plaintiffs were entitled to an ancient ferry and an injunction to restrain the defendants from disturbing them in the enjoyment thereof, the Court of Appeal held that where such an action was dismissed on the ground that there had been no disturbance of the ferry a declaration of the plaintiffs' title under Order XXV, r. 5, should not be made. Cozens-Hardy M.R. said that the rule enabling the Court to make a declaratory decree ought not to be applied where a declaration is merely asked as a foundation for substantive relief which fails. While the decision of the Court of Appeal was reversed in the House of Lords (*Hammerton* v. *Dysart (Earl)* (2)), Viscount Haldane agreed with the opinion of the Court of Appeal on this point, saying (p. 64):—

> As the learned judge had found that the plaintiffs could have no relief against the defendants, the Court of Appeal thought that it was not proper, having regard to the character of the case, to make a declaration which might prejudge other cases.

Lord Sumner said (p. 95) that whatever the jurisdiction might be to grant declarations of right where no other relief is given, this was not a case in which the power should have been exercised. There was no dissent from these views by the other members of the House who delivered judgment.

In the present matter, when the claims for damages and for a mandamus were abandoned, there remained only the claim for a declaration of the rights of the respondent under the statutes of the province. Those rights were not merely those of the respondent but were similar to those of all others who might wish to float their logs on these rivers and on other similar rivers throughout the province. The statement of the law contained in the judgments of the Chief Justice and of Dunfield J. sufficiently declare those rights and define them as nearly as they may be defined under the legislation, as it was at the date of the filing of the counterclaim. There are, in my opinion, practical difficulties in the way of defining those rights more specifically without prejudging other cases, as is pointed out in the judgment of my brother Estey. Situations will, no doubt, continue to arise on streams such as the Colinet at many places throughout the Province of Newfoundland

(1) [1914] 1 Ch. 822. (2) [1916] A.C. 57.

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where dams have been lawfully erected, down which logs can only be floated with their assistance or in periods of high water, which will result in litigation. The respective rights of parties who have constructed such dams and of those claiming to float logs will, presumably, in time be controlled as they are in other provinces by some body vested with statutory power to regulate them. In the meantime, to attempt to more particularly define them by a declaratory judgment is impractical, in my opinion.

I agree with the disposition of the costs proposed by my brother Estey.

Appeal allowed in part.

Solicitors for the appellant: *McEvoy, Lewis & Smallwood.*

Solicitors for the respondent: *G. G. Tessier* and *O. J. Lewis.*

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*Feb. 1, 2, 3
*Mar. 7

SAMUEL MAX MEHR ..... APPELLANT;

AND

THE LAW SOCIETY OF UPPER CANADA ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Barrister—Solicitor—Law Society of Upper Canada, Discipline Committee, powers of—Admissibility of Statutory declaration to rebut defence to professional misconduct charge—Only members hearing case would appear qualified to participate in Discipline Committee's decision—The Law Society Act, R.S.O. 1950, c. 200, s. 48—Law Society Rules, r. 74 (4).

The appellant, a member of the Law Society of Upper Canada, was charged with conduct unbecoming a barrister and solicitor in that he had failed to account for money had and received on behalf of a client. At an inquiry conducted by the Society's Discipline Committee the appellant admitted the receipt of the money and claimed he had advised his client by letter that he was retaining it as payment on account of an agreed fee of $10,000 for conducting certain litigation. At a second meeting of the Committee a declaration of the client, who had left the country, was introduced. This declaration, which was obtained by the Committee on its own initiative, denied the appellant's evidence. The appellant objected to its reception but the objection was overruled. Following a third hearing the Committee reported to the Society that it found the appellant guilty of the misconduct charged. The report set out the fact of the declaration having been obtained and a summary of its contents, but stated that

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

the Committee had disregarded it in reaching its decision. Its report was adopted by the Benchers of the Society in Convocation and as a result the appellant on the order of the Registrar of the Supreme Court of Ontario was disbarred.

Held: That the appeal be allowed, the resolution of the Benchers of the Law Society of Upper Canada, and the report of the Discipline Committee, be quashed; the order of the Supreme Court of Ontario set aside, and the name of the appellant be restored to the Rolls.

Per Curiam: The Committee regarded the declaration as admissible in evidence under r. 74 (4) which provides, that for the purpose of its investigation and report the Committee may receive and accept as *prima facie* evidence of any facts stated in it, a statutory declaration. Assuming, without deciding, that r. 74 (4) is valid, the declaration was neither sought nor received as *prima facie* evidence of the facts stated in it, but as evidence to contradict on a vital point the defence which had been sworn to by the appellant. The reception of such evidence was wrongful and fatal to the proceedings which accordingly should be quashed. This result was not avoided by the statement in the report of the Committee that the declaration had been disregarded. *Walker* v. *Frobisher* 7 Ves. 70 approved in *Szilard* v. Szaz [1955] S.C.R. 3, followed.

Decision of the Court of Appeal for Ontario [1954] O.R. 692, reversed.

Semble: Only those members of the Discipline Committee who have heard all the evidence given at the inquiry should take part in rendering a decision. *Rex* v. *Huntingdon Confirming Authority* [1929] 1 K.B. 698 at 714 and 717 referred to.

APPEAL by the appellant in person by special leave from the judgment of the Court of Appeal for Ontario (1) affirming a judgment of McRuer C.J.H.C. (2) dismissing the appellant's application by way of appeal from the order of the Supreme Court of Ontario striking the appellant off the rolls of the Law Society of Upper Canada.

S. M. Mehr in person.

C. H. Walker, Q.C. for the respondent.

The judgment of the Court was delivered by:

CARTWRIGHT J.:—This is an appeal from an order of the Court of Appeal for Ontario, dismissing an appeal from an order of McRuer C.J.H.C. (2) dismissing a motion brought by the appellant by way of appeal from an order of the Registrar of the Supreme Court of Ontario dated Jan. 21, 1954, striking the applicant off the rolls, and asking for an order restoring the name of the appellant to the rolls and for an order in the nature of *certiorari* removing into

(1) [1954] O.R. 692; 3 D.L.R. 796.

(2) [1954] O.R. 337.

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Cartwright J.

the Supreme Court of Ontario the resolution made by the Benchers of the Law Society of Upper Canada on Jan. 21, 1954, the report of the Discipline Committee dated Jan. 12, 1954, the evidence taken at the purported hearings of the Discipline Committee on Sept. 18, Oct. 2 and Nov. 19, 1953, the record of its proceedings and all other matters, exhibits, documents or things incidental or relevant hereto, so that the said resolution might be quashed.

In the view that I take of the matter it is not necessary to deal with all of the points argued before us or to set out the facts at any great length.

On July 22, 1953, the appellant was notified that a complaint had been made to the Law Society that he had been guilty of professional misconduct and conduct unbecoming a barrister and solicitor in that in July 1950 he had received on behalf of the Ambassador to Canada of the Chinese Nationalist Government the sum of $5,237.35 for which he had failed to account and that such complaint or charge would be brought before the Discipline Committee for investigation and trial on Sept. 18, 1953.

There were hearings before the Committee on Sept. 18, 1953, Oct. 2, 1953, and Nov. 19, 1953. On Jan. 12, 1954, the Committee made a lengthy report finding that the appellant was guilty of professional misconduct and conduct unbecoming a barrister and solicitor and recommending that he be struck off the rolls of the Society. At a meeting of the Benchers in Convocation on Jan. 21, 1954, the report of the Discipline Committee was read and a motion made that it be adopted. Before the motion was put counsel for the appellant addressed Convocation. Following this a motion that the report be adopted and that the appellant be disbarred and declared unworthy to practise as a solicitor was put and carried.

The appeal was argued by both parties on the assumption that the function of the courts below and of this court was not to examine and weigh the evidence taken before the Committee with a view to determining whether the Committee had drawn a right conclusion from it but rather to consider whether there had been a denial of natural

justice in the proceedings before the Committee or whether there was error in law appearing on the face of the proceedings and, accordingly, I propose to deal with the matter on that assumption.

The appellant did not deny receipt of the $5,237.35. His answer to the complaint was that the complainant was indebted to him in the sum of $10,000 and that he had advised the complainant that he was retaining the $5,237.35 on account of that indebtedness. There was uncontradicted evidence before the Committee that the appellant had been retained by Mr. Yin-Tso Hsiung then Consul-General of the Republic of China to bring action in the Supreme Court of Ontario for a declaration that certain freehold lands in the City of Toronto, held by Mr. Hsiung in trust for the Government whose representative he was, were not subject to taxation by the City, and that he was not liable to pay taxes aggregating $4801.11 claimed by the City for the years 1946, 1947, 1948 and 1949. The appellant brought action accordingly. A special case was stated under r. 126 of the Ontario Rules of Practice and was argued before Smily J. on March 1, 1950. That learned judge reserved the matter and on May 25, 1950 gave judgment in favour of Mr. Hsiung for all the relief claimed, (*vide Yin-Tso Hsiung* v. *The City of Toronto* (1)). The party and party costs of the action were taxed at between $600 and $700 and were paid to the appellant. According to the evidence of the appellant there were discussions between him and Mr. Hsiung before the commencement of the action in which the appellant explained that the question to be raised in the proposed action was one of general importance and might well be carried to the court of last resort. The appellant states that he made an agreement with Mr. Hsiung which was not reduced to writing, that his fee for conducting the litigation to its final conclusion should be $10,000 and disbursements. The appellant states that the diplomatic representatives of the governments of other countries were also interested and that he understood from Mr. Hsiung that they would be contributing to the costs which he had agreed to pay. The appellant gave evidence that he made a number of trips to Ottawa and Washington in connection

(1) [1950] O.R. 463; 4 D.L.R. 209.

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with the matter. Prior to the rendering of the judgment of Smily J. the lands in question had been sold and in order that a clear title could be given to the purchaser a sum of money sufficient to cover the amount claimed for taxes was deposited with the City to abide the result of the pending action. It appears that a written direction signed by the client was given to the City requesting that in the event of the action succeeding this money should be paid to the appellant and this is the sum of money for which it is charged the appellant has failed to account.

The appellant gave evidence that after receiving this money he wrote to his client advising him of its receipt and of the fact that the City was not appealing from the judgment of Smily J. and asking for payment of the difference between the amount received and the $10,000. The Committee reported that it did not believe the evidence of the appellant either as to the making of the agreement for a fee of $10,000 or as to his having written such a letter to his client. Had this evidence of the appellant been accepted by the Committee I cannot think that they would have found him guilty of the charge made against him. I have not overlooked the fact that had it been in writing such an agreement as that alleged would seem to be subject to the provisions of s. 49 of *the Solicitors Act* R.S.O. 1950, c. 368 and that the client would seem to be entitled to have the appellant's bill taxed even should the making of the agreement be established. But, on the uncontradicted evidence the appellant was entitled to a substantial sum for costs as between solicitor and client and it must be remembered that it was not possible for the appellant to take any proceedings against the Ambassador for the purpose of taxing or collecting his costs while the Ambassador, on the other hand, was at liberty to take proceedings in the Supreme Court of Ontario in which his claim to the money and the claim of the appellant for his costs could have been expeditiously determined. At the conclusion of his evidence the appellant had deposed to facts which if established furnished an answer to the charge against him. At this point in the proceedings a joint declaration, dated Oct. 22, 1953, made by Mr. and Mrs. Hsiung was placed before the Committee. Mr. Walker in answer to a question from the Court said that it was a fair inference that the Committee had taken

the initiative in obtaining this declaration. A few days before the hearing held on Nov. 19, 1953, a copy of this declaration was furnished to the appellant's counsel and at that hearing he objected to the declaration being received as evidence. The Chairman intimated that it was admissible under the terms of r. 74 (4) to be referred to hereafter. Counsel for the appellant then unequivocally took the position that the Committee should not make a report without bringing Mr. and Mrs. Hsiung before them so that they might be cross-examined. This was not done and the appellant had no opportunity of cross-examining them.

In its report the Committee deals with the declaration as follows:—

> In a joint declaration dated and sworn Oct. 22, 1953, both Mr. and Mrs. Hsiung deny (with some vigor) having received those letters, and deny having made any arrangement to pay Mehr $10,000 as a fee. The Committee has not given any effect to these declarations because the Hsiungs were not present in person and available for cross-examination.

Rule 74 (4) reads as follows:

> (4) For the purposes of its investigation and report the Committee may receive and accept as prima facie evidence of any facts stated in it the statutory declaration of any person who therein declares to his personal knowledge of such facts.

It was argued before us for the appellant that this subsection of the rule is invalid. I do not find it necessary to decide this question as even assuming the rule to be valid it did not render the declaration admissible. The declaration was neither sought nor received as prima facie evidence of the facts stated in it but as evidence to contradict on a vital point the defence which had been sworn to by the appellant. The reception of such evidence was, in my opinion, wrongful and fatal to the validity of the proceedings.

The learned Chief Justice of the High Court dealt with this matter as follows:—(1)

> However, after listening to argument at some length on the question of the admissibility of certain statutory declarations which came before the Committee it eventually developed that the Committee in its report expressly stated that these statutory declarations were excluded from consideration in arriving at its decision. That being the case, I think the report of the Committee is to be treated as the judgment of a Judge would be treated where inadmissible evidence, and I am not saying that this evidence was inadmissible, was brought before the Court and the Judge expressly stated in his reasons for judgment that he excluded that evidence from his consideration in arriving at his conclusion.

(1) [1954] O.R. 337 at 342.

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Laidlaw J. A. who delivered the unanimous judgment of the Court of Appeal dealt with it in these words:—(1)

> The objection taken in respect of the declaration made jointly by Mr. and Mrs. Hsiung can be answered in a word. The report of the Committee shows that: "The Committee has not given any effect to these declarations because the Hsiungs were not present in person and available for cross-examination." That statement is accepted by the Court and is conclusive.

With the greatest respect I am unable to agree with either of these passages. They appear to me to be directly contrary to the following language of Lord Eldon in *Walker* v. *Frobisher* (2) which was approved in the unanimous judgment of this Court delivered by my brother Rand in *Szilard* v. *Szasz* (3) on Nov. 1, 1954:—

> But the arbitrator swears it (hearing further persons) had no effect upon his award. I believe him. He is a most respectable man. But I cannot from respect for any man do that which I cannot reconcile to general principles. A judge may not take upon himself to say whether evidence improperly admitted had or had not an effect upon his mind. The award may have done perfect justice, but upon general principles it cannot be supported.

The statement of the Committee that it did not give any effect to the declaration, although of course I accept it as made in perfect good faith, does not enable the Court to support the report.

It must also be borne in mind that the decision as to whether or not the appellant should be struck off the rolls rested not with the Committee but (subject to the power reserved to the Court by s. 48 of the *Law Society Act* R.S.O. 1950, c. 200) with Convocation and the passage from the report of the Committee quoted above informed Convocation that the evidence of the appellant on a crucial point in the case was denied "with some vigor" on oath.

In my respectful view the course taken in regard to this joint declaration requires the quashing of the proceedings referred to in the notice of motion.

While this is sufficient to dispose of the appeal I wish to mention two other matters.

It is not necessary for us to consider the appellant's argument that, subject only to the exception provided in r. 74 (4) (if that subsection be valid), the Discipline Com-

(1) [1954] O.R. 337 at 342. (2) (1801) 6 Ves. 70 at 72; 31 E.R. 943.
(3) [1955] S.C.R. 3.

mittee in hearing a charge against a member of the Society is bound to observe the rules of evidence as administered in the Supreme Court of Ontario. I do not wish my silence in regard to such argument to be construed as an agreement with the views adverse to it expressed in the reasons for judgment in the courts below.

The other matter to which I wish to refer is as follows. At the hearing before the Discipline Committee on Sept. 18, six members were present. At the hearing on Oct. 2 the same six members and two additional members were present. At the hearing on Nov. 19 the eight members who had been present on Oct. 2 were present and one additional member was present. There is nothing to indicate that all nine of these members did not take part in deciding as to the report which the Committee should make to Convocation. While it is not necessary to express any final opinion as to whether such a course would render the report invalid I am much impressed by the reasoning of Lord Hanworth and Romer J. in *Rex* v. *Huntingdon Confirming Authority* (1). At page 714 Lord Hanworth said:—

> One more point I must deal with, and that is the question of the justices who had not sat when evidence was taken on April 25, but who appeared at the meeting of May 16. We think that the confirming authority ought to be composed in the same way on both occasions: that new justices who have not heard the evidence given ought not to attend. It is quite possible that all the justices who heard the case and the evidence on April 25 may not be able to attend on any further hearing, but however that may be, those justices who did hear the case must not be joined by other justices who had not heard the case for the purpose of reaching a decision, on this question of confirmation.

And at page 717 Romer J. who agreed with Lord Hanworth added:—

> Further, I would merely like to point this out: that at that meeting of May 16 there were present three justices who had never heard the evidence that had been given on oath on April 25. There was a division of opinion. The resolution in favour of confirmation was carried by eight to two, and it is at least possible that that majority was induced to vote in the way it did by the eloquence of those members who had not been present on April 25, to whom the facts were entirely unknown.

I would allow the appeal and direct that the resolution of the Benchers of the Law Society of Upper Canada and the report of the Discipline Committee referred to in the notice of motion be quashed, that the order of the Registrar

(1) [1929] 1 K.B. 698.

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of the Supreme Court of Ontario, dated Jan. 21, 1954, be set aside and that the name of the appellant be restored to the rolls as asked in the notice of motion. The appellant is entitled to his costs throughout. In taxing such costs in this Court regard must be had to the facts that an order was made permitting the appellant to proceed *in forma pauperis* and that he acted for himself.

Appeal allowed.

The appellant in person.

Solicitors for the respondent: McDonald and McIntosh.

1954

*Oct. 29

1955

*Apr. 6

JOHN HAROLD WILSON ..... APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Revenue—Income Tax—Business and business premises inherited subject to personal covenant to pay annuity—Premises also charged with payment—Whether such payments allowable as Income Tax deductions—The Income War Tax Act, R.S.C. 1927, c. 97, ss. 3 (1) (a), (b), (c)—The Income Tax Act, S. of C. 1948, c. 52, s. 12 (1) (a), (b), (d).

T by his will gave his business and the land on which it was carried on to his son, the appellant, subject to the son's entering into a covenant to pay T's widow an annuity and to maintain two residences for her lifetime, the land being charged with the performance of the covenant. The appellant claimed the disbursements made by him in fulfilling the covenant as deductions from his income for the years 1946, '47, '48 and '49. The respondent disallowed them on the grounds that they were not as regards *The Income War Tax Act*, R.S.C. 1927, c. 97 as amended, "disbursements and expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning income" within the meaning of s. 6(1) (*a*) of that Act but were "capital expenses" within the meaning of s. 6(1) (*b*) and that as regards *The Income Tax Act*, S. of C. 1948, c. 52 as amended, the disbursements were not "an outlay or expense incurred by the appellant for the purpose of gaining or producing income" within the meaning of s. 12 (1) (*a*) but a "capital outlay" within the meaning of s. 12 (1) (*b*) of that Act.

Held (Estey and Locke JJ. dissenting): That for the purpose of determining the appellant's taxable income the receipts from the business should be reduced to the extent of the rental value of the land charged. *Raja Bejoy Singh Dudhuria* v. *Commsr. of Income Tax* (1933) 1 I.T.R. 135; 60 Ind. App. 196, followed.

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

Per Estey and Locke JJ. (dissenting): As the payments were made in discharge of personal covenants entered into to obtain the business and the business premises, they were not deductions allowable under s. 6(1) (*a*) or s. 12(1) (*a*) of the respective Acts. The *Raja Bejoy Singh Dudhuria* case, *supra*, distinguished.

Per Locke J. (dissenting): There was no charge upon the business or the income from that business but upon the land alone. The income was accordingly not diverted to the widow nor did the appellant receive any part of it on her behalf. As the payments were not incurred in earning the income of the business no deduction was allowable for the annual value of the business premises under s. 6(1) (*c*) of the first Act or s. 12 (1) (*b*) of the second, and as the payments were on account of capital within the meaning of clause (*b*) of s. 6(1) and 12(1) of the respective Acts they were not properly deductible from income.

Judgment of the Exchequer Court of Canada, Cameron J., [1954] Ex. C.R. 36, reversed.

APPEAL from a judgment of the Exchequer Court of Canada (1), Cameron J., dismissing the appellant's appeal from the judgment of the Income Tax Appeal Board (2) which dismissed the appellant's appeal from assessments for income tax for the 1946, '47, '48 taxation years under *The Income War Tax Act* and an assessment for the 1949 taxation year under *The Income Tax Act*.

D. K. MacTavish, Q.C. and *G. Perley-Robertson* for the appellant.

W. R. Jackett, Q.C. and *T. Z. Bolès* for the respondent.

RAND J.:—This appeal is from an income tax assessment (3). The question is whether the payment of an annuity and certain outgoings by the devisee of premises and a business owned and conducted on them by the testator can be deducted in the ascertainment of the taxable income of the business.

The taxpayer was the son of the testator and the effect of the provisions of the will dealing with the property can be shortly stated. The premises and business were given subject to the son's complying with certain terms. These included (*a*) the payment of succession and probate duties; (*b*) the assumption and discharge of all debts and liabilities related to the premises or business; (*c*) the payment of four small legacies to named employees; (*d*) a covenant

(1) [1954] Ex. C.R. 36; 53 D.T.C. 1242.
(2) 53 D.T.C. 68; 8 Tax A.B.C. 37.
(3) [1954] Ex. C.R. 36.

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to pay to his mother during her lifetime the sum of $500 a month; (*e*) a covenant, during her lifetime, to maintain a residence in which she was given a life interest.

The land was charged with the payments under (*d*) and (*e*), to secure which the title during the life of the widow was to remain in the names of the trustees. On the request of the son the trustees were to sell the premises on terms approved by them; the moneys realized, if the son so desired, were to be used to purchase other premises; if not, they were to be invested and the income paid to the son, subject to the performance of the covenants. On the mother's death, the capital was to be paid him. If the son within three months of his father's death did not elect to take the property on the terms stipulated, the trustees were to sell both land and business, make the payments under (*a*), (*b*) and (*c*), set aside a sum sufficient to produce the the annuity and the outgoings, and pay the balance of the proceeds to the son. On the mother's death, the retained portion of the proceeds was likewise to be paid over to him.

At the outset it is desirable to consider the relation of the possession of premises to a business which they carry. That possession by the owner is an income value to his business has long been recognized. In *Russell* v. *Town and County Bank* (1), Lord Herschell used this language:—

> Now it is not disputed that the annual value of premises exclusively used for business purposes is properly to be deducted in arriving at the balance of profits and gains. I am, of course, speaking, for the moment, of premises which are not used in any way as a place of dwelling but are exclusively business premises. But there may be a question where the right to make that deduction is to be found. I am myself disposed to think that it is allowed because it is an essential element to be taken into account in ascertaining the amount of the balance of profits.

This language was quoted with approval in *Stevens* v. *Boustead & Co.* (2), where Warrington L.J. said:—

> Secondly, I think that if for any reason it should be held that the deduction in question is not in terms allowed by any of the rules, then it ought on general principles to be allowed, using the words of Lord Herschell . . . "because it is an essential element to be taken into account in ascertaining the amount of the balance of profits."

(1) (1888) 13 App. Cas. 418 at 425.

(2) [1918] 1 K.B. 382 at 389.

It has received like approval in several Australian decisions. In *Moffatt* v. *Webb* (1) both Griffith C.J. at p. 125 and Isaacs J., at p. 137 express agreement with it. In *Egerton-Warburton* v. *Deputy Federal Commr. of Taxation* (2) where, under an arrangement between a father and two sons lands were sold to the latter in consideration of a life annuity to the father, an annuity after his death to his widow, and after the death of both, the sum of £10,000 to the three daughters and the descendants of another, an arrangement looked upon as a family settlement, the annuity was held deductible by the sons in determining their income from farming operations on the land. Lord Herschell's quoted words and those of Lord Sumner in *Usher's Wiltshire Brewery Ltd.* v. *Bruce* (3) were referred to with this concluding comment:

> It is thus fully recognized that revenue loss or expenditure suffered by a taxpayer through appropriating land to the purposes of trade is a proper allowance against trade profits, but that a sum having been allowed as a deduction must be taxed as notional income from property. In the Commonwealth Act this discrimination is not adopted, but somewhat unfortunately, perhaps, the provision forbidding a deduction of sums not wholly laid out or expended for the purpose of the trade has been adopted with no greater modification than the substitution for the reference to trade of the words "for the production of assessable income" . . .. In the case of income from property, it is difficult to suppose that an obligation to pay an annual charge incurred as a necessary condition of acquiring the property does not amount to a deductible expenditure as money laid out for the production of assessable income.

It is clear, then, that on principle the use of one's property for the purposes of one's business involves the appropriation to the business of an economic value which is consumed in carrying on the business. The deduction of rent paid for premises owned by another, which under our statute is allowed, exhibits that value in its true nature. The taxation decision on any question of this kind must, indeed, depend upon the statutory provisions which are applicable, but that does not affect the principle or the fact of the economic values used up in the course of producing profits.

We have no separate taxation of the annual value of land, as in Schedule "A" of the English Income Tax Act;

(1) [1913] 16 C.L.R. 120. (2) [1934] 51 C.L.R. 568 at 579.
(3) [1915] A.C. 433 at 469.

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and since no deduction is allowed an owner of both land and business for that value, it operates by rendering the income so much the greater than otherwise it would be.

That value is included in the income reported by the taxpayer here. Charged against it, however, as a current annual payment, is the annuity and the other outlays. Are these payments wholly, exclusively and necessarily paid out in earning the income? Although the covenants are a condition for receiving both the land and the business, yet the charge is reserved only against the premises. In that situation, the outgoings, wholly, exclusively and necessarily related to the enjoyment of the possessory value, are as equally so related to the income as current charges for the use of a machine would be. The personal liability for the payments is merely a collateral remedy which does not affect the economic realities. The deductions are thus within ss. 6(1) (*a*) and 12(1) (*a*) of the statute.

Certain authorities were cited by Mr. Jackett, among them the following: *Grant* v. *Commr. of Taxation (N.Z)* (1); *Bern* v. *Commr. of Taxation (N.Z)* (2); *Colonial Mutual Ass. Co.* v. *Commr. of Taxation* (3) and *Calvert* v. *Commissioner of Taxes* (4) in the same court. In *Grant, Calvert* and *Colonial Mutual,* the facts involved an agreement whereby the taxpayer purchased property on which he carried on business for a price which included the payment of an annuity. I see nothing in that that touches the question before us. The purchase price of capital property is itself capital in whatever form it may take though it may be paid out of income. In *Bern,* the property of the taxpayer had been devised to him subject to an annuity in favour of his mother. The income was derived from farming and a contracting business, for which the devised as well as other land was used. It was held by Callan J. that the payment of the annuity was a capital item not deductible and that it was not an expenditure exclusively incurred in the production of assessable income. The judgment purported to apply *Tata Hydro-electric Agencies Ltd., Bombay* v. *Commr. of Income Tax* (5). There the taxpayer company had purchased a business as

(1) (1948) 8 A.T.D. 403.
(2) (1950) 9 A.T.D. 148.
(3) (1953) 10 A.T.D. 274.
(4) (1927) 40 C.L.R. 142.
(5) [1937] A.C. 685.

managing agents of a principal company for carrying on which they were entitled to a percentage of the annual net profits of the principal. A prior purchase of this agency by the vendor of the taxpayer had called for certain payments which the predecessor vendor had obligated itself to make to two other interests as part of that prior price. The question was whether these payments, the liability for which the taxpayer had assumed, could be deducted and it was held that they could not. The reason is evident: they were capital payments as part of the price paid for the agency. In *Bern,* the property came charged with the annuity as a reservation: there was no question of price or a capital outlay as the means of acquisition. The difference between the two situations is, I think, basic.

Another aspect of the question is presented by *Raja Bejoy Singh Dudhuria* v. *Commr. I.C.,* (1) decided by the Judicial Committee. There, on the death of the taxpayer's father, his stepmother brought suit for maintenance against him in which a consent decree was entered for a monthly payment of a fixed sum charged on the ancestral estate in his hands. The effect of that charge was held to be to intercept the maintenance payment so that it was never received by the taxpayer as his own income, and for that reason was deductible .

The case of a gift by will subject to a charge is similar. The benefit conferred is what remains after the deduction of what is reserved. Here the possessory value is transmuted into the income of the business, charged, by way of reservation, with the annual payment: there is constituted in substance an equitable rent charge which never becomes income, in the beneficial sense, of the taxpayer in whose revenue it appears. It lies, then, either within a broad but justified interpretation of the word "rent", as the annual value was taken to be a disbursement or expense by Lord Herschell in *Russell's* case (*supra*) at p. 425; or it is to be treated as the property or interest of the beneficiary mother throughout its process of coming into existence. In the prima facie or formal aspect of the income, the payment is within s. 6(1) (*d*), 12(1) (*d*); beneficially it never becomes income of the taxpayer.

(1) (1933) 1 I.T.R. 135.

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Evidence was given of the annual value of the premises, but in the view taken by Cameron J., it was unnecessary for him to ascertain its amount: nor, for a similar reason, was it determined either by the Income Tax Appeal Board or by the Minister. Since the only question raised on this appeal is the right to deduct and the evidence shows the annual value to have been greater than the amount sought to be deducted, I think we should conclude the controversy by a finding to that effect.

I would, therefore, allow the appeal, refer the assessment back to the Minister with the direction that these outgoings including the annuity are properly deductible from the income returns for the years in question. The appellant will be entitled to his costs throughout.

KELLOCK J.:—The appellant acquired certain lands in the City of Victoria and the business carried on therein by the testator, the late J. E. Wilson, who died on the 2nd of January, 1945, under the terms of the latter's will, the relevant provisions of which are as follows:

I GIVE, DEVISE AND BEQUEATH to my said son Joseph Harold Wilson the property and premises known as number 1221 Government Street in said City of Victoria and more particularly described as Lot 166, Block 13, City of Victoria, and the business carried on by me therein under the name of W. & J. Wilson and the goodwill thereof, all goods, stock-in-trade, furniture, machinery, store fittings and plant together with the benefit of all contracts subsisting in relation to the said business, all book debts owing to me in connection with said business and all securities for money, cash and money in bank to the credit of the said business subject to my said son complying with the following terms, namely:

(*d*) Entering into a covenant under seal with my wife binding himself and his executors and administrators to pay to her during her lifetime the sum of $500 each and every month on the first day thereof in advance, the first of such payments to be made on the 1st day of the month next following my death;

(*e*) Entering into a covenant under seal with my said wife and my Trustees, binding himself and his executors and administrators, whereby he shall covenant that during the lifetime of my wife or until the same be sold, whichever event shall the earlier happen, he or they will pay all taxes, local improvement charges, insurance premiums and expenses of all ordinary repairs to the upkeep of the fabric of my residence known as number 811 St. Charles Street in the said City of Victoria and of the buildings situated on my summer residence property at Finnerty's Beach in the Municipality of Sannich;

(*f*) The said Lot 166 shall be and is hereby charged with the performance by my said son's covenants required above by paragraphs (*d*) and (*e*) to be entered into by him and accordingly, during the lifetime of my wife the title to the said Lot 166 shall

be in the names of my said Trustees with the right to my said son, should he desire that the same be sold, to require my Trustees to sell the same provided the sale price thereof and the terms of sale meet with their approval and the moneys to be realized from any such sale shall, if my said son so desires, be used in the purchase of other business premises for my said son, and unless so used shall be invested and the income to be derived therefrom shall be paid to my said son, subject to the performance by him of his covenants as above mentioned, and on the death of my said wife the capital thereof shall be paid to my said son;

(*g*) Upon my son complying with the terms of this bequest and devise to him within three months from the date of my death my Trustees are authorized to turn over the said business to my said son as a going concern as of the date of my death, but should my son fail to carry out the above terms within the said period of three months or thereafter within a period of one month from the giving of written notice to my said son requiring him to elect as to whether he will take the said business over or not, then my Trustees are to sell and convert the said business and land into money, and pay the moneys required to be paid under paragraphs (*a*), (*b*) and (*c*) hereof and to set aside a sufficient amount which when invested will in the opinion of my Trustees produce a sufficient income to pay to my wife the said sum of $500 as provided by paragraph (*d*) hereof, and the other outgoings provided by paragraph (*e*) hereof, and apply such income for such purpose and to pay the balance of said proceeds to my said son, and on the death of my said wife to pay to my said son the capital retained and invested as above required to be invested. I AUTHORIZE AND EMPOWER my Trustees until the said business be turned over to my son or sold and converted as above provided, to manage and carry on the said business and for such purpose in their discretion to appoint my said son to act in the full management thereof.

The appellant complied with these terms and accordingly became the owner of the business and the beneficial owner of the real property subject to the charge of the annuity, which, in the years in question, namely, 1946 to 1949 inclusive, was duly paid to the widow of the testator.

The point at issue in this appeal is as to whether or not the amounts so paid are taxable as income in the hands of the appellant. The first period, from 1946 to 1948 inclusive, is governed by *The Income War Tax Act*, R.S.C., 1927, c. 97, as amended, and the last period, namely, 1949, by *The Income Tax Act*, being 11-12 George VI, c. 52, as amended. The two statutes are cast in somewhat similar terms.

Considerable discussion took place on the argument as to the effect of s. 6(1) (*a*) and (*b*) of the earlier statute and the corresponding provisions of the later Act, namely,

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s. 12(1) (*a*) and (*b*), but in my view these provisions have no application in the circumstances of the present case for reasons which I shall state as shortly as possible.

It is always a question of construction as to whether, upon the terms of any instrument, a testator has made an annuity given by his will, a charge on property or a personal liability, or has set up a trust, or whether there has been created both a personal liability and either a trust or a charge; *in re Lester* (1). In the case at bar, the provisions of the will, which are not unlike those of the will in question in *Parker* v. *Judkin* (2), are beyond doubt. The testator has not only made the appellant personally liable but has expressly charged the annuity on lot 166. While the hand by which the widow receives payment may be that of the appellant, the annuity payable out of the land is her property and never at any time forms part of his income. She would in respect of arrears, be entitled to the appointment of a receiver; *Dalmer* v. *Dashwood* (3); *Cupit* v. *Jackson* (4).

In *London County Council* v. *Attorney General* (5), Lord Davey, in referring to the scheme of United Kingdom Income Tax Acts, said at p. 42:

> It was, no doubt, considered that the real income of an owner of incumbered property, or of property charged, say, with an annuity under a will, is the annual income of the property less the interest on the incumbrance or the annuity; and the mortgagee or annuitant and the owner of the property are, in a sense, entitled between them to the income. . . .

In so far as an annuity charged on land is concerned, this statement is in accord with the authorities above referred to and the principle was applied by the Judicial Committee in *Raja Bejoy Singh Dudhuria* v. *Commr. of Income Tax* (6) In that case the appellant had succeeded to his family ancestral estates upon the death of his father. A consent decree for maintenance had been pronounced in favour of the appellant's stepmother in a proceeding between them which, in the words of Lord MacMillan, at p. 136, (quoting the finding of the court in the litigation in which the decree had been pronounced):

(1) [1942] 1 Ch. 325.
(2) [1931] 1 Ch. 475.
(3) (1793) 2 Cox 378.
(4) (1824) 13 Price 721 at 733.
(5) [1901] A.C. 26.
(6) (1933) 1 I.T.R. 135; 60 Ind. App. 196.

Was a legal liability of the Raja (the appellant) arising by reason of the fact that the Raja is in possession of his ancestral estate, that it is payable out of such estate and that this Court had declared that the maintenance was a charge thereon in the hands of the Raja.

It was the view of the court below (57 Indian L.R. 918), with which the Judicial Committee concurred, that the liability of the Raja, by virtue of the decree, was the same as if he "had received his various properties . . . under a bequest from his father upon the terms that these assets were charged with an annuity for the maintenance of the widow". The court, however, held notwithstanding, that the amounts payable to the stepmother were taxable as income in the hands of the appellant. With this their Lordships did not agree, holding that:

when the Act by s. 3 subjects to charge "all income" of an individual, it is what reaches the individual as income which it is intended to charge . . . It is not a case of the application by the appellant of part of his income in a particular way, it is rather the allocation of a sum out of his revenue before it becomes income in his hands.

I am unable to distinguish the present case in principle and there is nothing in the legislation here in question which prevents its application in the circumstances of the case at bar. On the contrary, the legislation taxes only the income of the taxpayer and not income which is not his. The charge created upon the land devised to the present appellant by the testator operates to divert from him to the widow income to that extent and such diverted income does not form part of the income of the appellant.

It is unquestioned, of course, that there can be no deduction of the annuity from the taxpayer's income from sources other than the land charged. But to the extent that the land charged does produce income, the charge operates to prevent such income becoming income of the taxpayer.

In the present case the land in question does produce income, as it is used by the taxpayer in carrying on business thereon. The income from the land is thus merged, in the hands of the appellant, with the gross receipts from the business. The amount of the income from the land is clearly ascertainable, however, and is an amount equal to the rentable value of the land. Evidence was given that the annuity is less than that amount. S. 6(1) (*a*) of the earlier statute and s. 12(1) (*a*) of the later, which permit the deduction of "disbursements or expenses" in the one

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case, and "an outlay or expenses" in the other, apply only in the ascertainment of the income of the taxpayer. They therefore have no application to revenue coming to his hands which forms no part of his income.

For the same reason that s. 6(1) (*a*) and (*b*) do not apply, s. 6(1) (*c*) equally does not apply. Morever, while "the annual value" of property may not, by reason of s. 6(1) (*c*) be deducted by a taxpayer in the ascertainment of income, and in consequence of that provision, such annual value forms part of the income of the taxpayer and is subject to tax, that is not to say that where the taxpayer does not receive a part of the annual value by reason of the existence of a charge such as that here in question, nevertheless he is to be taxed as though he were in receipt of the whole, as well as the person entitled to receive the charged income. In so far as the annual value of the lands here in question exceeds the annuity, it forms part of the taxable income of the appellant.

This aspect of the matter does not appear to have been argued below.

I would therefore allow the appeal with costs throughout.

ESTEY J. (dissenting):—The father of the appellant, by his last will, devised and bequeathed Lot 166, Block 13, City of Victoria, and the business conducted thereon to his son, the appellant, subject to his "complying with the following terms," which may be summarized:

That the appellant

(*a*) pay succession and probate duties in respect of benefits received by himself and others under this will;

(*b*) pay the testator's debts and liabilities in respect of the business and premises;

(*c*) pay certain legacies to five employees of the business totalling $2,000;

(*d*) enter into a covenant to pay his mother, during her lifetime, $500 per month;

(*e*) enter into a covenant to pay, during his mother's lifetime or until the same be sold, all taxes, local improvement charges, insurance premiums and expenses of all ordinary repairs to the upkeep of the fabric of her residence.

The will also provided, in part:

Upon my son complying with terms of this bequest and devise to him within three months from the date of my death my Trustees are authorized to turn over the said business to my said son as a going concern as of the date of my death, . . .

The said Lot 166 shall be and is hereby charged with the performance by my said son's covenants required above by paragraphs (*d*) and (*e*) to be entered into by him and accordingly, during the lifetime of my wife the title to the said Lot 166 shall be in the names of my said Trustees with the right to my said son, should he desire that the same be sold, to require my Trustees to sell the same. . . .

The appellant accepted the foregoing terms, entered into the covenants with his mother and the trustees and has discharged his obligations to date.

It is not contested that at all times material hereto the appellant owned and carried on the business under the name of W. & J. Wilson, under which it had remained since 1864. With respect to Lot 166, I respectfully agree with Mr. Justice Cameron that

. . . the appellant became the beneficial owner . . . immediately upon complying with the conditions laid down in his father's will. . . .

In this litigation we are concerned only with the payments made under paras. (*d*) and (*e*) by the appellant to and on behalf of his mother, which were as follows:

1946	$6,927.77
1947	7,132.91
1948	6,950.53
1949	6,798.62

It is contended that these amounts were never part of appellant's income. This submission is made largely upon the authority of *Raja Bejoy Singh Dudhuria* v. *Commissioner of Income Tax* (1). In that case when the father died his son succeeded to the family ancestral estate. Thereafter his stepmother brought a suit for maintenance in which by consent an order was directed which, though not produced to the Court, was described by the Chief Justice in the Calcutta High Court, at p. 136, in part, as follows:

. . . it was not disputed that the lady's maintenance was a legal liability of the Raja (the appellant) arising by reason of the fact that the Raja is in possession of his ancestral estate, that it is payable out of such estate and that this Court had declared that the maintenance was a charge thereon in the hands of the Raja.

Their Lordships of the Privy Council stated at p. 138:

In the present case the decree of the court by charging the appellant's whole resources with a specific payment to his step-mother has to that extent diverted his income from him and has directed it to his step-mother; to that extent what he receives for her is not his income. It is

(1) (1933) 1 I.T.R. 135.

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not a case of the application by the appellant of part of his income in a particular way, it is rather the allocation of a sum out of his revenue before it becomes income in his hands.

In that case the maintenance was the primary responsibility of and payable out of the estate. This is emphasized by the Chief Justice where, in describing the order, he states the maintenance "is payable out of such estate and that this Court had declared that the maintenance was a charge thereon in the hands of the Raja." It is in these circumstances that Lord Macmillan, speaking on behalf of the Privy Council, states that to the extent of the charge in favour of his step-mother the decree of the Court "diverted his income from him and has directed it to his step-mother; to that extent what he receives for her is not his income." In the case at bar the circumstances are quite different. The testator under the will gave to the appellant the option to acquire the business and Lot 166, upon his agreeing to make the payments under paras. (*a*), (*b*) and (*c*) and upon his entering into certain personal covenants under paras. (*d*) and (*e*), and the charge provided for under the will is security for the performance of the covenants under paras. (*c*) and (*d*). It is not a case of the appellant acquiring Lot 166 subject to a mortgage or charge, but rather the acquisition by him of that lot and the business in consideration of which, *inter alia,* he gave his personal covenants under paras. (*d*) and (*e*), and, when he had done so, the will then provides "the said Lot 166 shall be and is hereby charged with the performance" of his personal covenants. These personal covenants constitute the primary obligation which he must discharge irrespective of whether Lot 166 is used by him, or whether he derives any benefit therefrom, or, indeed, whether he continues to carry on the business or not. The payments, when made in the discharge of these covenants, are, as indicated in the foregoing quotation, an "application by the appellant of part of his income in a particular way" and not the payment or delivery of funds which had never become part of his income.

Moreover, the language of the will in paras. (*d*) and (*e*) contemplates a relationship of debtor and creditor between the appellant and his mother and does not contemplate that any sum derived by the use or otherwise of Lot 166 shall be paid to the mother, at least until such time as the appellant makes default and the mother takes appropriate

proceedings to realize out of this security. Under such a charge it cannot be said that there has been any diversion of income, at least prior to the taking of the proceedings already suggested.

That the foregoing is in accord with the intention of the testator would seem to follow from the fact that the testator provided in his will that the appellant might require the trustees to sell Lot 166 and that the proceeds be either used to purchase other business premises or invested, in which latter event the income therefrom was to be paid to the appellant. All of which was "subject to the performance by him of his covenants" under para. (*d*), which suggests that the trustees, while they might release the charge against the lot, would be under an obligation to see that other appropriate security was provided therefor. This provision would appear quite inconsistent with any intention to divert income, as contended by the appellant.

On the basis that the payments were made out of his income, appellant submits that they should be deducted in computing his income tax for 1946, 1947 and 1948 under s. 6(1) (*a*) of *The Income War Tax Act* (R.S.C. 1927, c. 97), which reads:

> 6(1) In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
>
> (*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income;

and for 1949 under s. 12(1) (*a*) of *The Income Tax Act* (S. of C. 1948, 11-12 Geo. VI, c. 52), which reads:

> 12(1) In computing income, no deduction shall be made in respect of
>
> (*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer.

These payments, as already stated, were made in the discharge of his personal covenants entered into in order that he might obtain the business and Lot 166. They were not made for the purpose of acquiring goods, services or equipment in the ordinary course of buying and selling merchandise, or can they in any relevant sense be said to have been made in the course of operations of the business for the purpose of earning income. The payments here in question do not come within the meaning of s. 6(1) (*a*). Sir Lyman Duff C.J., with whom Davis J. agreed, in construing this section, stated that "in order to fall within

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the category 'disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income,' expenses must, I think, be working expenses; that is to say, expenses incurred in the process of earning the 'income,'" *Minister of National Revenue* v. *Dominion Natural Gas Co. Ltd.* (1).

Moreover, it would seem the position of the appellant is somewhat similar to that described by Lord Macmillan:

> In short, the obligation to make these payments was undertaken by the appellants in consideration of their acquisition of the right and opportunity to earn profits, that is, of the right to conduct the business, and not for the purpose of producing profits in the conduct of the business. If the purchaser of a business undertakes to the vendor as one of the terms of the purchase that he will pay a sum annually to a third party, irrespective of whether the business yields any profits or not, it would be difficult to say that the annual payments were made solely for the purpose of earning the profits of the business. *Tata Hydro-Electric Agencies, Bombay* v. *Income-Tax Commissioner, Bombay Presidency and Aden* (2).

Moreover, these payments, for the same reason, could not be regarded as an expense "for the purpose of gaining or producing income from property or a business of the taxpayer" within the meaning of the above s. 12(1) (*a*).

I respectfully agree with Mr. Justice Cameron that the payments cannot be regarded either as rent, or payments in the nature of rent. There was not only no lease, but neither in the will nor in any other document is there language which suggests that the amounts were ever paid as, or in lieu of rent, or in any sense for the use of the building. The nature and character of the payments must be determined from the circumstances under which the obligation was incurred and, therefore, the fact that in the books of W. & J. Wilson the sums as paid to the mother were charged to the Augusta A. Wilson account and at the end of the year transferred to the rent account does not establish that they were, in fact, rent. Moreover, the fact that evidence was adduced to the effect that the fair rental value for the premises known as Lot 166 would be about $800 per month does not, apart from evidence that the testator intended to create such a relationship, assist in the solution of this problem.

Our attention was directed to three Australian cases and the appellant particularly relied upon *Egerton-Warburton*

(1) [1941] S.C.R. 19 at 22. (2) [1937] A.C. 685 at 695.

and Others v. *Deputy Federal Commissr. of Taxation* (1). The first of the three cases was decided in 1927, *Calvert* v. *The Commissioner of Taxes for Victoria* (2). There Lewis G. Calvert and his wife, Jessie Irvine Calvert, entered into an agreement with their son, the appellant, Lewis N. Calvert, whereby they conveyed to him certain land in the State of Victoria. Lewis N. Calvert covenanted to pay to his father, Lewis G. Calvert, an annuity of £666 and after his death to his widow, Jessie Irvine Calvert, an annuity of £333. The land was transferred to Lewis N. Calvert and a charge duly registered against the land to secure the payment of the respective annuities. In this litigation the appellant contended that the £333 paid to his mother should be deducted as an expense. The High Court of Australia held that such an amount could not be deducted under s. 19(2) (*g*) of the legislation of Victoria, which provided that only such disbursements or expenses as were "wholly and exclusively laid out or expended for the purpose of such trade" might be deducted. The appellant, in the case at bar, sought to distinguish this case on the basis that Calvert was the registered owner, did not make the payments out of the business and they were not regarded as rent. The appellant in the case at bar being the beneficial owner, it is not material that he is not the registered owner, nor does the fact that he saw fit to make the payments to his mother by cheques issued out of the business of which he was the sole owner involve any distinction in principle. Furthermore, having regard to the language of the will, the above amounts cannot be accepted as payments made for the use of the land or in any sense payments analagous to rent.

In the *Egerton-Warburton* case, *supra,* pursuant to an agreement for sale, certain property was transferred by the father, R.E., to his two sons, P.E. and G.G., under terms that required the sons to pay an annuity to the father during his lifetime of £1,200 and a further annuity and payments after his death. The two sons formed a partnership and carried on the business and in filing their respective income tax returns each deducted the sum of £329, 10s. In the High Court of Australia this sum was allowed on the basis that "so far as the taxpayer is concerned it is an

(1) (1934) 51 C.L.R. 568. (2) (1927) 40 C.L.R. 142.

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expenditure incurred to create his assessable income" and, therefore, deductable under the provisions of s. 25(*e*) of the *Income Tax Assessment Act,* 1922-1933 which forbids the deduction of money not wholly or exclusively laid out for the production of assessable income. In the course of the judgment it was stated that the transaction bore "all the marks of a family settlement" and then the Court stated:

> We think it is impossible to treat the annuity of £1,200 a year as mere instalments of purchase money.

The Court referred to the *Calvert* case and distinguished it on the basis that it was decided under language of other legislation enacted in another state (Victoria).

The last of three cases decided in the High Court of Australia was *Colonial Mutual Life Ass. Society Ltd.* v. *Commr. of Taxation* (1). The appellant, a life insurance company, owned a block of land in Adelaide. Just Brothers owned an adjoining lot. The appellant entered into an agreement with Just Brothers whereby it purchased from Just Brothers their lot on terms that the appellant would erect an office building on both lots, 7% of which would be occupied by the appellant, rent free, and that Just Brothers would receive 90% of the rents collected from the balance, or 93%, of the building for fifty years. This 90% in the taxation period amounted to £1,183, which amount the appellant sought to deduct in the computation of its income tax. The Court held that this money was expended for the purpose of obtaining a fixed capital asset and, therefore, "the payment under appeal is an outgoing of a capital nature within the meaning of s. 51(1) of the *Income Tax Assessment Act.* The payment represents one of a series of annual payments which the appellant agreed to make to Just Brothers for the acquisition of their land."

Mr. Justice Williams, in referring to the *Egerton-Warburton* case, *supra,* after stating that the payments to Just Brothers were of a capital nature, continued at p. 279:

> In these circumstances their Honours evidently considered that the annuities, being charged on the land and payable during the lives of the father and mother, were in the nature of rents which the sons had to pay during this period in order to occupy the land and carry on their business.

(1) (1953) 10 A.T.D. 274.

Mr. Justice Fullagar, with whom Mr. Justice Kitto and Mr. Justice Taylor agreed, referring to the *Egerton-Warburton* case, stated:

> This was a case of a very exceptional character. . . . It is simply that in the particular circumstances the annuity was not regarded as part of a purchase price payable by the sons to the father for the land.

In these Australian cases the facts are quite distinguishable and do not appear to assist the appellant, more particularly as in Australia the *Egerton-Warburton* decision is regarded as one that apparently ought not to be extended beyond its particular facts. The appellant's acquisition of the lot and business is not in the nature of a purchase, as we ordinarily understand that term, but that does not detract from the fact that once he elected to take the lot and business he was required to enter into covenants and to make large payments, including those to his mother, and, however these payments may be technically described, they were made for the acquisition "of the right and opportunity to earn profits" rather than laid out or expended for the purpose of earning income.

The appeal should be dismissed with costs.

LOCKE J. (dissenting):—Joseph E. Wilson, the father of the appellant, had carried on business in Victoria for a long period of years under the firm name of W. & J. Wilson and died on January 2, 1945. The appellant has continued to carry on business under the same name since his father's death, in the same premises on Government Street in Victoria, and it is from the income derived from that business, treating it as a separate entity, that the payments in question are claimed to be deductible as an expense of operation.

By the will, the testator bequeathed to the appellant:

> the property and premises known as No. 1221 on Government Street in said City of Victoria and more particularly described as Lot 166, Block 13, City of Victoria, and the business carried on by me therein under the name of W. & J. Wilson and the goodwill thereof, all goods, stock-in-trade, furniture, machinery, store fittings and plant, together with the benefit of all contracts subsisting in relation to the said business, all book debts owing to me in connection with the said business and all securities for money, cash and money in bank to the credit of the said business.

Subject to his complying with the following terms:—paying all succession and probate duties chargeable against the estate and the legatees in respect of the bequests to himself, his mother and five named employees to whom a

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total of $2,000 was given, assuming and discharging all the debts and liabilities of the business and the premises referred to and entering into a covenant with his mother, binding himself to pay her $500 on the first day of each month during her lifetime, and a further covenant with her and with the trustees to pay all taxes, insurance premiums and the expenses of upkeep of the testator's former home at 811 St. Charles Street in Victoria and of a summer residence at Finnerty's Beach in the Municipality of Saanich. It was a term of the will that, should the appellant fail to carry out these conditions, the trustees were to sell the business and the premises, retain and invest such portion of the proceeds as they considered necessary to provide for the $500 payable monthly to Mrs. Wilson Sr. and to pay the balance to the appellant, the capital so retained to be paid to him on Mrs. Wilson's death.

While the record does not contain any evidence of the extent and nature of the assets bequeathed to the appellant on these conditions, these may, I think, properly be estimated from the balance sheet of W. & J. Wilson as of January 31, 1946, filed as an exhibit. This shows assets consisting principally of the business premises, cash, accounts receivable, inventories and Dominion of Canada bonds, of a value of $317,537.94. Of this amount, the business premises accounted for $118,316.45. The liabilities for accounts payable and amounts owing to sundry employees approximated $31,000.

Within a period of three months, the appellant entered into the required covenants with Mrs. Wilson, Sr. and with her and with the trustees and complied with the other stipulated conditions, thereupon becoming entitled to his bequest. Title to the store premises (as distinct from the business carried on therein and all the other assets mentioned) has remained, however, in the name of the trustees of Mr. Joseph E. Wilson's estate by reason of the following provision in the will:—

> The said Lot 166 shall be and is hereby charged with the performance by my said son's covenants required above by paragraphs (*d*) and (*e*) to be entered into by him and accordingly, during the lifetime of my wife the title to the said Lot 166 shall be in the names of my said Trustees.

This clause further provided that should the appellant desire the business premises to be sold, he might require

the trustees to do so, providing the price offered was approved by them and the moneys realized might, at the option of the appellant, be used for the purchase of other business premises and:—

unless so used shall be invested and the income to be derived therefrom shall be paid to my said son, subject to the performance by him of his covenants as above mentioned, and on the death of my said wife the capital thereof shall be paid to my said son.

Having entered into the required covenants and received the assets bequeathed to him, the appellant, in reckoning the income of the business of W. & J. Wilson, has charged as an expense of that business for each of the years 1946 to 1949, both inclusive, the amounts paid to Mrs. Joseph E. Wilson and the amounts expended for taxes and the upkeep of the two house properties. In the accounts of the business these were charged as rent amounting for the year 1946 to $6,427.77, for 1947 to $7,132.91, for 1948 to $6,950.53 and for 1949 to $6,798.62.

While W. & J. Wilson is simply the trade name under which the appellant carries on the business referred to, the income in respect of which the assessments complained of were made was that of this business alone and did not include the income of the appellant from other sources.

In respect to the taxation years 1946, 1947 and 1948, the liability is to be determined under *The Income War Tax Act* (c. 97, R.S.C. 1927 as amended): and for the year 1949 under the *Income Tax Act* (11-12 Geo. VI, c. 52). S. 6 of *The Income War Tax Act* reads in part as follows:

6. (1) In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of

(*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income;

(*b*) any outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence, except as otherwise provided in this Act;

(*c*) the annual value of property, real or personal, except rent actually paid for the use of such property, used in connection with the business to earn the income subject to taxation.

In *The Income Tax Act* of 1948, these paragraphs of s-s. (1) of s. 6 appear as paragraph (*a*), (*b*) and (*d*) of s-s. (1) of s. 12, with some slight changes. Thus para. (*a*) reads:—

(*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer.

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Para. (*d*) which replaced para. (*c*) of the earlier Act reads:

> (*d*) the annual value of property except rent for property leased by the taxpayer for use in his business.

As appears from the provisions of the will to which I have referred, on the death of his father the appellant was given the option of entering into the covenants mentioned or to receive from the trustees the proceeds of the sale of the business and the premises after they had deducted from the amount realized sufficient to provide for the obligations referred to, and on his mother's death to receive the amount retained to provide for the monthly payments to her. The appellant, while thus being under no obligation to do so, entered into the covenants and, in consequence, obtained the business as a going concern with the benefit of the goodwill which, it is clear from the evidence, was of great value, and was thus enabled to continue the business. While, under the terms of the will, the trustees were required to retain title to the store premises in their names until the death of the widow unless the appellant should elect to require that they be sold and used for the purchase of other premises, the appellant was, it is quite clear, from the time he entered into the covenants the beneficial owner of the property, subject only to the charge imposed upon it by the terms of the will.

In my opinion, the provisions of s. 6 (1) (*a*) of *The Income War Tax Act* and s. 12 (1) (*a*) of *The Income Tax Act* are fatal to the appellant's claim. While it is true that the monthly payments to Mrs. Wilson, Sr. and for the upkeep of the properties were made out of the earnings of the business carried on upon the store premises in question, these sums were paid in consequence of the obligations voluntarily assumed by the appellant and formed part of the consideration paid or agreed to be paid by him as a term of receiving, in addition to the lands and premises, all of the assets of his father's business valued in the 1946 balance sheet at roughly $200,000 and the valuable goodwill of that business. I think the situation to be no different than if, instead of stipulating for the payment of these monthly amounts and providing for the upkeep of the properties, the will had required that a lump sum should be paid to the widow and that the appellant had

agreed to pay and had paid such sum. In my opinion, the amounts so paid were neither "wholly, exclusively and necessarily laid out for the purpose of earning the income" of the business carried on under the name of W. & J. Wilson, within the meaning of *The Income War Tax Act*, nor did they constitute "an outlay or expense . . . for the purpose of gaining or producing income from . . . a business of the taxpayer" within the meaning of *The Income Tax Act*. Had the appellant ceased to carry on the business the day following that upon which he entered into the covenants, the monthly amounts would still have been payable by him as they would have been had he elected to request the trustees to sell the business premises.

In the evidence tendered at the hearing before Cameron J., Mr. Watt, a chartered accountant whose firm were the auditors for the appellant's business, said that the amounts paid to Mrs. Wilson, Sr. and the further amounts paid for the upkeep and the taxes payable in respect of the Victoria House property and the property at Finnerty's Beach were entered in the business accounts of the firm as payments for rent. However, no relationship of landlord and tenant existed since the appellant was the beneficial owner of the property and, indeed, the property, both land and the buildings erected on it, was shown as an asset of W. & J. Wilson in the balance sheet and annual depreciation claimed upon the building and fixtures.

In the argument addressed to us on behalf of the appellant, reliance was placed upon the decision of the Judicial Committee in *Raja Bejoy Singh* v. *Income Tax Commissioner* (1). With respect for differing opinions, I think that case is clearly distinguishable on its facts. That case came before the Judicial Committee by way of an appeal from the judgment of a court of appeal in India upon a reference under s. 66(2) of the *Indian Income Tax Act of 1922* (1930, 57 I.L.R.) The facts briefly were that the father of the appellant died intestate. The appellant, as his only son, inherited the estate. The widow, the appellant's stepmother, brought an action against him for a declaration that she was entitled to proper maintenance and suitable accommodation for her residence out of the properties in his hands forming part of the estate of her deceased husband. This

(1) (1933) 60 Ind. App. 196.

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suit was compromised, a consent decree being entered under the terms of which the appellant made over to his stepmother a place for her residence and agreed to pay a sum of Rs. 1100 monthly for her maintenance. The question referred to the Court was whether the Raja was entitled to deduct from his income the amounts so paid. Rankin C.J., who delivered the judgment of the Court, said in part (p. 924):—

> it was not disputed that the lady's maintenance was a legal liability of the Raja arising by reason of the fact that the Raja is in possession of his ancestral estate, that it is payable out of such estate and that this Court had declared that the maintenance was a charge thereon in the hands of the Raja.

Finding that there was no provision in the *Indian Income Tax Act* which permitted the appellant to deduct the amounts so paid from his taxable income, the Court found that they were taxable.

The judgment of the Judicial Committee which reversed the finding of the Court of Appeal was delivered by Lord McMillan. Referring to the judgment appealed from, he said in part (p. 200):—

> The learned Chief Justice in his judgment . . . deals with the case on the footing that, by the decree of the Court, the appellant's stepmother had a charge not only on his zamindari property from which his agricultural income was derived, but also on all his other sources of income included in the assessment. He rejects the suggestion that the appellant's liability to his stepmother was of the same kind as his liability to provide for his wives and daughter, and states that the position is the same as if the appellant "had received his various properties, securities and businesses under a bequest from his father upon the terms that these assets were charged with an annuity for the maintenance of the widow." The case was not one of "a charge created by the Raja for the payment of debts which he has voluntarily incurred." Their Lordships agree that this is the correct approach to the question.

and continuing:—

> It is not a case of the application by the appellant of part of his income in a particular way; it is rather the allocation of a sum out of his revenue before it becomes income in his hands.

The grounds upon which the judgment of the Court of Appeal were reversed are thus expressed (p. 200):—

> When the Act by s. 3 subjects to charge "all income" of an individual, it is what reaches the individual as income which it is intended to charge. In the present case the decree of the Court by charging the appellant's whole resources with a specific payment to his stepmother, has to that extent diverted his income from him and has directed it to his stepmother; to that extent what he receives for her is not his income. It is not a case

of the application by the appellant of part of his income in a particular way; it is rather the allocation of a sum out of his revenue before it becomes income in his hands.

The charge upon the estate in that case to which the stepmother was entitled under the Hindu law, the extent of which was declared by the decree, extended to the income derived from it. It was by reason of this that Lord MacMillan said that, to the extent of the amounts to which the stepmother was found entitled, the Raja received the income on her behalf.

In the present matter there was no charge upon either the business of W. & J. Wilson or the income from that business. The charge was upon the land alone and was not one to which it was subject by law but arose only upon the appellant electing to acquire the business, the property and the other assets mentioned and entering into the required covenants. The income was not accordingly diverted to Mrs. Wilson, Sr. nor did the appellant receive any part of it on her behalf. The money so paid were not for expenses incurred in earning the income of the business but in satisfaction of the appellant's obligations under his personal covenants.

It may be noted that while the Raja realized more than half of his total income from the business of agriculture carried on upon the estate and while s. 10(2)(XV) of the *Indian Income Tax Act* permitted the deduction from the profits of a business of:—

> any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly or exclusively for the purpose of such business.

neither the report of the proceedings in the Court of Appeal or in the Privy Council indicate that the claim to deduct the payments made was attempted to be justified under this statutory provision.

I find nothing in this decision to support the appellant's contention in the present matter.

As the appellant was the owner of the business premises, he was not entitled to any deduction for their annual value by reason of the provisions of s. 6(1)(*c*) of the *Income War Tax Act* and s. 12(1)(*d*) of the *Income Tax Act*.

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Locke J.

I am of the further opinion that the payments made to Mrs. Wilson, Sr. were payments on account of capital, within the meaning of s. 6(1)(*b*) of the *Income War Tax Act* and s. 12(1)(*b*) of the *Income Tax Act* respectively, and are thus not proper deductions from income. Those payments were merely part of the consideration which the appellant agreed to pay as a term of acquiring all of the assets of the business theretofore carried on by his father. The fact that part of the agreed consideration was payable in instalments during his mother's lifetime cannot affect the true nature of the transaction or render such payments any the less "payments on account of capital."

I would dismiss this appeal with costs.

FAUTEUX J.:—The land charged and actually used in the business of the appellant did produce an income which, equal to the rental value of the land, was merged with the gross receipts of the business. But, as shown in the reasons for judgment of my brothers Rand and Kellock, the charge on the land, imposed as a condition precedent to the right of beneficial ownership, diverted from the business, in a measure equal to the amount necessary to its satisfaction, such income it produced and thus, and to this extent, prevented it becoming income to the appellant. In this view, the provisions of s. 6(1) (*a*) and (*b*) of the *Income War Tax Act,* R.S.C. 1927 c. 97, as amended, and s. 12(1) (*a*) and (*b*) of the *Income Tax Act,* 11-12 Geo. VI, c. 52, as amended, are of no application in this case.

I would therefore allow the appeal with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Haldane & Campbell.*

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

GEORGE WOTTA AND WILLMS TRANSPORT CORPORATION (*Plaintiffs*) ..... APPELLANTS;

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*Feb. 14
*Apr. 26

AND

HALIBURTON OIL WELL CEMENTING COMPANY AND MIKE SMAYDA (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Automobiles—Oncoming vehicles—Collision while passing—Claim and Counterclaim—Conflicting evidence—Negligence—Trial judge unable to make any finding as to liability—Dismissal of claim and counterclaim.

Following a collision between two oncoming trucks, a claim and counterclaim was made by the parties. The accident occurred in daylight at a curve on a dirt road, which was dry and level. The weather was clear. Both parties alleged that the accident occurred after the front parts of their vehicles had passed and that the collision was caused by the negligence of the other driver. The two drivers were the only witnesses of the accident and each testified that he had been driving on his own side of the road. There were no marks on the road, there was ample clearance between the front parts of the vehicles as they passed, and both drivers saw the other vehicle as they approached.

The trial judge was unable to make a finding of negligence against either driver. He found that neither side had proved its case and dismissed both the claim and the counterclaim. The appeal and the cross-appeal were both dismissed by the Court of Appeal. Only the plaintiff appealed to this Court.

Held (Kellock J. dissenting): that the appeal should be dismissed.

Per Taschereau J.: The contention that there is a collision between two motor vehicles, under such circumstances that there must have been negligence on the part of one or both drivers, and the court is unable to distinguish between such drivers as to liability, both drivers should be found equally at fault, is untenable. There are no principles of law that may justify a court of justice, in a case like the one at bar, to hold a person liable in damages, unless negligence is established. There was no prima facie case that both parties were negligent and it is impossible to infer from the facts where the responsibility lies. Neither party has proved its case and both claims were rightly dismissed.

Per Estey J.: There is no suggestion on the part of the trial judge that either driver must have been negligent and the evidence is not such as to lead necessarily to the conclusion that one or the other, or both, were negligent. No basis is disclosed in this case for holding that the judgments below are characterized by some aberration from principle or affected by some error at once radical and demonstrable in the appreciation of the evidence adduced or in the method by which the consideration of it has been approached.

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

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Per Locke and Fauteux JJ.: The onus of proving negligence, which was the only cause of action asserted in both the action and the counterclaim, lay upon the party advancing the claim. The appellant's contention that the respondent's truck had been driven around the curve at a high rate of speed, causing its rear wheels to skid and to come into contact with the appellant's vehicle, was rejected by the trial judge. There are concurrent findings on this question of fact and this Court should not interfere unless satisfied that the courts below were clearly wrong. The trial judge and the Court of Appeal declined to draw the inference that both parties were at fault and the evidence did not justify such an inference. The respondent may not be found liable on the footing that one or the other of the drivers was guilty of the negligence which caused the collision.

Per Kellock J. (dissenting): The problem presented by such case as the present one is to be approached not only from the point of view that either the one driver or the other had been negligent, but also from the standpoint that the collision had occurred from the negligence of both, and is to be determined upon the balance of probabilities. The trial judge did not approach the case from that standpoint. A consideration of the evidence leads to the conclusion that the negligence which caused the accident was that of the driver of the respondent's car.

APPEAL from the judgment of the Court of Appeal for Saskatchewan, dismissing the appellant's appeal from the dismissal of a claim and counterclaim following a collision between two motor vehicles.

L. McK. Robinson, Q.C. for the appellant.

E. D. Noonan, Q.C. for the respondent.

TASCHEREAU J.:—The plaintiffs-appellants seek to recover damages from the defendants-respondents, as a result of a highway accident which occurred on the 25th of August, 1952, on a municipal road between Katepwa and Balcarres, in the province of Saskatchewan. Wotta, one of the plaintiffs, claims $4,180, being the value of a 1951 White Power Unit, and the other plaintiff claims $6,269, representing the value of a semi-trailer, and 3,000 gallons of gasoline. The total weight of both vehicles and cargo was about twenty tons. The power unit was driven by one Osler. The defendant company, owner of a 1951 model F.W.D. truck, also sustained damages as a result of the collision, and counter-claimed against both plaintiffs for $9,636.79. The trial judge dismissed the action and the counter-claim, and his judgment was confirmed by the Court of Appeal. The plaintiff only appeals to this Court.

The appellants' car was being driven in a northerly direction, and the defendant Smayda, an employee of the company, was at the wheel of the truck coming in the opposite direction. The two drivers were the only witnesses of the accident, and their evidence is conflicting. The trial judge was left in a quandary as to who caused the accident, or as to who contributed to it. He could not make any finding of negligence, and consequently dismissed the action and counter-claim, as neither party proved its case, not having *sustained the onus* which was necessary to success. The Court of Appeal shared these views, and I am satisfied that these judgments should stand.

It has been submitted by the counsel for the appellants that when there is a collision between two motor-vehicles, under such circumstances that there must have been negligence on the part of *one* or both drivers, and the Court is unable to distinguish between such drivers as to liability, both drivers should be found equally at fault. The case of *Leaman* v. *Rae* (1) was cited as an authority for that proposition. If that case has really that meaning, as it seems to have, I respectfully think that it should be overruled, as I am not aware of any principle that may justify a court of justice in a case like the one at bar to hold a person liable in damage, unless negligence is established. As it was said by Jenkins L.J. in *Bray* v. *Palmer* (2) "there is no doubt that a judge is entitled in an action for damages for personal injury occasioned by the negligent driving of the defendant to reject the plaintiff's case, if in the view of the judge, the evidence does not suffice to make out that case. The onus is on the plaintiff. The same, of course, applies where there is a counterclaim; the onus is on the defendant to make out the counterclaim." In that case, the trial judge found the stories of the plaintiffs and the respondents "wildly improbable" and was unable to choose between the two, and therefore dismissed the claim and counter-claim. The Court of Appeal ordered a new trial, merely because the trial judge took the view that the accident must have been due to the exclusive negligence of one or the other side, and rejected the possibility of both sides being to blame.

(1) [1954] 4 D.L.R. 423.

(2) [1953] 2 All E.R. 1449 at 1451.

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Taschereau J.

In *France* v. *Parkinson* (1) and *Baker* v. *Market Harborough* (2), the Court of Appeal held that prima facie an inference could be drawn that both parties were negligent, and that both drivers should share the responsibility. The present case is entirely different. No prima facie case has been established, and it is impossible to infer from the facts where the responsibility lies. Neither the plaintiff nor the defendant who counter-claims has proved its case, and both claims were rightly dismissed.

The appeal fails and should be dismissed with costs.

KELLOCK J. (dissenting):—These proceedings arise out of a collision between two motor vehicles which occurred on a municipal road between Katepwa and Balcarres, in the Province of Saskatchewan, on the 25th of August, 1952. The road was dry and level, the weather was clear and the accident occurred in broad daylight. The appellants' vehicle, consisting of a tractor and trailer, carrying a load of gasoline and weighing in all some twenty tons, was being driven northerly by one Osler, while the respondents' vehicle, a truck, with its load of oil well cementing equipment, consisting of a motor, two pumps and a tank, and weighing some fourteen tons, driven by one Smayda, was proceeding southerly. In the vicinity of the point of collision, the road borders a coulee to the west, around which it curves. The curve to one proceeding southerly is first to the east and then to the west.

According to Smayda, although his truck was still on the curve, the rear end of it had reached a point approximately twenty feet south of the peak or apex of the curve when the collision occurred. Osler says that the place of collision was some seventy-five or one hundred feet southerly of the apex of the curve. The respondents do not in any way attack the credibility of the witness with respect to this statement. He was badly burned and was rushed to the hospital from the scene of the accident. They contend merely that in thus placing the place of accident, he was expressing a view formed on a later inspection.

The fronts of the vehicles successfully passed each other but contact occurred between parts of the vehicles to the rear of where each driver sat. Neither driver saw the actual

(1) [1954] 1 All E.R. 739. (2) [1953] 1 W.L.R. 1472.

contact. The steering gear of the appellant's vehicle being rendered useless, the vehicle, as Osler says, "angled along the road a little bit" and and then went down into the coulee to the west at a point immediately south of the apex of the curve. On the other hand, the rear wheels of the respondents' vehicle were knocked out of commission, with the result that it "just fell over" on its right side but remained within the travelled part of the west side of the road.

Each of the drivers had seen the other's vehicle or the dust from its approach for a considerable distance before they met. According to Osler, he was on his own side of the road with the right wheels of his vehicle about two feet from the ditch. Smayda testified that his right wheels were two feet from the "edge of the road". Whether he meant the edge of the travelled part of the road or that he was, like Osler, on the shoulder, he did not indicate. The vehicles themselves were approximately eight feet wide. The travelled part of the road was from twenty-two to twenty-four feet wide, while from shoulder to shoulder it was thirty feet.

Smayda does not attempt to account for the collision, stating that he does not know how it occurred. Osler testified that as the respondents' truck came around the curve it was, in his view, proceeding at some forty miles an hour and that it "slid" into the vehicle he was driving. Smayda testified that his vehicle could not reach a speed of more than twenty-eight miles per hour in fourth gear, which he was using at the time. Each of the drivers deposed that he was travelling about twenty-five miles per hour, and that neither had put on his brakes before the accident.

The learned trial judge reached the conclusion that both vehicles were in fourth gear at the time of the collision and that their maximum speed would be twenty-eight miles per hour. He also accepted the evidence of Smayda that the latter's truck would not skid at such a speed. The learned judge said that he found himself in a quandary and could make no finding as to "which" driver had been negligent. He therefore dismissed both the action and counterclaim.

Both parties appealed but the appeal and cross-appeal were dismissed. Martin, C.J.S., in delivering the judgment of the court, after stating that the onus was upon each party

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to prove negligence on the part of the driver of the other vehicle, summed up the judgment of the learned trial judge as follows:

> After a detailed review of the evidence the trial judge concluded that he could not make a finding which driver was negligent; he was of the opinion that neither party had sustained the onus which was necessary to success.

In the view of the learned Chief Justice:

> The important point in the case is as to *which* vehicle was on the wrong side of the centre of the highway . . . There was no eye-witness and there were no marks on the highway which would indicate *which* vehicle was on the wrong side. The learned trial judge has made no findings as to the credibility of the witnesses and under the circumstances, it is impossible for this court to say that the trial judge was wrong in his decision *that he could not find which driver was negligent.*

It is, of course, true, as has been pointed out in other cases, that a judge is entitled in an action for damages occasioned by the negligent driving of the defendant to reject the plaintiff's case if, in the view of the judge, the evidence does not suffice to make out that case. The onus is on the plaintiff. The same, of course, applies where there is a counterclaim; the onus is on the defendant to make out the counterclaim.

In *Claxton* v. *Grandy* (1), Cannon J., speaking for Duff C.J., Rinfret and Crocket JJ., said at p. 263:

> Moreover, a jury, properly directed, would have found that, in the case of two cars driven on a straight road having an icy surface, about to pass each other when the collision occurred such an accident must have resulted from negligence, and not from an unavoidable accident. . . .

In my opinion, this statement is not limited to the facts of the case there under consideration and is even more applicable where the road surface is dry. The problem presented by such a case as the present is to be approached from the above point of view, and is to be determined by the balance of probabilities.

In *Baker* v. *Harborough Industrial Co-operative Society Ld.* (2), Denning L.J., points out at 1476, that it is pertinent to ask in such a situation what would have been the position if there had been in either of these vehicles, a passenger who had been injured in the collision. Had he brought action, then on proof of the collision the natural inference would be that one or other or both drivers had been to blame. Every day, proof of collision is held to be

(1) [1934] 4 D.L.R. 257. (2) [1953] 1 W.L.R. 1472.

sufficient in such a case to call on the two defendants for an answer, and in no case do both escape liability, one or other being held to blame, and sometimes both.

Where, as here, no third person is involved, the conclusion, as already stated, while it might be that neither had established a case of negligence on the part of the other, in reaching that conclusion the court would have to approach the problem, not only from the standpoint that either the one or the other had been negligent, but also from the standpoint that the collision had arisen from the negligence of both.

In my opinion, it is clear that the learned trial judge, in the case at bar, did not approach the case from that standpoint. This is stated in terms in the judgment of the Court of Appeal. As there pointed out also, the learned trial judge did not deal with the question of credibility. Although he appears to have proceeded on the view that the collision occurred through negligence, nevertheless, unless he could determine *which* driver had been negligent, the action and counterclaim must fail. He did not direct his mind to the question as to whether or not both had been negligent. This would of itself be sufficient to require that a new trial be directed. *Bray* v. *Palmer* (1). When the evidence is considered, however, it leads, in my opinion, to a different result.

Under the provisions of the relevant statute, the *Vehicles Act*, 1951, c. 85, s. 124(1), each driver was required, in passing the other, to drive closer to the shoulder than to the centre of the road, and by s-s. (8), not to inconvenience the other in any way. According to his evidence, Osler was complying with these requirements but Smayda was not, if his evidence above referred to is to be taken as referring to the edge of the travelled part of the road.

In answer to a question by his own counsel as to whether he had swung "over to the left at all, that is the east side of the road, at any time coming around that curve", Smayda's answer was:

> No, I don't think so—no.

Again, on discovery, he testified in relation to the time when his truck was rounding the curve,

> I think if I had put on the brakes that it probably would have pulled me into the coulee.

(1) [1953] 2 All E.R. 1449.

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Why this should have been the result is not explained. When proceeding around the curve, the tendency of the vehicle would undoubtedly be to go to its left and the driver would, of course, be endeavouring to control that by directing the vehicle to the right. Had the vehicle been proceeding around the curve under proper control, application of the brakes should not have had any such result as Smayda says he feared. There is, in the above answer, more than a suggestion that, under the circumstances, Smayda realized that he was going too fast.

Smayda testified also that when the fronts of the two vehicles passed each other there was an intervening space of some four feet. At that time the whole of the appellants' vehicle was in his vision and remained so until the tail end of the trailer had passed him. If there had been the slightest indication during that time that any part of that vehicle would encroach upon the road occupied by any part of Smayda's truck, he would undoubtedly have realized it and said so. He notices nothing of the kind, however. In fact, as already pointed out, he does not suggest fault in any particular on the part of the driver of the appellants' truck.

If, therefore, the rear of Smayda's truck had been proceeding and continued to proceed in the same path as the front of his vehicle, there could have been no collision. The probable explanation for the collision, in my view, is either that the rear of the respondents' truck had not straightened out on the road after rounding the curve, or that the high load which it carried caused the body to lean toward the left under the influence of the pull to the left to which it was subjected in rounding the curve. This would explain what Osler saw and described as "sliding", even though, as found by the learned judge, the truck did not actually skid. There is, moreover, other evidence which supports this view.

After the accident the respondents' truck turned over on its right-hand side and came to rest on the westerly half of the travelled portion of the highway. The force of the collision with the much heavier vehicle of the appellants would, of course, tend to drive the respondents' vehicle to its right. The inference, therefore, is that that truck was farther to its left when struck than when it came to rest.

It is, however, contended that no inference of this kind can be drawn because Smayda at one point in his evidence

testified that his truck had travelled some sixty feet out of control after the accident before it came to rest. He does not say, however, that in the interval the course of the truck had in any way been deflected towards its left. Moreover, in his answer to his own counsel he said:

A. Well, as the fronts passed, the fronts of the trucks, it was O.K., there was plenty of clearance. I would say practically four feet, everything was fine, just passing by like any other vehicles on the road, *until it struck* some place in the rear. There was just one—and that was it. My truck went out of control and started to turn *then*, the wheels were knocked out underneath it.

Q. Do you know what caused your truck to go out of control?

A. Well, the back wheels were knocked out and they criss-crossed underneath the truck and the truck *just went over on its side and turned over.*

The italics are mine.

Osler testified that any curve in the road upon which he was travelling tended to carry his vehicle to its right. This is undoubtedly so.

In these circumstances, in my opinion, the evidence warrants the conclusion that the negligence which caused the accident was that of the driver of the respondents' truck. I would therefore allow the appeal and, the respondents not having questioned the damages, direct the entry of judgment in favour of the appellants for the sum of $10,149. The appellants should have their costs throughout.

ESTEY J.:—This appeal arises out of a collision between two large motor vehicles at about 3:00 o'clock in the afternoon of August 25, 1952, on a municipal road near Katepwa in the Province of Saskatchewan. The appellants brought an action for damages to their truck and trailer and the respondent Haliburton Oil Well Cementing Company, Limited counterclaimed for damages to its truck. The learned trial judge stated: "On the evidence I cannot make a finding which driver was negligent," and dismissed both the action and the counterclaim. This judgment was affirmed in the Court of Appeal, where it was pointed out that there were no eye witnesses other than the drivers of the respective motor vehicles and no evidence of skid or other marks on the highway to indicate the position of the motor vehicles as they approached the point of collision. The drivers, in their evidence, differed materially on vital points. Chief Justice Martin, writing the judgment of the Court, concluded:

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The learned trial judge has made no findings as to the credibility of the witnesses and under the circumstances it is impossible for this court to say that the trial judge was wrong in his decision that he could not find which driver was negligent.

The learned trial judge stated the facts:

At about 3:00 o'clock on the afternoon of the 25th day of August, 1952, one Donald Osler, an employee of the plaintiff Wotta, was driving a motor vehicle comprised of a 1951 White power unit owned by the plaintiff Wotta and a Westeel semi-trailer owned by the plaintiff Willms Transport Corporation. This motor vehicle was just less than eight feet in width and 37 or 38 feet long and the semi-trailer carried 3,000 gallons of gasoline. The total weight of the unit and cargo was 20 tons. Visibility was good. The vehicle was being driven in a northerly direction on a municipal road between Katepwa and Balcarres. The road was dry, in good condition and Osler says that the travelled portion of the road was approximately 24 feet wide. When surveyed on May 4th, 1953, the width was established as 30 feet from shoulder to shoulder.

At the same time the defendant Smayda, an employee of the defendant Haliburton Oil Well Cementing Company, Limited, was driving a 1951 model F.W.D. truck owned by his co-defendant, in a southerly direction from Balcarres on the same road. The truck was a solid unit, that is, there was no trailer. The truck weighed about 14 tons, was 26 feet in length and 7' 10" in width. Both drivers were experienced operators and knew the road well. Osler says in his evidence that he saw the defendant's truck coming towards him about a mile away and was at that time travelling at about 20-25 miles per hour, that he was driving at this slow rate of speed in order to avoid meeting the truck on the curve. He was driving on the east side of the road about three feet from the edge. He claims that as the defendant's truck came around the curve it was sliding and that he endeavored to edge into the ditch, but the truck "struck me on the front along the side of my truck." On being asked by counsel for the plaintiff whether the front part of the defendant's vehicle went by without colliding with the front part of his, he replied "I don't know, I can't say just what—exactly whether the front part of his vehicle struck first or whether it scraped or whether it went by clear, but he claims the defendant's vehicle struck his."

In this Court the appellants rested their case largely upon the contention that the respondent Smayda drove the Haliburton vehicle around the curve in such a negligent manner as to cause it to skid and collide with the appellants' truck. The road was a muncipal dirt highway and, upon the day in question, dry. Osler, driving the appellant's truck, deposed:

. . . this truck came around the curve and it was sliding and I tried to edge into the ditch, I tried to get my outside into the ditch but this truck struck me on the front along the side of my truck.

.....

Well, I saw him come around the curve and I saw him starting to slide and I watched him and he didn't seem to be getting any less.

At another point in his evidence he used the word "skidding". While at that time he thought Smayda was driving too fast, he did not then form an opinion as to his speed, but, at the trial thought he was going about forty miles an hour.

Smayda, driving respondent's truck, says he was driving in fourth gear at about twenty-five to twenty-eight miles an hour and, going around the curve, because of the governor on his vehicle, he could not go faster than twenty-eight miles per hour. At that speed he deposed "there is no possible chance of that truck skidding." Moreover, he said he experienced no trouble in going around the curve. The trial judge stated:

> It is true that Osler says the defendant's truck caused the collision, that he tried to go into the ditch and that the defendant's truck skidded. On the other hand, I accept the evidence that a truck of that description would not skid at the maximum speed of 28 miles per hour but I can understand that a trailer outfit as the plaintiff was operating might do so. There is no physical evidence such as tire marks to assist me.

While the trial judge makes no finding as to credibility, it is obvious that in this instance he accepts the evidence of Smayda and refuses to accept the evidence of Osler. The learned trial judge so disposed of that contention and the evidence supports his conclusion.

Once that issue is disposed of the evidence is all to the effect that two competent drivers, familiar with the road, proceeding at a reasonable rate of speed around what they both described as a dangerous curve, somehow collided. That the front ends passed without contact appears to be clearly established. The road measured thirty feet from shoulder to shoulder. Both drivers claim they were within two feet of the edge of the road. Both trucks were approximately eight feet wide. If the drivers were right as to their respective positions, there was such a distance between their vehicles as to make a collision, apart from very substantial skidding or some other incident not here suggested, impossible. Smayda says the distance between the two vehicles as their front ends passed was about four feet. Osler, when asked if the front of his vehicle passed without hitting the front of respondent's, answered:

> I don't know. I can't say just what—exactly whether the front part of his vehicle struck first or whether it scraped or whether it went by clear.

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He was, however, satisfied that it was the respondent's vehicle that struck his. The impact must have been substantial. Osler's vehicle proceeded some distance into a coulee on the south side of the road and immediately caught fire. The Smayda truck remained upon the highway, proceeded some sixty feet and turned over on its side. An examination of that vehicle disclosed that the point of impact must have been just in front of the rear wheels. Osler states that as a consequence of the impact his brakes were completely ineffective.

It is also of some significance that, though Osler deposed he saw the respondent's truck sliding or skidding, he was not sure whether the front end had passed without colliding. Moreover, he changed his mind as to where the collision took place after he had visited the premises at some later date.

Counsel for the appellants cited a number of cases which he submitted lent support to his submission, among them *Laurie* v. *Raglan Building Co.* (1). There a ten-wheel lorry, heavily laden with wood, was driven on a road described as "in an extremely dangerous condition." It had snowed earlier in the day, then it had frozen and "the surface of the road was like glass." In the course of his judgment it was stated by Lord Greene M.R.:

> . . . the road was in such a condition that a prudent driver, even if he did not find it necessary to stop, would have proceeded at a very much slower speed.

The excessive speed of the defendant upon the slippery road presented a stronger case in favour of the plaintiff and quite distinguishes it from the case at bar.

He also referred to *McIntosh* v. *Bell* (2), where a collision occurred between the appellant's (plaintiff's) truck, driven westward on Boulevard Drive in Toronto, and a motor car driven eastward by the respondent (defendant). The learned trial judge was of the opinion that a dangerous rate of speed had not been proved, nor had the other items of negligence been established, and he accordingly dismissed the action. The Court of Appeal held that upon the defendant's own evidence he was driving in a dangerous manner

(1) [1942] 1 K.B. 152. (2) [1932] O.R. 179.

on a slippery road and, as a consequence, at a turn in the road, he skidded across a wide boulevard and collided with the plaintiff. Latchford C.J. stated at p. 183:

> The fact remains that when the defendant was aware the pavement was in a most dangerous condition, his car was being driven by him at such a speed that its momentum caused him to lose the control which it was his duty towards the plaintiff to have exercised in the circumstances.

Here again the condition of the road and excessive speed, neither of which is present in the case at bar, make it quite distinguishable upon its facts.

In *Claxton* v. *Grandy* (1), the collision occurred upon a straight, slippery road, when visibility was good. The plaintiff claimed damages on the basis of the defendant's negligence and the defendant counterclaimed, alleging the plaintiff was negligent. The jury found that owing to the icy condition of the pavement the accident was unavoidable. Upon this verdict the learned trial judge dismissed both the claim and the counterclaim. In the Court of Appeal a majority of the learned judges (Middleton and Macdonnell JJ.A. dissenting) affirmed the judgment at trial. In this Court it was held that there "were serious misdirections" and with respect to unavoidable accident Mr. Justice Cannon (with whom Sir Lyman Duff C.J., Rinfret J. (later C.J.) and Crocket J. agreed) stated at p. 263:

> . . . a jury, properly directed, would have found that, in the case of two cars driven on a straight road having an icy surface, about to pass each other when the collision occurred such an accident must have resulted from negligence, and not from an unavoidable accident.

In *Bray* v. *Palmer* (2), the facts were that both drivers turned toward the centre of the highway, which resulted in a head on collision. Both gave their respective explanations for so doing. In such circumstances at least one, as the learned trial judge intimated, was at fault. The Court of Appeal, while expressly recognizing the well known rule that a plaintiff must prove negligence in order to recover, concluded that upon the evidence negligence was established and that in the circumstances it was for the judge to determine whether one or both of the parties were negligent.

In the case at bar there is no suggestion on the part of the learned trial judge that either must have been negligent

(1) [1934] 4 D.L.R. 257. (2) [1953] 2 All. E.R. 1449.

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and, apart from the skidding, to be further discussed, the evidence is not such as to lead necessarily to the conclusion that one or the other, or both, were negligent.

In the case at bar the appellants did make a prima facie case of negligence when Osler deposed the respondent's vehicle skidded as it came around the curve. This, considered in relation to the evidence given by Smayda, caused the learned trial judge to conclude that there had been no skidding and, therefore, he did not accept the evidence of Osler. While the learned trial judge did not make a finding with respect to the credibility of the respective drivers, he did, upon this issue, accept the evidence of the respondent. The onus rested upon the appellants to prove negligence on the part of the respondent. Upon the evidence the learned trial judge found that he could not find the driver Smayda was negligent and, therefore, the appellants had not discharged the onus resting upon them, nor could he find that the driver Osler was negligent and, therefore, the respondent had not discharged the onus resting upon it with respect to its counterclaim. In the result the learned trial judge has found that neither the appellants nor the respondent had discharged the onus to establish the negligence which they had alleged.

As already stated, the Court of Appeal affirmed the view expressed by the learned trial judge. In such circumstances the rule expressed by Sir Lyman Duff in *Livesley* v. *Horst Co.* (1), applies:

> In these circumstances, the appellants must fail unless they can make it appear that the judgments below are characterized by some aberration from principle or affected by some error at once radical and demonstrable in the appreciation of the evidence adduced or in the method by which the consideration of it has been approached.

It would appear that no basis is disclosed in this record for holding that any of the exceptions mentioned in the foregoing quotations are present in the case at bar.

The appeal must be dismissed with costs.

The judgment of Locke and Fauteux JJ. was delivered by

LOCKE J.:—On the afternoon of August 25, 1952, the vehicle driven by one Osler, the property of the appellant Wotta, and that of the respondent, driven by one Smayda,

(1) [1924] S.C.R. 605 at 606.

collided upon the road between Katepwe and Balcarres. This was described in the evidence as an ordinary municipal dirt road which ran approximately north and south, being 30 feet in width from shoulder to shoulder, of which some 22 feet was occupied by the travelled portion.

Osler was driving north. The vehicle driven by him was a White truck and 3,000 gallon Westeel tank semi trailer designed for hauling gasoline, the over all length approximating 36 feet and the width 8 feet. With its load the total weight approximated 40,000 pounds. The semi trailer was equipped with dual wheels.

The vehicle driven by Smayda which was proceeding south consisted of a F.W.D. truck carrying a tank and two pumps and other equipment used for the purpose of cementing oil wells, its length being 26 feet over all and its width at the widest point 7 feet 10 inches. It was equipped with single wheels in the front and two duel wheels on each side at the rear. Its weight approximated 28,000 pounds.

Both drivers saw the other vehicle as they approached the scene of the accident. The exact point of impact was not found by the learned trial judge but the evidence appears to me to establish that it was at or close to a point where the road, which curved slightly to the east to pass a coulee, straightened out to continue southerly.

It is common ground that there was ample clearance between the front portions of the vehicles as they passed. When examined for discovery, Smayda said that the front of his truck was about 4 feet west of the other vehicle as they passed and this was put in as part of the appellant's case at the trial. In passing, however, the vehicles came into collision. According to Osler, the respondent's truck struck that of the appellant but he was unable to say whether it was the front part or the side of it which had struck his vehicle. According to Smayda, the reverse was the case. He claimed that his truck had been struck by the appellant's vehicle near the rear wheels which, he said, were "knocked out" so that the truck turned over on its side. Both drivers claimed to have been driving on their own side of the road. Osler, who said that his own speed was from 20 to 25 miles per hour, estimated the speed of the other truck at 40 miles per hour as it passed around the curve on

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the road, and said that it was "sliding" towards him and that while he had endeavoured to turn his vehicle into the ditch at the east side of the road he had been unable to do so. Smayda said that he had been driving in fourth gear as he rounded the curve at about 28 miles per hour and that there was a governor on the engine which prevented his going any faster. According to him, he had no difficulty in negotiating the curve, and said that the road was perfectly dry, and there was no possible chance of the truck skidding at that speed.

There were no marks on the road made by either truck to assist in determining their respective positions either before or at the time of impact and, other than the two drivers, there were no eye witnesses.

The present appellant brought action and the respondent counterclaimed for the loss sustained by them respectively.

Doiron J., by whom the action was tried, found that both vehicles were in fourth gear at the time of the collision and that their maximum speed was not more than 28 miles per hour, thus rejecting Osler's estimate of the speed of the respondent's car. As to the alleged sliding or skidding of the respondent's truck, the learned trial Judge said:—

> I accept the evidence that a truck of that description would not skid at the maximum speed of 28 miles per hour but I can understand that a trailer outfit as the plaintiff was operating might do so.

Saying that on the evidence he was unable to make a finding of negligence against either driver, he found that neither side had proved its case and dismissed both the action and the counterclaim.

The present appellant appealed to the Court of Appeal and the present respondent cross-appealed and both appeals were dismissed by the unanimous judgment of the Court delivered by the Chief Justice of Saskatchewan. The reasons for judgment delivered conclude:—

> The learned trial judge has made no findings as to the credibility of the witnesses and under the circumstances it is impossible for this court to say that the trial judge was wrong in his decision that he could not find which driver was negligent.

Rule 141 of the Court of Queen's Bench of Saskatchewan declares that counterclaim shall have the same effect as a cross action. The collision being between two motor vehicles upon a highway, the statutory presumption of

negligence referred to in s.152(1) of the *Vehicles Act* (R.S.S. (Sask.) c. 344) is inapplicable. The onus of proving negligence, which was the only cause of action asserted in both the action and the counterclaim, lay upon the party advancing the claim.

I construe the finding of the learned trial Judge as meaning that the evidence adduced by the parties respectively, to the extent that the same was accepted by him, failed to satisfy him that the other party was at fault.

As long ago as 1860, Erle C.J. said in *Cotton* v. *Wood* (1):

> Where it is a perfectly even balance upon the evidence whether the injury complained of has resulted from the want of proper care on the one side or on the other, the party who founds his claim upon the imputation of negligence fails to establish his case.

a statement the accuracy of which has never been questioned.

It was the appellant's case that Smayda had driven around the curve at a high rate of speed, causing the rear wheels of his vehicle to skid so that they came in contact with the appellant's vehicle, but both these contentions were rejected by the trial Judge. There are concurrent findings on these questions of fact and we should not interfere unless satisfied that the courts below were clearly wrong in the manner in which they disposed of the issue (*Albert* v. *Aluminum Co.* (2)). These contentions being negatived, there remained only the conflicting evidence of the drivers that each had driven on his side of the centre of the roadway.

In *Metropolitan Railway Co.* v. *Jackson* (3), a case in which the issues of negligence had been tried by a Judge and a jury, Cairns L.C. said (p. 197):

> The Judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence ought to be inferred.

Where, as in the present matter, the issues are tried by a Judge without a jury, he must decide both of these questions. The learned trial Judge, upon the evidence in this case, declined to draw the inference that there had been negligence on the part of either driver, and the Court of

(1) (1860) 8 C.B. (N.S.) 568 at 571.
(2) [1935] S.C.R. 640 at 642.
(3) [1877] 3 A.C. 193.

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Appeal has unanimously concurred in that view. My consideration of the evidence taken at the trial and the argument addressed to us on behalf of the appellant has failed to disclose any error in the judgment appealed from and, in my opinion, this appeal fails.

We were referred on the argument of this matter to the judgment of the Appeal Division of the Supreme Court of New Brunswick in *Leaman* v. *Rea* (1), and some recent decisions in the Court of Appeal in England where, upon the facts proven, it was found that the inference to be drawn was that both parties had by their negligence contributed to the accident. It must be rarely, indeed, that decisions upon the facts proven in one negligence action are of assistance in arriving at a proper conclusion upon different facts in another action. What constitutes actionable negligence and the applicable rules as to the burden of proof are matters which have long since been decided. In Beven on Negligence, 4th Ed. 138, it is said that the rule *res ipsa loquitur* does not apply to an accident on a highway and that the fact of an accident raises no presumption of negligence. As support for that statement, a passage from the judgment of Blackburn J. in *Fletcher* v. *Rylands* (2), in which that learned Judge referred to what had been said in *Hammack* v. *White* (3), is relied upon. I think this statement to be too broad since there are circumstances in which negligence may be inferred from the mere occurrence of an accident upon a highway. In the New Brunswick case, the trial Judge had been of the opinion that the two cars which came into collision were driving in the center of the highway when they collided, and one of the cases in England upon which Harrison J. relied was *Bray* v. *Palmer* (4), where there had been a head-on collision in the center of the road. In such cases, at least in Canada where the various highway traffic statutes as well as every rule of prudence require drivers when meeting another vehicle to turn seasonably to the right to permit a safe passing, a collision in the center of the road clearly affords some evidence from which negligence on the part of each driver might, in the absence of a satisfactory explanation, be properly inferred.

(1) [1954] 4 D.L.R. 423.
(2) (1866) L.R. 1 Ex. 265 at 286.
(3) (1862) 11 C.B. (N.S.) 588.
(4) [1953] 1 W.L.R. 1449 at 1455.

This is, however, not such a case. It appears to be common ground that at least the forward part of both vehicles were on the proper side of the road and passed at a safe distance from each other, but something occurred which brought the rear part of the vehicles into contact. That any part of both vehicles was in the center of the road is not suggested by anyone. In my opinion, the evidence does not justify the inference that both parties were at fault and the respondent may not be found liable on the footing that one or other of the drivers was guilty of the negligence which caused the collision.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Robinson, Robinson & Alexander.*

Solicitors for the respondent: *Hodges & Noonan.*

HARRY NARINE-SINGH AND MEARL INDRA NARINE-SINGH (*Applicants*) APPELLANTS;

AND

THE ATTORNEY GENERAL OF CANADA (*Respondent*) ..... RESPONDENT.

1955
*Apr. 4
*Apr. 19

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Immigration—Deportation Order—Meaning of "ethnic"—"Asian"—The Immigration Act, R.S.C. 1952, c. 325, s. 61(g)—The Immigration Regulations, 1953, s. 20(2).

Section 61 (*g*) of the *Immigration Act*, R.S.C. 1952, c. 325 authorizes the making of regulations respecting the prohibiting or limiting of admission of persons into Canada by reason of nationality, citizenship, ethnic group, class or geographical area of origin. Regulation 20 (2) provides that subject to the provisions of the Act and to the regulations authorized by it, the landing in Canada of any "Asian" is limited to certain classes, none of which embraced the present appellants. The latter, who were born in Trinidad, where their parents and grandparents were also born, appealed from an Order of Detention and Deportation made by a Special Inquiry Officer under the provisions of the above Act.

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

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NARINE-SINGH v. ATTORNEY GENERAL OF CANADA

Held: That the dictionary meaning of the word "ethnic" applicable under Regulation 20 (2) was: "pertaining to race; peculiar to a race or nation" and the Order was authorized by the regulation and the regulation itself was within the statute.

Decision of the Court of Appeal for Ontario [1954] O.R. 784, affirming the judgment of Aylen J., affirmed.

APPEAL from a judgment of the Court of Appeal for Ontario (1) affirming the judgment of Aylen J.

F. A. Brewin, Q.C. for the appellants.

J. D. Pickup, Q.C. for the respondent.

The judgment of the Court was delivered by:—

KELLOCK J.:—This appeal is from an order of the Court of Appeal for Ontario (1) dismissing an appeal from an order of Aylen J. (1) which had, in turn dismissed an application on behalf of the appellants, husband and wife, for a writ of habeas corpus with *certiorari* in aid and, in the alternative, by way of *certiorari,* for an order quashing an order of detention and deportation, dated the 5th of April, 1954, made against the appellants by a Special Inquiry Officer under the provisions of the *Immigration Act* on the ground that the said order was made without jurisdiction. Both the appellants were released, the male appellant entering into a bond requiring him to surrender when called upon so to do.

The order in question proceeded upon the ground that the appellants were "Asians" and, as such, excluded by the terms of s-s. (2) of Regulation 20, passed under the provisions of s. 61(*g*) of the *Immigration Act,* R.S.C., 1952, c. 325. Without considering whether the appeal might have been rejected upon any other ground, it is sufficient to say that, in our view, the order was authorized by the regulation and that the regulation itself is within the statute.

The argument on behalf of the appellants was based upon the difference between the phraseology employed in s. 39(*c*) of the former Act, R.S.C., 1952, c. 145, and that of s. 61 (*g*) of the present statute, in that the earlier statute authorized the Governor in Council, *inter alia,* to prohibit the landing in Canada of immigrants belonging to any "nationality or race", whereas s. 61 of the present Act authorizes the making of regulations respecting

(1) [1954] O.R. 784.

(g) the prohibiting or limiting of admission of persons by reason of
(i) nationality, citizenship, ethnic group, occupation, class or geographical area of origin.

Under the provisions of the earlier statute, the relevant regulation prohibited the landing in Canada of any immigrant "of any Asiatic race", whereas s-s. (2) of Regulation 20 of the existing regulations provides that

subject to the provisions of the Act and to these regulations, the landing in Canada of any Asian is limited to the following classes of person or persons . . .,

none of which classes embraces the appellants.

It appears that both appellants were born in Trinidad, from whence they had come to Canada, and that in reply to the question "of what race are you?", the answer in each case was "East Indian".

Mr. Brewin contends that the use of the word "Asian" in the regulation is justified only by the words "geographical area of origin" in the statute and that his clients, having been born in Trinidad and alleging that their parents and grandparents were also born there, are not within the statute. It is not necessary to consider the true meaning of the words referred to nor the word "nationality" as, in our view, the words "ethnic group" justify the regulation. In Mr. Brewin's submission the words "ethnic group" cannot be interpreted as in any sense equivalent to "race" but are to be given a much narrower meaning.

According to the Oxford Dictionary, the meaning of the word "ethnic" here appropriate, is "pertaining to race; peculiar to a race or nation; ethnological". An example given of the use of the word is "That ethnic stock which embraced all existing European races". Similarly, the word "ethnically" is equated to "racially". Further, one of the meanings given to the word "race" is

a group of persons connected by common descent or origin. In the widest sense the term includes all descendents from the original stock but may also be limited to a single line of descent or to the group as it exists at a particular period.

A second meaning given is "a group of several tribes or peoples forming a distinct ethnical stock."

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Kellock J.

We therefore think that for present purposes at least, the change in the language of the statutes and the regulations is not of significance. The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Cameron, Weldon, Brewin & McCallum.*

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

1955

*Jan. 14, 15
*Apr. 26

CANADA EGG PRODUCTS, LIMITED (*Defendant*) ..... APPELLANT;

AND

CANADIAN DOUGHNUT COMPANY LIMITED (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Contract—Breach by repudiation—Whether continuing—Whether issue of writ sufficient notice of acceptance of repudiation, and made within a reasonable time.

By a contract in writing entered into in Feb. 1951, the appellant agreed to sell and the respondent to buy a quantity of powdered egg yolk and egg albumen. It was provided that initial deliveries were to begin July 15 following, and that if the powder was not satisfactory, or not in accord with the specifications, it was to be returnable within 14 days of delivery. On May 7 the appellant notified the respondent that the contract was not valid and that it would not make delivery. Despite the notice, the respondent continued negotiating for delivery until June 1, when because of the appellant's continued refusal to deliver the order, other than a small quantity of albumen, the respondent without notifying the appellant made the purchases elsewhere. On June 25 it brought action for a declaration that a valid contract had been entered into and claimed damages for an anticipatory repudiation thereof.

Held: That the refusal by the appellant on May 7 to perform the contract, which it never retracted, constituted in the circumstances, a continuing refusal. *Ripley* v. *McClure* 4 Ex. R. 344; *Hochster* v. *De la Tour* 2 E. & B. 678, 22 L.J. (Q.B.) 455. The issue of the writ by the respondent was sufficient notice of its acceptance of the appellant's

*PRESENT: Kerwin C.J. and Estey, Locke, Fauteux and Abbott JJ.

continuing repudiation, and even if there was on June 1 another and independent act of repudiation, the acceptance thereof was made within a reasonable time. *Roper* v. *Johnstone* L.R. C.P. 167; *Ripley* v. *McClure, supra.*

Decision of the Court of Appeal for Saskatchewan (1954) 11 W.W.R. (N.S.) 193, affirmed.

APPEAL from a judgment of the Court of Appeal for Saskatchewan (1) dismissing an appeal, from the judgment of Doiron J. who awarded the respondent damages in the sum of $54,843 because of the appellant's repudiation of a contract to deliver certain quantities of powder egg yolk and powdered egg albumen to the respondent.

G. H. Yule, Q.C. and *I. Nitikman, Q.C.* for the appellant.

E. M. Hall, Q.C. and *R. F. Reid* for the respondent.

THE CHIEF JUSTICE:—This is an action brought by the respondent against the appellant for a declaration that a valid contract had been entered into between the parties and for damages for an anticipatory repudiation thereof. In its statement of defence, at the trial and before the Court of Appeal, the appellant set up a number of defences, one of which was that no contract had been entered into between the parties. That defence was abandoned in this Court and, therefore, the record contains much that is now not material.

In February, 1951, the appellant agreed to sell and the respondent agreed to purchase 100,000 pounds of Grade A Spray Powdered Egg Yolk and 10,000 pounds of Powdered Egg Albumen. The transaction took the form of an order on the respondent's standard form, which the appellant accepted. On the face of the form appears the specifications, followed by this clause printed in red ink:—"This order subject to conditions printed on reverse side", and this typed clause:—"It is understood that if the powder is not satisfactory and within the above specifications upon arrival at Trenton, it can be returned to the seller within 14 days for full credit, plus transportation and charges." On the reverse side are the printed conditions, number 6 of which reads as follows:—

All goods furnished will be received subject to inspection, and if found defective, or not in accordance with the specifications, will be returned to the seller at the latter's risk and expense.

(1) (1954) 11 W.W.R. (N.S.) 193.

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CANADA EGG PRODUCTS LTD. v. CANADIAN DOUGHNUT CO. LTD.

Kerwin C.J.

One argument on behalf of the appellant which may be immediately disposed of is that the typewritten clause on the face of the order renders the contract too vague to be enforced, or, alternatively, that it renders the contract unenforceable for want of mutuality. There is no substance to the last branch of this submission because, the parties having entered into the contract, they are bound by its proper construction. As to the first branch, emphasis is placed upon the word "satisfactory" and it is said that even if goods supplied under the contract would have complied with all the specifications and would have been free from defect, the respondent could still have rejected them on the ground that they were unsatisfactory. As against this there is much to be said for the view of Chief Justice Martin that the goods could not be returned by the respondent unless found defective, or unless found to be not in accordance with the specifications. It appears difficult to hold that the typed clause is mere surplusage, as the trial Judge considered, since it may well be that the real reason for inserting it, as indeed he indicated, was that the respondent desired fourteen days to ascertain if the goods were defective or were not in accordance with the specifications. However, whatever its proper construction may be and even if it were to be left to the respondent to decide if goods furnished by the appellant were satisfactory, the parties agreed to the terms and the mere fact that disputes might arise as to their meaning is of no consequence.

The appellant's main submission was that there had been no repudiation of the contract. Even if it be not admitted that both Courts have found against the appellant, there appears to be no doubt that it unequivocally repudiated the contract on May 7, 1951. It is true that at that time the appellant did not treat the repudiation "as a wrongful putting an end to the contract", to quote the words of Chief Justice Cockburn in *Frost* v. *Knight* (1). Adapting the language used earlier by the Chief Justice, the respondent might have treated the repudiation as inoperative and awaited the time when the contract was to be executed and then hold the appellant responsible for the consequence of non-performance; in which case it would have kept the

(1) (1872) L.R. 7 Ex. 111 at 113.

contract alive for the benefit of both; it would remain subject to all its own obligations and liabilities under the contract and would have enabled the appellant not only to complete the contract, if so advised, notwithstanding its previous repudiation of it, but also to take advantage of any supervening circumstance which would justify it in declining to complete it.

However, the matter does not rest here. In a conversation between the representatives of the parties on May 30, 1951, the appellant insisted that there was no contract. Objection was taken by the appellant to any evidence of a further discussion on June 1st on the ground that it was without prejudice. Although I understood Mr. Yule to admit that he had waived that objection by his introduction of evidence, I do not proceed upon any such admission. The important fact is that after June 1st the appellant continued to put forward its claim that there was no contract and that it was not bound to deliver the goods to the respondent, and the result is that the respondent was entitled to treat that continuing repudiation as a breach of the contract. In fact that claim was advanced at the trial and before the Court of Appeal. Shortly after June 1st the respondent's purchasing agent was instructed to buy egg yolk wherever possible. Once it is found that the repudiation was still alive, the respondent was not obliged to say in so many words, orally or in writing, that it treated the repudiation as putting an end to the contract, but it was sufficient to bring this action while the matter remained in that position. *L. Roth & Co. (Ltd.)* v. *Taysen, Townsend, & Co. and Grant and Grahame* (1). In *Heyman* v. *Darwins, Ltd.* (2), Viscount Simon states that the issue of a writ claiming a declaration that an agreement had been terminated by the wrongful repudiation by the defendants which had been accepted by the plaintiffs may sometimes be regarded as amounting to the exercise of the plaintiffs' claim to rescind. In *American National Red Cross* v. *Geddes Brothers* (3), Geddes Brothers had agreed to sell and the Red Cross to purchase a quantity of yarn. The single question for determination was whether an unequivocal and

(1) (1896) 12 T.L.R. 211 at 212. (2) [1942] A.C. 356 at 362.
(3) (1921) 61 Can. S.C.R. 143.

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absolute written renunciation by the former of the contract had been adopted by the Red Cross. At p. 145 Chief Justice Davies says:—

> The question then, it seems to me, in every such case must be whether under the proved facts adoption of one party to a contract of its repudiation by the other party may be inferred from the proved facts, or whether an actual notice of acceptance or adoption must be given by the party receiving notice of the repudiation to the party repudiating.
>
> It seems to me from reading the authorities that such an actual notice of acceptance or adoption is not necessary but that adoption may be reasonably inferred from all the circumstances as proved.

The facts in that case lead the Court to the conclusion that the Red Cross had adopted Geddes Brothers' renunciation; the evidence in the present case requires the same result. Other cases were cited, but an examination of them shows that the judgments depend upon their particular facts.

At one stage of the proceedings it was contended that paragraph 8 of the statement of claim indicated that the respondent was relying only upon the repudiation of May 7. That paragraph reads as follows:—

> 8. On or about the 7th day of May 1951, the said A. E. Leary in his capacity of Manager at Toronto aforesaid of the defendant and on behalf of the defendant, notified the plaintiff that the defendant did not intend to carry out its contract to deliver to the plaintiff the products described in paragraph 3 hereof as agreed.

Paragraph 3 of the defence reads:—

> 3. As to Paragraph 8, the defendant repeats its denial that Leary was Manager for the defendant at Toronto but says that on or about the 7th of May, 1951, and on divers occasions prior thereto the said Leary did notify the plaintiff that the defendant took the position that it had not entered into a contract with the plaintiff for delivery of the products referred to in Paragraph 3 of the statement of claim.

Before the trial the appellant had sought, but was refused, leave to amend this paragraph. In view of the course of the trial, Mr. Yule quite frankly admitted that he could not ask the Court to restrict paragraph 8 to an averment that the repudiation of the appellant ceased on May 7th, but that it should be taken as alleging a continuing repudiation. It was not necessary that the appellant should have pleaded that it had treated that continuing repudiation as a wrongful putting an end to the contract, since it was made quite clear that that was the position it had adopted.

Because of what occurred with reference to the albumen, it is argued that it was impossible for the respondent to contend that it had "accepted" the repudiation. In my opinion, no difficulty arises. The agreement was for 10,000 pounds of albumen "as required to March 31, 1952". While declining to deliver any yolk the appellant, when pressed by the respondent to carry out its contract, agreed to send what albumen it had on hand. Some of this was in the form of crystals which had to be pulverized, and the respondent agreed to pay and did pay an independent company's charge of three cents per pound for this process, in addition to the contract price. The appellant continuing to refuse to carry out any other part of the bargain, the respondent had the right, notwithstanding the arrangement with reference to the albumen, to treat the appellant's repudiation as a breach of all else and bring its action,—which it did, after the delivery of the last of the albumen which the appellant had on hand.

A question was raised as to the amount of damages awarded in connection with the albumen purchased elsewhere by the respondent after March 31, 1952, in order to complete the total of 10,000 pounds. The action was tried in March, 1953, and no point appears to have been made there that there was any substantial difference between the prices of the albumen before and after March 31, 1952, and, in the absence of any relevant material to which our attention was drawn, the $881.61 allowed by the trial Judge under this heading and approved by the Court of Appeal should not be interfered with by this Court.

The appeal should be dismissed with costs.

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

ESTEY J.:—The appellant in this Court conceded (except as to a submission of ambiguity to be hereinafter discussed) the contract and there are concurrent findings of fact, fully supported by the evidence, that it denied the validity of the contract and refused performance of its obligations thereunder on May 7, 1951. The essential issues in this appeal are, therefore, (*a*) on June 25, 1951, was it open to the respondent to adopt the appellant's repudiation; and (*b*) if so, did the issue of the writ on that date constitute an adoption.

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CANADA EGG PRODUCTS LTD. v. CANADIAN DOUGHNUT CO. LTD.

Estey J.

The parties hereto, on February 9, 1951, entered into a contract under which the appellant agreed to sell and the respondent to purchase 100,000 pounds of Grade A spray powdered egg yolk (hereinafter referred to as egg yolk) to be delivered on July 15, 1951, and July 31, 1951, and 10,000 pounds of powdered egg albumen (hereinafter referred to as egg albumen), delivery to be made as required to March 31, 1952.

About the middle of April the appellant, either because of its inability to purchase sufficient eggs or because it could not purchase eggs at a price that would enable it to make deliveries under the contract, decided it would not carry out its obligations thereunder. This the appellant's representatives in Toronto intimated to those of respondent at some preliminary discussions and finally, on May 7, definitely stated to respondent that a valid contract had not been concluded on February 9, 1951, and, in any event, the appellant would not make the deliveries thereunder as required.

The appellant, prior to the issue of the writ, in its pleadings and both at trial and in the Court of Appeal consistently adhered to its position of May 7. Only in this Court has it admitted the validity of the contract and, in the main, rested its case upon the fact that respondent had not adopted its repudiation.

Appellant's repudiation prior to the time fixed for performance gave respondent the opportunity to adopt that repudiation and thereby rescind the contract, reserving a claim for damages, or to ignore the repudiation, in which event the contract remained in force. *Hochster* v. *De la Tour* (1); *Johnstone* v. *Milling* (2); *Dalrymple* v. *Scott* (3); *Principles of Rescission of Contracts,* Morison, c. 4.

It is, therefore, necessary to determine whether the respondent has adopted appellant's repudiation. After the interview on May 7, appellant's representatives reported that respondent "would like to get together" with the officers of the appellant "and see what kind of a compromise can be worked out." The interview of May 30 was apparently as a consequence of this attitude on the part of the respondent, but at its conclusion the parties continued

(1) (1853) 2 E. & B. 678. (2) (1886) 16 Q.B.D. 460.
(3) (1891) 19 O.A.R. 477.

to maintain the positions as of May 7. In fact, the appellant's representative left that interview on the understanding that he would return, as he did, on June 1.

On June 1 the interview in the morning was without prejudice and no evidence was given with regard to what was then said. In the afternoon the interview was continued, but nothing was said as to whether it was then without prejudice. As it was admittedly an adjourned meeting relative to the same matter, it might well be regarded as being without prejudice. However, both parties adduced evidence as to the result of the afternoon conversation and at least to that extent the protection provided by its being without prejudice would be waived. *Georgia Construction Co.* v. *Pacific Great Eastern Ry. Co.* (1). This evidence makes it clear that at the conclusion of the interview of June 1 the parties were still persisting in the positions they had taken on May 7. While at all times throughout these interviews the respondent consistently took the position that it desired the contract carried out, I do not think, in the circumstances, it can be said that this was done other than as part of the negotiations out of which it was hoped that the appellant might be induced to withdraw its repudiation and deliver the egg yolk and albumen. It ought not to be said that respondent, by so urging a withdrawal, intended to accept or refuse appellant's repudiation.

After the interview of June 1 respondent, at a conference of its officers, concluded that further negotiations with the appellant would be futile and that it would, as in fact it did, go into the market and buy egg yolk and albumen. However, the respondent did not make known to the appellant, expressly or by appropriate conduct, that it did not intend to negotiate further or to go into the market.

The appellant had on hand about 4,000 pounds of egg albumen which, as requested, it delivered to the respondent. These deliveries, apart from that of May 16, were made as a result of the conversation on May 30, upon which occasion the parties, as to the egg yolk and the balance of egg albumen, continued their respective positions as of May 7. In these circumstances such deliveries do not affect the issues involved in this action.

(1) [1929] S.C.R. 630.

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No further correspondence or interviews followed after June 1, except such as related to the delivery of the 4,000 pounds of egg albumen, until June 25, when the respondent issued the writ.

The appellant, at all times material hereto, has maintained that there was no binding contract between the parties and, even if there were, it would not perform its obligations thereunder. It has adhered to that position in its pleadings and submissions both at trial and in the Court of Appeal. Apart from its conceding the validity of the contract in this Court, it has not in any way withdrawn from the position it took on May 7. In my view its refusal has continued and is properly described in the language of Baron Parke as "a continuing refusal." In *Ripley* v. *McClure* (1), on March 16, 1847, the plaintiff agreed to sell and the defendant to purchase one-third of a cargo of tea upon its arrival at Belfast. The defendant repudiated its obligations and when it persisted in that attitude throughout "a long correspondence" it was held to constitute "a continuing refusal." The cargo did not arrive at Belfast until September 21 of the same year and action was brought after that date. Baron Parke, referring to the judge's charge to the jury, stated at p. 358:

> He left the questions in writing, whether there was a refusal at any time, and whether that refusal had been subsequently retracted; and the jury having found, as we think they were warranted by the evidence to do, that it had not, there was certainly evidence of a continual refusal down to and inclusive of the time when the defendant was bound to receive, . . .

In *Hochster* v. *De la Tour, supra,* Lord Chief Justice Campbell, in referring to *Ripley* v. *McClure* at p. 693, stated:

> And they held that a refusal by one party before the day when the act is to be done, if unretracted, would be evidence of a continual refusal down to, and inclusive of, the time when the act was to be done.

In *Roper* v. *Johnson* (2), in April, 1872, the plaintiff agreed to purchase and the defendant to sell 3,000 tons of coal in May, June, July and August. Keating J. stated at p. 175:

> There was some controversy as to the facts; but there can be no doubt that the defendant, soon after the contract was entered into, intimated his determination not to perform it; and it seems to be agreed

(1) (1849) 4 Ex. R. 344. (2) (1873) L.R. 8 C.P. 167.

that, at all events, that repudiation of the contract was accepted by the plaintiffs on the 3rd of July, when they brought this action for the non-performance of it.

Even if, as it was contended, there was on June 1 another and independent act of repudiation on the part of the appellant, it would appear that the respondent would, having regard to all the circumstances, have until at least June 25 to make its election whether to adopt appellant's repudiation or not. It is stated the adoption must be made known "with every reasonable dispatch" (*Halsbury's Laws of England,* 2nd Ed., Vol. 7, p. 229) and "with all reasonable dispatch" (*Leake on Contracts,* 8th Ed., p. 675 and *Pollock on Contracts,* 13th Ed., p. 219). These phrases are not equivalent to immediately, or forthwith, but rather would appear to mean what is reasonably required or dictated by the circumstances. The authorities cited by the learned authors would appear to support this construction. When regard is had to the preliminary discussions prior to May 7, the negotiations thereafter and the nature and character of the egg market, the period of twenty-four days, apart from evidence to the contrary, would not be in excess of what would be reasonable in the circumstances. The foregoing authorities, and particularly *Ripley* v. *McClure* and *Roper* v. *Johnson,* would appear to support this view.

Therefore, when the writ in this litigation was issued the appellant's refusal continued and respondent had not adopted appellant's repudiation.

Whether or not the issue of the writ will constitute an adoption must depend upon the circumstances of the particular case. Where the repudiation arises out of a disagreement as to the construction of a contract the issue of a writ to determine the meaning thereof would not constitute an adoption of the act of repudiation. There is no such suggestion in the case at bar. The respondent here asks a declaration that the contract was duly executed, that there was a wrongful repudiation thereof by the appellant, and damages. Upon the authorities it would appear that the issue of such a writ did constitute an acceptance of the appellant's repudiation. In *Hochster* v. *De la Tour, supra,* and *Frost* v. *Knight* (1), there does not appear to have been any adoption apart from the issue of the writ. In *Roper* v.

(1) (1872) L.R. 7 Ex. 111.

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Johnson, supra, the contract was made in April and shortly thereafter the defendant intimated that he would not perform it. It was held that this repudiation was adopted by the issue of the writ on July 3. In 1925 Lord Atkinson, speaking for the Privy Council, stated:

> On the other hand, in no way could this repudiation by Mr. Martin be more unequivocably accepted by Mr. Stout, and by him acted upon, than by instituting within forty-eight hours of the telegram reaching him an action claiming to recover damages for breaches of those very contracts so repudiated. *Martin* v. *Stout* (1).

See also *Heyman* v. *Darwins, Ltd.* (2).

It would, therefore, appear that respondent's action is not premature.

The appellant submitted that the contract is too vague to be enforceable. This submission is based upon a typewritten clause in the purchase order and accepted as a term of the contract. It reads:

> It is understood that if the powder is not satisfactory and within the above specifications upon arrival at Trenton, it can be returned to the seller within 14 days for full credit, plus transportation charges.

This provision, it is suggested, gives to the respondent a right which it is free to exercise in a manner arbitrary or otherwise and, therefore, in reality, there is no agreement or, as counsel for respondent expressed it, the contract is unenforceable "for want of mutuality." In support of this submission counsel quoted a statement from *Williston on Contracts,* 1936, Vol. 1, s. 43, p. 124, and *Leake on Contracts,* 7th Ed., p. 3. The latter reads:

> Promissory expressions reserving to the promiser an option as to the performance do not create a contract: as in cases of employment upon the terms of such remuneration as the employer thinks right to give; . . .

In the cases there cited no binding obligation was concluded. The case of *Roberts* v. *Smith* (3), illustrates the type of case the learned author had in mind. There the plaintiff claimed remuneration for work done. In dismissing the action Baron Martin stated at p. 320:

> . . . the plaintiff put himself in this condition—"I will work for you, and I leave the remuneration in your hands." In reason and common sense that is a liability in honour, and not a liability by contract.

(1) [1925] A.C. 359 at 363. (2) [1942] A.C. 356.
(3) (1859) 4 H. & N. 315.

The statement quoted from *Williston* is followed by a sentence:

> Thus an agreement to pay such wages as the employer wishes is invalid, though an agreement to pay such wages as the employer considers "right and proper" is not too uncertain, since performance of such a promise does not leave the promisor free to do as he may choose.

These authorities emphasize that where performance by one of the parties is entirely a matter for his own decision there is no enforceable contract. In the case at bar there is a contract under which the appellant undertook to deliver egg powder which, if not satisfactory to the respondent, as purchaser, might be returned. The meaning of the clause is neither indefinite nor vague, nor is the language thereof different in effect from that which has been recognized and enforced by the courts over a long period of time. In *Truman* v. *Ford Motor Co. of Canada Ltd.* (1), the plaintiff undertook to supply sods and place them in a manner satisfactory to the defendant. When the latter became dissatisfied with the sods it cancelled the contract and the plaintiff brought an action for breach thereof. The jury found that the defendant, in rejecting the sods, had acted honestly but not reasonably. Upon these findings the learned trial judge directed judgment for the plaintiff and this was reversed in the Court of Appeal on the basis that the defendant, having acted honestly, was acting within his contractual rights.

It would appear, under a contract providing for the delivery of powdered egg, which, if not satisfactory, might be returned, the purchaser is within his contractual rights if he honestly rejects the powder. The fact that others might have been satisfied or that he has acted unreasonably is not material. *Stadhard* v. *Lee* (2); *Grafton and Others* v. *The Eastern Counties Ry. Co.* (3); *Diggle* v. *Ogston Motor Co.* (4); *Benjamin on Sale,* 8th Ed., p. 582.

Scammell v. *Ouston* (5), cited by appellant, is an example of a case where the language used is so indefinite, and in relation to which the parties had not adopted a meaning, that it cannot be said the parties had agreed upon the essential terms and, therefore, no *consensus ad idem* and

(1) [1926] 1 D.L.R. 960.
(2) (1863) 3 B. & S. 364.
(3) (1853) 8 Ex. 699.
(4) [1915] 84 L.J.K.B. 2165.
(5) [1941] 1 All E.R. 14.

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consequently no contract. See also *Lethbridge Brewing & Malting Co. Ltd.* v. *Webster* (1); *Coldwell & Jennings Ltd.* v. *J. W. Creaghan Co.* (2).

Parties may, subject to exceptions not material hereto, embody in a contract such terms as they may agree upon. In the case at bar, under the terms agreed upon, the parties assumed obligations that were clearly expressed and with respect to which no misunderstanding is suggested. In such a case, as stated by Cockburn C.J.:

> . . . to ascertain and give effect to the intention of the parties as evidenced by the agreement; and though, where the language of the contract will admit of it, it should be presumed that the parties meant only what was reasonable, yet, if the terms are clear and unambiguous, the Court is bound to give effect to them without stopping to consider how far they may be reasonable or not. *Stadhard* v. *Lee, supra,* at p. 372.

The appellant objects to an item of $881.61, being damages allowed by the learned trial judge in respect to two shipments of egg albumen dated respectively October 28 and November 4, 1952. These purchases were, upon the evidence, made as a result of the appellant's failure to deliver egg albumen and there is no evidence to the contrary. The mere fact that it was purchased after the date when the respondent might have required deliveries under a contract is not necessarily inconsistent therewith. It would, therefore, appear that the judgment of the learned trial judge and the Court of Appeal allowing this item should be affirmed.

The appeal should be dismissed with costs.

LOCKE J.:—That there was a binding contract made between the parties by the acceptance of the respondent's written order of February 9, 1951, subject to the variation asked for in the telegram from the appellant of February 13 which the respondent agreed to in the answering telegram of February 14, 1951, is conceded on behalf of the appellant.

It was contended before us that, by reason of the fact that as it was a term of the agreement that if the egg powder was not satisfactory and did not comply with the specifications it might be returned by the seller within 14 days, it was too vague to be enforceable. Whatever be the proper interpretation of the word "satisfactory" in the context, a matter which the Court would have been required

(1) (1919) 49 D.L.R. 250. (2) [1951] 4 D.L.R. 840.

to determine had the need arisen, the acceptance of the respondent's offer obligated the appellant to deliver the material at the price and at the times specified. There is neither vagueness nor uncertainty in the terms in which that obligation was expressed. The decision of the House of Lords in *Scammell* v. *Ouston* (1), relied upon by the appellant, turned upon the fact that, in the opinion of the House, there was no completed contract. Here it is conceded that there was.

The objection that the action was premature raises a question of more difficulty. It is clear from the evidence of the witness Livingston that on May 2, 1951, Leary, the appellant's salesman who had negotiated the sale, informed the respondent that the appellant was not going to deliver the goods sold, saying that it contended that there was no enforcible contract and that this statement was repeated at a meeting between the representatives of the parties in Toronto on May 7. The respondent did not then elect to rescind the contract or, as it might be more accurately expressed, elect to treat this as a repudiation of the contract and treat it as at an end but, maintaining its stand that there was an enforcible contract, endeavoured to induce the appellant to carry out its obligations.

On May 7, and again on May 23, 1951, the solicitors for the respondent wrote to the appellant at Saskatoon asking if they intended to carry out the contract, but these communications were not answered. On a date which appears to have been May 30, Bernard Halstead, then the sales manager of the appellant, met the representatives of the respondent in Toronto, at which time it was arranged that the appellant would deliver some 4,000 pounds of albumen which it then had in Eastern Canada on account of its obligations under the contract, to be paid for at the agreed price. As to the balance of the material to be delivered, however, Halstead said that they had no egg yolk available and that the plant was not in operation. The parties met again on the morning of June 1st but the discussions that morning were without prejudice. Later that day, however, Halstead had a further discussion with D. H. Beskind and

(1) [1941] A.C. 251.

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one Goldhill, an American lawyer representing the respondent, at which time Halstead informed them that the appellant could not and would not make delivery of the goods.

While the discussion during the morning had been expressly stipulated to be without prejudice, nothing apparently was said as to this regarding the meeting in the afternoon and the evidence of Beskind as to Halstead's final refusal was given without objection. Halstead also was called as a witness for the appellant and gave evidence as to the afternoon meeting. It is thus clear that neither party regarded the discussion during the afternoon as being privileged from disclosure. If it were to be regarded as merely a continuation of the meeting in the morning and thus protected by the stipulation then made, it is clear that both parties waived the privilege. It was shown by the evidence of the witness Livingston that Halstead's statement then made, that the appellant refused to complete, was accepted as final by the respondent. Following the meeting, a conference was held by Beskind with Goldhill and the Toronto solicitor for the company, following which Beskind instructed Livingston to go into the market and buy egg powder for the company's requirements.

There is no evidence to suggest that the election of the respondent to treat the contract as at an end was communicated to the appellant otherwise than by the delivery of the Statement of Claim in the action. In that pleading the respondent alleged that the appellant had on May 7, 1951, declared its intention not to carry out the contract, and the prayer for relief which claimed, *inter alia*, a declaration that there was a valid contract asked a further declaration that the appellant had wrongfully repudiated and wrongfully refused to carry it out.

It is, of course, true that no legal consequences result from a simple declaration by a party to a contract that it does not intend to carry out his part of it. When, however, such a declaration is made, the other contracting party may either insist on holding his co-contractor to the bargain or elect to treat the contract as at an end and claim damages for its breach, even though the time for performance has not arrived.

Where the promisee elects to treat the contract as at an end or, as it is sometimes described, to rescind the contract, his election is not complete until it is communicated to the other party, and this must be done within a reasonable time. In the present matter, as shown by the evidence to which I have referred, it was on or shortly after June 1, 1951, that the respondent, acting apparently on legal advice, elected to treat the contract as at an end and went in the market to obtain the goods which the appellant had contracted to deliver. It was on June 25, 1951, that the action was commenced.

Where one party to a contract declares his intention to repudiate his obligations under it, the other party, if he insists upon performance, cannot until after the time fixed for performance bring an action to recover damages for its breach. The contract is then kept alive for the benefit of both parties. Thus, the respondent in the present matter cannot rely, in my opinion, upon what occurred on May 7, 1951, to support an action brought before the time fixed for performance. Where, however, as in the present case, the respondent after the refusal of May 7 continued its efforts to induce the appellant to alter its position and discharge its obligations, it is entitled, in my opinion, to rely upon the final refusal of June 1st and its own election to then treat the contract as at an end to support the action brought before the time fixed for performance.

While an election to treat a contract as at an end is not complete until notice of such election is given to the other party and until such notification the latter is entitled to treat the contract as subsisting and insist upon carrying out its terms, no particular manner of communicating such election is required. In *Syers* v. *Syers* (1), the notice required to terminate a partnership at will was held sufficiently given by the answer filed in the action. In *Roper* v. *Johnson* (2), the election of the plaintiff to accept the repudiation of the obligations under a contract made on June 11 was, in the language of Keating J. (p. 175), "accepted" by the plaintiffs on July 3, when they brought the action for the non-performance of it. There was, apparently, no other notice of the plaintiffs' election to treat the contract as at an end.

(1) (1876) 1 App. Cas. 174. (2) (1873) L.R. 8 C.P. 167.

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In the present matter I consider that the service of the Statement of Claim was a sufficient notice of the election of the respondent to treat the contract as at an end and that it was given within a reasonable time, in the circumstances. In my opinion, the action was not prematurely brought.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

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

Solicitors for the respondent: *Hall, Maguire & Wedge.*

1955

*Apr. 1
*Apr. 26

F. HOFFMANN-LAROCHE & CO. LTD. CO. ..... APPELLANT;

AND

THE COMMISSIONER OF PATENTS ...RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—New process for manufacture of aldehyde—Application for patent to new process and for patent to product produced thereby—No novelty in product—The Patent Act, 1935, S. of C. 1935, c. 32, ss. 2(d), 26(1), 35(2), 40(d).

The appellant invented a new process for the manufacture of aldehyde and in his application for a patent for the process also claimed a patent to the product produced by such process.

Held: There being nothing new about the product, the appellant was not entitled to obtain a patent therefor even on the basis of a process dependent product claim. *Von Heyden* v. *Neustadt* 14 Ch. D. 230; *Auer Incandescent Light Mfrg. Co.* v. *O'Brien* 5 Ex. C.R. 243; *Toronto Auer Light Co. Ltd.* v. *Colling* 31 O.R. 18.

Per Kerwin C.J. and Taschereau, Locke and Cartwright JJ.: S. 41 (1) of the *Patent Act,* S. of C. 1935, c. 32, prohibits a claim for a substance for which a claim might otherwise be made: it does not authorize a claim for any substance which is not authorized by the other provisions of the Act.

Per Rand J.: The prohibition applies to a new substance alone but allows one for that substance as produced by the new process. The special protection afforded the latter by s-s. (2) would seem to confirm the view that both the substance and process are to be new, but at least the substance must be new, and no inference can be drawn from it of a process dependent product claim where the product is old.

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

APPEAL from the judgment of the Exchequer Court of Canada, Thorson P. (1) dismissing an appeal from the Commissioner of Patents who rejected certain claims in an application for a Canadian patent to a process for the manufacture of aldehyde.

G. F. Henderson, Q.C. and *A. A. Macnaughton, Q.C.* for the appellant.

W. R. Jackett, Q.C. and *K. E. Eaton* for the respondent.

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

THE CHIEF JUSTICE:—This is an appeal against the decision of the President of the Exchequer Court dismissing an appeal from the Commissioner of Patents who had refused to allow claims 14 to 18 inclusive in the appellant's application for a patent. Nos 1 to 13 claimed a new and useful process for the manufacture of an aldehyde and the claims in controversy relate to that product made by that process. Aldehyde is a well-known substance and admittedly there can be no patent for it per se.

In my opinion, the Commissioner and the President of the Exchequer Court rightly decided that the appellant was not entitled to include the claims for the product. By s. 2(*d*) of the *Patent Act* 1935, c. 32,

> (*d*) "invention" means any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter;

S. 35 dealing with what the specification shall contain provides by s-s (2):

> (2) The specification shall end with a claim or claims stating distinctly and in explicit terms the things or combinations which the applicant regards as new and in which he claims an exclusive property or privilege.

There being nothing new about the product, the appellant is not entitled to obtain a patent therefor even on the basis of a process dependent product claim.

According to the decisions of the Court of Appeal in England in *Von Heyden* v. *Neustadt* (2) following previous decisions of single judges, the applicant would have a

(1) [1954] Ex. C.R. 52.

(2) (1880) 14 Ch. D 230; (1881) 50 L.J. Eq. 126.

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monopoly in respect of aldehyde when prepared according to his process. In Canada it was decided in the same sense by Mr. Justice Burbidge in the Exchequer Court in *Auer Incandescent Light Manufacturing Co. and O'Brien* (1) and by a Divisional Court in Ontario, in *Toronto Auer Light Co. Ltd.* v. *Colling* (2). There seems to be no reason to doubt the correctness of these decisions. Counsel for the appellant, however, argues that, if as a matter of law this protection is afforded the appellant, it is entitled to have a patent issued for the product. The difficulty in the appellant's way is not only that the Act does not so provide but s. 2(*d*) and s. 35(2) demand a negative answer. The statement as to the English practice in Patents for Inventions by Mr. T. A. Blanco White, at p. 59, "it is of course very common to insert such a claim" is borne out by three English patents filed as exhibits but in view of our statutory provisions that practice cannot be followed here.

Mr. Henderson relied upon s-s (1) of s. 40 of the Act:—

> In the case of inventions relating to substances prepared or produced by chemical processes and intended for food or medicine, the specification shall not include claims for the substance itself, except when prepared or produced by the methods or processes of manufacture particularly described and claimed or by their obvious chemical equivalents.

While this provision prohibits a claim for a substance for which a claim might otherwise be made, it does not authorize a claim for any substance which is not authorized by the other provisions of the Act. It is not necessary in the present case and I therefore refrain from considering the precise effect of any part of s. 40 except to point out that there is nothing in the decision of this Court in *Continental Soya Co. Ltd.* v. *J. R. Short Milling Co. (Canada) Ltd.* (3) that affords any assistance to the argument on behalf of the appellant in this connection. It is apparent from a perusal of the reasons for judgment in this Court and from the reasons for judgment of the then President of the Exchequer Court (4), that the product there in question was a new manufacture.

The appeal should be dismissed with costs.

(1) (1897) 5 Ex. C.R. 243.
(2) (1899) 31 O.R. 18.
(3) [1942] S.C.R. 187.
(4) [1941] Ex. C.R. 69.

RAND J.:—The appellant in his application for a patent has claimed for a new process for making a well known substance, an aldehyde, and as well for the aldehyde as made by that process; the former has been allowed but the latter rejected on the ground that the Act does not provide generally for such a subject matter of patent; and the question is whether that view is well founded.

S. 2(*d*) defines "invention" as follows:—

"invention" means any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter;

As is seen, a patent may be granted for a process as well as for a product provided that each is novel. Where the product, per se, is known, some new attribute must be introduced to furnish novelty, and Mr. Henderson argues that that is done here by associating with it its production by the new process.

This is an artificial attribution, but the argument for it is that it is necessary in order to make effectual the privilege of the process. It is urged that protection by the courts is afforded a patented process by treating persons participating in a production in a foreign country for sale in this country as parties to the infringement of the process in Canada, and several authorities seemingly to that effect are cited: *Elmslie* v. *Boursier* (1); *Neilson* v. *Betts* (2); *Von Heyden* v. *Neustadt* (3). In the latter it was said:—

A person who makes, or procures to be made, abroad for sale in this country, and sells the products here, is surely indirectly making, using and putting in practice the patented invention. Any other construction would, in fact, in the case of any really valuable invention of a process, render the whole privilege granted by the Crown futile.

But the mere need for means of protecting the monopoly cannot justify the extension of the statutory language beyond what it can fairly bear. The definition clause furnishes no warrant for treating a well known substance as being a "new and useful . . . composition of matter" because it has been produced by a certain process. The assumption is that the product of different processes is identical and no such constructive attribute can render the substance itself either new or useful.

(1) (1870) L.R. 9 Eq. 217. (2) (1870) 5 E. & I. 1.
(3) (1880) 14 Ch. D. 230.

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Rand J.

Nor can the claim on this basis be made under ss. 26(1) or 35(2); as provided in the latter the application must, in explicit terms, claim the things or combinations which the applicant regards as new and in which he claims an exclusive property or privilege. The exclusive privilege as to the matter of the invention here is in the process.

S. 41 (of R.S.C. 1952, c. 203, S. 40 of the 1935 Act) remains to be considered. It provides:—

> (1) In the case of inventions relating to substances prepared or produced by chemical processes and intended for food or medicine, the specification shall not include claims for the substance itself, except when prepared or produced by the methods or processes of manufacture particularly described and claimed or by their obvious chemical equivalents.

That language seems to be concerned primarily with new substance, and when process is associated with it, new process. The expressions "claims for the substance itself" and "produced by the methods or processes . . . claimed" point to that: the section prohibits a claim for the new substance alone, but allows one for that substance as produced by the new process. Special protection is afforded the latter by s-s. (2) by means of a presumption that any substance of the same chemical composition as the new product shall "in the absence of proof to the contrary, be deemed to have been produced by the patented process". This again seems to confirm the view that both substance and process are to be new. But at least the substance must be new, and no inference can be drawn from it of a process dependent product claim where the product is old It furnishes only a qualification of the prohibition by authorizing the substance claim when associated with a special constructive attribute.

Even if the claim were allowed, what benefit would result that, on the assumption that protection by the Court is given against infringement, would not now be available? Proof that the product was made by the patented process would be necessary. Only with some such means as that provided by clause (2) in raising a presumption or casting the burden of proof on the alleged infringer could any real advantage be gained. But such an evidentiary device could not be supplied by a court.

I agree with the judgment of the President of the court below and would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Gowling, MacTavish, Osborne & Henderson.*

Solicitor for the respondent: *W. P. J. O'Meara.*

HENRY A. THOMPSON (*Defendant*) ....APPELLANT;

AND

DAVID FREDERICK FRASER (*Plaintiff*) .RESPONDENT.

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*Feb. 8, 9.
*Apr. 26

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Automobiles—Head-on collision on top of hill—Both on wrong side of road—Gratuitous passenger—Whether gross negligence—Vehicles and Highway Traffic Act, R.S.A. 1942, c. 275, s. 104(1).

Two approaching cars collided on the top of a hill so steep that a car approaching from the opposite direction would be hidden from view. Both cars were on the wrong side of the road. The respondent was a gratuitous passenger in the appellant's car. The trial judge found both drivers grossly negligent. His findings, with regard to the appellant, were that the latter immediately prior to the application of his brakes was travelling at a speed in excess of 35 m.p.h.; that he was driving with part of his car on the wrong side; and that he was not keeping a proper lookout for approaching traffic. The Court of Appeal divided equally and the judgment at trial was therefore affirmed. The appellant admits his negligence but denies the charge of gross negligence.

Held (Taschereau and Locke JJ. dissenting): that the appeal should be allowed. The appellant was not grossly negligent within the meaning of s. 104(1) of the *Vehicles and Highway Traffic Act,* R.S.A. 1942, c. 275.

Per Estey, Cartwright and Abbott JJ.: The evidence does not support the trial judge's findings that the appellant was proceeding at a speed in excess of 35 m.p.h. and that he did not maintain a proper look-out.

Per Estey J.: It would seem that the appellant, when confronted with an oncoming car which was more on the wrong side than he was and which was proceeding with such speed and in such proximity, followed a course that one cannot say would not, in the circumstances, have been followed by a reasonable man.

*PRESENT: Taschereau, Estey, Locke, Cartwright and Abbott JJ.

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Per Cartwright J.: The fact that the appellant's car was partly to the left of the centre line does not appear to have been a cause of the collision. Had the appellant turned his car completely to his right side of the centre line the evidence indicates that the impact would have been no less violent than it was.

Per Taschereau J. (dissenting): The trial judge reached the right conclusion. Both drivers were driving in a careless way and their negligence falls into the category called gross negligence.

Per Locke J. (dissenting): Whether the appellant was guilty of very great negligence was a question of fact (*McCulloch* v. *Murray* [1942] S.C.R. 141), and there are concurrent findings on that question. It cannot be properly said that such a finding was clearly wrong, and the appeal should accordingly fail.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), dividing equally and therefore affirming the trial judge's finding of gross negligence resulting from a collision between two automobiles.

J. D. Paterson and L. D. MacLean for the appellant.

J. Cohen for the respondent.

TASCHEREAU J. (dissenting):—This appeal arises out of an automobile accident. Although three actions were instituted, we are concerned only with the appeal of the appellant, in whose car, the respondent was a gratuitous passenger, and who suffered severe injuries. The trial judge found that the appellant had been guilty of *gross negligence*, and therefore liable in damages. The Court of Appeal (1), composed of four judges, divided equally, and the judgment was consequently confirmed.

The accident happened on the 22nd day of August, 1951. The appellant was driving East on the highway between Vulcan and Lomond, and on the top of a steep hill collided with the car of Gerald Gaetz and driven by Peter Langdon. The learned trial judge thought that both drivers were at fault, and that the appellant should bear 25% of the responsibility, and the others 75%. It is admitted by the appellant that he was negligent to a certain extent, but denies the charge of gross negligence, which is the essential element which can only be the foundation of the claim of a gratuitous passenger.

After a thorough examination of the evidence, the trial judge reached the conclusion that both cars were, in the circumstances, going at an excessive rate of speed, that they

(1) [1954] 11 W.W.R. (N.S.) 394.

were not, as they should have done, in view of the limited visibility, keeping the right side of the highway, and that they did not keep a proper look-out. Although he did, as admitted by both parties, commit some errors in his recital of the facts, I believe that he reached the right conclusion. Both drivers were driving in a careless way and their negligence, I think, falls into the category called "gross negligence".

I also agree that the fault of both drivers was not in equal degree, and that Langdon, because of his higher speed and excessive drinking, must bear a larger share of responsibility. But this of course does not absolve the appellant who, in the circumstances, as it was said by this Court in *Murray* v. *McCulloch* (1) and *Cowper* v. *Studer* (2), showed "a very marked departure from the standards by which responsible and competent people in charge of motor cars, habitually govern themselves". In *Kerr* v. *Cummings* (3), Kerwin J. (as he then was) held:—

> This of course, is a civil case, but it is one where *something more* than negligence must appear. As was held by this Court in *Studer* v. *Cowper*, this means there must have been *very great negligence*.

I am of the opinion that in the present case, Thompson's negligence was not merely ordinary negligence, but amounted to a negligence of such a degree, that he cannot escape liability. I fully agree with what was said by the trial judge:—

> To approach a blind spot on the road, knowing, as Thompson did, because he was familiar with the danger of vehicles approaching blindly from the other direction, to approach that spot at a speed in excess of 35 miles an hour, to approach it driving on the wrong side of the road, to fail to observe the most careful lookout, and to proceed with the utmost caution, constitutes, in all the circumstances which exist here, a marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves, and is negligence of so high a degree that it falls within the category of *gross negligence*.

The appeal should be dismissed with costs.

ESTEY J.:—The appellant Thompson, owner of a Dodge automobile, on August 22, 1951, was driving it eastward from Vulcan, Alberta, when he collided with a Chevrolet automobile owned by respondent Gaetz and driven westward toward Vulcan by respondent Langdon. The learned

(1) [1942] S.C.R. 141. (2) [1951] S.C.R. 450.
(3) [1953] 1 S.C.R. 147 at 148.

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trial judge found both drivers grossly negligent. There were other actions arising out of this collision, but in this appeal we are concerned only with the claim of Fraser, a gratuitous passenger in appellant Thompson's automobile, against Thompson. Fraser, in order to recover, must establish that the appellant Thompson was grossly negligent within the meaning of s. 104(1) of R.S.A. 1942, c. 275.

The learned trial judge found that the appellant Thompson was grossly negligent and directed judgment in favour of the respondent Fraser. In the Appellate Division (1) the learned judges were equally divided and, therefore, the judgment at trial was affirmed.

The learned trial judge stated the facts, in part, as follows:

> The accident occurred on the Vulcan-Lomond road in Southern Alberta, at about 6:30 p.m. on August 22nd, 1951. Thompson was travelling east from Vulcan to his farm near Lomond; Langdon was travelling west from Armada to Vulcan. The road is a gravelled country highway about 21 feet wide, and, on the day in question, was dry and in good condition. As is not unusual on roads of this type, a single path had been beaten by traffic in the approximate centre of the highway, but the whole highway was easily passable, the gravel on the unbeaten part being about 1 inch in depth. The country is hilly, and the road follows the general contour of the surrounding country so that it has many hills, some of a substantial size and steepness. The day was slightly "murky" or hazy, but at the time of the accident it was still broad daylight but there was nothing to interfere with the vision of either driver.
>
> At a point about 7 miles west of Lomond, both cars approached a fairly high hill which falls away both to the east and west, with a level area or "plateau" on top about 60 feet long. It was necessary for both cars to climb before reaching this plateau, and the driver of neither car could see the other car until at least one of them had reached the top of his hill and was actually on the plateau.

The learned trial judge, with respect to Langdon, stated as follows:

> I have no hesitation in finding that the negligence of Langdon was gross negligence. The combination of excessive speed under the circumstances, the driving on the wrong side of the road, the failure to keep a proper lookout or any lookout, combined with the evidence as to excessive drinking, leaves no doubt in my mind that Langdon's negligence falls into the category termed "gross" by the Statute.

His finding as to Thompson was as follows:

> . . . I have, after consideration, come to the conclusion that Thompson was guilty of gross negligence. In his conduct were all the elements, though in somewhat lesser degree, which constituted gross negligence in the case of Langdon, except the excessive use of alcohol. In my view, to

(1) [1954] 11 W.W.R. (N.S.) 394.

approach a blind spot on the road, knowing (as Thompson did, because he was familiar with this road) the danger of vehicles approaching blindly from the other direction, to approach that spot at a speed in excess of 35 miles per hour, to approach it driving on the wrong side of the road, to fail to observe the most careful lookout, and to proceed with the utmost caution, constitutes, in all the circumstances which existed here, a marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves, and is negligence of so high a degree that it falls within the category of gross negligence.

The learned trial judge, as to Thompson's speed, stated:

I find as facts on the evidence available, that Thompson, prior to the application of his brakes, was travelling at a speed considerably in excess of 35 miles per hour, and that Langdon, up to the moment of impact, was travelling at a speed greatly in excess of 40 miles per hour.

The effect of Thompson's evidence is that he was driving at about 35 miles per hour on his way from Vulcan; that in the collision he was rendered unconscious and had no recollection of his speed as he proceeded up the hill or of the events up to the moment of the accident. Respondent Fraser deposed that he was sitting in the back seat and that Thompson was driving at about 30 to 40 miles per hour, but, when asked if Thompson continued at that speed until he applied his brakes, he replied: "Well, that I do not know. I would imagine so. I imagine he was getting down pretty slow, although I do not know." In other words, there is no evidence as to the speed at which Thompson's automobile was being driven up the hill, or when he applied his brakes. With great respect, the evidence does not support a finding of fact that he was proceeding, at any relevant time, at a speed in excess of 35 miles per hour.

I quite agree with the learned trial judge that one ought to observe a high degree of care in proceeding up a hill such as that with which we are here concerned, and to do so in the middle of the highway is clearly a failure to use reasonable care. However, it may well be that such negligence was not a direct cause of the accident, an issue we do not have to here consider. Moreover, and with great respect, there does not appear to be any evidence that, as he proceeded up the hill and at the top thereof, he did not maintain a reasonably careful lookout. It is admitted that until he reached the crest he could not see a vehicle approaching from the east. At the crest there is a plateau of 60 feet and it is clear that he put on his brakes and skidded a distance of 50 feet close to the eastern edge of the crest. This is

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established by the presence of skid marks for 50 of the 60 feet and which ended at the place of impact. When one has regard to the time which is often described as the reaction period, appellant must have seen the Langdon automobile approaching as he reached the crest and immediately applied his brakes. It would seem, with great respect, that the evidence does not support the view that he was not maintaining a careful lookout.

The skid marks were straddle the centre line and straight, indicating that Thompson, from the moment he put on his brakes, had not altered his direction. Moreover, these skid marks show that Thompson's automobile was approximately 9 inches more on the south side than on the north side of the centre line. The learned trial judge concluded that he had reached the top of the hill straddle of the centre line and in much the same position. Inasmuch as he was apparently following what was a well marked portion of the road, I am in respectful agreement with the conclusion of the learned trial judge. However, once at the crest of the hill he was confronted with an oncoming automobile that was apparently more to the south of the centre line than he was and proceeding with such speed and in such proximity that he had to instantly elect whether to turn toward the north and be still further on the wrong side, or to turn to the south and, if the respondent Langdon continued, to crash head on, or to apply his brakes and stop as quickly as possible. In the emergency he elected to follow the latter course. It would seem that the appellant Thompson, faced with this circumstance, followed a course that one cannot say would not, in the circumstances, have been followed by a reasonable man.

It may be pointed out that respondent Langdon, on his part, did not see the Thompson automobile until it was right upon him and did not change his direction. It is true respondent Fraser says he did, but the learned trial judge did not accept that evidence.

The learned trial judge adopted the description of gross negligence as stated by Sir Lyman Duff C.J. in *McCulloch* v. *Murray* (1), where he stated at p. 145:

> All these phrases, gross negligence, wilful misconduct, wanton misconduct, imply conduct in which, if there is not conscious wrong doing,

(1) [1942] S.C.R. 141.

there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves.

My Lord the Chief Justice (then Kerwin J.) in *Studer* v. *Cowper* (1), when referring to a corresponding provision in the Saskatchewan statute, described gross negligence as "very great negligence" and used the same phrase in *Kerr* v. *Cummings* (2), in arriving at a decision under the British Columbia statute. Negligence is the failure to use the care a reasonable man would have exercised under the same or similar circumstances and the degree of care required depends on the danger or risk involved. What, therefore, may be negligence in one case may not be in another and, by the same token, what may be gross negligence under some circumstances may be but negligence under others. That the appellant Thompson was negligent is not disputed in this appeal, but it is contended that his conduct was not within the language of Chief Justice Duff "a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves," nor was his conduct in the circumstances "very great negligence," to adopt the phrase of my Lord the Chief Justice. It is, of course, a question of fact to be determined in each case and one hesitates to overrule the finding of a learned trial judge. Where, however, the evidence does not support at least some of the important factors upon which the learned judge bases his finding it would seem to be the duty of an appellant court to review that finding and, in an appropriate case, to either modify or reverse it according as the circumstances may dictate. This would appear to be such a case and one in which the appellant, by his conduct, was negligent, but not grossly negligent within the meaning of s. 104(1) *supra*.

The claim of the respondent Fraser should be dismissed and this appeal allowed with costs.

LOCKE J. (dissenting):—The evidence upon which the learned trial judge found the appellant to have been guilty of gross negligence contributing to the accident in which the respondent suffered injury may be summarized as follows:—During the early evening of August 22, 1951, the appellant was driving east upon the highway between

(1) [1951] S.C.R. 450 at 455.
(2) [1953] 1 S.C.R. 147 at 148.

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Vulcan and Lomond, proceeding to his farm to the east of the last mentioned place, when a collision occurred on the summit of a hill with a car proceeding west driven by the defendant Langdon. The respondent was a gratuitous passenger in the rear seat of the car. Giving evidence, the appellant said that he could not remember the collision. As to his speed, he said that when about a quarter of a mile back he had been driving at 35 miles an hour approaching the hill, which he described as "very steep." The roadway was 21 feet in width, with a gravel surface which was dry. The appellant drove up the hill in the middle of the road and said that the collision with Langdon's car occurred "right at the crest." He was very familiar with the road in question and was well aware that, as you proceeded up the hill from the west, a car approaching from the opposite direction would be hidden from view. A passage from his examination for discovery reads:—

> Q. And until you got to the top of that crest neither could see the other, is that correct?
>
> A. It would be pretty near impossible.

There was, according to the appellant, gravel about one inch in depth on the hard surface of the road and the traffic had made tracks in this, approximately in the center of the road upon which he was driving as he approached the crest.

Constable Hacking and Corporal Hurst of the Royal Canadian Mounted Police attended within about two hours of the occurrence of the accident and took measurements and prepared a plan of the roadway at the crest of the hill. The vehicles had collided at almost the center of the road upon the level surface of the crest which was some 60 feet in length. Constable Hacking, in describing the hill, said that it was quite a steep hill which was level on the top and fell away both to the west and the east for 300 feet. He fixed the point of collision as being 10 feet from the easterly limit of the level top of the hill and said that there were two skid marks plainly visible for a distance of 50 feet to the west of the point of impact, which had been made by the appellant's car. These skid marks were 4 feet apart and almost in the center of the road, the most northerly being 9 feet from the north edge of the road and the most southerly 8 feet and 3 inches from the south limit. As to the visibility of traffic coming from the opposite direction up the hill, he said that

it was his practice, when approaching the crest from either direction, to keep over to the right of the road "for the simple reason you cannot see what is coming on the other side." Corporal Hurst agreed that, as you approach the hill, vehicles would be within 75 feet of each other before they could see each other. In saying this, it is apparent that he meant vehicles approaching from the opposite direction in such a manner that they would arrive at the crest at the same time.

Photographs taken by the constable which were put in evidence at the trial support this statement of the constable, in my opinion.

I do not think this view of the matter is affected by an answer made by the appellant when examined for discovery when, after saying that he did not remember seeing Langdon coming, he said that if he had been looking he "imagined" that he could have seen him "possibly about 200 feet". He was not asked and did not say from what point he could have seen the other car at that distance. This was, obviously, mere speculation and not intended as evidence as to the distance the cars were from each other when he first saw Langdon's car. As to that, as I have said, he remembered nothing.

The finding of negligence made at the trial against the appellant was expressed by the learned trial judge in these terms:—

> With these decisions, and the numerous decisions pronounced both before and since in mind, I have, after consideration, come to the conclusion that Thompson was guilty of gross negligence. In his conduct were all the elements, though in somewhat lesser degree, which constituted gross negligence in the case of Langdon, except the excessive use of alcohol. In my view, to approach a blind spot on the road, knowing (as Thompson did, because he was familiar with this road) the danger of vehicles approaching blindly from the other direction, to approach that spot at a speed in excess of 35 miles per hour, to approach it driving on the wrong side of the road, to fail to observe the most careful lookout, and to proceed with the utmost caution, constitutes, in all the circumstances which existed here, a marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves, and is negligence of so high a degree that it falls within the category of gross negligence. It must be kept in mind that Thompson's conduct was not a mere momentary lapse or oversight, such as a too sudden cut-in while passing another vehicle, but was wrongful conduct which persisted for some period of time while he was approaching the crest of the hill, and from which it should have been apparent to him, as a normal, prudent person, what a situation of danger was likely to be created.

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The only evidence from which an inference may be drawn as to the speed at which the appellant had driven as he approached the crest, other than his own estimate to which I have referred, is the fact that the skid marks made by his car commenced just at the westerly limit of the crest, showing that he had obviously seen the other car and applied the brakes just before reaching that point and that the car had skidded 50 feet on the dry gravel roadway. In drawing the inference that he had been driving at a higher rate than 35 miles, the learned trial judge relied, in part, upon his belief that after the collision the appellant's car had continued to the east for a distance of 20 feet after the impact, whereas, in fact, the car had been driven backward to the southwest for a distance of some 12 or 14 feet.

That the appellant was guilty of negligence contributing to the occurrence of the accident is not disputed in the argument addressed to us. There was the clearest evidence of negligence, in my opinion. The danger of driving in the center of a highway when approaching the crest of a hill, where the view of traffic coming from the opposite direction is obscured, is manifest. On well marked highways in various parts of this country, the center line is marked on the approaches to hills and warnings against passing are posted to protect against this very danger. Whether the speed of the appellant's car was 35 miles per hour or more as he neared the crest, it was at such a high rate that it was impossible for him to bring the car to a halt, though the wheels skidded on the dry surface for 50 feet. The width of the crest of the hill was, to the appellant's knowledge, only about 60 feet, a distance which, at 35 miles per hour, he would travel in slightly more than one second, so that he was well aware of the fact that he could not stop his car in from the opposite direction, or change his direction in time from the opposite direction, or change his direction in time to prevent a collision.

It has been pointed out in this Court on more than one occasion that it is impossible to accurately define the expression "gross negligence" which appears in various Highway Acts in Canada. The cases are reviewed in the

judgment delivered in *Studer* v. *Cowper* (1). The meaning assigned to the expression by Sir Lyman Duff C.J., in *McCulloch* v. *Murray* (2), does not appear to me to differ from that given to it earlier by Sedgwick J. in delivering the opinion of the majority of the Court in *City of Kingston* v. *Drennan* (3), which was "very great negligence." In *McCulloch's case,* it was pointed out by the Chief Justice that it is a question of fact for the jury whether conduct falls within the category of gross negligence.

In the present matter, it was a question of fact for the learned judge by whom the action was tried. The appeal from his finding that the appellant had been guilty of very great negligence in the circumstances which I have narrated was dismissed by an equal division of the Appellate Division and there are thus concurrent findings.

It cannot, in my opinion, be properly said that the finding was clearly wrong. On the contrary, with respect, I think it was clearly right.

I would dismiss this appeal with costs.

CARTWRIGHT J.:—The sole question in this appeal is whether the appellant was guilty of gross negligence. Egbert J., before whom the action was tried without a jury, held that he was and his judgment was upheld by the Appellate Division on an equal division. It is not suggested that the learned trial judge misdirected himself as to what in law amounts to gross negligence and the question we are called upon to determine is one of fact.

The relevant facts are fully set out in the reasons of Clinton Ford J.A. and need not be repeated. The learned trial judge found (i) that the appellant immediately prior to the application of his brakes was travelling at a speed "considerably in excess of 35 miles per hour"; (ii) that he was driving with part of his car to his left of the centre line of the highway and (iii) that he was not keeping a proper look-out for approaching traffic. For the reasons given by Clinton Ford J.A. I agree with his conclusion that neither the first nor the third of these findings is supported by the evidence. As to the second finding, in the peculiar circumstances of this case the fact that the appellant's car was

(1) [1951] S.C.R. 450. (2) [1942] S.C.R. 141.
(3) (1896) 27 Can. S.C.R. 46.

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partly to the left of the centre line does not appear to have been a cause of the collision. Had the appellant turned his car completely to his right side of the centre line the evidence indicates that the impact with Langdon's car would have been no less violent than it was.

For the reasons given by Clinton Ford J.A. I agree with his conclusion that gross negligence on the part of the appellant was not established.

I would allow the appeal and direct that the respondent's action be dismissed with costs throughout.

ABBOTT J.:—For the reasons assigned by Clinton J. Ford, J.A., of the Supreme Court of Alberta, with which I am in respectful agreement, I would allow the appeal and dismiss the action of the respondent Fraser against appellant, with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Rice, Paterson, Cullen & Ives.*

Solicitor for the respondent: *J. Cohen.*

1955

*Mar. 15
*May 24

JACK ROSS ..... APPELLANT:

AND

HER MAJESTY THE QUEEN, ON THE INFORMATION OF A. GRAY } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal Corporations—Power to pass by-laws for licensing, regulating and governing taxicabs—Taxicab licensed in one municipality parking on private property in other municipality—Applicability and validity of by-law purporting to prohibit same—The Municipal Act, R.S.O. 1950, c. 243, s. 406(1).

The appellant, a taxicab owner and driver, was convicted of having violated s. 42(*b*) of By-Law No. 12899 of the Township of York, by parking his cab on private property in the municipality for the purpose of obtaining a fare. The appellant held a taxicab licence from a different municipality. The by-law was passed under the authority of s. 406(1) of the *Municipal Act*, R.S.O. 1950, c. 243, which provides for the licensing, regulating and governing of owners and drivers of cabs

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

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etc. The appellant contends that s. 42(*b*) of the by-law applies only to the owners or drivers licensed by the municipality or using cabs in operations which could not lawfully be carried on without such a licence and alternatively, that if it applies to the appellant it is *ultra vires* of the municipality.

Held (Kerwin C.J. dissenting): that the appeal should be allowed and the conviction quashed, the costs of the appellant throughout to be paid by the informant.

Per Estey, Locke, Cartwright and Fauteux JJ.: The judgments in *The Commodore Grill* v. *The Town of Dundas* [1943] O.W.N. 408 and *Rex ex rel Stanley* v. *De Luxe Cab Ltd.* [1951] 4 D.L.R. 683, do not support the conclusion of the Court of Appeal that although the municipality had no power to require the appellant to obtain a licence it could validly regulate his conduct in regard to his cab so long as the cab was physically situate within the limits of the municipality.

On its proper construction, s. 42(*b*) is intended to apply to owners of cabs although neither licensed nor required to be licensed by the municipality. However, to the extent that it prohibits the owner of a cab, who does not require a license, from permitting the cab to stand on private lands within the municipality, s. 42(*b*) is *ultra vires* of the municipality. It would require clear and explicit words to confer power on the municipality to prohibit the owner of such a cab from allowing it to stand on private property in the municipality whether owned by him or by some other person. The general words of s. 406(1) of the *Municipal Act* are not apt to confer so unusual a power.

Per Kerwin C.J. (dissenting): S. 42(*b*) applies to owners of motor vehicles used for hire although neither licensed nor required to be licensed by the municipality, and is *intra vires* the municipality. The terms of s. 406(1) of the *Municipal Act* are wide enough to authorize the municipality to provide that no owner or driver of any cab, when not actually in use for hire, shall permit the same to stand on any public highway or on any private lands owned either by the owner or driver or by anyone else. The municipality is not attempting to restrict the use of private lands as such.

APPEAL from the judgment of the Court of Appeal for Ontario (1), dismissing an appeal from the judgment of Macdonell Co. Ct. J., of the County Court of the County of York, which had dismissed the appellant's appeal from his conviction of having violated s. 42(*b*) of the By-Law No. 12899 of the Township of York.

J. R. Robinson, Q.C. for the appellant.

C. Foreht for the respondent.

THE CHIEF JUSTICE (dissenting):—I have had the advantage of reading the reasons of Mr. Justice Cartwright wherein are set out the facts and the contentions advanced by the parties. I agree that clause 42 (*b*) of the by-law

(1) [1954] O.W.N. 707.

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applies to owners of motor vehicles used for hire although neither licensed nor required to be licensed by the municipality and the only point remaining, therefore, is whether, as so construed, the clause is *intra vires* the municipal council. In my opinion, that question should be answered in the affirmative.

The relevant provision of *The Municipal Act* is s-s. 406 (1) as found in R.S.O. 1952, c. 243:

> 406. By-laws may be passed by the councils of towns, villages and townships and by boards of commissioners of police of cities:—
>
> 1. For licensing, regulating and governing teamsters, carters, draymen, owners and drivers of cabs, buses, motor or other vehicles used for hire; for establishing the rates or fares to be charged by the owners or drivers of such vehicles for the conveyance of goods or passengers either wholly within the municipality or to any point not more than three miles beyond its limits, and for providing for the collection of such rates or fares and for revoking any such licence.

Under this sub-section a by-law may be enacted providing for licensing, for regulating, and for governing, owners and drivers of cabs, etc., used for hire; and it may do any one of these things. The terms of s-s. (1) of s. 406 of *The Municipal Act* are wide enough to authorize the municipality to provide that no owner or driver of any cab, etc., when not actually in use for hire, shall permit the same to stand on any public highway or on any private lands owned either by the owner or driver or by anyone else. The council is exercising its authority within the boundaries of the municipality and is not attempting to restrict the use of private lands as such. The prohibition is not directed to a cab, etc., but to the owner and driver thereof used for hire found within the municipality. The Information in the present case was laid against the owner who was also the driver.

The appeal should be dismissed with costs.

ESTEY J.:—I agree the appeal should be allowed and the conviction quashed with costs throughout.

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

CARTWRIGHT J.:—This is an appeal, brought by special leave granted by this Court, from a judgment of the Court of Appeal for Ontario (1), affirming a judgment of His

(1) [1954] O.W.N. 707.

Honour Judge Macdonell whereby the conviction of the appellant by a Justice of the Peace for the Province of Ontario was affirmed.

The charge on which the appellant was convicted was that he on the 22nd day of April A.D. 1953, at the Township of York, in the County of York, being the registered owner of motor vehicle Licence No. 3L608, did unlawfully permit said vehicle to stand on the property known as Crosstown Car Wash, located at 1467 Bathurst Street, for the purpose of obtaining a fare contrary to Section 42(*b*) of By-law No. 12899 of the Township of York as amended by By-law No. 14512 of the said Township of York.

The facts are undisputed. The appellant was on April 22, 1953, the owner of the motor vehicle referred to in the charge which he used as a taxi-cab, that is for the conveyance of persons for hire. It was standing on the property mentioned. It was equipped with a radio by which the appellant received communications from his headquarters. The appellant was sitting in his cab waiting for a fare or for a call over the radio to tell him where to go to pick up a passenger. The appellant held a taxi-cab licence from the Township of East York. Earlier in the year he had applied to the Township of York for a taxi-cab licence but his application had been refused. There was no evidence that he had ever picked up or set down a passenger in the Township of York.

The property on which the appellant's cab was standing was private property belonging to a firm known as Crosstown Car Wash. It is a corner lot having a frontage of 192 feet on the east side of Bathurst Street and 139 feet 9 inches on the north side of St. Clair Avenue. The southerly portion of the lot measuring 75 feet from north to south is in the City of Toronto. The northerly portion measuring 117 feet from north to south is in the Township of York. The whole width of Bathurst Street for a distance of 185 feet measured northerly from the north limit of St. Clair Avenue is in the City of Toronto, so that for 110 feet the east limit of Bathurst Street is the boundary between the Township of York and the City of Toronto. The appellant's cab was standing facing westerly about four feet from this boundary

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and could have driven westerly on to Bathurst Street or southerly on to St. Clair Avenue without using any highway in the Township of York.

The appellant submits (i) that s. 42 (*b*) of By-law 12899, as amended, on its proper construction does not apply to the appellant but applies only to the owners or drivers of taxi-cabs licensed by the Township of York or used in operations which could not lawfully be carried on without such a licence and (ii) alternatively, that if on its proper construction it does apply to the appellant it is *ultra vires* of the Council of the Township.

The respondent does not seek to support the By-law under any provision of the *Municipal Act* other than s. 406 (1) which reads as follows:—

> 406. By-laws may be passed by the councils of towns, villages and townships and by boards of commissioners of police of cities:—
>
> 1. For licensing, regulating and governing teamsters, carters, draymen, owners and drivers of cabs, buses, motor or other vehicles used for hire; for establishing the rates or fares to be charged by the owners or drivers of such vehicles for the conveyance of goods or passengers either wholly within the municipality or to any point not more than three miles beyond its limits, and for providing for the collection of such rates or fares; and for revoking any such licence.

In view of the operations carried on by the appellant, set out in the above statement of facts, it follows from the judgment of Wright J. in *Re Ottawa Electric Railway Co. Ltd. and Town of Eastview* (1), that the Township of York had no power to require him to take a licence for his cab. At page 56 Wright J. said:—

> I think the conclusion is irresistible that, if the Legislature intended to confer upon the councils of towns and villages the power to require Licenses for vehicles that operate between one municipality and another or other municipalities, it would use express words to that effect; and that, in the absence of such express legislation, the powers of municipal councils are confined to licensing the owners of vehicles kept for hire entirely within the limits of their municipalities. This construction would give full effect to the section of the Consolidated Municipal Act already cited which declares that the jurisdiction of a municipal council to enact by-laws is confined to that municipality.

This judgment was followed by Greene J. in *Rex ex rel Taylor* v. *Kemp* (2), by Rose C.J.H.C. in *Rex ex rel St. Jean* v. *Knott* (3), and by His Honour Judge Macdonell in *Rex* v. *Olive* (4), affirmed by the Court of Appeal (5).

(1) (1924) 56 O.L.R. 52.
(2) [1943] O.W.N. 54.
(3) [1944] O.W.N. 432.
(4) [1951] O.W.N. 637.
(5) [1953] O.W.N. 197.

F. G. MacKay J.A. who delivered the unanimous judgment of the Court of Appeal in the case at bar follows these cases and sums up the law in the following passage with which I respectfully agree:—

> It is settled law that municipal corporations in the exercise of the statutory powers conferred upon them to make by-laws should be confined strictly within the limits of their authority. The municipality under what is now Section 406 of R.S.O. 1950, Chapter 243, may require that a cab engaged in carrying passengers from and to places within the municipality obtain a licence but cannot compel a cab licensed in another municipality and carrying passengers from one municipality to another to obtain a license. *Rex* v. *Olive,* (1951) O.W.N. 635, affirmed on appeal (1953) O.W.N. 197 and cases therein referred to.

The learned Justice of Appeal then goes on to hold, on the authority of *The Commodore Grill* v. *The Town of Dundas* (1) and *Rex ex rel Stanley* v. *De Luxe Cab Ltd.* (2), that although the Township had no power to require the appellant to obtain a licence it could validly regulate his conduct in regard to his cab so long as the cab was physically situate within the limits of the Township.

In my view neither of these cases supports the conclusion drawn from them in the case at bar. In *The Commodore Grill Case* the Town had passed a by-law requiring the owners of restaurants operated within the Town to obtain a licence but the by-law neither limited the number of such restaurants nor provided for their regulation. The by-law was passed under the authority of s. 436 (2) of R.S.O. 1937 C. 266 which empowered the Town to pass by-laws:—

> For limiting the number of and licensing and regulating victualling houses, ordinaries, and houses where fruit, fish, oysters, clams or victuals are sold to be eaten therein, and places for the lodging, reception, refreshment or entertainment of the public, and for revoking the license.
>
> (*a*) The sum to be paid for the license shall not exceed $20.

No question arose as to whether the powers given to the Town could be exercised in regard to the plaintiff's restaurant. The only question raised was whether, as Plaxton J. had thought himself bound by authority to hold, the municipality if it acted at all under the sub-section quoted must exercise all of the three powers given to it, i.e., (i) the power to limit the number of restaurants, (ii) the power to license them, and (iii) the power to regulate them. The Court of Appeal decided that although these

(1) [1943] O.W.N. 408. (2) [1951] 4 D.L.R. 683.

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three powers were stated conjunctively in the enabling subsection they constituted separate powers which could be separately exercised. At page 432 Robertson C.J.O. said:—

> Unless there is something to be found in the provision of the statute that indicates that its operation should be so restricted, I know of no rule of interpretation that would require that a municipality should exercise to the full the power given it, or not exercise it at all. Doubtless the powers of a municipality are limited to what are given by statute, but to exercise a power to less than its full extent is not to exceed it. To do one thing when two or more are authorized is not to do something unauthorized, unless all that is authorized is to be deemed unseverable, in the intention of the Legislature expressly declared or properly to be inferred.

In the *De Luxe Cab* case, the defendant was charged with a breach of s. 32 of by-law 214 of the Board of Commissioners of Police of the City of Toronto, reading as follows:—

> No person licensed under this by-law shall employ or allow any runner or other person to assist or act in concert with him in obtaining any passenger or baggage, at any of the stands, railway stations, steamboat landings or elsewhere in the said City.

This by-law was passed under the authority given by s. 441 (1) of the *Municipal Act*, R.S.O. 1937, c. 266. Section 441 provides that certain by-laws may be passed by Boards of Commissioners of Police of cities. Subsection (1) of s. 441 is as follows:—

> For licensing, regulating and governing teamsters, carters, draymen, owners and drivers of cabs, buses, motor or other vehicles regularly used for hire within the city and for establishing the rates or fares to be charged by the owners or drivers of such vehicles for the conveyance of goods or passengers either wholly within the city or to any other point not more than three miles beyond its limits and for providing for enforcing payment of such rates or fares and for revoking and cancelling the license.

Robertson C.J.O., who gave the judgment of the Court of Appeal upholding the validity of the section of the by-law quoted above, said in part at page 685:—

> In the first place, it is to be noted that the Police Commissioners' By-law 214 in s. 32 deals only with persons licensed under that by-law. It is the conduct of persons licensed under the by-law that is regulated and governed by the Police Commissioners' by-law passed under the authority of s. 441 (1) of the Municipal Act.

and at page 686:—

> A number of other defects were suggested by counsel for the respondent in his ingenious argument. Counsel pressed upon the Court the lack of any authority in the Board of Commissioners of Police to pass a by-law forbidding the use of private property by runners. It is plain, however, that the Police Commissioners' by-law does nothing of the kind. It deals

with the employment and use by licensed persons of runners to assist them in soliciting business. It is the conduct of the employer, not that of the employee, that the by-law deals with.

By implication the reasons of the learned Chief Justice appear to negative any power in the Board of Commissioners of Police under s. 441 (1) to have passed a by-law prohibiting the activities of the runners.

In considering the first submission of the appellant, that s. 42 (*b*) of the by-law does not apply to him, it is to be observed that ss. 42 (*a*) and 42 (*b*) read as follows:—

> 42 (*a*) That when not engaged in driving his cab for hire the owner or driver thereof shall keep the same at the cab stand or other premises specified in his application for license, or at such other place as may be authorized or approved in writing by the License Inspector.
>
> 42 (*b*) Subject to the provisions of Paragraph 42 (*a*) no owner or driver of any cab when not actually in use for hire, shall permit the same to stand on any public highway or on any private lands within the municipality.

It is, I think reasonably plain that s. 42 (*a*) applies only to the owner or driver of a cab licensed under the by-law. Its wording contemplates that an application for a licence will have been made in which will have been specified the place at which the cab shall be kept when not being driven for hire. The forms of licence are prescribed by ss. 4 and 5 of the by-law and do not provide that such place shall be specified therein, and presumably it is for this reason that the section refers not to the licence but to the application therefor. Section 42 (*b*) is made subject to s. 42 (*a*) but if its application is limited to the owners and drivers of cabs licensed by the township it would appear to be unnecessary. Since such cabs are imperatively required by s. 42 (*a*) to be kept in specified places it would be otiose to say that they may not be kept elsewhere. I conclude therefore that on its proper construction s. 42 (*b*) is intended to apply to owners of cabs although neither licensed nor required to be licensed by the Township.

It remains to consider whether s. 42 (*b*) so construed is *intra vires* of the Council. In my opinion, in so far as it prohibits the owner of a cab, who does not require a licence, from permitting the cab to stand on private lands within the municipality, it is not. It is unnecessary to consider whether, and if so to what extent, the Council may by by-law regulate the owner of a cab used for hire, lawfully

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operated by him in such manner that the Council has no power to require that he obtain a licence, merely by reason of the fact that the cab is physically present in the municipality. It would I think require clear and explicit words to confer power on the Council to prohibit the owner of such a cab from allowing it to stand on private property in the municipality whether owned by him or by some other person. The general words of s. 406 (1) are not apt to confer so unusual a power.

I wish to emphasize that I am deciding only that s. 42 (*b*) is *ultra vires* of the Council to the extent stated above. For the purpose of deciding the case before us that is all that it is necessary to determine and I think it undesirable to express any further opinion in regard to the construction or validity of the By-law.

For the above reasons I would allow the appeal and quash the conviction of the appellant with costs throughout.

Appeal allowed and conviction quashed.

Solicitors for the appellant: *Robinson & Haines.*

Solicitor for the respondent: *Cecil Foreht.*

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*Apr. 26, 27
*May 24

HER MAJESTY THE QUEEN .....APPELLANT;

AND

ANNUNZIATO TRIPODI .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Murder—Defence of provocation—Appeal by Crown—Whether evidence to support defence of provocation—Element of suddenness required in provocation—Criminal Code, s. 261.

The respondent had emigrated to Canada from Italy. His wife and children had remained behind. In correspondence received from friends and relatives abroad, he was advised that his wife had been unfaithful while he was in Canada and had suffered an abortion. Subsequently, he arranged for his wife and children to come to Canada, where he strangled his wife a few days after her arrival. The theory of the Crown was that he had brought his wife to Canada with the intent to kill her when she got here. This was supported by a letter written by him to his brothers and by statements, admitted in evidence, given

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

by him to the police. The respondent pleaded that he was provoked by her admission to him that she had been guilty of infidelities while he was in Canada.

He was convicted of murder and the Court of Appeal ordered a new trial. The Crown obtained leave to appeal to this Court on the ground, *inter alia*, that the Court of Appeal erred in holding that there was any evidence to support the defence of provocation.

Held (Kerwin C.J., Estey, Cartwright and Abbott JJ. dissenting): that the appeal should be allowed and the conviction restored.

Per Taschereau, Rand and Fauteux JJ.: What s. 261 of the *Criminal Code* provides for is "sudden provocation", and it must be acted upon by the accused "on the sudden and before there has been time for his passion to cool". "Suddenness" must characterize both the insult and the act of retaliation. The expression "sudden provocation" means that the wrongful act or insult must strike upon a mind unprepared for it, that it must make an unexpected impact that takes the understanding by surprise and sets the passion aflame. There was nothing of that in the case at bar. What was said between the accused and the victim could not, in the circumstances, amount to "sudden provocation". The words furnished not the provocation but the release of his pent-up determination to carry out what he had deliberately decided upon, as he put it, to avenge his family honour.

Per Kellock and Locke JJ.: If, upon becoming aware of his wife's adultery, a husband determines to kill her, he may rely upon provocation only if he acts "on the sudden" before there has been time for his passion to cool. Consequently, the suggestion that if such an intention, once formed, was given up but was renewed upon subsequent mention of the previous information may be relied upon as "sudden provocation", cannot be accepted. There is then no element of "suddenness" as expressly required by s. 261 of the *Code*. In the case at bar, there is no question but that the accused already knew and had for some time known what was involved in the statement made by his wife to him immediately before the tragedy.

Per Kerwin C.J., Estey, Cartwright and Abbott JJ. (dissenting): The jury were not properly instructed with regard to an alternative defence, disclosed in the evidence, to the effect that even if the accused had once intended to kill his wife upon her coming to Canada, he had thereafter forgiven her and that, therefore, at all relevant times he had no intention of killing her.

The trial judge did not, also, make it sufficiently clear to the jury that if, in respect of provocation, they entertained a reasonable doubt, the accused should be given the benefit of it.

APPEAL from the judgment of the Court of Appeal for Ontario (1), setting aside the conviction of the appellant for murder and ordering a new trial.

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

C. L. Dubin, Q.C. and *J. Agro* for the respondent.

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The judgment of Kerwin C.J., Estey, Cartwright and Abbott JJ. (dissenting) was delivered by:—

ESTEY J.:—Upon the respondent's appeal from his conviction for murder a new trial was directed. The Crown appeals to this Court and, as I am in respectful agreement with the learned judges of the Court of Appeal for Ontario (1) that a new trial must be had, only a brief outline of the facts will be given.

The respondent was married in Italy. In 1952 he came to Canada, leaving his wife and two infant children in Italy. At St. Catharines he obtained employment and each month sent back to Italy sums of money varying from $35 to $50. In correspondence received from certain of his friends and relatives residing in Italy he was advised that his wife had been unfaithful to him and had, in a hospital, suffered an abortion. He, however, arranged for his wife and children to come to Canada and they arrived at Halifax in July, 1954, where he met them. They at once proceeded to St. Catharines, arriving there in the forenoon of July 27 and going immediately to the home of his brother with whom he had been living. After lunch, at the home of his brother, he and his wife went upstairs. He admits that he asked her to go, and for the purpose of marital relations, and, while she did not refuse, her attitude was rather cold toward him and she said "I cannot have any more children" and in reply to his question asking the reason she explained that "she was in hospital and had an abortion." Because of this admission on the part of his wife he says he lost his self-control and, as her body indicates, he seized her by the neck and strangled her. When he realized she was dead he went downstairs, intimated to his sister-in-law what he had done, hired a taxi and proceeded to the police station, where he informed the police of what he had done and was placed in custody.

There can be no doubt, upon the evidence, but that the accused had committed culpable homicide and the real issue turned upon whether he had suffered such provocation as would reduce his offence from murder to manslaughter.

Counsel for the Crown contended that the words attributed to the deceased by the respondent, which he deposed caused him to lose his self-control, did not amount,

(1) 110 C.C.C. 330; [1955] O.R. 144.

in law, to provocation for the reason that these words repeated only what he already had been told and which, upon the evidence, he at least at one time believed. The *Code,* in s. 261(2), defines provocation as "any wrongful act or insult, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control." It was not contested that if the words attributed to the deceased conveyed the information for the first time that they would provide evidence from which a jury might find provocation. It will be noted that the Code does not provide that the words used must convey something theretofore unknown to the accused, nor, as a matter of principle, can it be said that repetition might not constitute provocation. If Parliament had so intended, it would no doubt have used apt words to that effect. In both *Rex* v. *Krawchuk* (1) and *Taylor* v. *The King* (2), the accused had knowledge of the relationship existing between his wife and another man. It is true that the words in each of these cases were spoken at the time of a new or fresh wrongful act. In this case, however, it must be acknowledged that it is one thing to hear from friends and relatives and quite another matter to have the admission made by the wife herself. More particularly would that be so with respect to one in the position of the accused who deposed that, notwithstanding what he had heard, he continued to forward funds for the support of his wife and children, had decided to forgive, purchase a house and make a new home. As he stated: "I was going to forget about all what happened in Italy, and start a new life here," and again to his wife on the train: "This is a new country, a new land, and we are to start a new life." It, however, cannot be doubted but that the fact that nothing new was expressed would be taken into consideration by the jury in determining whether an ordinary person would thereby be deprived of the power of self-control and, if so, it would also be material in considering the further question whether or not the accused was actually "deprived of the power of self-control by the provocation which he received."

At the trial it was the contention of the Crown that the accused had brought his wife out from Italy with the intention of taking her life and that he had, on July 27, carried out that intention and was consequently guilty of murder.

(1) (1941) 75 C.C.C. 219. (2) [1947] S.C.R. 462.

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The main contention on behalf of the respondent was that he had never believed that his wife had been unfaithful; that he at all times loved her and never intended to kill her and did so entirely because of her admission upon the day in question. While, therefore, apparently not pressed at the trial, it has been submitted on behalf of the respondent, both in the Court of Appeal and in this Court, that there was evidence which supported an alternative defence to the effect that even if the respondent had, as late as July 18 (when in a letter to his brothers and sister-in-law he expressed such an intention), intended to murder his wife upon her coming to Canada, that he had thereafter forgiven her and decided to buy a house and make a home for his wife and family in this country; that, therefore, at all relevant times he had no intention of killing his wife. The record discloses evidence which, if believed, would support such a defence. I am, therefore, in agreement with the learned judges of the Court of Appeal that it was incumbent upon the trial judge to instruct the jury with regard thereto in a manner that they would appreciate the relevant law and the evidence in relation thereto. The language of Sir Lyman Duff is appropriate:

> The able and experienced judge who presided at the trial properly directed the attention of the jury to the defence as it was put before them by counsel for the prisoner; and, having done this, he did not ask them to apply their minds to the further issue we have just defined. It was the prisoner's right, however, notwithstanding the course of his counsel at the trial, to have the jury instructed upon this feature of the case. We think, therefore, that there must be a new trial. *MacAskill* v. *The King* (1).

The learned judges in the Court of Appeal directed a new trial, not only on the foregoing ground, but also on the ground that the learned trial judge had failed to charge the jury that they might believe all or any part, or disbelieve all or any part, of the evidence of a witness, including the accused. This instruction would appear to be particularly important in this case where the oral testimony given by the accused was, in material respects, in conflict with the letter to his brothers and sister-in-law and to his statement made to the police.

I am also in respectful agreement with the learned judges in the Court of Appeal in their conclusion that the learned trial judge, while instructing the jury in general terms with

(1) [1931] S.C.R. 330 at 335.

respect to reasonable doubt, did not make it sufficiently clear that if, in respect to provocation, they entertained a reasonable doubt, the accused should be given the benefit thereof. This conclusion is supported by the observations of Viscount Sankey:

> When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted. *Woolmington* v. *The Director of Public Prosecutions* (1).

The appeal should be dismissed.

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

RAND J.:—I confine myself to a brief statement of the reasons for which I think the appeal of the Attorney General should prevail.

The only ground urged by Mr. Dubin which calls for consideration relates to provocation. What s. 261 of the *Code* provides for is "sudden provocation", and it must be acted upon by the accused "on the sudden and before there has been time for his passion to cool". "Suddenness" must characterize both the insult and the act of retaliation. The question here is whether there was any evidence on which the jury, acting judicially, could find the existence of "sudden provocation".

I take that expression to mean that the wrongful act or insult must strike upon a mind unprepared for it, that it must make an unexpected impact that takes the understanding by surprise and sets the passions aflame. What was there of that here?

On the evidence furnished by the accused himself, in his testimony, in letters written three days before leaving St. Catharines to meet his family arriving at Halifax, in statements made to the police immediately following the death of his wife, and from the words spoken to his sister-in-law as he came downstairs, "What I had to do is done", it is indisputable that for months he had been burning within over the news of his wife's conduct received from Italy. But

(1) [1935] A.C. 462 at 482.

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it is argued that in the prospect of rejoining his family the past was put behind him and that he met his wife with open arms and in a happy and reconciled spirit; and I will assume that that is a true description of his state of mind at the time.

But he found his wife cold. To questions put to her on the train, she suggested that they might separate, and he put no more. Within one hour of her arrival at the home of his brother-in-law where his family were to have their temporary home, she was a corpse by noiseless strangling at his hands. What she told him in the bedroom, and all that can be claimed to be provocative, was that she could not have more children because of an operation for abortion. What he had so fully foretold in his letters of July 18 had, nine days later, come to pass.

He had learned of the operation from the information received months before and it was one of the thoughts he had lived with during the period of waiting. I have no hesitation in holding that what was said could not, in the circumstances, amount to "sudden provocation". The words furnished not the provocation but the release of his pent up determination to carry out what he had deliberately decided upon, as he put it, to avenge his family honour.

It may be that such a code is recognized in Bagaladi as a mitigation of the law's severest sanction, but it has no place in the law of this country. Any abatement of the consequences of such an act can here come only from the executive. I cannot imagine any encroachment on the inviolability of the individual more dangerous than that such a palliation should be countenanced by the courts.

I would allow the appeal and restore the judgment at the trial.

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

KELLOCK J.:—S. 261 of the *Criminal Code* is as follows:

Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

2. Any wrongful act or insult, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

3. Whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact: Provided that no one shall be held to give provocation to another by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

It would seem plain that if what is relied upon as constituting provocation is an act, the question as to whether or not there is any evidence of a "wrongful" act is one of law for the court. It is equally a question of law as to whether or not, in any given case, there is any evidence of "insult"; *Taylor* v. *The King* (1).

Provided the act or insult be wrongful, it must, to constitute provocation, be (*a*) such as would cause an ordinary person to be deprived of self-control, and (*b*) to have produced abrupt reaction on the part of the offender without time for deliberation; s-s. (2). Whether the particular act or insult amounts to provocation and whether the offender was, in fact, deprived of self-control by it are, by s-s. (3), to be considered questions of fact.

Moreover, the question as to whether the provocation was "sudden", as provided by s-s. (1), must be established by evidence, and the question as to whether or not there is any evidence of sudden provocation is also a question of law.

According to the Oxford Dictionary, to which I had occasion to refer in *Taylor* v. *The King, supra,* at 475, an insult is defined, inter alia, as

injuriously contemptuous speech or behaviour; scornful utterance or action intended to wound self-respect; an affront; indignity.

The case at bar requires consideration first as to what was the insult, if any, involved in what the deceased said to the appellant, as related by him, immediately prior to the killing, and whether there was anything "sudden" about the statement so made.

It has long been considered that circumstances more wounding or more calculated to cause the loss of self-control cannot be imagined than the discovery by a husband of his wife in the act of adultery. Accordingly, sudden discovery of the fact constitutes sufficient provocation either at common law or under the *Criminal Code*. Once a husband has

(1) [1947] S.C.R. 462 at 472, 480-1.

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Kellock J.

become aware, however, subsequent mention by a wife to him of the same act, although it may cause a reassertion of anger on the part of the husband, cannot constitute legal provocation unless, for example, there be something new in the nature of a taunt as in *Taylor's* case.

Whether the husband becomes aware of the fact of adultery by his own discovery, by his wife's confession or by other information, can make no difference from this standpoint. The "insult" is received upon discovery of the fact. It is therefore not possible to regard a confession on the part of a wife as a new indignity or affront if the husband already knows of the occurrence which is the subject of the confession.

If, upon becoming aware of the fact, the husband determines to kill his wife, he may rely upon provocation in reduction of his crime from murder to manslaughter only if he acts "on the sudden" before there has been time for his passion to cool. The suggestion that if such an intention, once formed, was given up but was renewed upon subsequent mention of the previous information may be relied upon as "sudden" provocation, is a contention which, as I view the provisions of s. 261, I cannot accept. It lacks the element of "suddenness" which the section expressly requires. The English cases on the subject are, in my opinion, applicable under the law as laid down in the section.

In *Regina* v. *Rothwell* (1), Blackburn J., in summing up to the jury, instructed them as to the law then prevailing in England that as a general rule no provocation by words only will reduce murder to manslaughter but that this is not an invariable rule and that if a husband *suddenly* hearing from his wife that she had committed adultery and were thereupon to kill his wife, this might be manslaughter "he having had no idea of such a thing before". The decision of the Court of Criminal Appeal in *Palmer's* case (2) illuminates the point further. In that case, at p. 210, Channell J., stated the reason for the exception to the rule in England that the nature of such words renders the confession equivalent "to the discovery of the act". It is perfectly plain that there can be no more than one "discovery" of the same act.

(1) 12 Cox C.C. 145.

(2) (1913) 8 Cr. App. R. 207.

In *R.* v. *Leonard Holmes* (1), the appellant had killed his wife partly by hitting her with a hammer and eventually by strangling her immediately after her confession that she had been untrue to him. In a statement he admitted having previously had suspicions of her. Wrottesley J., in the Court of Criminal Appeal, said at p. 525:

> It is not therefore surprising to find that one form of provocation which would reduce what would be murder to manslaughter is the *sudden discovery* by a husband of his wife in the act of adultery;

On the following page the learned judge, after referring to the decisions which establish that a sudden confession by a wife of adultery constitutes an exception to the general rule that provocation by words alone is not sufficient in England, continued at p. 526:

> The appellant in the case before us was not informed of something of which he had no idea before hand . . . To hold that a killing in these circumstances could fall within the exception of the general rule that no words are sufficient provocation would be to extend the exception in two directions: first, to a case where the husband, himself unfaithful, had—and for some time had had—an idea that his wife had been unfaithful; and secondly. . . .

which is irrelevant for present purposes as are the words I have omitted from the above quotation relating to the manner by which death was produced.

In the case at bar there is no question but that the respondent already knew and had for some time known what was involved in the statement made by his wife to him immediately before the tragedy.

In the letter left by the respondent on July 18, 1954, for his brothers and sister-in-law, he states:

> I am leaving this note; naturally you know by now what happened in Italy and *I know it too* . . . I knew more than you but I could not show it . . . I don't know what to do, that dishonest mother wanted her children to be orphans. She thought that I did not know anything and would not have the courage to kill the bad woman.

In a postscript addressed to one brother he said:

> Open your eyes because I cannot see anything myself, I am going to die to cancel my dishonour and the dishonour of my family . . . I got the most dishonest woman on earth.

Again, in his statement to the police of July 29, he said:

> . . . I didn't show any feeling or I didn't let people understand that I knew what was happening over there . . . and I didn't want them to

(1) [1946] 1 All E.R. 524.

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write to Bagaladi (where his wife resided) and tell them that *I knew everything* and I didn't write over there explaining how much I knew thinking that my wife wouldn't come here.

As the Court of Appeal has said,

> . . . the remainder or statement of the wife . . . in reality would appear to mean no more than the appellant already knew or believed to be so.

In these circumstances, there was, in my opinion, no evidence of sudden provocation within the meaning of s. 261.

I would allow the appeal and restore the conviction.

Appeal allowed and conviction restored.

Solicitor for the appellant: *W. C. Bowman.*

Solicitor for the respondent: *C. L. Dubin.*

1954
*Apr. 1
*Jun. 17, 18
*Oct. 13
*Nov. 23

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*May 24

SYSTEM THEATRE OPERATING COMPANY LIMITED ..... APPELLANT;

AND

HARRY PULOS ..... RESPONDENT;

AND

ALBERT LAMARRE ..... MIS-EN-CAUSE.

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

Winding-up—Provisional liquidator—Setting aside of appointment and winding-up order—Liability for fees of liquidator—Winding-up Act, R.S.C. 1927, c. 213, ss. 28, 94, 106, 138—Civil Code, Arts. 1117, 1823(3) —Code of Civil Procedure, Art. 594.

On the petition of the respondent, the Superior Court made a winding-up order against the appellant and appointed a provisional liquidator. Provisional execution of the order in so far as the appointment of the provisional liquidator was concerned was granted by the Court of Appeal. Subsequently, the Court of Appeal set aside the winding-up order and dismissed the petition. The appellant now appeals from that part of the judgment of the Court of Appeal directing it to pay the fees, charges and expenses, other than court costs, of the provisional liquidator.

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

Held: The appeal should be allowed, the provision complained of struck out and the matter referred back to the Superior Court to determine the amount of the fees, including their apportionment between the parties pursuant to Art. 1117 C.C.

By reason of ss. 106 and 138 of the *Winding-up Act,* Article 594 of the *Code of Civil Procedure* constitutes ample authority for the order granting provisional execution. The appointment of the provisional liquidator was legally made under s. 28 of the Act and he was, therefore, entitled to his fees and disbursements.

There having been no liquidation and therefore no assets, s. 94 of the Act does not apply, but by s. 138, the ordinary practice of the Superior Court in analogous cases is invoked and, consequently, Art. 1823(3) C.C., respecting judicial sequestrators, whose functions are closely analogous to those of the provisional liquidator, is the appropriate rule to be looked at. Following the authorities, both parties must be held to be jointly and severally liable for the fees of the provisional liquidator, the same as they are held to be in respect of the judicial sequestrator appointed under Art. 1823(3) C.C.

As there is no tariff in the province for the taxation of the judicial sequestrator's fees, s. 42(1) of the *Winding-up Act* applies and the liquidator is to be paid such salary or remuneration by way of percentage or otherwise as the court directs upon such notice to the shareholders as the court orders.

APPEAL from that part of the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), directing the appellant to pay the fees of the provisional liquidator.

N. Levitsky for the appellant.

E. Lafontaine for the respondent.

J. Perrault for the mis-en-cause.

The judgment of the Court was delivered by:—

KELLOCK J.:—This is an appeal by leave pursuant to the provisions of *The Winding-Up Act,* from that part of the judgment of the Court of Queen's Bench, Appeal Side (1), dated April 28, 1953, which directed payment by the appellant of the fees, charges and expenses, other than court costs, of the provisional liquidator.

On June 17, 1948, on the petition of the respondent, the Superior Court made a winding-up order against the appellant and appointed one Albert Lamarre as provisional liquidator. The company having appealed, the Court of Appeal on the 23rd of September following, on the petition of the respondent, granted provisional execution of the

(1) Q.R. [1953] Q.B. 524.

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order in appeal in so far as the appointment of the provisional liquidator was concerned. In the result Lamarre remained in possession as provisional liquidator until the judgment now in appeal. Lamarre was made a party to the appeal in this court and appeared by counsel in support of the judgment in appeal.

The winding-up order was set aside on the 23rd of June, 1949, and a new trial ordered, as a result of which the Superior Court, on the 23rd of February, 1950, again found the appellant insolvent and ordered it to be wound up. This was, on a further appeal, set aside and the petition dismissed by the judgment of April 28, 1953.

For the respondent, reliance is placed on Art. 549 of the *Code of Civil Procedure,* it being contended that the remuneration of the liquidator is part of the "costs" dealt with by that article. It is past question, of course, that in order for the respondent to succeed in this contention, it is essential there be found in *The Winding-Up Act* itself some provision conferring jurisdiction upon the Court of Appeal to make the order in question; *Boily* v. *McNulty* (1). It may be observed that there are no provisions in *The Winding-Up Act* as are to be found in Rules 91 and 92 under *The Bankruptcy Act,* which make express provision for a matter of this kind. It is said for the respondent, however, that *The Winding-Up Act* does sufficiently provide for the jurisdiction which was asserted by the court below.

The appellant objects, in the first place, to the order granting provisional execution in so far as the appointment of the provisional liquidator is concerned. The contention is that Art. 594 of the *Code of Civil Procedure,* under which the order was made, does not apply to these proceedings. The appellant does not appear to object to the operation of the Code in bringing about the stay of execution itself by reason of the lodging of the appeal from the winding-up order of June 17, 1948. If the provincial Code could operate to bring about a stay, it would seem that it must have equal application as to removal of that stay. In my opinion, the Code is operative in both situations by reason of s. 106 of *The Winding-Up Act,* which provides that "all appeals shall be regulated, as far as possible, according to the practice in other cases of the court appealed to". S. 138 also provides

(1) [1928] S.C.R. 182.

that until rules and regulations are made as to proceedings under the statute, the "various . . . procedures", in cases under the Act, shall be the same "as nearly as may be" as those of the court in other cases. In my opinion, Art. 594 becomes applicable by analogy and paragraphs (6) and (8) of that article constitute ample authority for the order granting provisional execution.

The appointment of the provisional liquidator by the order of the 17th June, 1948, was made pursuant to s. 28 of *The Winding-Up Act,* which authorizes the court, i.e., the Superior Court, on the presentation of a petition for a winding-up order or at any time thereafter but "before the first appointment of a liquidator", to appoint a liquidator provisionally. S. 26 provides that no "liquidator" shall be appointed without notice to creditors, contributories and shareholders or members. Compliance with this provision was held by this court to be fundamental for the valid appointment of a liquidator; *Shoolbred* v. *The Union Fire Insurance Co.* (1).

S. 94 provides that "all costs, charges and expenses properly incurred in the winding up of a Company", including the remuneration of the liquidator, are payable "out of the assets of the company" in priority to all other claims. It is, however, impossible to apply this provision in the present case for the reason that, as the appellant was not wound up, there are no assets out of which payment may be ordered. It is therefore necessary to turn to other provisions of the statute.

It is provided by s. 137 that the judges of the Superior Court may make "forms, rules and regulations to be followed and observed in proceedings under this Act" and "rules as to the costs, fees and charges which shall or may be had, taken or paid" in all such cases by or to various named classes of persons or "other persons" or "for any service performed or work done under this Act."

S. 138 provides that, as already mentioned, until such forms, rules and regulations are made, the various "forms and procedures, including the tariff of costs, fees and charges in cases under this Act," shall, unless otherwise specially provided, be the same "as nearly as may be" as

(1) (1887) 14 Can. S.C.R. 624.

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those of the court in other cases. It would appear, therefore, that the ordinary practice of the Superior Court in analogous cases is thus invoked.

In my view Art. 1823(3) of the *Civil Code,* which provides for the appointment of a judicial sequestrator, is the appropriate rule to be looked to. The duties of such a functionary are custodial and therefore closely analogous to those of a provisional liquidator, the nature of whose functions is referred to in *Re Union Fire Insurance Co.* (1), per Hagarty C.J.O., at 269-70 and per Burton J.A., at 272-3.

It was held by the Court of King's Bench, Appeal Side, in *Maillet* v. *Fontaine* (2), that both parties to the proceedings are jointly and severally liable for the remuneration and expenses of a judicial sequestrator appointed under Art. 1823(3). It was there argued, upon the basis of the last paragraph of Art. 1825, that the person who procured the appointment of the sequestrator is alone liable, but this contention was expressly negatived, it being held that the terms of that paragraph do not apply in the case of a sequestrator appointed under Art. 1823(3).

It has been suggested that the court erred in the above decision in holding that the liability was several as well as joint. In my view, however, the case was rightly decided. It is true that, as provided by Art. 1105, such liability is not to be presumed, but that rule is not to prevail in cases where a joint and several obligation arises of right by virtue of some provision of law.

In *Baudry-Lacantinerie et Wahl,* Tr. de la sociéte, du prêt, du dépot, 3rd Ed. N. 1303, it is stated:

> On décide que le séquestre judiciaire a, pour le payementde son salaire et le remboursement de ses frais, une action solidaire contre toutes les parties qui ont figuré dans l'instance, par analogie de la règle adoptée en matière de séquestre conventionnel.

Again, on the 21st of December, 1929, the Court of Appeal of Paris (reported in Gazette du Palais, 1930, Vol. 1, p. 415) reached the same conclusion.

In *Planiol et Ripert,* Droit Civil, 2nd Ed., Vol. 11, p. 541, note 3, it is stated that as against the parties, the rules of mandate prevail over those of deposit so far as the obliga-

(1) (1886) 13 O.A.R. 268. (2) Q.R. (1912) 21 K.B. 426.

tion to pay the fees and disbursements of a judicial sequestrator are concerned. In the same work at p. 542, the authors state:

> Le séquestre est en effet responsable envers les parties comme un dépositaire, et, relativement à ses actes juridiques, comme un mandataire.

As Mignault states in *Droit Civil*, Vol. 8, p. 5:

> . . . le mandat judiciaire est celui que la justice défère, *comme le séquestre*.

La Cour de Cassation in a judgment reported in *Gazette du Palais*, 1883. 1. 145, appear to take a similar view of the status of a liquidator receiving rents under the judgment there in question. It does not appear that the articles of the *Code Napoléon* differ in any substantial respect from the corresponding relevant articles of the *Civil Code*. In this view, Art. 1726 of the latter is pertinent. Accordingly, both the appellant and the respondent petitioning creditor are jointly and severally liable for the remuneration and disbursements of the provisional liquidator.

No tariff exists in the province according to which the fees and disbursements of a judicial sequestrator may be taxed but it is provided by s. 42(1) of *The Winding-Up Act* that a liquidator is to be paid such salary or remuneration by way of percentage or otherwise as the court directs upon such notice to the creditors, contributories, shareholders or members as the court orders. In the present instance, the winding-up order having been set aside, it would appear that shareholders are the only persons to whom the section would, in such circumstances as the present, have any application. While a distinction is made by s. 28 between a liquidator "appointed provisionally" and the first appointment of a "liquidator", I think there is no reason for holding that the word "liquidator" in s. 42 does not include a provisional liquidator. It is plain, I think, that the same word in s. 48 must include a provisional liquidator, and this is also true of s. 135.

Accordingly, the court below erred in applying Art. 549 of the *Code of Procedure*. The appeal should be allowed and the judgment of April 28, 1953 amended by striking out the provision complained of. The matter should be referred back to the Superior Court to determine in the winding-up proceedings the amount of fees and disbursements of the provisional liquidator and the payment thereof,

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including the division of liability as between the petitioning creditor and the company in accordance with Art. 1117 of the *Civil Code*. The appellant should have its costs in this court against the respondent. There should be no further order as to costs.

Appeal allowed with costs.

Solicitor for the appellant: *N. A. Levitsky.*

Solicitor for the respondent: *E. Lafontaine.*

Solicitors for the mis-en-cause: *Walker, Martineau, Chauvin, Walker & Allison.*

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*Dec. 9, 10

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*May 24

THE CORPORATION OF THE CITY OF TORONTO (*Appellant*) ..... APPELLANT;

AND

OLYMPIA EDWARD RECREATION CLUB LTD. (*Respondent*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment—Taxation—Powers and jurisdiction of Court of Revision, County Court Judge, Municipal Board, Court of Appeal—The Assessment Act, R.S.O. 1950, c. 24, ss. 80, 82 and 83—The British North America Act, ss.

The issue raised by this appeal was whether the respondent's bowling alleys formed part of the real estate as defined by the *Assessment Act*, R.S.O. 1950, c. 24, s. 1 (i) (iv) and were therefore assessable.

Held (Affirming the decision of the Court of Appeal for Ontario, Rand, Kellock, Locke and Cartwright JJ. dissenting): that the question was a question of law and that the Court of Appeal was right in determining that the Ontario Municipal Board had no power to decide it. *Toronto Ry. Co.* v. *Toronto Corp.* [1904] A.C. 809. *Bennett & White (Calgary) Ld.* v. *Municipal District of Sugar City No. 5* [1951] A.C. 786 distinguished.

Per Estey, Fauteux and Abbott JJ.: The question could only be determined by a court presided over by a judge appointed under s. 96 of the *British North America Act*. *Quance* v. *Ivey* [1950] O.R. 397 approved. *Phillips & Taylor* v. *City of Sault Ste. Marie* [1954] S.C.R. 404 distinguished.

Per Rand and Cartwright JJ. (dissenting): The series of special appeals from an original assessment is, on the present statutory language limited to the task of completing the assessment roll and does not

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

extend to the judicial determination of liability to taxation, a function of the civil courts alone. Under s. 83 an appeal to the Court of Appeal does not embrace the determination of taxability either appellate or original, the section gives an appeal only on a question of law properly arising before the lower tribunals.

On an appeal to the Municipal Board that body would be concerned with administrative jurisdiction only in the sense of being the final tribunal in review of the original assessment, its decision having no greater effect judicially than the act of the assessor. On appeal it may (as here) revise the acts of the assessor, amend the assessment roll and give it administrative finality. The court in *Quance* v. *Ivey, supra,* did not consider the administrative function of the Board. On this view of the statute it was within the jurisdiction of this Court to review the appeal to the Court of Appeal on the question of the jurisdiction of the Board.

Per Kellock J. (dissenting): The *Assessment Act* lays a statutory duty upon the assessor to determine whether a given piece of property is or is not "land" or is assessable or exempt. He is to form his own judgment and act upon it. The same is true of the several assessment tribunals charged with the statutory duty of preparing and settling the assessment roll. The function of the courts is to determine in any given case to what extent, if any, liability to taxation follows. The decision of the Privy Council in the *Sugar City* case, *supra,* was not, as wrongly decided in *Quance* v. *Ivey, supra,* that the legislation was to be construed as conferring upon the assessment tribunals a jurisdiction formerly exercised by the courts and therefore ultra vires, but upon the view that it did not confer any such jurisdiction at all. The same is true of the judgment of this Court in *Phillips and Taylor* v. *Sault Ste. Marie, supra.*

Per Locke J. (dissenting): The powers given to the Court of Revision, the County Court Judge and the Municipal Board by s. 83 of the *Assessment Act* to decide whether property is or is not assessable, may properly be exercised by them respectively, in discharge of their statutory duties as administrative acts to enable the completion of assessment rolls with reasonable promptness. *Bennett & White* v. *Municipal District of Sugar City, supra,* at 811 and 812; *Ladore* v. *Bennett,* [1939] A.C. 468 at 480. *Quance* v. *Ivey, supra,* distinguished.

APPEAL by special leave from the judgment of the Court of Appeal for Ontario (1) dismissing the appellant's appeal from the decision of the Ontario Municipal Board (2) in assessment appeal proceedings under the *Assessment Act* (Ont.)

J. P. Kent, Q.C. and *A. P. G. Joy* for the appellant.

C. R. Magone, Q.C. for the Attorney General for Ontario.

H. E. Manning, Q.C. and *D. W. Mundell, Q.C.* for the respondent.

(1) [1954] O.R. 14. (2) [1953] O.W.N. 149.

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D. W. H. Henry, Q.C. for the Attorney General of Canada.

The judgment of Kerwin C.J. and Taschereau J. was delivered by:

THE CHIEF JUSTICE:—In this appeal from the decision of the Court of Appeal for Ontario (1) the Corporation of the City of Toronto is the appellant and Olympia Edward Recreation Club, Ltd., is the respondent. It is an assessment appeal and leave was given by this Court to bring it here. The Attorney General of Canada and the Attorney General of Ontario were notified and were represented.

The proceedings commenced in 1950 when the *Assessment Act* in force in Ontario was R.S.O. 1937, c. 272, as amended, since the Revised Statutes of Ontario, 1950, did not come into force until December 31st of that year. Earlier in the year the respondent had been assessed $31,250 in respect of a parcel of land in the City of Toronto and $31,000 in respect of an unfinished building being erected on the land. In the later part of 1950, under the provisions of the old *Assessment Act,* a notice was given that the building was assessed for $305,000 and that taxes would be levied on that assessment for a period of two months from November 1, 1950 to December 31, 1950. Another notice was given that the buildings were assessed at $274,000 and that taxes would be levied on such assessment for a period of twelve months from January 1, 1951 to December 31, 1951. In each case the respondent appealed to the Court of Revision giving as its reason "building assessment too high". When the respondent's appeals came before the Court of Revision and the appellant's appeals before the County Court Judge and the Ontario Municipal Board the Revised Statutes of 1950 were in force so that these proceedings are governed by the provisions of the *Assessment Act* in that revision, c. 24.

The Court of Revision deducted in each case $96,000 from the value of the building. While the notices of appeal to it might indicate on their face that the matter to be determined by the Court of Revision was merely one of quantum, it has been made clear throughout that the

(1) [1954] O.R. 54.

$96,000 represented the value of the bowling alleys in the building in question and that the real problem was whether the alleys were personal property and, therefore, not subject to assessment. Undoubtedly the assessor's duty was to perform the functions allotted to him by the *Assessment Act,* but if a party assessed takes no steps upon receiving notice of an assessment, there is nothing to prevent it raising in the ordinary Courts the question that it was not legally assessable; and if it appeals, even as far as the Court of Appeal, and fails, it is not bound by that action and may raise that question in a similar manner.

It was so held in *Toronto Ry.* v. *Toronto Corporation* (1), although no constitutional point was there raised. The matter had been determined in the same sense in *Great Western Ry. Co.* v. *Rouse* (2) and *Nickle* v. *Douglas* (3), so that the jurisdiction conferred by the *Assessment Act* on the various appellate tribunals broadly conforms to the type of jurisdiction exercised by the Superior, District or County Courts, which is the test adopted in *Labour Relations Board of Saskatchewan* v. *John East Iron Work Ld.* (4).

It is now settled that the assessor, the Court of Revision, the County Court Judge and the Ontario Municipal Board have no jurisdiction to determine conclusively whether a company is taxable in respect of any particular property. (*Phillips and Taylor* v. *City of Sault Ste. Marie* (5)). When such a question is raised what purpose can there be to permit appeal after appeal at great expense to those concerned when the same matter may be litigated again? The question of ultra vires was not raised in *Bennett & White (Calgary) Ld.* v. *Municipal District of Sugar City No. 5*(6), but, in my opinion, the Judicial Committee did not there decide, as contended by the appellant, that, when such a matter as the one in issue here arises, any of the appellate tribunals provided for by the Assessment Act has jurisdiction to decide the point as an administrative matter. Their Lordships found that s. 53 of the Alberta Act there in question was not unambiguous and suggested that it might bear several constructions. Nowhere, as I read the judg-

(1) [1904] A.C. 809.
(2) (1857) 15 U.C.Q.B. 168.
(3) (1875) 37 U C.Q.B. 51.
(4) [1949] A.C. 134.
(5) [1954] S.C.R. 404.
(6) [1951] A.C. 786.

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ment, is it suggested that when the only matter is, for instance, the one before the appellate tribunals in this case, any one of them has any authority of any kind to pronounce upon that subject.

Here the question before the Court of Appeal was whether the Ontario Municipal Board has power to decide that question. Being of opinion that the Court of Appeal was right in determining that the Board had no such power, the appeal should be dismissed with costs, but there should be no costs to or against either Attorney General.

RAND J. (*dissenting*):—A few observations may be useful in clarifying what has for some time been and seems still to be somewhat confused. The assessment of property for taxation purposes is primarily an administrative function, directed by statute, in two aspects of which legal questions may arise. They may go to the jurisdiction to tax, or they may arise in the course of exercising the function. An example of the latter would be whether the basis on which a valuation is made is within the intendment of the statute. That would be a question which the administrative tribunals would pass upon judicially and the decision of which, if not appealed from, would stand.

The question of jurisdiction, however, is of another nature. Whether person or property is within the scope of the assessing and taxing provisions, with which alone the assessing bodies are authorized to deal, depends, in its legal aspect, upon the decision of a court within s. 96 of the Confederation Act. But obviously when the assessor is preparing the roll he must consult those provisions in deciding upon doubtful property or exemption, or doubtful residence, and what he does is to exercise a lay judgment in discharging his duty to prepare the roll.

All features of the assessment may, in turn, be made subject to appeal to other subordinate tribunals. There may be administrative questions of law, as in the illustration used, or of fact, the findings on which will be conclusive unless reversed through the means of appeal given. In matters of jurisdiction, these tribunals can be invested with power to revise the lay judgment on assessability exercised

in the first instance by the assessor and to modify the assessment roll accordingly. The policy of vesting such authority in a body with provincial wide scope is quite apparent, contributing as it would to greater uniformity and probability of soundness, and the only question would be whether the legislation has conferred that authority on the appeal body.

Then there may be appeals to superior courts. Questions of law within the judicial scope of the assessment tribunals could be carried to them. If appeal is not expressly provided the decisions would be open to *certiorari*. In the revising authority of an administrative nature, the question arises whether a Court of Appeal as such could be charged with such a duty. And finally it might have to be considered whether a superior court has been given a special original jurisdiction, in the course of such appeals, to deal with the liability to assessment.

With these considerations in mind, the issues in this appeal can now be approached. The decision in *Bennett & White Ld.* v. *District of Sugar City* (1) in the Judicial Committee, and in this Court (2), that of this Court in *Sifton* v. *Toronto,* (3) and that of the Court of Appeal for Ontario in *Ottawa* v. *Wilson,* (4) have clarified the interpretation of the assessment statute of Ontario from which that of Alberta is largely taken. It is now settled that the series of special appeals from the original assessment is, on the present statutory language, limited to the task of completing the assessment roll and does not extend to the judicial determination of liability to taxation.

It is also settled that in providing these assessment tribunals the statute does not set them up as alternative to the civil courts, carrying the right of election. So far as the former are validly invested with jurisdiction to deal with questions of law, recourse against an assessment lies to them alone. The significance of this is that matters within their competence become *res judicata* whether or not resort is had to them by way of appeal. In *Bennett & White,* at p. 808, Lord Reid, on this point, said:—

> This could only be a valid distinction if the law were that a person aggrieved by an assessment has an option either to appeal in the manner

(1) [1951] A.C. 786.
(2) [1950] S.C.R. 450.
(3) [1929] S.C.R. 484.
(4) [1933] O.R. 21.

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provided by the Act or to raise the matter in the ordinary courts. Their Lordships have seen nothing in the Act from which an intention to create such an unusual option could be inferred.

But the present language of s. 83 of the Ontario statute is the same as that on which *Sifton* v. *Toronto* and *Ottawa* v. *Wilson* were decided. If that section was valid to create a jurisdiction in the Court of Appeal to pronounce upon the validity of the tax, then a collateral attack on the assessment in the civil courts could not succeed. But in each of those cases that attack was held to be open and it follows that the appeal to the Court of Appeal under s. 83 does not embrace the determination of taxability either appellate or original. Consistently with this, the subordinate bodies are limited to administrative functions, including questions of law not going to jurisdiction.

In its application to the Court of Appeal, s. 83 must be held to give an appeal only on a question of law properly arising before the lower tribunals: I find it impossible to attribute to the legislation the intention to attempt to make that Court as such a final revising body in administrative matters. It would verge on absurdity to have that Court pronounce an opinion on such a matter in another than a judicial sense. The questions in this case, in the administrative sense, could not, therefore, be carried there for final revision.

But the appeal to the Ontario Municipal Board would be concerned with administrative jurisdiction only, dealing with the question raised here only in the sense of being the final tribunal in review of the original assessment and having no greater effect judicially than the act of the assessor. That body can, then, be called upon by way of appeal to revise the acts of the assessor, to amend the assessment roll and to give it administrative finality.

The judgment in *Quance* v. *Ivey,* (1) interpreted s. 83 as purporting to give jurisdiction to the assessment tribunals to determine judicially their own jurisdiction and that it was therefore ultra vires. The court in that case did not consider the administrative function of the Ontario Municipal Board in the sense in which that of the similar body in Alberta was held to be effective in *Bennett & White.* On

(1) [1950] O.R. 397.

the assumption made, the decision of the Court of Appeal is in accordance with the view I have here expressed, but it does not go to the contention now urged.

On this view of the statute, the jurisdiction of this Court to hear the appeal was challenged by Mr. Manning. That depends upon whether or not the judgment in appeal is one rendered in the course of a judicial proceeding. The taking of an appeal to the Court of Appeal on the question of the jurisdiction of the Board is a proceeding of that nature which this Court is competent to review.

The object sought by the legislation is undoubtedly to provide a machinery of adjudication which can settle the question of taxability with despatch, and the desirability of concluding these questions within a fixed time seems to be obvious. To obtain that needs only some mode of resort to the appropriate tribunals, the civil courts. If by way of appeal or *certiorari* the Court of Appeal was given original jurisdiction to deal with such questions, including appropriate provision for furnishing the facts, with power to refer the roll back to the Board or County Judge for amendment in accordance with the judgment, and fixing the time within which the motion or application must be made, the difficulty facing municipal assessments would appear to be removed. But the existing language of the statute, as the cases cited show, is not sufficient to that end.

I would, therefore, allow the appeal and direct judgment declaring the Ontario Municipal Board to possess jurisdiction to consider the appeal made to it for the purpose of completing the assessment roll. The appellant will have its costs in this Court, but there will be no costs in the Court of Appeal.

KELLOCK J. (*dissenting*):—The respondent, the owner of certain premises in the city, was successful, on appeal to the Court of Revision against assessments for the years 1950 and 1951, in securing a reduction to the extent of the value of the bowling alleys installed in the building. An appeal by the present appellant to the county judge was dismissed. A further appeal by the appellant to the Ontario Municipal Board was dismissed on the ground that the Board was without jurisdiction to make any determination as to

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whether or not the alleys, i.e., the floors, came within the definition of "land", "real property" and "real estate" contained in s. 1(i) (iv) of the *Assessment Act,* which 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,

Considering itself bound by the decision of the Court of Appeal in *Quance* v. *Ivey* (1). The Board distinguished the judgment of the Privy Council in *Bennett & White* v. *Sugar City* (2), which affirmed, on the matter here relevant, the judgment of Rand J., speaking for the majority in this court.

Under the scheme provided by the *Assessment Act,* complaints by a person of an error or omission in regard to himself as having been "wrongfully inserted in or omitted" from the roll, or as having been "undercharged or overcharged" by the assessor in the roll are to be dealt with by the Court of Revision, s. 69. From the Court of Revision an appeal lies to the county judge, s. 72(1), who, in my view, is here *persona designata,* or directly to the Board, s. 80(1). If the first course be taken, an appeal lies from the county judge to the Board under s. 80(1) or, on consent of all parties, directly to the Court of Appeal; s. 81(1) and (7). In the case of appeals to the Board, a similar right of appeal lies to the Court of Appeal under s. 80(7).

S. 83 of the statute, which was first enacted in 1910 by c. 88, s. 19, provides:

83. It is hereby declared that the court of revision, the county judge the Ontario Municipal Board, and every court to which and every judge to whom an appeal lies under this Act have jurisdiction to determine not only the amount of any assessment, but also all questions as to whether any persons or things are or were assessable or are or were legally assessed or exempted from assessment. R.S.O., 1950, c. 24, s. 83.

A similar provision limited to the Board is contained in s-s. (6) of s. 80, this provision having been enacted at the time of the creation of the Board in 1906 by c. 31, the relevant provision being s. 51, s-s. (2). The jurisdiction of the Court of Appeal in the case of appeals from the Board, is provided for by s-s. (7) of s. 80 of the *Assessment Act.* This provision also derives from the statute of 1906, s. 51(3). As originally enacted, the sub-section read:

An appeal shall lie from the decision of the Board under this section to the Court of Appeal upon all questions of law.

(1) [1950] O.R. 397. (2) [1951] A.C. 786.

The additional words now found in s. 80(7) were added in 1916 by c. 41, s. 6(2), as follows:

> Or the construction of a statute, a municipal by-law, any agreement in writing to which the municipality concerned is a party, or any order of the Board.

By the same statute the jurisdiction of the Court of Appeal in the case of appeals from the county judge, now found in s. 81(1), was provided for in similar terms by s-s. (1) of s. 6.

The contention of the respondent is that given effect to in the *Quance* case, namely, that s. 80(6) and s. 83 purport to vest in the Board and the other assessment tribunals a jurisdiction to determine finally the question as to whether property is or is not assessable under the Act, and that that jurisdiction, being already vested in the superior courts of the province prior to 1867, the above provisions are ultra vires. It is also contended that the jurisdiction given the Court of Appeal by s. 80(7) and s. 83 is limited to matters within the jurisdiction of the lower tribunals and is not, therefore, to be taken as including jurisdiction to determine such a question.

The appellant contends, on the other hand, that the assessment tribunals (not including in this description the Court of Appeal) were obligated by the terms of the statute to determine all questions arising upon the assessment roll, for the purpose of settlement of that roll, without regard to the question as to whether or not any such determination would, if not appealed against, be final so far as liability to taxation may be concerned. It is further contended that the jurisdiction given to the Court of Appeal is an original jurisdiction entitling that court to decide finally such questions, including such a question as that involved in this litigation.

As the legislation under consideration in the *Sugar City* case is to all intents and purposes the same as the corresponding provisions of the *Assessment Act*, with the exception that the Alberta Act makes no provision for appeal to a court, it will be convenient at the outset to consider the judgment of the Judicial Committee in that case.

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The question there was as to whether or not a decision of the Assessment Commission of Alberta that the appellants were assessable in respect of certain personal property as to part of which the appellants contended was not their property but that of His Majesty, and as to another part was exempt under the statute, was *res judicata,* or whether it was open to the appellants to litigate the matter in the ordinary courts. It was held that they were so entitled.

In delivering the judgment of the Board, Lord Reid referred to certain earlier decisions under the Ontario statute, namely, *Toronto Ry. Co.* v. *Toronto* (1), *Sifton* v. *Toronto* (2), and *Ottawa* v. *Wilson* (3), and continued at p. 808:

> In their Lordships' judgment the effect of these authorities is that a taxpayer called on to pay a tax in respect of certain property has a right to submit to the ordinary courts the question whether he is *taxable* in respect of that property unless his right to do so has been clearly and validly taken away by some enactment, and that the fact that the statute which authorizes assessment allows an appeal or a series of appeals against assessments to other tribunals is not sufficient to deprive the taxpayer of that right.

These decisions referred to by Lord Reid are not, of course, based upon the view of the legislation now put forward by the respondent and accepted in *Quance* v. *Ivey,* (*supra*) namely, that the legislation is to be construed as conferring upon the assessment tribunals a jurisdiction formerly exercised by the courts and therefore ultra vires. They are based upon the view that it did not confer any such jurisdiction at all. The same is true of the judgment of this court in *Phillips & Taylor* v. *Sault Ste. Marie* (4).

Quance v. *Ivey* cannot, therefore, stand with the later decisions referred to and must be taken to have been wrongly decided. It may, moreover, be pointed out that in none of the Ontario cases above referred to did the courts have occasion to consider whether there was any duty of an administrative character resting upon the assessment appeal tribunals as was considered to be the case under the legislation in question in the *Sugar City* case.

S. 53 of the Alberta Act in question in that case corresponds to s. 83 of the Ontario Act except that s. 53 contains

(1) [1904] A.C. 809.
(2) [1929] S.C.R. 484.
(3) [1933] O.R. 21.
(4) [1954] S.C.R. 404.

no provision for a further appeal to a court. Their Lordships, adopting the view of Rand J., held that the section, in its setting in the statute, was not to be construed as an optional method of proceeding in contradistinction to proceeding in the ordinary courts but as laying upon the Commission a duty to determine the matters mentioned in the section

> in so far as it is necessary for it to determine these matters in order to carry out its statutory duty to determine whether the assessment roll should be amended, but only for that purpose.

That being so, their Lordships held that the Court of Revision *must* have jurisdiction to determine those same matters for the same purpose because "the grounds on which the Act allows complaint to be made to it may involve those matters" and the statutory function of the Assessment Commission was only to hear and determine appeals from Courts of Revision.

The Privy Council did not consider that either in s. 45, which corresponds essentially to the Ontario s. 70, or elsewhere in the statute was there any indication that an entry in the assessment roll upheld by the Commission was in any different position from any other entry in the roll or any less subject to challenge in the courts. Such a provision, they considered, was "plainly only what their Lordships in *City of Victoria* v. *Bishop of Vancouver Island* (1), referred to as a machinery section"; per Lord Reid, at p. 810.

Unless, therefore, the Ontario legislation is to be distinguished by reason of the existence of the right of appeal to the Court of Appeal and the reference in s. 83 to that court, the judgment of the Privy Council requires this court to hold that, while it is competent and indeed mandatory, for the assessment tribunals, including the Municipal Board, to exercise their judgment upon all questions arising in the course of the preparation of the assessment roll, including the question of assessability or exemption, nevertheless, when it comes to a question of determining finally a question of the latter character so as to entail liability to taxation, such jurisdiction is not to be considered as having been conferred upon these assessment tribunals.

(1) [1921] 2 A.C. 384.

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It will be convenient at this point to consider some of the provisions of the statute relating to the duty of the assessor and other municipal officials as to the preparation of the assessment roll. These provisions are expressed in the clearest mandatory terms.

By s. 16(1), it is provided that every assessor "shall" prepare an assessment roll in which "after diligent inquiry" he "shall" set down according to "the best information to be had" the particulars mentioned in the section and in so doing he "shall" observe the provisions therein set out. Under clause (*a*) the assessor "shall" set down the names and surnames in full, if they can be ascertained, of all persons, resident or non-resident, who are "liable to assessment therein". By clause (*b*), he is required to set down in the proper column opposite each name the amounts "assessable" against such person.

S-s. (2) requires that the assessor "shall" set down in column 14 the "actual value" of the parcel of real property exclusive of buildings; in column 15, the value of buildings as determined under s. 33; in column 16, the total actual value of the land; in column 17, the total amount of "taxable" land; in column 18, the total value of the land "if liable for school rates only"; in column 19, the total value of land "exempt from taxation" or "liable for local improvements only"; and in column 22, the "total assessment". In my view, it is impossible, in the face of these provisions, to say that the assessor is not required to exercise his judgment as between assessability and exemption and make up his roll accordingly.

By s. 33, s-s. (1), it is provided that, subject to the other provisions of the section, "land" shall be assessed at its actual value. In s-ss. (2) and (3), the considerations entering into the ascertainment of that value in the case of both vacant land and land having buildings thereon are given. By s-s. (4), it is provided that the buildings, plant and machinery in or under "mineral land" and used mainly for obtaining minerals, as well as certain named mining equipment, and the minerals themselves "shall not be assessable". The definition of "land" in s. 1(i) of the statute has already been referred to. All of these provisions

must be interpreted by the assessor and the entries he makes in his roll are the result, as they are by the statute intended to be, of the exercise of his judgment.

It is therefore impossible, in my view, to contend that where a question arises such as in question in these proceedings, that is, as to whether a given piece of property is or is not "land" or is assessable or exempt, the assessor can do other than enter such property upon the roll because he cannot decide that question. It is true that he cannot decide such a question finally, but he is required by the statute to form his own judgment and act upon that judgment. A contrary conclusion would be in the very teeth of the statute.

Moreover, by s. 50 it is provided that if at any time it "appears" to any treasurer or other officer of the municipality that "land" "liable to assessment" has not been assessed in whole or in part for the current year or for either or both of the next two preceding years, he "shall" report the same to the clerk of the municipality, who "shall" thereupon, or upon the omission to assess coming to his knowledge in any other manner, enter the land on the collector's roll at its average valuation as assessed in the three previous years. If the land had not been so assessed, then the clerk "shall" require the assessor to value the land and

it shall be the duty of the assessor to do so when so required, and to certify the valuation in writing to the clerk.

It is clear that the officers of the municipality here mentioned are also required to exercise their judgment on the question as to assessability or exemption in the same way as is the assessor under the earlier provisions already discussed, and if it "appears" to them there has been an omission from the roll of land which ought to have been assessed by the assessor, they are required to enter it. The same rights of appeal are provided for by s-s. (3) as if the land "had been assessed in the usual way."

If such be the statutory duty of the assessor and these other municipal officers, it is equally for the Court of Revision to exercise its judgment upon the same questions in order to carry out its statutory duty to determine whether the assessment roll should be amended, but only for that purpose. The Court of

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Revision *must* have jurisdiction to determine those matters for that purpose because the grounds upon which the Act allows a complaint to be made to that court may involve those matters,

to refer again to the language of Lord Reid in the *Sugar City* case at p. 811, already quoted. The same is true of the county judge and Municipal Board for the reason that, to quote further from the same page,

the statutory function of the Commission (here the judge or Board) is only to hear and determine appeals from Courts of Revision.

It may be again observed that s. 35 of the Alberta statute, which provides for appeals to the Court of Revision does not, for present purposes, differ in any material respect from s. 69 of the Ontario statute. The same comparison is true as between s. 47(1) of the Alberta statute and ss. 72(1) and 80(1) of the Ontario Act as to appeals from the Court of Revision.

This being then the function of the assessment tribunals, it follows that, as the jurisdiction conferred upon the Court of Appeal cannot be taken to be other than one to be exercised judicially, that jurisdiction, with respect to a question such as is here involved, is limited to determining upon the true interpretation of the statute the nature of the duty resting upon the Board and the inferior tribunals. It has already been pointed out that the decisions to which I have referred, approved as they were in this respect in the *Sugar City* case, involve the finding that, notwithstanding the breadth of the language employed, the Court of Appeal has no jurisdiction with respect to such a question as that raised in these proceedings.

It is not necessary for the purposes of this appeal to determine the extent of the jurisdiction committed to the Court of Appeal or the kind of question upon which, should there be no appeal, the decision of any of the inferior assessment tribunals would be final. Illustrations may be found in the authorities referred to by their Lordships in *Toronto Ry. Co.* v. *Toronto City* (1). In the course of his judgment in that case Lord Davey said at p. 815:

In *London Mutual Insurance Co.* v. *City of London* (2), the decision of the county court judge was treated as final, because the question was within the jurisdiction of the assessor; but Hagarty C.J. held that if the property had not been assessable that would have shewn that *ab initio*

(1) [1904] A.C. 809. (2) 15 O.A.R. 629.

the assessor and the appellate tribunals had been dealing with something beyond their jurisdiction, and their confirmation of the assessor's act would go for nothing.

That is not to say that the assessor or the assessment tribunals must any the less carry out the duty laid upon them by the statutory provisions to which I have referred but merely that it is open to the person affected to apply to the ordinary courts in the case of such a question as is involved between the parties to this appeal.

The whole matter, in my opinion, comes to this, that the legislature, having laid upon the assessor and the several assessment tribunals the statutory duty of preparing and settling the assessment roll, who is to say that duty is not to be performed? The function of the courts is to determine in any given case to what extent, if any, liability to taxation follows.

I would allow the appeal with costs in this court and in the Court of Appeal and refer the matter back to the Municipal Board for its decision.

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

ESTEY J.:—The appellant, in assessing respondent's land and building in 1950 and 1951, included, as part of the latter, its bowling alleys. Upon respondent's appeal to the Court of Revision these were held not to be part of the building and, therefore, not taxable as such. This decision was affirmed by the County Court judge. Upon further appeals to the Ontario Municipal Board and the Court of Appeal both followed the decision in *Quance* v. *Ivey* (1), under which neither of these tribunals had jurisdiction to finally determine such a question of law. In the course of his judgment Mr. Justice Laidlaw, speaking on behalf of the Court, stated:

> It appears to me to be settled beyond controversy that the Legislature of a Province, acting within its legislative powers, cannot constitute a tribunal composed of a member or members appointed by provincial authority and empower that tribunal to determine conclusively questions of a character that fall for determination within the jurisdiction of a superior court. Thus, the Legislature could not give jurisdiction to such a tribunal to finally determine the question whether a taxpayer is taxable in respect of certain property. Such a tribunal could not finally decide whether an assessor exceeded his powers in assessing property which was not liable in law to assessment.

(1) [1950] O.R. 397.

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The issues in this appeal are, therefore, (*a*) is the question whether the bowling alleys are part of the real estate one of law and (*b*) if so, is it one that must be determined by a court presided over by a judge appointed under s. 96 of the *B.N.A. Act*.

With respect to (*a*) the facts are not in dispute. If the bowling alleys were personalty rather than real estate the assessor had imposed liability in respect of property not taxable under the statute. The respondent, to that extent, would not be liable and there was, therefore, an important question of law to be determined rather than a mere question of valuation, as the appellant contended. *Township of London* v. *The Great Western Ry. Co.* (1); *Toronto Ry. Co.* v. *Toronto* (2).

As to (*b*), in *Quance* v. *Ivey, supra,* the respondent contended that under the statute it was exempt from a business tax. The County Court judge agreed with the respondent and held that upon a construction of the statute it was exempt. The Ontario Municipal Board reversed the decision of the County Court judge. The Court of Appeal held the construction of an act was a question of law and that none of the tribunals sitting in an appeal under the *Assessment Act* (R.S.O. 1950, c. 24) had any jurisdiction to finally determine this question. In the course of the reasons written by Robertson C.J.O. and concurred in by Laidlaw, Roach and Hope JJ.A., and those written by Hogg J.A., the Ontario cases prior to Confederation, certain provisions of the *B.N.A. Act* (ss. 92(14), 96, 99 and 100), as well as the authorities to that date were all considered and the conclusion arrived at that similar tribunals sitting in appeal from an assessor existed prior to Confederation, but that a question of law such as that here submitted could be finally decided only in the courts of law of that period; that under the *B.N.A. Act,* while these tribunals may be competently created by the legislature, questions of law such as that here considered can only be finally determined by a court presided over by a judge appointed under s. 96 of the *B.N.A. Act* and, therefore, the above-mentioned tribunals, including the Court of Appeal sitting in appeal under the

(1) 17 U.C.Q.B. 262.

(2) [1904] A.C. 809.

provisions of the *Assessment Act,* could not finally determine such a question. At p. 408 Robertson C.J.O. stated:

> In my opinion it is well established by decisions of highest authority that jurisdiction to decide disputed questions of liability to assessment, such as were raised in the cases I have referred to, and in the present case, was vested in the superior Courts of the Province, and not in the bodies having jurisdiction to hear assessment appeals under the provisions of The Assessment Act. It is also clear that that jurisdiction was so vested prior to Confederation, and continued to be so vested thereafter.

To much the same effect is the statement of Lord Atkin when, in dealing with the jurisdiction of the Ontario Municipal Board, he stated:

> It is primarily an administrative body; so far as legislation has purported to give it judicial authority that attempt must fail. It is not validly constituted to receive judicial authority; so far, therefore, as the Act purports to constitute the Board a Court of Justice analogous to a Superior, District, or County Court, it is *pro tanto* invalid; not because the Board is invalidly constituted, for as an administrative body its constitution is within the Provincial powers; nor because the Province cannot give the judicial powers in question to any Court, for to a Court complying with the requirements of ss. 96, 99 and 100 of the British North America Act the Province may entrust such judicial duties as it thinks fit; but because to entrust these duties to an administrative Board appointed by the Province would be to entrust them to a body not qualified to exercise them by reason of the sections referred to. The result is that such parts of the Act as purport to vest in the Board the functions of a Court have no effect. *Toronto Corporation* v. *York Corporation* (1).

The contention that, in effect, the subsequent decisions of *Bennett & White (Calgary) Ltd.* v. *Municipal District of Sugar City* (2), and *Phillips & Taylor* v. *Corporation of Sault Ste. Marie* (3) are in conflict with *Quance* v. *Ivey, supra,* does not appear to be well founded. In the *Bennett & White* case the precise point here in question was neither raised nor considered. There the personal property of the appellants was assessed and appeals taken to the Court of Revision and the Alberta Assessment Commission, being the only appellate tribunals provided under the *Assessment Act* of that province. In both of these tribunals the appellant was unsuccessful and when the municipality sought to enforce the tax it commenced this action for a declaration that the assessment was invalid. It was contended on behalf of the municipality that the matter was res judicata by virtue of the decision of the Alberta Assessment Commission. The Privy Council held that upon a construction

(1) [1938] A.C. 415 at 427. (2) [1951] A.C. 786.
(3) [1954] S.C.R. 404.

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of s. 53, upon which the respondents relied, the legislature had not purported to give to the tribunal under the *Assessment Act* jurisdiction to decide such a question. It was, therefore, unecessary to consider the legislative competence of the province to deprive the courts of the jurisdiction to determine the question of liability. In fact, Lord Reid, speaking on behalf of their Lordships, stated at p. 811:

> Some indication that the scope of s. 53 is not unlimited may also be got from the fact that it only confers jurisdiction to deal with questions of assessment and is silent as to questions of liability to taxation, whereas ss. 4 and 5, which are the leading sections in the Act, deal with liability to and exemption from both assessment and taxation.

That in the *Bennett & White* case it was not the intention of the Privy Council to in any way limit or qualify their decision in *Toronto Ry. Co.* v. *Toronto, supra,* is apparent from their reference to that case and the statement of Lord Reid in relation thereto at p. 806:

> Their Lordships held that the Court of Revision and the courts exercising the statutory jurisdiction of appeal from it "had no jurisdiction to determine the question whether the assessment commissioner had exceeded his powers in assessing property which was not by law assessable. In other words, where the assessment was *ab initio* a nullity they had no jurisdiction to confirm it or give it validity." Their Lordships pointed out that this decision was in accordance with earlier Canadian authorities.

The question in the *Toronto Railway* case was not unlike that here raised. The city imposed a tax upon the street cars as part of the appellant's real estate. After being unsuccessful in its appeals provided for under the *Assessment Act,* the appellant commenced an action for a declaration that its street cars were personalty. The Privy Council held the matter was not res judicata, that the street cars were personalty and directed a declaration accordingly. At p. 815 Lord Davey stated:

> In other words, where the assessment was *ab initio* a nullity they had no jurisdiction to confirm it or give it validity. The order of the Court of Appeal of June 28, 1902, was not, therefore, the decision of a Court having competent jurisdiction to decide the question in issue in this action, and it cannot be pleaded as an estoppel.

See also *Sifton* v. *City of Toronto* (1).

In *Phillips & Taylor* v. *The Corporation of Sault Ste. Marie, supra,* the taxpayers had failed in their respective appeals to certain of the appellate tribunals under the *Assessment Act* and thereafter brought this action for a

(1) [1929] S.C.R. 484.

declaration that the assessments were invalid. The respondent pleaded, *inter alia, res judicata.* Mr. Justice Taschereau, writing the judgment of this Court, in dismissing that plea adopted the reasons of Mr. Justice Laidlaw in the Court of Appeal. There Mr. Justice Laidlaw referred to many of the authorities and quoted a passage from *Bennett & White (Calgary) Ltd.* v. *Municipal District of Sugar City, supra,* at 808 and 809:

> . . . that a taxpayer called on to pay a tax in respect of certain property has a right to submit to the ordinary courts the question whether he is taxable in respect of that property unless his right to do so has been clearly and validly taken away by some enactment, and that the fact that the statute which authorizes assessment allows an appeal or a series of appeals against assessments to other tribunals is not sufficient to deprive the taxpayer of that right.

Mr. Justice Laidlaw then continued:

> I apply that principle to the instant case and conclude that the plaintiffs had a right to submit to the Supreme Court of Ontario the question whether they were liable to assessment and taxation. The argument that that question is *res judicata* therefore fails.

It is clear that a county court judge, sitting in appeal under the *Assessment Act,* is not acting by virtue of his appointment under s. 96 of the *B.N.A. Act,* but rather as a person selected and designated by the legislature in the *Assessment Act.* The same is true of the members of the Court of Appeal and, therefore, sitting in appeal under the *Assessment Act,* they possess only such appellate jurisdiction as the Provincial Legislature may competently vest in them.

This must follow from *Toronto Ry. Co.* v. *Toronto, supra,* where the taxpayer unsuccessfully appealed to the appellate tribunals under the *Assessment Act,* including the Court of Appeal, and thereafter brought an action for a declaration that a portion of the property included in the assessment was not assessable and, in the course of their reasons directing that the declaration should be made, it was stated at p. 815:

> It appears to their Lordships that the jurisdiction of the Court of Revision and of the Courts exercising the statutory jurisdiction of appeal from the Court of Revision is confined to the question whether the assessment was too high or too low, and those Courts had no jurisdiction to determine the question whether the assessment commissioner had exceeded his powers in assessing property which was not by law assessable.

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That the legislature of a province may, within the field of its legislative competence, impose original jurisdiction upon courts presided over by judges appointed under s. 96 does not in any way assist the respondent in this litigation. It is sufficient, for the purpose of this discussion, to point out that the legislature is not here purporting to do so, but rather it designates the judges of the respective courts as the parties it desires to constitute certain of these tribunals, including the Court of Appeal when sitting as such.

While the work of an assessor is largely administrative, he must, of necessity, make judicial as well as administrative decisions. The nature and character of his work and its importance in relation to the financing of a municipality make it desirable that there should be, at least with respect to the major portion of his duties, a summary and expeditious appeal available to the taxpayer. The legislature, in appreciation of such, has set up these tribunals and given to them, as it appears by virtue of the provisions of ss. 69 to 83 inclusive of the *Assessment Act,* such jurisdiction and authority as it has deemed appropriate and within its legislative competence. When, however, there is, as here, an important question of law involving the liability of the taxpayer, which prior to and since Confederation has never been within the jurisdiction of these tribunals, it must be decided by a court presided over by a judge appointed under s. 96 of the *B.N.A. Act.*

That such was the position prior to Confederation is illustrated by *Township of London* v. *The Great Western Ry. Co. supra.* There the assessor, in valuing the defendant railway company's land, included as part thereof the rails and other superstructure upon the land. No appeal was taken. When, however, the municipality brought action to realize the amount of the taxes the railway defended. It admitted the assessment upon its land and paid into court the amount of the tax thereon, but contended that the rails, etc. were improperly included in the valuation. At the trial a verdict was directed for the plaintiffs, but upon appeal this was reversed and in the course of his judgment Mr. Justice Burns stated at p. 266:

> The distinction where it is necessary to appeal, and where the claim may be resisted by an action of trespass or replevin, is this: if the power existed to make the assessment, then there is a jurisdiction in those doing

it, and in such case the remedy is by appeal only; but if the assessment be illegal, then there is no jurisdiction to do it, and in such case the person resisting is not compelled to resort to the remedy of appeal, but may resist the illegal exaction.

The court held that inclusion in the valuation of that which was not part of the land raised a question of liability which must be decided by the courts. On the other hand a fourth plea was raised as to the amount of the assessment upon the property which the company had admitted was subject to assessment. The plaintiff demurred to this plea and the court upheld the demurrer on the basis that this did not raise a question of liability, but only as to the amount thereof, which was a matter of which the appellate tribunal, under the *Assessment Act*, was the proper body to make a final disposition.

Tribunals such as the appellate tribunals under the *Assessment Act* were continued under s. 29 of the *B.N.A. Act* and in relation thereto the provincial legislatures are competent to legislate. *Re Adoption Act* (1).

The tribunals set up under the *Assessment Act* are in no different position from others similarly constituted with respect to their jurisdiction to determine questions of law.

The decision in *Quance* v. *Ivey, supra,* clearly expresses the relevant law. It restricts these tribunals to those matters over which they may deal effectively and avoids for the taxpayer an expenditure of time and money in pursuing before these tribunals an issue which can only be finally and competently disposed of in the courts.

It was submitted at the hearing that notwithstanding the inability of the legislature to vest in these appellate tribunals authority to deal finally with such issues as that with which we are here concerned, the legislature may impose and, in fact, has particularly in s. 83 of the *Assessment Act* imposed upon these tribunals a duty to determine such issues, even though without any degree of finality. The imposition upon a tribunal of such a duty or to encourage a taxpayer to submit to an expenditure of time and money that can accomplish nothing in any legal sense and which, if ultimately determined by a competent tribunal in favour of the taxpayer, will mean that what was done by the

(1) [1938] S.C.R. 398.

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assessor or any appellate tribunal under the *Assessment Act* was, in effect, a nullity and void *ab initio,* ought to be set forth in language that clearly discloses such an intention.

No such intention is to be found in s. 83. On the contrary, the legislature in that section discloses a clear intention that the appellate tribunals shall deal effectively and finally with the duties and responsibilities imposed upon them.

It was suggested that such a course may avoid delays in the final determination of the roll. Such a suggestion does not appear to be well founded. When completed, and on or before the required date, the assessment roll, as prepared by the assessor, must be returned "to the clerk" of the municipality (s. 53(1)).

Section 54(5) reads:

> 54(5) Nothing in this section shall in any way deprive any person of any right of appeal provided for in this Act, and the same may be exercised and the appeal proceeded with in accordance with this Act, notwithstanding that the assessment roll has been certified by the court of revision and become the last revised assessment roll.

The effect of subpara. (5) is that the assessment roll is completed, notwithstanding that appeals may be carried to the other appellate tribunals, and certainly where an issue such as we are here concerned with is raised under proceedings in a court presided over by a judge appointed under s. 96 of the *B.N.A. Act.*

The decisions of these appellate tribunals, when made within the scope of their respective authorities and subject to any right of appeal under the *Assessment Act,* are final and binding upon the parties. This has been repeatedly recognized by the courts. The question with which we are here concerned is that of liability, admittedly one of law, in respect of which only courts presided over by a judge appointed under s. 96 of the *B.N.A. Act* may make a final decision. If it is finally determined in favour of the taxpayer, the assessments were made without authority. The true position with respect to the only issue with which we are here concerned is clearly stated by Strong C.J. in *The Corporation of the City of London* v. *George Watt & Sons* (1):

> If there is no power conferred by the statute to make the assessment it must be wholly illegal and void *ab initio* and confirmation by the Court of Revision cannot validate it.

(1) (1893) 22 Can. S.C.R. 300 at 302.

See also to the same effect *Toronto Railway Co.* v. *Corporation of the City of Toronto, supra; Bennett & White (Calgary) Ltd.* v. *Municipal District of Sugar City, supra.*

Moreover, the position with respect to the roll is aptly explained in *Shannon Realties* v. *Ville de St. Michel* (1), where the Privy Council quoted with approval the statement of Duff J. (later C.J.):

> There remains the argument based upon the Municipal Charter, s. 28. This section deals with the subject of taxation rather than the subject of valuation. It can afford no basis for impeaching the assessment roll. Nor do I think it is a ground for impeaching the collector's roll except as an answer to a claim for taxes. The contention now raised will be open to the respondents in answer to such a claim. *La Ville St-Michel* v. *Shannon Realties Ltd.* (2).

The Ontario Municipal Board held that the question here raised was one of law upon which it had no jurisdiction to adjudicate. The Court of Appeal affirmed this decision and held also that, sitting as an appellate tribunal under the *Assessment Act,* it had no jurisdiction to deal therewith. The effect of this decision and that of *Quance* v. *Ivey, supra,* upon which it is founded, is that if either of the parties desires a final determination of the question of law here raised it can only be had, as already intimated, by a court presided over by a judge appointed under s. 96 of the *B.N.A. Act.*

The appeal should be dismissed with costs.

LOCKE J. (dissenting):—This is an appeal from a judgment of the Court of Appeal of Ontario, by which the appeal of the City of Toronto from a decision of the Ontario Municipal Board given on December 15, 1952, was dismissed.

The respondent company is the owner of a property in Toronto upon which it caused to be erected a two storey brick building, to be used for the purpose of the operation of bowling alleys. The construction and the installation of these alleys was completed in the year 1950. While the question as to whether the alleys were land, real property or real estate within the meaning of those expressions as used in the *Assessment Act* (R.S.O. 1950, c. 24) is a matter of controversy between the parties, it is unnecessary for the

(1) [1924] A.C. 185.

(2) (1922) 64 Can. S.C.R. 420 at 441.

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disposition of this appeal to determine this question, and sufficient to say that the alleys were laid upon frame stringers placed, in turn, upon what were described as sleepers laid along the concrete floors of the building but in no way attached to them, being kept in place by their own weight.

The City gave notice of assessment to the respondent on December 22, 1950, for a period of the last two months of the year 1950 and for the calendar year 1951: in respect of the stated period for 1950 the notice of assessment stated that the building had been assessed at $305,000 and for the year 1951 at $274,000. Other than to say that the assessments were for the "value of buildings" no further particulars were given.

Under the appropriate provisions of the *Assessment Act* the respondent appealed to the Court of Revision. The reasons assigned in the notices of appeal read merely "building assessment too high." By that body the assessment for each year was reduced by an amount of $96,000. Other than the endorsements made on the notices of assessment that in respect of the year 1950 the assessment of the buildings had been reduced to $209,000 and as to the year 1951 to $178,000 there is no written record of the proceedings before the Court of Revision before us.

The city appealed from this decision to a judge of the County Court of the County of York and the appeals were dismissed. No written reasons were given.

From this decision the city appealed to the Ontario Municipal Board. Evidence was taken before that body and, apparently with the concurrence of the respondent, the assessor of the city stated that the action of the Court of Revision in reducing the assessment by the amount stated was based upon the view that the bowling alleys were not assessable and their replacement value fixed at $96,000 had accordingly been deducted from the values stated in the notices of assessment. The Municipal Board dismissed the appeal on the ground that the only question involved was whether the bowling alleys were liable to assessment or exempt therefrom, the members considering that, in view of the decision of the Court of Appeal in *Quance* v. *Ivey* (1), they were without jurisdiction to determine the matter.

(1) [1950] O.R. 397.

The appeal of the City to the Court of Appeal was dismissed, Mr. Justice Laidlaw, delivering the unanimous judgment of the Court, finding that the Ontario Municipal Board was right in deciding that it was without jurisdiction to decide the question: consequently, he considered that the Court of Appeal was also without jurisdiction.

By s. 1(i) of the *Assessment Act*, "land," "real property" and "real estate" include, all buildings and all structures, machinery and fixtures erected or placed upon, in, over, under or affixed to lands. By s. 40, real property in Ontario is declared to be liable to taxation, subject to certain exemptions, none of which touch the present matter.

Before the completion of the assessment roll, the assessor or his assistant is required to send to every person named therein a notice in a prescribed form, notifying him of the sum for which he has been assessed (s. 46). Provision for the disposition of complaints against the assessment is made in s. 69 and following sections of the Act. These may be summarized as follows:—Any person complaining of an error or omission in regard to himself as having been wrongly inserted in or omitted from the roll, or as having been undercharged or overcharged by the assessor in the roll, may give notice in writing to the clerk of the municipality or the Assessment Commissioner that he considers himself aggrieved (s. 69(1)). The appeal is heard by a court of revision, provision for the constitution of which is made by ss. 58, 59 and 60. Included in the powers of this court is authority to reopen the whole question of the assessment and to direct any correction necessary to be made in the roll (s. 69(20)). The roll as finally revised and certified by the Court of Revision is declared to be valid and, subject to the right of appeal, to bind all parties concerned (s. 70).

S. 72 provides that an appeal shall lie to the County Judge at the instance, *inter alia*, of any person assessed and the procedure to be followed for the disposition of the appeal is prescribed. S. 74(2) reads:—

> The hearing of the appeal by the county judge shall, where questions of fact are involved, be in the nature of a new trial, and either party may adduce further evidence in addition to that heard before the court of revision, subject to any order as to costs or adjournment which the judge may consider just.

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S. 80(1) permits an appeal from the decision of the county judge to the Ontario Municipal Board, a body constituted under the provisions of the *Ontario Municipal Board Act* (c. 262 R.S.O. 1950) or, where no appeal has been taken to the county judge, direct from the decision of the court of revision. By s. 80(6):—

> The Board shall have power upon such appeal to decide not only as to the amount at which the property in question shall be assessed, but also all questions as to whether any persons or things are liable to assessment or exempt from assessment under the provisions of this Act.

S. 83 reads:—

> It is hereby declared that the court of revision, the county judge, the Ontario Municipal Board, and every court to which and every judge to whom an appeal lies under this Act have jurisdiction to determine not only the amount of any assessment, but also all questions as to whether any persons or things are or were assessable or are or were legally assessed or exempted from assessment.

S. 80(7) provides for an appeal from a decision of the Board under that section, *inter alia,* upon a question of law or the construction of a statute. No provision is made for an appeal from a finding of that body upon a question of fact.

In cases where an appeal lies from the decision of the judge to the Board under s. 80, the judge may, with the consent and at the request of both parties, state a case on, *inter alia,* a question of law or the construction of a statute for the decision of the Court of Appeal (s. 81).

S. 82(1) gives to the judge of a county court and the court hearing an appeal under s. 80 and the Court of Appeal powers similar to those given to the court of revision by s. 69(20) to reopen the whole question of the assessment, so that the assessment roll may be corrected and the accurate amount for which the assessment should be made stated in it.

The respective contentions of the parties may be briefly stated. The respondent contends that the Ontario Municipal Board, a body appointed by the Lieutenant Governor of the Province, was without jurisdiction to decide the legal question as to whether under the provisions of the *Assessment Act* it was liable to assessment in respect of the value of the bowling alleys, as distinct from the building in which they are situate. It submits that the powers sought to be vested in the Board by ss. 80(6) and 83 are ultra vires a

provincial legislature, in that they purport to vest in its powers which broadly conform to those generally exercisable by judges of Superior, District or County Courts referred to in s. 96 of the *British North America Act*. The appellant and counsel for the Attorney General of Ontario contest this position, saying that the functions of the Court of Revision, the County Court Judge and the Ontario Municipal Board under the sections referred to are administrative in their nature, being the machinery devised for the purpose of settling an assessment roll for the purpose of imposing municipal taxation and that they may accordingly decide questions of this nature for the purpose of enabling them to discharge those functions. While s. 83 declares the power of the court, the county judge and the Board to determine the question of law as to whether any persons or things are assessable or have been legally assessed, neither counsel contend that their decisions in such matters render the question of liability *res judicata*.

The record does not disclose whether this issue was raised either before the court of revision or the county judge. Before the Municipal Board, however, the respondent took the position, which was upheld by the Board, that the only question to be determined was as to whether the bowling alleys were liable to assessment or exempt therefrom. Upon this issue, the Board considered itself bound by the judgment of the Court of Appeal to which reference has been made. It does not appear from the reasons for judgment delivered by the members of the Board that it was contended before them that its function in determining this disputed issue was simply administrative, or that its decision upon the question of law involved would not be binding upon both parties. That question was, however, argued before the Court of Appeal (1), Laidlaw J.A. saying (at p. 22) that it had been contended before them that the Court of Revision, the County Court judge and the Board had jurisdiction:—

> To decide the question in issue as an administrative matter and "on that level" have power to decide whether the assessor was right or wrong when he included the value of the bowling alleys in the assessment made by him of the building.

(1) [1954] O.R. 14.

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As to this, that learned Judge said that:—

The court of revision and the courts of appeal therefrom cannot assume jurisdiction in that way or upon that basis decide the real question in issue between the parties as I have stated it above.

S. 96 of *The British North America Act, 1867* reads:—

The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

S. 129 reads in part:—

Except as otherwise provided by this Act, . . . 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 . . . 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 respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

Prior to Confederation, by an Act to amend and consolidate the assessment laws of Upper Canada (c. 182, 16 Vict.) provision was made for the assessment of lands for the purpose of municipal taxation. By s. 26 of that statute it was provided that any party who:—

Shall deem himself wrongfully inserted in or omitted from the Roll or undercharged or overcharged by the assessor.

might appeal to a court of five members of the municipal Council designated a court of revision. That court was empowered to determine the question raised and the assessment roll as passed by it and certified by the clerk was declared to be binding on all parties concerned, except in so far as it might be further amended on appeal. S. 28 provided for an appeal from the decision of the Court of Revision to the "Judge of the County Court" who was required, after hearing, to transmit his decision to the Clerk of the Division Court to be forthwith transmitted to the Clerk of the Municipality, such judgment to be final and the assessment roll amended accordingly.

The decision of a county court judge upon a question as to whether certain property of a railway company was subject to assessment was held not to be final by Robinson C.J. in *Great Western Ry. Co.* v. *Rouse* (1).

(1) (1857) 15 U.C.Q.B. 168.

It is unnecessary, in my opinion, to discuss the changes made in the appeal provisions between 1853 and 1904, when *Toronto Ry* v. *Toronto Corporation* (1), was decided by the Judicial Committee.

The *Assessment Act* which affected the matter to be determined in that case was c. 224, R.S.O. 1897, which did not contain provisions similar to the present sections 80(6) or 83. The question was whether the electric cars of the railway company were personal estate and thus not liable to assessment. S. 71 of that Act which provided for an appeal to the Court of Revision, in so far as it affected the nature of the appeal, was in the language of s. 26 of the statute of 1853 above referred to. The street cars having been assessed as real estate within the meaning of that term in the statute, the railway company appealed successively to the Court of Revision, the County Court judge (to whom an appeal was permitted under the terms of the statute) and to the Court of Appeal and, these appeals having failed, it was contended on behalf of the City before the Board that the question of liability to assessment was *res judicata*. In rejecting this contention, Lord Davey, by whom the judgment of the Board was delivered, said in part (p. 815):—

> It appears to their Lordships that the jurisdiction of the Court of Revision and of the courts exercising the statutory jurisdiction of appeal from the Court of Revision is confined to the question whether the assessment was too high or too low, and those Courts had no jurisdiction to determine the question whether the assessment commissioner had exceeded his powers in assessing property which was not by law assessable. In other words, where the assessment was *ab initio* a nullity they had no jurisdiction to confirm it or give it validity. The order of the Court of Appeal of June 28, 1902, was not, therefore, the decision of a Court having competent jurisdiction to decide the question in issue in this action, and it cannot be pleaded as an estoppel.

In considering this decision, it is to be noted that nothing was said as to that portion of s. 71 also authorizing an appeal by a person claiming to be "wrongfully inserted in or omitted from the Roll" and there was no discussion as to the powers of the Province to enact the relevant portions of the *Assessment Act* or any part of them. An earlier decision to the same effect as that of the Judicial Committee is *Nickle* v. *Douglas* (2), where the authorities are reviewed.

(1) [1904] A.C. 809.

(2) [1875] 37 U.C.Q.B. 51.

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By c. 31 of the statutes of 1906 the Ontario Railway and Municipal Board, the predecessor of the Ontario Municipal Board, was constituted and provision made for appeals to that board in lieu of the appeal to the Board of County Judges theretofore provided for by the *Assessment Act*. By s. 51(2) of that Act it was declared that the Board should have power upon such appeals to decide not only as to the amount at which the property should be assessed but also all questions as to whether any persons or things were liable to assessment or exempt from assessment under the provisions of the *Assessment Act*.

By c. 88 of the statutes of 1910 the *Assessment Act* of 1904 was amended by adding thereto as s. 78(*a*) language to the same effect as the present s. 83.

By c. 27 of the statutes of 1932, s. 6, it was provided that the Ontario Railway and Municipal Board, as theretofore constituted, should hereafter be called the Ontario Municipal Board. Members of the Board were declared to hold office during pleasure and a wide variety of functions were assigned to the Board.

In *Toronto Corporation* v. *York Corporation* (1) while the question to be determined was the power of the Board to make an order for discovery of documents, authorising the respondents to inspect the appellant's water work system and directing an examination of the appellant's Commissioner of Works under oath, the Judicial Committee considered generally the nature of the functions assigned to the Board. It was there contended for the city that the Act of 1932 and in particular ss. 41 to 46 and 54 and 59 were ultra vires, in that the Board was entrusted with the jurisdiction and powers of a Superior Court and within the purview of those sections was, in fact, constituted a Superior Court.

The judgment delivered by Lord Atkin, after finding that the Board was primarily, in pith and substance, an administrative body, said (at p. 427) in respect to the powers contained in the above mentioned sections (which, with immaterial changes, appear as ss. 37 to 42 and 52 and 55 of R.S.O. 1950, c. 262) p. 427:—

> It is difficult to avoid the conclusion that, whatever be the definition given to Court of Justice, or judicial power, the sections in question do

(1) [1938] A.C. 415.

purport to clothe the Board with the functions of a Court, and to vest in it judicial powers. But, making that assumption, their Lordships are not prepared to accept the further proposition that the Board is therefore for all purposes invalidly constituted. It is primarily an administrative body; so far as legislation has purported to give it judicial authority that attempt must fail. It is not validly constituted to receive judicial authority; so far, therefore, as the Act purports to constitute the Board a Court of Justice analogous to a Superior, District, or County Court, it is pro tanto invalid; not because the Board is invalidly constituted, for as an administrative body its constitution is within the Provincial powers; nor because the Province cannot give the judicial powers in question to any Court, for to a Court complying with the requirements of ss. 96, 99 and 100 of the British North America Act the Province may entrust such judicial duties as it thinks fit; but because to entrust these duties to an administrative Board appointed by the Province would be to entrust them to a body not qualified to exercise them by reason of the sections referred to. The result is that such parts of the Act as purport to vest in the Board the functions of a Court have no effect.

The argument in support of the legislation in that case was that the administrative powers vested in the Board and the powers sought to be given by the sections above referred to were severable and that the powers, the exercise of which was attacked as ultra vires, were properly exercisable only as incidental to and as appropriate machinery for the exercise of administrative functions. This contention was upheld in the judgment delivered, it being considered that the powers of examination, inspection and discovery of documents, even though couched in terms of similar powers of a court of justice, were not inconsistent with the powers of an administrative body whose duty it may be to ascertain the facts with which they are dealing.

The effect of s. 129 of the British North America Act must be considered. As I have pointed out, the Court of Revision and the County Court Judge were by the statute of 1853 respectively empowered to consider and determine the question as to whether the name of a person had been wrongfully inserted on the roll or whether he had been undercharged or overcharged by the assessor. It cannot be said, for the reasons so clearly pointed out by Sir Lyman Duff C.J. in delivering the judgment of this Court in the *Reference Re the Adoption Act and other Acts* (1), that it is not within the power of a provincial legislature to give additional powers to bodies such as courts of revision and other courts constituted under provincial authority which do not answer to the description of Superior, District and

(1) [1938] S.C.R. 398.

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County Courts in s. 96. That judgment expressly dissented from the view that the jurisdiction of inferior courts, whether within or without the ambit of s. 96, was by the *B.N.A. Act* fixed forever as it stood at the date of Confederation. May it not, therefore, properly be said that to confer the power to determine questions of law of this nature for the purpose of discharging the administrative functions assigned to these various appellate bodies is within the powers of a province?

In *Quance* v. *Ivey* (1), Robertson C.J.O., in delivering the judgment of the majority of the Court, reviewed certain of the legislation dealing with municipal assessments in Upper Canada prior to Confederation and the subsequent legislation of the Province leading up to the amendment of the *Assessment Act* of 1910, purporting to grant to the Municipal Board the powers now defined in s. 83 of the Act. The learned Chief Justice concluded that the powers sought to be conferred on the Board by s. 83, which would include the power to decide whether a person is liable or exempt from assessment, attempted to confer jurisdiction over a subject matter that, both before and after Confederation, had been dealt with by the Superior Courts. It does not appear from the judgments delivered in that case that the question as to whether the legislation, while ineffective to give the Board jurisdiction to decide the question of law involved so that the matter would be *res judicata* as between the parties and their privies, might not validly empower it in the discharge of its administrative functions to decide the question for the purpose of enabling the municipality to complete the assessment roll. Reference was made to that portion of the judgment of Lord Atkin in *Toronto Corporation* v. *York Corporation,* above referred to, in which, after saying that the Board was primarily an administrative body and that, so far as legislation had purported to give it judicial authority, that attempt must fail, it was said that (p. 427):—

> The result is that such parts of the Act as purport to vest in the Board the functions of a court have no effect.

The reference in Lord Atkin's judgment was to ss. 41 to 46, 54 and 59 of the *Municipal Board Act, 1932,* but there

(1) [1950] O.R. 397.

seems to me to be no answer to the contention that they apply with equal force to s. 83 of the *Assessment Act*, if that section is to be construed literally.

That it should not be so construed appears to me to follow from what was said in the judgment of the Judicial Committee in *Bennett & White* v. *Municipal District of Sugar City* (1). In that case, the statutory provision considered was s. 53 of the *Assessment Act* of Alberta, the meaning of which, in so far as it purported to vest jurisdiction in the Alberta Assessment Commission, seems to me to be indistinguishable from that to be assigned to s. 83 of the *Assessment Act* of Ontario. The question as to whether the section of the Alberta Act was intra vires the Legislature was not argued in the Sugar City case, and that portion of the reasons for judgment which I have mentioned referred to the contention of the Municipal District that, since an appeal from the assessment had been taken to the Court of Revision and the Alberta Assessment Commission, the matter was *res judicata*. In rejecting this contention, which had also been rejected in this Court, the Board found that both the Court of Revision and the Alberta Assessment Commission had jurisdiction to deal with the question, in discharge of their statutory functions.

In *Ladore* v. *Bennett* (2) Lord Atkin, in delivering the judgment of the Judicial Committee, pointed out (p. 480) that the Province has exclusive legislative power in relation to municipal institutions by reason of s. 92(8) of the *British North America Act, 1867* and that:—

> Sovereign within its constitutional powers, the Province is charged with the local government of its inhabitants by means of municipal institutions.

In the exercise of this power and the discharge of this duty, the Legislature has provided by the *Assessment Act* the machinery by which municipal institutions are required, as a necessary step in imposing taxation upon property within their territorial limits, to prepare an assessment roll, value the property for the purpose of an assessment and afford to those who claim that they are improperly assessed, or that their names should or should not appear on the roll, the right of recourse to tribunals to which appeals may

(1) [1951] A.C. 786 at 811, 812. (2) [1939] A.C. 468.

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be taken. To the powers given to the Court of Revision, the County Court Judge and the Municipal Board by the earlier sections, there have been added the further powers now given by s. 83. The power given by that section to decide whether property is or is not assessable may properly, in my opinion, be exercised by them respectively, in discharge of their statutory duties as administrative acts to enable municipal institutions to complete their assessment rolls with reasonable promptness and raise the moneys necessary for their government.

It was not contended by any of the parties to this appeal that a decision by the Municipal Board in the present matter that the bowling alleys, if part of the real property of the respondent within the meaning of that expression in s. 1 (i) of the *Assessment Act,* are or are not liable to assessment would render that question *res judicata* or oust the jurisdiction of the courts to determine it.

In the result, this appeal should, in my opinion, be allowed with costs and the order of the Court of Appeal set aside and the matter referred back to the Ontario Municipal Board to be decided. I think there should be no costs for or against the intervenants.

CARTWRIGHT J. (dissenting):—This is an appeal, brought pursuant to leave granted by this Court on February 15, 1954, from a judgment of the Court of Appeal for Ontario, pronounced on December 2, 1953, affirming a decision of the Ontario Municipal Board, hereinafter referred to as the Board, rendered on December 16, 1952.

The decision of the Board dealt with two appeals from orders of His Honour Judge McDonagh, a judge of the County Court of the County of York, dismissing appeals from decisions of the Court of Revision of the City of Toronto which had reduced, by $96,000 in each case, an assessment made in 1950 for levying additional taxes for that year and an assessment made in the same year upon which taxes for the year 1951 were to be levied.

The Court of Appeal and the Board were of the opinion, with which I respectfully agree, that notwithstanding the form of the notice of appeal to the Court of Revision the only question decided by the Court of Revision and by the learned County Court Judge and raised for decision before

the Board was whether certain bowling alleys contained in the assessed building and valued by the assessor at $96,000 were liable to assessment or exempt therefrom. The Board decided that it was bound by the decision of the Court of Appeal for Ontario in *Quance* v. *Ivey* (1), to hold that it was without jurisdiction to decide this question and consequently made no order other than a direction that the appellant should pay the costs of reporting the proceedings. This decision was affirmed by the Court of Appeal. Laidlaw J.A. who delivered the unanimous judgment of the Court concludes his reasons as follows:—

> On this appeal the only question for determination is whether the Ontario Municipal Board has jurisdiction to decide the question in issue between the parties. Having reached the conclusion that it has no such jurisdiction it follows that this Court has no jurisdiction on this appeal to decide the question and I refrain from expressing any views in respect of it.
>
> I would direct that the appeal be dismissed with costs.

In *Quance* v. *Ivey* (*supra*), the appellant had been assessed, in the year 1948, in the sum of $12,700 for "business assessment" in respect of the premises in which it carried on its business. It appealed to the Court of Revision on the ground that owing to the nature of its business it was exempt from business assessment. This appeal was dismissed. The appellant then appealed to the County Judge who allowed the appeal. The assessor appealed from the decision of the County Judge to the Board. The Board allowed the appeal and restored the "business assessment". The appellant then appealed from the decision of the Board to the Court of Appeal. The Court of Appeal set aside the order of the Board on the ground that the Board was without jurisdiction and made no further direction.

There appears to be no ground on which the case at bar can be distinguished from *Quance* v. *Ivey* and it becomes necessary to consider whether that case was rightly decided.

The judgments delivered in *Quance* v. *Ivey* contain a review of the legislation and the relevant decisions. Robertson C.J.O., with whom Laidlaw, Roach and Hope JJ.A. agreed, after quoting from the judgment of the Privy Council in *Toronto Ry Co.* v. *Toronto* (2), said at page 408:—

> In my opinion it is well established by decisions of highest authority that jurisdiction to decide disputed questions of liability to assessment, such as were raised in the cases I have referred to, and in the present case,

(1) [1950] O.R. 397.

(2) [1904] A.C. 809 at 815.

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was vested in the superior Courts of the Province, and not in the bodies having jurisdiction to hear assessment appeals under the provisions of The Assessment Act. It is also clear that that jurisdiction was so vested prior to Confederation, and continued to be so vested thereafter.

The learned Chief Justice then reviewed the legislation constituting the Board and its predecessor the Ontario Railway and Municipal Board and assuming to give them jurisdiction to hear assessment appeals and continued at page 412:—

> We have the Board, at its origin given jurisdiction by the Legislature to deal with, and to adjudicate upon, a subject-matter that always, both before and after Confederation to that time, had been dealt with by the Superior Courts in formal actions as within their jurisdiction exclusively, subject to strictly limited rights of appeal. The Legislature, at the same time, has purported "to clothe the Board with the functions of a Court and to vest in it judicial powers." And these are severable from the Board's administrative functions and duties, as Lord Atkin has said in the case of *Toronto* v. *York Tp., supra.* In my opinion it is clear that the Board has assumed, under an authority that the Legislature has assumed to give it, to exercise the jurisdiction of a Superior Court, or a tribunal analogous thereto, in dealing with the appeal before it, and has made an order that it could make only if there had been observance, in its members, appointment to and tenure of office, of the provisions of ss. 96, 99 and 100 of the B.N.A. Act. Without such observance, the Board could not, in my opinion, exercise jurisdiction in the appeal brought before it by the respondent, and could not make the order now appealed from.

Hogg J.A., who delivered reasons reaching the same result, in summarizing his conclusions, said in part at page 427:—

> It is not within the legislative power of the provincial Legislature to confer on the Board, the members of which are appointed by the Government of Ontario, the jurisdiction purported to be given to it by ss. 84 (5) and 87 of the Assessment Act, nor for the Board to exercise such jurisdiction.

S. 84 (5) and 87 referred to by Hogg J.A. are now ss. 80 (6) and 83 of the *Assessment Act.*

While it is nowhere explicitly so stated in the reasons delivered by the Court of Appeal in *Quance* v. *Ivey* it is I think clear from reading them as a whole that in the view of that Court the amendments made to the Assessment Act subsequent to the decision of the Privy Council in *Toronto Ry. Co.* v. *Toronto* (*supra*), on their true construction, expressed the intention of the Legislature to confer upon the Board jurisdiction to finally decide all questions of the nature referred to in what are now ss. 80 (6) and 83 so that

its decision of such questions would be *res judicata inter partes,* subject only to the right of appeal given by what is now s. 80 (7).

Counsel for the appellant and for the Attorney General for Ontario submit, if I have apprehended their arguments correctly, that on a true construction of the relevant sections of the Assessment Act the powers conferred on the Court of Revision, the County Judge, the Board and the Court of Appeal by ss. 80(6), 82 (1), 83 and other related sections are limited, as regards disputed questions of liability to assessment the jurisdiction to decide which was vested in the Superior Courts of the Province prior to Confederation, to deciding such questions as an administrative matter only, so as to make the assessment roll correct as the assessor would have done had he not fallen into error; that the jurisdiction of the Courts is not ousted by the decisions of the tribunals mentioned and that none of such decisions would support a plea of *res judicata* if the same questions were raised in an action between the same parties for a declaration that the property assessed was exempt from assessment and taxation. It is said that the nature of the power given to the assessment tribunals by the Ontario Statute is the same as that conferred on the Alberta Assessment Commission by the Alberta Assessment Act; and that the reasoning which in *Sugar City* v. *Bennett and White Ltd.* (1), brought Rand J. and Lord Reid to the conclusion that the decision of the Alberta Assessment Commission would not support a plea of *res judicata* requires a similar conclusion in regard to the decisions of the assessment tribunals provided by the Ontario Statute upon questions of the nature above mentioned. In my view this argument is sound in so far as it relates to the nature of the powers conferred upon the Court of Revision, the County Judge and the Board.

In the *Sugar City* case it was not argued that the sections of the Alberta Assessment Act conferring jurisdiction on the Assessment Commission were *ultra vires* of the Legislature.

(1) [1950] S.C.R. 450; [1951] A.C. 786.

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The constitutional validity of the Act being assumed the problem considered was that of its proper construction. Section 53 of the Alberta Act is 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.

It will be observed that there is no substantial difference between the words of this section conferring jurisdiction on the Commission and those of s. 83 of the Ontario Statute conferring jurisdiction on the tribunals therein mentioned including the Board.

It was pointed out in argument however that there are certain substantial differences between the provisions dealing with assessment appeals in the Alberta Act and those in the Ontario Act, an example being that the latter Act gives rights of appeal to both a County Judge and the Court of Appeal while the former Act does not. This is quite true, but in the *Sugar City* case in the Privy Council and in this Court the Ontario decisions were carefully considered and both Lord Reid, who delivered the judgment of the Judicial Committee, and Rand J., who delivered the judgment of the majority in this Court, disapproved of the decision in *Hagersville* v. *Hambleton* (1), in which the provisions of the Ontario Assessment Act had been construed as giving binding and conclusive effect to the decisions of the assessment tribunals.

In *Phillips and Taylor* v. *City of Sault Ste. Marie* (2), the question of the construction of the sections of the Ontario Assessment Act which confer jurisdiction on the assessment tribunals came before this Court for decision. That was an action brought in the Supreme Court of Ontario for a declaration that the appellants were not liable to taxation in respect of their occupancy of certain lands belonging to the Crown in the right of Canada. This was clearly a question the jurisdiction to decide which was prior to Confederation vested in the Superior Courts of the Province. Prior to the commencement of the action each of the appellants had appealed to the Court of Revision against the assessments made upon the sole ground that they were

(1) (1929) 63 O.L.R. 397. (2) [1954] S.C.R. 404.

not assessable. That Court having confirmed the assessment, each appellant appealed to the District Judge upon the same ground and the appeals were dismissed. They took no further appeal. In defence to the action the City pleaded that the issues raised were *res judicata* by reason of the decisions of the Court of Revision affirmed by the District Judge. In this case also the constitutional validity of the sections of the Act conferring jurisdiction on the assessment tribunals was assumed but the plea of *res judicata* was rejected. In giving the judgment of the majority in the Court of Appeal, Laidlaw J.A. applied to the Ontario Act the principle stated by Lord Reid in *Sugar City* in the following words:—

> . . . that a taxpayer called on to pay a tax in respect of certain property has a right to submit to the ordinary courts the question whether he is taxable in respect of that property unless his right to do so has been clearly and validly taken away by some enactment, and that the fact that the statute which authorizes assessment allows an appeal or a series of appeals against assessments to other tribunals is not sufficient to deprive the taxpayer of that right.

Taschereau J., who gave the unanimous judgment of this Court, said at page 409:—

> . . . It is now the contention of the respondent that the judgment given by the Judge of the District Court was final and that the question of the validity of the assessments is, therefore, *res judicata*. For the reasons given by Laidlaw J.A. in the Court of Appeal, I believe that this argument fails.

It therefore appears to me that judgments which are binding upon us have construed the provisions of the sections of the Ontario Assessment Act which confer jurisdiction upon the assessment tribunals as not giving to such tribunals jurisdiction to determine conclusively questions the jurisdiction to decide which was prior to Confederation vested in the Superior Courts. The jurisdiction with which the assessment tribunals are clothed by the statute thus construed is described by Rand J. in *Sugar City* (*supra*) at page 465 as follows:—

> 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

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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 appeals, 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.

I conclude, therefore, that the Ontario Assessment Act, on its proper construction, by s. 83 and the related sections, confers upon the Court of Revision, the County Judge and the Board jurisdiction to decide all questions not only as to the amount of any assessment but also as to whether any persons or things are or were assessable or are or were legally assessed or exempted from assessment, but that any decision given by such tribunals on questions the jurisdiction to decide which was prior to Confederation vested in the Superior Courts is to be regarded only, as it was put by Rand J. in the passage quoted above, as a decision given in the same sense as the decision of the assessor.

Neither in the *Sugar City* case nor in *Phillips* v. *Sault Ste. Marie* was it necessary for the courts to deal expressly with the nature of the right of appeal to the Court of Appeal given by ss. 80 (7), 82 (1) and 83 of the *Assessment Act*. That court is of course one whose members' appointment to and tenure of office are in accordance with the provisions of ss. 96, 99 and 100 of the *British North America Act*. In this it differs from the Court of Revision and the Board. The powers conferred upon the County Judge are conferred upon him as *persona designata* while those conferred upon the Court of Appeal are conferred upon it as a Court and not upon its members as *personae designatae*. I have had the advantage of reading the reasons of my brother Rand and I agree with his conclusion as to the nature and extent of the jurisdiction which is conferred upon the Court of Appeal by the sections referred to.

It remains to consider the question, which was not raised in either *Sugar City* or *Phillips* v. *Sault Ste. Marie*, whether it is within the power of the Provincial Legislature to confer upon the Court of Revision, the County Judge and the Board the powers conferred upon them by the relevant sections as above construed. In my opinion, it is. The

attack on the constitutionality of the sections in question is based upon the contention that they purport to confer upon the tribunals mentioned the powers of a superior court. But it is of the essence of the nature of a superior court that it has jurisdiction to give a decision which, subject to such rights of appeal as may be given by statute, is final and binding between the parties. The statute, as it has been construed, does not purport to confer upon the assessment tribunals any such power in regard to questions the jurisdiction to decide which was prior to Confederation vested in the superior courts.

While, of course, the fact that the Attorney General for Canada and the Attorney General for Ontario have taken certain positions on the argument of the appeal does not relieve the Court of its responsibility in deciding a constitutional question, it is to be observed that the former contended that the sections in question were *ultra vires* of the Provincial Legislature only if they were construed as conferring jurisdiction on the assessment tribunals "to determine finally whether persons or things are or were assessable or are or were legally assessed or exempted from assessment" while the latter did not argue that they should be so construed.

As to our jurisdiction to hear this appeal I agree with the reasons and conclusion of my brother Rand.

I would allow the appeal, set aside the order of the Court of Appeal and the decision of the Board and direct that the matter be referred back to the Board in order that it may decide the question raised before it. The appellant should recover its costs in the Court of Appeal and in this Court from the respondent. There should be no order as to the costs of the intervenants.

ABBOTT J.:—The relevant facts in this appeal as well as the statutory provisions and the authorities bearing on the questions in issue, are fully discussed in the judgments of my Lord the Chief Justice and my brother Estey. I agree with their reasons and I desire to add only a few brief observations.

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It appears to me that the question to be determined in this appeal is identical with that which arose in *Quance* v. *Ivey* (1), which in my view was rightly decided.

As my brother Rand has pointed out the assessment of property for taxation is primarily an administrative function directed by statute, and in making an assessment the assessor must decide whether a particular person or piece of property is taxable or not. Other questions will arise in the course of establishing an assessment such as the basis upon which the valuation of property is to be made and, since before Confederation, questions of this kind have been passed upon by appellate tribunals such as the Ontario Municipal Board, the decisions of which if not appealed from are final. An example of a case where such a question arose is *City of Toronto* v. *Ontario Jockey Club* (2), where following successive appeals to the Court of Revision, a County Court Judge, the Ontario Municipal Board, the Ontario Court of Appeal and this Court, the valuation of certain buildings in the original assessment was held to have been made on an improper basis. Liability to payment of some tax was not disputed.

Where, as in the present case, the sole question in issue is whether certain property is assessable, it is clear on the authorities that prior to Confederation the power to decide such a question judicially was vested in the Superior, County, or District Courts, and has continued to be so vested.

This question of liability to assessment is one of law upon which in my opinion tribunals such as the Court of Revision or the Ontario Municipal Board are not competent to pronounce. It follows that where they purport to do so such action is without effect.

As Lord Reid said in *Bennett & White (Calgary) Ld.* v. *Municipal District of Sugar City No. 5* (3), referring with approval to the previous decision of the Judicial Committee in *Toronto Railway Co.* v. *Corporation of the City of Toronto* (4):—

> Their Lordships held that the Court of Revision and the courts exercising the statutory jurisdiction of appeal from it "had no jurisdiction to determine the question whether the assessment commissioner had exceeded his powers in assessing property which was not by law assessable. *In*

(1) [1950] O.R. 397.
(2) [1934] S.C.R. 223.
(3) [1952] A.C. 786 at 806.
(4) [1904] A.C. 809.

other words, where the assessment was ab initio a nullity they had no jurisdiction to confirm it or give it validity". Their Lordships pointed out that this decision was in accordance with earlier Canadian authorities.

The italics are mine.

The constitutional question in this appeal was not raised in either the *Sugar City Case supra* or in *Phillips & Taylor* v. *City of Sault Ste. Marie* (1) and the learned judges who decided those cases do not appear to have directed their attention to it.

So far as this appeal is concerned, the *Sugar City* case and the *Sault Ste. Marie* case, are in my opinion authority for no more than the proposition that an assessment tribunal such as the Ontario Municipal Board cannot determine conclusively whether a particular property is liable to assessment. I agree with the view expressed by my Lord the Chief Justice that nowhere in those judgments is it suggested, that where the sole question in issue is the fundamental legal one of liability to assessment, these tribunals have any authority to decide it.

The appeal should be dismissed with costs. There should be no costs for or against the intervenants.

Appeal dismissed with costs. No costs to or against either Attorney General.

Solicitor for the appellant: *W. G. Angus.*

Solicitors for the respondent: *Armstrong, Kemp, Young & Burrows.*

Solicitor for the Attorney General for Ontario: *C. R. Magone.*

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

(1) [1954] S.C.R. 404.

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*Feb. 28
*Mar. 1
*May 24

In re HUGHSON

THE DIOCESAN SYNOD OF FREDERICTON (*Defendant*) ..... } APPELLANT;

AND

C. WALLACE PERRETT and NELLIE PERRETT (Executors of the estate of George Miles Hughson) (*Plaintiffs*), NEW BRUNSWICK PROTESTANT ORPHANS HOME, THE MARITIME TRUST CO., ADA A. FITZGERALD and BESSIE CARLOSS (*Defendants*) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, CHANCERY DIVISION, WITH LEAVE OF THE APPEAL DIVISION

Will—Ademption—Devise to executors for sale with direction to pay net proceeds into Trust Fund—Sale by testator—Proceeds deposited in bank—Subsequent withdrawals—Effect on legacy.

A testator by his will directed his executors to sell and convert into money all the assets of his estate and after the payment of debts and a legacy to the Flower Fund of a church "to pay the net proceeds from the sale of my automobile, furniture and Adelaide Street property in the said city of Saint John" to the appellant upon certain trusts, to pay certain other pecuniary legacies; and the residue to the respondents FitzGerald and Carloss. He finally directed that "Should the net proceeds of my estate at the time of my death be insufficient to pay the aforesaid legacies in full then I direct that they should be paid *pro rata* but that the gift for the Flower Fund and of the net proceeds of the sale of my automobile, furniture and real estate shall be paid in full." Prior to his death the testator sold the three last mentioned items and deposited the proceeds in his bank account. He later drew against the account but at his death the balance in the account was greater than the net proceeds arising from the sale.

Held (Cartwright J. dissenting): that the principle of ademption did not apply: the phrase "net proceeds of the sale" meant the means of determining the amount of a pecuniary bequest; there was no specific property. The testator by providing that in the event "the net proceeds of my estate at the time of my death" should be insufficient for the payment of "the aforesaid legacies in full" indicated that he intended his net estate, whatever it might be at the date of his death, should be employed in payment of all his legacies, priority to be given that of the appellant. *Hicks* v. *McClure* 64 Can. S.C.R. 361, referred to.

Per Cartwright J. (dissenting): The words of the clause in question are indistinguishable from those in *Hicks* v. *McClure* (*supra*) and must accordingly be construed as a gift not of the Adelaide Street property but of the proceeds of the sale thereof so long as those proceeds

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

retained a form by which they could be identified as such. For the reasons given by the judge of first instance, such proceeds had lost their identity at the date of the testator's death and the legacy was adeemed. *Re Stevens* [1946] 4 D.L.R. 322 followed.

APPEAL *per saltum* by leave of the Supreme Court of New Brunswick, Appeal Division, from the judgment of Harrison J. (1) of the Chancery Division, by which he determined certain questions arising with respect to the administration of the estate of George Miles Hughson, deceased.

J. F. H. Teed, Q.C. for the appellant.

Norwood Carter for the respondents.

RAND J.:—This appeal concerns the interpretation of a will. The instrument was made in September, 1950. At that time, as well as at his death, the testator was a widower with no living issue. He then owned a home on Adelaide Street, Saint John, and had money on deposit in the Bank of Nova Scotia. In the late Fall of 1951, he went to live elsewhere. In February, 1952, he sold the property, together with his furniture and automobile, for $10,000 in cash which, on February 9th, was deposited in his savings account in the bank. At that time the account showed a credit of $8,469.72 to which was added the deposit. It appears also that on December 21, 1951, the testator issued a cheque to Ada A. Fitzgerald, one of the respondents and a legatee, for the sum of $5,000, the amount of a bequest in the will. Between the 9th of February and the 20th of May, 1952, when he died, he withdrew from the savings account the sum of $1,656.96 which did not relate to the house or other property sold.

By the will, he devised and bequeathed to his executors "all my property both real and personal for the following purposes". The debts were first to be paid and following a legacy of $100 to the Flower Fund of Saint Luke's Church in Saint John the executors were

to sell and convert into money all of the assets of my estate, and to pay the net proceeds from the sale of my automobile, furniture and real estate situate at No. 180 Adelaide Street in the said City of Saint John to the Diocesan Synod of Fredericton, to be invested in a Memorial Fund in my name, and with the income therefrom to be used and applied by the Bishop of Fredericton in such terms and conditions as he and his successor

(1) (1954) 35 M.P.R. 206.

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in office shall from time to time determine toward grants to a student or students selected by the Bishop for the purposes of assisting such student or students who undertake a course in Divinity Studies; preference at all times being given by the Bishop to students whose homes are in the area served by St. Luke's Church in the said City of Saint John, and if there be no such students in any given year, the Bishop shall be entitled to apply such income to the Divinity Scholarship Account of the Diocese of Fredericton.

Four legacies followed:—

To pay the sum of Five Thousand Dollars ($5,000) to the New Brunswick Protestant Orphans' Home;

To pay the sum of Five Thousand Dollars ($5,000) to the Maritime Trust Company for certain charitable purposes;

To pay the sum of Five Thousand Dollars ($5,000) to Ada A. Fitzgerald (who apparently had rendered services in caring for him);

To pay the sum of Three Thousand Dollars ($3,000) to Bessie Carloss.

The residue was given to Ada A. Fitzgerald and Bessie Carloss in equal shares. The last clause is in these words:—

Should the net proceeds of my estate at the time of my death after the payment of my said debts, funeral and testamentary expenses, be insufficient to pay the aforesaid legacies in full, then I direct that they should be paid *pro rata* but that the gift for the Flower Fund, and the gift of the net proceeds of the sale of my automobile, furniture and real estate shall be paid in full.

The question is whether the gift to the Diocesan Synod of Fredericton was adeemed by the sale of the property mentioned.

It will be seen that the gift is not of the property itself; the executors are to pay "the net proceeds". The word "proceeds" here means the net amount of money, not in specie, which the property should bring on its sale, i.e. it was the means of determining the amount of a legacy. The direction is to sell "all" the property belonging to him; the total proceeds so realized were to constitute one mass or fund, on which the legacy was made a first charge. It was, in short, a pecuniary bequest in the amount of the net sum realized from the sale. The property was sold by the testator most likely because he was no longer living in it and because of what he considered a good price: but whatever the reason, it clearly was not intended to affect the bequest. Ademption carries the sense of taking from another to one's self: but the circumstances exclude any such purpose or intention.

This construction is strikingly confirmed by the last paragraph, which puts beyond doubt the fact that he envisaged

the payment of all the legacies out of the total realized moneys, including those already in the bank. But the gifts to the Church and to the Synod were not to abate: they were to be paid in full first. The latter was, therefore, as the others, a general bequest of so much money.

It was argued that the gift was specific, not of the money realized in specie but, in some sense not very clear to me, specific as to some converted form of the property. Assuming it to be specific, which seems here to mean only that the property must be sold by the executors, there would have been no abatement at law and the precaution taken in the last clause is referable only to its having been intended to be of the general character.

That the courts lean strongly against specific legacies has long been settled. In Williams, vol. 2, p. 610, par. 932, it is said that

> Courts do not favour construing a bequest or devise in a will as being specific, and will not do so unless the intent of the testator to give a specific bequest or devise is clearly so expressed.

and at p. 611, par. 934:—

> The courts in general are averse to construing legacies to be specific; and the intention of the testator, with reference to the thing bequeathed, must be clear.

Jarman, 8th ed., vol. 2, p. 1041, puts it:—

> But in construing wills the court leans very strongly against specific legacies so that in a case of doubt the more probable view is that that legacy is not specific.

But here, without that general tendency, the circumstances leave no doubt of what the testator intended. It is indicated in the ademption by payment of the legacy to Miss Fitzgerald. The sale of the property was a mere incident in the administration of his estate by the executors. The predominant purpose was that out of that estate reduced to money these payments should be made, in the case of the Synod, with the preference expressly provided.

I would, therefore, allow the appeal and dispose of the costs as proposed by my brother Kellock.

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

KELLOCK J.:—The testator gave, devised and bequeathed all his property, real and personal, to his executors, in the first instance, to pay debts, funeral and testamentary

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expenses, and in the second place, to provide for a legacy of $100 to the Secretary-treasurer of the Flower Fund of Saint Luke's Church in the City of Saint John to be used for the purchase of flowers from time to time for use in the Church. He then directed his executors:

I To sell and convert into money all of the assets of my estate, and to pay the net proceeds from the sale of my automobile, furniture and real estate situate at No. 180 Adelaide Street in the said City of Saint John.

to the appellant upon certain trusts, the detail of which is not relevant.

After providing for other legacies and for the division of the residue of his estate between the respondents Ada A. Fitzgerald and Bessie Carloss, the testator further directed:

II Should the net proceeds of my estate at the time of my death after the payment of my said debts, funeral and testamentary expenses, be insufficient to pay the aforesaid legacies in full, then I direct that they should be paid *pro rata* but that the gift for the Flower Fund, and the gift of the net proceeds of the sale of my automobile, furniture and real estate shall be paid in full.

The appellant contends that the learned judge of first instance was in error in his conclusion that by reason of the realization of the property described in the paragraph I have numbered *I*, in the lifetime of the testator and the deposit of the proceeds to the testator's account in the bank and the subsequent dealings with that account, brought about an ademption of the gift.

In my opinion, it is not arguable but that the gift of the "net proceeds of the sale" in the above paragraph means exactly what it says and does not constitute merely a gift of the enumerated items of property as such. In *Hicks* v. *McClure* (1), a testator directed his executors to sell his farm and to divide the "proceeds" in a certain way. The testator had himself sold the farm and taken a mortgage for part of the purchase price and this mortgage formed part of his estate at his death. It was held that the trust declared by the will with respect to the proceeds of the sale of the farm applied to the mortgage. Sir Lyman Duff thus laid down the principle applicable at p. 364:

Has the testator manifested his intention that his gift is not of the particular property only but of the proceeds of the property so long as the proceeds retain a form by which they can be identified as such?

(1) (1922) 64 Can. S.C.R. 361.

Anglin J., as he then was, with whom Davies, C.J.C., agreed, in holding that there was enough in the language of the will to indicate an intention that "the funds representing the property dealt with should go to the beneficiary *in whatever form they might be found at the testator's death*", said at p. 364:

> *Morgan* v. *Thomas* (1), shews that in a case such as this a broad and even a lax construction of the terms of the will should prevail if thereby effect will more probably be given to the testator's intention.

Were there nothing else in the will it would be necessary to consider whether or not the proceeds of the assets here in question were still identifiable as such at the date of the death of the testator. In view of the later paragraph, which I have numbered *II* above, however, I do not find it necessary to embark on that inquiry.

If the gift in paragraph *I* is to be regarded for all purposes as purely a specific legacy and was so regarded by the testator, there would have been no need whatever for paragraph *II*. If at the date of his death there were no identifiable "proceeds" of the enumerated items, the gift would simply fail. If there were proceeds, there was equally no reason for paragraph *II*, as a specific legacy does not abate with general legacies for the purpose of rateable payment.

Paragraph *II* is not to be regarded as meaningless if a rational meaning can be given to it. In my opinion, the testator has indicated by this paragraph that in his mind the gift of proceeds was not specific in a technical sense but that he was giving a pecuniary legacy equal in amount to that which should be realized from the sale of the itemized property. Paragraph *II* is perfectly clear. It provides that in the event that "*the net proceeds of my estate at the time of my death*" are insufficient for the payment of debts, funeral and testamentary expenses and "the aforesaid legacies in full", the legacies other than the two mentioned are to abate rateably. Those two are to be *paid in full*. In my view, this is the clearest indication that the testator intended his net estate, whatever it might be at the date of his death, to be employed in payment of all his legacies, priority being given to the two mentioned.

I would accordingly allow the appeal. All parties should have their costs out of the estate, those of the executors as

(1) 6 Ch.D. 176.

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between solicitor and client. In the payment of costs regard shall be had to the priority given by the will to the gifts for the benefit of the appellant, and in the event of a resulting abatement of the other legacies, any costs to which the respondent Ada A. Fitzgerald would otherwise be entitled shall be reduced by such sum as her legacy of $5,000 would have abated had it not been paid to her in the lifetime of the testator and the assets of the testator at his death included such amount.

CARTWRIGHT J. (dissenting): This is an appeal, brought *per saltum* by leave of the Supreme Court of New Brunswick, Appeal Division, from a judgment of Harrison J. determining certain questions as to the interpretation of the will of the late George Miles Hughson, hereinafter referred to as the testator.

Several questions were raised before Harrison J. but this appeal relates to only one of these which is as follows:—

Whether the legacy and benefits given to The Diocesan Synod of Fredericton by and under Paragraph 3 of the said Will are adeemed by reason of the sale by the Testator George Miles Hughson in his lifetime of his automobile, furniture and real estate at No. 180 Adelaide Street, Saint John, New Brunswick, and the depositing of the proceeds from such sale in Savings Account No. 1843 in The Bank of Nova Scotia, Main Street, Saint John, New Brunswick, which account contains other deposits and withdrawals which are without relation to the subject matter of such bequest.

The relevant facts are undisputed. The testator died on May 20, 1952, leaving a will dated September 25, 1950 of which probate has been granted. The relevant provisions of the will are as follows:—

I, GEORGE MILES HUGHSON, of the City of Saint John in the County of the City and County of Saint John and Province of New Brunswick, retired Canadian National Railway employee, do hereby make, publish and declare this to be my Last Will and Testament.

I nominate, constitute and appoint C. WALLACE PERRETT of the said City of Saint John, Electrician and NELLIE PERRETT his wife, or the survivor, Executors of this my Last Will.

I give, devise and bequeath all my property both real and personal to my said Executors or to the survivor for the following purposes:—

1. To pay all my just debts, funeral and testamentary expenses.
2. To pay the sum of One Hundred Dollars ($100) to the Secretary-treasurer of the Flower Fund of Saint Luke's Church in the said City of Saint John to be used for the purchase of flowers from time to time for use in the said Church.
3. To sell and convert into money all of the assets of my estate, and to pay the net proceeds from the sale of my automobile, furniture and real estate situate at Number 180 Adelaide Street

in the said City of Saint John to the Diocesan Synod of Fredericton, to be invested in a Memorial Fund in my name, and with the income therefrom to be used and applied by the Bishop of Fredericton in such terms and conditions as he and his successor in office shall from time to time determine towards grants to a student or students selected by the Bishop for the purpose of assisting such student or students who undertake a course in Divinity Studies; preference at all times being given by the Bishop to students whose homes are in the area served by St. Luke's Church in the said City of Saint John, and if there be no such students in any given year, the Bishop shall be entitled to apply such income to the Divinity Scholarship Account of the Diocese of Fredericton.

4. To pay the sum of Five Thousand Dollars ($5,000) to the new Brunswick Protestant Orphans' Home.
5. To pay $5,000 to the Maritime Trust Company (on trusts for a Protestant Home for aged persons, the terms of which are not material).
6. To pay the sum of Five Thousand Dollars ($5,000) to Ada A. Fitzgerald, wife of Eaven Fitzgerald at present of 22 Kennedy Street, Saint John, New Brunswick, said sum to be inclusive of any amount to which she may be entitled for care, services and expenses which she has or may hereafter incur for me or on my behalf.
7. To pay the sum of Three Thousand Dollars ($3,000) to Bessie Carloss at present of 378 Haymarket Square in the said City of Saint John.

All the rest, residue and remainder of my estate I give and bequeath to the said Ada A. Fitzgerald and the said Bessie Carloss, share and share alike, or to the survivor, should either predecease me.

Should the net proceeds of my estate at the time of my death after the payment of my said debts, funeral and testamentary expenses, be insufficient to pay the aforesaid legacies in full, then I direct that they should be paid *pro rata* but that the gift for the Flower Fund, and the gift of the net proceeds of the sale of my automobile, furniture and real estate shall be paid in full.

IN WITNESS WHEREOF, I the said George Miles Hughson have hereunto set my hand and seal this 25th day of September, A.D. 1950.

At the date of this will the testator was living at 180 Adelaide Street. He owned this property and the furniture in it and an automobile. Nothing turns on the fact that two of these items of property are personalty and one realty and, as a matter of convenience, I will hereinafter refer to the three items collectively as "the Adelaide Street property". Late in the year 1951 the testator left 180 Adelaide Street and went to live in the home of the respondent Ada A. Fitzgerald. In February 1952 the testator sold 180 Adelaide Street together with the furniture and his automobile, and conveyed the same to the purchasers by deed and bill of sale dated February 9, 1952.

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The purchasers paid for the said real and personal property the sum of $10,000. This $10,000 was deposited to the credit of the testator in the Bank of Nova Scotia, Main Street, Saint John, N.B., on February 9, 1952. Only two withdrawals from this bank account were made after the deposit of the $10,000. These totalled $1,656.96, and the amount on deposit in this account at the date of the death of the testator was $16,811.76. The remainder of the estate consisted of a Dominion of Canada Bond $100, and two deposits in other banks totalling $3,230.82. The total value of the Estate according to the inventory amounted to $20,142.58.

The learned judge was of opinion that the legacy to the appellant was a specific legacy not of the Adelaide Street property but of the proceeds arising from the sale thereof, that the proceeds of the sale had lost their identity prior to the death of the testator and that, consequently, the legacy was adeemed.

For the appellant it is first argued that the legacy is not specific but is a general legacy of a sum of money equal in amount to the net proceeds of the sale of the three items of property. In support of this it is pointed out that there is no gift of the Adelaide Street property by designation and no specific direction to sell it by designation and that the testator deals with his assets, both in the gift to the executors and in the direction to convert, as a totality. It is argued that the words of the will shew the intention of the testator to be that his whole estate should be converted into one mass of money which he then proceeds to distribute among his beneficiaries.

I am unable to agree with this submission. The words of paragraph 3 of the will appear to me to indicate that the testator contemplated that among his other assets the Adelaide Street property would come into the hands of his executors, that they were to sell and convert such property and (having done so) to pay the net proceeds of the sale thereof to the appellant. The word "and" and the word "my" in the phrase "*and* to pay the net proceeds from the sale of *my* automobile, furniture and real estate situate at Number 180 Adelaide" are significant. Pausing here, I would have thought that there was a great deal to be said for the view that as at the date of his death the testator had

parted with the Adelaide Street property the legacy to the appellant was adeemed and further inquiry was unnecessary, but I agree with the learned judge of first instance that the case of *Hicks* v. *McClure* (1) is indistinguishable from the case at bar and requires us to construe the words of clause 3 as a gift not of the Adelaide Street property but of the proceeds of the sale thereof so long as those proceeds retain a form by which they can be identified as such.

Turning then to the question whether the proceeds of the sale of the Adelaide Street property were identifiable at the time of the testator's death, for the reasons given by the learned judge of first instance I agree with his conclusion that they were not. I do not find it necessary to review the numerous authorities dealing with the effect of the proceeds of the sale of a specific item of property being commingled with other moneys in the bank account of the vendor. A number of them are discussed in the judgments of the Supreme Court of Nova Scotia on appeal in *re Stevens* (2), which, in my opinion, was rightly decided. I would like to adopt the following statement from the judgment of Doull J. (at page 335) as correctly stating the law and as applicable to the facts of the case at bar:—

> The law seems to be that if at a testator's death, the thing answering the description is not in existence, there must be something else which can be identified as taking its place or there is ademption. In this case the something is "the proceeds" of the sale of the property, and the weight of authority is that the failure to keep such fund separate from other funds works such a change in the thing bequeathed that there is no longer anything upon which the gift can act. In the present case, a sum of money greater than "the proceeds" is in existence but its amount and form and substance have changed, and in my opinion there has been an ademption.

I have not overlooked the argument based on the direction in the concluding paragraph of the will that "the gift of the net proceeds of the sale of my automobile, furniture and real estate shall be paid in full". This paragraph does not appear to me to be of assistance in determining whether or not ademption has taken place. The testator is assuming that there will have been no ademption, and providing, *ex abundanti cautela,* that this legacy should not abate.

(2) [1946] 4 D.L.R. 322. (1) 64 Can. S.C.R. 361.

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For these reasons I would dismiss the appeal. As the majority of the Court are of the opinion that the appeal succeeds, nothing would be gained by my expressing my view as to the order which should have been made as to costs had the appeal failed.

Appeal allowed with costs.

Solicitors for the appellant: *Teed & Teed.*

Solicitor for the Executors: *H. O. McLellan.*

Solicitors for New Brunswick Protestant Orphans Home, respondent: *Inches & Hazen.*

Solicitor for Bessie Carloss, respondent: *R. G. Fairweather.*

Solicitors for The Maritime Trust Co., respondent: *Norwood Carter.*

Solicitor for Ada A. FitzGerald, respondent: *G. T. Clark.*

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*Apr. 5
*May 24

IN THE MATTER OF the Estate of BENJAMIN REACH HOOPER, deceased;

ISABEL J. COLES .....APPELLANT;

AND

SYLVIA GREENSHIELDS BLAKELY AND ROBERT GREENSHIELDS BLAKELY ..... } RESPONDENTS;

AND

THE ROYAL TRUST COMPANY, Administrator with Will annexed.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Will—Construction—Vesting—Gift to a class—Ascertainment thereof.

A testator left the residue of his estate to his widow for life, with a discretionary power of appointment both of income and corpus in his personal representative for the maintenance of his wife and his son, the corpus to vest in the son upon his surviving the testator's wife

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

and attaining the age of thirty years. The son died in the testator's lifetime, intestate and unmarried. The will provided that in such event the corpus be divided among the heirs-at-law as though the corpus were part of the son's estate.

Held (Rand and Kellock JJ. dissenting): That there was no intestacy as to the corpus as the testator had specifically dealt with the contingency that had arisen. The general rule as to vesting is that where there is a direction to pay the income of a fund to one person during his lifetime and to divide the capital among certain other named and ascertained persons on his death, even although there are no direct words of gift either of the life interest or the capital, vesting of the capital takes place a *morte testatoris* in the remaindermen. *Brown* v. *Moody* [1936] A.C. 635 at 645. The rule also applies where the remaindermen are referred to as a class rather than named specifically. *Ross* v. *National Trust Co.* [1939] S.C.R. 276. The general rule as to vesting will be displaced only if the will contains a clear indication of a contrary intention. There was no evidence of such intention here.

APPEAL from a judgment of the Court of Appeal for Ontario (1) reversing a judgment of McRuer C.J.H.C. (2).

W. E. Spencer, Q.C. for the appellant.

T. Sheard, Q.C. and *S. Heighington* for the respondents.

E. S. Livermore, Q.C. for the Administrator.

THE CHIEF JUSTICE:—I agree with the reasons of Mr. Justice Cartwright and of Mr. Justice Abbott.

The judgment of Mr. Justice Rand and of Mr. Justice Kellock (dissenting) was delivered by:—

KELLOCK J.:—This is an appeal from a judgment of the Court of Appeal for Ontario reversing the judgment of the Chief Justice of the High Court. The learned Chief Justice, in answer to certain questions propounded by the respondent, the administrator with the will annexed, held that the persons entitled to the residue of the estate of the testator, were the heirs-at-law of the testator's son living at the death of the testator's widow. The Court of Appeal, however, directed that the residue was to be dealt with as part of the widow's estate on the theory that the class entitled was determinable at the date of the death of the testator. The court did not give any written reasons.

After certain bequests of personal property, the testator gave, devised and bequeathed his residue on certain trusts. The widow was, in the first place, given the income for life

(1) [1954] O.W.N. 488. (2) [1954] O.W.N. 306.

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but the testator by a subsequent provision gave to his personal representative a discretionary power of appointment both of income and corpus for the maintenance of his wife and the maintenance and education of his son. Ultimate vesting of the corpus in the son was made dependent upon his surviving the widow of the testator and also upon his attaining the age of thirty years. In fact, although the widow survived the testator, the son died in the lifetime of his father, intestate and unmarried. In these circumstances, the relevant provisions of the will are contained in paragraph (*e*) as follows:

> (*e*) If my said son should die before reaching the age of thirty years or should predecease my wife leaving any issue him surviving, subject to the life estate of my wife, and subject to the powers of my executrix or executor and/or trustee to appoint the corpus of my estate from time to time as heretofore set out, I direct my executors or trustee to pay the income from my said estate for a period of twenty years after the death of the survivor of my said wife and son, with like powers as heretofore to appoint such part of the corpus of my estate as my executor and/or trustee, in his sole discretion, may deem necessary for the maintenance and education of such of my son's wife and/or children as shall survive my said wife and son, unto such of my son's wife and/or children as shall survive my said wife and son, but should my son predecease my said wife or die before reaching thirty years of age leaving no issue him surviving, I direct my executor and/or trustee to divide the corpus of my estate subject to the powers of my executors to appoint to my wife, and subject to the life estate of my wife, amongst the beneficiaries of my son's will, as my son in his will may appoint and in default of appointment or if my son should die intestate, amongst the heirs-at-law in the same proportions as though the corpus of my estate were part of my son's estate and I hereby give my said executor and/or trustee the power to so appoint my said estate.

It is the second branch of this paragraph which has to be considered in the event which happened, namely, the death of the son intestate and without issue.

It has been held that the fact that the donee of the power of appointment predeceases the testator does not affect the interest of those directed to take in default of appointment; *Edwards* v. *Saloway* (1); *Nichols* v. *Haviland* (2); *Jones* v. *Southall* (3); *Farwell*, 3rd Ed., 267.

In *Edwards* v. *Saloway*, a testator gave the residue of his real and personal estate to trustees in trust to pay the income to his wife for life and from and after her death, then as to one moiety upon trust for such person or persons and in such manner and form as his said wife should by

(1) (1848) 2 Ph. 624. (2) (1855) 1 K. & J. 504.
(3) (1862) 32 Beav. 31 at 39, 40.

deed or will appoint, and in default of appointment, he directed that the same should go to her next of kin. The testator's wife died in 1839, the death of the testator not taking place until seven years later. In overruling earlier authority to the contrary and upholding the validity of the gift over in default of appointment, the Lord Chancellor, Lord Cottenham, said at p. 627:

> It is in vain to speculate on what a testator might or might not have done or intended in a different state of circumstances, from that which he in fact contemplated. That would be quite arbitrary and full of danger. The only safe way of determining what a testator intended, is to look at what he has said. It may be that in the present case the disposition in favor of the next of kin of the wife, was introduced only for the purpose which has been suggested, and that the testator would not have thought fit to provide for those individuals if he had foreseen that his wife would not live to take the benefit of his bequest to herself; but whatever may have been the motive for the gift, the gift and the motives for the gift are different things, and the gift itself is there.

It is not necessary in the present case to depend upon the rule thus enunciated as the testator has, in the will here in question, manifested his intention that the gift in default of appointment is to be operative notwithstanding the decease of his son in his lifetime.

In paragraphs of the will immediately following paragraph (*e*), the testator deals with moneys payable under certain policies of insurance upon his life. These provisions are predicated upon his wife predeceasing him for the reason that, presumably, she was otherwise the beneficiary under these policies. In these provisions the testator goes on to provide for the disposition of the insurance moneys should not only his wife but his son predecease him. It is sufficient to quote one of these paragraphs as follows:

> (3) If both my said wife and my said son shall predecease me, any moneys becoming payable under the said Policy Number 201375 may be commuted on the basis of an interest rate of three and one-half per cent per annum, compounded annually, and be made payable and included with the residue of my estate.

It therefore appears that the testator contemplated the death of his son in his lifetime, and further, in directing in that event payment of the insurance moneys as part of the residue, that he intended the gift contained in the latter part of paragraph (*e*) to be operative notwithstanding that the son might predecease him.

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The question remains as to the date at which the class is to be ascertained. For the respondent, it is contended that the rule applied in *Browne* v. *Moody* (1), governs and that the relevant date is the death of the testator, at which date the gift became vested. This was the view of the Court of Appeal. On the other hand, it is contended that, as the learned Chief Justice considered, there is in the will sufficient indication that the class intended by the testator were those living at the death of the widow.

The principle of the decision in *Browne* v. *Moody* does not apply when, to employ the language of Lord Macmillan at p. 1699, the object of the postponement of the division is not "obviously" in order only that the tenant for life may, during his lifetime, enjoy the income, or where the direction to divide the capital is accompanied by a condition personal to the beneficiaries.

In the case at bar, it is to be observed that not only is the division to be carried out by the executor and/or trustee of the testator (a phrase clearly applicable only to the executor in office after the death of the widow) but the testator gives to that executor "the power to so appoint my estate". This language must be given a meaning.

Apart from the language quoted, the division would clearly be among the class living at the death of the testator and would include the widow. But in my opinion, the additional words indicate that the appointment by his executor, which can take place only after the life estate and the power to encroach on corpus on the part of the wife have been terminated by her death, is a prerequisite to the vesting of the gift in remainder, although undoubtedly, the employment of the language "amongst the heirs-at-law in the same proportions as though the corpus of my estate were part of my son's estate" leaves no room for any discretion on the part of the executor in the making of the distribution amongst the class. In other words, in my view, the testator in the use of the words "I hereby give my said executor and/or trustee the power to so appoint my said estate" indicates that the class entitled is to be ascertained at the time when his executor will be in a position to make actual distribution by reason of the prior interests of the widow having terminated by her death.

(1) [1936] 2 All. E.R. 1695.

I would allow the appeal accordingly and restore the judgment of the learned Chief Justice. The costs of all parties in this court and in the court below should be taxed and paid out of the estate, those of the Administrator with the will annexed on a solicitor and client basis.

CARTWRIGHT J.:—The facts and the relevant portions of the testator's will are set out in the reasons of my brothers Kellock and Abbott.

It will be observed that the scheme of the provisions of the will which are applicable in the events that have happened is as follows. A life estate is given to the widow with a discretionary power to appoint parts of the corpus for her own benefit and on her death the corpus remaining is to be divided amongst the son's heirs-at-law.

The general rule, in such a case, as to when the class of those entitled to take as next-of-kin of the son, is well settled. It is stated as follows in Halsbury 2nd Edition Vol. 34, page 319:—

> Whatever may be the time of distribution, where there is a gift to a testator's next-of-kin, without more, the class prima facie has to be ascertained as at the testator's death, and where there is a gift to the next-of-kin of any other person, the class prima facie has to be ascertained at that person's death if he survived the testator, and if not, at the testator's death.

and in Hawkins on Wills 3rd Edition, page 134 as follows:—

> The rule in *Gundry* v. *Pinniger* (1) must be stated with a qualification, namely, where the gift is to the "next-of-kin", next-of-kin "according to the Statute" et cetera, of a person who dies in the testator's lifetime, or who is dead at the date of the Will:—in this case the objects to take are to be ascertained at the death of the testator, as if the person whose next-of-kin are spoken of had died at that time.

No doubt this general rule would yield to any clear indication in the language of the will of an intention that the class was to be ascertained at some time other than the date of the death of the testator, but I agree with my brother Abbott that no such indication is to be found in the will before us.

It is suggested that such an indication is to be found in the use by the testator at the end of clause (*e*) of the words "and I hereby give my said executor and/or trustee the power to so appoint my estate"; but the words quoted do not appear to me to modify in any way the duty of the

(1) (1852) 14 Beav. 91.

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executor or to enlarge the powers given to him under the preceding words of the clause. On the death of the testator's widow the executor is required "to divide the corpus . . . amongst the heirs-at-law in the same proportions as though the corpus of my estate were part of my son's estate." The persons (or person) who are to take and the proportions in which they are to take are fixed by the law as to the distribution of the estate of an intestate. The executor has no power to appoint otherwise and no discretion to exercise.

For the reasons given by my brother Abbott and those set out above I would dispose of the appeal as proposed by my brother Abbott.

ABBOTT J.:—This is an appeal from an Order of the Court of Appeal for Ontario varying an Order of the Honourable the Chief Justice of the High Court, made on an application for the construction of the will of the late Benjamin Reagh Hooper.

The testator died on March 20, 1953, leaving him surviving his wife, Isabel Helen Jane Greenshields Hooper, who died on May 8, 1953, having first published her last will and testament, letters probate of which were granted to the Royal Trust Company on July 29, 1953. Benjamin Reagh Hooper and his wife had one child only, David Benjamin Stewart Hooper, who predeceased his father on July 18, 1944, at the age of seventeen years, intestate and unmarried.

By his will dated January 30, 1942, Benjamin Reagh Hooper appointed his wife executrix and trustee of his will during her lifetime, and after her death appointed one Howard Riddle to be executor and trustee. The said Howard Riddle renounced his position as executor and trustee and on July 15, 1953, Letters of Administration with the Will Annexed were granted to The Royal Trust Company.

The testator, by his will, left to his wife his household furniture and personal effects outright, and a life interest in the residue of his estate with the following provision:—

> I give my executrix or executor or trustee a discretionary power to appoint such parts of my estate, whether real or personal, whether interest or corpus, that she or he shall, in their sole discretion, deem necessary for the proper maintenance, well being and comfort of my said wife and/or the comfort, education and maintenance of my son, David Benjamin Stewart Hooper.

On the death of the testator's wife the estate was to go to his only son on his attaining the age of thirty years with a gift over to the son's children in the event of his dying before attaining that age. The will then went on to provide in paragraph (*e*) as follows:—

> . . . but should my son predecease my said wife or die before reaching 30 years of age leaving no issue him surviving, I direct my executor and/or trustee to divide the corpus of my estate subject to the powers of my executors to appoint to my wife, and subject to the life estate of my wife, amongst the beneficiaries of my son's Will, as my son in his Will may appoint, and in default of appointment or if my son should die intestate, amongst the heirs-at-law in the same proportions as though the corpus of my estate were part of my son's estate and I hereby give my said executor and/or trustee the power to so appoint my said estate.

The will also provided for the disposition of the proceeds of certain life insurance policies on the testator's life, but these provisions do not appear to be particularly relevant to this appeal except that they do indicate that the testator clearly contemplated the contingency of his son predeceasing him.

The advice and direction of the Court was sought with respect to the following questions:—

1. Is there an intestacy as to the residue of the testator's estate?
2. If there is no intestacy as to the residue of the testator's estate, who are the persons entitled to receive the residue of the testator's estate under the words "amongst the heirs-at-law in the same proportions as though the corpus of my estate were part of my son's estate and I hereby give my said executor and/or trustee the power to so appoint my said estate" as contained in paragraph (*e*)?
3. In what proportions is the residue to be divided among the persons referred to in question (2)?

In his reasons the learned Chief Justice of the High Court set out the four contentions put forward namely:—

(*a*) The will does not deal with the contingency that the son might die before the testator and there is therefore an intestacy.

(*b*) The class of the heirs-at-law of the son is ascertained as of the date of the son's death.

(*c*) The class of the heirs-at-law of the son is ascertained as of the date of the testator's death.

(*d*) The class of the heirs-at-law of the son is ascertained as of the date of death of the life tenant.

As to the first of these contentions, the learned Chief Justice held that there was no intestacy as the testator had specifically dealt with the contingency that had arisen. With this view I am in complete agreement.

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As to the second contention, he held that the testator did not intend by his will to put himself or his estate in the position that he would be one of the heirs-at-law contemplated by the will in whose favour the trustee was to exercise the power of appointment after his death, and that in consequence the class of heirs-at-law is to be ascertained either at the death of the testator or at the death of the life tenant. With this view I am also in agreement.

By Order of the Court of Appeal for Ontario, dated May 3, 1954, the order of the Chief Justice of the High Court was varied and the Court of Appeal determined that the residue of the estate of Benjamin Reagh Hooper should be paid to the executors of the estate of Isabel Helen Jane Greenshields Hooper to be dealt with as part of her estate. No written reasons were given by the Court of Appeal for its decision that the heirs-at-law of the son should be ascertained as at the death of the testator.

The question at issue in this appeal is whether the class of the heirs-at-law of the son David Benjamin Stewart Hooper is to be ascertained as of the date of the testator's death or whether it is to be ascertained as of the date of the life tenant, the mother. In other words, whether the remainder interest of the son's heirs-at-law vested at the date of the testator's death or whether they had a contingent interest only, the class being ascertainable at the death of the life tenant, the testator's wife.

The determination of this question depends primarily upon the interpretation to be given to paragraph (*e*) which I have quoted.

The son having predeceased his mother it is clear that distribution of the residue of the estate is to take place on the death of the widow. The direction to make such distribution at that time is not accompanied by any condition personal to the beneficiaries, and the object of the postponement is clearly therefore for the sole purpose of protecting the life tenancy of the widow.

As Lord Macmillan said in *Browne* v. *Moody* (1) at p. 645:—

> The mere postponement of distribution to enable an interposed life-rent to be enjoyed has never by itself been held to exclude vesting of the capital.

He then went on to state the general rule as to vesting in these terms:—

> But where there is a direction to pay the income of a fund to one person during his lifetime and to divide the capital among certain other named and ascertained persons on his death, even although there are no direct words of gift either of the life interest or of the capital, the rule is that vesting of the capital takes place a morte testatoris in the remaindermen.

Although the rule as just stated refers to "named and ascertained persons", it has been held to apply where the remaindermen are referred to as a class rather than named specifically: *Ross* v. *National Trust Company Ltd.* (2), which was followed in *re Simpson* (3).

This general rule as to the time of vesting will be displaced only if the will contains a clear indication of a contrary intention on the part of the testator. Reading paragraph (*e*) together with the will as a whole, and applying to the words used the primary rule of construction, namely, that they are to be given the natural ordinary meaning which they bear in relation to the context in which they stand, I can find no evidence of such intention.

The appeal should be dismissed but the costs of all parties should be paid out of the estate, those of the Administrator with the Will Annexed on a solicitor and client basis.

Appeal dismissed with costs.

Solicitors for the appellant: *Spencer & Braund.*

Solicitor for the respondents: *Jacob Markus.*

Solicitors for the Administrator: *Ivey, Livermore & Dowler.*

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(1) [1936] A.C. 635.

(2) [1939] S.C.R. 276; 4 D.L.R. 653.

(3) [1945] O.R. 169.

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*Mar. 29, 30
*May 24

SCULLY SIGNAL COMPANY .....APPELLANT;

AND

YORK MACHINE COMPANY LIMITED .RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Infringement—Claims—Language of claims differing from that of specification—Applicability of doctrine of mechanical equivalents.

*PRESENT: Kerwin C.J. and Rand, Estey, Cartwright and Abbott JJ.

The appellant, owner of the Canadian patent to a signal device known as a liquid level indicator, designed for indicating the liquid level in fuel tanks, claimed the purpose of its invention was to provide a continuous audible signal until the liquid introduced into a tank reached a predetermined level, and that it accomplished this by a whistle which commenced to operate as soon as the liquid was introduced and continued until the latter reached a point predetermined by the extension of a tube into the tank. The whistle was stopped by the trapping of the lower end of the tube by the rising liquid. The respondent's device was designed for the same purpose and the audible device was also provided by means of a whistle but the vented gas went from the tank directly to the opening in the whistle. No dependent tube was used and the whistle was stopped by means of a cork suspended below the level of a casing by a rod. The rising liquid caused the cork and the rod to float upward until it covered the lower opening in the whistle and thus shut off the sound. In the Exchequer Court, Cameron J. held that the dependent tube constituted an integral and essential part of the appellant's invention; that the doctrine of mechanical equivalents did not apply and that the appellant had failed to establish an infringement.

Held: (Rand J. dissenting) that for the reasons given by the trial judge, the appeal should be dismissed.

Per Estey J. Throughout the appellant contended that a dependent tube projecting into the fuel tank was not an essential part of its invention and that, as in all other essentials the respective inventions were identical, an infringement had been effected. Upon the evidence it would seem that in any practical sense the dependent tube was essential to the efficient operation of the invention. A reading of the specification as a whole not only did not suggest any alternative meaning but in fact, supported the finding of the trial judge that "a second vent passage of smaller capacity" in claim 9 meant the dependent tube.

Per Rand J. (dissenting)—Although only the tube that extended into the tank was described as the means of signalling the required level, that circumstance could not be taken as intending to embody the tube as the essential means of the device for that purpose. The tube or the float being obviously means of completing the purpose of the invention, the latter as defined in claim 9 was infringed. The tube not being an essential element in the combination, the use of the float was that of a mechanical equivalent.

APPEAL from a judgment of the Exchequer Court of Canada, Cameron J. (1) dismissing the appellant's action for infringement of a patent. Affirmed.

Christopher Robinson, Q.C. for the appellant.

G. F. Henderson, Q.C. for the respondent.

The judgment of Kerwin C.J. and of Abbott J. was delivered by:—

THE CHIEF JUSTICE:—For the reasons given by the trial judge this appeal should be dismissed with costs.

RAND J. (dissenting):—The patent in this appeal is an uncomplicated device for signalling the desired level of liquids in the course of filling closed receptacles. It has its most prominent use today in delivering fuel oil from trucks to tanks set up inside homes or other premises.

The device consists of an open casing of ample diameter for venting purposes, threaded into the tank. It is shaped at the bottom to provide a seat ordinarily engaged by a hollow hemispherical valve which, by being lifted, vents abnormal air pressure within the tank. In what the inventor considered its most effective form, through a small passage at the base of the valve a tube is introduced projecting downward into the tank, the upper end attaching to a whistling contrivance within the valve. The tube is of sufficient size to allow the escape of air under normal pressure while the tank is being filled. This escape causes the whistle to sound and it continues until the flow of air through the tube is cut off. This takes place when the rising oil traps the lower end of the tube at the predetermined level fixed by the depth of the tube in the tank. The smaller air passage is, until so trapped, at all times open to the air.

It would at once be appreciated by a person competent to deal with the contrivance that the essence of what the inventor has given to the public is the combination of the two means of venting the air under different pressures coupled with the signal automatically given when the determined level is reached by closing the smaller vent through action exerted by the rising oil itself.

(1) (1954) 20 C.P.R. 27.

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The respondent is charged with infringing this mechanism by another which as to valve and whistle is indistinguishable but which, for the purpose of announcing the required liquid level, makes use of a float reaching to the aperture of the lower whistle plate by means of a rod with a small flat cap sufficient to close it and consequently to stop the whistle signal. It is the substitution of this float for the tube which the respondent relies on to justify his device.

In both cases the closure of the vent leading to the whistle is effected by the rising liquid: in one case directly by trapping the lower end of the tube; in the other by trapping what is in reality the upper end of the tube. It is obvious that the tube can be of any length to meet any liquid level from the base of the valve downwards, and what both the tube and the float accomplish is the closure of the whistle vent by the action of the liquid.

The specification gives what I take to be a full and clear statement of that invention and the manner in which it can be carried into use. Although only the tube extended into the tank is described as the means of signalling the required level, I cannot take that circumstance as intending to embody the tube as the essential means of the device for that purpose. As the inventor stated in his evidence the float was not only familiar and in fact, to one of the slightest mechanical knowledge, an obvious means for utilizing the liquid level, but it was tried out by him and rejected as inefficient. The tube represented what, in his opinion, was the best means; but it was a connecting link which could be furnished by another means once its function was appreciated.

The action is based on claim 9:—

> In combination with a closed tank for the reception of fluid, a supply conduit leading into the tank, and a combined signal and vent device comprising a casing fixed in an opening in the upper portion of the tank, said casing having therethrough a vent passage of large capacity open at one end into the interior of the tank and open at its other end externally of the tank, a valve normally closing said passage, said valve being constructed and arranged automatically to open and vent the tank in response to abnormal pressure within the tank, means providing a second vent passage of smaller capacity, and an audible signal arranged to be sounded by gaseous fluid escaping through said smaller vent passage, the smaller vent passage and whistle being of such capacity as to vent the tank under normal filling conditions without unduly increasing the pressure in the tank.

Mr. Henderson stresses the phrase "means providing a second vent passage of smaller capacity". Necessarily, he says, this "means" and "passage" must be taken to be the tube, and so Cameron J. has found. But the specific mention of the tube in the other claims and its omission here, as well as the substitution of the word "means", are a clear indication that the terms are not interchangeable. It was said that the word "means" was ambiguous as to the tube or float; but this confirms the limit of the inventive idea: there is no ambiguity as to anything essential.

What is the smaller "passage"? In the assembly given it is the exit for the normal escape of air which is to operate the whistle. It has no necessary length whatever. It must be an opening through the bottom of the valve, but it need be nothing more. As an orifice in the valve it might itself reach into the tank depending on the depth of the casing and the shape of the valve.

The device of the respondent shows a short length, say, 3/16", within the casing as a passage leading to the whistle frame; but the lower plate of the latter could have been the face of the casing and the exit and passage would have been present and equally effective. What is required is a vent through the valve leading the air through the opening of the whistle plate, and the latter would ordinarily determine its size. It is, therefore, of no importance that the rising air be funnelled into the whistle opening by any convergence or fashioning of the casing or by an added tube. Length is not significant: outlet is the necessity. This clearly appears from figure no. 2 on the drawing annexed to the specification.

With that as the pith of the new idea, it was apparent to ordinary observation that the connection between the predetermined liquid surface and the whistle aperture could be effected by a float as well as by a tube: the mouth of the tube was simply the extended orifice of the valve. There is nothing in either of these links inventive to the purpose in view and it is in that conception that claim 9 is framed. The tube or the float being obvious workable means of completing the purpose of the invention, the latter as defined in claim 9 has been infringed. To express it otherwise, the tube not being an essential element in the combination, the use of the float is that of a mechanical equivalent.

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It was urged that in this interpretation there is no utility where the valve orifice does not extend into the tank. That the closure of the small passage at the inside top of the tank would furnish a signal to a person filling the tank of more use than none at all is, on the evidence, uncontrovertible. But where the feature of the invented device has a continuous range of operative action patent to any one, the fact that the projection downward has a vanishing point is not material to the validity of the obviously more effective range.

It is finally argued that the device was anticipated and a number of specifications have been placed in evidence dating from 1867 to 1922. In none of them are the two essential features here, that is, the valve and the smaller vent through the whistle device, present. They do show the early familiarity with the idea of a whistle signal caused by escaping air before a rising liquid, and of the escape being cut off by the liquid itself as well as by means of a float. But they do not at all reach the requirements of the ground taken.

The combination is not otherwise challenged, and its efficiency has been demonstrated by the extensive market which has been opened to it. It met a widespread demand which, in a simple and ingenious manner, it supplied.

I would, therefore, allow the appeal and direct that the appropriate judgment be entered for the plaintiff in the court below.

ESTEY J.:—I agree with the reasons and conclusions of the learned trial judge and desire to add only a few words with respect to certain points raised at the hearing of this appeal.

Throughout, the appellant has contended that a dependent tube projecting into the fuel tank was not an essential part of its invention and that, as in all other essentials the respective inventions of the appellant and respondent were identical, an infringement had been effected by the respondent. In this appeal counsel particularly stressed that the learned trial judge was in error in not construing Claim 9 as applicable to the invention without the dependent tube. Claim 9 reads: (See p. . . ?)

The learned trial judge, in construing Claim 9, stated:

> Nor am I able to find that Claim 9, whether read by itself or with the disclosure, is a claim for the device without the dependent tube. I agree with the submission of counsel for the defendant that the phrases, 'means providing for a second vent passage of smaller capacity' and 'an audible signal arranged to be sounded by a gaseous fluid escaping through said smaller vent passage,' mean the dependent tube and not the openings in the whistle itself.

The fact is the phrase "dependent tube," though it appears in the disclosure, is not to be found in the Claims, where it is variously referred to as the "vent pipe," "vent tube" or "tube." Moreover, the word "means" appears in Claims 3 and 6, as well as 9. In fact, a reading of the specification discloses that the draftsman was not at pains to use words and phrases with the same meaning. In these circumstances it is not surprising that some difficulty is experienced in ascertaining the meaning of Claim 9. The language of Lord Justice Romer is appropriate:

> One may, and one ought to, refer to the body of the Specification for the purpose of ascertaining the meaning of words and phrases used in the Claims or for the purpose of resolving difficulties of construction occasioned by the Claims when read by themselves. *British Hartford-Fairmont Syndicate, Ld.* v. *Jackson Bros. (Knottingley) Ltd.*, (1).

See also *The P. & M. Company* v. *Canada Machinery Corp., Ltd.* (2); *Electrolier Manufacturing Co. Ltd.* v. *Dominion Manufacturers Ltd.* (3).

The purpose of the invention is to provide an audible signal which shall continuously operate until the liquid level has reached a predetermined point. Once that point is determined the dependent tube is projected into the tank to that point and as such it must be regarded as an essential part of the invention. It was suggested that the invention could be used without any dependent tube. That could only be in the special case where it was intended to fill the tank, in which event it was pointed out the sound of the whistle would diminish or taper off and thus indicate that filling of the tank should cease. Even in this limited application it would be more satisfactory to have some, though a short, dependent tube. Upon the evidence it would seem that in any practical sense the dependent tube is essential to the efficient operation of the invention.

(1) (1932) 49 R.P.C. 495 at 556. (2) [1926] S.C.R. 105 at 114.
(3) [1934] S.C.R. 436 at 440.

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A reading of the specification as a whole not only does not suggest any alternative meaning, but, in fact, supports the finding of the learned trial judge that "a second vent passage of smaller capacity" in Claim 9 means the dependent tube.

The appeal should be dismissed with costs.

CARTWRIGHT J.:—I agree that, for the reasons given by the learned trial judge, this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *R. H. Soffrey.*

Solicitor for the respondent: *Gowling, MacTavish, Osborne & Henderson.*

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*Mar. 1, 2
*May 24

BRUCE N. KENNEDY ..... APPELLANT

AND

WORKMEN'S COMPENSATION BOARD ..... } RESPONDENT

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

Labour—Workmen's compensation—Whether injuries arose out of employment—Workmen's Compensation Act, R.S.N.B. 1952, c.255, s.6.

The appellant together with his truck and tractor was engaged by his two sons at a fixed rate per day to truck supplies and do hauling at their lumber camp, they to supply the gas and oil. The tractor was to be kept at the site of the work. One of the sons while using the tractor damaged it and told the appellant to take it to a garage for repairs or buy a new one. The appellant took the tractor home on his truck and to a garage the next day. There he decided to buy a new one and had the tracks of the old one transferred to it. While trying it out he was injured.

Held: (Rand and Cartwright JJ. dissenting) that the appellant elected in his own interest to make the purchase and there was no basis upon which it could be said that the accident arose out of his "employment" within the meaning of s. 6 of the *Workmen's Compensation Act*, R.S.N.B. 1952, c. 255. *Reed* v. *Great Western Ry. Co.* [1909] A.C. 31, applied.

Per Rand and Cartwright JJ. (dissenting) The significant fact was that the sons were to pay for the use of the tractor throughout the operation. It was to remain on the work and the father was not exclusively to operate it. The damage was done by the employer and the instruction to have it repaired or to get a new one was of primary importance in interpreting what followed. In obtaining the repairs or their

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

substitute, a new tractor, the father was at some time acting within his employment. Treating his driving home and to the garage the next day as for his own purposes, when he reached the latter place, he had clearly re-entered upon what he was to do under instructions. In the broad perspective of the circumstances, the occurrence was caused by the work and in the course of it.

APPEAL from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), disallowing the appellant's claim for compensation.

N. Carter for the appellant.

D. M. Gillis and R. E. Logan for the respondent.

The judgment of Rand and Cartwright JJ. (dissenting) was delivered by:

RAND J.:—The controlling facts here are not in dispute. The sons of the appellant were carrying on logging operations and they engaged with him for his own services and the use of a truck and tractor for trucking and hauling purposes generally. The tractor was kept at the site of the work but the father would return home at night with his truck. The sons were to pay at the rate of $8 a day and supply oil and gas. Nothing seems to have been said regarding repairs, although the father stated the understanding to be that the equipment was to be returned to him when the work was finished in the same condition as when begun.

On an occasion when he was cruising with one of the brothers, the other, while driving the tractor, stripped a cog in the steering column. Unable to get repairs done locally, the son told his father to take the machine to Gagetown to be repaired or to buy a new one. The tractor accordingly was that night placed on the truck, taken to the father's home, and the next morning to Gagetown. For reasons which do not appear, it was there decided by the father to make an exchange. The old tracks were placed on the new machine which, in the course of being tried out, overturned, pinning the father underneath and causing him serious injury.

The ownership of both machines was admittedly in the father. It is on that circumstance and the inferences from it that the Workmen's Compensation Board and the Appeal

(1) [1954] 2 D.L.R. 426.

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Rand J.

Division have held the injury not to have arisen "out of and in the course of the employment". Their view was that it was the father's responsibility to furnish the tractor at the scene of operations, and until that was done it could not be said that he was at his work.

But, with the greatest respect, that seems to me to overlook significant facts. It was not merely that the sons were to pay for the use of the tractor; they had bargained for its use throughout the operation. It remained at the work and was there to be used as required. That the father was not, exclusively, to operate it, or that to drive it was not his only duty, is seen by what was taking place at the time of stripping the gear. The damage done was by the employer himself and the liability as between the sons and the father arising out of that is not to be decided here; but the instruction to have the machine repaired or get a new one is of primary importance in interpreting what followed.

I cannot think it controvertible that in obtaining the repairs or their substitute, a new tractor, the father was at some time and place acting within his employment. Treating his driving home and the next morning to Gagetown as for his own purposes, when he reached the latter place, he had clearly re-entered upon what he was to do under instructions; and if the repairs had been made, and the accident had taken place on the way back to the work, the case would be free from doubt.

The exchange effected only a substitution of machine, the use of which was engaged. The son could not "instruct the father" in the sense of compelling him to buy the new tractor; but it was sufficient to effect, as it was intended, a continuity of use and relation to the work; the new machine became identified with the old as to the employers and for its return to the operations.

In that situation, testing the old tracks on the new machine was an ordinary precaution taken in the interest of the employment; a similar trial of the repaired machine would not be questioned. The old tracks were part of the substitution and to try them out at a place where, if not working satisfactorily, they could be adjusted, was exercising good judgment.

In the broad perspective of the circumstances, the occurrence was caused by the work and in the course of it. The responsibility for the damage led to the necessity for the repair or substitution, and that what the father did was considered an ordinary incident of the employment is seen in the regular allowance of remuneration made for the day on which it took place. That to be engaged in restoring such breakages of the employer by a course of action directed by him, is outside the employment, although recognized by him as being within it, seems to me to be, in the circumstances, an untenable conclusion in law.

I would, therefore, allow the appeal with costs in both courts.

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

KELLOCK J.:—The question in this appeal is as to whether the accident causing the injury to the appellant was one "arising out of and in the course of his employment" within the meaning of s. 6(1) of the *Workmen's Compensation Act,* R.S.N.B. 1952, c. 255.

The appellant commenced work for his sons on November 14, 1951, which work consisted, at the relevant time, of "trucking supplies and hauling around the camp", with his own truck and tractor for which he was to be paid $8. per day, the sons, who were his employers, paying for gas and oil. In a statement made by one of the sons to an investigator of the respondent board, he said that "I imagine we will pay for the use of the tractor though no arrangement was made."

On the 4th of December, while one of the sons was driving the tractor, it was damaged and as it could not be repaired in the neighborhood, the appellant was instructed by the sons to take the tractor to a garage "and have it fixed or supply a new one".

The appellant was not living at the camp where the accident occurred but at his own home, to which he returned every night. He accordingly took the tractor home in his truck on the night of December 4th and the next day drove in to Gagetown to have it repaired. According to Ralph Kennedy, one of the employers, the appellant "while there decided to trade for a new one." This he did, the tracks from the old tractor being transferred to the new one,

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Kellock J.

whereupon the appellant proceeded to try out the new tractor. It was while demonstrating what these tracks would do that the tractor overturned, causing the injuries.

It is quite true that if the appellant wished to carry out his contract with his sons, he had to have a tractor, which could have been done either by the keeping of the old one in repair or by purchasing a new one. Had he chosen to have the old one repaired, it might have been that it could be said he was acting on behalf of the sons in so doing, although this could only follow, in my opinion, if it were part of the arrangement of hiring that the obligation to keep the tractor in repair lay upon the employers. In the circumstances, I agree with the statement of counsel for the appellant in his factum that this point is immaterial. The old tractor was not repaired. The appellant elected in his own interest to purchase a new machine, and I can see no basis upon which it can be said that in so doing he was acting in any sense in the course of his "employment" with the sons.

To say that the appellant was "instructed" to repair the old machine or to supply a new one means nothing more, in my view, than that it was immaterial to his employers which he did, but that if he were to maintain himself in a position to continue working for them, he would have to possess a tractor. The election to purchase a new machine was his own, and the purchase moneys were his own. He was in the course of performing no duty to his employers in purchasing the new one. I do not think it could be contended that, had the appellant sustained injury by reason of some defect in the premises of the vendors while he was engaged in making the purchase, such injury could have been said to have arisen in the course of his employment by his sons. The actual occurrence, in my opinion, cannot be put on any higher ground. In my opinion, the principle of the decision in *Reed* v. *Great Western Railway* (1), applies.

I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Inches* and *Hazen.*

Solicitors for the respondent: *Logan, Bell* and *Church.*

(1) [1939] A.C. 31.

IN THE MATTER OF A REFERENCE AS TO THE VALIDITY OF THE INDUSTRIAL RELATIONS AND DISPUTES INVESTIGATION ACT, R.S.C. 1952, C. 152, AND AS TO ITS APPLICABILITY IN RESPECT OF CERTAIN EMPLOYEES OF THE EASTERN CANADA STEVEDORING COMPANY LIMITED.

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*Jan. 25, 26, 27, 28
*Jun. 28

Constitutional law—Validity and applicability of the Industrial Relations and Disputes Investigation Act, R.S.C. 1952, c. 152, ss. 1 to 53 inclusive.

Part I of the *Industrial Relations and Disputes Investigation Act*, R.S.C. 1952, c. 152, deals with labour relations and provides for collective bargaining, certification and revocation thereof, unfair labour practices, strikes, lockouts and conciliation proceedings. Its application is restricted by s. 53 which states that Part I "applies in respect of employees who are employed upon or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada including but not so as to restrict the generality of the foregoing, (*a*) works, undertakings or businesses operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada". Other paragraphs specify other works, undertakings and businesses to which Part I applies.

Held (Per Kerwin C.J., Taschereau, Kellock, Estey, Cartwright, Fauteux and Abbott JJ.): Ss. 1 to 53 inclusive of the Act (on which alone argument was heard) are *intra vires* the Parliament of Canada, and their application will depend upon the circumstances of any particular case.

Per Rand J.: The Act is valid if applied to works and undertakings within ss. 91(29) and 92(10) of the *B.N.A. Act*. But crews of vessels engaged in strictly local undertakings or services and locally organised stevedores are outside the scope of the Act.

Per Locke J.: Sections 1 to 53 inclusive of the Act are *intra vires*, except as to employees engaged upon or in connection with the works, undertakings or businesses operated or carried on for or in connection with shipping, the activities of which are confined within the limits of a province, or upon works, undertakings or businesses of which the main or principal part is so confined.

The Eastern Canada Stevedoring Company Ltd., incorporated under the Companies Act of Canada, 1934, supplied stevedoring and terminal services in Toronto consisting exclusively "of services rendered in connection with the loading and unloading of ships, pursuant to contracts with seven shipping companies to handle all loading and unloading of their ships arriving and departing during the season." All these ships were operated on regular schedules between ports in Canada and ports outside of Canada.

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

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VALIDITY AND APPLICABILITY OF THE INDUSTRIAL RELATIONS AND DISPUTES INVESTIGATION ACT

Held (Rand J. dissenting and Locke J. dissenting in part): The Act applied in respect of employees in Toronto of the Company employed upon or in connection with the operation of the work, undertaking or business of the Company as described in the Order of Reference.

Per Rand J. (dissenting): On the evidence submitted, the Act did not apply to the employees of the Company.

Per Locke J. (dissenting in part): The Act applied to the stevedores, as defined in the Order of Reference, but not to the office staff of the Company.

REFERENCE by His Excellency the Governor General in Council (P.C. 1785, dated November 18, 1954) to the Supreme Court of Canada.

F. P. Varcoe, Q.C., D .W. Mundell, Q.C. and *R. W. McKimm* for the Attorney General of Canada.

C. R. Magone, Q.C. for the Attorney General of Ontario.

L. E. Beaulieu, Q.C. for the Attorney General of Quebec.

H. J. Wilson, Q.C. and *J. J. Frawley, Q.C.* for the Attorney General of Alberta.

A. W. Roebuck, Q.C. and *D. R. Walkinshaw, Q.C.* for the Brotherhood of Railway and Steamship Clerks.

F. A. Brewin, Q.C. for District 50, United Mine Workers of America.

N. L. Mathews, Q.C. and *Beatrice E. Mathews* for the Eastern Canada Stevedoring Co. Ltd.

THE CHIEF JUSTICE:—His Excellency the Governor General-in-Council has referred the following questions of law to this Court for hearing and consideration:—

(1) Does the Industrial Relations and Disputes Investigation Act, Revised Statutes of Canada, 1952, Chapter 152, apply in respect of the employees in Toronto of the Eastern Canada Stevedoring Co., Ltd., employed upon or in connection with the operation of the work, undertaking or business of the company as hereinbefore described?

(2) Is the Industrial Relations and Disputes Investigation Act, Revised Statutes of Canada, 1952, Chapter 152, *ultra vires* of the Parliament of Canada either in whole or in part and, if so, in what particular or particulars and to what extent?

Certain facts and circumstances are recited in the Order of Reference, the relevant ones being now set out.

The Eastern Canada Stevedoring Co. Ltd., which was incorporated under *The Companies Act of Canada, 1934,* c. 33, furnishes stevedoring and terminal services for certain

shipping companies in the ports of Halifax, St. John, Montreal, Mont Louis, Rimouski and Toronto. In Toronto it owns Shed Number 10 and leases Shed Number 4 and during the navigation season in 1954—approximately April to November—its operations consisted exclusively of services rendered in connection with the loading and unloading of ships, pursuant to contracts with seven shipping companies to handle all loading and unloading of their ships arriving and departing during that season. All these ships were operated on regular schedules between ports in Canada and ports outside of Canada.

The Company's business in Toronto consists in rendering the following services. The Company on notification of the pending arrival of ships makes such preparations as are necessary for unloading and loading such ships, including the taking on of necessary employees. It also receives delivery of cargo from the tailboards of trucks or from railway car doors and holds it in its sheds for loading. With respect to unloading, when the ship has arrived, and been secured by its crew alongside the Company's sheds, the Company opens the hatches (if this is not done by the crew) and removes the cargo from the hold to the dock and there delivers it to consignees at the tailboards of trucks or at railway car doors or places the cargo in the Company's sheds. The cargo placed in the sheds is immediately, or during the next few days, delivered by the Company as required to the tailboards of trucks or to railway car doors. In these operations the Company uses the ship's winches and booms for raising and lowering the slings; it furnishes pallets necessary for lifting and piling the cargo and machines for towing and lifting cargo on the dock and in the sheds; and in cases of cargo too heavy for the ship's winches and booms it uses land cranes obtained by it. With respect to loading, the operations are substantially similar except that they are reversed, the last act of loading being the securing of the hatch covers if this is not done by the crew of the ship. In unloading the Company checks the cargo against the ship's manifest as it is unloaded and for loading it checks the cargo as it is received to assist in preparation of the ship's manifest. Forms of contracts entered into by the Company in 1954, which are typical of all such contracts entered into by it for providing these services, are annexed to the Order-in-Council.

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VALIDITY AND APPLICABILITY OF THE INDUSTRIAL RELATIONS AND DISPUTES INVESTIGATION ACT

Kerwin C.J.

In Toronto the Company has the following employees: officers, office staff, superintendents, foremen, longshoremen, checkers and shedmen. The four last-mentioned groups are commonly referred to in the port of Toronto as "stevedores". During loading and unloading the Company has at the dock a management representative, superintendents and walking-bosses, and stevedores. The duties of these stevedores are as follows. The longshoremen work in gangs under the foremen. In unloading some remove hatch covers if necessary and work in the hold to place the cargo in slings; some are winch operators and signalmen operating the ship's hoists; and some work on the dock to sort and pile cargo in the sheds except where immediate delivery is taken by the consignee or carrier. In loading the operation is reversed, the cargo being taken from the sheds and stowed in the hold by longshoremen whose last act is, if necessary, to secure the hatch covers and winches and booms. The shedmen in general deliver cargo from the sheds to the tailboards of trucks or to railway car doors or receive cargo at those points and place it in the sheds and sometimes re-arrange the cargo in the sheds. The checkers check the incoming cargo against the ship's manifest and check outgoing cargo for preparation of the ship's manifest. The unloading and loading of a ship is performed under the direction and authority of the ship's officers. The orders of the ship's officers are given to the supervisory personnel of the Company who direct the work of the stevedores.

In 1953 the Brotherhood of Railway and Steamship Clerks, Freighthandlers, Express and Station Employees, as the bargaining agent for a bargaining unit, consisting of all employees of the Company in the port of Toronto, save and except non-working foremen, persons above the rank of foreman, office staff and security guards, was granted conciliation services by the Minister of Labour for Canada and subsequently entered into a collective agreement with the Company, pursuant to the Canadian Act. On June 17, 1954, a further collective agreement was entered into by the Company and the Brotherhood. On June 15, 1954, the United Mine Workers of America applied to the Ontario Labour Relations Board for certification as the bargaining agent of the same employees, and that Board decided it had

jurisdiction to hear the application for certification and to deal with it on its merits. The Brotherhood applied to the Supreme Court of Ontario for an order quashing that decision, or, in the alternative, for an order prohibiting the Board from taking proceedings with respect to the application. The Attorney General of Ontario intervened and notified the Attorney General for Canada that in those proceedings the constitutional validity of the Canadian Act, the long title of which is an Act to provide for the Investigation, Conciliation and Settlement of Industrial Disputes, would be brought in question. The order of reference was made in order to settle the dispute and obtain the opinion of this Court as to the jurisdiction of Parliament to enact the statute.

The Industrial Disputes Investigation Act of 1907 applied generally to a large number of important industries in Canada and it was held by the Judicial Committee in *Toronto Electric Commissioners* v. *Snider* (1), that that Act was not within the competence of Parliament, as it was clearly in relation to property and civil rights in the Provinces, a subject reserved to the Provincial Legislatures by s. 92, s-s. 13 of the *British North America Act*. Since then the Act has been re-cast and is now found in the form submitted to us for consideration.

As its name indicates, the present Act deals with labour relations and the sections in Part I provide, in a pattern now familiar, for collective bargaining, certification and revocation thereof, unfair labour practices, strikes, lockouts, conciliation proceedings. S. 2 (1) (i) reads:—

> 2. (1) In this Act,
>
> .....
>
> (i) 'employee' means a person employed to do skilled or unskilled manual, clerical or technical work, but does not include
>
> (i) a manager or superintendent, or any other person who, in the opinion of the Board, exercises management functions or is employed in a confidential capacity in matters relating to labour relations, or
>
> (ii) a member of the medical, dental, architectural, engineering or legal profession qualified to practise under the laws of a province and employed in that capacity.

(1) [1925] A.C. 396.

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However, the Act is restricted in its application by the first section in Part II, s. 53:—

53. Part I applies in respect of employees who are employed upon or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada including, but not so as to restrict the generality of the foregoing,

(*a*) works, undertakings or businesses operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada;

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

(*c*) lines of steam and other ships connecting a province with any other or others of the provinces or extending beyond the limits of a province.

(*d*) ferries between any province and any other province or between any province and any country other than Canada;

(*e*) aerodromes, aircraft and lines of air transportation;

(*f*) radio broadcasting stations;

(*g*) such works or undertakings as, although wholly situate within a province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces; and

(*h*) any work, undertaking or business outside the exclusive legislative authority of the legislature of any province;

and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employers' organizations composed of such employees or employers.

The sections in Part I are thus specifically restricted in general terms to any work, undertaking or business that is within the legislative authority of the Parliament of Canada. The enumeration in paragraphs (*a*) to (*h*) inclusive is not to restrict "the generality of the foregoing", but, taking in order the subjects listed, the matters coming within paragraph (*a*), subject to a reservation hereafter mentioned, are referable to Head 10 of s. 91 of the *British North America Act*, "Navigation and Shipping"; the matters within paragraphs (*b*) and (*c*) are referable to Head 10 of s. 92 and, therefore, by virtue of Head 29 of s. 91, are within the exclusive legislative authority of Parliament; those within paragraph (*d*) are referable to Head 13 of s. 91 "Ferries between a Province and any British or Foreign Country or between Two Provinces"; those within paragraph (*g*) are referable to Head 10 (*c*) of s. 92 and again, therefore, by Head 29 of s. 91, within the exclusive legislative authority of Parliament; paragraphs (*e*) and (*f*) have been placed

under the jurisdiction of Parliament by judicial interpretation and (*h*) is merely an omnibus paragraph. The reservation is that in some particulars a provincial legislature has jurisdiction over ferries or ships plying only between points within the limits of the province, but even there questions may arise in connection with particular employees because the power to control the class of subjects falling within "Navigation and Shipping" is to be widely construed. *Paquet* v. *Corporation of Pilots for and Below the Harbour of Quebec* (1); *City of Montreal* v. *Montreal Harbour Commissioners* (2), particularly at 312.

It is not to be presumed that Parliament intended to exceed its powers. *McLeod* v. *Attorney-General for New South Wales* (3); *Attorney-General for Ontario* v. *Reciprocal Insurers* (4), and, therefore, the Act before us should not be construed to apply to employees who are employed at remote stages, but only to those whose work is intimately connected with the work, undertaking or business. In pith and substance the Act relates only to matters within the classes of subjects within the specific heads of s. 91 of the *British North America Act*. Cases may develop, depending upon their particular circumstances, where it will be necessary to determine the applicability of the statute under review, but that is not a question as to the validity of its provisions.

It was contended that any meaning to be given the words "or in connection with the operation of any" in s. 53 would include the employees of the Empress Hotel in *Canadian Pacific Railway Company* v. *Attorney General for British Columbia* (5). However, there it was held that the hotel was not part of the railway works and undertaking of the railway company connecting British Columbia with other provinces, within the meaning of Head 10 (*a*) of s. 92 of the *British North America Act*, so as to be excepted from provincial legislative authority and brought within the Dominion legislative power by virtue of Head 29 of s. 91, but was a separate undertaking. Similarly it was also held that the hotel did not fall within the definition of "railway" in s-s. 21 of s. 2 of the Railway Act, 1927, and, accordingly,

(1) [1920] A.C. 1029.
(2) [1926] A.C. 299.
(3) [1891] A.C. 455 at 457.
(4) [1924] A.C. 328 at 345-46.
(5) [1950] A.C. 122.

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was not "declared to be a work for the general advantage of Canada", within the meaning of s. 6 (*c*) of the 1927 Act. That decision has no relevancy to the present discussion.

If the words complained of had not been inserted it might have been contended that it was necessary that employees should be actually employed *upon* a work, undertaking or business. In *John Pigott and Sons* v. *The King* (1), the phrase "upon any public work" in the Exchequer Court Act dealing with the liability of the Crown was construed in that sense and it was found necessary to amend that enactment. As amended it was considered in *The King* v. *Schrobounst* (2). The decision of the High Court of Australia in *Australian Steamships, Limited* v. *Malcolm* (3), is significant in the present connection, notwithstanding the difference between the constitutions of Australia and Canada and the following statement by Isaacs J. at p. 331 is particularly appropriate:—

> Now, it is evident to me that to leave outside the sphere of control, with respect to inter-State and foreign trade and commerce, all but the mere act of supply or commodity or service would practically nullify the power.

It is emphasized that the first question asks whether the Act applies "in respect of employees in Toronto of the Eastern Canada Stevedoring Co. Ltd. employed upon or in connection with the operation of the work, undertaking or business of the Company", as described in the Order-in-Council. That description is that the Company's operations for the year 1954 "consisted *exclusively* of services rendered in connection with the loading and unloading of ships, pursuant to contracts with seven shipping companies to handle all loading and unloading of their ships arriving and departing during that season. All these ships were operated on regular schedules between ports in Canada and ports outside of Canada". In connection with the first question, the fact that the Company by its charter has power "to carry on a general dock and stevedoring business in all its branches" does not require us to consider the possibility of such a power being used, or indeed the possibility of anything except the facts as they are presented to us. The circumstance that the Company is an organization independent of

(1) (1916) 53 Can. S.C.R. 626. (2) [1925] S.C.R. 458.
(3) (1914-15) 19 C.L.R. 298.

the steamship companies with which it contracted, does not, in my opinion, affect the matter, and I find it difficult to distinguish the employees we are considering from those, engaged in similar work, employed directly by a shipping company whose ships ply between Canadian and foreign ports. The question whether employees of other independent organizations engaged in furnishing services are covered by the Act should be left until the occasion arises. The employees of the Company in Toronto, as they were engaged in the year 1954, are part and parcel of works in relation to which the Parliament of Canada has exclusive jurisdiction to legislate.

Construing the Act in the manner indicated it applies in respect of employees in Toronto of Eastern Canada Stevedoring Co. Ltd. employed upon or in connection with the operation of its work, undertaking or business, as described in the Order-in-Council, including persons employed to do skilled or unskilled manual, clerical or technical work, but excluding those referred to in (i) and (ii) in s. 2 (1) (i) of the Act. The first question submitted should be answered in the affirmative.

The second question should be answered in the negative so far as sections 1 to 53 inclusive of the Act are concerned. These are the only sections as to which argument was adduced and nothing is said as to any of the others.

TASCHEREAU J.—The Governor in Council, by Order in Council of the 18th day of November, 1954, (P.C. 1954-1785) referred the following questions to this Court for hearing and consideration:—(See p. *supra*).

The material facts essential for the consideration of this submission are taken from the above mentioned Order in Council. The Eastern Canada Stevedoring Co., Ltd. is a company incorporated under The Companies' Act of Canada, Statutes of Canada, 1934, c. 33. The operations of the company consist in furnishing stevedoring and terminal services for certain shipping companies in the ports of Halifax, St. John, Toronto, Montreal, Mont Louis and Rimouski. In Toronto, the company owns one shed and leases another shed on the piers in the port. The company receives delivery of cargo from the tailboards of trucks or railway car doors,

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and holds it in its sheds for loading. As to unloading, when the ship has been secured by the crew alongside the company's shed, the hatches are opened by the company or by the crew, and the company removes the cargo from the hold to the dock, and there delivers it to consignees at the tailboards of trucks or at railway car doors, or places the cargo in the company's sheds from which it is delivered without delay.

On the 10th of June, 1953, the Brotherhood of Railway and Steamship Clerks, Freighthandlers, Express and Station Employees, entered into a collective agreement with the company, pursuant to the *Industrial Relations and Disputes Investigation Act, Revised Statutes of Canada, 1952, c 152,* and on the 17th of June, 1954, a further collective agreement was executed by the said Brotherhood to be in effect until the 11th day of June, 1955.

On the 15th of June, 1954, District 50, United Mine Workers of America filed an application before the Ontario Labour Relations Board for certification as the bargaining agent of the employees of the company. By Order dated the 14th day of September, 1954, the Labour Relations Board of Ontario found that the *Labour Relations Act, Revised Statutes of Ontario, 1950, c. 194,* applied to the company; it also found that it had jurisdiction to accept the application and to deal with it on its merits. It was ordered that a representative vote should be taken of employees of the company in the bargaining unit.

The Brotherhood of Railway and Steamship Clerks, Freighthandlers, Express and Station Employees moved before the Supreme Court of Ontario for an Order quashing the decision of the Ontario Labour Relations Board, or in the alternative, for an Order prohibiting the Board from taking further proceedings. In order to expedite the final disposition of the legal questions involved in the proceedings in the Supreme Court of Ontario, the present reference was made by the Governor in Council.

I think that it is better to dispose first of the second question, as to whether the Federal Industrial Relations and Disputes Investigation Act is *ultra vires* of the Parliament of Canada, and if so to examine next if the Act applies in respect of the employees in Toronto of the Eastern Canada Stevedoring Co., Ltd.

The Attorney General for Canada, the Brotherhood of Railway and Steamship, the Eastern Canada Stevedoring Co., Ltd., contend that the Act is within the powers of the Federal Parliament, while the Attorney General for Ontario, the Attorney General for Quebec, the Attorney General for Alberta, and the United Mine Workers of America submit that it is *ultra vires*.

The contention is that the provincial legislatures have exclusive power to make laws in relation to matters coming within the following classes of subjects, pursuant to the B.N.A. Act, s. 92:—

13. Property and civil rights in the province.

16. Generally all matters of a merely local or private nature in the province.

It would follow that the Industrial Relations and Disputes Investigation Act is an invasion of the exclusive legislative jurisdiction of the provinces to legislate in relation to property and civil rights, because the "true nature and character of the law," or, "its pith and substance," is legislation affecting those civil rights,

The Industrial Relations and Disputes Investigation Act was originally enacted in 1907 (6 and 7 Edward VII, c. 20), but in 1925 it was held invalid by the Judicial Committee (*Toronto Electric* v. *Snider* (1)) as being legislation on a matter of provincial concern. The Act was amended in the same year (Statutes of Canada, 1925, 15 and 16 Geo. V. c. 14) in order to limit the application of the Act to a more restricted number of labour disputes. Finally, in 1948 (Statutes of Canada, 11 and 12 Geo. VI, Vol. 1, c. 54) the former legislation was repealed and a new Act was enacted to provide for the investigation, conciliation and settlement of industrial disputes.

The legislation of 1907 which was declared *ultra vires* by the Privy Council, was of a very wide general application, and its primary object was directed to the prevention of settlement of strikes and lock-outs in mines and industries connected with public utilities. It provided that upon a dispute occuring between employers and employees, in any of a large number of important industries in Canada, the Minister of Labour for the Dominion might appoint a Board

(1) [1925] A.C. 396.

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of Investigation and Conciliation, and the Board was empowered to summon witnesses, inspect documents and premises and was to try and bring about a settlement. If no settlement resulted, they were to make a report with recommendations as to the fair terms, but the report was not to be binding upon the parties. After reference to the Board, a lock-out or strike was to be unlawful. It was held that the Act was not within the competence of the Parliament of Canada under the British North America Act. It was the opinion of the Judicial Committee that the legislation was in *relation to property and civil rights in the provinces,* a subject reserved to the provincial legislatures by s 92, s-s. 13, and was not within any of the overriding powers of the Dominion Parliament specifically set out in s. 91. It was further said that the Act could not be justified under the general power in s. 91, to make laws "for the peace, order and good government of Canada", as it was not established that there existed in the matter any emergency which put the national life of Canada in an anticipated peril.

The new law is quite different and its application is limited by section 53. This section reads as follows:—

> 53. Part I applies in respect of employees *who are employed upon or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada* including, but not so as to restrict the generality of the foregoing,
>
> (*a*) works, undertakings or businesses operated or carried on for or in connection with *navigation and shipping,* whether inland or maritime, including the operation of ships and transportaton by ship anywhere in Canada;
>
> (*b*) railways, canals, telegraphs and other works and undertakings connecting a province with any other or others of the provinces, or extending beyond the limits of a province;
>
> (*c*) lines of steam and other ships connecting a province with any other or others of the provinces or extending beyond the limits of a province;
>
> (*d*) ferries between any province and any other province or between any province and any country other than Canada;
>
> (*e*) aerodromes, aircraft and lines of air transportation;
>
> (*f*) radio broadcasting stations;
>
> (*g*) such works or undertakings as, although wholly situate within a province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces; and
>
> (*h*) any work, undertaking or business outside the exclusive legislative authority of the legislature of any province;

and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employers' organizations composed of such employees or employers.

Generally, I think that the Industrial Relations and Disputes Investigation Act may be justified by head 10 of s. 91 of the British North America Act, which gives to the Parliament of Canada exclusive jurisdiction on *Navigation and Shipping*. Regulation of employment of stevedores is, I believe, an essential part of navigation and shipping and is essentially connected with the carrying on of the transportation by ship. Even if incidentally the law may affect provincial rights, it is nevertheless valid if it is, as I think, in relation to a subject within the federal legislative power under s. 91.

As it was said by Lord Haldane in *The City of Montreal* v. *Montreal Harbour Commissioners* (1): "Now, there is no doubt that the power to control *navigation and shipping* conferred on the Dominion by s. 91, is to be widely construed", and he further adds: "The terms on which these powers are given are so wide, as to be capable of allowing the Dominion Parliament to restrict very seriously the exercise of *proprietary rights.*"

In *Paquet* v. *The Corporation of Pilots for and below the Harbour of Quebec* (2), the Judicial Committee held that it was for the Dominion and not for the provincial legislature to deal exclusively with the subject of pilotage, *including the earnings of pilots.* Lord Haldane expressed the views of the Committee in the following language:—

> Navigation and shipping form the tenth class of the subjects enumerated as exclusively belonging to the Dominion in s. 91 of the Act, and the second class in the section, the regulation of trade and commerce, is concerned with some aspects at least of the same subject. Whether the words "trade and commerce", if these alone had been enumerated subjects, would have been sufficient to exclude the Provincial Legislature from dealing with pilotage, it is not necessary to consider, because, in their Lordships' opinion, the introduction into s. 91 of the words "navigation and shipping" puts the matter beyond question. It is, of course, true that the class of subjects designated as "property and civil rights" in s. 92 and there given exclusively to the Province would be trenched on if that section were to be interpreted by itself. But the language of s. 92 has to be read along with that of s. 91, and the generality of the wording of s. 92 has to be interpreted as restricted by the specific language of s. 91, in accordance with the well-established principle that subjects which in one aspect may come under s. 92 may in another aspect that is made dominant be brought

(1) [1926] A.C. 312. (2) [1920] A.C. 1029.

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within s. 91. That this principle applies in the case before their Lordships they entertain no doubt, and it was, therefore, in their opinon, for the Domnion and not for the Provincial Legislature to deal exclusively with subject of pilotage after confederation, notwithstanding that the civil rights and the property of the Corporation of Pilots of Quebec Harbour might incidentally, if unavoidably, be seriously affected.

In the *Minimum Wage Act of Saskatchewan* (1), it was held by this Court that the wages of an employee of a Postal Service of Canada were within the exclusive legislative field of the Parliament of Canada, and that any encroachment by provincial legislation on that subject must be looked upon as being *ultra vires* whether or not Parliament has or has not dealt with the subject by legislation.

This last case is very similar to the one at bar, and I have no doubt that, if it is not competent to a provincial legislature to legislate as to hours of labour and wages of Dominion servants, it is not within its power to legislate as to industrial disputes of employees on a subject matter coming within the jurisdiction of the Parliament of Canada under s. 91.

This however, cannot be construed as excluding the provincial jurisdiction over certain matters, as for instance *inland shipping,* which is not always of federal concern. The Industrial Relations and Disputes Investigation Act applies to employees who are employed *upon or in connection with* the operation of any work, undertaking or business, *that is within the legislative authority of the Parliament of Canada,* and it would therefore be *inoperative* if applied beyond this limited sphere. But this would not make the law *ultra vires.*

The words *"in connection with"* found in s. 53, must not of course be given too wide an application. But, I think it quite impossible to say in the abstract, what is and what is not *"in connection with"*. It would be overweening to try and foresee all possible cases that may arise. I can imagine no general formula that could embrace all concrete eventualities, and I shall therefore not attempt to lay one down, and determine any rigid limit. Each case must be dealt with separately.

I would therefore answer the second question in the negative.

(1) [1948] S.C.R. 248.

As to the first question, I believe that it should be answered in the affirmative. The transportation of goods by water by means of ships, is an operation entirely dependent on the services of the stevedores of the company and both are so closely connected that they must be considered as forming part of the same business.

Moreover, it is common ground that the operations of the Eastern Canada Stevedoring Company in Toronto during the relevant navigation season consisted exclusively of services rendered *in connection with* the loading and unloading of ships pursuant to contracts with seven shipping companies to handle all loading and unloading of their ships arriving and departing during that season. All these ships were operated on regular schedules between *ports in Canada and ports outside of Canada.* It is, therefore, my opinion that this is exclusively of federal concern under head 10 of s. 91, and also head 10 of s. 92 of the B.N.A. Act.

In *Harris* v. *Best Ryley & Co.* (1), (7 Asp. M.C. 274) Lord Esher said:—

> Loading is a joint act of the shipper or charterer and of the ship owner, neither of them is to do it alone but it is to be the joint act of both . . . by universal practice the shipper was to bring the cargo alongside so as to enable the ship owner to load the ship . . . it is then the duty of the ship owner to be ready to take such cargo on board and to store it on board. The stowage of the cargo is the sole act of the ship owner.

It is therefore my view that the Industrial Relations and Disputes Investigation Act applies in respect of the employees in Toronto of the Eastern Canada Stevedoring Co., Ltd.

The first interrogatory should be answered in the affirmative, and the second in the negative.

RAND J.:—The questions put to the Court arise out of *The Industrial Relations and Disputes Investigation Act* whose object is to mitigate and so far as possible avoid in advance disruptive effects to trade, commerce, transportation and other matters caused by conflicts between employers and employees resulting in strikes and lockouts.

(1) (1892) 7 Asp. M.C. 272 at 274.

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The statute does this by furnishing the machinery and procedure for negotiation and conciliation looking to agreement between the principals concerned. This latter ordinarily relates to the terms of the employment, but it is not always so.

The right to strike and to lockout are undoubtedly civil rights, but, directly or indirectly, they are exercised as auxiliary to other rights. Legislation such as that before us is directed to the public interest in the activities which the employment serves and at the same time there is an interest related to the civil rights. The primary matter of the legislation is the actual or prospective work stoppages affecting vital national concerns, but the civil rights involved, though secondary, are undoubtedly substantive. In determining its true nature and character, the considerations to be taken into account include those public interests; and consequences are pertinent, both of the underlying matters, here the stoppages of work, as well as of the legislation itself. Where the interests lie within the same legislative jurisdiction little or no difficulty is presented; but where that is not so, questions of some nicety may arise; and it is the latter feature which furnishes the principal matter for decision here.

The specific application of the statute is provided by s. 53. This is a comprehensive assertion of parliamentary power over this aspect of employment in relation to many activities. The enumeration has two main groups, "works and undertakings" allocated by s. 91(29), and "works, undertakings and businesses carried on for or in connection with navigation or shipping" under s. 91(10); and it will facilitate conclusions on both of the questions put to the Court to deal first with these groups in that order.

The background is furnished by several rulings of the Judicial Committee. In *Toronto Electric Commissioners* v. *Snider* (1), the original of the present statute passed in 1907 was held to be *ultra vires*. Its subject matter was industrial disputes throughout Canada arising out of employment in mines and industries connected with public utilities. The legislation was found to be enacted in relation to civil rights as committed exclusively to the provinces.

(1) [1925] A.C. 396.

That judgment was delivered in January of 1925. In June of the same year a Reference was made to this Court on a convention adopted by the International Labour Conference of the League of Nations limiting hours of labour in industrial undertakings, and questions were put as to the competence of legislature and Parliament over that matter. The answers were to the effect that the subject generally was within the provincial field, but that it was not competent to the legislatures to give the force of law to the proposed provisions in relation to servants of the Dominion Government or to legislate for those parts of Canada not within the boundaries of a province. In the opinion given by Duff J. it was said:—

> It is now well settled that the Dominion, in virtue of its authority in respect of works and undertakings falling within its jurisdiction, by force of section 91, no. 29, and section 92, no. 10, has certain powers of regulation touching the employment of persons engaged on such works or undertakings.

And that

> if servants of the Dominion Government egaged in industrial undertakings as defined by the convention are within the scope of its provisions, then the Dominion Parliament is the competent authority also to give force of law to those provisions as applicable to such persons.

The references to Dominion Government industries and to undertakings within s. 91(29), are to be viewed in the light of an observation by Lord Haldane on the abridged scope of Trade and Commerce in the judgment of five months earlier and the subsequent dissent from it. The convention being restricted to industrial labour, no canvass of certain matters raised in the present reference was called for.

There followed the rulings in 1937 on the Weekly Rest in Industrial Undertakings Act, 1935, The Minimum Wages Act, 1935, and The Limitation of Hours of Work Act, 1935, (1). All three enactments were held to be *ultra vires* on the same ground as in *Snider*. Lord Atkin sums up, without comment, the 1925 Reference opinion in these words:—

> The answers to the Reference, . . . were that the legislatures of the provinces were the competent authorities to deal with the subject matter, save in respect of Dominion servants, and the parts of Canada not within the boundaries of any province.

(1) [1937] A.C. 326.

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But works and undertakings within 91(29) present features of overriding importance. For example, three systems of railways extend from the Atlantic to the Pacific; for them Canada is a single area in which provincial lines are for most purposes obliterated: on them, hours of labour, qualification and classification of employees, working conditions, wages, and other items of like nature, with uniformity in general, unavoidable, are so bound up with management and operation that a piecemeal provincial regulation would be intolerable. Out of them strikes are generated which the authority responsible for the services must have the means of coping with. Provincial laws of contract may apply to formal features of individual engagements; but these play small part in large scale employment. Labour agreements, embodying new conceptions of contractual arrangements are now generally of nation-wide application, and as we know, strike action may become immediately effective throughout the systems.

In these undertakings, as in other subjects of s. 91, civil rights are necessarily embodied, and the question is not of their existence but their extent. In *Grand Trunk Railway Company* v. *Attorney General for Canada* (1), the Judicial Committee sustained the authority of Parliament to prohibit the Railway Company from contracting against liability for personal injury to their employees, which means that it can legislate in relation to the terms of employment. In *Snider* (*supra*) it was said:—

> Whatever else may be the effect of this enactment, it is clear that it is one which could have been passed, so far as any province was concerned, by the provincial legislature under the powers conferred by s. 92 of The British North Amercia Act. . . . It did no more than what a provincial legislature could have done under head 15 of s. 92 when it imposed punishment by way of penalty in order to enforce the new restrictions on civil rights.

This language, however appropriate to the general legislation then being considered, is quite unrealistic as applied to these undertakings.

As to them, and subject to what is said hereafter as to incidental matters, the provisions of the Act before us are, in my opinion, within the competency of Parliament. It was argued by Mr. Varcoe that the relations dealt with are

(1) [1907] A.C. 65.

so far implicated in management as to be exclusively within that jurisdiction; but it is unnecessary to say more than that provincial legislation, in relation to them, is inoperable.

The items of the second group present more difficulty. "Navigation and Shipping" has not been the subject of adjudication that throws much light on the issues here. Immediately associated with it in s. 91 are "(9), Beacons, Buoys, Lighthouses and Sable Island", and "(11), Quarantine and the Establishment and Maintenance of Marine Hospitals" and the latter as an exception to the generality of 92(7) gives some indication of its scope. Head (13) deals with ferries between a province and any British or foreign country or between two provinces and (29), in conjunction with 92(10), takes in (*a*) and (*b*) of the latter, Lines of Steam or other ships connecting the province with any other province or extending beyond the limits of the province or between the province and any British or foreign country.

It is of some pertinency that, until the Statute of Westminster, 1931, legislative power to deal with shipping in Canada was subject to the Merchant Shipping Act of 1854 and its successor of 1894. Under s. 735 of the latter any of its provisions could, with the approval of Her Majesty, be repealed by the legislature of a British possession as to ships registered there. Through the effect of the Merchant Shipping (Colonial) Act of 1869 and the Interpretation Act, 1889, Parliament was the appropriate legislature in Canada for that purpose. From 1873 onward statutes dealing with registration seamen, pilotage, carriage, liability and like matters, subjects of the Merchant Shipping Acts, were passed. In 1906 they were consolidated in c. 113, and culminated in The Shipping Act of 1934 enacted for the first time unrestrained by imperial legislation. The circumstance that "Navigation and Shipping" was committed to the Dominion by s. 91, apart from any question of imperial policy, is to be ascribed to the special character of these subjects and to their international as well as national implications; and the parliamentary enactments of the past seventy-five years, in their uniform and extended application to all shipping, evidence at least no incompatibility with settled provincial administration.

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In this background, fortified by the view expressed by Lord Haldane in *Montreal* v. *Harbour Commissioners* (1), the power is to be construed widely. For general purposes, the merchantile marine of this country, as one of its great national agencies, is placed under dominion control. It has become an instrument of world wide service, vital to our economic life. But s. 91 itself in heads (13) and (29) indicates some limitation to the widest scope of the words of head (10), and its reconciliation with local regulation is examined hereafter. The only authority cited bearing on the questions put is *Paquet* v. *Corporation of Pilots for Quebec* (2), which confirms the power of Parliament over pilotage fees. But from what has been mentioned it seems to be indubitable that as to matters relating to the mode of engagement, the qualifications, discipline and government of crews, exclusive legislative authority resides in Parliament.

The tests of the scope of dominion powers as they touch incidentally upon civil rights are difficult of precise formulation. In *Grand Trunk Railway Company* v. *Attorney General of Canada* (*supra*) Lord Dunedin asks whether the dealing with a civil right there was "truly ancillary to railway legislation". The fact that the prohibition would tend, as argued by the company, to negligence on the part of employees, was taken, if true, to be conclusive that the prohibition was ancillary Other expressions have been used: "necessarily incidental"; in the *Local prohibition case* (3); "incidentally"; *Ladore* v. *Bennett* (4). These phrases assume that legislation on a principal subject matter within an exclusive jurisdiction may include as incidents subordinate matters or elements in other aspects outside that jurisdiction. The instances in which this power has been upheld seem to lead to the conclusion that if the subordinate matter is reasonably required for the purposes of the principal or to prevent embarrassment to the legislation, its inclusion to that extent is legitimate. This may be no more than saying that the incidental has a special aspect related to the principal. Actual necessity need not appear as the contracting out case shows; it is the appropriateness,

(1) [1926] A.C. 299 at 312.
(2) [1920] A.C. 1029.
(3) [1896] A.C. 348 at 360.
(4) [1939] A.C. 468.

on a balance of interests and convenience, to the main subject matter or the legislation. I do not construe the words "in connection with" in the opening paragraph of s. 53 as to local matter to go beyond what can be annexed to federal legislation within the meaning of these phrases.

The facts underlying the first question show that the company concerned was incorporated under The Companies Act and is authorized to operate throughout Canada. Its services include loading and unloading cargo, storage and handling connected with the receipt and delivery of goods, and generally terminal services of transportation both by vessel and by railway. At Toronto it controls two sheds on the docks at which its work for the navigation season of 1954, April to November, was confined to water traffic between Canada and foreign countries carried on ships owned by certain steamship companies and running on regular schedules. I take this latter to mean that the traffic was that of "lines of ships" within s. 92(10(a) and (b). Whether the working staff is engaged on terminal work during the rest of the year does not appear.

As this work is clearly within the scope of the undertakings of carriage, is it significant to legislative competency that it may be carried on by the company at any wharf or port regardless of the class of the shipping service? There is nothing in the facts shown inconsistent with the company's supplying services at any other wharf and for local shipping. The company may, at any time, organize a pool of stevedores from which men would be despatched to one wharf today and to another tomorrow, and employees could be switched from one to the other at the company's pleasure. All the company undertakes is to "stevedore" the ships, but by what particular persons is a matter of indifference. At other ports in the same or in any other province, the same situation would be present. At each the activities are, in an important sense, local and make up at least a quasi-undertaking. Are its employees, as they were engaged in Toronto in 1954, amenable, in respect of labour relations, to dominion law?

The provincial position is this: the heads of Navigation and Shipping and Lines of Ships as dominion undertakings assume that in local organizations such as the company here

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labour relations are under provincial authority; the charges and the hours of work for and other terms of the services rendered, as local conditions to which all shipping is subject, are analogous to those of taxes, insurance, workmen's compensation, supplies, repairs and facilities for terminal services generally. The provinces might adopt policies on labour deemed to be of local advantage but burdening to shipping and dominion trade; but unreasonable action of this sort is not to be anticipated, and that possibility is equally applicable to industrial production for foreign trade. In fact the Dominion regulates the goods of trade and commerce and the shipping that serves them which come into existence under the terms of provincial regulation of labour.

Against this is to be weighed the national interest on which the consequences of a strike directly impinge. Legislative authority over a subject may carry with it responsibility for dealing with its disruption. If the interest, say, of the Dominion in maintaining shipping in relation to foreign trade and commerce is so affected, the question is whether ss. 91 and 92 contemplate such an interference to be subject to the provincial interest in the civil rights involved, or whether the former is such as to confer authority to deal with the cause as ancillary to the dominion power.

This latter would mean an extension of dominion jurisdiction to the internal relations of an independent organization specializing in a limited function employed not as a permanently annexed or incorporated segment of dominion undertakings but as a local agency furnishing terminal services generally for which the steamship companies contract currently. The mere fact here that the company's activity during the shipping season of 1954 was confined to certain steamships is not a controlling circumstance for the reasons already mentioned. Parliament could, I will assume, require that all loading and unloading of ships in dominion undertakings be done by employees of the ship, but it has not done so.

The legislative scope over dominion undertakings extends clearly to all features of the ship. The requirements of structure and machinery are subject to special regulations. But the employees of a dockyard or of an engineering company employed generally in that work, because of being

under an engagement to repair all the ships of a dominion line, would not thereby be brought under the Act. That local cost is one of the provincial conditions under which the vessel operates. Various needs of the undertakings call for services the furnishing of which has become specialized locally; and when unloading is performed by an independent organization, can a fractional portion of its employees be split off and annexed to dominion labour control? A divided authority would become hopelessly confused as the employees were allocated to local or federal service. This is illustrated by analogous example: must a general protective agency, because it serves banks, be treated in any degree in respect of labour relations as performing a service ancillary to banking? Would a general delivery service engaging with an express company to make local deliveries be drawn fractionally within the dominion orbit? These considerations show that, from the standpoint of practicability, the entire organization must be taken to be under a single legislative control including such auxiliary staff as office workers.

The dominion interest affected by a strike of stevedores may undoubtedly be of great importance; but in the absence of annexation of the local labour to exclusively dominion shipping, and except as to situations in which local service is merely incidental to its primary function, I am unable to treat its employee relations as ancillary to dominion power over shipping: to the civil rights involved, the dominion interest must be taken to be subordinate.

The scope of Shipping has its counterpart in the regulation of Trade and Commerce. It is now settled that jurisdiction under head 91(2) extends at least to the regulation of interprovincial and international trade and to as yet undefined general regulation throughout the Dominion but not to the regulation of particular trades within the provinces. But it is not a merely auxiliary power where civil rights are affected: Duff C. J. in *Reference re Alberta Statutes* (1):

> It is clear now, however, from the reasons for judgment (in *Attorney General for Ontario* v. *Attorney General for Canada*, (1937) A.C. 377) that the regulation of Trade and Commerce must be treated as having full independent status as one of the enumerated heads of s. 91.

(1) [1938] S.C.R. 100 at 121.

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But in their unrestricted sense, the words, "Regulation of Trade and Commerce" were early found to be such that circumscription became necessary in order, as was said by Duff J. in *Lawson* v. *Interior Tree, Fruit and Vegetable Committee* (1):

> to preserve from serious curtailment, if not from virtual extinction, the degree of autonomy which as appears from the scheme of the Act, the provinces were intended to possess.

And for the same purpose I find here a like necessity in delineating the field of Shipping.

In both s. 91(13) and s. 92(10) and (16) works, undertakings and local services within provincial authority are contemplated, and the scope of Shipping must similarly be accommodated to strictly provincial subjects. In the case of a local ferry or service on, say, a lake wholly within a province, its existence, the regulation of schedules, tariffs and matters unrelated to marine features, mark out a provincial control consistent with the general regulation of Shipping. The government and management of the ship, including qualifications and discipline of the crew, and all matters relating to navigation, remain with Parliament: but the civil rights of crews must be considered.

Shipping is not confined to the large sense of undertakings such as "lines of ships", it may be fluid both in routes and functions. Single ships may be engaged in interprovincial or foreign commerce today, otherwise than incidentally, and local trade tomorrow: they may be carriers of goods for their owners or for the public: they may compose fishing fleets as in the Maritime provinces and British Columbia with employees in incidental activities. They have their home port in a province. In these, as in strictly local undertakings, the local interest is paramount and the civil rights of the crews prima facie find their regulation in provincial law.

The jurisdiction to exercise the machinery provided by the Act must include the power to adjust, compulsorily if necessary, the civil rights involved. Can Parliament, then, prescribe the terms of settlement for striking seamen engaged in these local services? The case of *Paquet* makes

(1) [1930] S.C.R. 357 at 366.

clear its power to fix the fees for pilotage and the remuneration to the pilot, but this is a constitutive feature of navigation rather than of shipping. But it would, in my opinion be an unwarranted encroachment on provincial powers to extend the scope of Shipping in the application of s. 53 to crews of vessels engaged in strictly local undertakings or services, including fishing fleets and craft engaged primarily in intraprovincial carriage. Subject to that limitation the dominion authority under 91(10) comprehends all Shipping.

No attempt was made to adduce evidence that the organization of labour, either in relation to the crews of local shipping or to terminal services, had become so exclusive and consolidated, so uniform in action, and so implicated in trade and shipping as to bring about a new and dominating national interest in those matters. If that had been so, its relation to residual powers as well as to Shipping would have had to be examined.

Items (*g*) and (*h*) of s. 53 remains:—

> (*g*) such works or undertakings as, although wholly situate within a province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces; and
>
> (*h*) any work, undertaking or business outside the exclusive legislative authority of the legislature of any province;

The former, so far as the works themselves are likewise undertakings, would be such as yield some mode of service of a public or quasi-public nature. I see no distinction to be made between them and dominion works and undertakings generally. Undertakings, existing without works, do not appear in 92(10) (*c*) and cannot be the subject of such a declaration.

Item (*h*) seems to envisage matters falling within the residuary power of s. 91. No illustration of subject matter was offered on the argument and what might well come within it, "radio", is already mentioned in item (*f*). Nor is it evident that except in extraordinary circumstances could "business" be brought within that power. The general considerations already mentioned would be relevant; but until something more precise of the nature of the possible matters or business appears little more can be said.

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Then the opening language of s. 53 speaks of any "business" within the authority of Parliament. This would include banking or businesses undertaken by the Dominion government. The latter being property of the Dominion within s. 91(2), the terms and conditions of employment as well as the activities themselves lie within parliamentary regulation, whether carried on through the means of an agency or a corporation or by a department.

Banking, the incorporation of banks and the issue of paper money come under s. 91(15). It would be incompatible with that power with its national interest and responsibility that the qualifications, classifications, hours of labour, wages and salaries of employees, related as they are to the earning charges of interest, etc., or the procedure to obtain agreement on them, should not lie within the regulation of Parliament.

The argument before us confined itself to the validity of ss. 1 to 53 inclusive and I deal with no others.

My answers are, therefore:—

To the first question: On the evidence before the Court No;

To the second question: The Act in general and as to incidental matters is intra vires subject to the limitations indicated in the reasons.

KELLOCK J.:—The questions referred to this court concern the validity of *The Industrial Relations and Disputes Investigation Act*, R.S.C., 1952, c. 152, and the applicability of that statute to the employees at Toronto of the Eastern Canada Stevedoring Company Limited.

This legislation is rested, by those contending for its validity, upon the powers conferred upon Parliament by the introductory words of s. 91 to make laws for the peace, order and good government of Canada, and upon heads 2, 10 and 29 of that section as well as head 10 of s. 92. On the other hand, it is contended that the subject matter of the legislation is within the ambit of heads 13 and 16 of s. 92 and not affected by any of the enumerated heads of s. 91.

In support of this latter contention there was invoked, not unnaturally, the decision of the Judicial Committee in *Snider* v. *Toronto Electric Commissioners* (1). The legislation there under consideration, however, was of general application and it is precisely because of the limited application of the legislation here in question that questions which were in no way raised or considered by the Judicial Committee in *Snider's* case are presented. It will be convenient to consider, in the first place, whether the present legislation is authorized by any of the enumerated heads of s. 91. If that be so, s. 92 becomes inapplicable, nothwithstanding that the subject matter of the legislation inevitably affects matters otherwise within that section.

The essential provisions of Part I of the statute are to be found in s. 7 and following. They deal with such matters as certification of bargaining agents and its effects; negotiation of collective bargaining agreements; conciliation proceedings for the prevention or settlement of strikes and lockouts, including the constitution of conciliation boards, their reports and the enforcement thereof. The earlier sections of the statute contain provisions dealing respectively with the rights of employer and employee to join a trade union or an employer's organization, and what are described in the statute as "unfair labour practices."

It is provided by s. 54 that Part I shall apply to any corporation established to perform any function or duty on behalf of the Government of Canada and with respect to the employees of such corporation except such as may be excluded by Order-in-Council. Subject to s. 54, the following section provides that Part I shall not apply to Her Majesty in right of Canada or her employees. By reason of this last mentioned section, it would appear that the employees referred to in the previous section are, in the contemplation of the statute, employees of Her Majesty in the right of Canada notwithstanding that their immediate employer is a corporation. It was not contended in argument that s. 54 is to be otherwise construed. In this view, nothing more need be said as to the section, as it is past question that government employees are exclusively subject to federal jurisdiction; Reference re *Legislative Jurisdiction Over Hours of Labour* (2).

(1) [1925] A.C. 396. (2) [1925] S.C.R. 505.

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Apart from government employees, the application of Part I is provided for by s. 53, which it is not necessary to restate. In my view, the words "in connection with" in the second line of s. 53, as well as in paragraph (a), are not to be construed in a remote sense but as limited to persons actually engaged in the operation of the work, undertaking or business which may be in question. Just what are the proper limits in this connection of the word "employees" in the section must be left for determination in particular cases as they arise. For example, person performing merely casual services upon or in connection with a Dominion "undertaking" would not necessarily fall within the ambit of that word as used in s. 92(10). In *Attorney General for Ontario* v. *Winner* (1), the word "undertaking" was used by the Judicial Committee interchangeably with "enterprise". It has also been defined as "an arrangement under which physical things are used"; the *Radio* case (2). In the *Empress Hotel* case (3), Lord Reid equated "undertakings" with "organizations." In referring to the object in view in the enactment of s. 92(10) (*a*), namely, dealing with means of interprovincial communication, he said, at p. 142:

> Such communication can be provided by organizations or undertakings, but not by inanimate things alone. For this object, the phrase 'line of ships' is appropriate: that phrase is commonly used to denote not only the ships concerned but also the organization which makes them regularly available between certain points.

In *Winner's* case the Judicial Committee considered that a line of buses operating between points in the United States and Canada was analogous to a line of steamships providing similar communication. In their Lordships' view, as expressed by Lord Porter at p. 572, "As in ships so in buses it is enough that there is a connecting undertaking."

In my opinion the legislative jurisdiction vested in Parliament to make laws in relation to works and undertakings of the character excepted by s. 92(10) from the legislative jurisdiction of the provinces, involves jurisdiction to legislate with respect to the persons engaged in the operation of such undertakings and the manner in which and the conditions under which such operations are carried out. This view is in accord with the judgment of this court in *The*

(1) [1954] A.C. 541. (2) [1932] A.C. 304 at 315.
(3) [1950] A.C. 122.

Hours of Labour Reference (1), and I consider the legislation here under consideration belongs in the same category as that which was there in question.

For present purposes it is not necessary to consider whether, so far as s. 92(10) is concerned, such legislation as the present would fall within the exclusive jurisdiction of Parliament or whether, as this court considered with respect to the legislation before the court in 1925, provincial legislation covering the same ground would be operative in the absence of Dominion legislation. In the present instance, the field is occupied. It may be pointed out, however, that in the Reference as to the Dominion legislation considered by the Judicial Committee in their judgment reported in 1937, A.C., 326, Lord Atkin referred to the decision of this court in 1925 without expressing either approval or disapproval, merely stating that the advice given in 1925 "appeared to have been accepted, no further steps being taken on the part of Parliament until the enactment of the legislation of 1935." It may also be pointed out that the character of the legislation considered by this court in 1925 and by the Judicial Committee in 1937 was, unlike the statute here in question, of general application.

On the other hand, in *C.P.R.* v. *Bonsecours* (2), the Judicial Committee had to consider for the purposes of that case the extent of the power conferred upon Parliament by s. 92(10). In the view of their Lordships, as expressed by Lord Watson at p. 372:

> The Parliament of Canada has, in the opinion of their Lordships, *exclusive* right to prescribe regulations for the construction, repair, and alteration of the railway, and for its *management,* and to dictate the constitution and powers of the company; . . .

If the matters dealt with by the legislation in question on this Reference can therefore be said to fall within the scope of management of the undertakings excepted by s. 92(10), there would be no room for provincial legislation on the same subject matter with relation to such an undertaking, whether the field had or had not been occupied. The power conferred upon a provincial legislature by No. 8 of s. 92 is, as stated by Lord Watson in 1896 A.C., 348 at 364, simply the power "to create a legal body for the management of

(1) [1925] S.C.R. 505. (2) [1899] A.C. 367.

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municipal affairs," and in *Toronto Electric Commissioners* v. *Snider* (2), Viscount Haldane considered that the subject matter of the industrial relations legislation there in question fell within the scope of such management.

Regulation of the relations between operator and operative engaged upon a Dominion undertaking is, in any event, within the federal power even on the basis that, in the absence of Dominion legislation, provincial legislation may find scope for operation; *Grand Trunk Railway* v. *Attorney General of Canada* (2). It may also be noted that in the Reference re *Waters and Water-Powers* (3), Duff J., as he then was, speaking for the court, said at p. 214:

> . . . 'railway legislation, *strictly so-called*' (in respect of such railways), is within the *exclusive* competence of the Dominion, and such legislation may include, inter alia (Canadian Pacific Ry. v. Corporation of the Parish of Notre Dame de Bonsecours, 1899, A.C., 367), regulations for the construction, the repair and the alteration of the railway and for its management.

Coming to the statute of 1952, s. 53 contains, in my opinion, a legislative pronouncement that each and every of the works, undertakings and businesses described in the lettered paragraphs are works, undertakings and businesses within the exclusive legislative jurisdiction of Parliament and their enumeration is not to restrict the generality of the works, undertakings or businesses within that legislative authority.

Leaving aside for the moment par. (*a*) of s. 53, it is clear, in my opinion, that paragraphs (*b*), (*c*), (*d*), and (*g*) deal with works and undertakings described in s. 92(10) of the *British North America Act* save as to the words "or undertakings" in (*g*), which are not to be found in s. 92(10). As to paragraphs (*e*) and (*f*), the decision of this court in *Johannesson* v. *West St. Paul* (4), and that of the Judicial Committee in the *Radio* case (5), establish the jurisdiction of Parliament. No question arises under par. (*h*) in view of its language.

Upon the view expressed above as to the jurisdiction of Parliament on a subject matter of the nature of that here in question in relation to a Dominion undertaking, it would follow, on the basis of s. 92(10) taken alone, that in the

(1) [1925] A.C. 396.
(2) [1907] A.C. 65.
(3) [1929] S.C.R. 200.
(4) [1952] 1 S.C.R. 292.
(5) [1932] A.C. 304.

case of a provincial railway, for example, a similar jurisdiction vests in the legislatures of the provinces by virtue not only of s. 92(10) but by virtue of heads 13 and 16 of that section, within which jurisdiction legislation of this character would be comprised were it not ousted in the case of Dominion undertakings by force of head 10. What is true with relation to Dominion railways, on the one hand, and purely local railways, on the other, would also be true in the case of a Dominion line of ships as opposed to a purely provincial line. But when one comes to the subject matter of shipping, it is necessary to consider any enumerated head of s. 91 which deals with that subject matter for the reason that any matter coming within such an enumerated head is not to be deemed to come within any head of jurisdiction assigned to the provincial legislatures by s. 92. This brings me, therefore, to a consideration of s. 91(10), "Navigation and Shipping," which, as pointed out by Viscount Haldane in *Montreal* v. *Montreal Harbour Commissioners* (1), is to be given a wide interpretation.

Prior to the passing of *The British North America Act* in 1867, there had been passed in the United Kingdom, *The Merchant Shipping Act* c. 104, of 1854, which continued to apply to Canada after 1867, as did subsequent legislation on this subject matter, until the Statute of Westminster in 1931. By s. 6 of that statute the Board of Trade was constituted the department to undertake "the general superintendence of matters relating to merchant ships and seamen". By s. 2, the expression "ship" was, in the absence of a contrary context, to include "every description of vessel used in navigation not propelled by oars." The statute dealt, inter alia, with such matters as ownership, measurement and registry of British ships, certifiction apprenticeship, engagement, wages, health, accommodation and discipline of seamen, safety and prevention of accidents and pilotage.

In 1894 the earlier legislation was consolidated by the *Merchant Shipping Act,* 57 and 58 Victoria, c. 60. By virtue of s. 735 of that statute, a provision contained also in earlier legislation (s. 547 of the Act of 1854), read with the

(1) [1926] A.C. 299 at 312.

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Merchant Shipping (Colonial) Act of 1869 and the *Interpretation Act* of 1889, the Parliament of Canada was the appropriate legislature for purposes of repeal of such enactments with respect to ships registered in Canada.

From 1873 onward, Parliament enacted various shipping statutes and these were consolidated in the *Revised Statutes of Canada*, 1906, c. 113. They cover much the same matters as are to be found in the Merchant Shipping Acts of the United Kingdom, including certification of masters and mates; apprenticeship; shipping masters and shipping offices; engagement of crew and agreements with members of the crew not only of ships engaged in international and interprovincial trade but also in the case of those operating entirely on inland waters; wages; discipline and conduct of masters and crew. It would therefore seem that such matters were uniformly deemed both before and after Confederation to be included within the head "Navigation and Shipping".

Head 13 of s. 91, "Ferries between a Province and any British or Foreign Country or between two Provinces" must also be considered. The limitation in this head of jurisdiction to international and interprovincial ferries would appear to vest in the provincial legislatures jurisdiction with regard to purely local ferries. The current understanding of a "ferry" at the time of the passing of the *British North America Act* was expressed by Kindersley V.C., in *Letton* v. *Gooden* (1), as follows:

> A ferry has been said to be the continuation of a public highway across a river or other water for the purpose of public traffic from the termination of the highway on the one side to its recommencement on the other side;

In the words of Lord Parker of Waddington in *Hammerton* v. *Dysart* (2).

> A ferry may thus be regarded as a link between two highways on either side of the water, or as part of a continuous highway crossing the water.

I think, therefore, that while the granting of franchises (re *International and Interprovincial Ferries* (3)) as well as such matters as schedules, rates and control of traffic using the ferry may well be included in the jurisdiction to

(1) (1866) L.R. 2 Eq. 123 at 130. (2) [1916] 1 A.C. 57 at 79.
(3) [1905] 36 Can. S.C.R. 206.

legislate with regard to ferries, the jurisdiction of Parliament under s. 91(10) with regard to "Navigation and Shipping" is not otherwise encroached upon by the jurisdiction conferred with respect to ferries. It would seem that provincial legislation dealing with ferries has been enacted in accord with the above view. Reference may be made, for example, to R.S.O., 1952, c. 135; R.S.Q., 1941, c. 76, ss. 123-126; R.S.N.S., 1954, c. 98. In my opinion, therefore, such matters as wages, hours of labour, and agreements relating to conditions of labour upon ships, whether operated in local or interprovincial or international waters, are within the exclusive jurisdiction of Parliament.

The question therefore arises as to whether the work of stevedoring falls within head 10 of s. 91. In my opinion, this head of jurisdiction extends to all matters connected with a ship as an instrument of navigation and transport of cargo and passengers. The jurisdiction must extend to stowage and, in my opinion, to loading and discharge also, which operations have been traditionally the responsibility of the ship and carried out under the direction of the master.

Coming to the employees of the Eastern Canada Stevedoring Company, Limited, the Order of Reference states that the operations of the company in Canada during the navigation season of 1954 consisted *exclusively* of services rendered in connection with the loading and unloading of ships, all of which were operated on regular schedules between ports in Canada and ports outside of Canada. It is on the footing of the continuance of this situation that the question is to be considered, and I construe the situation thus disclosed as indicating that the ships in question fall within the words "Lines of Steam or other Ships . . . ", jurisdiction with respect to which is vested in the Dominion by s. 92(10) (*a*) and (*b*). There would be no difficulty, in my opinion, in holding, on the footing of s. 92(10) alone, that the undertaking of an interprovincial or international line of ships would include such operations as loading and discharge of cargo and passengers, as would also be true in the case of a Dominion railway or a line of planes or buses. However, as the jurisdiction of Parliament with respect to "Navigation and Shipping" includes, as already mentioned,

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loading and discharge of all shipping whether engaged in local or interprovincial or international waters, the provincial jurisdiction conferred by s. 92(10) is subject thereto.

It may well be as a matter of construction of the Order of Reference that the employees referred to in the first question are the employees of the classes referred to in the collective agreement which was the subject of the order of the Ontario Relations Board of the 14th of September, 1954, namely, "all employees of the respondent in the port of Toronto save and except non-working foremen, persons above the rank of foreman, office staff and security guards", with regard to whom the dispute between the unions referred to in the Order of Reference arose. If, however, the order-in-council is not to be construed as confined to the named classes, I would be of opinion that all the employees of the company in question are to be regarded as part of the "organization" or "arrangement" under which the lines of ships here concerned are "made available", although in the employ of an employer other than the proprietors of those lines, just as, in my opinion, would be the case with employees of the undertaking of a Dominion railway.

My answer to the first question is, therefore, in the affirmative and to the second, that the *Industrial Relations and Disputes Investigation Act*, R.S.C., 1952, c. 152, construed as above, is *intra vires* of Parliament save as to ss. 56 and following, as to which I express no opinion, no argument having been addressed to the court with regard to these sections.

ESTEY J.:—The two questions submitted to this Court are set out in full in the judgment of my Lord the Chief Justice.

It will be more convenient to deal at the outset with the second question, or the competence of the Parliament of Canada to enact the *Industrial Relations and Disputes Investigation Act* (R.S.C. 1952, c. 152). The Parliament of Canada, in 1907, enacted what may be described as the forerunner of the legislation here in question under the title *Industrial Disputes Investigation Act* (S. of C. 1907, c. 20). The purpose and object of this enactment was the settlement of industrial disputes arising between employers and

employees. In 1925 this statute was declared *ultra vires* in *Toronto Electric Commissioners* v. *Snider* (1). Labour and labour relations, under this decision, were classified as property and civil rights and, therefore, by virtue of s. 92(13) of the *B.N.A. Act,* subject to provincial legislation, except in so far as the Parliament of Canada had power to legislate in respect to its own employees and under the particular headings of s. 91.

In the same year this Court held, in *Reference re Hours of Labour* (2), that legislation in relation to hours of labour was "generally within the competence of the legislatures of the provinces," subject to certain exceptions and, in particular, "in relation to servants of the Dominion Government," or those parts of Canada not included within the boundaries of a province. The formal answers contained no reference to s. 91, or to any other exceptions, but in the course of his opinion Sir Lyman Duff (later C.J.) stated at p. 511:

> It is now settled that the Dominion, in virtue of its authority in respect of works and undertakings falling within its jurisdiction, by force of section 91, no. 29, and sec. 92, no. 10, has certain powers of regulation touching the employment of persons engaged on such works or undertakings. The effect of such legislation by the Dominion to execution of this power is that provincial authority in relation to the subject matter of such legislation is superseded, and remains inoperative so long as the Dominion legislation continues in force.

In 1906 the Privy Council held that legislation enacted by Parliament preventing railways subject to its jurisdiction from "contracting out" of liability to pay damages for personal injury to their servants was intra vires. *Grand Trunk Railway of Canada* v. *Attorney-General of Canada* (3).

In 1935 Parliament enacted the *Weekly Rest and Industrial Undertakings Act,* the *Minimum Wages Act* and the *Limitation of Hours of Work Act,* all of which were declared to be ultra vires. *Attorney-General for Canada* v. *Attorney-General for Ontario et al* (4). 1937 A.C. 326; Plax. 278. In Plaxton at p. 293 it is stated:

> It was admitted at the bar that each statute affects property and civil rights within each province and that it was for the Dominion to establish that nevertheless the statute was validly enacted under the legislative powers given to the Dominion Parliament by the British North America Act, 1867.

(1) [1925] A.C. 396.
(2) [1925] S.C.R. 505.
(3) [1907] A.C. 65; 1 Cam. 636.
(4) [1937] A.C. 326; Plax. 278.

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In *Reference Minimum Wage Act of Saskatchewan* (1), 1948 S.C.R. 248, this Court held that employees of the Government engaged in the postal service were subject to Dominion legislative jurisdiction.

These authorities establish that there is a jurisdiction in the Parliament of Canada to legislate with respect to labour and labour relations, even though these relations are classified under Property and Civil Rights within the meaning of s. 92(13) of the *B.N.A. Act* and, therefore, subject to provincial legislation. This jurisdiction of Parliament to so legislate includes those situations in which labour and labour relations are (*a*) an integral part of or necessarily incidental to the headings enumerated under s. 91; (*b*) in respect to Dominion Government employees; (*c*) in respect to works and undertakings under ss. 91(29) and 92(10); (*d*) in respect of works, undertakings or businesses in Canada but outside of any province.

If, therefore, a system of collective bargaining and statutory provisions for settlement of disputes in labour relations are to be made available to employers and employees within the legislative jurisdiction of Parliament, that body alone can enact the appropriate legislation. Parliament, therefore, in 1948 (S. of C. 1948, c. 54) first enacted the *Industrial Relations and Disputes Investigation Act,* the validity of which is here in question. Part I thereof recognizes the right of employees and employers to organize and prohibits certain unfair labour practices, makes provisions for collective bargaining as between employer and employee and for the settlement of labour disputes in works, undertakings and businesses. Then in Part II, entitled "Application and Administration," Parliament obviously intended to restrict the application of the statute to those works, undertakings and businesses over which it possesses legislative jurisdiction. It is, of course, not the intent with which Parliament passes legislation, but rather the effect thereof that must determine whether it be competently enacted. *Attorney-General of Manitoba* v. *Attorney-General of Canada* (2). Section 53(*a*), being the first section in Part II, provides, in part:

> 53. Part I applies in respect of employees who are employed upon or in connection with the operation of any work, undertaking or business

(1) [1948] S.C.R. 248. (2) [1929] 1 A.C. 260 at 268.

that is within the legislative authority of the Parliament of Canada including, but not so as to restrict the generality of the foregoing,

(*a*) works, undertakings or businesses operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada;

The subparas. (*b*) to (*h*) inclusive which follow it, as in (*a*), describe certain works, undertakings or businesses which are in effect, said to be subject to the legislative authority of the Parliament of Canada. These subparas. have not been inserted, as in the *War Measures Act of 1914*, to cover what Duff J. (later C.J.) described as "marginal instances" (*Re Gray* (1)) but rather, as Mr. Varcoe suggested, to indicate or illustrate more precisely what Parliament had in mind in enacting the general provision in the opening language of s. 53. Subparas. (*b*), (*c*), (*d*) and (*g*) would appear to apply to ss. 92(10) (read in association with s. 91(29)) and 91(13). Subparas. (*e*) and (*f*) have to do with aerodromes, aircraft and lines of air transportation and radio broadcasting stations and no doubt are included because of the decisions in *Reference re Control of Aeronautics* (2), *Reference re Radio Communication* (3) and *Johannesson* v. *Rural Municipality of West St. Paul* (4), which held these works and undertakings to be subject to the legislative jurisdiction of the Parliament of Canada. Subpara. (*h*) provides: "any work, undertaking or business outside the exclusive legislative authority of the legislature of any province." This latter is a general provision which at least includes those parts of Canada outside of the provinces, as well as any work, undertaking or business which is not included under either s. 92 or any one of the enumerated heads of s. 91 and, therefore, subject to the legislative jurisdiction of the Parliament of Canada.

Subpara. (*a*) was particularly attacked in the course of the hearing of this appeal. It refers to "works, undertakings or businesses operated or carried on for or in connection with navigation and shipping, . . . " The precise meaning of this phrase "navigation and shipping," as used in s. 91(10), is not easy of determination, but it would appear clear that whatever may be included under this heading

(1) (1918) 57 Can. S.C.R. 150 at 168.
(2) [1932] A.C. 54.
(3) [1932] A.C. 304.
(4) [1952] 1 S.C.R. 292.

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applies equally whether the work, undertaking or business be otherwise subject to the legislative jurisdiction of either Parliament or a provincial legislature. It is appropriate, therefore, that in this subpara. Parliament should adopt comprehensive language to make it clear that its provisions apply to labour and labour relations in respect of navigation and shipping, whether the work, undertaking or business be inland or maritime, and to the operation of ships and transportation by ship anywhere in Canada. This subpara. so construed does not enlarge the meaning or effect of "navigation and shipping," as that phrase is used in s. 91(10).

Mr. Magone particularly emphasized the words "upon or in connection with" in the opening words of s. 53 and "on for or in connection with" as they appear in s. 53(*a*). He contended that these words are so wide and comprehensive as to include not only matters which may form an integral part or be necessarily incidental to a work, undertaking or business over which the Parliament of Canada has legislative jurisdiction, but would extend to any activity, however slightly or remotely it may be connected with a given work, undertaking or business. It may be conceded that in their widest import there is much in such a contention, but these words must be read and construed in association with the other language of the section and, indeed, with that of the Act as a whole. When so read I do not think they could be construed to include more than that which would form an integral part or be necessarily incidental to the work, undertaking or business that was within the legislative competence of Parliament.

This construction of subpara. (*a*) and the words "upon or in connection with" in the opening part of s. 53 finds support in the intent and purpose of Parliament and is to be preferred upon the basis that it ought not to be assumed that Parliament intended to enact legislation beyond its competence. *Valin* v. *Langlois* (1); *Hewson* v. *Ontario Power Co.* (2); *Reference Section 31, Municipal District Act of Alberta* (3). Moreover, the language of Cleasby J. is appropriate:

> And I have found myself compelled in a case of great difficulty to resort to the simple and well-grounded means of ascertaining what ought

(1) (1879) 5 App. Cas. 115. (2) (1905) 36 Can. S.C.R. 596 at 602.
(3) [1943] S.C.R. 295 at 312.

to be regarded as the real subject-matter of legislation; and in this way have come to the conclusion that nothing but Admiralty jurisdiction was operated upon.

Gunnestad v. *Price* (1).

When regard is had to the real subject-matter of subpara. (*a*), only that which may be properly classified under the heading "Navigation and Shipping" is dealt with.

It may well be that difficult and important questions may arise as to whether a particular work, undertaking or business may be subject to the legislative jurisdiction of Parliament or a legislature. Such problems are unavoidable under the *B.N.A. Act*. Moreover, it is possible that in the course of time it may be necessary to construe particular sections, but in a reading of the Act as a whole it would appear that properly construed it would apply only to those works, undertakings and businesses which are within the legislative competence of Parliament. It is a statute the effect of which is not to create new or further encroachments upon property and civil rights, or any other of the enumerated heads of s. 92, but rather it is, in pith and substance, an enactment which provides to those works, undertakings and businesses (subject to the legislative jurisdiction of Parliament) collective bargaining and a method for the negotiation and settlement of labour problems between the employer and the employee. It is this feature of this statute that distinguishes it from the *Industrial Disputes Investigation Act* of 1907, declared, as aforesaid to be ultra, vires in 1925.

Then with respect to the first question, or whether the *Industrial Relations and Disputes Investigation Act* applies in respect of the employees in Toronto of the Eastern Canada Stevedoring Co. Ltd., the facts, as disclosed in the preamble of the order in council, indicate that the Eastern Canada Stevedoring Co. Ltd. (hereinafter referred to as the company) confined its activity in Toronto to the performance of its obligations under contracts with seven shipping companies "to stevedore the vessel (s) of the" owners, agents or charterers that may be parties to the respective contracts. The phrase "to stevedore the vessel (s)" means all loading and unloading of these vessels or ships, all of

(1) [1875] L.R. 10 Ex. 65 at 72.

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which operate on regular schedule between ports in Canada and ports outside of Canada. This work is carried on under the authority and supervision of the ships' officers and payment therefor is received from ship owners or charterers thereof. The company maintains sheds on the docks for both the storage of goods to be shipped and of those to be delivered after unloading. At Toronto its employees are officers, office staff, superintendents, foremen, longshoremen, checkers and shedmen. The last four are referred to as and included in the contract under the words "stevedores."

These ships or vessels so owned and "operated on regular schedules between ports in Canada and ports outside of Canada" are "Lines of Steam Ships between the Province and any British or Foreign Country" within the meaning of s. 92(10) (*b*) and, therefore, by virtue of s. 91(29), to be regarded as within one of the enumerated heads of s. 91 and subject to the exclusive legislative jurisdiction of the Parliament of Canada. *City of Montreal* v. *Montreal Street Railway* (1); the *Winner* case (2), at 568. If, therefore, the work of stevedoring, as performed under the foregoing contracts, is an integral part or necessarily incidental to the effective operation of these lines of steam ships, legislation in relation thereto can only be competently enacted by the Parliament of Canada.

That the work of the stevedores is an integral part would seem to follow from the fact that these lines of steam ships are engaged in the transportation of freight and the loading and unloading thereof, which would appear to be as necessary to the successful operation thereof as the enbussing and debussing of passengers in the *Winner* case, supra. The loading would, therefore, be an integral part of the operation of these lines of steam ships and, therefore, subject to the legislative jurisdiction of Parliament.

The foregoing is founded upon the construction of the *B.N.A. Act*. The fact that under other statutes stevedores have not always been regarded as seamen and have not always had a lien upon the ship for their wages does not in any way detract from the foregoing. However, history does assist to this extent—that the loading and unloading of

(1) [1912] A.C. 333 at 342. (2) [1954] A.C. 541.

ships have always been regarded as the duty and responsibility of the owner or charterer and to this extent it is of assistance in holding that the work of unloading and loading is an essential part of the transportation of freight in vessels. *Lewis on Shipping; Busby* v. *Winchester* (1), affirmed (2). The fact that a portion of the stevedores' work is on land as well as on the ship does not detract from the foregoing because that which is done on land is as essential a part as that on the ship in respect to loading and unloading.

The fact that the stevedores here in question were employees of the Eastern Canada Stevedoring Co. Ltd. is not conclusive of, if, indeed, material to a consideration of the question whether they are subject to the legislative jurisdiction of the Parliament of Canada or the legislature of a province. *Reference re Minimum Wage Act of Saskatchewan* (3); *Canadian Pacific Railway Co. v. A. G. for British Columbia and A. G. for Canada* (4). Such a question must be resolved by a consideration of the nature and character of the services in relation to the works and undertakings of the lines of steam ships here in question. This is not, therefore, a case such as *Toronto Corporation* v. *Bell Telephone Company of Canada* (5), where a company incorporated under legislation of the Parliament of Canada possessed powers, the exercise of which was being interfered with under provincial legislation.

It will be observed that the first question is asked in respect to the employees in Toronto. These are enumerated in the order in council and, other than stevedores, are officers, office staff and superintendents. In determining what legislative body may have legislative jurisdiction in respect to these parties it is important to observe that the services they render on behalf of the Eastern Canada Stevedoring Co., Ltd. are exclusively in connection with the loading and unloading of the ships pursuant to the contracts already mentioned. It must be obvious that their work, so restricted, is equally as essential to the loading and unloading as that of the stevedores who do the actual physical work. It is important to observe that it is the work or undertaking that passes in its entirety, by virtue of the

(1) 27 N.B.R. 231.
(2) (1890) 16 Can. S.C.R. 336.
(3) [1948] S.C.R. 248.
(4) [1950] A.C. 122.
(5) [1905] A.C. 52.

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provisions of s. 92(10) (*b*) and s. 91(29), to the Parliament of Canada and in this connection the words of Lord Reid are apt:

> For this object the phrase 'lines of ships' is appropriate: that phrase is commonly used to denote not only the ships concerned, but also the organization which makes them regularly available between certain points.

Canadian Pacific Railway Co. v. *Attorney-General of British Columbia* (1).

I would answer the first question "Yes"; the second question "The Industrial Relations and Disputes Investigation Act is intra vires the Parliament of Canada."

LOCKE J.:—The question referred to the Court and the terms of s. 53 of the *Industrial Relations and Dispute Investigation Act* (c. 152, R.S.C. 1952) are stated in other opinions to be delivered in this matter.

The facts set out in the Order in Council, so far as they are relevant to the questions, appear to me to be as follows: Eastern Canada Stevedoring Co. Ltd. was incorporated by letters patent under the provisions of the Dominion Companies Act, its activities consisting of supplying stevedoring and terminal services for certain shipping companies in several Canadian ports, including Toronto. At Toronto, where the dispute arose which resulted in the making of this reference, the services consisted during the navigation season of 1954 of loading and unloading cargoes of ships operating on regular schedules between ports in Canada and ports outside of Canada, pursuant to contracts made with seven shipping companies. The company owns one shed and leases one shed on the piers in the Port of Toronto. On notification of the pending arrival of ships, it makes such preparations as are necessary for unloading and loading them, including the taking on of necessary employees. When a ship has arrived at the pier and is secured alongside, its employees open the hatches, if this has not been done by the crew, and remove the cargo to be unloaded from the hold to the dock and there deliver it to the consignees, either at the tail boards of trucks or railway car doors. Cargo of which immediate delivery is not taken by the consignee is placed in the company's sheds and delivery subsequently taken from there by the consignees in trucks

(1) [1950] A.C. 122 at 142.

or railway cars. It receives delivery of outgoing cargo to be shipped from the tail boards of trucks or railway car doors and holds it in its sheds for loading. In the operations of loading and unloading, the company uses the ships' winches and booms for raising and lowering the slings and furnishes pallets necessary for lifting and piling the cargo and machines for towing or lifting cargo on the dock and in the sheds, and in the case of cargo too heavy for the ship's winches and booms it uses land cranes obtained by it. The last act of loading, being the securing of the hatch covers, is performed by the company's employees, if this is not done by the crew of the ship. As the cargo is unloaded, it is checked against the ship's manifests, and when loading they check the cargo, as received to assist in the preparation of the ship's manifests. In the performance of this work, the company employs foremen, longshoremen, checkers and shed men, groups of employees commonly referred to in the Port of Toronto as stevedores.

In addition to the stevedores, the company has other employees described in the Order in Council as officers, office staff, superintendents and walking bosses. Other than to say that during loading and unloading the company has at the dock a management representative, superintendents and walking bosses, the functions of these persons are not defined. The definition of employee in the Act excludes managers or superintendents or persons who, in the opinion of the Board established to administer Part 1 of the Act, exercise management functions, and I assume that the officers referred to, as well as the superintendents, are not among the employees referred to in Question 1. As to those described as walking bosses, I propose to consider the matter on the footing that they perform the same or similar functions to those of the foremen in charge of the gangs of stevedores referred to in the collective agreement of June 17, 1954, mentioned in the Order in Council and are properly classified as stevedores. The office staff, in the absence of any definition of their functions, I will assume to be those engaged in carrying on the accounting work and other office work incident to the carrying on of the undertaking.

The duties of the stevedores are stated to include, in addition to the actual carrying and loading and unloading, the operation of winches and sorting and piling cargo in the

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sheds. The loading and unloading of the ships is performed under the direction and authority of the ship's officers whose orders are given to the supervisory personnel of the company, who direct the work of the stevedores.

S. 53 limits the application of Part I of the Act to employees who are employed upon or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada. That expression is defined to include:—

> (*a*) works, undertakings or businesses operated or carried on for or in connection with navigation and shipping whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada.

The answer to be made to the first question depends, in my opinion, upon whether legislation of this nature is, in substance, in relation to navigation or shipping, within the meaning of Head 10 of s. 91 of the *British North America Act,* or in relation to a subject matter referred to in Head 29.

From the description of the services rendered by the stevedores, it appears to me to be clear that they are as essential to the carrying on of large scale shipping operations as are the services rendered by the crews of ships. Successful operation of steamship lines for the carriage of goods of necessity involves the loading of cargo from the docks and its stowage and the discharge of it onto docks at the point of destination and, in the case of operations of any considerable magnitude, I think it is evident that the performance of this work by the ships' crew would be impractical.

Parliament has, in the exercise of the authority vested in it by Head 10, assumed to regulate in many respects the relations between those operating vessels and their employees, and to define their respective duties. In this respect, the Canadian legislation after Confederation, included many of the provisions to be found in the *Merchant Shipping Act of 1854* (Imp. 17-18 Vict. c. 104) and in the earlier legislation in England which preceded that Act (5-6 Wm. IV, c. 19; 7-8 Vict. c. 112; 8-9 Vict. c. 116, and the *Mercantile Marine Act 1850,* 12-14 Vict. c. 93). Thus in 1872, by an *Act respecting the Shipping of Seamen in Nova Scotia* (c. 39), Shipping Masters in that province

were directed to perform certain duties in connection with the hiring of seamen and the formalities to be performed in making such engagements were prescribed. By *The Seamen's Act 1873*, made applicable to the Provinces of Quebec, Nova Scotia, New Brunswick and British Columbia only, various provisions were made regulating the engagement of seamen and apprentices on ships, defining in a variety of respects the terms of contracts of employment and defining the rights of seamen to enforce payment of their wages, these being generally of the same nature as those contained in Part III of *The Merchant Shipping Act of 1854*. These matters were also dealt with in *The Seamen's Act* (c. 74, R.S.C. 1886), *The Canada Shipping Act* (c. 186, R.S.C. 1927) and in c. 44 of the Statutes of 1934 which repealed earlier Acts and the Merchant Shipping Acts 1894 to 1928, in so far as they were part of the law of Canada, and a number of earlier Canadian statutes.

The Act now appears as c. 29, R.S.C. 1952. Part III bears the sub-heading "Seamen" and contains most precise directions on a variety of matters affecting the relationship between employers engaged in shipping and their employees. The manner in which seamen may be employed in all ports in Canada and elsewhere is defined and certain required terms of agreements of employment are specified, both for foreign going and home-trade ships: the manner of discharge is prescribed, the rights of seamen in regard to wages declared and provisions for discipline made and punishments prescribed for such breaches of contract as desertion or wilful disobedience.

The regulation of the relationship between persons engaged in shipping and those employed by them at sea has thus, for a very long time indeed, been recognized as necessary for the effective regulation by statute of the operation of ships. The fact that this is so supports the view that the regulation of the relations between ship owners and those employed to assist, either on board ship or on land, in performing functions, such as loading and unloading, essential to the carriage of goods, is legislation in relation to shipping within the ordinary meaning of that expression. The right of Parliament to legislate in regard to the form and as to certain provisions of contracts of employment entered into at ports in Canada has not, so far as I am

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aware, ever been questioned and could not, in my opinion, be successfully questioned. The reason, I think, must be that it has been universally recognized that, at least in regard to seamen employed upon ships of the nature of those described in s. 92(10) (*a*) and (*b*), these were matters falling within the jurisdiction of the Dominion under Head 10.

The position of those employees described as stevedores whose duties are above detailed is to be considered apart from those classified as office workers. To these latter, different considerations apply. As shown by the documents referred to in the reference, the Eastern Canada Stevedoring Co. Ltd. furnishes stevedoring services under contracts with vessel owners, charterers of vessels or shipping agents representing the owners or charterers. The stevedores are employed by the company and paid by it and the relationship of master and servant exists only as between them. If the stevedores were employed by the owners or charterers and were carried as members of the crew of the ship, it is my opinion that, for the reasons I have above enumerated, provisions similar to those contained in the Act in question, if embodied in the *Canada Shipping Act,* would be intra vires Parliament. Does the fact that while they perform this function which, in my view, is an integral part of carrying on the activity of shipping, their services are supplied by the Stevedoring Company renders such legislation beyond the powers of Parliament?

While the question as to the power of Parliament and Provincial legislatures, respectively, in regard to employees' relations has been considered in certain aspects, both by the Judicial Committee and by this Court, I do not think the questions to be determined here are concluded by authority.

In the *Reference in the Matter of Legislative Jurisdiction over Hours of Labour* (1), Duff J. (as he then was) who delivered the judgment of the Court, said that legislative jurisdiction touching the subject matter of the Convention was primarily vested in the provinces under the head of jurisdiction numbered 13 in s. 92 "Property and Civil

(1) (1925) S.C.R. 505.

Rights", or under the 16th Head "Local and Private Matters within the Provinces", or under both heads. A qualification to this general proposition was said to be that, as a rule, the province has no authority to regulate the hours of employment of the servants of the Dominion Government.

This passage from the opinion in this reference was referred to by Lord Atkin in delivering the judgment of the Judicial Committee in *Attorney General for Canada* v. *Attorney General for Ontario* (1), without further comment than to say that this advice appeared to have been accepted. The statutes under consideration in the latter reference were *The Weekly Rest in Industrial Undertakings Act 1934, The Minimum Wages Act 1935* and *The Limitation of Hours of Work Act 1935* of the Parliament of Canada and, speaking generally, as to the three Acts Lord Atkin said (p. 350) that, normally, the legislation came within the class of subjects assigned by s. 92 exclusively to the legislatures of the provinces, namely Property and Civil Rights in the Province.

Some general statements in earlier cases require consideration. The exclusive jurisdiction of Parliament in regard to railways falling within the description in s. 92(10) (*a*) and (*c*) was referred to in the judgment of Lord Watson in *C.P.R.* v. *Bonsecours* (2), in the following terms:—

> Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company.

A statement more closely in point occurs in the judgment in the Contracting-out Case: *Grand Trunk Railway* v. *Attorney General for Canada* (3), where Lord Dunedin said in part (p. 68):—

> It seems to their Lordships that, inasmuch as these railway corporations are the mere creatures of the Dominion Legislatures—which is admitted—it cannot be considered out of the way that the Parliament which calls them into existence should prescribe the terms which were to regulate the relations of the employees to the corporation. It is true that, in so doing, it does touch what may be described as the civil rights of those employees. But this is inevitable, and, indeed, seems much less violent in such a case where the rights, such as they are, are, so to speak, all *intrafamiliam,* than in the numerous cases which may be figured where the civil rights of outsiders may be affected.

(1) [1937] A.C. 326 at 347. (2) [1899] A.C. 367, 372.
(3) [1907] A.C. 65.

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In *Paquet* v. *Pilots' Corporation (Quebec)* (1), the Corporation sued to recover from a pilot in Quebec Harbour his earnings as received under the terms of its statute of incorporation under the laws of the Province of Canada prior to Confederation. While the main question to be determined was as to whether the rights of the Pilots' Corporation under the statute of the Province of Canada by which it was incorporated survived, in view of the provisions of the *Canada Shipping Act* (R.S.C. 1906, c. 113) and an amendment to that Act (c. 48, S.C. 1914), the question as to whether these sections of the Dominion statute were *intra vires* was considered. Included in the powers vested in all pilotage authorities by s. 433 of the Act was the power to fix and alter the mode of remunerating the pilots and the amount of such remuneration. Viscount Haldane, delivering the judgment of the Judicial Committee, said that the introduction into s. 91 of the words "Navigation and Shipping" put the matter beyond question.

There is also to be considered a passage from the opinion of Duff J. (as he then was) in the 1925 Reference (2), which reads:—

> It is now settled that the Dominion, in virtue of its authority in respect of works and undertakings falling within its jurisdiction, by force of section 91, no. 29, and sec. 92, no. 10, has certain powers of regulation touching the employment of persons engaged on such works or undertakings. The effect of such legislation by the Dominion to execution of this power is that provincial authority in relation to the subject matter of such legislation is superseded, and remains inoperative so long as the Dominion legislation continues in force. There would appear to be no doubt that, as regards such undertakings—a Dominion railway, for example—the Dominion possesses authority to enact legislation in relation to the subjects dealt with in the draft convention. The only Dominion legislation on this subject to which our attention has been called is to be found in sec. 287 of the Railway Act of 1919, which confers authority on the Board of Railway Commissioners to make orders and regulations concerning the hours of duty of persons employed on railway subject to the jurisdiction of the Board, with a view to the safety of the public and of such employees. It is understood that no orders or regulations have been made in execution of this power; and in view of the fact that this enactment, creating this unexecuted power, appears to be the only Dominion legislation in existence on the subject matter of the draft convention, the primary authority of the province in relation to that subject matter remains, subject to the qualification mentioned, unimpaired and unrestricted.

(1) [1920] A.C. 1029. (2) [1925] S.C.R. 505 at 511.

The matter referred to did not expressly arise in the reference.

In the present case, Parliament has legislated by the Act under consideration, so that the question of an unoccupied legislative field does not arise. Since, however, the combined effect of head 29 of s. 91 and head 10 of s. 92 is, *inter alia*, that legislation in relation to railways connecting a province with any other or others of the provinces is exclusively within the powers of Parliament, the statement in the concluding sentence of the passage quoted is to be contrasted with what was said by Lord Watson in *Union Colliery Ltd.* v. *Bryden* (1), that the abstinence of the Dominion Parliament from legislating to the full limit of its powers could not have the effect of transferring to any provincial legislature the legislative power assigned to the Dominion by s. 91. It is also to be noted that in *C.P.R.* v. *Attorney General for British Columbia* (2), their Lordships refrained from expressing any opinion as to whether, if the Empress Hotel was part of the railway within Head 10(*a*) or (*c*) of s. 92, the provincial legislation would be effective.

The main purposes of *The Industrial Relations and Disputes Investigation Act* may be summarized as being the prevention of unfair labour practices, the setting up of machinery for the selection and certification of bargaining agents to represent employees and to facilitate collective bargaining, the settlement of disputes by conciliation proceedings and the prevention of strikes and lockouts for defined periods to enable such proceedings to be taken, the imposition of penalties for offences declared by the Act, and the provision of administrative machinery to facilitate its effective operation.

The first question is as to whether the Act applies in respect of the employees in Toronto of the Eastern Canada Stevedoring Co. Ltd. employed upon or in connection with the work, undertaking or business of the company as above described.

As to the stevedores, while the passages from the judgments of the Judicial Committee in the Bonsecours, Contracting-Out and Paquet's cases tend to support an affirmative answer, they are not, in my opinion, decisive upon the

(1) [1899] A.C. 588. (2) [1950] A.C. 122.

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issue raised in this part of the first question. The question of jurisdiction as to matters affecting the relations between railway companies and their employees was not one of the questions under consideration in *Bonsecours's* case and what was said by Lord Watson was not directed to that subject. The passage from the opinion delivered by Lord Dunedin in the *Contracting-Out* case, to which I have referred, should not, I think, be construed as meaning that it was due alone to the fact that the railway companies concerned had been incorporated by or under the provisions of Dominion statutes that Parliament was empowered to legislate in regard to the relations between the companies and their employees, since this would be to disregard the effect of Head 29 of s. 91 and Head 10(*a*), (*b*) and (*c*) of s. 92. As to *Paquet's* case, the work of pilots requiring them, as it does, to take an active part in the navigation of the ship, legislation affecting their relations with the ship owner or charterer falls so clearly under Head 10 that a contrary view seems untenable. I have reached my conclusion rather upon the ground that, upon the facts stated in the reference, it appears that the loading and unloading of cargo are part and parcel of the activities essential to the carriage of goods by sea, and that, as in the case of the seamen, legislation for the regulation of the relations between employers and employees is, in pith and in substance, legislation in relation to shipping.

Assuming as I do that the office staff referred to in paragraph 5 of the Order in Council consists of those employees who are engaged in the accounting or other office work incidental to the carrying on of the undertaking of the Eastern Stevedoring Co. Ltd., it is my opinion that the Act does not apply to them.

As I have indicated, it is my opinion that the question as to whether the provisions of the Act apply to a class of employees depends upon whether the services rendered are in relation to a matter as to which Parliament has jurisdiction. The office staff are not "employed upon" any such work, in my opinion. The following words "in connection with" should, I think, be construed as referring to services rendered by employees which by their very nature are necessarily incidental to activities subject to the legislative

control of Parliament, such as the services of those operating the winches who, in this occupation, are included in the designation of stevedores. The services rendered by the office staff cannot, in my judgment, be so classified.

The second question is as to whether the Act is *ultra vires* the Parliament of Canada, either in whole or in part.

The opening words of s. 53, as above stated, declare it to be applicable to persons employed upon or in connection with:—

> any work, undertaking or business that is within the legislative authority of the Parliament of Canada.

including those enumerated in subparagraphs (*a*) to (*h*) inclusive.

Fields of legislation assigned to Parliament by heads 1 to 28 inclusive of s. 91 contain no reference to works, undertakings or businesses as such. By reason, however, of head 29, certain works and undertakings referred to in s. 92(10) are made subject to the legislative authority of Parliament. These, it will be noted, are all included in the specific enumeration in the subparagraphs of s. 53.

Construing the word "work" as including a commercial enterprise, the words "work, undertaking or business" within the legislative authority of Parliament do not define a legislative field since there is no commercial business, enterprise, undertaking or business in this country that is not subject in some respects to the legislative authority of Parliament (as by way of illustration under the Income Tax Act), and also to the legislative authority of the province or provinces in which its activities are carried on (*John Deere Plow* v. *Wharton* (1)).

Some meaning should be assigned, however, to the language quoted and I have come to the conclusion that it should be construed as referring to enterprises, undertakings or businesses engaged in activities which fall within the legislative authority of Parliament under s. 91.

A more difficult question arises from the fact that by subparagraph (*a*) Part 1 is declared to apply in respect of employees engaged upon or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in

(1) [1915] A.C. 343.

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Canada. The word "inland" thus includes the operation of a shipping undertaking carried on exclusively within the limits of a province.

The fact that ferries between a province and any British or foreign country or between two provinces are assigned to the legislative jurisdiction of Parliament by head 13 of s. 91 at least indicates that ferries operating between points entirely within one province are excluded from the jurisdiction in relation to shipping in head 10. Further, head 29 of s. 91 refers to the classes of subjects expressly excepted in the enumeration of the classes of subject assigned exclusively to the legislatures of the provinces, and the enumeration in subparagraphs (*a*), (*b*) and (*c*) of head 10 of s. 92 does not include the undertakings of persons engaged in shipping activities confined within the limits of a province or the main or principal part of whose undertakings are so confined. In the latter classification I would include persons residents of ocean ports in Canada engaged in deep sea fishing, part of whose activities are carried on beyond the three mile limit.

I have come to the conclusion that, as to the latter, the exclusive power to make laws in relation to the industrial relations between employers and those employed in carrying on or assisting in carrying on their shipping activities is in the province.

Other than as to s. 53 I express no opinion as to whether Part II of the Act is within the powers of Parliament, since no argument was addressed to us as to the other sections in that Part of the statute.

For these reasons, I would answer the questions referred to us as follows:—

1. (*a*) As to stevedores, as defined in the order of reference: Yes.

   (*b*) As to the office staff referred to: No.

2. As to Part I thereof and as to s. 53: No, except as to employees engaged upon or in connection with works, undertakings or businesses operated or carried on for or in connection with shipping the activities of which are confined within the limits of a province, or upon works, undertakings or businesses of which the main or principal part is so confined.

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CARTWRIGHT J.:—The questions referred to this Court for hearing and consideration and the facts relevant thereto are sufficiently stated in the reasons of other members of the Court. It will be convenient to deal first with the second of the questions submitted to us.

It will be observed that Part I of the Act provides a basis for negotiation and collective agreement between employees and their employers as to methods, terms and conditions of employment, provides against unfair labour practices which might result in industrial unrest, provides methods and procedure for settling grievances between employees and their employers and makes strikes or lockouts unlawful in certain circumstances. While there are numerous differences of varying importance between the terms of the statute referred to us for consideration and those of the Industrial Disputes Investigation Act 1907, as amended, which was held, in *Toronto Electric Commissioners* v. *Snider* (1), to be *ultra vires* of Parliament, the cardinal difference relevant to the question of constitutional validity is that the application of Part I of the statute before us is strictly limited.

The first step is to determine to what employees Part I of the Act applies and this depends upon the construction of s. 53 which reads as follows:—

53. Part I applies in respect of employees who are employed upon or in connection with the operation of any work, undertaking or business that is within the legislatve authority of the Parliament of Canada including, but not so as to restrict the generality of the foregoing,

(*a*) works, undertakings or businesses operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada;

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

(*c*) lines of steam and other ships connecting a province with any other or others of the provinces or extending beyond the limits of a province;

(*d*) ferries between any province and any other province or between any province and any country other than Canada;

(*e*) aerodromes, aircraft and lines of air transportation;

(*f*) radio broadcasting stations;

(*g*) such works or undertakings as, although wholly situate within a province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces; and

(1) [1925] A.C. 396.

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(*h*) any work, undertaking or business outside the exclusive legislative authority of the legislature of any province;

and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employers' organizations composed of such employees or employers.

It is, I think, axiomatic that if words in a statute of Parliament (or of a legislature) are fairly suceptible of two constructions of which one will result in the statute being *intra vires* and the other will have the contrary result the former is to be adopted. With this in mind the words "in connection with" appearing in the second line of the section must be understood as meaning "connected in such manner with the operation of the work, undertaking or business referred to that the legislation contained in Part I of the Act when applied to the employees so described is in substance legislation in relation to the operation of such work, undertaking or business or necessarily incidental (to use the words of Lord Watson in *Attorney-General for Ontario* v. *Attorney-General for Canada* (1)) or truly ancillary (to use the words of Lord Dunedin in *Grand Trunk Railway* v. *Attorney-General for Canada* (2)) thereto." The words "in connection with" in the second line of clause (*a*) must be similarly construed with the result that clause (*a*) is to be understood as making Part I of the Act applicable to employees who are employed in works, undertakings or businesses operated or carried on in such manner that the legislation contained in Part I when applied to the employees so described is in substance legislation in relation to navigation and shipping whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada or legislation necessarily incidental or truly ancillary thereto.

Clause (*a*) so construed by its plain words makes Part I applicable to all employees who are employed *inter alia* in the operation of ships and transportation by ship anywhere in Canada and so to those employed for such purpose by the owners of a line of ships operated on inland waters wholly within the limits of one province. The power to make laws in relation to such a line of ships appears to be committed exclusively to the Provincial Legislature by s. 92 (10), for the excepting words of s. 92 (10) (*a*) are not apt to describe

(1) [1896] A.C. 348 at 360. (2) [1907] A.C. 65 at 68.

such a purely intra-provincial line. However by the combined effect of s.91 (10) and the concluding words of s. 91 there must be taken to be excepted from such provincial power to make laws in relation to navigation or shipping, subjects in relation to which exclusive legislative authority is committed to Parliament. In my view the actual operation of ships and the performance of such acts as are essential parts of "transportation by ship" fall within the words "navigation and shipping" in s. 91 (10) and so within the jurisdiction of Parliament even in the case of a purely intra-provincial line of ships.

The remaining clauses of s.53 do not appear to me to present difficulty. They describe works, undertakings and businesses in relation to all of which the exclusive legislative authority of Parliament extends by force of the words of s.91 and the decisions in *In re Regulation and Control of Radio Communication* (1) and *Johannesson* v. *West St. Paul* (2).

I realize that there may be cases in which it will be difficult to determine whether Part I is applicable to a particular group of employees but such difficulties are inherent in any federal system and must be left to be dealt with as they arise.

Having concluded that the proper construction of s.53 is as set out above, it follows that the whole of Part I of the Act is *intra vires*. Its application is limited to matters in the exclusive jurisdiction of Parliament and consequently it is without significance that it interferes with matters such as contractual relationships between employees and employers in the province, which would otherwise fall within the jurisdiction of the provincial legislatures. As was said by Lord Atkin in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (3).

> If then the legislation in question is authorized under one or other of the heads specifically enumerated in s. 91, it is not to the purpose to say that it affects property and civil rights in the Provinces. Most of the specific subjects in s. 91 do affect property and civil rights but so far as the legislation of Parliament in pitch and substance is operating within the enumerated powers there is constitutional authority to interfere with property and civil rights.

(1) [1932] A.C. 304. (2) [1952] 1 S.C.R. 292.
(3) [1931] A.C. 310 at 326, 327.

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While we are indebted to counsel for full and able arguments on the matters with which I have dealt above, nothing was said in argument as to the sections of the Act which follow s.53. I concur in what I understand to be the view of the majority of the Court that it is not desirable that we should express an opinion as to such sections without the benefit of argument and that if it is desired that we should deal with these sections counsel should be given an opportunity of presenting argument in regard to them.

Turning now to the first question referred to us, it will be observed that paragraph 2 of the recitals in the order of reference reads as follows:

> That the operations of the Company in Toronto during the navigation season in 1954—approximately April to November—consisted exclusively of services rendered in connection with the loading and unloading of ships pursuant to contracts with seven shipping companies to handle all loading and unloading of their ships arriving and departing during that season. All these ships were operated on regular schedules between ports in Canada and ports outside of Canada.

While this paragraph refers to the year 1954 it seems to me that our answer to the first question should be based on the assumption that the operations of the Company are as therein described. On this assumption it is my opinion that Part I of the Act when applied to employees who are employed in the operation of the undertaking of the Company is legislation in relation to shipping and not merely legislation incidental or ancillary thereto. The actual loading and unloading of ships is, in my view, an integral part of shipping.

It has been suggested that Part I of the Act may not be applicable to the office staff of the Company employed in Toronto. It will be observed that the members of the office staff were excluded from the operation of the Order of the Ontario Labour Relations Board of September 14, 1954, annexed to the Order of Reference and, perhaps for this reason, little information is given to us as to their duties. It appears to me, however, to be a reasonable assumption that the performance of their duties is necessary to the functioning of the Company and on such assumption I am of opinion that Part I would apply to them equally with those employees who are directly engaged in the work of physically moving cargo. The work of the office staff is, on the

assumption made above, an integral part of the operations of the Company considered as a whole and the sole purpose of such operations is the loading and unloading of ships plying between ports in Canada and ports outside of Canada.

For the above reasons I would answer the questions referred to us as follows:—

Question (1): Yes.

Question (2): Sections 1 to 53, inclusive, of the Industrial Relations and Disputes Investigation Act, R.S.C. 1952 Cap. 152, are *intra vires* of the Parliament of Canada. As to the remainder of the Act, for the reasons above set out, I wish to reserve my opinion until we have heard further argument.

FAUTEUX J.:—As to the validity. The provisions of the *Industrial Relations and Disputes Investigation Act,* R.S.C. 1952, c. 152, hereinafter referred to as the Act, indicate, when viewed comprehensively, that the Act aims mainly at the maintenance or securement of peaceful labour relations between employers and employees, the promotion of conditions favourable to settlement of labour disputes or, more precisely, at peaceful labour operations within this limited field of works, undertakings and businesses as to which the regulation by law is, under the *B.N.A. Act,* committed to the legislative authority of Parliament. Indeed and subject to a later comment as to ss. 54 to 71 inclusive, the will of Parliament to thus circumscribe the scope of application of the Act is made explicit, at first, in the opening phrase of the provisions of s. 53 reading:—

> 53. Part (1) applies in respect of employees who are employed upon or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada, including . . .

and again in the provisions under head (*h*) of the section. It is also to be necessarily implied from the general nature of the matters enumerated in the section under heads (*a*) to (*g*) inclusively, all of which come within such circumscribed area, either for the reason that they are referable to heads 10 or 13 of s. 91, or to head 10 of s. 92, and thus, by force of head 29 of s. 91, again to s. 91 of the *B.N.A. Act* or because, by binding judicial interpretation of the latter,

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(*In Re Regulation and Control of Radio Communication in Canada* (1); *Johannesson and the Rural Municipality of West St. Paul and the Attorney-General of Manitoba and the Attorney-General of Canada* (2), they were declared to be within the legislative authority of Parliament.

These considerations, relevant particularly to the interpretation of the Act, may conveniently be completed with the immediate examination and determination of two arguments advanced in support of the submission of invalidity:

(i) It was suggested that the words "or in connection with" appearing at first in the opening phrase of the section and again under head (*a*) thereof reading:—

> (*a*) Works, undertakings or businesses operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada.

may very well be construed as extending the application of the Act to persons not engaged in "any work, undertaking or business that is within the legislative authority of the Parliament of Canada"; with the alleged consequence that, failing the effectiveness of the limitation, placed on the application of the Act in order not to offend against the decision of the Judicial Committee in *Toronto Electric Commissioners* v. *Snider* (3), the Act, for that reason alone, would be to that extent, if not in its entirety, *ultra vires*. Whatever be, in this respect, the construction given to the provisions under head (*a*), considered out of the context of the section in which they are inserted, is not material for the provisions under heads (*a*) to (*h*), construed as they should be with the whole section, are all clearly controlled by the opening phrase thereof; hence, the operation of any of the provisions under the various heads of s. 53 which may by interpretation cover a field extending beyond the scope indicated in the governing phrase, is restricted by the latter and, to that extent, these provisions become ineffective. Being then considered, the governing phrase of the section shows that the limitative feature, therein expressed by the words "that is within the legislative authoirty of the Parliament of Canada", is directly related to "any work, undertaking or business", whether it be one "upon which" an

(1) [1932] A.C. 304. (2) [1952] 1 S.C.R. 292.
(3) [1925] A.C. 396.

employee, within the meaning of s. 2(i), is employed, or whether it be one "in connection with the *operation* of which" —and not in connection with which— he is employed. *In Lawson* v. *The Wallasey Local Board* (1), the expression "anything in connection with this contract" was, in effect, held by Denman J., as he then was, to mean: anything *"part of or necessarily connected with the contract"*. Under a like construction, consistent with the limiting feature in the governing phrase, the employment therein referred to would then be employment upon such work, undertaking or business that is within the legislative authority of the Parliament of Canada or *employment as to part of or necessarily connected with the operation of such work, undertaking or business.* Hence the effectiveness of the limitation is unaffected by the words "in connection with" appearing in the governing provision of the section and, therefore, under the controlled provisions of head (*a*).

(ii) It is also argued that the closing words of the provisions under head (*a*) i.e., "anywhere in Canada" extend the application of the Act to shipping activities exclusively intraprovincial and that, on the view—with which I agree— that there is no power in Parliament to deal with such local activities, the Act would be, to that extent, *ultra vires.* Again, however, such provisions must be construed with the whole section and, controlled as they are by the governing phrase thereof, must then be held to be inoperative beyond the scope therein indicated. Hence against the effectiveness of the limitation remains unaffected.

The enunciation of the principle of limitation with a consequential duty for the Courts to pronounce as to the operation or the application of the Act in each of the cases as they may arise, appears to be a prudent, practical and yet valid legislative technique to adopt, in a Federal state, in relation to such a wide embracing and complex matter. The possible difficulties there may be in the judicial determination of each case leave untouched the true character of the limitation, the enactment of which clearly manifests the will of Parliament to legislate within its own field. And constitutionally, this will must be held to have been validly implemented in the Act if, as it must now be considered, the

(1) (1883) L.R. 11 Q.B.D. 229 at 239.

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Act thus construed is, as submitted on behalf of the Attorney-General of Canada particularly, legislation truly *in relation to* classes of subjects within the legislative competence of Parliament.

Obviously, for the effectuation of its aim, i.e., peaceful labour operations in these works, undertakings and businesses within the above description, Parliament had to and did effectively assume, under the Act, the regulation of certain civil rights of employers and employees engaged in such field. Hence the submission of invalidity based on this legal effect of the provisions of the Act. That "Most of the specific subjects in s. 91 do affect property and civil rights . . ." has already been pointed out by Lord Atkin in *Proprietary Articles Trade Association* v. *Attorney-General of Canada* (1); and, as he goes on to say, ". . . but so far as the legislation of Parliament in pith and substance is operating within the enumerated powers, there is constitutional authority to interfere with property and civil rights." In the *Labour Conventions* case (2), it was admitted at bar that once it is shown, as here, that a statute of Parliament affects property and civil rights, it is for the central authority to establish that nevertheless the statute is validly enacted under its legislative powers and this admission was acted upon in the matter by Lord Atkin who delivered the judgment for the Judicial Committee. Amongst other methods, such burden may be discharged in certain cases by showing that the impugned legislation is, of necessity, legislation incidental to the power to legislate in relation to one or more of the subjects within its own legislative competence. In *Toronto Electric Commissioners* v. *Snider* (*supra*), the statute considered, which was the predecessor to the Act, did, in a like matter and in a manner substantially similar, interfere with property and civil rights of employers and employees. There was, however, as to the application of the legislation, no limitation of a character such as the one found in the present Act. Ultimately, the question considered was whether this interference constituted the purpose of the legislation or was it merely incidental to other purposes within the legislative competence of Parliament. It being found that either the evidence adduced in the record or the statute itself manifested no

(1) [1931] A.C. 310 at 327. (2) [1937] A.C. 326.

purpose other than the one indicated by the legal effect of its provisions, i.e., interference with property and civil rights, the legislation was declared *ultra vires*. Under the present legislation however, the limitation, resting moreover in its essence formally on constitutional grounds, evidences a purpose other than the one indicated by the legal effect of its provisions, i.e., the promotion of peaceful labour operations in works, undertakings and businesses strictly within the legislative competence of Parliament. And while a like conclusion may not be reached in all of the cases where a similar pattern of legislative action is adopted, in the present matter I think that ". . . the legislation of Parliament in pith and substance is operating within the enumerated powers . . ." of Parliament. The right of Parliament to assume regulation touching the employment of persons engaged in works and undertakings falling within its jurisdiction, has already been considered and affirmed judicially. (*Paquette and another* v. *Corporation of Pilots For and Below the Harbour of Quebec and Attorney-General of Canada* (1) (1920) A.C. 1029; *In the Matter of Legislative Jurisdiction Over Hours of Labour* (2)) (1925) S.C.R. 505.

With respect to ss. 54 to 71 inclusive of the Act, no argument was made; and following precedents adopted in like circumstances in this Court, nothing is said.

As to the applicability. Stevedoring is an operation "part of or necessarily connected with" the operation of shipping. It is the business in which the Eastern Canada Stevedoring Company Limited, in Toronto, is engaged and this with respect to ships operated on regular schedules between ports in Canada and ports outside of Canada. As this is, under head 10 of s. 91 and head 10 of s. 92 of the B.N.A. Act, of federal concern exclusively, the Act applies to the company and such employees thereof who, qualifying as such under s. 2 (i) of the Act, are engaged in stevedoring operations.

For these reasons, I would answer the questions referred to us as follows:—

Question (1): Yes.

Question (2): No, subject to the reserve indicated as to ss. 54 to 71 inclusive.

(1) [1920] A.C. 1029. (2) [1925] S.C.R. 505.

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ABBOTT J.:—The Governor in Council, by Order in Council of November 18, 1954, referred the following questions to this Court for hearing and consideration:—(See p. *supra*).

The relevant facts are set out in the preamble to the Order in Council, and briefly are as follows.

The Eastern Canada Stevedoring Co., Ltd., provides stevedoring services at the port of Toronto for companies operating ships exclusively in foreign trade. Its services consist of the loading and unloading of the cargo of these ships and include storing for short periods, cargo which is about to be loaded or which has just been taken from the ship. The ship's officers have the direction and authority over the loading and unloading of cargo, and the stevedoring services are provided under the terms of a contract with the shipowners, the stevedoring company having no contractual or other relationship with the shippers or consignees.

The Industrial Relations and Disputes Investigation Act, R.S.C. 1952, c. 152, was originally enacted in 1907 and was an Act of general application. Following the decision of the Judicial Committee in *Toronto Electric Commissioners* v. *Snider* (1), the Act was amended to restrict its application to what might be described generally as "federal activities". The present Act, which in its essential features is the same as the 1925 Act, was passed in 1948 and is c. 54 of the Statutes of that year.

The general purpose of the Act is indicated by the long title, which reads:—"An Act to provide for the Investigation, Conciliation and Settlement of Industrial Disputes". It provides a basis for negotiation between employers and employees as to terms and conditions of employment, contains provisions designed to eliminate unfair labour practices, provides methods and procedure for settling grievances and makes strikes and lockouts unlawful except under special circumstances.

The Act is divided into two Parts; Part I which contains the operative provisions and Part II which deals with application and administration.

(1) [1925] A.C. 396.

Section 53, which purports to limit the application of Part I to works, undertakings and businesses within the legislative authority of Parliament, reads as follows:—

53. Part I applies in respect of employees who are employed upon or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada including, but not so as to restrict the generality of the foregoing.

(*a*) works, undertakings or businesses operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada;

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

(*c*) lines of steam and other ships connecting a province with any other or others of the provinces or extending beyond the limits of a province;

(*d*) ferries between any province and any other province or between any province and any country other than Canada;

(*e*) aerodromes, aircraft and lines of air transportation;

(*f*) radio broadcasting stations;

(*g*) such works or undertakings as, although wholly situate within a province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces; and

(*h*) any work, undertaking or business outside the exclusive legislative authority of the legislature of any province;

and in respects of the employers of all such employees in their relations with such employees and in respect of trade unions and employers' organizations composed of such employees or employers.

It seems clear that the loading and unloading of ships (often referred to as stevedoring when done by men who are not members of the ship's crew) is an essential part of the transportation of goods by water. As such, in my opinion, it comes within the exclusive legislative authority of Parliament under head 10 of s. 91 of the British North America Act "Navigation and Shipping", which term, as Viscount Haldane said in the *Montreal Harbour Commissioners Case* (1), is to be widely construed. I should add, however, that in my view, except in such aspects as may relate to the navigation of the vessel, the combined effect of heads 10, 13 and 29 of s. 91 and head 10 of s. 92 is to exclude from federal jurisdiction shipping which is purely local in character such as a ferry or a line of ships operating wholly within the limits of one province.

(1) [1926] A.C. 299 at 312.

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The right to strike and the right to bargain collectively are now generally recognized, and the determination of such matters as hours of work, rates of wages, working conditions and the like, is in my opinion a vital part of the management and operation of any commercial or industrial undertaking. This being so, the power to regulate such matters, in the case of undertakings which fall within the legislative authority of Parliament lies with Parliament and not with the Provincial Legislatures.

Since in my view the undertaking or business of Eastern Canada Stevedoring Co., Ltd., is one which is clearly within the legislative authority of Parliament, I would answer the first question in the affirmative.

I am also of opinion that s. 53, which I have quoted, does limit the application of Part I of the Act to works, undertakings and businesses which are within the legislative authority of Parliament. It remains to be determined in each individual case, of course, whether a particular work, undertaking or business is, in fact, within such authority.

I would answer the second question referred in the negative.

THE ATTORNEY GENERAL FOR QUEBEC ..... APPELLANT;

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*Jun. 7
*Jun. 28

AND

RENE BEGIN ..... RESPONDENT.

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

Criminal Law—Manslaughter—Blood test—Obtained without a warning—Whether confession-rule and privilege-rule applicable—Admissibility of test—Whether s-ss. 4(d) and 4(e) of s. 285 of Criminal Code applicable.

The respondent was charged under ss. 262 and 268 of the *Criminal Code* and convicted of motor-manslaughter. At the trial, the Crown, to prove intoxication, tendered evidence of a blood test taken of the accused while he was in custody. His consent had been obtained but he had not been warned that it might be used in evidence against him. Considering that this evidence had been illegally admitted, the Court of Appeal ordered a new trial. The Crown obtained leave to appeal to this Court on the following questions of law: (1) Was the Court of Appeal right in deciding that s-ss. 4(*d*) and 4(*e*) of s. 285 of the Code enacted in 1951 had no application, and (2) in deciding that a warning was necessary in this case.

Held: The appeal should be allowed and the conviction restored. Cartwright J. would have referred the matter back to the Court of Appeal for disposal of a ground of appeal and of the appeal as to sentence which that Court had found unnecessary to consider and which were not argued in this Court.

Per Kerwin C.J. and Abbott J.: The evidence of the blood test was admissible, and would have been even if the accused had not been asked and had not given his consent. The matters of admissibility of statements or admissions and self-incrimination are entirely distinct. In taking a blood test, the accused does not say anything because he is not asked any questions.

S-ss. 4(*d*) and 4(*e*) of s. 285, enacted in 1951, have no application. The accused was charged with manslaughter under a different section of the Code. The contention that the mere fact that Parliament had provided as it did by these two subsections indicated that it was not prepared to enact the same provisions with reference to charges other than those dealt with by these subsections, cannot prevail. In 1951, Parliament was confining itself to the offences described in s-ss. 4 and 4(*a*).

Per Taschereau, Cartwright and Fauteux JJ.: Under the general law, as it was before the addition of s-s. 4(*d*) of s. 285 of the Code, evidence of a blood test taken without a warning is admissible. The contrary view is based on a misapprehension of the reason and object of the confession-rule and of the privilege-rule both of which are related to the very substance of the declarations made respectively by an

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

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accused or a witness. The taking of a blood test does not give rise to the application of these rules nor does the fact that while the method used to obtain a blood test might be illegal and give rise to civil or criminal recourses, renders, per se, inadmissible the evidence resulting therefrom. There does not appear to be in the amendment of 1951 any intention to change the general law on that point.

APPEAL by the Crown from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), ordering a new trial in a case of manslaughter arising out of the driving of an automobile.

Lucien Thinel, Q.C. for the appellant.

Raymond Daoust for the respondent.

The judgment of Kerwin C.J. and Abbott J. was delivered by:—

THE CHIEF JUSTICE:—The respondent was charged that, while driving an automobile, "par son incurie et sa négligence illégalement causé la mort de trois piétons, savoir: Paul Emile Dorion, Zenon Longpré & John Hudak, commettant ainsi un acte criminel, savoir: un homicide involontaire 'manslaughter', le tout tel que décrit aux articles 262 et 268 du Code Criminel". He was found guilty by a jury and sentenced to twenty-three months in jail and an Order was made prohibiting him from driving a motor vehicle anywhere in Canada for seven years. The Court of Queen's Bench (Appeal Side) (1) set aside the conviction and directed a new trial. By an Order of a Member of this Court, leave was granted to the Attorney General of Quebec to appeal from that decision on the following questions of law:—

1. Was the Court of Appeal right in deciding that subsections 4(*d*) and 4(*e*) of section 285 of the Criminal Code as enacted in 1951 had no application in the circumstances of this case in view of the fact that the accused was not charged under the said section 285 but was charged with manslaughter?

2. Was the Court of Appeal right in deciding that on a charge of manslaughter, evidence as to a blood test to which the accused submitted, is only admissible, if the accused has been warned that it might be used in evidence against him?

(1) (1955) 21 C.R. 33.

As appears from the second question, the accused had consented to a blood test, but he had not been warned that it might be used in evidence against him. Before considering s-ss. 4(*d*) and 4(*e*) of s. 285 of the *Criminal Code*, as enacted in 1951, it might be noted that there has been a divergence of opinion in Canada on the point mentioned in question 2. In *Rex* v. *Ford* (1), Boyd McBride J., of the Alberta Supreme Court, while finding that the accused did consent and that an adequate warning had been given, considered that the rules governing the admissibility of statements, or confessions, of an accused person applied, or at least should be followed. In Ontario in *Rex* v. *McNamara* (2), Schroeder J. decided that there was no analogy between the taking of a blood sample without consent and the taking of a statement which was not voluntary. The Court of Appeal for Ontario unanimously affirmed that decision which was followed by Egbert J. in *Rex* v. *McIntyre* (3). In the meantime, Roy J. of the Court of Sessions of the Peace of Quebec, in *Rex* v. *Frechette* (4), had decided that the same rule did apply, stating:

> A blood test constitutes an attack upon the human body and it is not within the power of a Judge to order it if the law does not authorize it.

An appeal to the Court of Queen's Bench (Appeal Side) (5) was dismissed without reasons. In 1949 Marquis J. in *Rex* v. *Gagnon* (6), refused to admit evidence of the result of a blood test.

In the present case the accused consented, but I agree with the judgment in the McNamara case that even if he had not been asked and therefore had not consented the evidence would be admissible. To the same effect is the judgment of the Court of Criminal Appeal in England in *Rex* v. *Nowell* (7). It was not suggested in that case that force had been used to examine Nowell and there is no suggestion in the present case that any force had been exercised. As stated by the Judicial Committee of the Privy Council in *Kuruma* v. *The Queen* (8):

> . . . the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue.

(1) (1948) 90 C.C.C. 230.
(2) (1951) 99 C.C.C. 107; D.R. 6.
(3) (1952) 102 C.C.C. 104.
(4) (1949) 93 C.C.C. 111.
(5) (1949) 94 C.C.C. 392.
(6) (1951) 11 C.R. 189.
(7) [1948] 1 All E.R. 794.
(8) [1955] A.C. 197 at 203.

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And at p. 204, it was pointed out that

> . . . when it is a question of the admission of evidence strictly it is not whether the method by which it was obtained is tortious but excusable but whether what has been obtained is relevant to the issue being tried.

It was stated in that case and, I repeat, we "are not now concerned with whether an action for assault would lie against the police officers and express no opinion on that point".

In my view a confusion has arisen between the rules as to the admissibility of statements, or admissions, and those relating to self-incrimination. In taking a blood test the accused does not say anything because he is not asked any question. Nothing in this judgment is to be taken as weakening the effect of the rules as to the admissibility of statements, or admissions, because the two matters are entirely distinct.

The amendments in 1951 to the *Criminal Code* have no application. S-s. (4) of s. 285 had already provided for the offence of driving, etc., while intoxicated or under the influence of any narcotic. In 1951 s-s. 4(*a*) created a new offence generally known as impaired ability to drive. S-s. 4 and s-s. 4(*a*), so far as relevant, are as follows:—

> (4) Every one who, while intoxicated or under the influence of any narcotic, drives any motor vehicle or automobile, or has the care or control of a motor vehicle or automobile, whether it is in motion or not, shall be guilty of an offence, and shall be liable . . .
>
> (4*a*) Every one who, while his ability to drive a motor vehicle or automobile is impaired by alcohol or any drug, drives any motor vehicle or automobile, or has the care or control of a motor vehicle or automobile, whether it is in motion or not, is guilty of an offence and liable upon summary conviction or upon conviction under indictment.

S-ss. 4(*d*) and 4(*e*) (also enacted in 1951) read:—

> 4(*d*) In any proceedings under subsection four or four *a* the result of a chemical analysis of a sample of the blood, urine, breath or other bodily substance of a person may be admitted in evidence on the issue whether that person was intoxicated or under the influence of a narcotic drug or whether his ability to drive was impaired by alcohol or a drug, notwithstanding that he was not, before he gave the sample, warned that he need not give the sample or that the results of the analysis of the sample might be used in evidence.
>
> (4*e*) No person is required to give a sample of blood, urine, breath or other bodily substance for chemical analysis for the purposes of this section and evidence that a person refused to give such a sample or that such a sample was not taken is not admissible nor shall such a refusal or the fact that a sample was not taken be the subject of comment by any person in the proceedings.

In the present case the accused was charged with manslaughter under a different section of the Code. Counsel for the accused argued that the mere fact that Parliament had provided as it did by s-ss. 4(*d*) and 4(*e*) indicated that it was not prepared to enact the same provisions with reference to charges other than those dealt with by those subsections. In my opinion, this contention is not entitled to prevail. In 1951 Parliament was confining itself to the offences described in s-ss. 4 and 4(*a*).

The appeal should be allowed and the Order of the Court of Queen's Bench (Appeal Side) set aside. At the argument counsel did not suggest that, if the Court came to this conclusion, the conviction should not be restored and it should be so ordered.

CARTWRIGHT J.:—For the reasons given by my brother Fauteux, I agree with his conclusion that the Court of Queen's Bench, Appeal Side, erred in law in holding that the evidence of the result of the analysis of a sample of the respondent's blood was illegally admitted at the trial. It remains to consider what order should be made.

As is pointed out by my brother Fauteux, the appeal to the Court of Queen's Bench against the conviction was based on three grounds. That Court rejected the first ground, gave effect to the second, and so found it unnecessary to consider the third. The judgment of the majority of this Court in *The Queen* v. *McKay* (1) indicates that, in deciding what order we should make, we have jurisdiction to consider this third ground; but in my view it is not desirable that we should do so in this case as, in regard to it, we have had neither the benefit of the expression of opinion by the learned Justices of the Court of Queen's Bench nor the assistance of the argument of counsel.

For these reasons I would direct that the judgment of the Court of Queen's Bench be set aside and that the matter be referred to that Court to dispose of the third ground of appeal against the conviction and such appeal as there may be as to sentence.

(1) [1954] S.C.R. 3.

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

FAUTEUX J.:—Accusé et trouvé coupable d'avoir, dans la nuit du 24 au 25 avril, 1953, dans le district de Terrebonne, province de Québec, illégalement causé la mort de trois piétons, en conduisant un véhicule moteur, l'intimé en appela du verdict sur des points libellés comme suit:—

(i) La preuve telle que faite ne justifie pas la condamnation de l'accusé;

(ii) L'admission en preuve de la prise de sang faite sur l'accusé n'a été précédée d'aucun avis ni mise-en-garde et constitue une confession irrégulière et nulle;

(iii) L'Honorable Juge a erré dans la directive de droit et de fait aux jurés;

La Cour d'Appel (1) a rejeté le premier grief comme mal fondé. Le troisième, qui ne comporte d'ailleurs aucune précision, n'a fait l'objet d'aucun prononcé; on n'a pas cherché à le justifier devant nous; et, à l'examen, les directives données par le savant Juge au procès ne révèlent aucune illégalité. Sur le second moyen, cependant, la Cour d'Appel (1) en est venue à la conclusion que l'admission de la preuve résultant de la prise de sang était illégale. D'où le maintien de l'appel et l'ordonnance d'un nouveau procès.

Le Procureur Général se pourvoit maintenant contre ce jugement, après avoir obtenu permission de ce faire, sur deux questions de droit ainsi formulées:—

(i) Was the Court of Appeal right in deciding that subsections 4(*d*) and 4(*e*) of section 285 of the Criminal Code as enacted in 1951 had no application in the circumstances of this case in view of the fact that the accused was not charged under the said section 285 but was charged with manslaughter?

(ii) Was the Court of Appeal right in deciding that on a charge of manslaughter, evidence as to a blood test to which the accused submitted, is only admissible, if the accused has been warned that it might be used in evidence against him?

Au jugement formel de la Cour d'Appel apparaissent les considérants suivants sur lesquels se fonde cette conclusion sur l'inadmissibilité de la preuve précitée:—

CONSIDERING that the only provisions of the Criminal Code relating to the admission of blood tests in evidence are set out in subsections 4(*d*) and 4(*e*) of Section 285 thereof added in 1951 by the Statute 15 George VI, Chapter 47, Section 14;

(1) (1955) 21 C.R. 33.

CONSIDERING that the said statutory provisions are only concerned with driving offences under Section 285 of the Criminal Code;

CONSIDERING that as the said sub-sections provide that no warning is required in connection with the said offences under Section 285, it must be assumed that a warning is required where the more serious charge of manslaughter is concerned;

CONSIDERING that although Appellant's consent to the blood test was obtained in the present instance he was not warned that it might be used in evidence against him;

CONSIDERING, therefore, that such evidence was illegally admitted and that a new trial should accordingly be ordered;

Ces considérants résument fidèlement les raisons de jugement de M. le Juge Hyde, auxquelles les autres membres de la Cour ont souscrit, et manifestent clairement, sur la question de droit à déterminer, la *ratio decidendi* du jugement *a quo*. En somme, on se réfère principalement au paragraphe 4(*d*) de l'article 285 prescrivant:—

Dans des procédures prévues par le paragraphe quatre ou quatre-a, le résultat d'une analyse chimique d'un échantillon du sang, de l'urine, de l'haleine ou autre substance corporelle d'une personne peut être admis en preuve sur la question de savoir si cette personne était en état d'ébriété ou sous l'influence d'un narcotique, ou si sa capacité de conduire était affaiblie par l'alcool ou une drogue, bien qu'avant de donner l'échantillon cette personne n'ait pas été avertie qu'elle n'était pas tenue de le donner ou que les résultats de l'analyse de l'échantillon pourraient servir en preuve.

On interprète ensuite cette disposition tout comme si, en raison de ce qui y est dit relativement à la mise en garde, le Législateur entendait pourvoir, à titre de principe nouveau, à l'établissement d'une dispense de la donner et non pas comme s'il entendait simplement indiquer *ex abundanti cautela* que l'absence de mise en garde n'affecte pas l'opération du paragraphe de l'article. Et du fait qu'on interprète la disposition comme n'ayant d'application que dans le cas d'offenses concernant la conduite d'un véhicule moteur, sous l'article 285, on conclut qu'il faut nécessairement inférer que, dans l'éventualité où cette conduite en violation des dispositions du même article 285, a comme conséquence la mort d'une personne, et qu'une accusation d'homicide involontaire s'ensuit, la mise en garde est de rigueur. En définitive, on applique la maxime *expressio unius est exclusio alterius.*

A mon avis et an toute déférence, la légalité de l'admissibilité en preuve des conclusions de l'expertise, résultant d'une prise de sang, non précédée de mise en garde, ne fait aucun doute sous la loi générale, telle qu'elle était avant et

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telle qu'elle est demeurée après l'addition du paragraphe 4(*d*) de l'article 285. Et si ces vues sont fondées, ainsi que je tenterai de le démontrer, il en résulte qu'il devient inutile pour les fins de cet appel, de décider la première question de droit sur laquelle permission d'appeler a été donnée; car si les prescriptions du paragraphe 4(*d*) de l'article 285 ne s'appliquent pas dans le cas d'homicide involontaire, c'est la loi générale qui régit et, dès lors, la preuve est admissible; et si, au contraire, ces mêmes prescriptions s'appliquent dans le cas d'homicide involontaire, la mise en garde n'est pas nécessaire. Dans les deux cas, le résultat est le même et l'appel doit être maintenu.

La loi avant l'addition au Code Criminel du paragraphe 4(*d*) de l'article 285. La jurisprudence canadienne sur le point s'est divisée. D'une part, invoquant l'inviolabilité de la personne de l'accusé, les règles gouvernant l'admissibilité de ses aveux extrajudiciaires et le principe *nemo tenetur seipsum accusare,* on a conclu que les règles régissant l'admissibilité des aveux s'appliquaient ou, au moins, devaient être suivies, faute de quoi le rapport au procès des conclusions de l'expertise résultant de la prise de sang était inadmissible. (*Rex* v. *Ford* (1); *Rex* v. *Fréchette* (2); *Rex* v. *Gagnon* (3)). D'autre part, on a jugé qu'il n'y avait aucune analogie entre la prise de sang sans consentement et la prise d'une déclaration ou d'une confession non volontaire et que, ni cette théorie de l'inviolabilité de la personne d'un accusé, ni le principe *nemo tenetur seipsum accusare* ne pouvaient justifier la conclusion d'inadmissibilité de cette preuve. (*Rex* v. *McNamara* (4), confirmée par la Cour d'Appel d'Ontario (5), *Rex* v. *McIntyre* (6)).

La source du conflit, dans la jurisprudence canadienne, paraît procéder d'une méprise par les tenants du premier groupe et non du second, sur la raison et l'objet de la règle excluant les aveux extrajudiciaires de l'accusé et la raison et l'objet de la maxime *nemo tenetur seipsum accusare,* assurant à une personne contrainte par la loi de répondre à des questions, le privilège de faire l'objection qui aura pour effet d'empêcher que la réponse donnée ne soit utilisée contre elle. La raison et l'objet de ces deux principes, aussi

(1) (1948) 90 C.C.C. 230.
(2) (1949) 93 C.C.C. 111.
(3) (1951) 11 C.R. 189.
(4) (1951) 99 C.C.C. 107.
(5) (1951) 99 C.C.C. 110.
(6) (1952) 102 C.C.C. 104.

bien que la différence existant entre eux, sont, de façon concise, indiqués comme suit dans Wigmore, On Evidence, Vol. 3, 3e éd. (1940) à la page 250:—

> The sum and substance of the difference is that the confession-rule aims to exclude self-criminating statements which are false, while the privilege-rule gives the option of excluding those which are true.

Dans les deux cas, on ne vise donc que des déclarations, soit celles d'un accusé dans le premier cas et celles d'un témoin dans le second. Et par application de ces règles, les aveux extrajudiciaires de l'accusé, faits à des personnes en autorité, ne sont admissibles que lorsqu'ils sont volontaires; l'accusé ne peut être contraint à rendre témoignage dans son procès, et la personne qui est contrainte par la loi à répondre peut, en faisant objection, se protéger contre l'usage futur de la réponse qu'elle donne. Bref, ces règles n'ont d'autre objet que la substance même des déclarations faites verbalement, par écrit ou par signes, par l'accusé ou les témoins. Aussi bien, et dans *Rex* v. *Voisin* (1), la Cour d'Appel d'Angleterre déclarait admissible en preuve un écrit fait de la main de l'accusé et requis d'icelui par la police, uniquement pour fins de comparaison avec un document trouvé sur les lieux du crime et ce, nonobstant le fait que l'accusé était détenu et qu'aucune mise en garde ne lui avait été faite. Au cours de l'argument, à la page 533, l'un des membres de la Cour signalait:—

> There is a difference between the admissibility of a statement and the admissibility of handwriting. A statement may be made under such circumstances that the true facts are not brought out, but it cannot make any difference to the admissibility of handwriting whether it is written voluntarily or under the compulsion of threats.

Et on jugea que:—

> The mere fact that the words were written at the request of police officers, or that he (the accused) was being detained at Bow Street, does not make the writing inadmissible evidence. Those facts do not tend to change the character of handwriting, nor do they explain the resemblance between his handwriting and that upon the label, or account for the same misspellings occurring in both.

Dans *Rex* v. *Nowell* (1), la même Cour déclarait admissible en preuve le récit d'un examen clinique du médecin de la police, bien que cet examen ait été fait sans le consentement de l'accusé, sans mise en garde et alors qu'en raison de son ébriété, Nowell ne pouvait validement consentir.

(1) [1918] 1 K.B. 531. (2) 32 C.A.R. 173.

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Dans les deux causes précitées, la Cour d'Appel d'Angleterre n'a donc pas jugé qu'il y avait lieu, en pareils cas, d'appliquer la règle relative aux aveux ou la maxime *nemo tenetur seipsum accusare.* Elle n'a davantage donné effet à cette théorie de l'inviolabilité de la personne dont il est question dans *Rex* v. *Fréchette* (*supra*). Je ne sache pas non plus qu'on ait jamais, pour ces motifs, exclu, comme inadmissible, de la preuve au procès, le rapport de faits incriminant définitivement l'accusé et que lui-même supplée involontairement, tel que par exemple:—sa tenue, sa démarche, son vêtement, sa façon de parler, son état de sobriété ou d'ébriété; son calme, son énervement ou son hésitation, ses marques d'identité, son identification lorsqu'à ces fins il est mis en ligne parmi d'autres personnes; la présence sur lui-même d'objets volés ou d'objets dont la possession uniquement constitue une infraction à la loi et donne lieu à des poursuites criminelles, telle la possession de narcotiques, de spiritueux illégalement manufacturés ou importés, et autres. Sans doute, la méthode employée pour l'obtention de certaines de ces preuves peut, dans certains cas, être illégale et même donner lieu à des recours d'ordre civil ou même criminel, contre ceux qui l'ont utilisée, mais on ne discute plus de la proposition voulant qu'en ces cas, l'illégalité entachant la méthode d'obtention de la preuve n'affecte pas, *per se,* l'admissibilité de cette preuve au procès.

Telle était la situation de la loi, au moment de l'amendement apporté à l'article 285, sur l'admissibilité en preuve des conclusions d'une expertise aux fins de laquelle un accusé a contribué en fournissant, sans avoir été mis en garde, les éléments nécessaires à sa tenue.

Depuis lors, il a déjà été jugé que les dispositions des paragraphes 4(*d*) et 4(*e*) de l'article 285 n'avaient pas affecté cette situation de la loi. (*Rex* v. *Baker* (1)). En l'espèce et comme déjà indiqué, la Cour d'Appel, pour en arriver à une vue contraire, a appliqué la maxime *expressio unius est exclusio alterius.* En tout respect, je dois dire qu'à mon avis, la maxime est inapplicable à l'espèce. Dans l'amendement, je ne vois aucune intention de changer la loi générale sur le point. Au surplus, et sur l'application

(1) (1952) 102 C.C.C. 295.

de la maxime, la citation suivante extraite de Maxwell "On Interpretation of Statutes", 9e éd., 318, me paraît pertinente:—

> Provisions sometimes found in statutes enacting inperfectly or for particular cases only that which was already and more widely the law have occasionally furnished ground for the contention that an intention to alter the general law was to be inferred from the partial or limited enactment, resting on the maxim *expressio unius est exclusio alterius*. But that maxim is inapplicable in such cases. The only inference which a Court can draw from such superfluous provisions (which generally find a place in Acts to meet unfounded objections and idle doubts), is that the Legislature was either ignorant or unmindful of the real state of the law, or that it acted under the influence of excessive caution. If the law be different from what the Legislature supposed it to be, the implication arising from the statute, it has been said, cannot operate as a negation of its existence, and any legislation founded on such a mistake has not the effect of making that law which the Legislature erroneously assumed to be so.

En somme, l'intimé, tel que noté par la Cour d'Appel, a consenti à la prise de sang; ce consentement, il l'a donné quelque quatre heures après son arrestation, à un moment où, suivant l'expertise même du docteur Roussel, il n'était affecté que d'une légère ébriété et n'était pas, pour cette raison, empêché de donner un consentement valide; il avait, de plus, été clairement informé qu'il n'y avait aucune obligation pour lui de se soumettre à cette expertise. C'est là la cause que nous avons à juger. En de telles circonstances et pour les raisons ci-dessus, il m'est impossible de conclure que le savant Juge au procès, M. le Juge Prévost, a illégalement permis que le résultat de cette expertise soit porté à la connaissance des jurés.

Je maintiendrais l'appel, annulerais le jugement de la Cour d'Appel et rétablirais le verdict de culpabilité rendu par les jurés.

Appeal allowed; conviction restored.

Solicitor for the appellant: *L. Thinel.*

Solicitor for the respondent: *R. Daoust.*

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*Mar. 25
*May 24

THE FIRESTONE TIRE & RUBBER COMPANY OF CANADA, LIMITED (*Applicant*) ..... APPELLANT;

AND

THE CORPORATION OF THE CITY OF HAMILTON (*Respondent*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment—Taxation, Municipal—Jurisdiction—Claim for refund of Business Tax—Plant closed by strike—Office Staff employed—Whether manufacturing business carried on—The Assessment Act, R.S.O. 1950, c. 24, s. 124 (e).

The appellant, a manufacturer of rubber goods, was forced to shut down its plant for a four-month period due to a strike. In the interval its office staff, housed in a separate building, continued in their employment in so far as they were able to do so. The appellant subsequently applied under s. 124 (*e*) of the *Assessment Act*, R.S.O. 1950, c. 24, to the Court of Revision for a refund of the business assessment tax paid by it for the period of the shut-down. The application was granted. An appeal by the respondent was dismissed by the Ontario Municipal Board but the Court of Appeal for Ontario set aside the Board's order. The appellant appealed and contended that the Court of Appeal had assumed jurisdiction which was not conferred on it by the Act and had purported to determine a fact (whether the appellant occupied or used land for the purpose of a manufacturer) which was not within its jurisdiction.

Held: That the appellant failed to establish that it did not, within the meaning of s. 124 (*e*) of the *Assessment Act*, carry on the business of a manufacturer for the period in question and its appeal should be dismissed.

Held Also by (Kerwin C.J. and Estey and Locke JJ.): That the Court of Appeal had jurisdiction.

Per Kerwin C.J. and Estey J.: The finding of the Board that the business of a manufacturer had not been carried on within the meaning of s. 124 (*e*) raised a question of law as to whether there was evidence to support such a finding.

Per Kerwin C.J. and Locke J.: If there was such evidence, it was also a question of law whether the evidence brought the case within the Statute.

Loblaw Groceterias v. *City of Toronto* [1936] S.C.R. 249; *Rogers-Majestic Corp.* v. *City of Toronto* [1943] S.C.R. 440; *South Behar Ry. Co.* v. *Commsrs. of Inland Revenue* [1925] A.C. 476 at 485, referred to.

Decision of the Court of Appeal [1954] O.R. 493, affirmed.

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

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FIRESTONE TIRE & RUBBER CO. LTD. v. CITY OF HAMILTON

APPEAL from a judgment of the Court of Appeal for Ontario (1) reversing a decision of the Ontario Municipal Board (2) ordering a refund of business tax.

H. E. Manning, Q.C. and *J. S. Marshall* for the appellant.

J. D. Arnup, Q.C. and *A. McN. Austin* for the respondent.

THE CHIEF JUSTICE:—Under s. 124 (*e*) of the *Assessment Act* of the Province of Ontario, R.S.O. 1950, c. 24, The Firestone Tire and Rubber Company of Canada, Limited, applied to the Court of Revision of the City of Hamilton for a reduction or refund of its business assessment taxes paid by it to the City in the year 1952. So far as is relevant s. 124 is as follows:—

> 124. (1) An application to the court of revision for the abatement or refund of taxes levied in the year in respect of which the application is made may be made by any person,
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> * * *
>
> (*e*) liable for business tax who has not carried on such business for the whole year;
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> * * *
>
> and the court of revision may reject the application or cancel or reduce the taxes or order a refund of the taxes or any part thereof.

The application was granted, the Ontario Municipal Board dismissed an appeal by the City, but the Court of

Dans *Rex* v. *Nowell* (2), la même Cour déclarait admis- declared that the application to the Court of Revision should have been dismissed. The Company now appeals to this Court.

Subsequent to the argument before it the Court of Appeal raised the question as to the constitutional power of the Province to authorize the Court of Revision and the Board to determine the point in issue. Although notified, neither the Attorney General of Canada nor the Attorney General for Ontario was represented upon the further argument. The Court of Appeal decided that the Province had such power, but, as the question was not raised by either party before this Court, nothing is said with reference to it. A point was raised which had not been taken before the Court of Appeal,—that whether the appellant did in fact occupy or use land for the purpose or in connection with the business of a manufacturer was a question of fact only and,

(1) [1954] O.R. 493; [1954] 3 D.L.R. 685.

(2) [1953] O.W.N. 873.

(3) [1954] O.R. 493.

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therefore, no appeal lay to the Court of Appeal. Irrespective of whether there was any evidence upon which the Board could have decided as it did, which is always a question of law, it is also a question of law whether the evidence brings the case within the statutory provision. *Loblaw Groceterias Co. Ltd.* v. *City of Toronto* (1); *Rogers-Majestic Corp Ltd.* v. *City of Toronto* (2). The Court of Appeal, therefore, had jurisdiction.

The appellant agrees that, with two exceptions to be mentioned later, the reasons of Mr. Justice Laidlaw, speaking on behalf of the Court of Appeal, contain an accurate statement of the facts and that statement is, therefore, reproduced:—

> Firestone Tire & Rubber Company of Canada Limited carries on a manufacturing business in Hamilton. It manufactures tires, mechanical rubber goods, tire accessories, tubes and miscellaneous rubber products. Its plant consists of some eight buildings, including a pumphouse, a cement-house, and a gatehouse, a special testing-building and several buildings used for manufacture. Its collective bargaining agreement with the Rubber Workers' Union Local 113, expired on 25th January, 1952. Negotiations respecting a new agreement began in November, 1951, a conciliation board was set up and this board made a report on 15th May, 1952. Further negotiations followed, but a strike began on 3rd June and continued until 28th September, 1952, a period of 118 days. During the strike about 165 employees of the company in its general office continued in their employment but owing to the union's picket lines only 5 or 6 of the factory office workers, all having management functions, entered the plant. No manufacturing was carried on during the strike and there were no shipments in or out of the plant. The following activities were carried on:
>
> (1) the pumphouse was tested each week;
> (2) the gatehouse, with a watchman, continued to operate, one man being on duty each 8-hour shift;
> (3) telephone messages were received, mostly enquiries about when the company would resume manufacture;
> (4) new orders were received;
> (5) mail was delivered;
> (6) invoices were sent and received, payments were received and made and correspondence continued;
> (7) plant watchmen made their rounds;
> (8) the company conferred with sales-agents, some of whom entered the office for that purpose;
> (9) emergency repairs were made in the plant.

The exceptions are these: (1) In addition to the assessment in 1951 (upon which the levy for taxes for 1952 was based) the City in 1952, pursuant to a power for that purpose in the *Assessment Act*, assessed, by a supplementary

(1) [1936] S.C.R. 249. (2) [1943] S.C.R. 440.

assessment, a recent extension of the Company's buildings as from July 1, 1952. The taxes consequent upon that assessment, as well as upon the assessment made in 1951 for business assessment purposes, were entered upon the collector' rolls for the City and paid by the Company in 1952. (2) In the Company's general office building the only business done was to receive telephone enquiries as to when the Company might start business and supply orders; orders and other communications were received by mail; some mail was despatched but "strictly in payment for goods that would have come in during the last month of operation"; there was also some conferences with salesmen.

It was argued that the Court of Appeal had misconstrued s. 124 and emphasis was placed upon the word "such" in paragraph (*e*). It was said that the appellant's business is that of a manufacturer and that it could not be deemed to have been carrying on that business when no manufacturing was done. A distinction was suggested between what actually happened and a shutdown of the manufacturing establishment for the purpose of retooling or overhauling the machinery, since those would be occasioned by the will of the Company. It may be pointed out that if a fire had occurred causing such a cessation as did occur, but with all the other existing circumstances, the appellant would not voluntarily have ceased to carry on such business for the whole year, and yet such a case would not fall within paragraph (*e*), although relief might be obtained under (*b*):—

> (*b*) in respect of a building which was razed by fire, demolition or otherwise in the year for the proportionate part of the taxes levied on the building assessment for the part of the year remaining after the building was razed;

Mr. Manning put the supposititious case of a Company having its office building in the City of Hamilton and its factory in an immediately adjoining Township. However, in that case if a strike occurred with the same consequences, while the Company might not have carried on any business in the Township for the whole year, it would certainly have done so in the City.

The other considerations telling against the appellant are dealt with satisfactorily by Mr. Justice Laidlaw and there might be added merely a reference to *South Bahar Ry. Co.* v. *Commissioners of Inland Revenue* (1), not so much for

(1) [1925] A.C. 476.

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the actual decision, since the circumstances there differed entirely from the present case, but because of the comments of Viscount Cave at 483 and at Lord Sumner at 485.

The appeal must be dismissed with costs.

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

RAND J.:—Notwithstanding Mr. Manning's exhaustive argument, I am unable to accept his interpretation of s. 124(1)(*e*) of the *Assessment Act* within which he claims to come.

What the statute envisages is the use or occupation of land for the purposes of a business being carried on. Both the use and the business life are deemed to continue while the work of employees or the operations, say, of machines are recurrent or periodic, that is, alternating with temporary cessations of various kinds.

There are, for example, periods, frequently annual, for revising models of industrial products and like purposes during which the machine and employee activity is suspended, while other activity continues. But labour relations are an important part of the body of the business and their determination by negotiation or by means of economic pressures is likewise an incident which the statute must be taken to contemplate. Marking time while this issue is being decided does not bring about a condition of "not carrying on" the business.

Several modes of non-user or non-"carrying on" are furnished which throw some light upon the question. Par. (*a*) of s.s. (1) permits a refund in respect of land which has been vacant three months or more in the year. It would be extraordinary that actual vacancy for two months should not give rise to a right to a refund while a strike for two weeks, involving only employees of certain departments, should do so. Par. (*b*) provides for the case of the total elimination of the building in which the business is carried on and it indicates what is meant by the absence of business. Here, although the machinery was not running, it was being kept in general running condition, the business office was being carried on as usual, there was communication with outside agencies or parties, orders were being

received and accepted; only part, however important it was, of the business was engaged in a temporary complication which, in these days, lies within the scope of foreseen possibility in most industrial businesses.

That was the view of the statute taken by Laidlaw J.A. in giving the reasons for the judgment of the Court of Appeal, and with what he said I am in agreement.

I would dismiss the appeal with costs.

ESTEY J.:—The appellant carries on business in the City of Hamilton as a manufacturer of automobile tires, tubes, tire accessories and mechanical rubber goods, for which purpose it utilizes eight buildings, including an office building. In 1952 the respondent City of Hamilton, under s. 6(1)(*e*) of the *Assessment Act* (R.S.O. 1950, c. 24), imposed upon the appellant, as a manufacturer, a business tax which it paid in the sum of $40,578.30. The relevant part of s. 6(1)(*e*) reads:

> 6(1) . . . every person occupying or using land for the purpose of, or in connection with, any business mentioned or described in this section shall be assessed for a sum to be called "business assessment" to be computed by reference to the assessed value of the lands so occupied or used by him, as follows:
>
> * * *
>
> (*e*) . . . every person carrying on the business of a manufacturer for a sum equal to sixty per cent of the assessed value . . .

In that year the appellant, because of a strike lasting 118 days, applied to the Court of Revision for an abatement or refund of a portion of the $40,578.30, under s. 124(1)(*e*), which reads:

> 124(1) An application to the court of revision for an abatement or refund of taxes levied in the year in respect of which the application is made may be made by any person
>
> * * *
>
> (*e*) liable for business tax who has not carried on such business for the whole year.

The appellant does not ask an abatement or refund with reference to that portion assessed in respect of the office building. It does, however, contend that in the other buildings it was not carrying on the business of a manufacturer and in respect of them it is eligible for an abatement or refund.

The facts are not in dispute. Throughout the 118 days the 1,438 factory workmen were not permitted upon the premises and without their presence no product could be

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nor was produced. In fact, the only buildings to which unrestricted access was permitted were the general office, where 165 were employed, and a smaller building known as the gate house. On certain occasions 5 or 6 out of 50 supervisory employees engaged in factory supervision, such as the plant superintendent, development engineer and chief chemist, were permitted to enter the plant. The watchmen made their rounds. Certain emergency repairs were permitted. The appellant conferred with its salesmen. A few orders were received, collections made and inquiries answered. However, no products were manufactured and no shipments were made, nor were supplies for manufacturing received.

The Court of Revision allowed the abatement or reduction. This was affirmed in the Ontario Municipal Board, but the Court of Appeal disallowed the appellant's claim (1). Mr. Justice Laidlaw, writing the judgment of the Court, stated in part:

> The employers had no intention of giving up business but, on the contrary, kept their organizations together so far as was possible in the circumstances. There was simply a temporary interruption in certain departments and a provisional suspension in production. The companies did not cease to engage in business activities of a varied and substantial character. They maintained the plants, the office and clerical staffs, they received orders and payments and, I observe in particular, there were conferences with their sales-agents. Indeed it would appear to me that they carried on business in every way possible in the face of the strikes and ceased only for the time being to manufacture and distribute their products.

The question, therefore, arises, do the foregoing facts bring the appellant within the scope of s. 124(1)(*e*) as one eligible for an abatement or a refund. Subpara. (*a*), in clear and unambiguous language, requires the appellant to establish that it "has not carried on" its manufacturing business for the whole year in order to make itself eligible for an abatement or refund. The language of this subpara (*e*) is in marked contrast to that of subparas. (*a*) and (*b*). Under (*a*), if the taxpayer's land be vacant for three months, or (*b*), the building be destroyed, even if the business otherwise continues, the taxpayer is, by these subparas., given a basis to apply for an abatement or a refund. Under subpara. (*e*) no such curtailment or non-usage of a particular parcel or area is contemplated. It is not, under

(1) [1954] O.R. 493.

this subpara. (*e*), a question of the extent or the degree, but rather whether the business is not carried on, in order to provide a basis for an application. The language of this latter subpara. does not contemplate that a taxpayer who suffers merely a reduction or curtailment of business activity or operation may make a claim thereunder.

In the determination of this question it is well to keep in mind the language of s. 6(1)(*e*) imposing the tax. Under that provision the assessment of a business tax is not only in respect to the premises in which only the actual production takes place, but those used in connection therewith. In *Canadian Leaf Tobacco Co. Ltd.* v. *Chatham* (1), the appellant's warehouses were taxed as part of the business of manufacturing, though far removed from the premises or plant used strictly for manufacturing purposes.

In the present application the phrase "carried on such business" under s. 124(1)(*e*) is identical in meaning with the phrase "carrying on the business of a manufacturer" under s. 6(1)(*e*). The only business the appellant is engaged in is that of a manufacturer. It was this business, curtailed or limited by the circumstances of the strike, which the appellant continued to carry on through its office. It maintained its equipment and organization throughout the other buildings to the end and purpose that, with the conclusion of the strike, production and the normal scope and extent of the business would be resumed. The appellant was, therefore, carrying on the business of manufacuring throughout all of its buildings, substantially limited or curtailed, but which does not provide a basis for an application for an abatement or refund under s. 124(1)(*e*).

While the business of manufacturing involves the production of a product, I respectfully agree with Mr. Justice Laidlaw's statement, in writing the judgment of the Court of Appeal, that the appellant "does not cease to carry on business because during an uncertain interval of time his production facilities are temporarily not in operation." There appears to be a substantial difference between non-production of a product during a temporary period and not carrying on of business as contemplated in s. 124 (1) (*e*). It would appear that the facts do not bring the appellant

(1) [1944] O.R. 458.

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within the meaning of the words "has not carried on" such business during the period of 118 days as contemplated by s. 124(1)(*e*).

The appellant submits that the finding of the Ontario Municipal Board that it did not carry on business was a finding of fact supported by the evidence and, therefore, ought not to have been disturbed by the Court of Appeal, restricted as it is to the considerations of questions of law. The Ontario Municipal Board concluded "that, by reason of the strike action of its employees, it did not carry on business during the strike period and is therefore entitled to an abatement or refund for the period in which the strike was in progress." Even if this be regarded as a finding of fact, it clearly discloses a misapprehension of the provisions of s. 124(1)(*e*).

A similar question was raised in *Rogers-Majestic Corp. Ltd.* v. *City of Toronto* (1), where my Lord the Chief Justice (then Kerwin J.), writing the judgment of the Court, at p. 449 stated:

> In the present case the County Court Judge states in the stated case, immediately before propounding the question, "Upon my construction of the statute I considered that I should find as a fact that the said sum was received as income derived from the business of the Respondent Company and was not assessable." The difficulty is that we do not know what his construction of the statute was, but, in my opinion, upon a true construction of the relevant provisions of *The Assessment Act*, there is no evidence upon which his decision can be supported.

The appellant cited, in support of his contention, *Re International Metal Industries Ltd. and the City of Toronto* (2), in which Mr. Justice Gillanders at p. 283 stated:

> The Municipal Board is unable to find that the appellant company is carrying on business at the premises in question. That to my mind, in view of the decisions, is a question of fact, and the matter is therefore concluded by the Board's finding.

It is important to note that in the course of his reasons and immediately before the foregoing Mr. Justice Gillanders stated:

> Had the matter turned on the question as to whether or not managing, operating and controlling subsidiary companies may be a business in respect of which a person may occupy or use land and be liable to assessment under sec. 8 of the Act, and I would think under proper circumstances it well might be, I would consider the matter a question of law

(1) [1943] S.C.R. 440. (2) [1940] O.R. 271.

involving as it would construction of the statute as to whether or not it included as a business the particular activities of the appellant company. But in this case that is not the question involved.

The facts are here not in dispute and they do not disclose any evidence to support a finding that the appellant was, at any time throughout the strike, not carrying on its business as a manufacturer within the meaning of s. 124(1)(*e*). The case of *Delhi* v. *Imperial Leaf Tobacco Co. Ltd.* (1), cited by the appellant, is in accord with the foregoing view. There Robertson C.J.O., at p. 649, stated:

> Having regard to the arguments submitted to us, to determine whether the respondent is (1) a manufacturer under s. 8(1)(*e*), or (2) a wholesale merchant within s. 8(1)(*c*), or (3) falls within s. 8(1)(*k*), depends upon the proper construction of the statute.

Roach J.A., at p. 656, after pointing out that there was no complaint with respect to the County Court judge's interpretation of the vital words, continued:

> Therefore, the only question of law that arises here is whether or not there was evidence from which the County Judge could reasonably decide, that is make his conclusion of fact, that the business carried on by the company came within one of the businesses assessable under s. 8(1)(*k*) and not in s. 8(1) specifically mentioned by name. . . . In my opinion there was no evidence on which he could reasonably have placed it in any of the classifications specifically named in the section.

Nor do I find anything in the other cases cited by counsel for the appellant which is contrary to the foregoing view.

The appeal should be dismissed with costs.

LOCKE J.:—By s. 6 of the *Assessment Act* (c. 24, R.S.O. 1950) it is provided that every person occupying or using land for the purpose of any business described in it shall be assessed for a sum to be called "business assessment", to be computed by reference to the assessed value of the land so occupied or used by him. By subparagraph (*e*) every person carrying on the business of a manufacturer, subject to an exception which does not apply, is to be assessed for a sum equal to sixty per cent of the assessed value of the premises referred to.

The appellant manufactures tires, tire accessories, tubes and mechanical rubber goods at the City of Hamilton. On June 3, 1952, a strike of the members of the Rubber Workers' Union was called as a result of which 1,438 of its employees engaged in the process of manufacturing ceased

(1) [1949] O.R. 636.

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work. In consequence, the entire manufacturing operation carried on was closed down until September 28, 1952, when these employees returned to work.

In separate buildings from those in which the manufacturing operations were carried on, there were employed 165 office workers and about 50 others in the factory office. These latter were described as the supervisory group which included the plant superintendent, the chief chemist and those employed in activities of that nature. None of these 215 employees was a member of the union and none ceased work.

By s. 124 of the Act it is provided that an application may be made to the Court of Revision for the abatement or refund of taxes levied in the year in respect of which the application is made, inter alia, by any person who is:—

> (*e*) liable for business tax, who has not carried on such business for the whole year.

While it is common ground that the appellant was properly classified as a manufacturer, it does not follow that its business was confined to carrying on the manufacturing process. The fact that the services of 165 people were required in the general office indicates that there were other extensive business activities incident, no doubt, to the necessity of purchasing raw materials for current and future use and selling the manufactured products when produced.

The evidence as to the activities of those employed in the general office is very meagre. The controller and assistant treasurer of the company who gave evidence said that some new orders for goods were received by mail and accounts of the company which had fallen due were paid, and he admitted that the office staff continued their activities in the normal way "in so far as they were able to do so." The evidence is silent as to what these activities consisted of during the nearly four month period of the strike.

Provision for permitting a rebate of taxes assessed on the carrying on of business where the taxpayer "has not carried on business for the whole year" was first introduced into the *Assessment Act* of Ontario by s. 20 of the *Assessment Amendment Act* of 1910 (c. 88). We have not been referred to any decided case in Ontario in which the question as to what constitutes a cessation of business sufficient to justify a rebate of taxes under the statute has been considered. I

have been unable to obtain any assistance from the decided cases in England to which we were referred, as they were decided upon different facts under revenue statutes.

It does not suffice to show that part of the appellant's business activities were suspended, even though it be the major part. It was incumbent upon it to show that no part of its business was carried on during the period. The evidence adduced in this matter before the Ontario Municipal Board did not establish this, in my opinion.

The question as to the nature and extent of the business activities carried on during the strike was a question of fact but the question as to whether, in view of these activities, the appellant had not carried on such business within the meaning of that expression in s. 124 was a question of law and the objection that the Court of Appeal was without jurisdiction to determine the matter should fail.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Manning, Mortimer, Mundell & Reid.*

Solicitors for the respondent: *Mason, Foulds, Arnup, Walter & Weir.*

HER MAJESTY THE QUEEN .....APPELLANT;

AND

DENNIS KRAVENIA .....RESPONDENT.

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*May 11, 12
*June 28

ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL

Criminal Law—Conspiracy—Trial judge having adequately charged jury as to elements requisite to support charge of conspiracy refused to indicate difference between crime charged and aiding and abetting—Whether new trial warranted.

The respondent, following a trial by a judge and jury, was convicted of conspiring with another to commit the indictable offence of illegally selling a drug. The trial judge adequately charged the jury as to the law relating to criminal conspiracy and as to its duty to give the accused the benefit of any reasonable doubt but, on the grounds that to do so might confuse the issue, refused accused counsel's request

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

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to instruct the jury as to the difference in law between aiding and abetting and conspiring. The accused appealed contending that the trial judge by his refusal had deprived him of one of his grounds of defence. The Court of Appeal for British Columbia by a majority judgment allowed the appeal and ordered a new trial. The Crown appealed.

Held (Cartwright J. dissenting): That it clearly appeared from the evidence and from the trial judge's address that the only question left to the jury was whether or not the respondent had agreed to co-operate with his co-accused to bring about the illegal sale, that they could not convict unless they could so find, and that the jury clearly understood the issue to be decided by it.

Held: Also, that there was no obligation on the trial judge to instruct the jury as to the difference between the crime charged and another crime for which the accused was not indicted and which the jury was not called upon to consider.

Per Cartwright J. (dissenting): The objection of counsel was that when the trial judge came to relate the theory of the defence to the law, which he had correctly stated, he did so in words which may have misled the jury, and it could not be said that the conclusion of the majority of the Court of Appeal, that the jury may have been so misled, was wrong in law.

Decision of the Court of Appeal for British Columbia (1955) 14 W.W.R. 112 reversed and verdict of jury restored.

APPEAL by the Crown on questions of law from the judgment of the Court of Appeal for British Columbia (1) allowing respondent's appeal, Sidney Smith J.A. dissenting, from his conviction before Whittaker J. and a jury and ordering a new trial.

D. McK. Brown and *D. K. Christie* for the appellant.

H. J. McGivern for the accused, respondent.

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

FAUTEUX J.:—The respondent and one Tomilin were found guilty, by a jury, of having conspired together to commit an indictable offence, namely, to sell a drug to one Smith, contrary to the Opium and Narcotic Drugs Act.

Tomilin did not appeal the verdict; but respondent did so on several grounds, of which only one found favour with a majority of the Court of Appeal. The grievance was that the trial Judge, as required by counsel for the defence, should have instructed the jury

that there is a difference in law between two people aiding and abetting one another in a crime and in conspiring to commit a crime and that the mere fact that one aided and abetted in a crime might not be conspiracy to commit a crime;

(1) (1955) 14 W.W.R. 112.

the Court of Appeal found that, in effect, the refusal of the trial Judge to so direct the jury amounted to a withdrawal of one of the defences of the accused and constituted in the matter a ground of substance affecting the verdict. The verdict was then quashed and a new trial ordered. Hence the appeal of the Crown to this Court.

It is admittedly beyond question that there is, in the record, evidence justifying a jury, acting judicially, to find a verdict of guilty against both Tomilin and the respondent, as to the only offence for which they were indicted, i.e., conspiracy. Reference to the evidence is therefore unnecessary. It is also conceded that the directions given to the jury as to the gist and constituent elements of the crime of conspiracy were adequate; indeed, I am in respectful agreement with Smith J.A., dissenting, who said in this respect:—

> The trial Judge's conduct of this whole case bespeaks of the care and thought he bestowed upon its every phase.

Thus the narrow and simple point upon which this appeal now falls to be determined is whether, in the absence of the above direction which the trial Judge refused to give for the reason that it "would confuse the issue", the attention of the jury was plainly alerted, by the instructions actually given, as to the specific view, it was necessary for them to form on the evidence, before they could legally return a verdict of guilty against the two prisoners.

With deference for those who are of a contrary opinion, a consideration of the whole address leaves no doubt in my mind that any reasonable jury abiding by the instructions of the trial Judge could not conclude as to the guilt of the two accused unless convinced beyond doubt that there existed between them an agreement to co-operate in bringing about a sale of a drug to Smith. This conclusion is, I think, fully supported by the following extracts of the address of the Judge:—

> The accused person is always considered innocent until the opposite is proven. The burden is upon the Crown to prove the guilt of the accused, to prove every material fact necessary for conviction and prove all the material ingredients of the crime and that it was committed by these accused.
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> * * *
>
> That presumption of innocence continues until there is put before you a body of evidence which establishes in your mind beyond a reasonable doubt, that the crime alleged has been committed and that it has been committed by these accused.

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* * *

The accused are not charged with selling or attempting to sell a drug nor with possession of drugs; they are charged with conspiracy to sell a drug.

* * *

A conspiracy is an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means. We are concerned only with the first part of the definition that is, a conspiracy is an agreement of two or more persons to do an unlawful act.

* * *

Perhaps I could put it more simply, that the Crown must prove that the two accused combined together in a plan to sell a drug to constable Smith.

* * *

The essence of a crime of conspiracy is the agreement to co-operate in bringing about the sale of a drug. As soon as that agreement to co-operate has been formed, the crime is complete.

* * *

In conspiracy cases, it is the plot or plan to act together in committing the offence which the law forbids and punishes.

* * *

It takes at least two people to form a conspiracy. Of course it follows that if one is innocent, the other cannot be guilty.

* * *

What constitutes the essence of the crime of conspiracy was again and otherwise made explicit by the trial Judge when he dealt with the particular rule of evidence applicable in conspiracy cases and by the illustrations he then gave on the matter. In this respect, he said:—

For example, in this case, the Crown is endeavouring to prove a conspiracy between these two accused. If a witness had come before you and said: "I was hiding behind a curtain in a room and I heard these two men talking together, agreeing together to co-operate in the sale of drugs to Smith", that would be direct evidence.

* * *

It would be obviously impossible in a great majority of cases, conspiracy cases, for the Crown to prove that two or more people met together and said: "Let us enter into an agreement together to sell drugs to so and so".

* * *

A conspiracy may, when the evidence warrants, be inferred from the conduct of the parties, that is, from what they said and what they did.

* * *

Ordinarily, in criminal cases, anything said or done by one accused not in the presence of the other accused is not evidence against the other but in conspiracy cases, if the acts done or statements made are proved to be such as to show from their very nature that they are part of a common scheme and were in execution or furtherance of the common scheme, then such facts or statements are evidence against the other.

Let us assume, for the moment, that the man to whom constable Smith spoke on the telephone was the accused Kravenia. If you find as a fact that Kravenia said to Smith over the phone: "Give me your number and I will have Bill call you"; and if you find as a fact that the accused Kravenia then phoned the accused Tomilin; and if you think that those two phone communications were steps necessarily taken in furtherance of a conspiracy between the two accused to sell drugs to Smith, then you could regard those two acts of Kravenia as evidence against Tomilin. Also if you find that Tomilin, as a result of a communication which he received from Kravenia in furtherance of the same conspiracy, telephoned to Smith and later went out to the Shell Service Station with forty caps of drugs, you could regard that act of Tomilin as evidence against Kravenia.

With these instructions, the majority of the Court of Appeal, however, expressed the view that:—

The defence not put to the jury was that even if the jury found as a fact that the appellant knew from the telephone inquiries that an unknown person wished to speak to Tomilin in order to arrange to buy illegal drugs from the latter and that the appellant gave Tomilin's telephone number to that person and that person's number to Tomilin, then such knowledge and conduct would not be sufficient to convict the appellant of conspiracy unless the jury could find as an additional fact that this knowledge and conduct, tested in the light of all surrounding circumstances, prove him party to an agreement with Tomilin for the sale of drugs to Stancil Smith.

With deference, I must say that the directions actually given to the jury made it very plain that they could not convict either one of the prisoners of conspiracy and that indeed the two of them were entitled to an acquittal unless and until they could find, as the very essential fact in the case, that both had agreed to co-operate together in bringing about a sale of drugs to Smith.

To the foregoing must be added that, as further indicated to the jury by the trial Judge, the case as actually submitted to them by the Crown was "to draw from all the evidence the inference that these two accused were working together in disposing of drugs", and that, as submitted to them by counsel for the accused, the defence was, as stated to the police officers by Kravenia, that the latter "was not in the drug business", that Kravenia "denied that from the beginning to the end" and that the Crown had failed to prove that the prisoners had conspired together.

It thus appears from the address and the actual course of trial before the jury, that the true and only question they were left with for determination was whether or not the two accused were engaged in the drug traffic, were co-operating in the same and had planned to sell drugs to Smith.

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Once, as in this case, a jury is instructed that they must comply with the directions given as to the law, that the Crown must prove all the elements of the offence charged, which is single and does not include a lesser one, and that these elements are clearly explained, several times and in many ways, any reasonable jury ought to be taken to have understood that, unless they were convinced beyond a reasonable doubt that all these material elements were proved, it would be a violation of their oath to return a verdict of guilty of the crime charged. It is not necessary for the trial Judge to go over the matter again and tell them, what is necessarily and plainly implied in such directions, that it is not sufficient if only some of the essential facts are proved. Nor in such case is there an obligation—but it may be very well confusing—to instruct the jury as to the differences between the crime charged and another crime for which the accused is not indicted and as to which they are not called upon to give consideration and a verdict.

In brief, the real defence of respondent was that the Crown had failed to prove the only offence charged. The submission that he might be guilty of another offence was only another way to express the same defence; the trial Judge, anxious to avoid confusing the jury, refused to entertain the request of the defence; this refusal did not, in the slightest, affect the fact that the true defence of the accused was put to the jury and that what they were plainly required to consider and determine was whether or not the accused had agreed to co-operate in bringing about the sale of drugs to Smith.

For these reasons, I would allow the appeal for the Crown, quash the judgment of the Court of Appeal and restore the verdict of the jury.

ESTEY J.:—The respondent was convicted of conspiring with Tomilin to commit the indictable offence of selling a drug contrary to *The Opium and Narcotic Drug Act*. The respondent alone appealed and the appellate court directed a new trial, Mr. Justice Sydney Smith dissenting. The Crown, in this appeal, asks that the conviction at trial be restored.

The charge contained no other count than that of conspiracy. The learned trial judge, in instructing the jury, explained the relevant law in respect to conspiracy and dis-

cussed the evidence in relation thereto so completely and accurately that no exception has been taken thereto. However, at the conclusion of the charge counsel for the respondent asked that the learned judge instruct the jury as to the law in respect to aiding and abetting and that, if the jury found respondent did no more than aid and abet, he was not guilty of conspiracy. The learned judge refused, being of the opinion that would but tend to confuse the issue.

The offence of conspiracy is committed only if it be found that two or more persons agreed to commit an indictable offence. Once the agreement is made the offence is committed. That it was not carried out or executed is not an issue. Conspiracy is, therefore, an offence separate and distinct from the offence in respect to the commission of which the parties conspired. *Rex* v. *Weiss* (1) (1913) 22 C.C.C. 42; *Rex* v. *Brown* (2). Lawrence J., in a British case, stated: "A charge of conspiracy is not the same as one of aiding and abetting." *Rex* v. *Kupferberg* (3). The difference important in this case between the offence of conspiracy and that of aiding and abetting is that an agreement is not an essential element in the latter offence. However, in the latter those charged may have acted by mutual consent, or jointly, or even by virtue of an agreement. It may be added that, while at common law aiding and abetting was a separate and distinct offence, under the *Criminal Code,* by virtue of s. 69, one who aids and abets is a party to the principal offence.

The agreement essential to a conspiracy is not of a type that is normally reduced to writing. Almost invariably it must be found as an inference or conclusion to be drawn from a consideration of the conduct, including written or spoken words, of the parties. Whether there was such an agreement, or whether the parties were acting in concert, jointly or independently, often presents a problem difficult of solution and in respect of which confusion may arise where a charge contains a count of conspiracy and of the substantive offence. Because of this possibility the authorities indicate that a charge which contains a count of conspiracy and of the substantive offence, while permissible, imposes upon the presiding judge a duty to define and distinguish the respective issues with great care. As stated by

(1) (1913) 22 Can. C.C. 42.
(2) (1945) 85 Can. C.C. 91.
(3) 1918 13 Cr. App. R. 166 at 168.

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Sankey J. in *Rex* v. *Luberg* (1), where the indictment included a charge of conspiracy in obtaining goods by false pretences:

> It is a perfectly admissible and proper course to pursue, and a course which is often pursued, but we think that if that course is pursued, great care and great caution is necessary during the hearing of the evidence to be quite sure that no evidence is given which is inadmissible, and great care is required in the summing-up to keep all the several issues perfectly clear.

See also *Rex* v. *Hill and McDonald* (2).

While no other count than that of conspiracy was included in the judgment, the granting of counsel's request to instruct the jury with respect to aiding and abetting provided a similar possibility of confusion. That the learned trial judge had this in mind, both as he instructed the jury and when refusing the request of counsel on behalf of the respondent, would appear to be evident from his statement made in the course of his charge:

> The accused are not charged with selling or attempting to sell a drug, nor with possession of drugs. They are charged with conspiracy to sell a drug.
>
> A conspiracy is an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means. We are concerned only with the first part of the definition, that is, a conspiracy is an agreement of two or more persons to do an unlawful act.

This is not a case where the accused was charged with an offence which, under the *Criminal Code,* contains one or more lesser offences. In those cases, where the evidence justifies it, there is a duty upon the trial judge to instruct the jury that if they do not find the accused guilty of the major offence they should then consider whether he is guilty of the lesser offence and should instruct them with regard thereto. The instruction with respect to the lesser offence is not by way of a defence to the major charge, but is relevant and to be considered only if the jury find him not guilty of the major offence.

Respondent's defence was that he had not agreed with Tomilin and, therefore, had not conspired to commit the offence of conspiracy as charged. Neither respondent nor Tomilin gave evidence or called witnesses. The learned trial judge, in the course of his instructions to the jury, stated:

(1) (1926) 19 Cr. App. R. 133 at 137.

(2) [1944] O.W.N. 581.

Now I come to the defence. The accused have put the Crown to the proof of the charge against them, as they are entitled to do. Defence counsel have argued that a case of conspiracy has not been made out. That is for you to say.

The accused Kravenia stated to police officers that he was not in the drug business, denied that from beginning to end; and the defence, as far as Kravenia is concerned, is that all he did was innocently to give Tomilin Smith's telephone number.

On behalf of the respondent it was contended that his conduct throughout was that if an innocent man, but, even if not entirely innocent, it could be no more than an aiding and abetting of Tomilin and, in any event, it could not support a conclusion that he had agreed with Tomilin to commit the offence of selling the drug and, therefore, he was innocent of the offence charged.

In all this the respondent's defence is that he had not agreed with Tomilin and, therefore, was not guilty. The learned trial judge, in language that was clear and explicit, made it abundantly plain that if there was no agreement the respondent was not guilty. That was the entire issue and, having regard to the evidence adduced and the charge to the jury, there can be no doubt that the jury clearly understood that issue. It was in order that the jury might not become confused in respect thereto that the learned trial judge was prompted to refuse the request of counsel for the respondent that he should embark upon a discussion of aiding and abetting.

It is suggested the learned trial judge, by his statement including the words "that all he did was innocently to give Tomilin Smith's telephone number," may have misled the jury to conclude that if they were not satisfied that respondent's relations with Tomilin were innocent they might conclude that he had conspired as alleged. It is difficult to conclude that a jury, apart from an affirmative suggestion not here present, would be so misled as to conclude that by negativing his innocence, without more, they might arrive at an affirmative conclusion to the effect that he and Tomilin had conspired. Even if an inference to that effect might be drawn from such a statement in another context, when read and construed with the charge as a whole, as it must be, it would appear, with great respect, that the jury would not be misled. The learned trial judge had already explained the essentials of the agreement and made it abundantly clear that in order to find the accused guilty

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they must find that the respondent and Tomilin had, in fact, agreed, and it was the conduct of both parties that had to be considered in order to determine whether such an agreement had been made. This the learned trial judge emphasized in the following statement:

> So what the Crown must prove in this case to your satisfaction beyond a reasonable doubt is that between the 6th and 9th days of January, 1954, at the City of Vancouver the two accused entered into an agreement or had a concerted purpose or a common design to sell diacetylmorphine hydrochloride to Constable Smith.

Moreover, that the jury would not be misled to draw such a conclusion or inference from the statement already referred to is strengthened by the caution which the learned trial judge immediately gave to the jury in the following terms:

> In this case as in most conspiracy cases, the evidence adduced in proof of the alleged conspiracy is circumstantial evidence. Where you are asked to infer conspiracy from the circumstances surrounding the case as in all cases of circumstantial evidence, you must, before convicting, find not merely that the circumstances are consistent with guilt but also that they are inconsistent with innocence.

In my view the jury would not be misled as suggested. The appeal should be allowed and the conviction at trial restored.

CARTWRIGHT J. (dissenting):—On May 31, 1954, the respondent and one William Tomilin were convicted, after trial before Whittaker J. and a jury, of conspiring to commit an indictable offence, namely to sell a drug, to wit diacetylmorphine hydrochloride (heroin) to one Smith, without a licence or other lawful authority. The Court of Appeal for British Columbia, by a majority, allowed the respondent's appeal and directed a new trial. O'Halloran J.A., with whom Bird J.A. agreed, was of opinion that a defence open to the respondent on the evidence was not only not put to the jury by the learned trial judge but was in effect withdrawn from their consideration. Sidney Smith J.A. dissenting would have dismissed the appeal being of the view that the charge of the learned trial judge was sufficient. On this point of law the Attorney-General appeals to this Court pursuant to s. 1023 (3) (now s. 598 (1)) of the *Criminal Code*.

His Lordship proceeded to review the evidence in some detail and continued:—

It was not argued that there was not sufficient evidence to sustain the verdict and it was conceded that the learned trial judge instructed the jury fully and accurately as to the law relating to criminal conspiracy. He then pointed out to the jury that the evidence was circumstantial and instructed them as to the rule in *Hodge's Case* (1). He also instructed them fully as to their duty to give the accused the benefit of any reasonable doubt. His summary of the evidence was fair and accurate.

When, towards the end of his charge, the learned trial judge came to deal with the theories of the defence he did so as follows:—

> Now I come to the defence. The accused have put the Crown to the proof of the charge against them, as they are entitled to do. Defence counsel have argued that a case of conspiracy has not been made out. This is for you to say.
>
> The accused Kravenia stated to police officers that he was not in the drug business, denied that from beginning to end; and the defence, as far as Kravenia is concerned, is that all he did was innocently to give Tomilin Smith's telephone number.

He then concluded his charge by reminding the jury of the rule in *Hodge's Case* and as to their duty to acquit if they had a reasonable doubt as to the guilt of the accused.

The view of the majority in the Court of Appeal as to the defect in the charge is stated as follows in the reasons of O'Halloran J.A.:—

> The defence not put to the jury was, that even if the jury found as a fact that appellant knew from the telephone enquiries that an unknown person wished to speak to Tomilin in order to arrange to buy illegal drugs from the latter, and that appellant gave Tomilin's telephone number to that person, and that person's number to Tomilin, then such knowledge and conduct would not be sufficient to convict appellant of conspiracy, unless the jury could find as an additional fact, that this knowledge and conduct tested in the light of all surrounding circumstances proved him party to an agreement with Tomilin for the sale of drugs to Stancil Smith.

As Mr. Brown points out, this passage is open to the construction that the learned Justice of Appeal mistakenly thought that the evidence was that Smith had told the respondent that he wished to speak to Tomilin in order to arrange to buy drugs, whereas actually it indicated that Smith had on each occasion asked for "Harry" and that it was the respondent who put forward the name of Tomilin

(1) (1838) 2 Lewin C.C. 227; 168 E.R. 1136.

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as a prospective vendor, but, assuming this to be so, I do not regard the suggested mistake as of decisive importance. The fact that the evidence for the prosecution was even stronger than the learned Justice of Appeal stated it to be would not affect the duty of the learned trial judge to place before the jury a defence open to the accused on the evidence.

The alleged defect in the charge is that the second of the two paragraphs, quoted above, in which the learned trial judge dealt with the theories of the defence might mislead the jury into thinking that if they rejected the submission that the respondent had acted innocently and found that, in his conversations with Smith, he was acting with guilty knowledge of the fact that Tomilin was selling drugs and with the guilty intention of facilitating a sale by Tomilin to Smith, that would be fatal to the defence of the respondent as "the" defence (i.e., the only defence) as far as he was concerned was that he was acting innocently, and so might prevent them from directing their minds to the question whether the respondent might not have done all that he did without any agreement or arrangement with Tomilin, and thus have been in the position not of a conspirator but merely of one who, (as it was put by Lawrence J. giving the judgment of the Court of Criminal Appeal in *R.* v. *Kupferberg* (1)) "appreciated what was going on and did something to further it." Counsel for the defence asked for a direction of the sort which the majority of the Court of Appeal have held to have been necessary, and, while in my view it was not incumbent upon the learned trial judge to deal with the law as to aiding and abetting the commission of an offence, I am of opinion that he should have acceded to the request of counsel to the extent of giving such further direction as would have removed the possibility of the jury being misled in the manner suggested above. It would, I think, have been sufficient if the learned trial judge had told the jury that, even if they rejected the theory of the defence, which he had put before them, that all that the respondent did was innocently done and found that he was acting with the guilty knowledge above referred to, still, in order to convict they must be satisfied beyond a reasonable doubt

(1) 13 Cr. App. R. 166 at 168.

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that he was acting in concert with Tomilin and not merely doing, without agreement, something to further the guilty purpose of which he was aware.

I feel the force of Mr. Brown's argument that, in view of the full and clear direction given by the learned trial judge as to agreement between the accused being an essential element in the crime of conspiracy, it is difficult to suppose that the jury were misled by the omission complained of. But the objection of counsel was not that the learned trial judge had failed to state the law fully and clearly but rather that when he came to relate the theory of the defence to the law which he had correctly stated he did so in words which may have misled the jury, and I find myself unable to say that the conclusion of the majority of the Court of Appeal that the jury may have been so misled was wrong in law.

In the result, I would dismiss the appeal.

Appeal allowed and jury's verdict restored.

Solicitors for the appellant: *Russell & DuMoulin.*

Solicitors for the respondent: *McGivern & Vance.*

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*Mar. 8
*Jun. 28

LUMBERMENS MUTUAL CASUALTY COMPANY (*Defendant*) ..... APPELLANT;

AND

HARRY STONE (*Plaintiff*) ..... RESPONDENT.

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

Insurance—Automobile—Registered letter cancelling policy sent by insurer—Letter not received by insured—Letter returned to insurer—Whether policy effectively cancelled.

Condition 13(2) of an automobile insurance policy provided that "This policy may be cancelled by the Insurer giving fifteen days' notice in writing by registered mail, or five days' notice personally delivered, and refunding the excess of paid premium . . . Such repayment shall accompany the notice, and in such case, the fifteen days shall commence to run from the day following the receipt of the registered letter at the post office to which it is addressed". Condition 15 pro-

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

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vided that "Written notice may be given to the insured by letter personally delivered to him or by registered letter addressed to him at his last post office address, notified to the Insurer . . .".

The respondent took action in warranty against his insurer, the appellant, following a collision involving his automobile. The appellant denied liability on the ground that it had cancelled the policy by sending to the respondent by registered mail a 15-day notice in writing of cancellation. A cheque representing the correct refund due to the respondent was enclosed with the notice. The evidence disclosed that the letter was properly addressed to the respondent, that it was never received by him or delivered to his address, and that it was eventually returned to the appellant who filed it unopened. No other action was taken by the appellant up to the time of the claim. The trial judge held that the policy was cancelled, but this judgment was reversed by the Court of Appeal.

Held Cartwright J. (dissenting): That the appeal should be allowed as the policy was effectively cancelled.

The conditions in the policy were unequivocal in providing for both the delivery of notice personally or by means of registered post. The risk of actual delivery by the post after the letter reached destination was placed upon the insured.

Per Cartwright J. (dissenting): The receipt of the letter at the postal station was not a receipt "at the post office to which it was addressed", since it was not addressed to such post office. It was addressed to a street number where it was not received.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), reversing the decision of the trial judge and holding that an insurance policy had been effectively cancelled by the insurer.

J. F. Chisholm, Q.C. and *L. P. de Grandpré, Q.C.* for the appellant.

R. Spector for the respondent.

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

RAND J.:—The narrow issue here is whether, under its terms, an insurance policy could be cancelled by a notice sent by registered mail to the insured at the address given in the policy where it did not in fact reach the insured. The relevant clauses are these:—

13. (2) This policy may be cancelled at any time by the Insurer giving to the Insured fifteen days' notice in writing of cancellation by registered mail, or five days' notice of cancellation personally delivered, and refunding the excess of paid premium beyond the pro rata premium for the expired time. Repayment of excess premiums may be made by money, post office order, postal note or cheque. Such repayment shall accompany

(1) Q.R. [1954] Q.B. 306.

the notice, and in such case, the fifteen days above mentioned shall commence to run from the day following the receipt of the registered letter at the post office to which it is addressed.

15. Any written notice to the Insurer may be delivered at or sent by registered post to the chief agency or head office of the Insurer in this Province. Written notice may be given to the Insured by letter personally delivered to him or by registered letter, addressed to him at his last post office address, notified to the Insurer, or, where no address is notified and the address is not known, addressed to him at the post office of the agency, if any, from which the application was received.

It is not disputed that ordinarily a notice terminating a contract must be brought home to the other contracting party and the only inquiry here is as to the sufficiency of the clauses quoted to furnish a means short of that.

The specification that the notice will take effect fifteen days after the arrival of the letter at destination is, as Smith J. at the trial held, the determining consideration. It was contended that this clause is not applicable to metropolitan centres with sub-post offices and street deliveries from them: but that is a gloss with no support in the policy. The Court of Queen's Bench (1), in effect, found a condition that the notice would be ineffectual unless received, but even in that situation the question remains, when would it become effective? Casey J. takes the fifteen days to run from the actual receipt; but what warrant in the language used is there for that?

On any interpretation requiring an actual receipt of the notice, and giving effect to the plain meaning of that clause, hardship might be entailed to the insured. If, because of absence of the insured, delivery was made, say, on the 14th day after the arrival or if the absence continued for more than fifteen days, the same exposure to prejudice would take place. These situations could be avoided only by writing the clause off as meaningless or by adding some such condition as that the letter must be actually received by the insured in the ordinary course of mail.

The reluctance of courts to give other than the strictest interpretation to such terms arises from the fact that a failure of actual notice misleads the insurer; he relies upon the continuance of the contract. But insurance has become a vast business, and in relation to automobile operations the complexities of the risk, dependent so often on the personal habits and character of the insured, which, under a practice

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beneficial to the insured, are ascertainable only after the policy has issued, cancellation has become something more than an infrequent and unimportant feature.

The company, as well as the insured, is seen, thus, to have a substantial interest in this provision. The latter could, by being absent from his place of abode, compel the maintenance of a risk which the insurer seeks to end; and it is to meet such a situation that the clause is provided. I am unable to agree that it is to be construed as meaningless or that any such condition as suggested can be implied; and its language, to the ordinary person, is as clear as the company can reasonably be called upon to make it.

The case of *London and Lancashire Fire Insurance Company* v. *Veltre* (1), was relied upon as governing the interpretation, but there the substantive clause was quite different. It provided:—

> The insurance may be terminated by the company by giving seven days' notice to that effect . . . and the policy shall cease after such notice or notice and tender, as the case may be, and the expiration of the seven days.

This was held not to be qualified by a clause dealing generally with the means of giving notice which included that by registered mail.

The substantive clause in the case before us is unequivocal in providing for both the delivery of notice personally or by means of registered post. "Personally" means as to the insured, not as by the insurer, and the last sentence of the clause I have already considered. In *Clapp* v. *Travellers' Indemnity Company* (2), on language indistinguishable, the Court of Appeal for Ontario held the notice effective though not in fact received. In the view of Riddell J.A., the clause places the risk of actual delivery by the post after the letter reaches destination upon the insured, and with this construction I am compelled to agree.

I would, therefore, allow the appeal and dismiss the action. In the circumstances, including the fact that leave to appeal was given on the ground that the question raised was one of importance to insurance companies generally, there will be no costs in this Court or in the Court of Queen's Bench.

(1) (1917-18) 56 Can. S.C.R. 588. (2) [1932] 1 D.L.R. 551.

KELLOCK J.:—The question for decision in this appeal arises upon the true construction of two of the "standard conditions" of the policy in question. The appellants contend that the notice of cancellation, dated the 19th of September, 1946, sent on the following day by registered mail to the respondent at "5481 Queen Mary Road, Montreal, Quebec", the address stated in the policy, was effective to cancel the policy at the expiration of fifteen days from the date of arrival of the letter at the post office in Montreal, which, at the latest, was September 23, 1946. Included in the letter was a cheque for the refund of the appropriate portion of the premium which had been paid in advance.

Two attempts were made by the postal authorities in Montreal to deliver the letter at the address stated, which was in fact the address at which the respondent was residing at the time, but delivery could not be effected owing to the absence of any person on the premises on either occasion. Evidence was given by the letter-carrier that he had left on the premises the usual card notifying the respondent that the letter was being held for him at the post office. Not having been called for (the respondent testified that the card had not been received) the letter was ultimately returned by the post office in Montreal to the appellants at Toronto.

It was held by the Superior Court that the policy was effectively cancelled, but this judgment was reversed by the Court of Queen's Bench, Appeal Side (1).

The conditions in question are as follows:—

CANCELLATION.

13. (2) This policy may be cancelled at any time by the Insurer giving to the Insured fifteen days' notice in writing of cancellation by registered mail, or five days' notice of cancellation personally delivered, and refunding the excess of paid premium beyond the pro rata premium for the expired time. Repayment of excess premiums may be made by money, post office order, postal note or cheque. Such repayment shall accompany the notice, and in such case, the fifteen days above mentioned shall commence to run from the day following the receipt of the registered letter at the post office to which it is addressed.

NOTICE.

15. Any written notice to the Insurer may be delivered at or sent by registered post to the chief agency or head office of the Insurer in this Province. Written notice may be given to the Insured by letter personally delivered to him or by registered letter addressed to him at his

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last post office address, notified to the Insurer, or, where no address is notified and the address is not known, addressed to him at the post office of the agency, if any, from which the application was received.

It is properly admitted by counsel for the respondent that the letter was

addressed to him (the respondent) at his last post office address, notified to the Insurer,

in accordance with condition 15. Condition 13(2) was accordingly complied with, the letter "giving to the Insured fifteen days' notice in writing of cancellation by registered mail". As the letter contained the cheque for the excess premium, as required by the second and third sentences of that paragraph, the remaining question is whether the language of the last sentence of condition 13, which provides for the commencement of the running of the fifteen days from the day following the "receipt" of the registered letter "at the post office to which it is addressed", is satisfied.

It is contended on behalf of the respondent that no letter which bears the street address of premises in any place in Canada where the post office provides delivery of mail by letter-carrier can come within the requirements of the paragraph, in that such a letter is not addressed to a "post office" as would be the case if the letter had, for example, simply borne the word "Montreal". It is further contended that, if effect cannot be given to this contention, the words "post office" in condition 13 must be read as the "last post office address, notified to the Insurer", which are the words actually used on condition 15.

I find it impossible to give effect to either contention. As condition 15 requires that any notice given to the insured otherwise than personally, must be by registered letter "addressed to him at his last post office address, notified to the Insurer", to give effect to the first contention would be to render it impossible for an insurer to give notice by mail to a policy-holder in any city or town throughout the country where delivery by letter-carrier is provided by the post office authorities, in which communities, no doubt, the bulk of policy-holders reside. Such a construction, in my view, would completely stultify the conditions, and would be contrary to all ordinary canons of construction. With respect to the second contention, it is sufficient to say that it requires the substitution in condition 13 of language which it does not contain.

What, after all, it may be asked, is meant by "addressing" a letter but directing the government department which operates the postal service to carry the letter and deliver it through the agency of the department at the place of destination, i.e., the "post office" at that point, to the person whose name and other means of identification, if any, the letter bears. Whether the post office undertakes to endeavour to find the person indicated or leaves the latter to call for his mail, is entirely a matter for the "post office". This, in my view, is exactly the situation which the policy conditions contemplate and for which they provide. The risk of the mails is entirely laid upon the insured.

Reliance was placed on behalf of the respondent, as well as in the judgments in the Court of Appeal, upon the decision of this court in *London and Lancashire Fire Insurance Company* v. *Veltre* (1). The statutory conditions there in question, however, lacked any provision for the commencement of the running of the fifteen days, and, in my opinion, that judgment, therefore, has no application.

It was also contended for the respondent that the provision for the repayment of the excess premium contained in condition 13 means that the insurer must establish actual receipt of such refund by the insured. In my view, acceptance of any such contention would again reduce the provisions of the policy to nonsense, a result not to be arrived at if they are capable of any other reasonable construction. If, on the proper construction of this condition, the notice is "given to the Insured" by such a letter as that here in question, as in my opinion it is, the repayment which the condition expressly provides "shall accompany" the notice is equally made for the purposes of the condition by compliance with that requirement.

I would therefore allow the appeal and restore the judgment of the learned trial judge, but in the circumstances without costs.

CARTWRIGHT J. (dissenting):—The relevant facts of this case are undisputed. The appellant issued an automobile policy in its usual form to the respondent insuring him against third-party liability and other risks, in connection with an automobile owned by him, for the period of one

(1) (1917-18) 56 Can. S.C.R. 588.

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year commencing February 19, 1945. The policy was renewed for the period of a further year, ending February 19, 1947.

The question to be determined is whether the policy was in force on January 14, 1947, when the automobile therein described was involved in a collision, or had been effectively cancelled by the appellant prior to that date.

The policy contained the following conditions which are not "statutory conditions" but are said to be included in all automobile policies issued by the appellant:—

13. (2) This policy may be cancelled at any time by the Insurer giving to the Insured fifteen days' notice in writing of cancellation by registered mail, or five days' notice of cancellation personally delivered, and refunding the excess of paid premium beyond the pro rata premium for the expired time. Repayment of excess premiums may be made by money, post office order, postal note or cheque. Such repayment shall accompany the notice, and in such case, the fifteen days above mentioned shall commence to run from the day following the receipt of the registered letter at the post office to which it is addressed.

15. Any written notice to the Insurer may be delivered at or sent by registered post to the chief agency or head office of the Insurer in this Province. Written notice may be given to the Insured by letter personally delivered to him or by registered letter, addressed to him at his last post office address, notified to the Insurer, or, where no address is notified and the address is not known, addressed to him at the post office of the agency, if any, from which the application was received.

On September 19, 1946, the appellant sent, by registered mail, a notice of cancellation in proper form addressed to the insured as follows:—

Mr. Harry Stone,
5481 Queen Mary Road,
Montreal, Quebec.

This was the address of the respondent contained in the application for the policy and set out in the policy. No other "post office address" was at any time notified to the Insurer. It was therefore the address to which a notice to the Insured was required to be addressed by the terms of Condition 15.

With this notice the appellant enclosed a cheque payable to the insured for $7.84, which is conceded to be the correct amount required to be refunded to the insured under the provisions of Condition 13 (2), quoted above.

This registered letter was never received by the insured nor was it delivered at 5481 Queen Mary Road. The evidence supports the finding of fact that the letter reached

Notre Dame de Grace postal station and in Montreal not later than September 23, 1946. It was returned to the appellant by the postal authorities as "undelivered" and received by it early in October, 1946. It was thereafter retained in the files of the appellant in Toronto, unopened.

No doubt, apart from statutory provisions, if the parties to a contract of insurance for a definite term, the premium for which is paid in advance, choose to do so they may agree that the insurer may cancel the policy and leave the insured without protection although neither the notice of cancellation nor the unearned premium to which he is entitled are received by him and he remains, to the knowledge of the insurer, in ignorance of the fact that the policy has ceased to be in force. But conditions in the contract having such an effect must be exactly complied with by the insurer if it seeks to take advantage of them. If such conditions are ambiguous they will not be construed in favour of the insurer whose words they are. This follows from s. 1019 of the *Civil Code,* which gives statutory force to the maxim *verba chartarum fortius accipiuntur contra proferentem.*

In the circumstances set out above, can it be said that the notice was received "at the post office to which it was addressed"? The contention of the appellant, which found favour with the learned trial judge, is that the receipt of the letter at the Notre Dame de Grace Postal station was receipt at the post office to which it was addressed; but the simple answer to this appears to me to be that the letter was not addressed to such post office. No doubt, as counsel for the appellant argued, a majority of the letters mailed in Canada are no longer addressed to addressees at post offices to which they go from time to time to call for their mail but are addressed to the street numbers of the addressees and delivered there by the postal authorities; but this fact does not appear to me to furnish a sufficient reason for reading into Condition 13 (2) words which are not there. The construction for which the appellant contends requires the insertion in the condition of some such words as those which I have italicized in the following sentence:—"the fifteen days above mentioned shall commence to run from the day following the receipt of the registered letter at the post office to which it is addressed *or if it is not addressed to a post office then from the day*

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Cartwright J.

following its receipt at the post office or postal station at which in the ordinary course of the business of the postal authorities it would be received for the purpose of being given to a carrier for delivery to the street address to which it is addressed."

I am unable to so construe the condition; and, in my view, the notice of cancellation to the insured was at no time "received at the post office to which it was addressed" within the meaning of the words of Condition 13 (2).

The judgment of the Court of Appeal for Ontario in *Clapp* v. *Travellers Indemnity Company* (1), relied on by the appellant, is distinguishable on the facts. In that case the notice of cancellation was addressed to the insured, Justine Barker, as follows:—

> Justine Barker,
> 401 Langlois Ave.,
> Windsor, Ont.

and was in fact delivered at 401 Langlois Ave. and received and signed for there by the wife of the insured. It was therefore received at the very address to which it was directed. It may be that a notice so received would be effective under the wording of Condition 13 (2) although not received by the insured personally; but it is not necessary to express an opinion on this point as, in the case at bar, the notice was not received at the address of the insured but was returned undelivered to the insurer.

As I have concluded that the notice was not effectively given within the terms of the Condition as properly construed, it is unnecessary to consider the further argument of counsel for the respondent that, even if in certain circumstances notice by registered mail may be effectively given although it does not actually reach the insured, there is an obligation on the insurer in cases where there is excess premium to be refunded to see that the amount repayable actually reaches the insured. It may, however, be observed that in the *Clapp case* this question did not arise as the policy in that case was cancelled for non-payment of the premium.

Another construction suggested was that reading Conditions 13 (2) and 15 together the concluding words of the former should be construed as meaning "the fifteen days

(1) [1932] O.R. 116.

above mentioned shall commence to run from the day following the receipt of the registered letter at the post office address of the insured as determined by Condition 15." Such a construction would support the decision in the *Clapp case* but in the case at bar it would not assist the appellant as the letter was never received at such address.

For the above reasons I agree with the conclusion arrived at by the Court of Queen's Bench and would dismiss the appeal with costs.

Appeal allowed without costs.

Solicitors for the appellant: *Tansey, de Grandpré & de Grandpré.*

Solicitor for the respondent: *Reuben Spector.*

1955
Mar. 30
June 28

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

AND

SHELDON'S ENGINEERING LIMITED .RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Assessment—Taxation—Income Tax—Capital cost allowance claimed by corporation on assets purchased from another—Whether corporations controlled by same persons—Whether dealing at arms length—The Income Tax Act, S. of C. 1948, c. 52, ss. 11(1)(a), 20(2), 127(5).

The respondent was incorporated under the *Companies Act* (Can.) in June, 1949, and by an agreement dated July 4, purchased the assets of Sheldon's Limited, an Ontario corporation. In its income tax return for that year it claimed, under s. 11 (1) (*a*) of *The Income Tax Act*, a deduction in respect to capital cost allowance (depreciation) based on the capital cost to the respondent of certain assets purchased from the old company. The claim was disallowed by the appellant on the ground that by virtue of s. 20 (2) of the Act, the capital cost for the purpose of paragraph (*a*) was deemed to be the capital cost to the old company since the transaction had not been one between "persons dealing at arm's length" within the meaning of that section.

Sheldon's Ltd. was controlled by its president and secretary who held a majority interest which they agreed to sell to three minority shareholders. The latter negotiated a loan with the Bank to finance the purchase and the Bank stipulated that the borrowers should deposit with and assign to it as collateral security eighty per cent of the

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

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issued shares of the old company, that a new company be formed to acquire the shares purchased from the majority interest and the assets of the old company, the new company to issue bonds to be applied toward retiring the loan and that an agreement be obtained with an underwriter to purchase the bonds when issued. The terms were complied with. A new company, the respondent, was incorporated and the shares of the old company deposited with the Bank which had them transferred into the names of its own nominees. The transaction between the two companies was completed on July 4 on which date the directors of the old company passed a by-law authorizing the sale and a winding-up and distribution of its assets. This action was ratified by a general special meeting of its shareholders at which the Bank's nominees were in control. The new company's directors then authorized the purchase of the assets and the bond issue and their action was ratified by its shareholders. The directors then authorized purchase of the controlling interest in the old company and assumption of the bank loan. The result was that the new company became entitled to a conveyance of all the assets of the old company, and by virtue of having acquired all of its issued shares, to the amount realized from the sale of its assets.

Held: At the time the sale of the depreciable property in respect of which the capital cost allowance was claimed, was made, the old company was completely controlled by the Bank. In the circumstances ss. 20(2) and 127(5) of the *Income Tax Act* had no application and the parties were at arms length within the commonly accepted meaning of that expression.

Partington v. *The Attorney General* L.R. 4 H.L. 100 at 122. *Verscilles Sweets* v. *Attorney General of Canada* [1924] S.C.R. 466 at 468, applied.

Judgment of the Exchequer Court of Canada [1954] Ex. Cr. 504, affirmed.

APPEAL from a judgment of the Exchequer Court of Canada (1) Potter J., dismissing the appellant's appeal from a decision of The Income Tax Appeal Board (2) allowing the respondent's appeal from its assessment for income tax for the year 1949.

W. R. Jackett, Q.C., E. D. Hickey and *F. J. Dubrule* for the appellant.

D. Guthrie, Q.C. and *H. D. Guthrie* for the respondent.

The judgment of the Court was delivered by:—

LOCKE J.:—This is an appeal from a judgment delivered in the Exchequer Court by the late Mr. Justice Potter (3), by which the appeal of the Minister from a decision of the Income Tax Appeal Board was dismissed. By that decision the present respondent's appeal from its assessment for income tax for the year 1949 was allowed.

(1) [1954] Ex. C.R. 507; 54 D.T.C. 1106.

(2) 7 Tax A.B.C. 353; 53 D.T.C. 11.

(3) [1954] Ex. C.R. 507.

The facts disclosed by the evidence, in so far as it appears to me to be necessary to consider them, are as follows: Sheldon's Limited, a company incorporated under the Companies Act of Ontario (hereinafter referred to as the old company), had for many years prior to 1949 carried on a manufacturing business at Galt, Ont. As of June 1st in that year 4,009 of the common shares had been issued and, of these J. P. Stuart and S. E. Nicholson owned a total of 2,177: 1,168 were held by W. D. Sheldon, Sr. and the remainder by W. D. Sheldon, Jr. and a number of other persons whose identity is immaterial. W. D. Sheldon, Jr. was employed by the company in the capacity of Chief Engineer and G. M. Egoff, W. C. Caldwell and H. W. Mogg were also in the company's employ. Some time prior to the month of June 1949, these four persons had learned that Stuart and Nicholson who, as stated, together held more than fifty per cent of the issued shares and directed the company's policy and occupied the positions of President and Secretary, respectively, wished to sell their shares. In order to prevent the control of the company being acquired by outside interests, Sheldon, Jr., acting on behalf of himself and Egoff, Caldwell and Mogg, entered into negotiations for the purchase of these shares, and an arrangement was concluded whereby Stuart and Nicholson agreed to accept $165 a share in cash for them. The following arrangements were then made by Sheldon, Jr. for the purchase of these shares and the continuing of the business: he arranged to borrow a sum of $359,205, the total purchase price of the shares, from the Royal Bank of Canada, the bank stipulating as a condition of making the loan that eighty per cent of the issued shares of the old company would be lodged with it as collateral security, that a new company should be formed for the purpose of acquiring the shares purchased from Stuart and Nicholson and the assets and good will of the old company, the new company to issue bonds of the face value of $300,000 to be applied towards retiring the loan to Sheldon, Jr. and that an agreement be obtained with an underwriter satisfactory to the bank to purchase the bonds when issued. Sheldon, Jr. was able to

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arrange with all of the minority shareholders of the company to exchange their shares for shares in the new company on an agreed basis, and on June 9, 1949 made an agreement with an underwriter agreeable to the bank for the purchase of the bonds when issued.

The present respondent was incorporated under the provisions of the Dominion Companies Act by letters patent dated June 15, 1949, its capital consisting of 16,000 preferred shares of the par value of $25 each and 80,000 common shares without nominal or par value. On June 17, 1949, Sheldon, Sr., Beatrice B. Sheldon, his wife, and Sheldon, Jr. hypothecated to the Royal Bank their total shareholdings in the old company aggregating 1,259, as security for the loan referred to, and on June 21, 1949, Sheldon, Jr. hypothecated to the bank 2,173 of the shares which he had agreed to purchase from Stuart and Nicholson. It was, apparently, on the latter date that the purchase of these shares was completed and the moneys paid. It is to be noted that, while the collateral security for the loan taken by the bank was on what appears to be the bank's customary form of hypothecation whereby the security was assigned to the bank as general and continuing collateral security for the fulfilment of the present and future obligations of the borrower, the bank, in addition to obtaining the certificates, presented them for transfer to the old company, directing that new certificates be issued in the name of its nominees, A. S. McKay and S. M. Baird. The minutes of a meeting of the directors of the old company held on June 21 show that on that date Stuart resigned as president and director of the company and Sheldon, Jr. was appointed to both offices in his place, and Nicholson resigned as director and secretary, being replaced by Egoff.

The new company having been incorporated and the arrangement with the underwriter made, the proposed transaction between the two companies was completed on July 4, 1949. On that date the companies entered into an agreement in writing for the sale of all the assets of the old company to the new company for an agreed consideration of $1,267,904.44. The agreement specified the sale price of the various kinds of assets sold. So far as it is necessary to consider them, the amounts were: $206,160.18 for the buildings; $348,108.71 for machinery, tools, equipment and

office furniture; $1,326.35 for motor vehicles and equipment and $20,054.42 for patents, patterns, drawings and cuts. To the extent of $517,825.06, the purchase price was to be satisfied by the assumption by the new company of the liability of the old company in respect of a dividend which had been declared by the directors of the old company. At 3 o'clock in the afternoon of that date, the directors of the old company met, declared a dividend in the amount above stated, payable to shareholders of record as of the day following, passed a by-law authorizing the sale, authorized the execution of the sale agreement above mentioned and elected directors in place of two members of the Board whose resignations were then presented. The directors further passed a by-law authorizing the winding-up of the company and the distribution of its assets among the shareholders. This meeting was followed by a special general meeting of the shareholders at which McKay and Baird, who then were in control of the company, were represented by a proxy given to them by Sheldon, Jr. and Egoff, which ratified the by-laws theretofore passed by the directors.

Following these meetings of the old company, the directors of the new company, then consisting of Sheldon, Jr., Egoff, Mogg, Caldwell and D. R. Dattels (who represented the underwriter on the Board pursuant to the agreement for the sale of the bonds to which I have referred) met. At this meeting a by-law authorizing the purchase of the assets of the old company and the execution of the agreement was adopted and applications for 24,001 common shares were accepted and the shares allotted: of these, Sheldon, Jr., Egoff, Caldwell and Mogg were allotted 18,000 shares. A further by-law passed authorized the issue of the bonds in pursuance of the arrangements made in advance of the incorporation of the company. Following this, a special general meeting of the shareholders was held at 6 o'clock, ratifying the above mentioned by-laws. At 6.30 o'clock, a further meeting of the directors was held which authorized the purchase by the company of the 2,177 shares of the old company which had been purchased from Stuart and Nicholson and the assumption by the company of the liability of Sheldon, Jr. to the Royal Bank and, in addition, the purchase of 1,832 shares of the old company, the consideration being fully paid shares in the new company,

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these shares being duly allotted. Upon the carrying out of these arrangements, the new company became the owner of all of the issued shares in the old company and entitled, as such, to the dividend which had been declared on the previous day.

It will be seen from the foregoing recital that the persons who negotiated the transaction whereby the assets of the old company were purchased and conveyed to the new company were Sheldon, Jr. and his three associates. Its completion was made possible by the loan secured from the Royal Bank of Canada with the assistance of Sheldon's parents, and the arrangements which Sheldon, Jr. was able to make, prior to the incorporation of the new company, with the underwriter and the minority shareholders. The result of the transactions carried out on July 4th was that the new company became entitled to a conveyance of all the assets of the old company under the terms of the agreement of purchase and, at the same time, by virtue of having acquired all of its issued shares, became entitled to the amount realized from its assets.

S. 11(1)(*a*) of the *Income Tax Act* ((Can.) c. 52, 1948 as amended by 1949 (Can. 2nd Sess.) c. 25, s. 4) provides that a taxpayer may deduct in computing his income such part of the capital cost to the taxpayer of property, if any, as is allowed by regulation.

S. 20 of the Act, as amended by s. 7 of the amending Act of 1949, provides, *inter alia,* that where depreciable property did at any time after the commencement of 1949 belong to one person who has by one or more transactions between persons not dealing at arm's length become vested in the taxpayer, the capital cost of the property to the taxpayer shall be deemed to be the amount that was the capital cost of the property to the original owner.

In the tax return filed by the respondent, the capital cost of the assets upon which depreciation could be claimed was stated at the amounts agreed to be paid for them as above stated. As contrasted with these figures, their undepreciated capital cost upon the books of the old company were: as to the buildings $107,228.05; as to the machinery, tools, equipment and office furniture $91,547.27 and as to the patents, patterns, drawings and cuts $6,695.30. By the assessment made the depreciation claimed was

reduced by $6,672.14 and it is the increased amount of the tax by reason of this partial disallowance of the claim which is involved in these proceedings.

It is not contended by the Minister that the capital value assigned by the respondent to the assets in question was less than their true value. The values assigned were indeed substantially less than the value of these assets, in the opinion of an appraiser who had valued them some time theretofore at the instance of the old company. The good faith of the respondent in the matter is not impugned, the only questions between the parties being as to the true construction of the relevant provisions of the statute.

The question to be determined is whether, at the time the assets of the old company became vested in the new company, the contracting parties were persons "not dealing at arms length", within the meaning of that expression in s. 20(2). As to the time at which the assets in question vested in the respondent, I agree with the learned trial judge that it was at the time of the execution of the agreement by the respondent on July 4, 1949.

The *Income Tax Act* does not define the expression "dealing at arms length", though s. 127(5)(*b*) provides that, for the purposes of the Act, corporations controlled directly or indirectly by the same person:—

> Shall, without extending the meaning of the expression "to deal with each other at arms length", be deemed not to deal with each other at arms length.

The expression is one which is usually employed in cases in which transactions between trustees and *cestuis que trust*, guardians and wards, principals and agents or solicitors and clients are called into question. The reasons why transactions between persons standing in these relations to each other may be impeached are pointed out in the judgments of the Lord Chancellor and of Lord Blackburn in *McPherson* v. *Watts* (1). These considerations have no application in considering the meaning to be assigned to the expression in s. 20(2).

The words do not appear in the *Income War Tax Act*, though the same subject matter is dealt with in s. 6(1)(*n*) of that Act. In addition to appearing in ss. 20 and 127, the term is employed in ss. 12(3), 17(1), (2) and (3), 36(4)

(1) (1877) 3 App. Cas. 254.

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and 125(3) of the *Income Tax Act*. S. 127(5) does not purport to define the meaning of the expression generally: it merely states certain circumstances in which persons are deemed not to deal with each other at arms length. I think the language of s. 127(5), though in some respects obscure, is intended to indicate that, in dealings between corporations, the meaning to be assigned to the expression elsewhere in the statute is not confined to that expressed in that section.

Where corporations are controlled directly or indirectly by the same person, whether that person be an individual or a corporation, they are not by virtue of that section deemed to be dealing with each other at arms length. Apart altogether from the provisions of that section, it could not, in my opinion, be fairly contended that, where depreciable assets were sold by a taxpayer to an entity wholly controlled by him or by a corporation controlled by the taxpayer to another corporation controlled by him, the taxpayer as the controlling shareholder dictating the terms of the bargain, the parties were dealing with each other at arms length and that s. 20(2) was inapplicable. The present is not such a case, in my opinion, and the question is whether the expression is properly applicable in the circumstances disclosed by the evidence. W. D. Sheldon, Jr. alone, did not, nor did he, together with his three associates Egoff, Caldwell and Mogg, control the old company at the time on July 4, 1949, when the resolutions and by-laws authorizing the sale to the new company were adopted by the directors and subsequently confirmed by the shareholders. I cannot accept the contention advanced on behalf of the Minister that, by reason of s. 73 of the *Companies Act* (R.S.O. 1937, c. 251), Sheldon was entitled to vote upon the shares standing on the share register of the company in the names of McKay and Baird. That section, in my opinion, has no application to a case in which, in addition to the instrument of hypothecation, an actual transfer of the shares to the creditor has been made. It would require an express provision in the *Companies Act* to authorize any person other than a shareholder or a proxy to vote at meetings of the company.

At the time these steps were taken by the old company, it was completely controlled by the bank. The bank depended to a great extent for the repayment of its loan to Sheldon upon the successful disposition of the bonds to be issued by the new company and, as it was pointed out in the evidence, the prospects of making a successful sale of the bonds might well have been prejudiced had the value of the depreciable assets acquired by the new company been shown at their original cost to the old company instead of at their fair value. At the time the meetings of the new company were held at which the purchase was authorized by the directors and shareholders of the new company, Sheldon, Jr. did not hold the controlling interest in the new company, though it would appear that, following the meeting of the directors held at 4.30 o'clock on the afternoon of July 4, when some of the applications for shares in the new company were accepted and the shares allotted, the combined holdings of Sheldon, Jr., Egoff, Caldwell and Mogg constituted a majority of the shares, and that it was later on the same day that the shareholders' meeting confirmed the by-law authorizing the purchase.

In this situation ss. 20(2) and 127(5)(*b*) had no application, in my opinion. While the arrangements which were carried into effect at the meetings of the two companies on July 4 were made in advance and, no doubt, included settling the consideration to be paid for the depreciable assets, it was the bank and not Sheldon, Jr., either alone, or together with his associates, that was in command of the old company after June 21.

S. 20(2) of the *Income Tax Act* may have been intended to cover a more extended field than s. 6(1)(*n*) of the *Income War Tax Act* but, if so, the nature of the extension has not been made clear. In *Partington* v. *The Attorney General* (1). Lord Cairns said in part:—

> . . . as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.

(1) (1869) L.R. 4 H.L. 100 at 122.

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This rule so stated for the construction of a taxing statute was adopted by Duff J., as he then was, in *Versailles Sweets* v. *Attorney General of Canada* (1).

The transaction in question does not fall within the letter of the law, in my opinion, and the respondent is entitled to the relief given in the judgment at the trial. I consider that the parties were at arms length, within the commonly accepted meaning of that expression.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

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

Solicitors for the respondent: *Cassels, Brock & Kelley.*

ADRIEN THIBODEAU .....APPELLANT;

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*Jun. 6
*Jun. 28

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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

Criminal law—Testimony of accomplice—Whether corroborated—Whether admission made by accused was corroboration—Whether fact that accused has previously changed his plea from guilty to not guilty could be taken as corroboration.

The appellant was convicted of having broken and entered a shop with intent to commit a theft. The Crown's case was supported by the testimony of a person whom the trial judge regarded as an accomplice but whose evidence he found was corroborated by (1) an admission made by the appellant and received in evidence by the trial judge, and (2) by the fact that the appellant had previously entered a plea of guilty, which had been withdrawn by leave of the Court. The conviction was affirmed by the Court of Appeal and leave to appeal to this Court was granted on the question as to whether there had been error in the acceptance of these two items as legal corroboration.

Held: The appeal should be allowed and the conviction quashed.

Per Kerwin C.J., Cartwright and Abbott JJ.: At any time before sentence the Court has power to permit a plea of guilty to be withdrawn, and that decision rests in the discretion of the judge and will not be

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

(1) [1924] S.C.R. 466 at 468.

lightly interfered with if exercised judicially. The original plea should then be treated, for all purposes, as if it had never been made. Consequently, the evidence that an accused had previously pleaded guilty to the charge but had been allowed to withdraw such plea, is legally inadmissible.

There was also error in admitting in evidence the statement made by the accused, as it cannot be safely affirmed that the trial judge would have decided to admit it if he had not been influenced, as appears clearly in his judgment, by the evidence of the plea of guilty.

On the properly admitted evidence in the record it would have been unreasonable to convict the appellant.

Per Taschereau and Fauteux JJ.: The decision to allow the withdrawal of a plea of guilty rests with the discretion of the judge, and if that discretion is exercised judicially the Appeal Courts will not interfere unless there exists serious reasons. Like considerations should guide the trial judge in deciding whether a withdrawn plea of guilty should be used in evidence to implicate the accused. In the case at bar there was nothing to suggest that this should have been permitted.

In these circumstances, it was illegal to use this withdrawn plea of guilty in the consideration of the question of the admissibility of the confession. Furthermore, that statement was exculpatory, and if the trial judge had the right to disbelieve all or part of it, he had no right to supply to it, as he did, what was not in it.

The remaining evidence in the record would not reasonably justify a verdict of guilty.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec, affirming the conviction of the appellant on a charge laid under s. 461 of the *Criminal Code.*

A. Villeneuve for the appellant.

R. Dugré, Q.C. for the respondent.

The judgment of the Chief Justice, Cartwright and Abbott JJ. was delivered by:—

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Queen's Bench for the Province of Quebec (Appeal Side) pronounced on November 22, 1954, affirming, without written reasons, the judgment of Judge Delaney a Judge of the Sessions of the Peace delivered on March 29, 1954, whereby the appellant was convicted of having, during the night of October 16-17, 1952, broken and entered a shop with intent to commit the theft of a safe, contrary to s. 461 of the *Criminal Code,* and was sentenced to two years imprisonment.

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THIBODEAU
v.
THE QUEEN

Cartwright J.

On December 22, 1954, my brother Abbott granted leave to appeal upon the following question of law:—

> Did the trial judge err (without first giving his opinion on the conflicting evidence) in accepting as legal corroboration of an alleged accomplice (*a*) an alleged confession made by the accused and accepted on voir dire and (*b*) a previous plea of guilty, subsequently changed to not guilty, by the accused?

The theory of the Crown was that the offence charged in the indictment had been committed by four persons, namely, Dufour, Aubin, the appellant's brother Jean Paul Thibodeau, and the appellant; that the appellant had driven the other three in his automobile to the shop for the purpose of committing the offence; that Aubin had broken a window to effect the entry; that Aubin, Dufour and Jean Paul Thibodeau had entered the shop and put the safe out through the window; that the appellant had placed his car close to this window so that the others could put the safe in the car; that after the safe had been removed from the building, but before it had been placed in the car, the owner of the shop, who had been warned by an alarm connected from the shop to his house, approached the scene with a flash-light and the four persons mentioned above drove away in the car leaving the safe on the ground. The owner did not recognize any of the culprits nor did he get the licence number of the car.

The appellant was arrested in June 1953. He was indicted and tried separately. At the trial evidence was given by the four persons named above. The evidence of Dufour supported the theory of the Crown as outlined above. At the time of giving his evidence Dufour had already been convicted and sentenced for the same offence as that with which the appellant was charged. There were discrepancies between the evidence Dufour gave at the trial and that which he had given at a previous hearing. There was evidence, which he denied, that he had a grudge against the appellant and had threatened to get even with him. Aubin admitted his own participation in the offence but stated that the appellant had had nothing to do with it. Both Jean Paul Thibodeau and the appellant denied having been present at the time of the crime or having had anything to do with it.

It is obvious that if the appellant took part in the commission of the offence charged Dufour was an accomplice. The learned trial judge so regarded him but was of opinion that there were two items of evidence corroborating his story. These were (i) a statement in writing said to have been made by the appellant to a police officer, and (ii) the fact that the appellant when first arraigned on the charge before Judge Boisvert had pleaded guilty. It will be convenient to deal first with the second of these items.

The only indication in the record that the appellant had at any time entered a plea of guilty is contained in the appellant's cross-examination on the voir dire held for the purpose of determining whether or not the written statement alleged to have been made to the police officer should be admitted in evidence. I propose, however, to deal with the matter on the assumption, made by the learned trial judge in his reasons for judgment, that evidence had been tendered and received proving the fact of the appellant having pleaded guilty. The appellant was arrested on June 16, 1953. On the following day he was arraigned before Judge Boisvert and pleaded guilty. On this occasion the appellant was not represented by counsel. This plea having been entered the learned Judge adjourned the matter to June 23, 1953, for sentence. On this last mentioned date, before sentence was passed, counsel for the appellant asked permission to withdraw the plea of guilty and to enter a plea of not guilty. Permission to do this was granted by Judge Boisvert and a plea of not guilty was entered.

On February 1, 1954, the case came before Judge Delaney. The only plea in the record was one of not guilty. The charge was read to the appellant and he again pleaded not guilty. The case was adjourned and finally came on for trial before Judge Delaney on March 22, 1954. What then occurred is set out as follows in the Proces-Verbal:—

22 mars 1954

De consentement des parties, la preuve offerte dans la cause portant le numéro 12939, la Reine vs Jean-Paul Thibodeau est versée dans la présente cause pour servir à toutes fins que de droit, même le témoignage de Adrien Thibodeau, lui-même, mais pour servir en défense, plus ce qui suit:—

PREUVE SUR VOIR-DIRE:

Philippe Laroche, 49 ans, sergent-détective, Québec, Que.

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DEFENSE SUR VOIR-DIRE:

Adrien Thibodeau, 29 ans, bûcheron, St-Martin, Que.

Me Henri Lizotte argumente sur le voir-dire.

Me Roland Dugré argumente sur le voir-dire.

La Cour permet la production de la confession. (Voir jugement écrit au dossier).

FIN DU VOIR-DIRE

Philippe Laroche, 49 ans, sergent-détective, Québec, Que., lequel produit P-1 (confession).

Jean-Paul Thibodeau, 22 ans, bûcheron, Coaticook, Que.

Me Henri Lizotte, adresse le Tribunal.

Me Roland Dugré, adresse le Tribunal.

Cause prise en délibéré pour jugement le 29 mars 1954.

29 mars 1954

L'accusé est trouvé coupable et condamné à deux (2) ans de pénitencier. (Voir jugement écrit au dossier). Mandat d'emprisonnement émis.

The record in case 12939 consisted of the evidence, called by the Crown, of Bourque the owner of the store broken into, his daughter Lidia Bourque, Dufour, Aubin, Laroche a police officer, and Poulin from whom the appellant had purchased his automobile, and the evidence, called by the defence, of the appellant Adrien Thibodeau, and of two ladies who gave evidence in support of an alibi for both Jean-Paul Thibodeau and the appellant. The record included the deposition of Dufour at the preliminary inquiry. Nowhere in this record was there any mention of the appellant having at one time pleaded guilty.

Immediately following the filing of this record, Laroche and the appellant were examined and cross-examined on the voir dire for the purpose of determining whether the statement, dated June 16, 1953, later filed as Exhibit P-1, should be admitted in evidence. This statement was written out, in the form of question and answer, by the police officer and consisted of two separate sheets, the second of which only was signed by the appellant. The police officer stated that he did not give the statement to the appellant to read but that he had read it to him before he signed it. The appellant's evidence was that he had made a statement in answer to questions put to him by the police officer but that it was substantially different from the statement produced. The statement which the appellant said he had made to the officer would not have afforded any corroboration of Dufour's evidence but the statement produced by

the officer was capable of being regarded as corroboration as it contained an admission by the appellant that he had been present at the scene and time of the crime.

The cross-examination of the appellant on the voir dire concluded as follows:—

Q. Vous avez comparu devant de Juge Boisvert?
R. Oui.
Q. Vous avez plaidé coupable?
R. Oui.
Q. Ca c'était le dix-sept (17) de juin; votre sentence a été ajournée au vingt-trois (23) de juin?
R. Oui.
Q. Là, vous avez pris un avocat?
R. Oui.
Q. Vous avez obtenu la permission de changer votre plaidoyer de culpabilité?
R. Oui.
Q. C'est le lendemain que vous êtes venu ici devant le Juge Boisvert?
R. Oui.
Q. Vous avez plaidé coupable quand ils vous ont lu l'accusation?
R. Monsieur Laroche est venu me chercher pour m'amener devant le Juge. Il m'a dit: "écoute là, fais un homme de toi, tiens-toi droit et quand le Juge va te demander coupable ou non coupable, tu diras coupable"
Q. Vous dites que c'est lui qui vous a dit de dire ça?
R. Oui monsier je le jure. Je connaissais rien là-dedans, j'avais jamais été arrêté à nulle part, je connaissais rien là-dedans.

PAR LA COUR:

Q. Vous pensiez que coupable et non coupable c'était pareil, c'était la même chose pour vous?
R. Oui. Je connaissais pas ça.
Q. Vous pensiez que c'était la même chose; coupable ou non coupable c'était la même chose pour vous?
R. Je pensais que c'était la même chose. Je lui ai dit: si je dis coupable, ils peuvent-y me garder? Il dit: non, ils te garderont pas, c'est pas toi qui es là-dedans, c'est Dufour et Aubin et ton frére, c'est pas toi certain, t'as pas besoin d'avoir peur'; c'est là que j'ai dit coupable, c'est pour ça que j'ai dit coupable.
Q. Le vingt-trois (23), une semaine après, vous êtes revenu devant le même Juge avec un avocat, l'avocat Nadeau?
R. Oui.
Q. Là, vous avez obtenu la permission de changer votre plaidoyer?
R. Oui.
Q. Vous avez eu une enquête préliminaire?
R. Oui.

Laroche, although present, was not re-called and the appellant's evidence as to why he pleaded guilty is uncontradicted.

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Following this the learned trial judge gave judgment on the voir dire holding that the statement was made freely and voluntarily and should be received in evidence. In his reasons he said in part:—

> L'accusé nous dit ensuite qu'il a comparu devant un Juge, qu'il a plaidé coupable, qu'il ne savait pas ce que ça voulait dire, un homme de vingt-et-un ans, il ne voyait pas de différence entre un plaidoyer de culpabilité et un plaidoyer de non culpabilité. Il ne me semble pas que je serais justifiable, par ces simples constations, d'admettre le témoignage de l'accusé pour jeter un doute sur l'officier de police . . .

At the conclusion of the trial the learned judge reserved his judgment until March 29, 1954. On that date he convicted the appellant. In his reasons the learned judge having stated that Dufour's evidence incriminated the appellant and that Dufour was an accomplice instructed himself as follows:—

> La doctrine veut que le Juge, en appréciant la preuve, doit se rappeler qu'il est fort dangereux de condamner sur le témoignage non corroboré d'un complice, mais il a le pouvoir et il doit le faire si par ailleurs il accorde une croyance entière et absolue aux complices.

With respect this does not conform to the law as laid down in this Court in *Vigeant* v. *The King* (1), followed in *Boulianne* v. *The King* (2). In the latter case at page 622 Anglin C.J.C., giving the judgment of the majority of the Court said:—

> . . . the majority of us are of the opinion that there was misdirection in a material matter, in that the learned judge, although he warned the jury properly of the danger of convicting on the uncorroborated evidence of an accomplice, further instructed them, in effect, that if they believed his evidence, although not corroborated, it was their duty to convict . . .

It is never correct to say that the jury, or the judge trying a case without a jury, ought to convict on the uncorroborated evidence of an accomplice.

The learned judge then proceeded to deal with the question whether there was corroboration of Dufour's evidence and also with the defence of alibi in the following passage:—

> Son témoignage est-il corroboré? Il y a d'abord la confession que j'ai déclarée avoir été faite librement et volontairement et qui est au dossier. Dans sa confession, il n'admet pas sa participation directe au crime, mais admet s'être rendu et dans l'après-midi et le soir à l'endroit où l'effraction a été commise et avoir attendu les autres dans le char. Son témoignage est également corroboré par son admission de culpabilité qu'il a faite lors de sa comparution. Il a été arrêté, il a comparu devant monsieur le Juge

(1) [1930] S.C.R. 396. (2) [1931] S.C.R. 621.

Boisvert, a plaidé coupable à l'accusation telle que portée. Le Juge a ajourné sa sentence à quelques jours et lorsque le jour de la sentence est venu, l'accusé, représenté par un savant procureur, a demandé de changer son plaidoyer. La Cour lui a permis de changer son plaidoyer. Je trouve une corroboration du témoignage de Dufour dans la confession de l'accusé, dans le fait qu'il a plaidé coupable, surtout lorsque ce fait n'est pas expliqué d'une façon raisonnable. Lorsque la Cour lui demande pourquoi il avait décidé de plaider coupable, il nous dit qu'il ne savait pas la différence entre un plaidoyer de culpabilité et un plaidoyer de non culpabilité. Il me semble qu'une excuse de cette nature là ne peut pas avoir grand attention et grand mérite auprès de la Cour. Son ami et complice avait plaidé coupable, il était déjà condamné à la prison, il n'était pas sans le savoir, et il savait bien la différence entre plaider coupable et plaider non coupable. L'accusé Thibodeau a témoigné; il a nié sa participation. Sa négation, en face de sa confession, ne peut valoir. De plus, il a fait entendre des témoins pour faire une preuve d'alibi, preuve par une dame et sa fille, amie d'un des accusés. Ils ont témoigné que les deux Thibodeau étaient chez eux l'après-midi du crime, qu'ils sont restés là pendant trois jours, qu'ils ne sont pas sortis ni l'un ni l'autre, que c'était la fête de l'un des deux, que la fête a été célébrée chez elle le samedi.

Ils seraient arrivés chez elle le jeudi et ils seraient restés là jusqu'au samedi. Cet alibi n'a pas été présenté à l'enquête préliminaire. Je comprends que l'alibi doit être présenté dans le plus bref délai possible, mais que ceci veut pas dire que l'alibi présenté au procès ne peut avoir aucune importance, mais il perd sûrement de sa valeur, et dans ce cas-ci je ne peux pas apporter foi à l'alibi, en présence de la confession libre et volontaire, du témoignage de Dufour et également du plaidoyer de culpabilité de l'accusé.

It will be observed that in reaching his judgment on the voir dire, that the statement made to Laroche should be admitted in evidence, the learned trial judge was influenced by the fact that the accused had pleaded guilty; and that in reaching his judgment at the conclusion of the trial he was influenced by both the statement to Laroche and the fact of the plea of guilty in (i) accepting the evidence of Dufour and (ii) rejecting the defence of alibi.

In approaching the question whether the judge presiding at the trial of an accused who has pleaded not guilty should admit evidence that the accused previously pleaded guilty to the charge but was permitted to withdraw such plea it may first be observed that it is clear that at any time before sentence the Court has power to permit a plea of guilty to be withdrawn. As to this it is sufficient to refer to the following cases; *R.* v. *Plummer* (1), *The King* v. *Lamothe* (2), *R.* v. *Guay* (3), and *R.* v. *Nelson* (4). These cases make it equally clear that the decision whether or not

(1) [1902] 2 K.B. 339.
(2) 15 C.C.C. 61.
(3) 23 C.C.C. 243 at 245-246.
(4) 32 C.C.C. 75.

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permission to withdraw a plea of guilty should be given rests in the discretion of the Judge to whom the application for such permission is made and that this discretion, if exercised judicially, will not be lightly interfered with.

Counsel informed us that they had not been able to find any reported case in the courts of this country or in England in which the question now under consideration has been considered. This may at first seem surprising as there must have been many cases in which a plea of guilty was permitted to be withdrawn and the accused went to trial on a plea of not guilty; but it seems probable that the true explanation of the lack of authority is that suggested by counsel for the defence when he says in his factum:—

> Il nous semble qu'il répugne qu'on puisse se servir contre un accusé de son changement de plaidoyer pour arriver à l'incriminer. Il nous semble que ceci irait contre les droits primordiaux d'un accusé selon notre organisation de justice pénale. C'est sans doute pour cette raison que nous avons cherché en vain de la jurisprudence sur ce point.

It is, I think, an inference that may fairly be drawn from the dearth of authority that whenever it has been tendered the courts have refused to admit evidence that an accused had entered a plea of guilty to the charge upon which he was on trial which had later been withdrawn by leave of the Court. It is highly improbable that such evidence should have been admitted and no redress sought in an appellate tribunal. Be this as it may, I am of opinion that, where a plea of guilty has been withdrawn and a plea of not guilty substituted by leave of the Court, the Judge before whom the case comes for trial following the plea of not guilty should assume that the Judge who granted leave to change the plea did so on sufficient grounds and should treat the original plea, for all purposes, as if it had never been made.

In *Wigmore on Evidence* 3rd Edition, Vol. IV, page 66, s. 1067, the learned author says:—

> For *criminal* cases (where a withdrawn plea of guilty is later offered) the few authorities are divided.

I have examined the authorities referred to and prefer the reasoning of those judges who have held the evidence in question inadmissible. In my opinion the dissenting judg-

ment of Wheeler J. in *State* v. *Carta* (1), deals satisfactorily with the question and reaches the right conclusion. I refer particularly to the following passage at page 415:—

> Considerations of fairness would seem to forbid a court permitting for cause a plea to be withdrawn, and at the next moment allowing the fact of the plea having been made, with all its injurious consequences, to be admitted in evidence as an admission or confession of guilt by the accused. The withdrawal is permitted because the plea was originally improperly entered. No untoward judicial effect should result from the judicial rectification of a judicial wrong.
>
> The majority hold that the fact that the former plea may be explained will be a sufficient protection to the accused. Such a ruling places upon him a burden of disproving a fact which does not exist; for the withdrawal eradicated it. It brings him before the jury under the heavy cloud of suspicion created by his plea of guilty when he is entitled to come before the jury with the presumption of innocence shielding him. It makes him prove again that his plea was wrongly entered when that fact has already been judicially ascertained and settled by a court of competent jurisdiction and cannot be opened unless a higher court finds an abuse of that court's discretion.

For the above reasons I have reached the conclusion that on the trial of an accused who has pleaded not guilty evidence that he had previously pleaded guilty to the charge but had been allowed to withdraw such plea is legally inadmissible; from which it, of course, follows that evidence of the former plea can neither be given for the prosecution nor elicited from the accused in cross-examination.

It should perhaps be mentioned in passing, that, even if the question of the admissibility of evidence of the withdrawn plea in the case at bar had fallen to be determined under the rules regarding extra-judicial confessions, the evidence ought clearly to have been rejected in view of the uncontradicted evidence quoted above as to the representations made by a person in authority to the appellant while in custody which influenced him to enter the plea.

For the above reasons it is my opinion that the learned trial judge erred in admitting evidence that the appellant had previously entered a plea of guilty and in treating such evidence as corroboration of the evidence of Dufour.

It is next necessary to consider whether the learned trial judge erred in admitting the written statement Exhibit P.1. After an anxious consideration of the evidence given on the

(1) (1916) 96 Atl. 411.

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voir dire, I entertain grave doubt as to whether the prosecution can be said to have discharged the onus of shewing that the statement should be admitted. It appears to me, moreover, that it cannot safely be affirmed that the learned judge would have decided to admit the statement if he had not been influenced by the evidence of the plea of guilty which he ought to have rejected altogether. That he was so influenced appears clearly from the passage from his reasons for judgment on the voir dire quoted above. In the result I conclude that the decision of the learned judge on the voir dire can not be supported. Apart altogether from what I have said in regard to the admission of the statement P.1, the wrongful admission of evidence as to the withdrawn plea of guilty and the very considerable weight given to it by the learned judge in his reasons for convicting the appellant would be fatal to the validity of the conviction, which must accordingly be quashed.

It remains to consider what further order should be made. After a careful reading and re-reading of all the evidence, I am of opinion that on the evidence in the record which was properly admitted it would have been unreasonable to convict the appellant and that we ought not to direct a new trial.

I would accordingly allow the appeal, quash the conviction and direct a judgment of acquittal to be entered.

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

FAUTEUX J.:—L'appelant se pourvoit à l'encontre d'une décision de la Cour d'Appel confirmant un jugement de culpabilité prononcé contre lui par M. le Juge Delaney, de la Cour des Sessions de la Paix de la province de Québec.

Les membres de la Cour d'Appel n'ont donné individuellement aucune raison supportant la décision; et le seul considérant apparaissant au jugement formel est à l'effet qu'il n'y a pas d'erreur dans le jugement de première instance.

En toute déférence, il m'est impossible de concourir dans ces vues. Bref, cette déclaration de culpabilité repose sur le témoignage du complice Dufour, lequel est contredit par celui d'un autre complice exonérant l'appelant de toute participation coupable dans l'affaire. Pour donner effet à la version de Dufour, le Juge de première instance a erronément, à mon avis, accepté comme corroboration du

témoignage de ce complice (i) le fait d'un plaidoyer de culpabilité que l'accusé enregistra d'abord et que M. le Juge Boisvert, un autre Juge de la même Cour, lui permit subséquemment de retirer pour y substituer un plaidoyer de non culpabilité; (ii) une prétendue confession de l'accusé à la police.

(i) Le fait du plaidoyer de culpabilité. Comme le signale mon collègue le Juge Cartwright en ses notes, il est clair que la jurisprudence relative à la demande de retrait d'un plaidoyer de culpabilité établit que la décision sur telle demande teste à la discrétion du Juge à qui elle est faite et que les tribunaux d'appel n'interviendront pas sans raisons sérieuses sur cette décision, si cette discrétion a été exercée judicieusement. Dans le dossier actuel, rien ne suggère qu'une telle intervention eut été justifiée. A mon avis, l'esprit de cette règle guidant les tribunaux d'appel sur la question doit également guider le Juge au procès, quant à l'utilisation en preuve du fait de ce changement de plaidoyer pour impliquer l'accusé. Dans les circonstances, c'est illégalement que le Juge au procès a accepté comme preuve corroborant le témoignage du complice, que l'accusé avait d'abord plaidé coupable à l'accusation.

(ii) La confession. Il faut dire d'abord que pour conclure à l'admissibilité de cette confession, le Juge a encore pris en considération le plaidoyer de culpabilité en premier lieu enregistré par l'accusé; ce qui, pour les raisons déjà indiquées, était illégal. De plus, ces déclarations faites à la police par l'accusé sont exculpatoires; elles comportent une négation complète de toute participation coupable en l'affaire. Sans doute, le Juge avait le droit de ne pas croire à la vérité de toutes ou partie de ces déclarations; mais ce droit n'implique pas celui de suppléer aux déclarations ce qu'elles ne comportent pas, soit, en particulier, comme il est mentionné au jugement de culpabilité, le fait que l'appelant aurait attendu dans son automobile les personnes impliquées dans cette affaire. C'est donc affirmativement qu'il faut répondre à la question de droit sur laquelle permission d'appeler a été donnée, savoir:—

Did the trial Judge err (without first giving his opinion on the conflicting evidence) in accepting as legal corroboration of an alleged accomplice (*a*) an alleged confession made by the accused and accepted on *voir-dire* and (*b*) a previous plea of guilty, subsequently changed to not guilty, by the accused?

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Fauteux J.

L'appel doit être maintenu. Quant à l'ordonnance à rendre, je suis d'avis, comme mon collègue M. le Juge Cartwright, que, vidée des illégalités qui s'y trouvent, la preuve au dossier ne saurait raisonnablement justifier un verdict de culpabilité.

Je maintiendrais l'appel, infirmerais le jugement de culpabilité et ordonnerais l'inscription d'un jugement et d'un verdict d'acquittement.

Appeal allowed; conviction quashed, acquittal ordered.

Solicitors for the appellant: *Lizotte, Marchessault & Villeneuve.*

Solicitor for the respondent: *Roland Dugré.*

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*Feb. 21

*June 28

TEODOR SEMANCZUK (also known as Theodore Semanczuk) (*Defendant*) APPELLANT;

AND

MARY SEMANCZYK (also known as Mary Semanczuk) (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA

Appeal—Evidence—Husband and wife—Real Property—Property claim by wife raised non-support issue—Relevancy of wife's behaviour—Admissibility of husband's evidence—Trial by judge alone—Question of Fact—Principles governing appellate court.

The respondent in an action against her husband alleged that certain lands had been purchased with moneys earned by their joint efforts under a parol agreement whereby she was entitled to a one-half interest; that they had married in 1931 and that he deserted her in 1941 and had since refused to support her. At the trial questions were put to her in cross-examination, which might tend to indicate that she had committed adultery and had been intimate with several men, which she denied. The trial judge rejected the evidence of the respondent, accepted that of the appellant and dismissed the action. The Court of Appeal for Manitoba by a unanimous judgment reversed the trial judge and held that the questions put the respondent in cross-examination were prohibited by s. 8 of *The Manitoba Evidence Act* and were irrelevant as the case was not one in which the character of the parties was involved: that the appellant was bound by the respondent's denials and his evidence in contradiction was improperly allowed in and that, as it was impossible to ascertain

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

to what extent the trial judge may have been influenced in his findings by the inadmissible and irrelevant evidence adduced, the advantage of his having seen and heard the witnesses was not sufficient to explain or justify his conclusion.

Held: 1. That the Statement of Defence put in issue the question of non-support and was so treated by both parties. The behaviour of the wife thus became a relevant matter to be considered and the appellant's evidence, admitted without objection, was properly admitted.

2. That upon this issue the respondent might properly be cross-examined as to her associations with other men, restricted however by the provisions of s. 8 of *The Manitoba Evidence Act.*

3. That even if the questions asked in cross-examination offended against the section it could not have affected the judgment of the trial judge in deciding upon the veracity of the parties in view of the husband's evidence and of the admitted fact that the wife had been living in adultery and had given birth to an illegitimate child.

4. That the questions were answered by the wife without objection and it was for her to claim the protection of the section. *Hebblethwaite* v. *Hebblethwaite* L.R. 2 P & D 29.

5. That the questions to be determined were questions of fact and there was nothing in the record to indicate that the trial judge in reaching the conclusion that the respondent's story was not worthy of credence acted upon any wrong principle or was influenced by irrelevant matter. *SS. Hontesroom* v. *SS. Sagaporack* [1927] A.C. 37 at 47; *Yuill* v. *Yuill* [1945] A.C. 15 at 19; *Powell* v. *Streathem Manor Nursing Home* [1935] A.C. 243 and *Watt or Thomas* v. *Thomas* [1947] A.C. 484 at 487-8 referred to.

Decision of the Court of Appeal for Manitoba (1954) 12 W.W.R. (N.S.) 1 reversed and judgment of trial judge restored.

APPEAL from a judgment of the Court of Appeal for Manitoba (1) which reversed the judgment of the trial judge, Campbell J., by which the claim of the respondent, the plaintiff in the action was dismissed.

David Levin, Q.C. and *Jack Chapman* for the appellant.

Maurice Arpin for the respondent.

The judgment of the Court was delivered by:—

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for Manitoba (1) which reversed the judgment delivered at the trial by Campbell J., by which the claim of the respondent, the plaintiff in the action, was dismissed.

(1) (1954) 12 W.W.R. (N.S.) 1.

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SEMANCZUK v. SEMANCZYK

Locke J.

The parties are husband and wife, having been married in Winnipeg in the year 1931. The Statement of Claim reads in part:—

2. That at the time of the said marriage and/or prior and subsequent thereto it was agreed between the Plaintiff and the Defendant that whatever money or property either or each of them had was to be the joint property of the Plaintiff and the Defendant and any property they subsequently acquired would be pooled and the same was to be the joint property of the Plaintiff and the Defendant in equal shares.

3. In the alternative to the foregoing paragraph the Plaintiff alleges that the Plaintiff and the Defendant at the time of their marriage entered into a Partnership Agreement whereby it was agreed between them that they would pool all their resources and any monies and/or property of any description which either the Plaintiff or the Defendant received from any source whatsoever, the same was to go into the partnership enterprise and become the joint property of both of them and the losses and profits were to be shared equally between the Plaintiff and the Defendant.

It was alleged that three parcels of land had been purchased pursuant to the agreement referred to in paras. 2 and 3, that this had been done with moneys earned through the joint efforts of the parties, that they were the property of the parties in equal shares, and that, as to one half interest, the appellant was a trustee for the respondent. It was further alleged that the appellant had deserted the respondent in July of 1940, that they had not since lived together and that the appellant refused and neglected to maintain and support her. The prayer for relief asked a dissolution of the partnership, a declaration as to the respondent's interest and an accounting. Other than the allegations as to the marriage and as to the title to two of the parcels of land, all of the further allegations in the Statement of Claim were put in issue by the Statement of Defence.

The evidence given by the respondent as to the various agreements referred to in paras. 2 and 3 of the Statement of Claim was extremely vague. The parties are Ukrainians and both speak English imperfectly. While an interpreter was available and at times assisted in the taking of the evidence, most of it was given in English. The evidence of the respondent as to the alleged agreements may be summarized as follows. After saying that after their marriage she had worked for other persons in various capacities and had given the money to her husband, in answer to a question as to why she did this the respondent said:—

He asked me, he wanted money and he keep it, and after we buy something, we buy both together.

Then, asked if there had been any discussion between them before or after the marriage as to what would be done with the moneys earned by the two of them, she answered:—

No. He say at the time we working both and we buy both and we got both.

When these conversations took place was not stated with any more particularity. In 1934, apparently by their joint efforts, they had planted a crop of potatoes on a piece of rented land in the Municipality of Fort Garry and the respondent said that she and her husband decided to trade the crop for a three acre parcel of land in the Municipality. As to this, she said:—

He say we give him (the owner) crop and we buy property, the three acres of land and we put it in both names. I say we work both and we get it both.

The land referred to was the first of the three parcels of land referred to in the Statement of Claim and the respondent's story regarding it is supported by the evidence that, when title to the three acre parcel was obtained, the certificate showed both parties as owners.

It was shown that in 1935 the parties went to a mining camp at McKenzie Island, Ont. and while there were both employed, though the respondent did not live with the appellant continuously throughout this period, there being times when they were separated.

In August of 1937, according to the respondent, her husband insisted upon entering into a separation agreement and took her to a lawyer at Red Lake, Ont., by whom such an agreement was prepared. This document was not produced. At the same time, the respondent signed a transfer of her interest in the three acres at Fort Garry and received a sum of $515 from her husband. The receipt read "Re cash payment under separation agreement." Either then or prior thereto, the respondent also received a certificate for 400 shares of Frontier Red Lake Gold Mines Ltd. which she apparently regarded as part of the consideration for the transfer of her interest in the lands. Despite the making of the agreement, however, they resumed living together and the respondent claimed that she returned the $515.

Thereafter, the appellant purchased the two other parcels of land in the Parish of St. Vital; the certificate of title for the first of these, which was produced, bears date

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January 30, 1941, and for the second July 11, 1941, and in each the appellant appears as the owner. The respondent's evidence relating to her alleged interest in these parcels of land, other than that above quoted, was that while at McKenzie Island she gave her husband what money she earned and that when the first of the two mentioned properties, some six acres in extent, was purchased:—

> He said we have to take that property and we get a money order and we go to the Post Office. mail money to Winnipeg, and I don't know what should be but I know we both buy that property.

and, when asked as to whether they had had any discussion as to whose property it was to be, she said:—

> He say all the time it was mine and his, both.

and that later he had told her he had bought the lands in the names of both of them. She then said that she and her husband had come to Winnipeg in 1940 and bought the second of these parcels some two or three years after the six acre parcel had been bought and that she had gone with him to the lawyer when the purchase was made, bringing $2,000 which her husband had withdrawn from funds in the bank which, she said, were their joint property and that, as to this purchase, he had said that we had "bought for both."

While the respondent did not explain in the course of her evidence the reason for the separation agreed upon in 1937, she gave affirmative evidence in chief as to disagreements between them at various times at McKenzie Island when, she claimed, he had struck her. In 1941, after they had come back from McKenzie Island, they had separated, the respondent saying that her husband had refused to live with her and had left.

It was in the course of the cross-examination of the respondent that questions were directed to her which, in the opinion of the learned judges of the Court of Appeal who gave reasons for judgment in this matter, should not have been permitted and affected the finding of the learned trial judge as to her veracity. Presumably for the purpose of explaining the disagreements between the parties, to which reference had been made by the respondent in her evidence in chief, and the undoubted fact that the parties had not lived together since 1941, the respondent was asked if she had had "an affair" with one Richko, shortly after they were married, and with one Benes at Red Lake. As to

Benes, she was asked whether it was true that her husband had come home from work one day and found Benes in bed in the house, which she denied. Asked as to whether there was a man by the name of Piliuk living on Schultz Street in the house where she was living in 1941, she said at first she did not know him but then admitted that she was living with him and that she had a child born in 1942 of which he was the father.

The only other evidence given on behalf of the respondent in an effort to support the allegations as to the agreements was that of one Mary Verstraete, a neighbour in Fort Garry, who said that the appellant had told her at the time that he was going to buy the three acre property for himself and his wife.

The appellant's evidence was a complete contradiction of that of his wife as to the alleged partnership agreement, or any agreement before or after their marriage, as to the joint ownership of property. As she had worked with him in the raising of the crop on the rented property in 1934, he had, however, taken title to the three acre parcel in their joint names and had bought out her interest at the time the separation agreement was made in 1937. In answer, apparently, to the respondent's version of the cause of their disagreements, he gave evidence as to various difficulties he had had with her over her relationship with other men, commencing with Richko who, he said, had been attentive to his wife shortly after their marriage. Explaining the disagreement in 1937 at McKenzie Island, he said that Benes had been going around with his wife and that he had found him in bed with her and had got into a fight with him, in consequence. While they had resumed living together after entering into the separation agreement, they again quarrelled and the respondent left his house and, according to the appellant, was supported for a period by Benes. All of this evidence was given without objection, as well as an account of a discussion he had had with his wife within a year before the trial when the latter was accompanied by her child which, she informed him, was not his. Speaking further of her relations with Benes, he said that in 1939 this man had left McKenzie Island and gone to Winnipeg and his wife had followed him and had not returned until the Fall of the year. As to the purchase of the properties in

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1941, the appellant said that the moneys used were his own, nothing being contributed to their purchase by his wife, and he denied any agreement that she should have any interest in either of them, or that she had returned any part of the $515 to him. According to him, on August 10, 1941, he returned to his home in Winnipeg after an illness and, having decided to move to other quarters, asked his wife to accompany him and she refused. From that date onward, they had lived apart.

The respondent was not called in rebuttal and, other than the denials given by her in cross-examination to the questions asked regarding a suggested affair with Richko in 1931 and as to her being friendly with Benes and as to his having been found in bed in her husband's house, there was no denial of the evidence of the appellant that she had left his home shortly after the making of the separation agreement and been supported for a period of time elsewhere by Benes, that she had left her husband for several months in 1939 and gone to Winnipeg after Benes had moved there, and as to the conversation when, allegedly, she had told him that he was not the father of her child.

Campbell J. found that there never had been any agreement made between the parties, as alleged in the Statement of Claim, and said that he did not believe the respondent's evidence regarding any of the matters in dispute and accepted that of her husband. The learned judge referred to the fact that the respondent had been too friendly with a number of men and that the break-up of the home was attributable mainly to Benes. It was, no doubt, because the respondent had pleaded that the appellant had refused to maintain her and had tendered evidence in support of that claim (though no substantive relief had been claimed in respect of it) and that the appellant had given evidence as to the reason for their separation that the learned judge dealt with this aspect of the matter.

In the Court of Appeal, reasons for judgment were delivered by Coyne and Beaubien JJ.A Both of these learned judges were of the opinion that the questions asked in cross-examination in regard to Richko and Benes should not have been permitted, or the evidence regarding them given by the appellant received. As they considered the subject matter of the cross-examination to be irrelevant, it

was their opinion that the appellant was bound by the answers made. Beaubien J.A., with whom the other members of the Court agreed, considered that the questions to which I have referred were prohibited by s. 8 of *The Manitoba Evidence Act* (R.S.M. 1940, c. 65), which reads:—

> No witness in any proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery.

That learned judge, after referring to a passage in the judgment of Lord Thankerton in *Watt* v. *Thomas* (1), in which certain of the circumstances justifying an appellate court in reversing findings of fact at the trial are mentioned, said in part:—

> It being impossible to ascertain to what extent he, in his finding that "there never was any agreement between the parties", may have been influenced by the inadmissible and irrelevant evidence adduced, I must, with great respect, say I am not satisfied "that any advantage enjoyed by" him "by reason of having seen and heard the witness" is sufficient to explain or justify his conclusion within the meaning of the rules laid down by Lord Thankerton.

After considering the evidence, Beaubien J.A. reached the conclusion that the proper inference to be drawn from it was that an agreement of the nature referred to in para. 2 of the Statement of Claim had been made.

The formal judgment of the Court of Appeal declares the parties to be the owners of the three parcels in equal shares.

While the usual course followed by appellate courts when setting aside judgments on the ground of the improper admission or rejection of evidence is to order a new trial, since no mention is made of that subject in the reasons for judgment delivered, I assume it was not discussed in the argument in the Court of Appeal.

While both of the learned judges who delivered reasons in this matter were of the opinion that the questions directed to the respondent on cross-examination, to which reference has been made, were of the nature of those prohibited by s. 8 of the *Evidence Act,* and that the question of the conduct of the respondent was irrelevant to any issue in the action, no mention is made in either judgment of the claim

(1) [1947] A.C. 484 at 487-8.

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advanced in para. 14 of the Statement of Claim that the parties had lived separate and apart since the year 1940 and "that the defendant has refused and neglected to maintain and support the plaintiff", which was put in issue by the Statement of Defence. As I have said, the respondent gave evidence in chief as to alleged acts of cruelty on the part of her husband while they were at McKenzie Island and of the circumstances under which she claimed he had deserted her and of the fact that since they separated he had not contributed to her support. While no substantive relief was claimed by way of maintenance, the circumstances which gave rise to the separation and the consequent refusal of support were treated as matters in issue by both parties at the trial and the appellant directed evidence to them. The main cause of the ultimate separation, as found by the learned trial judge, was the relations of the respondent with the man Benes, who appears to have caused trouble between the parties on various occasions between the years 1937 and 1941. On that issue, it is my opinion that the behaviour of the respondent with Benes was a relevant matter to be considered and that the appellant's evidence as to the occurrences at McKenzie Island and elsewhere, to which I have referred and which were admitted without objection, was properly admitted. I am further of the opinion that upon this issue the respondent might properly be cross-examined as to her association with other men, restricted, however, by the provisions of s. 8 of the *Evidence Act*.

If it be assumed that the question asked in cross-examination regarding Benes offended against s. 8, I think the fact that it was asked or answered cannot have affected the judgment of the learned trial judge in deciding upon the veracity of the parties. In view of the evidence of the husband as to the respondent's relations with Benes at McKenzie Island and of the admitted fact that, at the time of the trial and for at least ten years previously, the respondent had been living in adultery with the man Piliuk and had given birth to an illegitimate child, I find it impossible to believe that the questions to which so much importance has been attached affected the matter in any way.

It is to be noted that the question addressed to the respondent regarding Benes was answered without objection on her part. It was for the witness to make the claim to

the protection afforded by the section (*Hebblethwaite* v. *Hebblethwaite* (1). Had she admitted that she had committed adultery, the effect of the section would not have been to render the evidence inadmissible (*Allen* v. *Allen* (2): *Welstead* v. *Brown* (3)). Here the question which has been construed as asking her if she had been guilty of adultery with Benes was answered in the negative. Had the fact that that question, and the other questions directed to her regarding Benes, had been asked been made the basis of an application for a new trial, the appeal, in my opinion, would have been rejected on the ground that there had been no "substantial wrong or miscarriage of justice" within the meaning of s. 28 of *The Court of Appeal Act* (R.S.M. 1940, c. 40).

The questions to be determined in this case were questions of fact. The issue depended upon the judge's finding as to the truth or falsity of the evidence given by the parties. I can find nothing in the record to indicate that, in reaching the conclusion that the respondent's story was not worthy of credence, the learned trial judge acted upon any wrong principle or was influenced by any irrelevant matters. He had the great advantage, which the Court of Appeal had not and we have not, of hearing these parties give their evidence, observing their demeanour and judging as to their veracity, with this assistance.

In *SS. Hontestroom* v. *SS. Sagaporack* (4), Lord Sumner said in part (p. 47):—

> Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.

In *Yuill* v. *Yuill* (5), Lord Greene M.R., referring to cases where the question was one of the veracity of the witnesses, said that it could only be on the rarest occasions and in circumstances where the appellate court is convinced by the plainest considerations that it would be justified in finding that the trial judge had formed a wrong opinion. To the

(1) (1869) L.R. 2 P. & D. 29.
(2) [1894] P. 248 at 255.
(3) [1952] 1 S.C.R. 23.
(4) [1927] A.C. 37.
(5) [1945] P. 15 at 19.

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same effect is the judgment of the House of Lords in *Powell* v. *Streatham Manor Nursing Home* (1), and that of Viscount Simon in *Watt* v. *Thomas*, above referred to, at p. 486.

In my opinion, the judgment at the trial in this case should not have been set aside and I would allow this appeal, with costs throughout.

Appeal allowed, judgment of trial judge restored with costs throughout.

Solicitor for the appellant: *David Levin.*

Solicitors for the respondent: *Greenberg & Arpin.*

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(1) [1935] A.C. 243.

ROBERT KENNETH CARNOCHAN (*Plaintiff*) ..... APPELLANT;

1955 *Mar. 24 *June 28

AND

MARGARET JEAN CARNOCHAN (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Husband and wife—Claim for possession of matrimonial home—Discretion of trial judge—Jurisdiction of Supreme Court of Canada—The Married Women's Property Act, R.S.O. 1950, c. 223, s. 12—Supreme Court Act, R.S.C. 1952, c. 259, ss. 41, 44.

In an action by a husband to recover possession of the matrimonial home and damages for mesne profits, the Court directed trial of the following issues: (*a*) the right of the husband to an order for possession; (*b*) his right to payment for use and occupation by the wife; (*c*) the wife's right to alleged arrears under the provisions of a deed of separation. The trial judge held as to issue (*a*) that the husband was not entitled to the order but that so long as the wife continued in occupation she was to pay all taxes, maintain adequate insurance and make all necessary and reasonable repairs and assert no claim for alimony, and that their respective claims under issues (*b*) and (*c*) failed.

The Court of Appeal dismissed the husband's appeal as to the disposition of issues (*a*) and (*b*). There was no cross-appeal as to issue (*c*). The husband appealed and a motion was made to quash on the ground, *inter alia,* that the judgment from which the appeal was sought to be taken was made in the exercise of judicial discretion and that, by reason of the provisions of s. 44 of the *Supreme Court Act,* R.S.C. 1952, c. 259, no appeal lies to that Court. The motion and the appeal were heard together.

Held: 1. That issue (*a*) raised a question between husband and wife as to possession of property. No question of title arose and the trial judge's judgment was given in the exercise of the judicial discretion conferred upon him by s. 12 of the *Married Women's Property Act,* R.S.O. 1950, c. 223. It was not made in proceedings in the nature of a suit in equity and was one as to which under the terms of s. 44 of the *Supreme Court Act* no appeal lies to that Court. *Minaker* v. *Minaker* [1949] S.C.R. 397 distinguished. *Lee* v. *Lee* [1952] 1 All E.R. 1299 at 1300, *Hutchinson* v. *Hutchinson* and *Stewart* v. *Stewart* [1947] 2 All E.R. 792 at 793 and 813 at 814 referred to.

2. That since s. 41 of the *Supreme Court Act* is expressly made subject to s. 44, leave to appeal could not be granted.

3. That that Court had jurisdiction to entertain the appeal so far as it related to issue (*b*) as the trial judge in dealing with it was not called upon to exercise the discretionary power conferred upon him by s. 12 of the *Married Women's Property Act* but to apply the law to ascertained facts. If the appellant's claim was regarded as one for

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

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mesne profits, it could not be entertained. If treated as a claim in contract on an implied agreement to pay reasonable rent, the trial judge's finding on the facts, concurred in by the Court of Appeal, should not be disturbed. Appeal quashed as to issue (*a*) and dismissed as to issue (*b*).

Decision of the Court of Appeal for Ontario [1954] O.W.N. 548, affirmed.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) affirming the judgment of Schroeder J. (2) on the trial of an issue directed in proceedings under s. 12 of the *Married Women's Property Act*, R.S.O. 1950, c. 223.

A. J. J. Bourassa for the appellant.

H. P. Hill, Q.C. for the respondent.

The judgment of the Court was delivered by:—

CARTWRIGHT J.:—The course of the litigation out of which this appeal arises is described as follows in the reasons of the learned trial judge (3):—

> The Plaintiff husband originally sued his wife to recover possession of house known for municipal purposes as 53 Renfrew Avenue, in the City of Ottawa, together with damages for mesne profits and for other relief. When the action came into the hands of his present solicitors, they advised him, in view of the judgment of the Supreme Court of Canada in *Minaker* v. *Minaker* (4), that it was more than doubtful that such an action was maintainable, in that, being a proceeding for wrongful detention and possession of lands, which is the modern equivalent of the old action of ejectment, such an action sounded in tort and was barred by s. 7 of the *Married Women's Property Act*, R.S.O. 1950, c. 223. In conformity with the decision of the Supreme Court of Canada in that case, the plaintiff applied for an order for the trial of an issue pursuant to s. 12 of The Married Women's Property Act and on June 9, 1953, the Honourable Mr. Justice Chevrier made an order, in which it was provided that the following issues were to be determined:—
>
> (*a*) The right of the plaintiff to an order for possession of premises known for municipal purposes as 53 Renfrew Avenue in the City of Ottawa in the County of Carleton.
>
> (*b*) The right of the plaintiff to the sum of Nine Thousand Seven Hundred and Thirty-seven ($9,737) Dollars or any portion thereof for the use and occupation by the defendant of said premises 53 Renfrew Avenue from the 1st day of May, 1940, to the date of the trial of the issue.
>
> (*c*) The right of the defendant to any alleged arrears of payments under the provisions of a deed of separation bearing date the 1st day of September, 1939, executed by the parties hereto.
>
> Pleadings were delivered in accordance with Mr. Justice Chevrier's order and the defendant's claim for arrears under the deed of separation was made the subject of a counterclaim by her.

(1) [1954] O.W.N. 543; 4 D.L.R. 448.
(2) [1953] O.R. 887; [1954] 1 D.L.R. 87.
(3) [1953] O.R. 887.
(4) [1949] S.C.R. 397.

It would appear from the formal judgment of Schroeder J. that the action was not discontinued. That judgment opens with the paragraph:—

> This action coming on for trial on the 7th, 8th and 9th days of October, 1953, at the sittings holden at Ottawa for trial of actions with a jury in the presence of counsel for all parties and upon reading the pleadings, and the issues directed by the Honourable Mr. Justice Chevrier, and hearing the evidence adduced and what was alleged by counsel aforesaid this Court was pleased to direct this action to stand over for judgment, and the same coming on this day of judgment.

As to issue (*a*), the learned trial judge held that the appellant was not entitled to an order for possession of 53 Renfrew Avenue but ordered that so long as the respondent continues to occupy such premises she shall pay all taxes, keep the premises adequately insured, make all necessary and reasonable repairs at her own expense and assert no claim for alimony. As to issue (*b*) he held that the appellant's claim failed. As to issue (*c*) he held that the respondent's claim failed.

The appellant appealed to the Court of Appeal as to the disposition made of issues (*a*) and (*b*). There was no cross appeal as to issue (*c*). The appeal was dismissed (1) and the appellant now appeals to this Court.

The appellant and the respondent are husband and wife. They were married in May, 1918. They have one child, a daughter, who was born in February, 1933. In April, 1925, the appellant purchased the house and premises, No. 53 Renfrew Avenue, of which he claims possession. It is not questioned that he is the legal and beneficial owner of this property. The parties lived together at this house from 1925 until the summer of 1939. In July 1939, the respondent went to a summer cottage owned by her brother, taking the daughter with her, for the purpose of having a holiday. She did not return to the matrimonial home and has never since lived with the appellant. On September 1, 1939, the parties entered into a separation agreement.

In December, 1939, the appellant was committed to the Ontario Hospital in Brockville, and shortly thereafter the Public Trustee rented 53 Renfrew Avenue to a tenant, who remained in occupation for a period but apparently had vacated the premises by May 1, 1940. On that date the respondent took possession of the house and its contents

(1) [1954] O.W.N. 543.

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and has lived in the house with her daughter ever since. At the date of the respondent's examination for discovery her mother was also living with her.

It appears from the record that the respondent went into the house without the permission of either the appellant or the Public Trustee, who was his statutory committee by virtue of s. 74 of the *Mental Hospitals Act* (R.S.O. 1950, c. 229), but that the Public Trustee did not object to her remaining in the house after it came to his notice that she had moved in. It appears that the appellant himself objected throughout to her having possession of the property.

Commencing in or about December, 1939, the Public Trustee paid the respondent $145 a month for about sixteen months and thereafter for about a year he paid her $50 a month. The payments then ceased and no further payments were made to the respondent either by the appellant or by the Public Trustee.

The appellant was finally discharged from the Ontario Hospital on July 4, 1951, and since that date has been in charge of his own affairs although as a matter of arrangement between him and the Public Trustee the latter is still looking after his assets for him.

On January 31, 1955, counsel for the respondent moved to quash this appeal on the ground, *inter alia,* that the judgment from which an appeal is sought to be taken was made in the exercise of judicial discretion and that, by reason of the provisions of s. 44 of the *Supreme Court Act,* no appeal lies to this Court. This motion was adjourned to the hearing of the appeal.

Section 12 (1) of the *Married Women's Property Act* R.S.O. 1950, c. 223, in pursuance of which the order of Chevrier J. was recited to be made, reads as follows:—

> In any question between husband and wife as to the title to or possession of property, either party, or any corporation, company, public body or society in whose books any stock, fund or shares of either party are standing may apply in a summary way to a judge of the Supreme Court or at the option of the applicant irrespectively of the value of the property in dispute, to the judge of the county or district court of the county or district in which either party resides, and the judge may make such order with respect to the property in dispute and as to the costs of and consequent on the application as he thinks fit or may direct the application to stand over from time to time, and any inquiry or issue touching the matters in question to be made or tried in such manner as he thinks fit.

In so far as the appeal relates to the judgment of the learned trial judge on issue (*a*) I am of opinion that this Court is without jurisdiction. The judgment of the learned trial judge on this issue was, I think, given in the exercise of judicial discretion. The question which he was called upon to decide falls clearly within the wording of s. 12 of the *Married Women's Property Act*. It is "a question between husband and wife as to the . . . possession of property" and the jurisdiction conferred by the section on the judge is to "make such order with respect to the property in dispute . . . as he thinks fit." No question of title arose. The case for the respondent was that notwithstanding the fact that the appellant was sole owner of the property the circumstances were such that the Court ought to refuse to make an order for possession. In the course of his reasons the learned trial judge said:—

> What is vested in the Court is a discretionary power which must be exercised judicially in the light of all the circumstances connected with the case. After giving all relevant matters the most earnest and anxious consideration, I am satisfied that it would be unjust to make an order for possession against the defendant wife.

There may well be cases falling within s. 12 of the *Married Women's Property Act* in which an appeal lies to this Court. If, for example, the sole question raised were whether property of which the husband was the legal owner was owned beneficially by him or was held by him as trustee for the wife or as trustee for himself and the wife jointly, while this would be "a question between husband and wife as to the title to . . . property" the judge would not, in my opinion, have a discretion to decide such question otherwise than in accordance with the applicable rules of law and equity. It was a question of that nature which was dealt with in *Minaker* v. *Minaker* (1), in which no question of jurisdiction appears to have been raised. In that case it appears to have been assumed that the giving of possession would follow as of course if it were determined that the husband was the sole beneficial, as well as legal, owner of the property. It does not appear that the wife sought to have the Court exercise a discretion to permit her to retain possession of the property if her claim to be the sole or joint owner thereof were rejected.

(1) [1949] S.C.R. 397.

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In *Lee* v. *Lee* (1), Somervell L.J., as he then was, in discussing the English counterpart of s. 12, says at page 1300:—

> I am inclined to agree with counsel to this extent—and this is clearly what Sir Boyd Merriman P., had in mind in *Kelner* v. *Kelner* (2), on which counsel for the husband relied—that, if the question is one of title only, it has, of course, to be decided according to law.

The judgments in this case and that of Denning J., as he then was, in *Hutchinson* v. *Hutchinson* (3), shew that in England the Court has a discretion to order that a wife be allowed to remain in possession of a home of which the husband is the sole owner. In the last mentioned case at page 793 Denning J. says:—

> The discretion remains with me, and I am quite satisfied that it would be unjust to turn the wife and the son out of their home.

In *Stewart* v. *Stewart* (4), which was also a claim for possession of a house, Tucker L.J. said at page 814:—

> It must always be a question for the exercise of the discretion of the judge on all the facts before him whether in a particular case he thinks it proper to make the order for possession which he clearly has jurisdiction to do.

I conclude that the judgment of Schroeder J. in the case at bar was "a judgment or order made in the exercise of judicial discretion."

It is next necessary to inquire whether it was made "in proceedings in the nature of a suit or proceeding in equity". In my opinion it was not. The judgments of Kellock J.A., as he then was, and of Laidlaw J.A. in *H.* v. *H.* (5) set out the history of the jurisdiction of the Supreme Court of Ontario to grant alimony and shew that it was formerly exercised in the Court of Chancery; but in the case at bar the learned trial judge was not, I think, exercising the jurisdiction formerly exercised by that Court or one which he would have possessed, apart from statute, in a proceeding in equity, but rather a statutory jurisdiction conferred upon him by s. 12 calling upon him in the circumstances of this case, in the exercise of his discretion to make such order as he saw fit. That in making such order the learned judge was called upon to exercise his discretion judicially goes without saying and was fully recognized by him.

(1) [1952] 1 All E.R. 1299.
(2) [1939] 3 All E.R. 957.
(3) [1947] 2 All E.R. 792.
(4) [1947] 2 All E.R. 813.
(5) [1944] O.R. 438; 4 D.L.R. 173.

For these reasons I am of opinion that the judgment of the learned trial judge in regard to issue (*a*) was one as to which under the terms of s. 44 of the *Supreme Court Act* no appeal lies to this Court.

In the result we can not entertain the appeal as to issue (*a*), nor could we grant leave to appeal, since s. 41 of the *Supreme Court Act* is expressly made subject to s. 44. Under these circumstances it is undesirable that I should express any opinion as to the merits of the decision in regard to this issue.

In my view the Court has jurisdiction to entertain the appeal in so far as it relates to the judgment on issue (*b*). It is not necessary to decide whether a claim for the payment of money of the sort made in this issue comes within the terms of s. 12 (1) because, although it came before the learned trial judge pursuant to the order made under s. 12 of the *Married Women's Property Act* it also came before him in the action. In dealing with it the learned judge was not called upon to exercise the discretionary power conferred upon him by the section but to apply the law to the ascertained facts.

As to the merits of issue (*b*), for the reasons given by the learned trial judge I agree with his conclusion that the appellant's claim if regarded as one for mesne profits cannot be maintained. If, on the other hand, it is treated as a claim in contract on an implied agreement by the respondent to pay a reasonable rent, the finding of the learned trial judge that on the facts no contract to pay rent could be implied is supported by the evidence, has been concurred in by the Court of Appeal and should not be disturbed. In my opinion the appeal as to this issue fails.

For the above reasons I would quash the appeal as to issue (*a*), and dismiss the appeal as to issue (*b*). The respondent is entitled to her costs in this Court.

Appeal quashed as to issue (a) and dismissed as to issue (b). Respondent entitled to costs in this court.

Solicitors for the appellant: *Ewart, Kelley, Burke-Robertson, Urie & Butler.*

Solicitors for the respondent: *Hill, Hill & Hall.*

1955
*Jun. 10
*Jun. 28

CONTINENTAL CASUALTY COMPANY (*Defendant*) ..... APPELLANT;

AND

THEODORE ROBERGE (*Plaintiff*) .....RESPONDENT.

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

Insurance—Sickness—Total disability—Whether insured confined to his house.

The respondent sought to recover under a contract of accident and sickness insurance on the ground that during the period in question he was totally incapacitated and was "nécessairement, strictement et continuement retenu dans la maison", within Clause A of Part 4 of his policy. The evidence disclosed that he was totally incapacitated during that time and that, although confined to the house, he made numerous visits to his doctor on the occasion of which he also visited each time the offices of his insurance company; that he went out each day for a short walk; that he was able to drive his car, although he did not do so in fact; that he regularly visited a store nearby and called at least once at the office of his lawyer. Both the trial judge and the majority in the Court of Appeal held that he was entitled to the benefit of the clause.

Held: The appeal should be allowed. The words "nécessairement, strictement et continuement retenu dans la maison" in the clause must be given the natural, ordinary meaning which they bear in relation to the context, and on the facts established the respondent was not entitled to recover under that clause. Otherwise, Clause B of Part 4, dealing with the case when the insured is not confined to the house, would be meaningless and inoperative.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), affirming, Casey J.A. dissenting, the judgment at trial.

A. Tourigny, Q.C. and *L. P. de Grandpré, Q.C.* for the appellant.

A. Sabourin, Q.C. for the respondent.

The judgment of the Court was delivered by:—

ABBOTT J.:—This appeal involves the interpretation of a contract of accident and sickness insurance issued by appellant in favour of respondent.

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

(1) Q.R. [1954] Q.B. 607.

The facts are not disputed and it is common ground that if the respondent was confined to his house, within the meaning of Clause A of Part 4 of the policy contract, the appeal should fail and that, if he were not so confined, the appeal should be maintained and the respondent's action dismissed.

The relevant clauses of the policy read as follows:—

PARTIE 4. PERTE DE TEMPS PAR MALADIE

A. INCAPACITE TOTALE LA VIE DURANT AVEC SEJOUR FORCE A LA MAISON. Lorsqu'une maladie rend l'assuré absolument, nécessairement et continuement incapable et l'empêche de vaquer à toute occupation ou emploi, et durant lequel temps l'assuré est sous les soins et régulièrement visité par un médecin, chirurgien ou ostéopathe qualifié, autre que lui-même, l'assureur paiera l'indemnité mensuelle contre les maladies pour la période que l'assuré sera ainsi incapable, et durant laquelle il sera aussi en raison de la dite maladie *nécessairement, strictement et continuement retenu dans la maison.*

$100 (Par Mois)

B. INCAPACITE TOTALE SANS SEJOUR FORCE A LA MAISON. Lorsqu'une maladie rend l'assuré absolument, nécessairement et continuement incapable et l'empêche de vaquer à toute occupation ou emploi, et durant lequel temps l'assuré reçoit les soins et services d'un médecin, chirurgien ou ostéopathe qualifié, autre que lui-même, l'assureur paiera l'indemnité mensuelle contre les maladies pour la période que l'assuré sera ainsi incapable, telle période ne dépassant pas un mois, *quoique non retenu dans la maison.*

$100 (Par Mois)

The italics are mine.

It is conceded that during the period for which indemnity of $100 per month is claimed, the respondent, as a result of a throat affliction was totally incapacitated within the meaning of the policy. He was confined to his house most of the time but it is also common ground that during the period in question he made numerous visits to Montreal to see his doctor and on the occasion of each of these visits also went to the offices of the Insurance Company appellant. In addition to these trips to Montreal, respondent went out of his house each day for a short walk, was able to drive his car, although there is no evidence that he did in fact do so, regularly visited a store nearby, and on at least one occasion called at the office of his lawyer. On these facts the learned

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Abbott J.

trial judge and a majority of the Court of Queen's Bench (1) held that respondent during the period in question was "nécessairement, strictement et continuement retenu dans la maison" as provided in Clause A of Part 4 of the contract.

Had the respondent left his house for the sole purpose of receiving medical treatment which might only be obtainable elsewhere, it is perhaps not unreasonable that a condition such as that contained in the clause in question should be broadly interpreted so as to permit such visits. A provision substantially identical to the one in issue in this appeal was so interpreted by Campbell J. in *Mitchell* v. *Occidental Life* (2), but it is significant that the learned judge, p. 343, described visits of this kind as "exceptional and temporary absences from the house, especially when ordered or recommended by the attending physician."

A similar question arose in the case of *Guay* v. *Provident Accident and Guarantee Co.* (3), decided by the Court of Review. In that case the insured was totally incapacitated and for a week was confined to the house except for visits to his doctor's office. During a subsequent six weeks' period he took exercise in the open air and visited the office of another doctor for a minor operation not related to his incapacity. The policy called for payment of $25 per week while the insured was necessarily confined to the house and of $12.50 per week while he continued to be incapacitated although not necessarily to the extent of confining him to the house. He was held entitled to recover the full rate of $25 for the week during which he was confined to the house except for visits to his doctor and $12.50 per week for the subsequent six weeks' period.

I find it unnecessary to determine in this case whether visits by respondent to his doctor for the sole purpose of obtaining medical treatment could be brought within the terms of Clause A of Part 4 since it is clear on the evidence that respondent was permitted a very considerable freedom of movement by his physician and did in fact leave his home daily.

The words "nécessairement, strictement et continuement retenu dans la maison" in the clause in question must be given the natural, ordinary meaning which they bear in relation to the context in which they stand and I am unable

(1) Q.R. [1954] Q.B. 607. (2) Q.R. [1948] S.C. 340.
(3) Q.R. (1917) 51 S.C. 328.

to agree with the conclusion reached by the Courts below that on the facts established in this case the respondent was entitled to recover under Clause A of Part 4 of the policy. As Mr. Justice Casey has pointed out in his dissenting judgment, to do so would render meaningless and inoperative Clause B of Part 4 of the policy.

The appeal should be maintained and the action and incidental demand of the respondent dismissed, with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *A. Tourigny.*

Solicitors for the respondent: *Sabourin & Sabourin.*

MIRON AND FRÈRES LIMITED .....APPELLANT;

AND

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

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*Mar. 7
*Jun. 28

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income tax—Whether transaction between shareholder and company was at arm's length—Onus—Income Tax Act, S. of C. 1948, c. 52, ss. 20(2), 127(5).

The appellant acquired a farm from one of its shareholders at a price far exceeding the original cost to the vendor. The appellant claimed a capital cost allowance based on the price paid. All the issued shares of the appellant, minus three, were owned by the vendor and his five brothers, with more than one-half of the shares being owned by the vendor and any three of his brothers. Considering that the purchase by the appellant was not a transaction "at arm's length" but was one between a corporation and one of several persons by whom the corporation was controlled, the Minister rejected the claim and based the allowance on the original cost to the vendor. The appeals to the Income Tax Appeal Board and to the Exchequer Court respectively were dismissed.

Held: The appeal should be dismissed. Under s-s. (5) of s. 127 of the *Income Tax Act, 1948,* c. 52, the appellant and the vendor were deemed not to have dealt with each other at arm's length.

Per Kerwin C.J. and Fauteux J.: Since the appellant was controlled by the vendor and three of his brothers, the vendor was one of several persons by whom the appellant was directly or indirectly controlled.

*PRESENT: Kerwin C.J. and Taschereau, Kellock, Fauteux and Abbott JJ.

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MIRON AND FRÈRES LTD. v. MINISTER OF NATIONAL REVENUE

Per Taschereau, Kellock and Abbott JJ.: The appellant failed to show error in respect of the Minister's conclusion that the transaction was not one between persons dealing at arm's length.

APPEAL from the judgment of the Exchequer Court of Canada (1), Fournier J., dismissing the appellant's appeal from the Income Tax Appeal Board which in turn had dismissed his appeal from the Minister's assessment.

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

D. H. W. Henry and *R. G. Décary* for the respondent.

The judgment of the Chief Justice and of Fauteux J. was delivered by:—

THE CHIEF JUSTICE:—I am unable to agree that this case is governed by the decision of this Court in *Johnston* v. *Minister of National Revenue* (2). Here there was an appeal to the Income Tax Appeal Board, and, before the Board counsel for the appellant outlined facts to which counsel for the respondent agreed. As stated in the reasons for judgment in the Exchequer Court (1), when the appeal to it came on for hearing, "the facts not being disputed, no verbal evidence was heard". It appears to me that upon the statement of facts in the Notice of Appeal to the Exchequer Court and the reply to that notice both parties considered that all the evidence that had any bearing upon the matter appeared in what was agreed upon. The parties having gone to trial under those circumstances it must be assumed that there are no other facts upon which the appellant relies, but it is entitled to a decision as to whether upon those admitted facts the purchase by it from one of its shareholders was a transaction "between persons not dealing at arm's length" within s-s. (2) of s. 20 of *The Income Tax Act,* as enacted in 1949.

In that connection it is necessary to refer to s-s. (5) of s. 127 of the Act by which

> 5. For the purposes of this Act,
>
> (*a*) a corporation and a person or one of several persons by whom it is directly or indirectly controlled
>
> .....
>
> shall, without extending the meaning of the expression "to deal with each other at arm's length" be deemed not to deal with each other at arm's length.

(1) [1954] Ex. C.R. 100; C.T.C. 45; 54 DTC 1022.

(2) [1948] S.C.R. 486.

This and the other provisions of this sub-section are not exhaustive of the meaning to be attached to the expression "persons not dealing at arm's length" in s-s. (2) of s. 20, but it is sufficient for the disposition of this appeal to refer to s-s. 5 (*a*) as set forth above.

Gérard Miron and any three of his brothers owned more than one-half of all the common (voting) shares of the appellant (at least 650 shares) and consequently the appellant was controlled by Gérard Miron and any three of his brothers. Gérard Miron and his five brothers owned 997 common (voting) shares out of the 1,000 common (voting) shares of the capital stock of the appellant. Gérard Miron was, therefore, one of several persons by whom the appellant was directly or indirectly controlled.

The appeal should be dismissed with costs.

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

KELLOCK J.:—The appellant, having acquired from one of its shareholders in June, 1949, for a consideration of $600,000, a farm which the said shareholder had in the latter part of 1948 himself purchased at a price of $90,000, claimed capital cost allowance on the basis of the price paid by it. Of a total issue of 1,000 common shares, the said shareholder held 200, another brother 200, a third brother 150, and three other brothers 149 each, and three remaining shares being held by other individuals.

The Minister, in the view that the transaction by which the property had been acquired by the appellant had taken place "between persons not dealing at arm's length" within the meaning of s. 20, s-s. (2) of the statute, rejected the claim and made the allowance on the basis of the cost to the shareholder, in conformity with paragraph (*a*) of the said subsection.

Both in his reply to the notice of appeal to the Tax Appeal Board and in his reply to the notice of appeal to the Exchequer Court (1), the Minister stated that he relied upon the provisions of s. 127, s-s. (5), particularly upon that part of paragraph (*a*) of the said subsection which provides that for the purposes of the statute, a corporation and one of several persons by whom it is "directly or

(1) [1954] Ex. C.R. 100; C.T.C. 45; 54 DTC 1022.

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Kellock J.

indirectly controlled" shall, without extending the meaning of the expression "to deal with each other at arm's length", be deemed not to deal with each other at arm's length.

Notwithstanding that an assessment is, by virtue of s. 42(6) deemed to be valid and binding, subject to appeal, the appellant saw fit to adduce no evidence with respect to the shares or the subject matter of control apart from the share-holdings as above set out. It is now argued on behalf of the appellant that it was for the respondent to support his decision by such evidence relative to control of the shares so held as he saw fit. In my view this is a misconception. The Minister, having concluded in the making of the assessment that the relevant transaction was not one between persons dealing at arm's length, it was for the appellant to show error on the part of the Minister in this respect; *Johnston* v. *Minister of National Revenue* (1). This it did not attempt to do.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Laurendeau & Laurendeau.*

Solicitor for the respondent: *R. G. Décary.*

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*Feb. 9, 10
*Jun. 28

CANADIAN CONSTRUCTION COMPANY LIMITED (*Defendant*) .... } APPELLANT;

AND

BEAVER (ALBERTA) LUMBER LIMITED (*Plaintiff*) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Covenant—Restrictive—Real property—Against use of land for certain business—Expressed to be for benefit of vendor—No reference to land retained by vendor—Whether runs against subsequent purchaser—Admissibility of oral evidence to show attachement to retained land—Land Titles Act, R.S.A. 1942, c. 205, ss. 51, 131.

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

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

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CDN. CONSTRUCTION CO. LTD. v. BEAVER (ALBERTA) LUMBER LTD

The respondent owned two parcels of land situate approximately 1,000 ft. apart and on different streets. It was carrying on a lumber and building material business on one of them, and, in 1944, sold the other under an agreement in which the purchaser covenanted not to use the land for 25 years for dealing in lumber and building materials. It was stated in the agreement that the restriction attached to and was to run with the land sold. There was no reference to the land retained by the vendor, but it was stated that the restriction was to be for the benefit of the vendor.

The respondent took action to maintain against the appellant, a successor in title of the purchaser, the caveat it had filed with the agreement. The amended statement of claim alleged that the covenant had been obtained for the protection of the land not sold and that this land was the dominant tenement. The trial judge held that the covenant was personal to the respondent and not for the benefit of its land. The Court of Appeal reversed this judgment.

Held: The appeal should be allowed. On the true construction of the agreement the covenant was merely personal to the vendor and not for the benefit of the land retained by it and was therefore not binding upon the appellant.

Per Taschereau, Rand, Estey and Cartwright JJ.: The agreement being a formal and carefully prepared instrument obviously intended to be a complete statement of the whole bargain, extrinsic evidence was inadmissible to contradict, vary or add to its contents. However, assuming that all the evidence as to surrounding circumstances received at the trial was admissible, the trial judge was right in his view that the covenant was intended by the parties to be personal to the respondent and not for the benefit of its retained land. In construing the agreement, the difference, stressed by the authorities, between a covenant personal to the vendor and one for the benefit of his land, can hardly be supposed to have been absent from the mind of the draftsman. The mere fact that at the time the respondent owned other land so situate that it might be capable of being regarded as a "dominant tenement", does not give sufficient reason for construing the agreement otherwise than as was done by the trial judge.

There is nothing in ss. 51 and 131 of the *Land Titles Act,* R.S.A. 1942, c. 205, which alters the general law as to restrictive covenants running with the land.

Per Locke J.: Oral evidence was not admissible in construing the agreement. There was no ambiguity in its language, and oral evidence calculated to add a term to the agreement instead of explaining the terms or identifying the subject matter, could not supplement its provisions. *Union Bank of Canada* v. *Boulter Waugh Ltd.* 58 S.C.R. 385, referred to. *Zetland* v. *Driver* [1938] 3 All E.R. 161, *Smith* v. *River Douglas* [1949] 2 All E.R. 179 and *Laurie* v. *Winch* [1953] 1 S.C.R. 49, distinguished. Even if the inadmissible evidence were to be considered, the covenant was a covenant in gross and did not run with the land.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), reversing the decision of the trial judge which had ordered the removal of a caveat.

(1) [1954] 2 D.L.R. 702; 11 W.W.R. (N.S.) 494.

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CDN. CONSTRUCTION CO. LTD. v. BEAVER (ALBERTA) LUMBER LTD.

D. F. McLeod for the appellant.

W. G. Morrow, Q.C. for the respondent.

The judgment of Taschereau, Rand, Estey and Cartwright was delivered by:—

CARTWRIGHT J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta (1), dated March 27, 1954, allowing an appeal from a judgment of Egbert J. pronounced on July 29, 1953.

The question raised is whether the respondent can enforce as against the appellant the observance of certain restrictions upon the use of lands of which the appellant is the owner.

The case was dealt with on an agreed statement of facts, no witnesses being called. We were informed by counsel that the making of this agreement as to the facts was not to prejudice the appellant's argument that extrinsic evidence was inadmissible to vary or add to the terms of the agreement of March 7, 1944, hereinafter set out.

The statement of facts agreed to may be summarized as follows. In 1927, or earlier, the respondent became the owner of lots 3 to 8 inclusive in Block 11 Plan T 3 in the Townsite of Leduc (hereinafter referred to for convenience as "Parcel A"). It used this land as a branch yard where it carried on the business of selling lumber and other building materials until November 1942, when it purchased lots 4, 5, and 6 in Block 18, Plan T 5 in the same Townsite (hereinafter referred to for convenience as "Parcel B"). In November 1942 the respondent moved its business from Parcel A to Parcel B and up to the date of the trial it continued to carry on at Parcel B the same sort of business which it had previously carried on at Parcel A. These parcels are distant approximately 1,000 feet from each other and are on different streets, Parcel B being four blocks to the north and one block to the east of Parcel A.

In March 1944 the respondent agreed to sell Parcel A to one Henderson and entered into an agreement with him dated March 7, 1944, which is set out in full hereafter. A transfer of Parcel A to Henderson was registered and the respondent filed a caveat in the Land Titles Office with a

(1) [1954] 2 D.L.R. 702; 11 W.W.R. (N.S.) 494.

copy of the agreement of March 7, 1944 attached thereto. Thereafter Henderson sold Parcel A to the Municipal District of Leduc No. 75 and that corporation became the registered owner thereof. In August 1950 the appellant purchased Parcel A from the Municipal District of Leduc No. 75 with actual knowledge of the agreement of March 7, 1944, but reserving its rights to maintain that the covenants therein contained were not enforceable against it. The appellant served a notice on the respondent, pursuant to s. 137 of The Land Titles Act, R.S.A. 1942, c. 205, requiring it to take proceedings on its caveat and this action followed.

The agreement of March 7, 1944, reads as follows:—

MEMORANDUM OF AGREEMENT made this 7th day of March, A.D. 1944.

BETWEEN:

BEAVER (ALBERTA) LUMBER LIMITED, a body corporate having its Head Office in the City of Winnipeg in the Province of Manitoba and a branch office in the City of Edmonton in the Province of Alberta (hereinafter called "the Vendor".)

of the First Part

—and—

HOWARD PAUL HENDERSON of the Town of Leduc in the Province of Alberta (hereinafter called "the Purchaser".)

of the Second Part.

WHEREAS the Purchaser is at present the owner of certain buildings situated upon the under-described lands, which said lands are the property of the Vendor, and

WHEREAS the Vendor has agreed to sell the said under-described lands without any improvements to the Purchaser, subject to the terms and conditions hereinafter set out,

NOW THEREFORE THIS AGREEMENT WITNESSETH and it is mutually covenanted and agreed between the parties hereto as follows:—

1. The Vendor does hereby agree to sell and transfer unto the Purchaser Lots three (3) and Four (4) in Block Eleven (11) in the Townsite of Leduc in the Province of Alberta, of record in the Land Titles Office for the North Alberta Land Registration District as Plan T-3, excepting thereout all mines and minerals and the right to work the same, and Lots Five (5) to Eight (8) in Block Eleven (11) in the Townsite of Leduc in the Province of Alberta, of record in the Land Titles Office for the North Alberta Land Registration District as Plan T-3, excepting out of the said Lot Five (5) all mines and minerals and the right to work the same in consideration of the Purchaser paying to the Vendor the sum of One Hundred and Three and Sixty-Two Hundredths ($103.62) Dollars and covenanting and agreeing that the said Lots or any part thereof shall not for the period of twenty-five (25) years from the date hereof be used for the purpose of manufacturing, storing, buying, selling or otherwise acquiring or disposing of any lumber or building materials of any kind whatsoever.

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2. The Purchaser does hereby covenant and agree with the Vendor that each and every part of the said Lots shall be subject to the above restriction and condition for the said period of twenty-five (25) years and that the said restriction and condition shall be binding upon each of the said lots hereby conveyed for the benefit of the Vendor and the said restriction and condition shall be a restrictive covenant attached to and running with the said lots for the said period of twenty-five (25) years.

3. It is further covenanted and agreed that the Vendor shall transfer Title to the said lands to the Purchaser by a separate Transfer and that the above set out restriction and condition shall be deemed to be a term and condition of the said Transfer and that the Vendor shall have the right and privilege of filing a Caveat against the Titles to the said lands to protect its interests under this Agreement.

4. The Purchaser covenants and agrees that he will not transfer, sell, lease, mortgage, encumber or otherwise dispose of all or any part of the said lands and premises, except such transfer, sale, lease, mortgage, encumbrance or disposition be made subject to the above set out restriction and condition.

These presents shall enure to the benefit of and be binding upon the successors and assigns of the Vendor and the heirs, executors, administrators and assigns of the Purchaser.

IN WITNESS WHEREOF the Vendor has hereunto caused to be affixed its corporate seal, duly attested by its proper officers in that behalf and the Purchaser has hereunto set his hand and seal on the day and in the year first above written.

(SEAL OF COMPANY) BEAVER (ALBERTA) LUMBER LIMITED.

SIGNED, SEALED and DELIVERED in the presence of: "Chas. E. Ayre"	Per "J. B. Sinclair, Secy-Treas."
Witness as to the signature of Howard Paul Henderson.	Per "Signature" "Howard Paul Henderson"

This agreement is sealed by the respondent but not by Henderson the purchaser. It will, however, be convenient to refer to the agreements made by Henderson as "covenants" as was done in the courts below and in argument.

In its amended statement of claim the respondent sets out the making of the agreement of March 7, 1944, the registration of the caveat, the purchase by the appellant of the lands described in the agreement with notice of the restrictions and continues:—

9A. The Plaintiff, prior to the 7th day of March, 1944, and on the 7th day of March, 1944, was the registered owner and has continued to be the registered owner and still is the registered owner of the lands described as (Parcel B) and it was for the protection of such land and in order to preserve, maintain and enhance its value that the Plaintiff obtained the covenants hereinbefore set forth at the time of selling the lands described

in paragraph 1 hereof, and the said (Parcel B) constitutes the dominant tenement owned by the Plaintiff for the benefit of which the lands referred to in paragraph 1 hereof (Parcel A) were made subject to the said restrictive covenants.

On this record the learned trial judge was of opinion (i) that the covenant sought to be enforced was clearly negative; (ii) that to be enforceable against the appellant it must have been given for the benefit of and must touch and concern some neighbouring land of the respondent, that "there must co-exist the dominant estate of the covenantee and the servient estate of the covenantor, and the covenant itself must "touch and concern" the dominant estate of the covenantee in such manner as to affect its mode of occupation or be such a covenant as per se, and not merely from collateral circumstances, affects its value;" (iii) that the respondent's land, Parcel B, was so situate in relation to the appellant's land, Parcel A, that the former was capable of being regarded as a "dominant tenement" and the latter as a "servient tenement" within the rule stated in (ii) above; (iv) that the covenant was one which could affect per se the value of such "dominant tenement;" (v) that the "dominant tenement" was still owned by the respondent; but (vi) that on the true construction of the agreement of March 7, 1944, with due regard to the surrounding circumstances, the covenant was intended by the parties to be personal to the respondent and not for the benefit of its land, Parcel B.

Frank Ford J.A., who delivered the unanimous judgment of the Appellate Division, differed from the learned trial judge only as to item (vi) above, as to which he reached a directly opposite conclusion. The accuracy of the views of the learned trial judge set out in items (i), (ii) and (v) above was not questioned before us. I have reached the conclusion that the learned trial judge was right in his view which is summarized in item (vi) above. This makes it unnecessary for me to express any opinion in regard to the questions, fully argued before us, on which the views of the learned trial judge are summarized in items (iii) and (iv) above.

In approaching the question of the construction of the agreement of March 7, 1944, it may first be observed that it is a formal and carefully prepared instrument obviously intended to be a complete statement of the whole bargain

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Cartwright J.

between the parties so that, according to the general rule, extrinsic evidence is inadmissible to contradict, vary or add to its contents. It was argued for the appellant that as there is nothing in the agreement to indicate the existence or situation of other land of the covenantee intended to be benefited the Court cannot allow the identity of such land to be deduced from the surrounding circumstances. This argument raises a difficult question as to which the authorities, a number of which are collected and discussed in a most helpful article by Sir Lancelot Elphinstone in 68 L.Q.R., 353, are not easy to reconcile. However, I do not find it necessary to decide this question because, assuming that all the evidence in the record was admissible to aid in the construction of the agreement, I would, for the reasons given by the learned trial judge, interpret it as he has done.

Having already expressed my concurrence with the reasons of the learned trial judge as to the interpretation of the agreement, I wish to stress one feature of the matter. The question is whether, on the true construction of the agreement, the respondent and Henderson intended the restrictive covenant therein contained to be (*a*) for the vendor's own benefit and personal to it, or (*b*) for the protection or benefit of the vendor's land, Parcel B. As was said by Lord Shaw in *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.* (1), the cases on the branch of the law dealt with in *Tulk* v. *Moxhay* (2) are legion. In these cases and in the text books dealing with them the importance of the difference between covenants intended to be for purpose (*a*) and those intended to be for purpose (*b*) is repeatedly stressed, and can hardly be supposed to have been absent from the mind of the draftsman of the agreement under consideration when he made no mention of any lands retained by the vendor and inserted in paragraph 2 the words "the said restriction and condition shall be binding upon each of the lots hereby conveyed for the benefit of the vendor". I cannot accept the view that the mere fact that at the date of the agreement the respondent owned another parcel of land so situate that it might be capable of being regarded as "a dominant tenement" within the rule stated above furnishes a sufficient reason for construing the agreement otherwise than the learned trial judge has done.

(1) [1926] A.C. 108 at 119. (2) (1848) 2 Ph. 774.

It remains to consider Mr. Morrow's submission that, whatever might have been the result of the appeal apart from the provisions of *The Land Titles Act*, R.S.A. 1942, c. 205, ss. 51 and 131 of that statute require a decision in favour of the respondent. We were informed by counsel that this point was argued in both courts below although there is no mention of it in the reasons for judgment. In my view there is nothing in these sections that alters the general law as to restrictive covenants running with land. Their purpose appears to be merely to provide methods of registering covenants so as to bring them to the notice of persons intending to deal with lands registered under the Act and to confer power upon the court to modify or discharge such covenants in certain circumstances. The intention of the Legislature not to alter the general law appears to me to be indicated by the words in s. 53 (3), "if it is of such nature as to run with the land", and by the words of s. 53 (4) reading as follows:—

(4) The entry on the register of a condition or covenant as running with or annexed to land shall not make it run with the land, if the covenant or condition on account of its nature, or of the manner in which it is expressed, would not otherwise be annexed to or run with the land.

I have already expressed my view that the covenant in question was a covenant personal to the respondent not touching or concerning any land retained by it. That is to say it was a covenant in gross and so on account of its nature would not run with the land.

I would allow the appeal and restore the judgment of the learned trial judge with costs throughout.

LOCKE J.:—The issues raised by the pleadings in this matter were tried upon an agreed statement of facts. We were informed upon the argument that in agreeing to the matter being disposed of in this manner the present appellant reserved to itself the right to object that evidence was not admissible to add to or vary the terms of the agreement of March 7, 1944, made between the respondent and Henderson.

That agreement contained a covenant by the purchaser that:—

the said lots or any part thereof shall not for the period of twenty-five (25) years from the date hereof be used for the purpose of manufacturing, storing, buying, selling or otherwise acquiring or disposing of any lumber or building materials of any kind whatsoever.

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The agreement further stipulated that each of the lots should be subject to the restriction for the stated period, that the covenant was "a restrictive covenant attached to and running with the said lots" and that if the lands were transferred by the purchaser the restriction should be deemed to be "a term or condition of the said transfer" and that the vendor might file a caveat against the land to protect its interest.

While, in my opinion, evidence that the respondent was at the time of the sale to Henderson the owner of other lots in the Townsite of Leduc is not admissible as between the parties to this action in determining the construction to be placed upon the agreement with Henderson, the agreed statement of facts discloses that in the year 1927 the respondent had acquired Lots 3 to 8 in Block 11 and carried on there the business of a lumber yard until the year 1942, when it transferred its business to Lots 4, 5 and 6 in Block 18 in the Townsite and was carrying on its business there at the time the action was instituted. Prior to that time, however, it had disposed of its remaining property in Block 11.

While the date upon which the property in question was transferred by the respondent to Henderson is not given, it was presumably on or before March 15, 1944, as on that date the respondent filed a caveat against the lands. The terms of the caveat are not stated in the agreed statement nor a copy of that instrument produced, but there was filed with it a copy of the agreement in question. In these circumstances, I must assume that the caveat was in the terms of Form 32 in the Schedule to the *Land Titles Act* (R.S.A. 1942, c. 205), and simply gave notice that the caveator claimed an interest in the lands under the restrictive covenant contained in the agreement and said nothing which would convey to a purchaser of the lands any more information than might be obtained from perusing the agreement.

Henderson sold the lands to the Municipal District of Leduc No. 75, from which they were purchased by the appellant by an agreement dated August 17, 1950. This document contains no reference to the caveat filed by the respondent or to the agreement with Henderson, but it is admitted that at the time the appellant purchased the

property it knew of the agreement of March 7, 1944, and purchased the property reserving its right to contest "the validity of the agreement dated the 7th of March A.D. 1944 and Caveat No. 2737 F.O. as being a good and valid charge against the said lands and premises as against the Municipal District of Leduc No. 75, and the Defendant."

The statement of claim in the action, after reciting the covenant in the agreement with Henderson and the latter's covenant that he would not sell the property other than by a disposition subject to the restriction expressed in the covenant and that, by its terms, it was declared to enure to the benefit of and be binding upon the heirs, executors, administrators and assigns of the purchaser, said that the caveat had been filed "giving notice of its claim under the said agreement" and that the defendant had purchased the land with notice of the caveat and of the plaintiff's interest in the land and asked for a declaration that it had "a good and valid caveat against the said land and prays for an Order of this Honourable Court to that effect."

The action was commenced in May of 1951 and the defence filed in the same month. On May 28, 1953, however, the plaintiff obtained leave to amend the statement of claim by alleging that prior to the 7th of March, 1944, it was the registered owner and had continued to be the registered owner of the property in Block 18 above referred to, that it was for the protection of such land and, in order to maintain and enhance its value, that the plaintiff had obtained Henderson's covenant and that the plaintiff's said lands constituted the dominant tenement for the benefit of which the lands were made subject to the restrictive covenant.

While the learned trial judge was of the opinion that in construing the agreement of March 7, 1944, he might consider the evidence afforded by the admissions as to the length of time the present respondent had carried on its business in Leduc and as to its ownership of other lands in the Townsite, he concluded that it had not been the intention of the parties that the restrictive covenant should enure to the benefit of these lands and that, accordingly, the covenant was merely a covenant in gross and thus not binding upon the present appellant.

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The reasons for the unanimous judgment of the Appellate Division (1) delivered by Frank Ford J.A. show that, in construing the agreement of March 7, 1944, and reaching a conclusion as to its legal effect, the learned judges considered the evidence as to the ownership of other property by the respondent in Leduc at the relevant times and as to the business carried on by it at that place. Having done so, they found that the intention of the parties to that agreement was that of profiting or benefiting the land upon which the vendor was carrying on and intended to continue to carry on business of the same nature as that covered by the restrictive covenant and that this covenant, so construed, was binding upon the appellant.

As has been pointed out in *Union Bank of Canada* v. *Boulter Waugh Ltd.* (2), the cardinal principle of the Torrens system is that the register is everything except in cases of actual fraud on the part of the person dealing with the registered owner, subject to certain other statutory exceptions which do not affect the present consideration. The Municipal District of Leduc, from which the property in question was purchased by the appellant, held a certificate of title to the lands of which those in question formed part and the only claim of which the appellant was affected with notice was that referred to in the caveat and the attached agreement. As pointed out by Farwell J. in delivering the judgment of the Court of Appeal in *Zetland* v. *Driver* (3), covenants restricting the user of land imposed by a vendor upon a sale fall into three classes: (i) covenants imposed by the vendor for his own benefit, (ii) covenants imposed by the vendor as owner of other land of which that sold formed a part, and intended to protect or benefit such unsold land, and (iii) covenants imposed by a vendor upon a sale of land to various purchasers who are intended mutually to enjoy the benefit of, and be bound by, the covenants. On the face of it, the covenants in the agreement in question fell within the first of these classes and as such, despite its term to the contrary, would not run with the land.

I am unable, with great respect, to agree with the view that, in construing this agreement, oral evidence was admissible. I do not consider that the cases referred to in the

(1) [1954] 2 D.L.R. 702; 11 W.W.R. (N.S.) 494.

(2) (1919) 58 Can. S.C.R. 385 at 387.

(3) [1938] 3 All E.R. 161.

judgment at the trial support that view. In *Bowes* v. *Rankin* (1), the report does not indicate whether the agreement sought to be enforced identified the dominant estate, and the question as to the admissibility of the evidence does not appear to have been argued. In *Zetland* v. *Driver*, as pointed out by Farwell J. at p. 162, the conveyance of the lands referred to the settlement in which the lands, of which those conveyed formed part, were referred to and expressly stated that the covenant was for the benefit of the unsold part of the land comprised in the settlement. In *Smith* v. *River Douglas* (2), the conveyance to the plaintiff Smith, in terms, provided that it was conveyed with the benefit of the agreement of April 25, 1938, which referred to, though it did not describe by metes and bounds, the lands entitled to the benefit of the covenant and the learned judges of the Court of Appeal considered that evidence to identify these lands might be given. In *Laurie* v. *Winch* (3), there was ambiguity in the terms of the grant which, Kellock J. held, might be explained by oral evidence, relying upon *Waterpark* v. *Fennell* (4), and other authorities to the like effect. In that case, the head note is to the effect that, where parcels are described in old documents by words of a general nature or of doubtful import, evidence of usage is proper to be received to show what they comprehend. There is no ambiguity in the language of the agreement of March 7, 1944, and, in my opinion, its provisions cannot be supplemented by oral evidence, not explanatory of its terms or identifying its subject matter but adding a term calculated to bring the covenant within the second class referred to by Farwell J. in *Zetland's* case.

I respectfully agree with the conclusion of the learned trial judge that the covenant in question was merely personal to the respondent and did not create an interest in the lands in question and was not binding upon the appellant.

I have had the advantage of reading the reasons for judgment to be delivered in this matter by my brother Cartwright and concur in his opinion that, even if the evidence which I think to have been inadmissible is considered in construing the agreement, the covenant was a covenant in gross and did not run with the land.

(1) [1924] 2 D.L.R. 406.
(2) [1949] 2 All E.R. 179.
(3) [1953] 1 S.C.R. 49.
(4) (1859) 7 H.L.C. 650.

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I would allow the appeal and restore the judgment of the learned trial judge with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *German, Mackay, McLaws & McLeod.*

Solicitors for the respondent: *Simpson & Henning.*

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*Feb. 3, 4, 7
*Jun. 28

MINNEAPOLIS-HONEYWELL REGULATOR COMPANY LIMITED (*Plaintiff*) ..... APPELLANT;

AND

EMPIRE BRASS MANUFACTURING COMPANY LIMITED (*Defendant*) .. RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Mechanic's lien—Action by sub-contractor to enforce trust under s. 19 of the Mechanic's Lien Act, R.S.B.C. 1948, c. 205—Meaning and applicability of s. 19—Assignment of book debts by contractor to creditor—Whether moneys received by contractor subject to trust—Principle of distribution—Jurisdiction.

The appellant claimed an accounting of moneys claimed to be held in trust by the respondent under s. 19 of the *Mechanic's Lien Act*, R.S.B.C. 1948, c. 205, and for judgment for any amount due.

A sub-contractor, which had a contract from the general contractor to install heating plants in four schools being built by the general contractor, had engaged the appellant to supply and install the automatic heating controls. The respondent was the principal supplier of materials engaged by the sub-contractor for this contract and earlier contracts.

Before the completion of its contract for the schools, the sub-contractor, which was then indebted to the respondent in the sum of $19,278.41, assigned to the respondent its present and future book accounts as security for that debt. The general contractor was notified of the assignment and thereafter made payments by cheques payable jointly to the sub-contractor and the respondent. Both then would decide what accounts of the sub-contractor should be paid, and the remaining moneys were applied on account of the indebtedness of the sub-contractor to the respondent.

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

The appellant, which had lost its right to a mechanic's lien against the schools by not filing within the prescribed time, obtained judgment against the sub-contractor for the balance of moneys owed it. Subsequently the sub-contractor went into liquidation.

The trial judge found that the sub-contractor was a sub-contractor within the meaning of s. 19, that the assignment secured only the specific debt, that the debt had been extinguished and that subsequent moneys subject to the trust of s. 19 had been received by the respondent. The Court of Appeal, by a majority, reversed this judgment.

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

Per Rand, Kellock, Estey and Fauteux JJ.: The appellant was cestuis que trust of the moneys received by the sub-contractor. The word "received" in s. 19 includes money paid to an assignee. Otherwise the entire purpose of s. 19 could be nullified by an assignment contemporaneous with the contract. But these payments, whether direct or to an assignee, remain subject both to s. 16 as respects liens and to s. 19 as to the beneficiaries of the trust. No assignment can destroy the rights created by s. 19 in the moneys paid. However, the moneys are not required to be distributed on a pro rata basis. The sub-contractor has a discretionary power and his obligation is satisfied when the moneys are paid to persons entitled to the trust, whatever the division.

In the present case, the respondent was properly liable as for a breach of trust to the extent of trust moneys received beyond the debts arising out of the contracts considered severally and applied to other debts. To the amount of that excess it is liable to the appellant for any balance that may be owing it on the same contract; and the right to have this determined and to recover judgment for any amount so found to be due can be enforced in any appropriate court of the province.

Per Locke J.: Once the specific debt for which the assignment was given was extinguished, the sub-contractor was entitled to all further moneys payable in respect of its sub-contract. The assignment secured only that debt and not any further liability incurred thereafter by the sub-contractor to the respondent. The moneys received during the life of the assignment were not received by the sub-contractor but were the property of the respondent and therefore not subject to the trust.

There is no ambiguity in s. 19, and while it creates difficulties to contractors seeking credit and there is no direction as to the apportionment of the fund, this is not sufficient to say that the rights can only be exercised by those who have a right of lien upon the work; the section was apparently designed to provide further security. S. 16 does not apply to the rights given to a creditor by s. 19.

Claims under s. 19 are for the recovery of moneys declared to be trust funds and are recoverable by action in the Supreme Court of British Columbia.

The Laws Declaratory Act, R.S.B.C. 1948, c. 179 and *Castelein* v. *Boux* (1934) 42 Man. R. 97 referred to.

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APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing, Robertson J.A. dissenting the judgment at trial directing enforcement of a trust under s. 19 of the *Mechanic's Lien Act*, R.S.B.C. 1948, c. 205.

D. M. M. Goldie for the appellant.

V. R. Hill for the respondent.

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

RAND J.:—This appeal raises the question of the interpretation of s. 19 of the *Mechanics' Lien Act* of British Columbia. The section reads as follows:—

> All sums received by a contractor or a sub-contractor on account of the contract price shall be and constitute a trust fund in the hands of the contractor or of the sub-contractor, as the case may be, for the benefit of the owner, contractor, sub-contractors, Workmen's Compensation Board, labourers, and persons who have supplied material on account of the contract; and the contractor or the sub-contractor, as the case may be, shall be the trustee of all such sums so received by him, and, until all labourers and all persons who have supplied material on the contract and all sub-contractors are paid for work done or material supplied on the contract and the Workmen's Compensation Board is paid any assessment with respect thereto, shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust.

I am unable to feel difficulty about what this language provides. The Act is designed to give security to persons doing work or furnishing materials in making an improvement on land. Speaking generally, the earlier sections give to such persons a lien on the land, but that is limited to the amount of money owing by the owner to the contractor under the contract when notice of the lien is given to him: only thereafter does he pay the contractor at any risk.

For obvious reasons this is but a partial security; too often the contract price has been paid in full and the security of the land is gone. It is to meet that situation that s. 19 has been added. The contractor and sub-contractor are made trustees of the contract moneys and the trust continues while employees, material men or others remain unpaid.

The appellants were, therefore, cestuis que trust of the moneys received by the sub-contractor. The mode of payment followed by the contractor toward the sub-contractor,

(1) [1954] 4 D.L.R. 800; 13 W.W.R. (N.S.) 449.

Irvine & Reeves Limited, and the respondent is given in the reasons of my brother Locke and I will not repeat it; but apart from the special features, I cannot interpret the word "received" in s. 19 as not including money paid to an assignee. The money "received" on account of the contract is the same as that paid by the contractor: payment the correlative of receipt. The assignee acts through the right and power of the assignor; and the receipt by him is likewise that by the creditor. If this were not so, the entire purpose of the section could be nullified by an assignment contemporaneous with the contract. S. 16 declares that

> no assignment by the contractor or any sub-contractor of any moneys due in respect of the contract shall be valid as against any lien given by this Act . . .

But this does not prevent valid payment to the assignee prior to a notice of lien. The statute contemplates payments to the contractor whether direct or to his assignee, but these remain subject both to s. 16 as respects liens and to s. 19 as to the beneficiaries of the trust. The assignee of such moneys must either see to the satisfaction of the rights under the trust, either directly or by way of subrogation to them, or run the peril of participating in a breach of it. I have no doubt that no assignment can destroy the rights created by s. 19 in the moneys so paid over.

S. 19 does not, however, require that they be distributed on a pro rata basis. The sub-contractor has, in this respect, a discretionary power, and his obligation is satisfied when the trust moneys are paid out to persons entitled, whatever the division. This, of course, might be affected by rights of unpaid trust creditors under other provisions of law.

These considerations raise another question which must be examined. Since it cannot be said that the appellants have any specific and exclusive interest in the fund, their right to recover against the respondent sounds in damages, and in some form or other it must appear that the improper diversion has affected moneys that would otherwise have reached the appellants. There is no claim on behalf of other creditors now entitled to the benefits of the trust; and the situation must be viewed from the standpoint of the sub-contractor as he would have carried out his duty. If there were no other claimants in the same class, that duty would be to pay the moneys still in the trust to the appellants.

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A judgment against the respondent in this case would be equivalent to an appropriation to the appellants by the sub-contractor. In the absence of circumstances which would reduce the claim first made to a proportionate sharing with other creditors of the same rank, it will be presumed that the diverted moneys would have gone to that claimant and their amount, up to that of his debt, will be the measure of damages.

But I am unable to agree that the arrangement between the respondent and the sub-contractor was such that as to trust moneys paid to persons other than the respondent, there could be said to have been a participation by the latter in their wrongful application. The most that can be said is that the respondent possessed a veto on payments to others than itself; a failure to exercise it cannot render the respondent a party to their diversion. There is nothing to show any interest of the respondent in them otherwise than as they may have affected the debt to itself.

The respondent, knowing all the facts, was therefore properly found liable as for a breach of the trust to the extent of trust moneys received beyond the debts arising out of the contracts considered severally and applied to other debts. To the amount of that excess it is liable to the appellants for any balance that may be owing them on the same contract; and the right to have this determined and to recover judgment for any amount so found to be due can be enforced in any appropriate court of the province.

I would, therefore, allow the appeal and restore the judgment at trial, modified by substituting the following in place of the directions there given for taking accounts and the order for judgment and costs:—

(*a*) A declaration that the respondent was a party to a breach of trust in relation to such part of the moneys represented by the joint cheques received, directly or indirectly, by the respondent in excess of and applied otherwise than on the accounts of the four contracts severally;

(*b*) An account to determine the amount of the trust funds received by the respondent and the appellants in respect of the contracts severally and their application;

(*c*) An account to determine the balance owing by the sub-contractor to the respondent and to the appellants on each of the contracts after the allocation thereto severally

of all applicable trust funds received by them, and the deduction therefrom of any sums other than such trust moneys appropriated by the respondent or the appellants thereto;

(*d*) Should it appear that the appellants have received trust moneys in excess of their claim on any contract and that in respect of the same contract there is a balance owing to the respondent, the amount of the excess to the extent of the balance so owing the respondent shall be deducted from moneys found to be owing by the respondent to the appellants on the remaining contracts;

(*e*) The appellants will be entitled to judgment against the respondent for the aggregate amount, if any, certified to be due them on the said contracts on the basis of the foregoing to the extent of the amount found to have been so received by the respondent and not so applied or allocated for trust purposes. The costs of the trial and of taking the accounts will be in the discretion of the Court on entering final judgment.

The appellants will have their costs in the Court of Appeal and in this Court.

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia (1), which allowed the appeal of the present respondent from a judgment of Davey J. (as he then was) in favour of the present appellant. Robertson J.A. dissented and would have dismissed the appeal.

The appellants supply and install automatic controls for heating systems. The defendant, Irvine and Reeves Ltd. (which is not a party to this appeal), was engaged in the business of a plumbing and heating contractor. The respondent is a wholesale dealer in plumbing and heating supplies.

Irvine and Reeves Ltd. (hereinafter referred to as the sub-contractor) had, prior to February 4, 1950, entered into contracts for the installation of heating plants in four public schools, with general contractors who had, in turn, contracted for their construction with the various public authorities for whom the same were built. The schools

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were the Carmi School at Penticton, B.C., the Helen Street and the Indian Schools at Port Alberni, B.C. and the J. P. Dallos School at Westview, B.C.

The respondent company was the principal source of supply of the material needed for the work by the sub-contractor and, on the date above mentioned, had supplied material for other contracts upon which the latter was engaged. It is not clear from the evidence whether at that date any materials had been supplied by the respondent in connection with the four schools above mentioned.

On February 4, 1950, the respondent obtained from the sub-contractor an assignment of book accounts which recited, inter alia, that the assignor was then indebted to the assignee in the sum of $19,278.41 for goods theretofore sold and delivered, that the assignors had applied for a continuing line of credit:—

> upon the execution of this indenture as collateral security for the said past and present advances (hereinafter called "the said indebtedness") in order to assist the assignors in its said business

and that in consideration of the said indebtedness the assignor assigned all debts, claims and demands then due, owing or accruing due to the assignor, and all such debts, claims or demands which might thereafter become due and owing to the assignor arising out of its said business. These recitals were followed by a clause which read in part:—

> It is understood and agreed that this indenture is given as collateral security only for the due payment of *the said indebtedness.*

Upon obtaining this assignment the respondent gave notice of it to the general contractors and thereafter payments by the general contractors, other than those for small amounts, were made by cheques made payable jointly to the respondent and the sub-contractor. These payments included the entire amounts payable to the sub-contractor on its contracts for the four schools mentioned, which included the automatic heat control system supplied and installed by the appellant at the request of the sub-contractor. By virtue of the manner in which these payments were made, the respondent obtained what amounted to complete control over the financial operations of the sub-contractor. When cheques payable to their joint order were received, it was necessary for the sub-contractor to obtain the consent of the respondent to the payment of any sums.

other than the small amounts referred to which do not enter into the matter, to its other creditors. From the payments, however, some amounts were, with the respondent's consent, paid on account of the amounts payable to the appellant. In March 1952 the sub-contractor went into liquidation, at which time there remained payable by it to the appellant in respect of the four schools a sum of $4,970.03. For this amount the appellant had recovered judgment against the sub-contractor on February 25, 1952.

The appellant's claim, the validity of which is to be determined in the present action, depends upon the construction which is to be placed upon s. 19 of the *Mechanics' Lien Act* (c. 205 R.S.B.C. 1948) and its application to the facts disclosed by the evidence. It reads as follows:—

> 19. All sums received by a contractor or a sub-contractor on account of the contract price shall be and constitute a trust fund in the hands of the contractor or of the sub-contractor, as the case may be, for the benefit of the owner, contractor, sub-contractors, Workmen's Compensation Board, labourers, and persons who have supplied material on account of the contract; and the contractor or the sub-contractor, as the case may be, shall be the trustee of all such sums so received by him, and, until all labourers and all persons who have supplied material on the contract and all sub-contractors are paid for work done or material supplied on the contract and the Workmen's Compensation Board is paid any assessment with respect thereto, shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust.

This enactment first appeared as an amendment to the *Mechanics' Lien Act* (c. 156, R.S.B.C. 1924) as s. 18A, being added by s. 2, c. 48 of the Statutes of 1948. The new section appeared in c. 156 and appears in c. 205 of the Revised Statutes of 1948 as the last of seven sections bearing a sub-heading "Security". It is to be noted that s. 16 of the Act provides that no assignment by the contractor or any sub-contractor of any moneys due in respect of the contract shall be valid as against any lien given by the Act.

Other than an unreported decision in *Weeks* v. *Mackenzie,* decided in 1953 by His Honour Judge Boyd of the County Court of Vancouver, the interpretation of the section has not apparently been considered by any court in British Columbia. A provision very similar in its terms, however, was added to the *Builders and Workmen Act of Manitoba* (c. 20, R.S.M. 1913) by c. 2 of the Statutes of Manitoba in 1932. That section was considered by the Court of Appeal

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in Manitoba in *Castelein* v. *Boux* (1). In that matter, a garnishing order was served upon an owner by a creditor of the contractor engaged in the construction of a work in an action against the latter. The debt sued for was not contracted in connection with the work. Part of the moneys payable to the contractor had been retained by the owner at the time the garnishing order was served and the defendant claimed that the amount due to him was affected by the trust declared by the section in favour of the workmen and persons who had supplied material on account of the contract. Prendergast, C.J.M., with whose Trueman and Richards JJ.A. agreed, decided the matter on the ground that, since the moneys had not reached the hands of the contractor, the section was inapplicable.

A similar section was added to the *Mechanics' Lien Act of Ontario* by s. 21 of c. 34 of the Statutes of 1942. We have not been referred to and I have been unable to find any case in that province in which the effect of the section, the meaning of which is indistinguishable from that of the British Columbia section, has been considered.

Davey J., in a carefully reasoned judgment in which the facts are reviewed in detail, found that Irvine and Reeves Ltd. were sub-contractors within the meaning of s. 19, that the assignment of book accounts of February 4, 1950, was to secure a specific indebtedness of $19,278.41 and not any further or other indebtedness, that this debt had been extinguished by payments received by the respondent, either from the sub-contractor directly or by payments by the principal contractors made to the joint order of the respondent and the sub-contractor, and that thereafter further moneys subject to the trust declared by s. 19 had been received by the respondent. A reference was directed to ascertain the amounts subject to such trust and the respective rights of the respondent and the sub-contractor in regard to them. The appellant had not filed liens against the various school properties, as might have been done for the protection of the lien rights given by s. 6 of the Act, but the learned trial judge was of the opinion that this did not affect the rights of the appellant under s. 19.

(1) (1934) 42 Man. R. 97.

While it was alleged in the Statement of Claim that the payments made by the general contractors pursuant to the terms of the assignment of book accounts amounted to a fraudulent preference, this claim was abandoned at the trial. Granted the validity of the assignment the respondent, by virtue of the provisions of s-s. 25 of s. 2 of *The Laws Declaratory Act* c. 179, R.S.B.C. (1948), was entitled to proceed directly against the general contractors as moneys became due to the sub-contractors, and this without reference to the latter and as between the respondent and the sub-contractor the former was entitled to these moneys to the extent of its secured debt. The situation was, however, changed when that debt was extinguished. The sub-contractor was then entitled to all further sums payable in respect of the sub-contracts, and it was upon this basis that the judgment at the trial granted relief to the appellant in respect of moneys received by the respondent after that time.

O'Halloran J.A., with whom Sidney Smith J.A. agreed, found that any rights which s. 19 purported to give could be invoked only by a person who was, at the time of the institution of the action, entitled to a lien upon the property in respect of which the work had been done or the materials supplied. The view of the learned trial judge to the contrary on this aspect of the matter was adopted by Robertson J.A.

I find no ambiguity in the language of s. 19 and, while the adding of this additional protection for the interests of labourers and material men may create difficulties for contractors seeking credit, as pointed out by Richards J.A. in *Castelein* v. *Boux* (at p. 106), and while the section lacks any direction as to the manner in which the trust fund declared is to be apportioned among those entitled, these considerations do not, in my opinion, afford any sufficient reason for failing to give effect to the plain meaning of the language employed or to read into the section a provision that the rights given may be exercised only by those who then have a right to a lien upon the work.

The Mechanics' Lien Act of British Columbia has since 1879 afforded to labourers, material men, contractors and others a means of enforcing their claims against the work produced as a result of their efforts, or with the materials

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they have supplied, by filing claims of lien within a defined period and, if default were made, instituting proceedings to realize the amounts payable. S. 19 was apparently designed to provide further security for such persons by providing that moneys received as payments on account of the principal contract or of any sub-contract should, in the hands of the recipients, constitute a trust fund for their benefit.

By s. 20 the lien given by s. 6 ceases to exist if, within the periods of time defined, the claimant fails to file an affidavit, stating the particulars of claim and the description of the property to be charged in the nearest county court registry in the county where the land is situate, and a duplicate, certified as such by the County Court Registrar, in the Land Registry Office in the district within which the lands are situate, and thereafter institutes proceedings for its enforcement. These provisions and the provisions for the enforcement of the lien upon the property contained in ss. 29 to 37, inclusive, have no application to the rights afforded to the material men, amongst others, by s. 19. Had it been the intention of the legislature that these rights should be extinguished in the same manner as the right of lien against the property, as provided by s. 20, I think an appropriate amendment to that section would have been made when s. 18A was added in 1942.

I am unable to agree with the contention of the respondent that the rights afforded to material men and others by s. 19 may only be asserted in proceedings in the County Court. Proceedings for the enforcement of the lien against the property in connection with which the material has been supplied or the work has been done are required to be taken in the County Court and, by reason of the provisions of s. 35, a judgment may be recovered in that court on a personal claim against the contractor or owner who may have ordered the work done or material supplied, notwithstanding that the amount may exceed the ordinary jurisdiction of the County Court. All of these provisions of the statute refer in terms to proceedings directed to realization of the claim out of the property and none refer to claims arising by virtue of the provisions of s. 19. Claims under that section are for the recovery of moneys declared to be trust funds to which the material men, amongst others, may

resort. The jurisdiction of the Supreme Court of British Columbia is declared by s. 9 of the Supreme Court Act (R.S.B.C. 1948, c. 73) as follows:—

> The Court is and shall continue to be a court of original jurisdiction and shall have complete cognizance of all pleas whatsoever and shall have jurisdiction in all cases, civil as well as criminal, arising in the province.

Here the claim advanced is to recover sums in excess of the ordinary jurisdiction of the County Court and is not of the nature referred to in s. 35. The jurisdiction of the Supreme Court is undoubted, in my opinion.

Sidney Smith J.A., who agreed generally with the reasons expressed by O'Halloran J.A., found that the appellant's claim also failed on the ground that the assignment of book debts secured not only the debt to which I have referred but any further liability incurred thereafter by the sub-contractor to the respondent. As to this, for the reasons I have already stated, I agree with the learned trial judge and with Robertson J.A. The claim of the respondent to moneys payable by the contractor to the sub-contractor depended entirely on the terms of the written assignment of February 4, 1950. The evidence of the witness Welsford referred to, by which it was sought to supplement the terms of the writing, was not admissible. The matter is simply a matter of the construction of the language of the written assignment but, if its terms were ambiguous (and I can see no ambiguity) and other evidence was admissible to construe its terms, it may be noted that ten days after it was given, at the instance of the respondent, the sub-contractor addressed a letter to the former, the opening sentence of which read:—

> By way of greater precaution in connection *with the present indebtedness of our company to yourself* which has already been the subject of a general assignment of book accounts.

This was written at the instance of the witness Welsford and indicates what both parties understood.

The judgment delivered at the trial restricted the relief granted to the moneys received by the respondent after the debt of $19,278.41 was extinguished. S. 19 declares that all sums received by the contractor or sub-contractor constitute a trust fund for the benefit of the designated persons, and as, by reason of the assignment, the moneys received by the respondent were, as between the respondent and Irvine and

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MINNEAPOLIS-HONEYWELL REGULATOR CO. LTD. v. EMPIRE BRASS MFG. CO. LTD.

Locke J.

Reeves Ltd., the property of the former, it was found that none of these moneys were received by the latter and hence were not at any time subject to the trust. As to s. 16, Davie J. was of the opinion that it did not apply to the rights given to a creditor by s. 19. With these conclusions of the learned trial judge I respectfully agree.

I would allow this appeal, with costs here and in the Court of Appeal, and restore the judgment at the trial, subject, however, to the variation suggested in the concluding paragraph of the reasons for judgment of Mr. Justice Robertson as to the order as to costs, for the reasons there indicated, pending a report on the accounts and providing that further consideration of the action be reserved.

Appeal allowed with costs, judgment at trial restored but modified.

Solicitors for the appellant: *Jestley, Morrison, Eckardt & Goldie.*

Solicitors for the respondent: *Macrae, Montgomery & Macrae.*

1955

*Jun. 9
*Oct. 4

GERARD AND FERDINAND BELLAVANCE (*Defendants*) ..... } APPELLANTS;

AND

ORANGE CRUSH LIMITED AND KIK COMPANY (*Plaintiffs*) ..... } RESPONDENTS.

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

Contract—To bottle and sell soft drinks—Termination of—Whether reciprocal obligation to sell and buy supplies on hand.

The appellants, by contract with the respondents, were granted a franchise to bottle and sell soft drinks made from concentrates manufactured by the respondents. The appellants had to buy the concentrates and all the supplies such as bottles, cases, stationery, advertising materials, vehicles etc. Clause 5(*c*) of the contract provided that, at the termination of the contract, the appellants "shall collect and make available for inspection" all supplies on hand, and by clause 5(*d*), it

*PRESENT: Taschereau, Rand, Estey, Fauteux and Abbott JJ.

was stipulated that the respondents "shall purchase" all supplies in good condition, and what was not so purchased "shall not be sold" except to other licensees.

The contract was terminated and the respondents brought action to enforce their right to purchase the supplies which the appellants contended they were not obliged to sell. The trial judge dismissed the action, but this judgment was reversed by a majority in the Court of Appeal.

Held (Rand J. dissenting): That the appeal should be dismissed.

Per Taschereau, Estey, Fauteux and Abbott JJ.: The parties were reciprocally obligated; the respondents, to buy the supplies and the appellants, to sell them at the termination of the contract. If the appellants were not obliged to sell, there would be no reason for clause 5(*c*) nor for the last paragraph of clause 5(*d*). Furthermore, the use in the bottle trade of the trade mark of another person without the consent of that person, is prohibited by Art. 490 of the *Criminal Code*.

Per Rand J. (dissenting): Clause 5(*d*) of the contract created an obligation to purchase but for the benefit only of the appellants, that is to say that the appellants were not bound to sell but could require the respondents to purchase. To interpret the language as implying an obligation to sell would be in direct conflict with what was in fact contemplated.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), reversing, Galipeault, C.J.A. and Marchand J.A. dissenting, the judgment at trial and maintaining the action.

Louis Philippe Rioux for the appellants.

Renault St-Laurent, Q.C. for the respondents.

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

TASCHEREAU J.:—Je crois que cet appel doit être rejeté. L'analyse du contrat me conduit nécessairement à la conclusion que non seulement les intimées ont l'obligation d'acheter les concentrés, bouteilles, étiquettes, bouchons, caisses, ainsi que matières publicitaires, mais que les appelants ont l'obligation de vendre à l'expiration du contrat. Malgré que les appelants aient acquis la propriété des choses qui font l'objet du procès, ils se sont bien engagés à les remettre à l'expiration du contrat moyennant paiement. Il s'agit d'obligations synallagmatiques.

Il ne faut pas juger ce litige par la lecture d'une seule clause du contrat. Toutes les clauses doivent s'intepréter les unes par les autres, et il faut donner à chacune le sens

(1) Q.R. [1953] Q.B. 573.

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Taschereau J.

qui résulte de l'acte entier (C.C. 1018). De plus, lorsque la commune intention des parties dans un contrat est douteuse, elle doit être déterminée par interprétation, plutôt que par le sens littéral des termes de ce contrat (C.C. 1013).

Ici, il est dit que les intimées devront acheter, mais il n'est pas clairement stipulé que les appelants devront vendre. Ces derniers ont cependant l'obligation, aux termes du contrat, de rassembler et préparer pour inspection tout ce qui fait l'objet de la convention et s'obligent de ne plus s'en servir. Ce n'est que ce que les intimées choisiront de ne pas acheter, que les appelants auront la liberté de vendre.

Pourquoi faire inventaire, tenir ces effets à la disposition des intimées; pourquoi se réserver le droit de ne vendre à d'autres que ce que les intimées décideront de ne pas acheter; si les appelants ne se sont pas engagés, par l'ensemble du contrat, de vendre aux intimées toute la marchandise qui sera en bon état? D'ailleurs, l'emploi de la marque de commerce d'autrui dans le commerce des bouteilles, est prohibé à moins d'une permission écrite du propriétaire de cetter marque. (Code Crim. Art. 490).

Il me semble, en conséquence, qu'il y a une réciprocité d'obligations, qui me conduit à la conclusion que l'appel doit être rejeté avec dépens.

RAND J. (dissenting):—The matter in controversy is a contract, by which, generally, the respondents granted to the appellants, whom I shall call the purchasers, an exclusive franchise to use certain concentrates to be sold by the respondents for the making and sale, within a defined territory, of beverages known in the trade as Orange Crush, Gurd's Dry Ginger Ale and Kik-Cola. The purchasers were to buy bottles from specified manufacturers of different styles and sizes to be used as to each type only for bottling the specified beverage. Advertising was to be done by them, including labels on bottles, cases, stationery and vehicles. Other supplies included approved crowns or stoppers and cases or bottle containers.

The dispute arises over the disposal of such of those supplies as, upon the termination of the contract, were on hand. This feature is covered by express provisions. After declaring that upon termination the rights and privileges of the purchasers shall "absolutely cease and determine", and

stipulating that the purchasers shall at once discontinue all use or exercise of the names, trademarks or other trade rights of the grantors, they proceed:—

"D"

5(*c*) The BOTTLER shall collect and make available for inspection at the BOTTLER'S premises all concentrate, bottles, authorized labels and crowns, cases and advertising matter used in connection with the production and sale of the Beverages and also such property of the BOTTLER as has been permanently marked with or bears any such trade-mark, name, design or copyright not to be used further by the BOTTLER; and

(*d*) ORANGE CRUSH and/or KIK shall purchase all of the said concentrate, bottles, authorized labels and crowns, cases and advertising matter which is in good condition at the cost thereof less freight and transportation charges and less a cumulative annual depreciation of 10% of the cost of all bottles and of 20% of the cost of all cases.

Any of the above described property not purchased by the COMPANIES shall not be sold by the BOTTLER except to other licensees of the COMPANIES.

The respondents brought the action to enforce what they contend is their right under par. (*d*) to purchase the supplies. The issue is whether par. (*d*) compels the purchasers to sell. At the trial Marquis J. dismissed the action, but on appeal (1) this was reversed, Galipeault C.J. and Marchand J. dissenting; and in that equal division in interpretation the case comes here.

The contract is lengthy and comprehensive and deals in great detail with the subject matter. It clearly indicates that nothing material was intended to be left to implication. That the property in the supplies became that of the purchasers is not disputed, and by clause 2 of s. B, the purchasers agree that they will not

deal with or dispose of said bottles, except by way of loan against deposit in the ordinary course of sale of the Beverages or by way of sale to the COMPANIES or their licensed BOTTLERS.

This contemplates a sale of bottles to other licensees while the contract remains in force. By clause 1 of s. D pars. (*a*) and (*c*) provision is made for the termination of the contract upon the expiration of thirty days from the giving of a written notice simpliciter by the purchasers or by the grantors in relation to curable defaults, the period mentioned being a locus penitentiae; and by pars. (*b*) and (*d*) upon notice by the grantors by reason of other defaults or

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Rand J.

the happening of specified events such as bankruptcy; but we are left in the dark as to the mode of termination in the present case. Within the notice period of pars. (*a*) and (*d*), the contract remaining in force, the purchasers could have sold the bottles, labels, crowns and other supplies to other licensees: is the case different as from the moment the termination becomes effective?

I think it clear that clause 5(*d*) providing that the grantors

> shall purchase all of the said concentrate, bottles, authorized labels and crowns, cases and advertising matter which is in good condition.

creates an obligation to purchase but for the benefit only of the purchasers, that is that the latter, not bound to sell, may require the grantors to purchase. This is put beyond question by the French version: "devront acheter" which I translate as "must" or "shall be bound" or "obliged" to purchase. The purchasers would otherwise be left with these supplies on their hands which they might not be able to sell to other licensees, and a special price is provided which insures them against excessive loss.

But the paragraph contemplates that the property may not be acquired by the grantors, in which event it can be sold to other licensees. If, as contended by the respondents, there is an implied obligation on the purchasers to sell as well as on the grantors to purchase and, as clearly appears to be the case, it lies within the judgment of the latter whether the supplies are or are not in good condition, then the only portion of the property which could be sold to other licensees would be what was judged to be not in good condition. How much would a licensee buy of what was so rejected? of what was declared unfit for the trade by the grantors? Can we seriously take the second paragraph to have that as its subject matter? But anything else means either that the purchasers are not bound to sell or that the grantors have an option to buy: and the courts below agree that it is not the latter.

I am unable to interpret the language as implying an obligation to sell: it would be in direct conflict with what is in fact contemplated. The property belongs to the purchasers; on the express language of the agreement, there is nothing to prevent the purchasers from destroying any part of it should they see fit to do so; and, on the other

hand, since they can sell only to licensees, they run the risk, in refusing to sell to the grantors, of being unable to dispose of it at all. But it would be imputing an unwarranted restriction upon their right to deal with what is their own to require them to sell to the grantors. The possibility of such a question arising is patent on the face of the provision and one that could not have escaped the mind of the draftsman. Since it is omitted I am bound to assume that clause (*d*) was intended only to give to the purchasers the right to require the grantors to buy without more.

Gagne J. interprets the second paragraph of that clause as implying by the words "property not purchased by the companies" an elective action by the latter. Although that is a possible interpretation, it is by no means the primary or a necessary one. The phrase means, I think, just what it says, goods that are not in fact purchased or acquired. That might result from either the objection that they were not in good condition or from the election by the licensees not to sell. Obviously it could only be goods not purchased that would fall within the second paragraph, but the grantors were not bound, when called upon, to acquire all, and this possibility simply refers us back to the first paragraph for the party who is given the election. Gagne J. seems to agree that the first paragraph, standing alone, confers the optional power upon the licensees. If that is so, then we must carry that assumption into the interpretation of the second paragraph unless the language clearly repels it: only when that appears are we to look for another interpretation; and that repulsion must be sufficient to override the admittedly plain meaning of the first. Gagne J. does not apply that test; he approaches the second paragraph independently of the first; but the second is a subordinate provision and unless radically incompatible with the principal, it should be interpreted consistently with it. This issue is, in fact, the crux of the controversy and as, in my opinion, there is no incompatibility, with the greatest respect I am unable to accept the view that appealed to him.

Clause 5(C) does not in any sense conflict with this view. It simply requires the purchasers to enable the grantors to inspect and determine the extent of the use of their trade rights which must disappear upon termination. The inclusion in the clause of the property of the purchasers,

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Rand J.

such as trucks, which has been "permanently marked" with the name, design, copyright or trademark of the grantors not thereafter to be used, excludes any other purpose.

I would, therefore, allow the appeal and restore the judgment at the trial with costs in the Court of Appeal and in this Court.

Appeal dismissed with costs.

Solicitor for the appellants: *L. P. Rioux.*

Solicitors for the respondents: *St-Laurent, Taschereau, Létourneau, Johnston, Noël & Pratte.*

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*May 31
*June 1
*Oct. 4

HER MAJESTY THE QUEEN .....APPELLANT;

AND

ALFRED PATRICK HEMINGWAY otherwise known as Barry Hamilton and Richard Balfour ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal Code—False Pretences—Conditional Sale—Obtaining goods through medium of written contract—Whether a buyer "obtains anything capable of being stolen" on acquiring a property interest in goods under a conditional sales agreement—The Criminal Code, s. 405 (1)—Conditional Sales Act, R.S.B.C. 1948, c. 64.

An accused was convicted by a jury under s. 405 (1) of the *Criminal Code*, R.S.C. 1927, c. 36, of having obtained certain goods by false pretences through the medium of a contract in writing. The conviction was quashed by the British Columbia Court of Appeal on the ground that as title to the goods was expressly reserved to the vendor by the terms of the contract, a conditional sales agreement, until the purchase moneys were fully paid, the conviction could not be supported.

Held: That the judgment should be set aside and the conviction at trial restored. The accused by false pretences induced the vendor not only to part with possession of the goods but also to pass to the accused a property interest recognized by the *Conditional Sales Act*, R.S.B.C. 1948, c. 64, and such an interest fell within the words "obtains anything capable of being stolen" as used in s. 405 of the *Criminal Code*.

Held: Further, by Kerwin C.J. and Estey and Abbott JJ., that the word "obtained" in s. 405 of the *Criminal Code* must be given a more extended meaning than that attributed to it in the British Larceny Act.

Rex v. *Scheer* 39 Can. C.C. 82 at 83, *Rex* v. *Craingly* 55 Can. C.C. 292 and *Rex* v. *Kennedy* 91 Can. C.C. 347, approved.

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

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APPEAL by the Crown from a judgment of the Court of Appeal for British Columbia (1) allowing the respondent's appeal from his conviction in the Supreme Court of British Columbia before Wilson J. and a jury on a charge of having obtained goods by false pretences through the medium of a contract in writing.

H. R. Bray, Q.C. for the appellant.

E. L. Whiffin for the respondent.

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

ESTEY J.:—The respondent's conviction of obtaining household goods by false pretences was quashed in the Court of Appeal for British Columbia and the Crown, in this further appeal, asks that the conviction at trial be restored.

On October 26, 1953, the respondent made certain representations which, upon the evidence, were false and thereby induced the Belmont Furniture Stores to deliver the goods to him under a conditional sales agreement of that date. Under this agreement he agreed to pay $2,050.38 on terms of $355 in cash, which he paid, and the balance in monthly instalments of $70.75. In addition to the cash payment, he paid two instalments. When the third was demanded he produced a receipt purporting to acknowledge the balance having been paid in full. The Belmont Furniture Stores had not given such a receipt and in these proceedings its validity has not been suggested.

The learned judges in the Court of Appeal were of the opinion that, because, under the agreement, title remained in the Belmont Furniture Stores until the purchase price was fully paid, the respondent had obtained no more than possession and a statutory right to the title and ownership of the goods upon completion of his payments and, therefore, it could not be said that in law the crime of false pretences had been committed.

The delivery of the goods having been made under a conditional sales agreement, the relationship between the respondent and the Belmont Furniture Stores is determined

(1) (1955) 14 W.W.R. 668.

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Estey J.

by the terms of that agreement read with the provisions of the *Conditional Sales Act* of British Columbia (R.S.B.C. 1948, c. 64). This latter Act contains the following relevant provisions:

> 11(2) The buyer shall not, prior to complete performance of the contract, sell, mortgage, or otherwise dispose of his interest in the goods, unless he, or the person to whom he is about to sell, mortgage, charge, or otherwise dispose of same, has notified the seller in writing, personally or by registered mail, of the name and address of such person, not less than ten days before such sale, mortgage, charge, or other disposal.
>
> (3) In case the buyer removes the goods or disposes of his interest in them contrary to the foregoing provisions of this section, the seller may retake possession of the goods and deal with them as in case of default in payment of all or part of the purchase price.
>
> 12(1) Where the seller retakes possession of the goods pursuant to any condition in the contract, he shall retain them for twenty days, and the buyer may redeem the same within that period by paying or tendering to the seller the balance of the contract price, together with the actual costs and expenses of taking and keeping possession, or by performance or tender of performance of the condition upon which the property in the goods is to vest in the buyer and payment of such costs and expenses; and thereupon the seller shall deliver up to the buyer possession of the goods so redeemed.
>
> (2) When the goods are not redeemed within the period of twenty days, and subject to the giving of the notice of sale prescribed by this section, the seller may sell the goods, either by private sale or at public auction, at any time after the expiration of that period.
>
> (7) This section shall apply notwithstanding any agreement to the contrary.

That the Legislature intended a buyer would, from the outset, have an interest in the goods is clearly evidenced in the foregoing s. 11(2), under which he may, upon giving the specified notice, "dispose of his interest in the goods." Again, in s. 11(3), if a buyer "disposes of his interest" in the goods without giving the notice "the seller may retake possession." Moreover, if the seller retakes possession, under s. 12(1) the buyer has certain rights of redemption. Also, and quite apart from the statute, the buyer would have an insurable interest. In these circumstances the respondent, as a buyer, acquired both possession and an interest in the goods, or what may be properly described as a property interest in the goods. It may be that the Belmont Furniture Stores had a right to repudiate the contract, in which event the respondent, by virtue of his payments, may have had some rights. These, however, are civil rights with which we are here not concerned.

The respondent was convicted under s. 405 of the *Criminal Code*, the material part of which reads as follows:

> 405. Every one is guilty of an indictable offence . . . who, . . . by any false pretense, either directly or through the medium of any contract obtained by such false pretense, obtains anything capable of being stolen, . . .

The main contention on behalf of the respondent is that, as the property did not wholly or entirely pass to the respondent, he cannot be found guilty of false pretences within the meaning of the foregoing section because the word "obtains," as there used, means the acquisition by the respondent of the whole or the entire property interest of the Belmont Furniture Stores.

In support of this contention counsel for the respondent referred to *The Queen* v. *Kilham* (1), in which Bovill C.J., in the course of his reasons and speaking for the Court, stated:

> But to constitute an obtaining by false pretences it is equally essential, as in larceny, that there shall be an intention to deprive the owner wholly of his property, and this intention did not exist in the case before us.

The Chief Justice expressed the basis of the decision in the following words:

> . . . the prisoner never intended to deprive the prosecutor of the horse or the property in it, or to appropriate it to himself, but only intended to obtain the use of the horse for a limited time.

He also stated:

> The word "obtain" in this section does not mean obtain the loan of, but obtain the property in, any chattel etc.

Their Lordships were there considering a case in which no property whatever was intended to pass. However, the general observation which includes the phrase "deprive the owner wholly of his property", though unnecessary to the decision, appears to have been accepted as a statement of the law by the learned authors of recognized texts. *Russell on Crime*, 10th Ed., p. 1377, states:

> . . . there must, as in larceny, be an intention to deprive the owner wholly of his property.

See also *Kenny, Outlines of Criminal Law*, 1952, 16th Ed., s. 342; *Archbold's Cr. Pl. Ev. & Pr.*, 33rd Ed., pp. 546 and 554.

(1) (1870) L.R. 1 C.C.R. 261.

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Estey J.

In 1951 Lord Goddard stated:

> There is no doubt that "obtains" means obtains the property and not merely possession, and the obtaining must not for this purpose be under such circumstances as to amount to larceny. *Rex* v. *Ball* (1).

In all of the foregoing it is the distinction between larceny by trick and false pretences, or between mere possession and property, that is under discussion. In fact, the precise point here under consideration does not appear to have been raised in any of the courts in Great Britain. This may be due to the fact that there chattels are disposed of, not under conditional sales agreements such as that here in question, but rather under hire-purchase agreements. The nature of the hire-purchase contract is described by the learned authors of *Dunstan's Law of Hire-Purchase*, 4th Ed., at p. 9:

> The contract of hire-purchase, as already defined, is a contract of hire with an option of purchase, in which the owner of goods lets them out on hire to the hirer for a fixed term, at an agreed rental to be paid at intervals mutually agreed upon, as instalments, and the owner, in addition to letting the goods out, further agrees that if the hirer keeps them for the agreed period and regularly pays the rent they shall become the hirer's property.

See also *1 Hals.*, 2nd Ed., p. 761, para. 1249.

Hire-purchase contracts, since 1938, are subject to the *Hire-Purchase Act* (1 & 2 Geo. VI, c. 53). There are other agreements, which apparently are referred to as hire-purchase agreements, which come within the provisions of the *Factors Act*, 1889, and the *Sale of Goods Act*, 1893. These enactments are referred to here only for the purpose of indicating that the exchange of chattels is effected in Great Britain under agreements subject to statutory provisions which are substantially different from the conditional sales agreement and the statutory provisions in respect thereto adopted generally throughout Canada.

It also appears that our relevant criminal law is quite different from that in Great Britain. Prior to 1892 the statutory law with respect to larceny and false pretences was contained in *The Larceny Act* (R.S.C. 1886, c. 164). Larceny is not, in that statute, defined and the relevant portion of s. 77, corresponding to the present s. 405, reads:

> 77. Every one who, by any false pretence, obtains from any other person any chattel, money or valuable security, with intent to defraud, is guilty of a misdemeanor, and liable to three years' imprisonment.

(1) [1951] 2 K.B. 109 at 111.

This s. 77 is in part founded upon s. 88 of the *Larceny Act*, 1861 of Great Britain (24 & 25 Vict., c. 96), being "An Act to Consolidate and Amend the Statute Law of England and Ireland Relating to Larceny and Similar Acts." In that statute s. 88 read in part:

> Whosoever shall, by any false pretence, obtain from any other person any chattel, money or valuable security with intent to defraud shall be guilty of . . .

In 1880 a British Royal Commission reported by submitting a draft criminal code which, in their own language, was "a reduction of the existing law to an orderly written system freed from needless technicalities, obscurities and other defects which the experience of its administration has disclosed. It aims at the reduction to a system of that kind of substantive law relating to crimes and the law of procedure both as to indictable offences and as to summary convictions" (Report Part I, Codification in General).

Apparently impressed by the advantages of a codification, the Government of Canada asked Mr. Justice Burbidge of the Exchequer Court, who had for some time been Deputy Minister of Justice, and Mr. Sedgewick, then Deputy Minister of Justice, later a Justice of this Court, to draft a code of the criminal law for Canada. The code which they drafted and submitted was, in a large part, taken from the British draft code submitted in 1880; in fact, so much so that Mr. Justice Taschereau, later Chief Justice of this Court, in his 1893 edition of the Criminal Code of Canada, referred, under each section taken in whole or in part therefrom, to the British draft code from which, as he stated, "the present code has been in a large measure textually taken." *Taschereau's Criminal Code,* 1893 Ed., p. iii.

Section 305 of the 1892 code, now s. 347, setting forth what constitutes the offence of theft, is taken verbatim from the British draft code, except that in subpara. (*a*) the word "permanently" in the British draft code is deleted and the phrase "temporarily or absolutely" inserted in lieu thereof. It will, therefore, be observed that in our code an important addition to the definition of theft as contained in the draft British code is made, which in itself was quite different and much wider in its scope than that which had been developed under the common law and for the first time authoritatively

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set forth in s. 1 of the 1916 *Larceny Act*, or, indeed, as interpreted under the British *Larceny Act* of 1861, or the Canadian *Larceny Act* above referred to.

This definition of theft is important in this discussion because s. 405 contains the words "obtains anything capable of being stolen . . .," which replace the words "any chattel, money or valuable security," as they appear in s. 88 of the 1861 British *Larceny Act*. Moreover, these words "any chattel, money or valuable security," as they appeared in s. 88, were construed to include only that which could be the subject of larceny at common law. *Stephen's History of the Criminal Law of England*, p. 162; *Kenny's Outlines of the Criminal Law*, 16th Ed., p. 278.

The words in s. 405 "anything capable of being stolen" are of wider import and this is emphasized by the language of ss. 344 and 347 of the *Criminal Code*, where, as already intimated, theft is defined in terms more comprehensive than at common law or under any of the statutory provisions in Great Britain. In s. 344 it is provided:

> Every inanimate thing whatever which is the property of any person . . . is capable of being stolen . . .

and the provisions of s. 347 read, in part, as follows:

> 347. Theft or stealing is the act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person, anything capable of being stolen, with intent,
>
> (*a*) to deprive the owner, or any person having any special property or interest therein, temporarily or absolutely of such thing or of such property or interest;

Section 405, with which we are mainly concerned, is not in the language of either the Canadian statutes or the British statutes with respect to larceny and false pretences in force prior to 1892. In fact, both s. 347 (with the change already noted) and s. 405 are taken from the draft British code which never did become law in Great Britain and which was itself quite different from the statutory provisions then in force in that country. It is but a section in a statute largely codifying the criminal law of Canada. Its provisions effected many changes which principle and experience dictated and by restatement was intended to remove technicalities and clarify the criminal law. As such, s. 405, as well as the entire statute, is, in the language of their Lordships of the Privy Council, "an original enactment with no trace of its origin or history to be found either

in its terms or in any other" legislation of the Parliament of Canada. *Attorney-General for Ontario* v. *Perry* (1). It was there held that a section of the Ontario *Succession Duty Act,* "obviously borrowed," but not identical, should be construed as an "original" section. It should, therefore, be construed in a manner that gives effect to the intention of Parliament as expressed in the language there adopted. Of course, regard must be had to its language in relation to the statute as a whole, but its history ought not to be examined except in the case of ambiguity, and then, as stated by their Lordships of the Privy Council, that "is always a process of construction which is accompanied with much danger." *Ouellette* v. *C.P.R.* (2).

The construction of the word "obtains" as expressed by Chief Justice Bovill was pronounced in a day when the enforcement of the criminal law was subject to refinements and technicalities which our code was intended to eliminate. A reference to the standard dictionaries discloses that, as ordinarily used and understood, the word "obtains" does not suggest or import that the entire property must be acquired. In the *Oxford Dictionary* the word is defined:

> To procure or gain, as the result of purpose and effort; hence, generally, to acquire, get.

As so defined, the word would include the acquisition of possession from a party together with whatever interest that party might have.

Neither do I find anything in the language of s. 405 to suggest that the word should be so construed. Then, as a matter of principle, there would appear to be no difference between one who, by false pretences, obtains the whole or entire property and one who obtains possession and a property interest in the goods.

Our attention was directed to the fact that the word "obtain" appears in other sections of the *Code,* particularly s. 399. A comparison of this section with s. 82 of the Canadian *Larceny Act* in the 1886 Statutes and s. 88 of the *Larceny Act* of Great Britain in 1861 leads to precisely the same conclusion that s. 399 is a new and an original section in which the word "obtain" is used in a wide and comprehensive sense and should be construed to the same effect as in s. 405.

(1) [1934] A.C. 477 at 483 (2) [1925] A.C. 569 at 575.

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In Canada there is authority in support of the view that if, by false pretences and with intent to defraud, the possession together with a property interest is acquired in anything capable of being stolen, that is sufficient to support a conviction for false pretences.

Counsel for the respondent discussed a number of Canadian authorities to which reference may now be made. In *The King* v. *Nowe* (1), *Rex* v. *Scheer* (2), and *Rex* v. *McManus* (3), there was no intention to pass any property whatsoever and, therefore, it was held the crime of false pretences was not committed. In *Rex* v. *Scheer* a conviction for false pretences was quashed. Chief Justice Perdue, in the course of his reasons, at p. 83, stated:

> To constitute the offence of obtaining by false pretences it must appear that the prosecutor had been induced to part with some property right and not merely the possession of the goods.

Both Chief Justice Perdue and Mr. Justice Cameron referred to *Tremeear,* 1919 Ed., at p. 498, where the learned author states:

> It must appear that the prosecutor had been induced to part with some property right and not merely possession of the goods.

In the 5th Ed., 1944, this statement, at p. 459, is altered to read:

> If he intends to part only with the possession there can be no conviction for obtaining by false pretences.

In *Rex* v. *Craingly* (4), Craingly supplied material to Goodman, who manufactured trousers therefrom. This arrangement continued for some time. In the course of their dealings Goodman gave to Fisher, a cartage agent, a parcel containing eight pairs of trousers with instructions to deliver them to Craingly only upon payment of $63.50. When Craingly refused to pay the $63.50 Fisher refused to deliver to him the trousers. Later, however, during the same day, Fisher received a telephone message purporting to be from Goodman and instructing him to deliver the parcel on receipt of $20. This Fisher did. The learned trial judge found, and this was accepted in the Court of Appeal, that Craingly had made the telephone call to Fisher. The accused was found guilty of obtaining the trousers by false pretences and his conviction was affirmed

(1) (1904) 8 Can. C.C. 441.
(2) (1922) 39 Can. C.C. 82.
(3) (1923) 42 Can. C.C. 248.
(4) (1931) 55 Can. C.C. 292.

upon appeal. Grant J.A., with whom Mulock C.J.O. and Hodgins J.A. agreed, found that Fisher was a bailee of the parcel and, therefore, had a special property or interest therein.

The above was followed in *Rex* v. *Kinsey* (1), where the accused purchased from Edmonton Automart a truck for $1,000, plus repairs thereto in the sum of $50, payable $500 in cash and the balance on terms. The accused signed a contract under which title remained in the vendor until payment had been made in full. The cash payment was made in cheques which proved to be worthless. The accused was charged and found guilty of obtaining goods by false pretences.

Rex v. *Craingly, supra,* and *Rex* v. *Kinsey, supra,* appear to have been decided in accord with the intention of Parliament expressed in s. 405.

The accused, by false pretences, acquired possession of the goods and a special property or interest therein in a manner that brings him within the words "obtains anything capable of being stolen," as used in s. 405 of the *Criminal Code.*

The appeal should be allowed and the conviction restored.

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

KELLOCK J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia allowing an appeal by the respondent from his conviction in the Supreme Court of British Columbia before Wilson J., and a jury, on a charge of having obtained goods by false pretences through the medium of a contract in writing.

On October 26, 1953, the respondent, under the name of "Barry Hamilton", entered into a conditional sales contract for the purchase of certain furniture. The premises at the address he gave were owned by a Mrs. Hamilton and her son, whose name was Barry Hamilton. He was not the respondent, whose real name is unknown. He goes under various aliases.

At the time of the transaction the respondent gave to the vendor for that part of the purchase moneys payable in cash, a cheque drawn by a third person in favour of "Barry

(1) (1948) 91 Can. C.C. 347.

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Hamilton" for $355, which he endorsed in the name of the payee. This left a balance of purchase moneys of $1,695.38, payable at the rate of $70.75 per month. Two of these instalments were subsequently paid in November and January following.

Early in February, the respondent, on being applied to for payment of the third instalment, then overdue, took the position that the full balance of the purchase moneys had been paid and he produced an alleged receipt to that effect. This, however, proved to be a forgery.

The indictment contained two counts in addition to that of false pretences, one of which was withdrawn. The other was of obtaining credit by false pretences. This was, however, not dealt with by the jury as the learned trial judge instructed them they need not consider it if they found the accused guilty of obtaining goods.

Ss. 404(1) and 405(1) of the *Code* are as follows:

404(1) A false pretense is a representation, either by words or otherwise, of a matter of fact either present or past, which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation.

405(1) Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud, by any false pretense, either directly or through the medium of any contract obtained by such false pretense, obtains anything capable of being stolen, or procures anything capable of being stolen to be delivered to any other person than himself.

In the Court of Appeal the conviction was quashed on the ground that, as title to the goods was expressly reserved to the vendor by the terms of the contract until the purchase moneys were fully paid, the conviction could not be supported. In the language of O'Halloran J.A., with whom Robertson and Bird JJ.A., agreed,

It has long been accepted that a conviction under Code Sec. 405(1) for "obtaining" goods by false pretences (as distinguished from theft by a trick see *The Queen* v. *Russett* (1), cannot be supported unless ownership of the goods as distinct from their authorized possession has passed to the convicted person;

The learned judge referred to a number of other authorities, including *Rex* v. *Scheer* (2). This is the sole point with which we are concerned on this appeal.

(1) [1892] 2 Q.B. 312.

(2) (1922) 39 Can. C.C. 82.

In *Russett's* case, the prisoner had agreed at a fair to sell a horse to the prosecutor for £23, of which £8 was paid down, the remainder to be paid on delivery. The horse was never delivered, the prisoner causing it to be removed from the fair under circumstances from which the jury inferred that he had never intended to deliver it. It was contended in appeal from his conviction of larceny by a trick that the only offence disclosed by the evidence was that of obtaining money by false pretences and that there was no evidence of larceny. In the course of his judgment affirming the conviction, Lord Coleridge C.J., said, at p. 314:

> . . . if the possession of the money or goods said to have been stolen has been parted with, but the owner did not intend to part with the property in them, so that part of the transaction is incomplete, and the parting with the possession has been obtained by fraud—that is larceny.

It was held that the £8 was paid by the prosecutor merely by way of deposit, the prosecutor never intending to part with the property in the money until he obtained delivery of the horse.

While the principle was sufficiently stated for the purposes of that case by Lord Coleridge, as above, it is important to understand the underlying distinction between the two offences of larceny by a trick and obtaining goods by false pretences. In *Queen* v. *Kilham* (1), Bovill C.J., at p. 263, quoted the language of s. 88 of 24-25 Victoria, c. 96, as follows:

> whosoever shall, by any false pretence, obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of a misdemeanour . . .

and continued:

> The word "obtain" in this section does not mean obtain the loan of, but obtain the property in, any chattel, etc. This is . . . made more clear by referring to the earlier statute from which the language of s. 88 is adopted. 7 & 8 Geo. 4, c. 29, s. 53, recites that "a failure of justice frequently arises from the subtle distinction between 'larceny and fraud'", and, for remedy thereof, enacts that "if any person shall, by any false pretence, obtain," etc. The subtle distinction which the statute was intended to remedy was this: that if a person, by fraud, induced another to part with the possession *only* of goods and converted them to his own use, this was larceny; while, if he induced another by fraud to part with the property in the goods as well as the possession, this was not larceny.

(1) (1870) L.R. 1 Cr. Cas. Res. 261.

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When emphasis is placed on the word "only", which I have italicized, the point of distinction between the two offences is clear. The subsequent language of the learned Chief Justice, namely,

> But to constitute an obtaining by false pretences it is equally essential, as in larceny, that there shall be an intention to deprive the owner wholly of his property . . .

is fully satisfied where the fraud is perpetrated "through the medium of a contract", whether part payment or no payment at all be made. The offence is nonetheless committed where the intention is to deprive the owner of what is his. In the case at bar the jury were satisfied of that. As the later authorities make plain, the contract need not provide for the immediate passing of the property in the goods.

In the circumstances of such a case as the present, the respondent could not have been convicted of theft as the vendor of the goods was consenting not only to the transfer of possession but to the transfer of the property in the goods upon the terms of the written contract. Under that contract the respondent obtained an interest in the goods which is recognized by the *Conditional Sales Act*. While it is provided by the contract that "title to, property in and ownership of said goods shall remain in Vendor at Purchaser's risk until all amount due hereunder, . . . are paid in cash" the statute provides by s. 11(2) that

> The buyer shall not, prior to complete performance of the contract, sell, mortgage, charge or otherwise dispose of *his interest* in the goods, unless . . .

and s-s. (3) enables the vendor to retake possession

> in case the buyer . . . disposes of *his interest* in them . . .

If the transaction under which the defrauder obtains possession of the goods does not provide for the passing of the property either immediately or in the future, "part of the transaction is incomplete", to use the language of Lord Coleridge above. A wrongful conversion in such circumstances means only one thing, namely, theft. If, however, the transaction is "complete" in the sense that the owner consents to the passing of the property in compliance with a term of the contract to that effect, there can be no theft. In so far, therefore, as the question in issue in the case at bar

depends upon a choice as between theft and obtaining the goods by false pretences, the only possible offence of which the respondent could have been convicted was the latter.

As pointed out in the 10th Edition of *Russell on Crime* p. 1413, the "main distinction" between larceny and obtaining by false pretences is that in the former the goods are taken "without the owner's consent, whereas in the latter the owner has been induced by the pretences to give his consent." In commenting upon the decision in *Russett's* case, the same author says, at p. 1110:

the essential point is in the presence or absence of the owner's consent:

That this is the essential principle is, in my opinion, borne out by the authorities.

In *Whitehorn Brothers* v. *Davison* (1), the facts were that one Bruford, whom the plaintiffs, a firm of manufacturing jewellers, knew as a jeweller and dealer in pearls, obtained from the plaintiffs a pearl necklace on the representation that he would like to send it to one of his customers on approval. The plaintiffs assented and, on obtaining the necklace, Bruford pledged it with the defendant as security for moneys owing by him. Subsequently, Bruford represented to the plaintiffs that his customer had decided to take the necklace but that he was in the habit of receiving six months' credit. Ultimately, the plaintiffs invoiced the necklace to Bruford, taking from him two bills, one at five, the other at six months. These were subsequently dishonoured, Bruford having absconded. The plaintiffs then sought recovery of the necklace from the defendant. In the course of his judgment at p. 473, Vaughan Williams L.J., said:

. . . I should have great difficulty in arriving at the conclusion that what Bruford did amounted to larceny by a trick. There was, no doubt, evidence to shew that he did by fraudulent statements persuade the plaintiffs to enter into a contract with him, which, taking the view of it most favourable to them, appears to me to have been a contract under which possession of the necklace was given to him together with an option, within a reasonable time, I suppose, to accept as sold to him the necklace so delivered on sale or return for a price to be paid in cash, or to return the same. That being so, the case is one in which he, undoubtedly, got possession of the necklace by fraud, but it appears to me that he got it under a contract between himself and the plaintiffs. He not only got it under this contract, but, admittedly, the object of that contract was that he should have an opportunity of seeing whether he could sell the necklace

(1) [1911] 1 K.B. 463.

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to a customer before he made up his mind whether he would accept it on the terms of the approbation note. Under these circumstances . . . I think that would constitute obtaining goods by fraud, and not larceny.

Buckley L.J., at p. 479, said:

On the other hand, goods are obtained by false pretences where the owner of the goods, being induced thereto by a trick, voluntarily parts with the possession of the goods, and does intend to pass the property. The question which is material under the circumstances of the present case is this. Suppose the facts are that the owner of the goods, being induced thereto by a trick, intends, not to pass the property in them, but to confer on the person to whom he gives possession a power to pass the property; under which head does that case fall? Prima facie it would look, inasmuch as he does not intend presently to pass the property, as if that would be larceny by a trick. I think, however, that is not so. It seems to me that, where the owner of the goods intends to confer a power to pass the property, it is a case of obtaining goods by false pretences.

Kennedy L.J., at p. 485, expressed a similar view.

The principle of these judgments was subsequently adopted and applied by the Court of Appeal in *Folkes* v. *King* (1). In my opinion, the principle so stated is right and fully covers the circumstances of the case at bar.

It may be observed that in *Rex* v. *Scheer* (*supra*) to which the Court of Appeal referred, the Manitoba Court of Appeal adopted the statement in the 1919 edition of Tremeear to the effect that in the case of the offence here under consideration, it must appear that the prosecutor has been induced to part with "some" property right and not merely possession of the goods.

It was further contended for the respondent that there never had in fact been any contract entered into between him and the owners of the furniture for the reason that the latter considered they were dealing not with the respondent but with another person, namely, the real Barry Hamilton. In my opinion, the evidence does not support this contention. It is true that the respondent used that name and that there was another person of that name, but that other person was not known to the vendors. They dealt with the respondent himself, although they accepted his statement that his name was Barry Hamilton, from which they were able to ascertain that a person of that name did reside at the address given.

This is not a case, therefore, of a contract with one person in the belief that it was with another. The vendors dealt and intended to deal with the respondent. The fact that

(1) [1923] 1 K.B. 282.

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he gave a false name is immaterial in these circumstances; *King's Norton Metal Co.* v. *Eldridge, Herrett & Co.* (1). The distinction between such a case and the circumstances in *Cundy* v. *Lindsay* (2), where the person defrauded was, by reason of the fraud of the person with whom they dealt, induced to believe they were dealing with another person, is obvious.

The appeal should be allowed and the conviction restored.

Appeal allowed and conviction restored.

Solicitor for the appellant: *H. R. Bray.*

Solicitor for the respondent: *E. L. Whiffin.*

FOREST LAWN CEMETERY COMPANY (*Defendant*) ..... APPELLANT;

AND

CORPORATION OF THE DISTRICT OF BURNABY (*Plaintiff*) ..... RESPONDENT.

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*May 20

*Oct. 4

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Cemetery Companies—Powers—Municipal By-Laws, application thereto—Cemetery Companies Act, R.S.B.C. 1948, c. 59—Municipal Act, R.S.B.C. 1948, c. 232, s. 58 (73), (74).

The *Municipal Act*, R.S.B.C. 1948, c. 232, s. 58 provides that in every municipality the Council may pass by-laws . . .

(73) For entering into agreements with cemetery companies for the provision of cemetery facilities within . . . the municipal limits.

(74) For prohibiting the burial of human bodies except in such places . . . as may be authorized.

The appellant was incorporated in 1935 under the *Cemetery Companies Act*, now R.S.B.C. 1948, c. 59, and with the approval of the respondent Municipality acquired land within the latter's limits for the purpose of a burial ground. In 1951 it acquired two additional parcels for similar purposes. The respondent under the authority of a by-law passed under s. 58 (74) of the *Municipal Act* refused approval of such use of the additional lands and, upon the appellant commencing to so use the lands without its consent, brought action to restrain such use. It was contended for the appellant that the Act under which it was incorporated was a special Act and that powers granted it upon

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

(1) (1897) 14 T.L.R. 98.

(2) (1878) 3 App. Cas. 459.

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its incorporation included authority to establish its cemetery in the respondent municipality and that it was not subject to the municipal by-law here in question. The trial judge, Coady J., gave judgment for the municipality and upon the appellant's appeal to the Court of Appeal for British Columbia that court affirmed his judgment. Upon appeal to this Court:

Held: That the appeal should be dismissed.

Held (By Rand, Kellock, Estey and Locke JJ.): That the *Cemetery Companies Act* does no more than provide the means by which a public cemetery corporation may be brought into being and endowed with certain powers, those powers so far as the actual location of a burying ground is concerned, to be subject to the *Municipal Act* as to the consent of the municipality within whose boundaries the cemetery is proposed to be established.

Kerwin C.J. would have dismissed the appeal for the reasons given by the trial judge concurred in by the Court of Appeal.

APPEAL from a judgment of the Court of Appeal for British Columbia (1), unanimously affirming the judgment of Coady J. (2) at trial, wherein there was granted to the Plaintiff Corporation an injunction restraining the appellant company from using certain lands within the limits of the Plaintiff Corporation for cemetery purposes.

E. G. Gowling, Q.C. and *J. A. MacInnes, Q.C.* for the appellant.

C. K. Guild, Q.C. and *C. C. Bell* for the respondent.

THE CHIEF JUSTICE:—This appeal should be dismissed with costs for the reasons given by the trial judge, concurred in, as they were, by the Members of the Court of Appeal for British Columbia.

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

KELLOCK J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia (1). Following its incorporation in 1935 under the provisions of the *Cemetery Companies Act*, now c. 59, R.S.B.C., 1948, the appellant company acquired for the purposes of its operations a parcel of land in the respondent municipality. Subsequently, in 1951, it obtained title to two additional parcels, eight acres

(1) [1954] 4 D.L.R. 850.

(2) (1953) 9 W.W.R. (N.S.) 433; [1953] 3 D.L.R. 213.

and forty acres respectively, intending to use these additional lands for the same purpose for which it was already using its original lands, namely, as a burial ground.

The respondent, acting upon the footing of a prohibitory by-law passed in 1919, refused approval of such use of these additional lands, although its approval had been given in 1935 in connection with the first parcel. Upon the appellant company commencing to use these lands without the consent of the respondent, this action was brought to restrain such use. The appellant was unsuccessful at the trial as well as in the Court of Appeal.

The appellant contends that the Act under which it was incorporated is a special Act and that the powers granted to it upon its incorporation, which appellant contends include authority to establish its cemetery in the respondent municipality without regard to the view of the latter, are not subject to the municipal by-law here in question, which was passed under the provisions of s. 58(74) of the *Municipal Act,* (R.S.B.C. 1948, c. 232). It is further contended that, in any event, the respondent is estopped by its conduct from withholding its consent.

The Cemetery Companies Act (R.S.B.C. 1936, c. 43), by s. 3, provides that any five or more persons may form an incorporated company under the Act for the purpose of establishing and maintaining a public cemetery without the limits of a municipality incorporated as a city or city municipality. By s. 4, s-s. (1), it is provided that the persons desiring to form the company shall execute in duplicate an instrument showing the place where the cemetery is to be located, which document is to be transmitted to the Registrar of Companies together with certain moneys as provided by the section. S-s. (2) provides that upon compliance with these requirements, the Registrar or a person authorized to perform his duties under the Companies Act shall issue under the seal of the Registrar a certificate showing that the company is incorporated and "the place where the cemetery will be". S. 5 provides that from the date of the certificate of incorporation, the subscribers and such other persons as may from time to time become shareholders in the company shall be a body politic and corporate by the name contained in the certificate "with

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the powers and subject to the provisions in this Act contained." S. 7 provides that for the "purposes of its cemetery" the company may acquire, hold, improve, develop, manage and dispose of "any" real and personal property.

In support of its contention that such a company is empowered to establish its cemetery at any place within the municipality named in the certificate without regard to the provisions of a by-law passed under the *Municipal Act*, the appellant points to the opening words of s. 58:

> The Council may from time to time make, alter, and repeal by-laws *not inconsistent with any law in force in the Province,*

and contends that the italicized words have in view a statute such as the *Cemetery Companies Act*, the effect of these words being to except such a company from any such by-law.

The essential provisions of the *Cemetery Companies Act* were originally enacted by c. 5 of the statutes of 1879, entitled *"The Cemeteries Act"*. That statute provided not only for the incorporation as above of cemetery companies but, by ss. 32 and 33, also authorized ten or more persons desiring to establish a burying ground not belonging exclusively to any particular denomination, to appoint trustees to whom land might be conveyed for that purpose. In the revision of the statutes in 1897, the sections dealing with cemetery companies became c. 14 under the title *"Cemetery Companies Act"*, while the sections dealing with trustees of undenominational cemeteries were continued in the *Cemeteries Act*, which became c. 15.

In 1908, by c. 10, the *Cemetery Sites Approval Act* was passed, prohibiting the opening of any new cemetery or graveyard for the burial of bodies without the approval of the Board of Health with respect to the site of the proposed cemetery as fit for such purpose. In the revision of 1911, this statute became c. 33 and by subsequent enactment, the Minister of Health was substituted for the Board.

Since the revision of 1911, para. 74 of s. 58 of the *Municipal Act* has read as follows:

> For prohibiting the burial of human bodies except in such places and under such conditions as may be authorized:

The original of this provision does not appear to have been in force in 1879 when the *Cemeteries Act* was enacted, but as early as 1896, c. 50 provided, by s. 50(31), for by-laws

of the above character save that instead of the words "as may be authorized", the paragraph read "as the by-law may authorize".

As the predecessor of para. 74 of s. 58 stood prior to 1911, the places where cemeteries might be located and the condition to which they should be subject thus required to be set out in the by-law itself. Any objection of such a character is not now open under the present wording of the paragraph and no argument was put forward by the appellant on the ground of any insufficiency for present purposes of the by-law in question. Indeed, it was assumed that, unless the appellant could succeed in its contention as above, it was prohibited from the intended use of its recently acquired lands.

In my opinion there is no substance in the argument of the appellant. It would require more express language to compel a construction of the *Cemetery Companies Act* to give to the act of an official such as the Registrar of Companies the authority to determine, without regard to the wishes of the municipality concerned, the location of cemeteries within its boundaries. I see no more compelling necessity in the statutory language in the case of such companies than in the case of trustees of undenominational cemeteries, provision for both of which was made in the original statute of 1879.

In my opinion, the *Cemetery Companies Act* does no more than provide the means by which such a corporation may be brought into being and endowed with certain powers, these powers, however, so far as the actual location of a burying ground is concerned, to be subject to the *Municipal Act* as to the consent of the municipality within whose boundaries the cemetery is proposed to be established. That such is the intendment of the provincial legislation is, I think, confirmed by the presence in the statute of para. 73 of s. 58, first enacted in 1945 by c. 52, s. 4. This paragraph reads:

> (73) For entering into agreements with cemetery companies for the provision of cemetery facilities within or without the municipal limits:

If a cemetery company were entitled to locate anywhere within the municipality named in its certificate of incorporation without the consent or approval of the council,

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such a provision as the above, authorizing the latter to enter into an agreement with the company to provide a cemetery in the municipality, would be somewhat incongruous. In my opinion, there is no room for the contention that para. 74 is to be read as excepting such a company from its provisions.

Nor do I think that the provisions of s. 2 of the *Cemeteries Act,* formerly contained in the *Cemetery Sites Act,* prohibiting the opening of any new cemetery without the approval of the Minister of Health, affects the question. The Minister, as provided by the section, gives or withholds his approval from the standpoint of the fitness or otherwise of the site for burial purposes. It is obvious that the interest of the municipality involves other considerations as well in the location of a cemetery.

I do not think it necessary to deal with the contention of the appellant based on derogation of grant. In my view no such question arises.

With regard to estoppel, the appellant contends that although in February, 1951, the respondent took the position it would not then consent to the use of the additional lands for burial purposes, nevertheless by agreeing to the closing of that part of Westminster Avenue which separated the forty acre from the eight acre parcel in consideration of the dedication of the land for a new street running easterly from Westminster Avenue along the northerly boundary of the eight acre parcel, the respondent lost its right to invoke the provisions of the prohibitory by-law.

I do not think this result follows even assuming that the consent of the municipality could be given in such a manner. The appellant, owning both parcels, desired to close the street which separated them. I do not think the agreement above referred to should be construed as involving anything beyond its actual terms or any representation that the respondent would consent to the use as a cemetery of the lands as altered by the amended plan.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *MacInnes, Arnold & McCabe.*

Solicitors for the respondent: *Bell, Munn & Sheppard.*

IN THE MATTER OF the Income Tax Act and IN THE MATTER OF the Income Tax Amendment Act, 1949.

1955
*May 24
*Oct. 4

HOME OIL COMPANY LIMITED .....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Assessment—Taxation—Income Tax—Allowance deductible in respect of an oil or gas well in computing income—The Income Tax Act, 1948 (Can.) c. 52, s. 11(1)(b)—Income Tax Regulation No. 1201(1), (4)—Income Tax Amendment Act, 1949 (Can.) 2nd Sess. c. 25, s. 53.

The appellant is a corporation whose principal business is the production of petroleum and the exploring and drilling for oil or natural gas within the meaning of s. 53 of the *Income Tax Amendment Act,* (1949 Can. 2nd Sess. c. 25). In computing income for the years 1949 and 1950 for the purpose of calculating depletion allowance under s. 11(1)(*b*) of the *Income Tax Act* and Regulation No. 1201 of the Income Tax Regulations and s. 53 of the *Income Tax Amendment Act,* it deducted exploration, development and other expenditures incurred in respect of wells that had shown a profit on an individual well basis excluding similar expenditures incurred on wells operated at a loss. The respondent ruled that the latter expenditures, as well as the former, should be deducted but on an aggregate well basis.

Held: That the deductions are to be related to the wells individually and that unless the items of expenditure under s. 53 are clearly related to a profit producing well, they are not to be taken into account in determining the allowance under Regulation No. 1201 in respect of that well. Appeal allowed and the matter remitted to the Minister for re-assessment on the basis indicated.

Decision of the Exchequer Court [1954] Ex. C.R. 622 reversed.

APPEAL from a judgment of the Exchequer Court, Thorson P., (1) dismissing an appeal from the Income Tax Appeal Board.

R. B. Law, Q.C. and *S. H. S. Hughes, Q.C.* for the appellant.

Joseph Singer, Q.C. and *J. D. C. Boland* for the respondent.

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

(1) [1954] Ex. C.R. 622.

1955

HOME OIL COMPANY LTD. v. MINISTER OF NATIONAL REVENUE

The judgment of the Court was delivered by:—

RAND J.:—This is an appeal by a company engaged in the production of natural oil and gas, and the question raised is whether the income in respect of which the allowance for depletion under s. 11(1)(*b*) of *The Income Tax Act* as defined by Regulation No. 1201(1) and (4) is calculated, is or is not to be reduced by the total allowance authorized by s. 53 of 13 Geo. VI, c. 25.

S. 11(1)(*b*) reads:—

> (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year
>
> * * *
>
> (*b*) such amount as an allowance in respect of an oil or gas well, mine or timber limit, if any, as is allowed to the taxpayer by regulation,

S-ss. (1) and (4) of Regulation No. 1201 provide that:—

> (1) Where the taxpayer operates an oil or gas well or where the taxpayer is a person described as the trustee in subsection (1) of section 73 of the Act, the deduction allowed for a taxation year is 33⅓ per cent of the profits of the taxpayer for the year reasonably attributable to the production of oil or gas from the well.
>
> * * *
>
> (4) In computing the profits reasonably attributable to the production of oil or gas for the purpose of this section a deduction shall be made equal to the amounts, if any, deducted from income under the provisions of section 53 of chapter 25 of the Statutes of 1949, Second Session, in respect of the well.

S. 53 is as follows:—

> (1) A corporation whose principal business is the production, refining or marketing of petroleum of petroleum products or the exploring and drilling for oil or natural gas, may deduct, in computing its income for the purposes of *The Income Tax Act,* the lesser of
>
> (*a*) the aggregate of the drilling and exploration costs, including all general geological and geophysical expenses, incurred by it, directly or indirectly, on or in respect of exploring or drilling for oil and natural gas in Canada
>
> (i) during the taxation year, and
>
> (ii) during previous taxation years, to the extent that they were not deductible in computing income for a previous taxation year, or
>
> (*b*) of that aggregate an amount equal to its income for the taxation year
>
> (i) if no deduction were allowed under paragraph (*b*) of subsection one of section eleven of the said Act, and
>
> (ii) if no deduction were allowed under this subsection,
>
> minus the deduction allowed by section twenty-seven of the said Act.

The aggregate of outgoings under s. 53(*a*) was the amount deductible in this case; and in determining the allowance under Regulation No. 1201 the Minister held that from the total income of the company arising from the oil production that aggregate amount should first be deducted. In this view "profits . . . reasonably attributable to the production of oil or gas from the well" mean the total income from all the wells operated less the total aggregate outlay related to oil in addition to the purely operating costs. That aggregate here is made up of costs of exploration and drilling, and general administrative expenses referable to those two items.

Mr. Nolan's contention is that the expression "profits of the well" requires a separate ascertainment for each profitable well: that drilling which does not win oil does not produce a "well"; and that only operating expenses plus, by virtue of s. 53, exploration and development costs related directly to each producing well with their appropriate share of general administrative costs are to be deducted from the proceeds of that well to determine its profit as the datum for the purpose of the allowance. On the other hand, Mr. Riley's position is that the word "well", by force of the Interpretation Act, is to be taken as including "wells" where more than one are operated, and that so taken, the profits from the wells, for the purposes of the allowance, and given the operation of s. 53 and s-s. (4) of the regulation, are the total income less total outlays as mentioned.

The claim of the Crown reduces itself here to a deduction from total oil income of three items, (*a*) exploration and drilling expenditures other than those directly related to the company's producing wells, (*b*) general and administrative expenses allocated to that exploration and development, and (*c*) operating deficits on individual wells. Both the Income Tax Appeal Board and the President of the Exchequer Court have upheld the Minister's contention, and the question is whether they are right.

The immediate consideration is that of Regulation No. 1201(1). The use of the word "profits" and of the expression "from the well" is, in the general context of the Act, singular, and to me they bear a signification that differentiates them from both "income" and "wells" or "oil". A company may operate only one well or a single well may be

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Rand J.

the subject of a lease from a land owner and many leases from any number of land owners may be operated by one company. Certainly the partitioned allowances to the lessor and lessee under s. 11(3) must be related to the profits strictly of at least the wells of the lessor: otherwise a lessee by large scale exploration costs in Nova Scotia might wipe out the "profits" on which a substantial allowance would otherwise be made to a lessor in Alberta. I am not in doubt, therefore, that the "profits" of a "well" are not intended to be identical in the sense claimed with the income of a company from its total oil operations remaining after the deduction of the allowance under s. 53 of amounts expended for capital work carried on anywhere in Canada. It remains to be seen in what they differ.

S-s. (4) of the regulation speaks of a deduction equal to that made from income under s. 53 "in respect of the well" from the profits "reasonably attributable to the production of oil or gas for the purpose of this section (1201)". I take this to imply that the outlays charged against the income under s. 53 must be "reasonably attributable" to the wells that have produced the profit and that means specially or directly related to them. On the argument of the Crown every outlay of every nature and wherever made in Canada, other than direct operating costs, must be taken as contributing to the income from the wells operating at a profit which produce it, and, for the purposes of the regulation, as attributed to those wells and as having been, under s. 53, deducted "in respect of" them. The allowance under s. 53 is an overall allowance related to total income for a specific purpose; the ascertainment of profits for the purposes of Regulation No. 1201 is on the basis of reasonable relation to the source of income and for a different purpose; and I am unable to agree that the total allowance under s. 53 can be said to be made "in respect of" the profitable wells. It might be that a dry hole is so related to a producing well that its cost, in one sense wasted, could be said to be incurred "in respect of" a profitable second well; that would be a question to be determined on geological and mining engineering considerations. But the costs of a dry hole, say, in Township 2 in Alberta could not, in any fair sense of the words, be related to a producing well in Township 20, and much less so to such a well in another province.

The difficulties in an attribution based on such matters are obvious. The anomalies in its application to lessors and lessees have been indicated: lessors would be deprived of their increment of wasting asset, though that asset produced the return that paid the general outlay, through means unrelated to their leases and over which they have no control. A dry hole on sec. 4 owned by A might be related geologically to a producing well on sec. 5 owned by B and to make that deduction for the purposes of a depletion allowance to B might deny depletion to him, while another producing well in A's land would be free of any such relation. That this allowance is made to offset the wasting capital resource is clear from the language of s. 12(*b*) which speaks of "depreciation, obsolescence or depletion", and if its purpose is not to be defeated, the producing wells must be dealt with individually.

Unless, then, the items of expenditure under s. 53 are clearly related to a profitable producing well, they are not to be taken into account in determining the allowance under Regulation No. 1201 in respect of that well. The purpose of enacting s. 53 was to promote exploration and development on the widest scale throughout the country, but I cannot take it as intending an effect that might wipe out what otherwise would be allowed to third persons under s. 11(3). The same considerations apply to wells that are operating at a loss; they represent drilling costs under s. 53 that cannot fairly be said to be "in respect of" profitable wells: no depletion can accrue in relation to them because they do not represent a productive value: but on the contention made, the total loss connected with them can be applied to deny depletion to profitable wells and to third persons interested in them.

I would, therefore, allow the appeal and remit the matter back to the Minister for a re-assessment of the taxes for the years 1949 and 1950 on the basis indicated. The appellant will have its costs in both courts.

Appeal allowed with costs.

Solicitors for the appellant: *Nolan, Chambers, Might, Saucier, Peacock & Jones.*

Solicitor for the respondent: *A. A. McGrory.*

1955
*Jun. 17
*Oct. 4

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

AND

ST. CATHARINES FLYING TRAINING SCHOOL LIMITED ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income and excess profits taxes—Company incorporated under Part I of the Companies Act, 1934, for purpose of training pilots under the British Commonwealth Air Training Plan—Whether income exempt—Income War Tax Act, R.S.C. 1927, c. 97, ss. 4(e) and 4(h).

The respondent was incorporated in 1940 as a private company under Part I of the *Companies Act*, S. of C. 1934, c. 33, for the purpose of giving flying training in conjunction with the British Commonwealth Air Training Plan. Its letters patent prohibited the declaration of dividends and the distribution of profits "during the hostilities or during the period that the company is required to carry on elementary training under the Training Plan". The shareholders made a declaration of trust to the effect that they held their shares in trust for the benefit of the St. Catharines Flying Club, a company whose objects were the promotion of flying and aviation in general and the teaching and training of persons in flying and aerial navigation and whose letters patent provided that all profits and accretions should be used in promoting its objects.

The respondent entered into two contracts with the Crown in 1940 and in 1943. Both contracts provided the terms of payments to be made for the services to be rendered, and in the second it was provided further that any profit should be held in a reserve account until the termination of the contract to be then paid to a flying club approved by the Minister of National Defence, failing which it would revert to the Crown.

The respondent made a profit on both contracts and this was assessed for income and excess profits taxes. The assessment was affirmed by the Minister of National Revenue, but set aside by the Exchequer Court.

Held: The appeal should be allowed as to the profit made under the first contract and dismissed as to the second.

Under the second contract, there was no income liable to taxation since the terms of that contract amounted to a declaration that any surplus would be held subject to the direction of or in trust for the Crown.

Under the first contract, any profit realized under the powers granted to the company by its letters patent was income liable to taxation under the terms of the statute. The fact that the company was incorporated under Part I of the Companies Act and the reference to dividends in the letters patent indicated that profits were contemplated. These profits were the property of the company which could retain them

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

and distribute them after the termination of the hostilities or the period during which it was required to carry on under the Training Plan. The income under this contract was not exempt from taxation under s. 4(*h*) or 4(*e*) of the *Income War Tax Act*.

APPEAL from the judgment of the Exchequer Court of Canada, Thorson P (1), allowing the taxpayer's appeal from the decision of the Minister of National Revenue.

J. Singer, Q.C. and *J. Boland* for the appellant.

H. H. Stikeman, Q.C., M. A. Seymour, Q.C. and *A. L.* Bissonnette for the respondent.

The judgment of the Court was delivered by:—

LOCKE J.:—The respondent was incorporated as a private company under the provisions of the Dominion Companies Act by letters patent issued on September 12, 1940, the capital stock consisting of five thousand shares without nominal or par value. The declared purposes and objects as stated in the letters patent were:—

To establish, maintain, conduct and operate a school or schools for instruction and training in flying to be operated for the purposes of and in conjunction with the British Commonwealth Air Training Plan.

A clause in the letters patent which has been regarded as affecting the liability of the respondent reads:—

And it is further ordained and declared that the company shall be prohibited from declaring dividends and shall also be further prohibited from distributing any profits during hostilities or during the period that the company is required to carry on elementary training under the British Commonwealth Air Training Plan.

The persons at whose instance this company was incorporated were Mr. M. A. Seymour, Q.C. and two other members of a company incorporated in 1928 under the provisions of the Companies Act of Ontario named St. Catharines Flying Club, the principal purposes and objects of which were the promotion of flying and aviation in general and the teaching and training of persons in flying and aerial navigation. The letters patent of this last named company contained a provision that the company should be carried on without the purpose of gain for its members and that any profits or other accretions should be used in promoting its objects.

(1) [1953] Ex. C.R. 259; C.T.C. 362.

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Locke J.

The Dominion Companies Act 1934 contained in Part I the provisions under which commercial and other corporations organized for the purpose of carrying on business with a view to profit may be incorporated. Part II of this statute provided for the incorporation of companies without share capital for the purpose of carrying on, without pecuniary gain to its members, objects of a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character, or the like.

Whatever is to be said as to the admissibility of the evidence, it was shown at the trial that Mr. Seymour, who was the Vice-President of the St. Catharines Flying Club, and his associates, wished to incorporate the Dominion company under the provisions of Part II but, for reasons which are not explained and which cannot in any event affect the question to be determined, leave to do so was refused and, of necessity, the incorporation was carried out under the provisions of Part I.

On the same date as that of the grant of the letters patent, a contract was entered into by His Majesty, represented by the Minister of National Defence, and the respondent, for the establishment, equipment and carrying on of a flying school at St. Catharines, Ont. for the purpose of the instruction and training of members of the Royal Canadian Air Force. It is unnecessary to consider in any detail the terms of this arrangement other than to say that the services to be rendered by the respondent in the operation of the school were to be paid for on specified terms, and that the agreement was to continue until March 1, 1943 unless earlier terminated by the Crown, either by reason of the cessation of hostilities or for any other reason for which it should be considered that the school was unnecessary.

Following the incorporation of the respondent, common shares were issued to ten persons, in addition to the three applicants for incorporation. The Minister of National Defence, as a term of entering into the contract, had apparently stipulated that the company should have not less than $35,000 in cash, and $37,850 was donated by a number of corporations in St. Catharines and the vicinity. These monies were not paid as the purchase price of shares but were simply gifts for the purpose of assisting in the war effort.

Twelve of the thirteen shareholders became directors of the respondent, six of them being nominees of the St. Catharines Flying Club and the others representing the donor companies. It was the intention of the incorporators and their associates that any surplus that might result from the operations of the respondent company should enure to the benefit of the St. Catharines Flying Club and, in November of 1940, a declaration of trust was signed by the thirteen shareholders declaring that they held their shares in trust for that company and that, after completion of flying training under the contract with the Crown, or as might be required by the Crown, and upon the fulfilment of the objects for which the respondent was incorporated, they would vote to return the capital donated by the various companies without interest and would transfer the shares to the said *cestui qui trust*.

The declaration of trust contained, in addition, a recital that the life of the respondent company was by its letters patent "limited to duration of the war" but this was inaccurate: the letters patent contained no such limitation. It further declared that it was the intention of the Minister of National Defence for Air and the Minister of Transport that the St. Catharines Flying Club should benefit from any surplus earned by the respondent.

Mr. Seymour, who apparently had charge of the matter of incorporating the respondent and of negotiating the agreement with the Crown, said that, when permission to incorporate under Part II of the Companies Act was refused, he had asked that a complete prohibition of the declaration of dividends should be incorporated in the letters patent but this was refused, the prohibition being "restricted to the life of the contract".

The respondent operated the flying school under the terms of the agreement of September 12, 1940, as amended from time to time by agreement between the contracting parties, for the term agreed upon and the operations were continued thereafter under a new agreement dated March 23, 1943 between the respondent and His Majesty, represented by the Minister of National Defence for Air. The term of the new contract was until March 31, 1945 subject to earlier termination under its terms. The only term of the new arrangement which affects the matter to be

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Locke J.

decided was one which provided that the amount retained by the company "shall not be distributed and shall be held by the company in a reserve account until the termination of the contract and shall then be paid to a flying club approved by the Minister, failing which it shall revert to the Crown."

The result of the operations carried on by the respondent under the first agreement was that a substantial profit was realized. Whether the amounts received by the company surplus to the cost of operation under the second contract should be designated as income in view of the above quoted term of that contract, a sum of money remained in the respondent's hands at its conclusion which, it is claimed by the appellant, was liable to taxation under the *Income War Tax Act and the Excess Profits Tax Act 1940.*

There can be no doubt in the present matter that the public spirited persons who were responsible for the incorporation of the respondent company were actuated by a desire to be of some service to the State by assisting in the war effort and that it was their intention that if any profits resulted from its activities they should be paid to the St. Catharines Flying Club, to assist in carrying on its work. The question, however, is not what the promoters of the company intended to do with these monies but whether profit realized in the operation of the respondent company under the powers granted to it by its letters patent was income liable to taxation under the terms of these statutes.

Different considerations apply, in my opinion, to the profits realized from the operations under the first contract and any surplus resulting from the operations under the second contract. As to the latter, it appears to me undoubted that there was no income liable to taxation since the surplus resulting was held by the respondent upon terms that, unless the Minister should consent to its being paid over to a flying club, it was to be paid to the Crown. The status of such monies does not, therefore, differ from that which would have existed had the contracts simply declared, without more, that the respondent would hold any surplus in trust for the Crown. The respondent is, in my opinion, entitled to succeed upon this aspect of the matter, not on the footing that the exempting provisions relied upon affect the matter but on the ground that there was no income.

The situation is, I think, different in regard to the income realized from the operations under the first contract. The carrying on of such work was one of the declared objects of the company. That it was contemplated that, as in the case of other companies incorporated under Part I of the Companies Act, profits would be realized is made clear by the reference to dividends.

It is said in the reasons for judgment delivered in the Exchequer Court (1), in support of the finding that the respondent was organized and operated solely for non-profitable purposes, within the meaning of that expression in s. 4(*h*) of the *Income War Tax Act*, that "the appellant could never keep any of its profits or distribute them to its stockholders or members" but, with respect, this appears to overlook the fact that the profits made were the property of the company and there was nothing in the letters patent which prohibited it from retaining them and the prohibition against declaring dividends or distributing profits was restricted to the period of the duration of hostilities or the period during which the company was required to carry on elementary training under the British Commonwealth Air Training Plan. There was nothing which prohibited the declaration of dividends or the distribution of profits after that time.

The question of the liability of the respondent to taxation depends, not upon the intention of the promoters or the shareholders as to the disposition to be made of the profits but rather upon consideration of the terms of the letters patent, the nature of the business authorized to be carried on and of the business which was carried on which resulted in the earning of the income. As I have pointed out, the fact that the company was incorporated under Part I and the reference to dividends in the letters patent both indicate that it was contemplated that profits would be made, and there was no restriction of the right of the company to retain such profits which would enure to the benefit of the shareholders by increasing the value of their shares or to pay dividends, except to the extent above indicated. If the company had succeeded in obtaining letters patent which prohibited the payment of dividends completely and, in

(1) [1953] Ex. C.R. 259; C.T.C. 362.

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Locke J.

addition, the retention of any earned income by the company, different considerations, which need not here be considered, would arise.

For these reasons, it is my opinion that the income resulting from the operations of this company under the first contract with the Crown is not exempt from taxation, either under the provisions of s. 4(*h*) or s. 4(*e*) of the *Income War Tax Act*. I think the liability to taxation of the income of this company resulting from those operations did not differ in any way from that of the income of any commercial company incorporated under Part I of the *Companies Act*.

Nothing said in the judgment of this Court in *Sutton Lumber Company* v. *The Minister of National Revenue* (1), or in the passage from the judgment of Sir Lyman Duff in *Anderson Logging Company* v. *The King* (2), there referred to, conflicts with the views above expressed.

I assume that all of the monies payable by the Crown under the first contract were received by the respondent before the end of its fiscal year in 1943 I would accordingly allow the appeal as to the assessments made for the years 1941, 1942 and 1943.

As success is divided, I think there should be no costs either of this appeal or of the proceedings in the Exchequer Court.

Appeal allowed for the years 1941, 1942 and 1943;

Appeal dismissed for the years 1943, 1944 and 1945.

Solicitor for the appellant: *A. A. McGrory.*

Solicitors for the respondent: *Stikeman & Elliott.*

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(1) [1953] 2 S.C.R. 77. (2) [1925] S.C.R. 45.

CORRIGENDA

Insert in Part VIII at page 605 in place of present line 22:

Appeal for Ontario set aside the Board's order (3) and

Insert in Part IX at page 733 following line 33 in place of counsel there appearing:

H. G. Nolan, Q.C. and *J. R. Tolmie, Q.C.* for the appellant.

H. W. R. Riley, Q.C. and *J. D. C. Boland* for the respondent.

ELI LILLY AND COMPANY (CANADA) LIMITED ..... APPELLANT;

1955

*Mar. 28, 29
*Oct. 4

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Assessment—Taxation—Income Tax—Whether sum reserved to pay Foreign exchange but not drawn on, "income"—The Income War Tax Act, R.S.C. 1927, c. 97, s. 3.

The appellant, the Canadian subsidiary of an American corporation, for the years 1940-1945 inclusive, purchased goods from the parent company totalling $640,978.29 in American currency. During that time the United States dollar was at a premium and the appellant, though it made no payments on account, set up in its books the amount of its indebtedness in Canadian dollars (as if the two currencies were at parity) plus the amount required each year to cover the premium on exchange for the purchases made in that year. At the end of 1945 the amount of Canadian dollars required to cover the premium totalled $67,302.77. In filing its income tax returns in each of these years the appellant included the premium so computed as an expense and it was allowed by the taxing authorities. In July 1946, the Canadian dollar attained a position of parity with the United States dollar and the appellant in its 1946 profit and loss account included the said sum of $67,302.77 as income under the heading of "Foreign Exchange Premium Reduction" and, in filing its income tax return for that year, treated the amount as a capital rather than an operating profit and deducted it in determining its net income subject to tax. The deduction was disallowed by the Minister. Appeals by the taxpayer to the Income Tax Appeal Board and to the Exchequer Court were each dismissed. In its appeal to this Court the appellant contended that as all the goods were purchased prior to 1946 it, in making settlement of the indebtedness in that year (which it effected with $640,978.29 in Canadian dollars by the issue of additional shares to the parent company without payment of any exchange) realized neither a profit, gain nor gratuity within the meaning of s. 3 of the *Income War Tax Act* and therefore the amount in question was not properly included in the word "income" as defined in that section.

Held (Locke and Cartwright JJ. dissenting): That the amount set up by way of reserve to meet payments of foreign exchange when unnecessary for that purpose was properly included as an item of profit in computing income tax. In 1946, owing to the change in the rate of exchange, the $67,302.77 held by the appellant as a reserve to provide for the contingency of having to pay for the U.S. dollars required to discharge its indebtedness ceased to be required for that purpose. It thereupon became available for the general purposes of the appellant and was properly treated as income in the year in which it became so available. *Davies* v. *The Shell Co. of China Ltd.*, 32 T.C. 133 at

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

1955

ELI LILLY AND COMPANY (CANADA) LIMITED v. MINISTER OF NATIONAL REVENUE

151, and *H. Ford & Co. Ltd.* v. *Commssr. of Inland Revenue*, 12 T.C., 997 at 1004, applied. *The Texas Co. (Australasia) Ltd.* v. *Federal Commssr. of Taxation*, 63 C.L.R. 382, referred to. *British Mexican Petroleum Co.* v. *Jackson*, 16 T.C., distinguished.

Per Locke J. (dissenting): It was income and income only, which was taxed by the *Income War Tax Act* as amended, which applied to the taxation year 1946. As applied to corporations, taxable income was determinable by calculating the amount received from the operation of the company's business less operating expenses and other deductions permitted by the Act in calculating such income. The appellant was benefited by the restoration of the value of the Canadian dollar in terms of U.S. currency, an event over which it had no control, but the advantage to it, as distinguished from the extent to which its profits were increased by its occurence, was no more a trading receipt than the advantage accruing to an export company by a recovery in world trade, or the benefit accruing to all trading corporations by a reduction in income or other taxation. *British Mexican Petroleum Co.* v. *Jackson* 16 T.C. 570, applied.

Per Cartwright J. (dissenting): The indebtedness of the appellant to its parent company which accrued from 1940-1945 inclusive was rightly calculated and allowed in those years at $708,281.06 in Canadian funds. The fact that in 1946 owing to a change in the rate of exchange, the appellant was able to discharge its indebtedness by payment of $640,978.29 in Canadian funds did not render the difference between these amounts, income of the appellant. In the year 1946 the appellant neither received the sum of $67,302.77 nor acquired any right to receive payment of it. The principle of the decision in *British Mexican Petroleum Co.* v. *Jackson*, supra, applied.

Judgment of the Exchequer Court of Canada [1953] Ex. C.R. 269, affirmed.

APPEAL from a judgment of the Exchequer Court, Thorson P. (1) dismissing an appeal from the Income Tax Appeal Board.

R. B. Law, Q.C. and *S. H. S. Hughes, Q.C.* for the appellant.

Joseph Singer, Q.C. and *J. D. C. Boland* for the respondent.

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

ESTEY J.:—The appellant, a Canadian subsidiary of Eli Lilly and Company of Indianapolis, Indiana, purchased goods from the latter during the period September 15, 1939, to December 31, 1945, at invoice prices which totalled $640,978.29 to be paid in United States dollars. While no part of this sum was paid prior to October, 1946, the appellant, as the United States dollar throughout that period

(1) [1953] Ex. C.R. 269.

was at a premium over the Canadian dollar, set up in its books an item equal to the amount required in each year to pay the premium on the purchases in that year. In filing its income tax returns in each of these years it included the premium so computed as an expense which was allowed by the taxing authorities.

In July, 1946, the Canadian dollar attained a position of par in relation to the United States dollar. On October 22 of that year the appellant's directors allotted 7,450 shares of its common stock to the parent company in settlement of appellant's indebtedness for goods purchased as already stated, computed at the sum of $717,532.72, and a cash payment of $27,467.28. These two items total $745,000, or an equavalent of 7,450 shares of common stock at a par value of $100.

The sum of $717,532.72 was made up of two items: (1) the sum of $640,978.29 and (2) the total of the premiums for the respective years in the sum of $67,302.77, and other items not material hereto. The appellant, in its factum, set the transaction up as follows:

> The said 7,450 shares, having in the aggregate a par value of $745,000, were paid for as follows:
>
> | | |
> |---|---|
> | The above mentioned liability | $640,978.29 |
> | Cash paid by the parent company to the appellant | 27,467.28 |
> | In satisfaction of other amounts owing by appellant to parent company | 76,554.43 |
> | | $745,000.00 |

In its 1946 profit and loss account the appellant included the said sum of $67,302.77 as income under the heading "Foreign Exchange Premium Reduction" and, in filing its income tax return for that year, treated the amount as a capital rather than an operating profit and deducted it in determining its net income subject to tax. This deduction was disallowed by the Minister and by the Income Tax Appeal Board, as well as in the Exchequer Court. In this appeal the appellant asks that the judgment in the Exchequer Court (1) be reversed and the deduction allowed.

It is contended that as all of the goods were purchased prior to 1946 the appellant, in making the settlement of that year, realized neither a profit, gain nor gratuity within the

(1) [1953] Ex. C.R. 269.

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meaning of s. 3 of *The Income War Tax Act* (R.S.C. 1927, c. 97) and, therefore, the amount here in question was not properly included within the word "income" as defined in that section.

The agreement that the invoice price in the total sum of $640,978.29 was payable in United States dollars introduced a contingency, or a factor of uncertainty, in the purchase price that could only be settled or determined by payment and, therefore, upon the date of payment. In reality the amounts set up in each year totalling $67,302.77 were a reserve to provide for this contingency. If, at the date of payment, no premium was required, the reserve set up would be unnecessary. If the premium was lower than the rate at which it was computed, only a part of the reserve would be necessary, but if, on the other hand, a higher premium was required, an additional item of expense would be incurred. That such was the position would seem to follow from the following evidence on behalf of the appellant:

> Q. And you were not under any liability to them to pay the additional accumulated items for foreign exchange which you show in this statement totalling $67,302.77—that is correct, is it not? A. Yes.
>
> * * *
>
> Q. So we have our position then in 1946, that you paid all your indebtedness to the American Company by the issue of shares in the Canadian Company, and you did not have to resort or pay to anyone the sum of $67,302.77, or any part of it—you did not have to resort to or pay any part of the sum of $67,302.77, which is the accumulation of the various amounts set up by you in this record, Exhibit 1, for exchange? A. Yes, that is right.

Payment was never made because the appellant was never in a position to do so and it would appear that the parent company, in 1946, deemed it desirable that a settlement should be made.

This case is, therefore, distinguishable from *The British Mexican Petroleum Co., Ltd.* v. *Jackson (H.M. Inspector of Taxes)*, (1). There, because of a slump in business conditions, the taxpayer was unable to pay its indebtedness. Three of its larger creditors, apparently to assist the taxpayer, entered into an agreement under date of November 25, 1921, whereby they reduced their respective claims.

(1) (1932) 16 T.C. 570.

One of the creditors, H. & Co., reduced its claim by the sum of 945,232 pounds. The issue, as stated by Lord Thankerton at p. 590:

> The question in this appeal is whether this sum of £945,232 fails to be brought into account for the purpose of computing the profits and gains of the Respondents under Schedule D of the Income Tax Act, 1918, either by reducing by that amount the debit item in the trading account to 30th June, 1921, or by crediting it as a trading receipt in the trading account to 31st December, 1922.

The total outstanding indebtedness of H. & Co. was the sum of £1,073,281 and the Crown contended that, as that amount had been treated as an expense in the accounts of June 30, 1921, part thereof, namely, £945,232, was never expended and, therefore, the account of June 30, 1921, should be reopened and this item of expense reduced by £945,232 in order to bring it into conformity with the amount actually paid. In the House of Lords this contention of the Crown was not accepted. Lord Thankerton, at p. 592, stated:

> . . . the account to 30th June, 1921, cannot be reopened, as the amount of the liability there stated was correctly stated as the finally agreed amount of the liability and the subsequent release of the Respondents' proceeds on the footing of the correctness of that statement.

In the case at bar there was no gift, nor had the item here in question ever been settled. The parent company continued to claim the invoice price of the goods in terms of United States dollars. The record indicates that throughout the relevant period the appellant was never in a position to pay cash and in 1946 it was apparently deemed, if not by the appellant by the parent company, desirable that a settlement be effected. There was, upon the day of the settlement, no premium and, therefore, the reserve which had been provided for that contingency was unnecessary. The position would appear, therefore, to be similar to that expressed by Rowlatt J. in *H. Ford & Co., Ltd.* v. *Commissioner of Inland Revenue* (1), where, in referring to the *woolcombers* (2) and *Newcastle Brewery* (3), cases at p. 1004, he stated that these cases

> went quite far enough to justify looking at the accounts and saying: "Nobody dreamt this was not a loss at the time, but it turns out it was not. Re-open the accounts and find out what really were the losses and the earnings in 1919."

(1) (1926) 12 T.C. 997. (2) 12 T.C. 768.
(3) 12 T.C. 927.

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In the *Ford* case the taxpayers engaged in the grain business were under a contractual obligation to pay certain demurrage to the Royal Commission upon Wheat Supplies in England. The Commission claimed the sum of £33,847 for the period April to July, 1920. The taxpayer protested, but placed in its balance sheet an item of expense of £33,847. Two years later the Commission abandoned their claim and it was held by Rowlatt J., affirming the Commissioner, that this amount ought not to be allowed as an expense.

The appellant states its alternative position in the following language:

> In the alternative if there was a gain in 1946 it was due to the extinction by the action of the Government of Canada of a liability or reserve. This was entirely fortuitous in its nature—not resulting from any action by the debtor or the creditor in the way of trade or in any other way. It was a lucky windfall. And when the learned President and incidentally Mr. Fisher, have classified it in the field of trading they forget that it was not paid. The gain, if any, was not derived from capital or the use of capital but was of the nature of a fortuitous gain accruing to capital

The cost of exchange arising out of fluctuations in foreign currency is an ordinary expense in relation to foreign trade and has been so recognized and treated in the computation of income tax. While the government, in times of emergency, may have particular reasons for fixing the exchange rate, it must be assumed that the market rate remains a dominating factor in the fixing of that rate. Moreover, while the rate of exchange, as fixed by government action, eliminates the fluctuations arising out of the operation of the market, it may itself be changed, as, indeed, it was in this case, from time to time and, therefore, it does not entirely remove the possibility of fluctuations. In other words, the fixing of the rate of exchange by government action does not alter its nature or character in respect to foreign trade. The language of Jenkins J. is appropriate:

> . . . where a British company in the course of its trade engages in a trading transaction such as the purchase of goods abroad, which involves as a necessary incident of the transaction itself, the purchase of currency of the foreign country concerned, then any profit resulting from an appreciation or loss resulting from a depreciation of the foreign currency embarked in the transaction as compared with sterling will *prima facie* be a trading profit or a trading loss for Income Tax purposes as an integral part of the trading transaction. *Davies (H. M. Inspector of Taxes)* v. *The Shell Company of China, Ltd.* (1).

(1) (1951) 32 T.C. 133 at 155.

In *Texas Co. (Australia) Ltd.* v. *Federal Commissioner of Taxation* (1), goods purchased were paid for in subsequent years when the exchange rate for the purchase of United States dollars had increased. It was contended that the delay in payment was permitted by the American company in order that the Australian company might have additional capital and that consequently the increase in exchange should be a capital rather than a revenue charge. It was held that it was a revenue rather than a capital charge. Latham C. J. stated at p. 428:

> Such expenditure of Australian pounds is an ordinary business expenditure, and the taxpayer is entitled to claim as a deduction the actual outgoing which he makes in order to discharge his normal business debts for stock-in-trade and the like.

Dixon J. stated at p. 465:

> For where liabilities are not fixed in their monetary expression, whether because of contingencies or because they are payable in foreign currency, a difference between the estimate and the actual payment must be borne as a business expense, and where the continuous course of a business is divided for accounting purposes into closed periods it is a reduction of the net profit, which otherwise would be calculated for the period.

The appellant apparently followed the usual practice of taking goods into account at the invoice price and where an uncertain factor such as foreign exchange must be provided for that was done by way of setting up a reserve. The position at bar is just the opposite of that in *Texas Co. (Australia) Ltd.* v. *Federal Commissioner of Taxation, supra,* where Dixon J. stated at p. 468:

> . . . the true nature of the deduction claimed is for the increase in the cost of discharging a past liability for which provision in the accounts was made at a lower figure.

The appellant was in the more fortunate position that the exchange discount had been eliminated. This, however, does not alter the principle that should be applied and, in my view, the established practice must here be followed that whether there be a loss or a gain in respect to the item of foreign exchange it should be taken into account as a trading loss or profit in the computation of income tax.

In my opinion the appeal should be dismissed with costs.

LOCKE J. (dissenting):—This is an appeal from a judgment delivered in the Exchequer Court by which the appeal of the present appellant from a decision of the Tax Appeal Board was dismissed with costs.

(1) (1939) 63 C.L.R. 382.

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The appellant is an incorporated company having its head office in Toronto, its business being that of a manufacturer of drugs, and it is a wholly owned subsidiary of Eli Lilly International Company, an American corporation carrying on business in the United States.

During the years 1940 to 1945, both inclusive, the appellant purchased, from the American corporation, materials the agreed purchase price of which was $640,978.29 payable in American currency. In each of these years, in preparing the balance sheet of the appellant for income tax purposes, the amount payable to the American company for material supplied during the year was shown in Canadian funds, which were at a discount in relation to American currency during the entire period. It was upon this basis that the appellant was assessed for taxation purposes under the *Income War Tax Act* during this six year period. On December 31, 1945, the debt of the appellant to the American Company for goods supplied during the period, expressed in Canadian funds, totalled $708,281.06.

During the period referred to, American funds were at a premium of from 10 to 10½%. On July 1, 1946, this differential disappeared and the Canadian dollar established at parity with that of the United States and, as of that date, the appellant's debt to the parent company might have been discharged by the outlay of $640,978.29 in Canadian funds. While the manner in which it was accomplished does not, in my opinion, affect the question of liability, this debt and a further indebtedness of the appellant to the American company was extinguished by issuing to the creditor shares of the common stock of the appellant company at their par value.

The question to be determined is whether the benefit that accrued to the appellant company, by reason of the recovery in the value of Canadian funds in relation to American funds, became taxable as income for the taxation year 1946. No question arises in regard to the earlier years where in preparing the profit and loss account the indebtedness was, as stated, reckoned at the amount of the debt in American currency plus the current rate of exchange and, since no impropriety is suggested in regard to the tax returns made during those years, no question can now be raised by the Crown in relation to any of them. It is to be noted, though the fact does not affect the matter to be determined,

that since the liability to the American company was shown at the above mentioned amount in the company's books at the commencement of the taxation year 1946, the fact that the liability had been extinguished for the equivalent of $67,302.77 less in Canadian funds necessitated a compensating entry for a like amount in the company's books. The difference while shown in the profit and loss account as "other income" was treated as a capital gain and shown as "foreign exchange premium reduction."

The learned President who delivered the judgment in the Exchequer Court rejected the contention of the present appellant that the difference between the amount of the debt as shown in the books and the amount of the consideration necessary to extinguish it was a fortuitous or capital gain, saying that since the gain, if it must be so called, was the result of the rise in value of the Canadian dollar and came to the appellant in the course of its business and, since this had increased the amount of its distributable profit for the year 1946, it had realized a profit within the meaning of s. 3 of the *Income War Tax Act.*

It is income, and income only, which was taxed by the *Income War Tax Act* (c. 97, R.S.C. 1927) as amended, which applied to the taxation year 1946. By s. 3 of that Act, income was defined as follows:—

> 3. For the purposes of this Act, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be whether derived from sources within Canada or elsewhere; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source including . . .

The enumeration which follows does not affect the matter to be decided here.

As applied to corporations, taxable income is determined by calculating the amount received from the operation of the company's business, less operating expenses and other deductions permitted by the Act in calculating such income. The argument addressed to us on behalf of the Minister in the present matter amounts to this, that the benefit

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which enured to the present appellant, together, it may be said, with all other Canadian nationals who were obligated to pay debts in American currency, was in itself a receipt.

While the circumstances were different, the decision of the House of Lords in *British Mexican Petroleum Co.* v. *Jackson* (1), affords an example of a somewhat similar attempt to impose income tax on a benefit accruing to a company which, it was contended, must be taken into account in computing its taxable income. The facts were that the company incorporated in England for the purpose of dealing in oil imported large quantities of oil purchased from Huasteca Petroleum Co., an American company operating in Mexico, and incurred a large liability to Weir & Co., a shipping company operating in England. In the year 1921 the company was in insolvent circumstances and, in order to enable it to continue in operation, the two creditor companies who owned all of its issued capital, and another creditor, released the Mexican company of the greater part of the debt owing. To the extent that these debts were released they were, for the purpose of the company's balance sheet, carried to a reserve and the question in the appeal was as to whether the amount so released was to be brought into account for the purpose of computing the income of the company under Schedule D of the *Income Tax Act 1918,* either by reducing the amount of the debit item in the trading account which showed the debt at its full amount or by crediting the amount rebated as a trading receipt for the year in which the debt was partially remitted. This contention on behalf of the Crown was upheld by the Special Commissioners. The matter came in the first instance by way of appeal before Rowlatt J. who reversed this decision. An appeal from that judgment was dismissed by the Court of Appeal, and a further appeal by the House of Lords.

In the *British Mexican* case the company benefited to the extent that the debts were remitted by its creditors. In the present case, the appellant was benefited by the restoration of the value of the Canadian dollar in terms of American currency, an event over which it had no control and which it had no part in bringing about. There is, in my opinion, no difference in the principle to be applied in

(1) (1930) 16 T.C. 570.

the present case from that applied by the courts in England. The advantage to the company which accrued from an event such as this, as distinguished from the extent to which the profits of the company are increased by its occurrence, is no more a trading receipt than the advantage accruing to an export company engaged in international trade by a recovery in world trade or the benefit accruing to all trading corporations by a reduction in income or other taxation.

I would allow this appeal, with costs throughout, and set aside the assessment.

CARTWRIGHT J. (dissenting):—The relevant facts are set out in the reasons of my brother Locke. I agree with his reasons and conclusion and have little to add.

The only matter now in dispute is whether the sum of $67,302.77 was properly included by the Minister as an item of taxable profit in assessing the appellant for income and excess profits tax for 1946. This sum is the difference between $708,281.06, the total of the amounts charged in the appellant's annual tax returns for the years 1940 to 1945 as representing in Canadian dollars its indebtedness for raw materials purchased during such years from its parent company in the United States and for which it owed $640,978.29 in United States dollars, and the sum of $640,978.29 in Canadian dollars with which it was able to discharge such indebtedness in 1946, by reason of the Canadian dollar having reached parity with the United States dollar.

There is no question but that the Minister was right in allowing the appellant to charge the sums totalling $708,281.06 in the years mentioned as the cost in Canadian dollars of materials purchased. We are not concerned to inquire whether upon such indebtedness being paid off in 1946 with $640,978.29 in Canadian funds the Minister might have re-assessed the appellant for any or all of the years 1940 to 1945, as, no such re-assessment having been made and more than six years having elapsed since the latest assessment for the years in question and there being no suggestion that the appellant made any misrepresentation or committed any fraud in making its returns, it is conceded that the accounts for those years can not now be re-opened.

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In these circumstances this case seems to me to fall within the principles enunciated by the House of Lords in *British Mexican Petroleum Co. Ltd.* v. *Jackson* (1). One of the questions calling for decision in that case was whether the amount by which a debt, actually owing and treated as an expense of the trade deductible from gross receipts in the trading account of the taxpayer for the year ending June 30, 1921, was subsequently reduced by the voluntary act of the creditor should be treated as a trading receipt in the account for the year in which such reduction was granted. I can find no significant difference between the statutory provisions considered in that case and those of the *Income War Tax Act* which applied to the taxation year 1946. The fact that in the case at bar the reduction in the amount payable in satisfaction of the debt contracted and allowed in earlier years resulted from a change in the rate of exchange and not from the voluntary act of the creditor does not appear to me to render the principle of the *British Mexican* case inapplicable. In each case a debt, actually owing and properly deductible in one taxation period, was, in a later taxation period, discharged for a lesser sum by reason of a circumstance beyond the control of the taxpayer; and in each case it was sought to tax the reduction in the amount required to discharge such debt as a profit received in the taxation period in which the reduction occurred.

In the *British Mexican* case Lord Thankerton said at page 592:—

> I am unable to see how the release from a liability, which liability has been finally dealt with in the preceding account, can form a trading receipt in the account for the year in which it is granted.

and Lord MacMillan said at page 593:—

> If, then, the accounts for the year to the 30th June, 1921, cannot now be gone back upon, still less in my opinion can the Appellant Company be required to enter as a credit item in its accounts for the eighteen months to 31st December, 1922, the sum of £945,232 being the extent to which the Huasteca company agreed to release the Appellant Company's debt to it. I say so for the short and simple reason that the Appellant Company did not, in those eighteen months, either receive payment of that sum or acquire any right to receive payment of it. I cannot see how the extent to which a debt is forgiven can become a credit item in the trading account for the period within which the concession is made.

(1) (1932) 16 T.C. 570.

In the case at bar it seems equally clear that in the year 1946 the appellant neither received the sum of $67,302.77 nor acquired any right to receive payment of it.

I would allow the appeal with costs throughout, declare that the said sum of $67,302.77 should not have been included in assessing the income of the appellant in the year 1946, and remit the assessment to the Minister for amendment accordingly.

Appeal dismissed with costs.

Solicitors for the appellant: *Raymond, Spencer, Law & MacInnes.*

Solicitor for the respondent: *A. A. McGrory.*

BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED (*Defendant*) ..... APPELLANT;

AND

ERNEST FARRER (*Plaintiff*) ..... RESPONDENT.

1955
*May 13, 16
*Oct. 4

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Contributory Negligence—Running down action—Traffic Light Signals—Right to proceed subject to common law duty.

Provisions enacted to facilitate and make safer the movement of pedestrian and vehicular traffic on the highways and public streets by means of regulatory traffic lights are supplementary to the common law duty that rests on all persons to exercise due care. The right to proceed on a "go" signal, whether a green light or a pedestrian "walk" signal, is not an absolute right but is qualified by the common law duty to exercise due care. Where, as in the present case, a pedestrian proceeds on a "walk" signal without looking to see if any traffic may be proceeding contrary to traffic signals and is injured, he may properly be held to be liable for contributory negligence.

Here, at the intersection of two streets where vehicular traffic was controlled by green, yellow and red signals and pedestrian traffic by "wait" and "walk" signals, the respondent while awaiting the "walk" signal saw a bus stopped west of the intersection. He proceeded on the "walk" signal and, after entering the cross-walk, was knocked down by the appellant's bus. The trial judge held the bus driver guilty of very great negligence; that the respondent was entitled to

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

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assume vehicular traffic would obey the traffic regulations and that the respondent's failure to again look for approaching traffic before proceeding did not, in the circumstances, amount to contributory negligence.

The Court of Appeal for British Columbia by a majority judgment ordered a new trial.

Held (Cartwright J. dissenting in part): That the negligence of the bus driver was the direct cause of the accident but that the failure of the respondent to again look to his left before proceeding on the "walk" signal constituted a failure to take reasonable care and in the circumstances amounted to contributory negligence.

Held: Also, that the appeal should be allowed and the judgment at trial restored with the variation that 80% of the fault be apportioned to the appellant and 20% to the respondent.

Cartwright J. (dissenting) would have set aside the order of the Court of Appeal and restored the judgment at trial. Applying *Glasgow Corporation* v. *Muir* [1943] A.C. 448 at 457, he was of opinion that it had not been established that the trial judge erred in concluding that the respondent in the circumstances was not guilty of contributory negligence.

Toronto Ry. Co. v. *King* [1908] A.C. 260 at 269 followed in *Swartz* v. *Wills* [1935] S.C.R. 628; *Chisholm* v. *London Passenger Transport Board* [1939] 1 K.B. 426; *Boxenbaum* v. *Wise* [1944] S.C.R. 292; *King* v. *Anderson* [1946] S.C.R. 129; *London Transport Board* v. *Upson* [1949] A.C. 155; *Nance* v. *B.C. Electric Railway Co.* [1951] A.C. 601; *Walker* v. *Brownlee* [1952] 2 D.L.R. 450; *Johnston National Storage* v. *Mathieson* [1953] 2 D.L.R. 604, considered.

APPEAL from a judgment of the Court of Appeal for British Columbia, which by a majority judgment set aside the judgment of Coady J. awarding the respondent damages for personal injuries sustained when struck by a bus belonging to the appellant.

J. L. Farris, Q.C. and *H. P. Baldwin* for the appellant.

D. McK. Brown for the respondent.

The judgment of Taschereau and Estey J. was delivered by:—

ESTEY J.:—The respondent, at trial, was awarded damages for personal injuries suffered when struck by a trolley bus owned and operated by the appellant. A majority of the learned judges in the Court of Appeal directed a new trial. In this appeal the appellant submits that the negligence of the respondent was the sole cause of his injuries and that his action should be dismissed, while the respondent asks that the negligence of the motorman be held the sole cause and the judgment at trial be restored.

The accident occurred at the corner of Pender and Beatty Streets in the City of Vancouver on March 6, 1952, at approximately 3:30 o'clock in the afternoon. Pender Street runs approximately east and west and Beatty Street enters Pender at this point. At this intersection vehicular traffic is controlled by the rotation of green, amber and red lights, while pedestrian traffic is controlled by "Wait" and "Walk" signals. Simultaneously the red light and the "Walk" signal come on and the pedestrians then proceed in all directions. After the "Walk" signal goes off the red light remains on an appreciable time to permit the pedestrians to reach the curb before vehicular traffic commences.

The respondent, an employee of the Vancouver *Sun*, had completed his day's work and proceeded to the southeast corner of Pender and Beatty Streets with the intention of crossing Pender Street. The "Walk" signal was just going off and when he thought it would change again to "Walk" he says:

> I glanced to my left (to the west). . . . I saw a bus . . . where it would be for taking off and putting on passengers . . . Then I glanced to see how my "Walk" sign was and it was okay, so I glanced down and then stepped off and I took about—I would say two or three steps . . . after that I came to in the hospital.

This is a busy intersection and, while probably a few people were at this curb, he did not think any other person stepped off with him.

The bus driver stated that he stopped at the usual stop sign on Pender, about thirty feet west of the west curb line of Beatty, took on a passenger and closed the door. He states that when he closed the door, after taking on the passenger,

> The light was green and I pulled out, checking my mirror. . . . Pulling into the intersection or to the intersection I glanced at the tray. The fellow put a quarter in it. I looked up again, my intersection was clear . . . no vehicular traffic in that intersection. . . . Approaching the cross-walk on the east side of Pender Street, a pedestrian stepped in front of the bus and I immediately swung the bus to the left, trying to avoid him, applying my brakes as hard as I could.

When the bus driver left the stop sign thirty feet west of Beatty Street the light was green. He did not again observe the lights and, therefore, as the learned trial judge commented, he did not know what colour the light was showing as he entered the intersection. Beatty Street is fifty-two feet wide and, as the bus struck the respondent

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while on the easterly pedestrian walk, it must have travelled from the passenger stop approximately eighty-two feet. Throughout this distance the bus driver says he gradually and continually increased his speed which, at the moment of the accident, he estimated to be approximately twelve miles per hour. Another witness thought it was fifteen miles per hour. The bus driver saw the respondent step from the curb, at which time he estimated the bus to be about fifteen or twenty feet from him. He immediately endeavoured to swing the bus and push the brake to the floor.

That the respondent stepped off the curb when the "Walk" signal permitted his doing so is corroborated by both the evidence of Mrs. Doolin and Mr. Adair, who not only saw the respondent, but they, themselves, stepped off the curb on the "Walk" signal. This, of course, does not mean that all three stepped at the same instant, but, for practical purposes, at substantially the same time.

There is no evidence as to how long the lights remained green, yellow or red, except that the yellow, or amber, light remained but a few seconds, or a very short time. The record does not disclose when these lights were installed, but there is no suggestion they had not been at this intersection a sufficient time to establish their efficiency. It would seem, therefore, in the absence of evidence to the contrary, a court would be justified in concluding that a bus, proceeding at a reasonable rate of speed, which had entered on the green light, would have passed through the intersection before the red light came on. The driver deposed that he had seen the respondent step from the curb. It is clear that the latter did so upon the "Walk" signal and, therefore, the red light would then be showing against the bus driver, who, upon his own admission, was then some fifteen to twenty feet west of the respondent. The fact that the driver was then in such a position in the intersection supports the conclusion that he had not entered upon the green light. Moreover, if, at a busy intersection such as this, a driver, in directing his bus, so far ignores the lights that he cannot say upon what light he entered or what changes in the lights took place as he proceeded through, is not exercising that reasonable care which a prudent driver would exercise under such circumstances.

The learned trial judge concluded that he "entered the intersection at the very tail-end of the yellow signal." This conclusion is supported, as the learned trial judge indicated, upon a consideration of Adair's position on the cross-walk when the bus passed him in relation to the evidence adduced by other witnesses. Moreover, the position of the bus in the intersection at the moment the driver observed the respondent step from the curb lends some support to the foregoing conclusion. Upon the basis that he so entered, I am in complete agreement with the statement of the learned trial judge that "to enter the intersection under these circumstances was a very hazardous and negligent thing to do."

Mr. Farris contended that the learned trial judge had overlooked Adair's statement that the bus had entered the intersection upon the green light. The learned trial judge described Adair as a "reliable witness". Adair deposed the green light was on when the bus entered the intersection. He also stated that when the "Walk" signal came on the front of the bus was six or eight feet east of the western lane; further, that when the accident happened he was himself one-third of the way across the intersection. The learned trial judge considered the relative positions of Adair and the bus and, assuming the bus was going three times as fast as Adair, reached the conclusion the bus had entered the intersection either on the red or "the very tail-end of the yellow signal." While the learned trial judge does not specifically mention Adair's statement that the green light was on, it is clear that he not only considered his evidence, but gave particular weight thereto. Moreover, his statement that the light was green is in conflict with the evidence of other witnesses, as well as with the position of the bus when the driver first observed the respondent. In all these circumstances it would appear that rather than overlooking this evidence the learned trial judge concluded that Adair was in error in making such a statement. Moreover, even if the bus driver had entered upon the green light, that would not have permitted of his ignoring his duty to proceed with due care. Such would have required that he, while within the intersection, should have observed the lights, and particularly at this busy intersection, with which he was familiar, where there were pedestrian "Walk" and

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"Wait" signals, he should, when the amber light showed, have discontinued the gradual and continuous acceleration of his speed and proceeded in a manner that would have enabled him to avoid a collision with a pedestrian exercising his right-of-way under the "Walk" signal.

Upon the whole of the evidence I am of the opinion that the bus driver's negligent driving of the bus through the intersection was a direct cause of the injuries suffered by the respondent.

A more difficult question arises with respect to the conduct of the respondent. He had reached the southeast corner of the intersection and observed the "Walk" change to the "Wait" signal and when, while waiting, he thought "it was going to change," he glanced toward the west, or, as he otherwise expressed it, "glanced casually" to his left and saw the bus at the passenger stop thirty feet west of Beatty Street. While it was not moving, he says the green light was then showing at the intersection, which would permit the bus to enter. He then turned his attention to the north, but could not say more than that it might have "been a question of seconds" after he saw the bus before the "Walk" signal again came on. He is clear, however, that, having "glanced casually" and seen the bus in a stationary position, he did not again look to the west. Had he done so, he would undoubtedly have seen the bus and, as he says, would not have stepped from the curb. The learned trial judge stated:

> He was entitled to assume that traffic proceeding eastward would obey the traffic regulations. . . . but the failure to take these extraordinary precautions which he could have taken is not negligence. There was no failure on his part to take the ordinary precautions that might be expected of a reasonable person. When he saw the "Walk" signal he was entitled to proceed and to expect that his right of way would be respected. This "Walk" signal is an invitation to the pedestrian to proceed. The pedestrian has waited his turn, and to facilitate his movement, all vehicular traffic is stopped in all directions. The ordinary pedestrian is concentrating on his signal and on getting to his destination. Under the circumstances here it seems to me he cannot be held negligent in not looking to his left before proceeding unless he was aware, or ought to have been aware, of the presence of some danger in so proceeding. No doubt it would have been a prudent thing for the plaintiff to look to his left before proceeding, but his failure to do so is not, under the circumstances, negligence.

The pertinent issue is, therefore, should the respondent have looked to the west before stepping from the curb and whether, in not doing so, he was negligent in a manner that

contributed to his own injury. Viscount Simon expressed the duty which rests upon a person to exercise care for his own safety when he stated:

> But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. *Nance* v. *British Columbia Electric Railway Co.* (1).

Legislative bodies have, for many years, been enacting provisions intended to facilitate and make safer the movement of pedestrians and vehicular traffic on the highways and public streets. The general rule is that these provisions and regulations are supplementary, or in addition, to the common law duty that rests upon all persons using the highways to exercise due care. *Swartz Bros. Ltd.* v. *Wills* (2); *Royal Trust Co.* v. *Toronto Transportation Commssn.* (3). In the latter case Mr. Justice Davis, with whom the majority of the Court agreed, stated at p. 674:

> Generally speaking, a motorman on a street car is entitled to assume that a pedestrian or a motorist approaching the street car tracks will stop to permit the street car to pass by and there was in this case a statutory right of way in favour of the street car. But the existence of a right of way does not entitle the motorman on the street car to disregard an apparent danger that confronts him.

The learned trial judge found support for his view that the respondent was not negligent in *Walker* v. *Brownlee* (4), and *Johnston National Storage* v. *Mathieson* (5), both decisions of this Court. In *Walker* v. *Brownlee* the appellant Walker, proceeding in a northerly direction, had failed to look and to yield the right-of-way to the vehicle on his right and, therefore, had not exercised due care at the intersection. It was held that he alone was liable and that in the circumstances the driver of the truck, having the statutory right-of-way, was not negligent. Mr. Justice Cartwright, at p. 461, stated:

> . . . I am of opinion that when A, the driver in the servient position, proceeds through an intersection in complete disregard of his statutory duty to yield the right-of-way and a collision results, if he seeks to cast any portion of the blame upon B, the driver having the right-of-way, A must establish that after B became aware, or by the exercise of reasonable care should have become aware, of A's disregard of the law B had in fact a sufficient opportunity to avoid the accident of which a reasonably careful

(1) [1951] 2 All E.R. 448 at 450.
(2) [1935] S.C.R. 628.
(3) [1935] S.C.R. 671.
(4) [1952] 2 D.L.R. 450.
(5) [1953] 2 D.L.R. 604.

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and skilful driver would have availed himself; and I do not think that in such circumstances any doubts should be resolved in favour of A, whose unlawful conduct was *fons et origo mali*.

In the *Walker* case there was upon him, not only a common law liability to use due care, but a statutory duty to yield the right-of-way. In the present case the respondent, by virtue of the "Walk" signal, had the right-of-way, but the question is was he required to, and, if so, did he, in exercising his right, use due care. In effect, the respondent contends that he had an absolute right to proceed on the "Walk" signal without looking to see if any traffic was proceeding contrary to the lights, or, as otherwise stated, he had an absolute right to assume that the vehicular traffic in the position of the appellant would obey the regulation and proceed only as the lights directed.

In *Boxenbaum* v. *Wise* (1), two automobiles collided at an intersection where traffic was controlled by lights. The driver having the right-of-way and otherwise proceeding with due care was exonerated of any negligence. Mr. Justice Taschereau, with whom Chief Justice Rinfret and Mr. Justice Hudson agreed, stated at p. 296:

> Before reaching the intersection Wise was invited to cross St. Lawrence boulevard, having the green light in his favour. . . . Seeing the green light, which in certain judgments has been termed "a command to go ahead" in heavy traffic, he committed no fault by slightly accelerating his speed.

My Lord the Chief Justice (then Kerwin J.), with whom Mr. Justice Hudson agreed, stated at p. 299:

> Wise had the right to cross and, with respect to the trial judge who found otherwise, there was no negligence on Wise's part in not anticipating that Pelchat would attempt to cross from south to north with the red light showing against him or in not seeing Pelchat's car sooner than he did.

See also *The King* v. *Anderson* (2).

In *Sparks* v. *Edward Ash, Ltd.* (3), Scott L.J. stated:

> So, on the pedestrian crossing, I think the duty of the pedestrian is intended to be less *onerous* than if he were crossing the road anywhere outside the crossing. His business is to attend primarily to his own duty of getting across as soon as he can with safety. It was this broad thought that was present to my mind in *Bailey* v. *Geddes* (4), although I expressed myself in terms that were too universal. If the effect of the statutory code is to relieve the pedestrian on the crossing of some of the duties he would owe to the motorist *away* from the crossing, the plea of contributory negligence necessarily has its scope cut down in a case like the present. The reality of the position is that the essential object of the set of regulations was to induce pedestrians to desist from the practice of crossing,

(1) [1944] S.C.R. 292.
(2) [1946] S.C.R. 129.
(3) [1943] 1 K.B. 233 at 231.
(4) [1938] 1 K.B. 156.

anywhere and anyhow, streets which carry much traffic, to the danger of themselves and the inconvenience of the traffic, and the inducement was the provision of sufficient privileged crossings where the pedestrian would have the right of way and be officially authorized, and, indeed, invited, to cross without fear of being run over, and free from the burden of anxiety and care involved in having to depend on being perpetually on the look-out for approaching traffic if he wanted to avoid sudden death. This must mean a statutory lightening of his duty of care. In truth, that is what the pedestrian crossing means.

In *Chisholm* v. *London Passenger Transport Board* (1), Scott L.J. stated:

> Neither the Regulations nor the judgments of the Lords Justices in that case (*Bailey* v. *Geddes* [1938]—1 K.B. 156) attempt to define the duty of a pedestrian in regard to embarking from the footway on to the crossing. His duty at that stage is left to the common law.

and at p. 438:

> The pedestrian desiring to leave the footway and traverse the crossing is entitled to assume (1) that approaching traffic is acting and will continue to act so as to be able without difficulty to comply with the directions of the Regulations, and (2) that if an approaching vehicle is far enough away for it conveniently to check its speed, he is entitled to cross.

The light signals at this intersection with respect to vehicular traffic were of the type that are generally found where the green is followed by the yellow, or amber, and then the red. Also, as already stated, there were pedestrian "Walk" and "Wait" signals. The legislative provisions with regard thereto are found in the Street and Traffic By-law No. 2849 of the City of Vancouver. Section 9(1)(*a*) provides, in part, that the "Green light or 'Go', shall mean or indicate that traffic facing such signal may proceed across the intersection, . . .," while in s. 9(1)(*b*) it is provided that the "Yellow light, or 'Caution' or double red, when shown following the green 'Go', shall mean or indicate that traffic facing the signal shall stop . . ." In s. 9(2)(*a*) pedestrians facing the "Walk" signal "may proceed across the roadway . . .," while in s. 9(2)(*c*) it is provided that no pedestrian "shall start to cross the roadway . . ." when the "Wait" signal is showing. The use of the words "may" and "shall" in this by-law would indicate that it was intended one proceeding on the green light should at least exercise the common law duty to use care for his own safety. In other words, the by-law imposes an absolute duty to stop on the red and "Wait" signals, but grants only a permissive right with respect to those who proceed on the green or

(1) [1939] 1 K.B. 426 at 437.

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"Walk" signals. It would, therefore, appear that the by-law contemplates that those proceeding on the green and "Walk" signals will use due care for their own safety, while those who fail to stop at a red or "Wait" signal are at least negligent.

The fact is this by-law appears to be in accord with the foregoing authorities. These authorities indicate that it has been suggested the green and "Walk" signals constitute respectively an "invitation," even a "command," to drivers of vehicles and pedestrians to proceed; further, that one proceeding in accord with the lights has a "less onerous" duty and that such a person is "free from the burden of anxiety and care involved in having to depend on being perpetually on the look-out for approaching traffic if he wanted to avoid sudden death" and, further, that "the plea of contributory negligence necessarily has its scope cut down." Notwithstanding all of these, it is nowhere suggested a person can proceed without the exercise of due care. It may well be that the presence of the lights is a factor in determining what may be, in the circumstances, due care. However that may be, Lord Justice Scott in *Chisholm* v. *London Passenger Transport Board, supra,* stated, in respect of a pedestrian embarking upon the pedestrian crossing in accord with the lights, that "His duty at that stage is left to the common law." In the subsequent case of *Sparks* v. *Edward Ash, Ltd., supra,* the same learned Lord Justice stated in respect to the pedestrian: "His business is to attend primarily to his own duty of getting across as soon as he can with safety." Moreover, in *Boxenbaum* v. *Wise, supra,* my Lord the Chief Justice (then Kerwin J.) at p. 299 stated, as already quoted:

> . . . there was no negligence on Wise's part in not anticipating that Pelchat would attempt to cross from south to north with the red light showing against him or in not seeing Pelchat's car sooner than he did.

Further, in *Walker* v. *Brownlee, supra,* Mr. Justice Cartwright stated that if there be any blame to be cast upon the party having the right-of-way it must be shown that that party "became aware, or by the exercise of reasonable care should have become aware" of the other's disregard of the law.

It, therefore, appears that a pedestrian in the position of the respondent, who is proceeding in the exercise of his right-of-way in accord with the "Walk" signal, cannot be

exonerated from not looking and observing the bus proceeding in a manner that makes it dangerous for him to leave the curb. The duty to use care rests upon every person using the highways and there can be no question here but that he had the opportunity to look and, had he looked, he would have seen the bus and, in that event, not left the curb. This feature distinguishes the case here under consideration from those of which *Johnston National Storage* v. *Mathieson, supra,* is an illustration. In the latter case the driver having the right-of-way, and observing with due care all that could reasonably be seen, had a right to assume that one entering the intersection upon his right would yield to him the statutory right-of-way. Moreover, the fact that one having the statutory right-of-way must proceed with due care is emphasized in *Boxenbaum* v. *Wise, supra.*

In my opinion the appeal should be allowed and the judgment at trial should be restored, but varied, as indicated, apportioning the fault 80% against the British Columbia Electric Railway Co., Ltd. and 20% against the respondent. The respondent should have 80% of his costs at trial, in the Court of Appeal and in this Court.

RAND J.:—I agree with the finding of negligence made at the trial against the bus driver. In giving his evidence, the latter could not remember what light was showing when he reached the first or westerly curb and did not see the yellow or red light at all, and it "bothered him" that he could not do so. It appears that the passenger taken on at the stop had handed over a twenty-five cent piece and that he stood near the driver awaiting either change or tickets, but here again the memory of the driver in part failed him. What he last saw was that as he looked up the light was green and the intersection clear. From this it is inescapable that after that glance at the light, and at once or within seconds, he started and drove through the intersection without further attention to lights; whether to anything else except the passenger, until the last second or so, remains for conjecture.

His course, then, was undoubtedly what Coady J. deduced. The stop was thirty feet west of the westerly curb; the yellow light had flashed on when the bus had

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reached that curb; and before it had reached the easterly curb, 50′ farther, the red light appeared. Automatically the green "walk" signal came on.

At this intersection the signal system set up stopped vehicular traffic in all directions and opened the entire intersection to pedestrians. It was necessary for the latter to move quickly because the "walk" signal gave place to the "wait" signal, while the red holding the vehicles remained a few seconds longer to enable pedestrians within the intersection to complete their movement. When the driver again looked up, he saw the respondent, as he says, from 10 to 15 feet in front of him, and without sounding the horn and moving at a speed of 12 miles an hour, attempted to swing clear. This he did not succeed in doing, with the result that the respondent was struck by the right side of the front end of the bus between 4 and 7 feet from the curb.

But Coady J. construed the "walk" signal to be an absolute justification for what the respondent did. The latter, while awaiting that signal, had glanced to the west where he saw the bus at the stop. Some seconds later, the number of which, judging from the place of impact appears to be not less than 10, the signal flashed on, and without looking in the direction of the bus he started across.

There must, of course, be strict observance of these signals at a protected crossing; but the by-law itself contemplates the possibility that a vehicle may, though moving on the green, enter the intersection on the yellow light. In that case it may happen also that the driver is faced with the red signal before his transit is completed. Regulation No. 9(1)(*b*) provides:—

> Yellow light, or "Caution" or double red, when shown following the green "Go", shall mean or indicate that traffic facing the signal shall stop before entering the nearest crosswalk at the intersection unless so close to the intersection that a stop cannot be made in safety.

When a driver finds himself in that predicament, obviously he must exercise the greatest care in extricating himself.

But I am unable to agree that the right to proceed on such a signal is absolute. These rules are directions governing the normal course of conduct, but they necessarily lack the flexibility which only individual action in special situations can supply. They are for the general safety but the

individual must on occasion supplement them by reasonable and incidental precautions. Even as the driver must contemplate the possibility of the red signal against him in the intersection, so the pedestrian must co-operate in similar anticipation when it is dictated by special circumstances.

Here the respondent, though properly attending to the "walk" signal, knew that a bus in the offing was on its course approximately 80′ away, and might at any moment move through the intersection. A careful pedestrian knowing that would keep in mind the possibility of just such a conjunction as arose. The slightest attention to the left would have revealed the bus and avoided the accident. This is no doubt an enhanced duty but the congestion of dangers in city traffic can, under some circumstances, call for it. In doing what he did he fell, in my opinion, short of reasonable care for his own safety.

In *London Passenger Transport Board* v. *Upson* (1), several of the law lords taking part considered this question. In the Court of Appeal (2), the Master of the Rolls, Lord Greene, at p. 937 had expressed the view that the bus driver in that case proceeding on a green light owed no duty to watch out for pedestrians walking in the face of the signals. On this Lord Uthwatt remarked:—

> In the view that I have formed it is not necessary for me to deal with the question of negligence. I desire only to register my dissent from the view expressed by the Master of the Rolls that drivers "are entitled to drive on the assumption that other users of the road, whether drivers or pedestrians, will behave with reasonable care". It is common experience that many do not. A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take.

Lord du Parcq, at p. 175, said:—

> My Lords, the learned Master of the Rolls has stated with great clarity a view of the law of negligence which, in my opinion, ought not to receive the approval of your Lordships' House. "The driver of the omnibus," the Master of the Rolls said, "was entitled to assume that the plaintiff, like other pedestrians, would conform to common sense and ordinary care in the presence of an adverse signal, particularly in view of the provisions of the Highway Code." . . . "The fact that a driver knows that other people on occasions do things that no careful driver would be expected to anticipate does not mean that he is under a duty to anticipate such action." It follows from these premises that the appellant's driver was "entitled to drive on the assumption that no pedestrian would disobey the light signal." . . . My Lords, if the premises are granted this reasoning is impeccable, but I do not accept the premises as sound.

(1) [1949] A.C. 155. (2) [1947] 1 K.B. 930.

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Lord Morton of Henryton, at p. 181, after quoting from the language used by the Master of the Rolls, said:—

> In such a case, I think that a driver fails to exercise due care, apart altogether from the regulations of 1941, if he proceeds on the assumption that pedestrians will refrain from crossing the road until the lights change, and drives his vehicle in such a way that he cannot avoid an accident if a pedestrian emerges suddenly from behind the obstruction.

With these general statements of the duties of drivers of vehicles and pedestrians at protected crossings I respectfully agree; they express the continuing obligation on all persons to be reasonably alert. Here there was nothing that called for the respondent's attention incompatible with giving a glance at the bus; but the failure was relatively excusable, and I would assess the responsibility for it at 20%.

The appeal should, therefore, be allowed and the judgment at trial modified accordingly. The respondent will be entitled to 80% of the costs throughout.

LOCKE J.:—The evidence given by the respondent at the trial is reviewed in the reasons to be delivered in this matter by my brother Estey. With great respect for the contrary opinion of the learned trial judge I think that upon his own statement the respondent should not have been relieved of any fault contributing to the accident.

When the respondent saw the bus stopped at the southwest corner of the intersection, he says the green light permitting traffic to proceed east on Pender Street was showing. Thereafter he paid no further attention to the bus. It is a matter of daily occurrence on city streets where the traffic is regulated by lights that at times motor vehicles proceeding at normal speeds approach the limits of intersections when the traffic lights are about to change. In these circumstances it is known to everyone that such vehicles will continue to cross the intersection since to do otherwise would result in blocking traffic when the green light shows for vehicles proceeding upon the intersecting street. It was presumably for this reason that these lights are so designed that the green light is followed by an amber light before the red light appears to permit vehicles in this position to complete their passage across the intersection. I think Farrer was at fault and should be held partially responsible for the accident since knowing how quickly vehicles such as motor buses move from a standing position and having seen

that the light was showing green he should, having regard to his own safety, have looked to see that the vehicle was not in motion across the intersection before stepping off the curb to walk north across the street. Had he done so, it is plain that there would have been no accident.

It would be exceedingly unfortunate, in my opinion, if any doubt should be cast upon the accuracy of the passage from the judgment of Lord Atkinson in *Toronto Railway Co.* v. *King* (1), which was adopted and followed in *Swartz* v. *Wills* (2) and in other judgments since delivered in this Court.

No one would suggest that to say that a driver having the right-of-way may proceed on the assumption that drivers of other vehicles will observe the rules regulating traffic on the streets means that such person may proceed without taking due care for the safety of himself and others. While it was, no doubt, unnecessary to do so, s. 21 of the Highway Act of British Columbia (c. 144, R.S.B.C. 1948) which gives the right-of-way to a driver approaching an intersection as against another approaching from the left concludes in these terms:—

> but the provisions of this section shall not excuse any person from the exercise of proper care at all times.

I do not intend to suggest that the learned trial judge applied the principle stated in *Toronto Railway Co.* v. *King* otherwise than in the manner I have above indicated, but with respect I think his finding relieving the respondent of any share of fault fails to take into account the circumstance to which I have above referred.

I would add that if anything said in *London Passenger Transport Board* v. *Upson* (3), should be considered to be at variance with the statement of Lord Atkinson to which I have referred that in my opinion it is the latter statement that should continue to be accepted as the law in this Court.

I agree that upon the evidence in this case the major part of the fault should be attributed to the driver of the bus and that the degrees of fault should be determined as being

(1) [1908] A.C. 260 at 269. (2) [1935] S.C.R. 628.
(3) [1949] A.C. 155.

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20% to the respondent and the remainder to the appellant. I agree with the disposition of the costs proposed by my brother Estey.

CARTWRIGHT J. (dissenting in part):—The relevant facts and the issues raised in this case are sufficiently set out in the reasons of my brothers Rand and Estey which I have had the advantage of reading.

I do not find it necessary to review the evidence in detail. In my view, it supports the finding of fact made by the learned trial judge that the bus entered the intersection either on the "walk" signal or "at the very tail-end of the yellow signal". The further finding of fact made by the learned trial judge that, in all the circumstances, the respondent was not guilty of contributory negligence ought not, in my opinion, to be disturbed.

In my view the passages from the opinions of the Law Lords in *London Passenger Transport Board* v. *Upson* (1), quoted in the reasons of my brother Rand, are not necessarily inconsistent with the statement of Lord Atkinson in *Toronto Railway Co.* v. *King* (2), as it has been applied in this Court. In *Swartz* v. *Wills* (3), Cannon J. giving the judgment of himself, Lamont and Davis JJ. and of Dysart J. *ad hoc* said at page 632:—

> He (the appellant) had the right of way and was entitled to assume that plaintiff would follow the rule.
>
> Lord Atkinson, in *Toronto Railway* v. *King*, said:—". . . traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less on the assumption that the drivers of all other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets."
>
> Especially in a case where we have a clear cut statutory duty, . . .

Duff C.J. delivered a separate judgment but expressed his concurrence with Cannon J.

In *The King* v. *Anderson* (4), Estey J. with whom Rinfret C.J.C. and Kerwin J., as he then was, concurred, after pointing out that the driver of the appellant's vehicle had violated the express provisions of regulations having the force of statute said at page 133:—

> The respondent on his part was entitled to rely upon the appellant complying with these provisions of section 3 (*j*) "to ascertain" if the

(1) [1949] A.C. 155.
(2) [1908] A.C. 260 at 269.
(3) [1935] S.C.R. 628.
(4) [1946] S.C.R. 129.

turn could be made "in safety" and also "give a signal plainly visible". *Carter* v. *Van Camp* (1); *Toronto Ry. Co.* v. *King* (2), where Lord Atkinson stated:—

> "It is suggested that the deceased must have seen, or ought to have seen, the tramcar, and had no right to assume it would have been slowed down, or that its driver would have ascertained that there was no traffic with which it might come in contact before he proceeded to apply his power and cross the thoroughfare. But why not assume these things? It was the driver's duty to do them all, and traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets."

In the same case at page 138, Kellock J. with whom Rand J. agreed said at page 138:—

> I do not think that the respondent was bound to anticipate that the truck would turn into Bute street in the absence of any indication that such was the intention of its driver.

It will be observed that in both *Swartz* v. *Wills* and *The King* v. *Anderson* what was decided was that one party was entitled to assume that the other would not violate an express statutory provision. In *Toronto Ry.* v. *King* the report does not indicate whether the regulations which the motorman disregarded had the force of statute, but their Lordships seem to have so treated them for, at page 269, Lord Atkinson speaks of "a tramcar bound to be driven under regulations such as those quoted above".

In *Upson's* case, on the other hand, the question was whether the appellant's bus-driver was entitled to assume that the respondent pedestrian would "behave with reasonable care" and so refrain from crossing against the light. The opinions stress two points, (i) that there was no statutory provision prohibiting a pedestrian from crossing the road with the light against him, and (ii) that it was in evidence that the bus-driver knew that pedestrians had a habit of doing so.

At page 171, Lord Wright says:—

> He (i.e. a pedestrian) is not given a licence to neglect any reasonable precaution for his own safety, though the law does not forbid him to traverse a crossing with the light against him if he can do so safely.

(1) [1930] S.C.R. 156. (2) [1908] A.C. 260 at 269.

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At page 175, after setting out the view which had been expressed in the Court of Appeal by the Master of the Rolls, Lord du Parcq, continued:—

> My Lords, if the premises are granted this reasoning is impeccable, but I do not accept the premises as sound. It is assumed in them that a pedestrian is "disobeying" an "adverse" signal if he crosses a light-controlled "pedestrian crossing" at a time when the green light is signalling to vehicular traffic permission to advance, whereas in truth the pedestrian is under no legal compulsion to keep off the crossing at such a time, and the signal is never "adverse" to him in the sense that it prohibits him from crossing. The most that can be said is that he often takes a risk, which may be such that it is negligent to take it, if he crosses when the traffic is not being held up.

At page 176, Lord du Parcq says further:—

> The driver of the appellants' omnibus agreed in cross-examination that he knew "that people in London have a habit of crossing a road when the lights are not in their favour." Even apart from the duty imposed on him by the regulations, he was therefore bound to take precautions against the possibility that some person was concealed from his view by the stationary cab and might suddenly emerge from its protection. On this ground alone it must at least be said that there was evidence to support the conclusion that the driver had failed to take reasonable care for the safety of others and was therefore negligent. A driver is never entitled to assume that people will not do what his experience and common sense teach him that they are in fact likely to do.

At page 181, Lord Morton of Henryton says:—

> In his evidence the driver, a very frank and honest witness, admitted that people in London "have a habit of crossing a road when the lights are not in their favour."
>
> * * *
>
> No doubt wise pedestrians do not cross the road when the lights are in favour of oncoming traffic, but there is no regulation which forbids this, and many pedestrians are unwise.

In *Upson's* case no reference appears to have been made in argument to the judgment of the Board in *Toronto Ry. Co.* v. *King* and it is not mentioned in the opinions.

In my view, there is nothing in the judgments in *Upson's* case which should cause us to hesitate to follow the statements which I have quoted above from *Swartz* v. *Wills* and *The King* v. *Anderson.* I do not interpret the last mentioned cases as laying down a rule that a party who has the benefit of a statutory rule of the road is thereby absolved from the duty of taking reasonable care in regard to the movements of the person on whom such rule imposes a duty. Rather, I think, they decide that in determining whether such party has or has not used reasonable care in a particular case a factor, always important and often decisive,

will be the circumstance that he would normally proceed on the assumption that the person upon whom such statutory rule imposed a duty would fulfil it. Observation of the movements of a party bound by statute to yield the right of way to the observer might well constitute a proper look-out when similar observation of the movements of a party not so bound might be inadequate. Whether in a particular case the observation actually made was sufficient to constitute the taking of reasonable care will be a question of fact, and I adhere to the opinion, which I expressed in *Walker* v. *Brownlee* (1), that in deciding such question no doubts should be resolved in favour of the party whose violation of an express statutory provision has been an effective cause of the accident.

In the case at bar, I do not think that the learned trial judge can be said to have misdirected himself as to the duty of the respondent to take reasonable care for his own safety when he said:—

> I am of the opinion, however, that under the circumstances here there was no negligence on the part of the plaintiff. He had looked to his left while waiting for his signal. He saw this bus at the loading zone and he was convinced that it was not moving. He was entitled to assume that traffic proceeding eastward would obey the traffic regulations. He admits that he could have taken greater precautions and could have looked to his left again and, if he did, he could have seen this bus, and having seen it, would not have proceeded. But the failure to take these extraordinary precautions which he could have taken is not negligence. There was no failure on his part to take the ordinary precautions that might be expected of a reasonable person. When he saw the "Walk" signal he was entitled to proceed and to expect that his right of way would be respected. This "Walk" signal is an invitation to the pedestrian to proceed. The pedestrian has waited his turn, and to facilitate his movement, all vehicular traffic is stopped in all directions. The ordinary pedestrian is concentrating on his signal and on getting to his destination. Under the circumstances here it seems to me he cannot be held negligent in not looking to his left before proceeding unless he was aware, or ought to have been aware, of the presence of some danger in so proceeding. No doubt it would have been a prudent thing for the plaintiff to look to his left before proceeding, but his failure to do so is not, under the circumstances, negligence.

I do not read this passage as asserting an absolute right in the respondent to proceed when the "Walk" signal appeared without first having taken reasonable precautions for his own safety. The learned judge accepts the evidence that the respondent looked to his left while waiting for the

(1) [1952] 2 D.L.R. 450 at 461.

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Cartwright J.

signal, that he saw the bus, that he calculated from its position that if he proceeded with the signal when it came on he could do so in safety so far as the bus was concerned, that this calculation was sound, and that it was falsified only by the driver of the bus committing a breach of the by-law by entering the intersection when either the red or the yellow signal light forbad him to do so. The learned judge recognizes a duty upon the respondent to look again to his left before proceeding not only if he was aware but also if he ought to have been aware of the presence of some danger in so proceeding. The learned judge declines to hold that, in these particular circumstances, the respondent ought to have anticipated the breach of the by-law committed by the bus-driver. He decides that the respondent did not fall short of the standard of foresight of the reasonable man.

In approaching the question whether this decision of the learned judge should be disturbed it is helpful to refer to what was said by Lord Macmillan in *Glasgow Corporation* v. *Muir* (1):—

> The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from overconfidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen. Here there is room for diversity of view, as, indeed, is well illustrated in the present case. What to one judge may seem far-fetched may seem to another both natural and probable.

The question I have to answer is not whether I would have reached the same conclusion as did the learned trial judge, but whether I am satisfied that such conclusion was wrong, and I have already indicated that I am not so satisfied.

(1) [1943] A.C. 448 at 457.

In the result I would set aside the order of the Court of Appeal and restore the judgment of the learned trial judge. The respondent is entitled to his costs throughout.

Appeal allowed judgment at trial modified.

Solicitor for the appellant: *A. B. Robertson.*

Solicitor for the respondent: *A. E. Branca.*

CANADIAN ICE MACHINE COMPANY LIMITED (*Defendant*) .... APPELLANT;

AND

J. HORACE SINCLAIR (*Plaintiff*) .....RESPONDENT.

1955
*May 20
*Oct. 4

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Master and servant—Contract—For Fixed Term—Termination without cause—Damages.

The appellant company and the respondent, its general manager, entered into a written contract whereby the company agreed to the manager's retirement subject to its right to retain the benefit of his business connections and to call upon him for such engineering and business advice as was consistent with the respondent's enjoyment of a life of reasonable leisure and his right to practise his profession. The date of retirement was fixed at Dec. 31, 1946 and the respondent's services were to be available and his salary paid to Dec. 1953. The appellant having purported to cancel the agreement, the respondent rejected the repudiation and sued for a declaration that the agreement was valid and binding and for damages.

Held: That the agreement was a valid and binding contract whereby the respondent was to furnish the appellant with the described services when called upon to do so. The respondent having complied with the obligation, if any, to mitigate his loss, was entitled to damages.

Per Locke J.: The respondent's rejection of the appellant's attempted repudiation continued the contract in force (*Heyman* v. *Darwins Ltd.* [1942] A.C. 356 at 361) and since the contract was not simply one of hiring and service the respondent was entitled to recover the amounts payable under its terms up to the date of trial and to a declaration that as of that date the agreement was valid and subsisting.

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

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APPEAL from a judgment of the Court of Appeal for British Columbia (1) dismissing the appellant's appeal and allowing the cross-appeal of the respondent from a judgment of Coady J. (2) in an action brought by the respondent for damages for breach of contract.

R. N. Starr, Q.C. for the appellant.

G. R. Long Jr. for the respondent.

The judgment of the Chief Justice and of Estey J. was delivered by:—

THE CHIEF JUSTICE:—In my opinion the contract was one whereby the respondent was to furnish the described services when called upon so to do by the appellant. All the respondent was obliged to do was to keep himself in readiness to comply with those demands of the appellant "consistent with his enjoyment of a life of reasonable leisure and with his retirement from active business" and to accept such other engagements as might be offered to him. This he did and therefore complied with the rule that a person in that position must take all reasonable steps to mitigate his loss: *British Westinghouse Electric Co.* v. *Underground Electric Railways Co.* (3); *Cemco Electrical Mfg. Co.* v. *Van Snellenberg* (4).

The trial judge was of opinion that the appellant's breach of contract constituting a release of the respondent from his covenant in the agreement not to engage in a business competing with that of the appellant had a bearing upon the damages. In view of the clause in the contract quoted above, I am unable to agree that this is a circumstance to be taken into consideration. It is difficult to fix an amount that is fair to both parties, but I have concluded that the sum of $4,800 is not out of the way.

The appeal should be dismissed with costs.

KELLOCK J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia (1) in an action brought by the respondent for damages for breach of an agreement dated the 27th of November, 1946. The respond-

(1) (1954) 11 W.W.R. (N.S.) 244.
(2) (1953) 9 W.W.R. (N.S.) 399; [1953] 2 D.L.R. 371.
(3) [1912] A.C. 673.
(4) [1947] S.C.R. 121.

ent had for some years prior thereto been employed as manager of the appellant company's branch at Vancouver. The agreement recites that the respondent wished to arrange for his retirement from the position of manager and the appellant agreed thereto subject to its retaining the benefits of Mr. Sinclair's business connection and of being able to call upon him for his engineering and business advice and assistance from time to time as required.

By para. 1 it was agreed that from the date of his retirement, fixed at December 31, 1946, the appellant was to employ the respondent "as an engineering and general consultant and to promote the sale of the company's merchandise, products and service" at a salary of $200 a month for the first two years and thereafter at $150 per month until December 10, 1953, when the said employment and salary was to cease and determine. The last sentence of para. 1 is as follows:

> The condition of the said employment shall be that Mr. Sinclair will to the best of his ability assure to the Company the continued enjoyment of its business goodwill in British Columbia, and that Mr. Sinclair will be available as a consultant to assist his successor, the manager of the Company's branch in Vancouver, in the solution of engineering and business problems, but Mr. Sinclair is only to be required to devote so much of his time and energy to his said employment as are consistent with his enjoyment of a life of reasonable leisure and with his retirement from active business.

The agreement further provided that "in addition to and independently of Mr. Sinclair's employment as aforesaid" from retirement until death or until his seventieth birthday on the 10th of December, 1953, whichever event should first happen, the company would bear all the costs of maintaining in good standing the respondent's claims under the appellant company's pension scheme. It was further provided that the respondent would not at any time after his retirement engage in the business of refrigeration or the business of airconditioning as principal or agent anywhere in the Province of British Columbia, "except on behalf of the Company as hereinbefore provided", but nothing contained in the agreement was to prevent Mr. Sinclair "from practising his profession as a Registered Professional Engineer (Mechanical)".

By notice dated the 30th of January, 1951, the appellant "cancelled and determined" this employment as of April 30 following, and advised the respondent that his services

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would no longer be required. With the notice there was enclosed a cheque for $600, being four months' salary. The notice did not purport to affect the appellant's obligation to pay into the pension fund.

The respondent refused to acquiesce in this cancellation and this action followed, the respondent asking for judgment declaring the agreement to be subsisting and for damages for breach of contract in the amount of future salary. In its defence, the appellant set up that it was entitled to cancel the "retainer" of the respondent by reasonable notice and that, in any event, it had terminated the agreement for cause. These defences were not sustained in either court.

The learned trial judge considered the respondent was entitled to damages for wrongful dismissal, which he fixed at $3,000. In the Court of Appeal, Smith J.A., concurred with the learned trial judge. Bird J.A., however, with whom O'Halloran J.A., agreed, considered that the agreement was a "retirement" agreement rather than one of employment, and that the remedy of the respondent was not by way of damages for wrongful dismissal but on the footing that the agreement was still subsisting and could not be terminated without the concurrence of the respondent, the latter being entitled to recover the instalments of salary as such for the full unexpired term of the agreement. The appellant contends that the learned trial judge was right and that the majority in the Court of Appeal erred.

While the agreement of the 27th of November, 1946, had for one of its objects to arrange for the retirement of the respondent, that retirement was only from "the position of manager". In addition, the appellant company agreed to "employ Mr. Sinclair as an engineering and general consultant", the express condition of that employment being that the respondent would to the best of his ability assure to the appellant the continued enjoyment by the latter of its goodwill in British Columbia and that he would be available as consultant to assist his successor in the post of manager in the solution of engineering and business problems.

It is unquestionable, therefore, in my opinion, that the monthly instalments were to be made in consideration of services to be rendered by the respondent, although it was

for the appellant to require the performance of such services from time to time as it saw fit. That being so, as Mr. Starr contends, the contract was an "employment" contract for a fixed term with the usual result that upon repudiation without cause on the part of the employer, the appellant company became liable for the consequent damages with a corresponding obligation on the part of the respondent to mitigate those damages. The law is clearly settled that the remedy of a person in the position of the respondent in such case is to sue for damages. He is not entitled to wait until the termination of the period for which he was engaged and sue for the whole amount of the wages which have fallen due in the interim.

In the case at bar, however, the employment in question was not a full time employment. Not only was the respondent to serve only when called upon, but it was expressly provided that he was to be required to devote only so much of his time and energy as was "consistent with his enjoyment of a life of reasonable leisure and with his retirement from active business." The appellant expressly pleaded that it had "only dispensed with the services of the plaintiff as consulting engineer to the defendant". The respondent was free under the terms of the agreement to practise his profession as a professional engineer on his own behalf.

The only way, therefore, in which it was open to the respondent to mitigate the loss consequent upon the refusal of the appellant to continue to pay him, was to utilize the time made available to him by reason of the appellant's refusal to consult him further; *Cemco* v. *Van Snellenberg* (1), per Rand J., at 128.

In the case at bar the evidence shows that for the first year until the respondent's successor became familiar with his work, there were more calls upon the respondent's time than subsequently proved to be the case. From the nature of things, this was to be expected. The respondent introduced the new manager to existing and prospective customers and was consulted by him from time to time in connection with the business of the appellant. Upon the death of this manager at the end of approximately two years, the new manager had little recourse to the respondent and when he, in turn, was succeeded in the fall of 1950 by

(1) [1947] S.C.R. 121.

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a new appointee, the latter consulted the respondent only once. It therefore appears that the time which the respondent was called upon to devote to the discharge of his duties under his contract with the appellant was insignificant. In my opinion, his acceptance of the supervision of the Victoria Rink job did not properly fall within the terms of the contract between the parties and is not to be considered for present purposes. It was not contended otherwise.

With regard to Mr. Starr's contention that the respondent did nothing to mitigate his damage, I think the respondent's evidence considered as a whole is this. He had his own office where, throughout, he carried on practice as an engineer. While he continued to hold himself at all times prepared to perform the agreement so far as the appellant was concerned, he was at the same time trying to obtain other clients. In holding himself available as a consulting engineer to all the world, including the appellant, he did all that he was called upon to do.

The action coming to trial in October, 1952, the damages necessarily had to be assessed having regard to the fact that somewhat over a year of the contract term was unexpired with the possibility that the respondent might not survive the full period.

The learned trial judge considered that the appellant's breach of the contract between the parties effected a release of the respondent from his covenant in the agreement not to engage in a business competing with that of the appellant and that this fact had a bearing upon the damages. In my opinion, this was not a factor. Under the terms of the agreement, it was clearly provided that the respondent had retired from active business. He was therefore under no obligation to mitigate his damage by entering into any such activity. Even had he done so any profit realized would equally have been outside any question of damages; *Cockburn* v. *Trusts and Guarantee Co.* (1). In fixing the damages at $3,000, I think the learned judge took a too restricted view of the amount to which the respondent was entitled; *Yelland's* case (2). At the date of the trial the amount already past due was $2,700. I would fix the

(1) (1917) 38 O.L.R. 396; 55 Can. S.C.R. 264.

(2) (1867) L.R. 4 Eq. 350.

damages at the sum of $4,500. I do not think the reduction in damages should affect the question of costs.

With this variation, the appeal should be dismissed with costs.

LOCKE J.:—The nature and extent of the duties which the respondent agreed to perform by the agreement of November 27, 1946, are expressed in rather vague terms in that document. The language of paragraph one is to be construed together with the recital which preceded it which said that the company had agreed to the respondent's retirement:—

subject to its retaining the benefits of Mr. Sinclair's business connection and of being able to call on Mr. Sinclair for his engineering and business advice and assistance from time to time as required.

While the language of the first sentence of paragraph one read literally would indicate that the respondent was undertaking to promote the sale of the company's merchandise, products and service throughout the province, the contrary is indicated by the following sentence which, consistently with the language quoted from the recital, provided that Sinclair would be available as a consultant to assist his successor in the solution of engineering business problems and to be only required to devote so much of his time as was consistent with his retirement from active business. The manner in which the language of the contract was understood by the parties is indicated by the fact that when Bews his successor took charge of the Vancouver branch, Sinclair helped him by introducing him to customers of the company and advising him in regard to the business until he was familiar with it and thereafter was rarely consulted. When Bews died in 1948 his successor did not seek to avail himself of Sinclair's advice except on one occasion nor did the appellant until it made the request that he should take charge of the contract for the Victoria Arena on October 21, 1949.

In addition the respondent agreed that if the company had not available on the date fixed for his retirement a suitable person to succeed him as manager such retirement might be postponed for a further maximum period of one year at the company's option, and that he would not at any time after he retired be concerned or interested in the business of refrigeration or air conditioning as principal or agent anywhere in the province of British Columbia except on behalf

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of the company as provided by the agreement provided however that this should not bar him from practising his profession as a professional engineer (mechanical).

On its part the company agreed to pay the respondent what was called a salary of $200 per month for two years from the date of his retirement and thereafter $150 a month until December 10, 1953 and to pay all the costs of maintaining his pension claim under its pension scheme in good standing until he reached his 70th birthday on December 10, 1953, an obligation which entailed its paying an annual sum of $315 into the pension fund, Sinclair being relieved of any liability to make further contributions.

On January 30, 1951, the appellant wrote to the respondent notifying him that his employment and retainer "as a consultant and for other services" as provided in the agreement was thereby "cancelled and determined as of the 30th day of April, 1951" and that his services would no longer be required after that date and further informed him that so far as it was concerned he might accept other employment or retainers after that date.

There are concurrent findings that nothing had been done by the respondent which was inconsistent with the due and faithful discharge of his obligations to the company under the agreement and these findings were not questioned in the argument before us. The only matter to be determined is the nature of the respondent's remedy in the circumstances disclosed by the evidence and the amount to be awarded.

By the statement of claim the respondent alleged that the appellant had purported to cancel the agreement, refused to pay his salary and repudiated all further liability, and asked for a declaration that the agreement referred to was a valid and subsisting agreement, judgment for the instalments to become payable up to the date of the judgment and damages. The statement of defence alleged that the defendant had only dispensed with the services of the plaintiff as consulting engineer and was therefore under no further obligation to pay for such services but had not repudiated any liability with respect to the other provisions in the agreement. Other defences pleaded were that the defendant was entitled to dispense with the services of the

plaintiff on reasonable notice and further that as the plaintiff had acted in a manner contrary to the provisions of the agreement the defendant was entitled to cancel that part of the agreement which related to his employment as consulting engineer.

The learned trial judge being of the opinion that, as framed, the action was in effect an action for specific performance and that upon the authorities this relief could not be granted, held that the respondent's remedy was limited to damages for wrongful dismissal. Dealing with the matter on this basis he gave judgment for damages in the sum of $3,000, an amount equal to the monthly payments stipulated for by the contract which would have accrued up to the date of the trial.

The present appellant appealed to the Court of Appeal and the respondent cross-appealed. Bird J.A., with whom O'Halloran J.A. concurred, considered that the respondent was entitled to recover the full amount of the monthly payments from the end of April, 1951 to December 10, 1953 in accordance with the terms of the contract. Sidney Smith J.A. would have dismissed both the appeal and the cross-appeal. In the result judgment was entered in favour of the respondent for the sum of $4,800 and costs.

I am unable with respect to agree with the learned trial judge that the action as framed was in the nature of an action for specific performance and I do not think that the authorities relied upon dealing with contracts of hiring and service are applicable in determining the rights of the parties under the present agreement. This, as pointed out by Mr. Justice Bird, was not a mere contract of hiring. There is nothing in the evidence to indicate that the respondent might not have retired from the services of the appellant company on reasonable notice, at the time he entered into the agreement of November 27, 1946 or to suggest that if he should elect to retire he might not set up a refrigeration and air conditioning business of his own in British Columbia and have become a formidable competitor of the appellant or have entered into the service of some other employer engaged in that business to the injury of the appellant. While the contract involved at the appellant's option the performance of some services by the respondent it was not in the true sense of the word a mere

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contract of hiring or service but one defining the terms upon which the respondent would, if requested, continue as manager for a further period of time after December 31, 1946 and upon withdrawing from the appellant's employ render it further service in an advisory capacity and refrain from engaging in a competing business.

When the appellant notified the respondent on January 30, 1951 that it proposed to repudiate part of its obligations under the contract the latter promptly rejected the attempted repudiation and informed the appellant that he proposed to enforce his rights under it. As pointed out by Viscount Simons in *Heyman* v. *Darwins* (1), a repudiation of a contract by one party has in itself no legal consequences unless the other party to the contract accepts the repudiation and agrees to treat the contract as at an end. Had the contract been simply one of hiring and service without more the respondent while treating the contract as continuing might have brought an action for damages for the breach of it by discharging him (Smith on Master and Servant, 8th Edition, 121) but this was not such a contract. The notice of January 30, 1951 did no more than say that the appellant did not intend to exercise its right to consult the respondent as it was entitled to do under the contract or pay the amounts agreed upon. The contract continued in full force with the resulting consequences.

In my opinion the respondent was entitled to recover the amounts payable under the terms of the agreement up to the date of the trial and to a declaration that as of that date the agreement of November 27, 1946, was a valid and subsisting agreement. The formal judgment of the Court of Appeal which was delivered on February 10, 1954, awarded to the respondent the full amount which would have become payable up to December 10, 1953. The trial apparently concluded on January 28, 1953. There is thus a period between the last mentioned date and December 10, 1953 during which events may have occurred which would affect the right of the respondent to recover the amounts specified.

I would accordingly vary the judgment appealed from by substituting therefor a declaration that on January 28, 1953, the agreement of November 27, 1946, was a good valid

(1) [1942] A.C. 356 at 361.

and subsisting agreement and direct that the respondent recover the amounts payable under its terms up to and inclusive of that date. If nothing occurred after that date which would affect the rights of the parties the further obligation of the appellant will no doubt be discharged without the necessity of further litigation.

With this variation I would dismiss this appeal with costs.

CARTWRIGHT J.:—I agree with the reasons and conclusions of my brother Kellock except as to the amount at which the damages should be fixed. I would assess these damages at $4,800.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *T. E. H. Ellis.*

Solicitor for the respondent: *G. R. Long Jr.*

THE B. V. D. COMPANY LIMITED .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1955
*Jun. 13, 14
*Oct. 4

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Action to recover subsidies paid by the Commodity Prices Stabilization Corporation—Non-compliance with condition attached to payment—Whether Crown bound by statement of officer—Whether Crown had the right to sue.

The Crown sought a return or reimbursement of "special subsidies" granted by the Commodity Prices Stabilization Corporation, a Crown corporation established under the direction of the Wartime Prices and Trade Board, to the appellant on textiles importations made by it in 1947. The order for these textiles had been placed in May, 1947, but they were not brought into Canada until September and October, 1947. The subsidies were payable subject to all the conditions imposed by the Corporation. The appellant was advised in a letter from an assistant supervising examiner of the Corporation, that the date prior to which the goods had to be invoiced and shipped was December 31, 1947. The goods were not invoiced and shipped at that date. The trial judge maintained the action.

Held: The appeal should be dismissed.

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

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Per Kerwin C.J., Taschereau and Fauteux JJ.: The statement in the letter of the supervising examiner was a sufficient specification, under the statement of policy of the Board, of the date before which the goods had to be sold in order to qualify for the subsidy.

The supervising examiner had no authority to declare a policy for the Board but in any event there was no policy declared in the letter.

The Corporation was the agent of the Crown and a principal has the right to sue in his own name.

Per Rand and Kellock JJ.: The goods in question came within the requirement of sale on or before December 31, 1947. The letter of the supervising examiner was only a warning that the matter rested within the judgment of the Board and that on goods sold after the specified date the subsidy situation would be precisely what the Board might decide. The writer of the letter had no authority to do more than to indicate what that policy might be.

APPEAL from the judgment of the Exchequer Court of Canada (1), Cameron J., maintaining an action to recover from the appellant subsidies paid by the Commodity Prices Stabilization Corporation.

F. B. Chauvin, Q.C. for the appellant.

R. Ouimet, Q.C. for the respondent.

The judgment of the Chief Justice and of Taschereau and Fauteux JJ. was delivered by:—

THE CHIEF JUSTICE:—This is an appeal by The B.V.D. Company Limited from a judgment of the Exchequer Court (1) ordering and adjudging that His Majesty the King, as plaintiff (now the respondent, Her Majesty the Queen), was entitled to be paid by the appellant-defendant $39,126.54 with interest thereon at 5% per annum from February 23, 1950, to the date of judgment. While originally there was some dispute as to the figures, it is admitted that if the respondent is entitled to succeed at all he is entitled to judgment for the amount and interest mentioned.

The Information claimed the $39,126.54 as a return or reimbursement of subsidies granted the appellant on textile importations made by it. The subsidies were paid to the appellant by a Crown corporation—The Commodity Prices Stabilization Corporation (hereinafter called "the Corporation")—in respect of the importation of cotton fabrics, the order for which was placed on May 31, 1947, but which were not brought into Canada until late September and October

(1) [1952] Ex. C.R. 191.

1947, the earliest date of entry being September 26, 1947. Under a system of price controls in force in Canada, Maximum Price Regulations had been established in 1941 and under the authority of an Order-in-Council the Minister of Finance caused the Corporation to be incorporated "With the intent and for the purpose of facilitating under the direction of the Wartime Prices and Trade Board the control of prices of goods, wares and merchandise in Canada". The position of the Board at all relevant times was well known and there is no dispute as to its powers.

On February 22, 1947, the Board issued a "STATEMENT OF POLICY ON SUBSIDIES ON IMPORTED TEXTILES". This referred to the Corporation's Form C-28 relating to what has been termed "general subsidies" with which we are not concerned since it is admitted that what were paid to the appellant were "special subsidies" under a statement of policy issued by the Board on September 13, 1947. Prior thereto the Board issued a statement on June 2, 1947, and listed in Schedule I the "goods eligible for subsidy subject to the limitations and conditions set forth in s. 4(*a*)". The class of importations made by the appellant came within this Schedule. The relevant portions of the statement of policy are as follows:—

1. The payment of subsidies is discretionary, not obligatory; no person has any legal right to an import subsidy or any other subsidy administered by or under direction of the Board. It follows that subsidies shall not be payable, and if already paid may be recovered, on any imports not falling within the conditions of eligibility for import subsidy herein set forth.

.....

3. Eligibility for subsidy within the above classes is limited to those goods listed or described in Schedules I and II hereto when sold in compliance with regulations from time to time made effective by the Board, and subject to the limitations set out elsewhere in this Statement. The Board may from time to time make additions to or deletions from the said Schedules; and goods classified by the Department of National Revenue for Customs purposes under a tariff item not in effect on January 1, 1946, are deemed to be included in Schedule II hereto and are subject to all the limitations applying to that Schedule.

.....

9. (*a*) *General:* From time to time goods may be made ineligible for subsidy by removal from Schedule I or II hereto or may be made eligible for reduced subsidy, with higher maximum prices or suspension from maximum prices being provided concurrently. In such cases the Corporation is prepared to give consideration to applications for special subsidy protection for such goods entered for consumption at Customs after the effective date of the change in status provided such importations arise

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from firm purchase commitments of reasonable character and amount entered into prior to the date of such change but not prior to December 1, 1941. The special subsidy protection which may be available is designed to assure the importer that he will be subsidized, if subsidy is necessary, on a basis appropriate to the price at which in the opinion of the Board such goods can reasonably be expected to be sold in Canada in the changed circumstances.

This special subsidy protection is subject to the following terms and conditions:

(i) The importer must file notice of his intention to apply for the special subsidy on goods imported after the date on which existing subsidies on them have been reduced or removed. He must file this notice with the Corporation at Ottawa on a form provided by the Corporation during the 10 days immediately following the date on which such goods are entered for consumption at Customs.

(ii) The Board will designate a selling price at which in its opinion such goods can reasonably be expected to be sold in Canada under the changed conditions and a corresponding base cost for subsidy purposes. The price so designated will in no case be lower than the maximum price in effect immediately prior to the change in subsidy regulations and will usually be higher.

(iii) A date or dates before which the goods, or products made from them are to be sold in Canada if the goods are to qualify for special subsidy protection will be specified by the Board.

(iv) Any subsidy payment under this special protection will be subject to recovery by the Corporation

(*a*) in an appropriate amount in relation to the extent that the actual selling prices of the imported goods or products made from them exceed the prices designated by the Board,

.....

9. (*b*) *Special note on Goods Covered by Validated C-28 Forms:* For the past several months special subsidy protection similar to that described in Clause (*a*) of this Section has been provided by the Statement of Policy on Subsidies on Imported Textiles effective February 24th for importations of cotton yarns and fabrics covered by validated C-28 forms. For all purchases covered by properly validated C-28 forms issued on and before May 31, 1947, this special subsidy protection is not subject to the profit limitation described in Clause (*c*) of paragraph (iv) above. However, on all purchases covered by C-28 forms issued on and after June 2, 1947, the special subsidy protection will be subject to the profit limitation described in that clause. Importers are reminded that to claim the special subsidy protection provided for goods covered by properly validated C-28 forms they must file notice of intention to apply for the special subsidy with the Corporation at Ottawa on Form C-29 during the 10 days immediately following the date on which such goods are entered for consumption at Customs.

The appellant filled in and sent to the Corporation several Forms C-29 referred to in the above statement of policy and stated therein that the date prior to which it would sell the goods was April 30, 1948. In a letter dated October 22,

1947, from an assistant supervising examiner of the Corporation, it was pointed out that the date prior to which the goods had to be invoiced and shipped was December 31, 1947. In my view, this statement in the letter is a sufficient "specification" by the Board under condition (iii) set out in the Board's statement of policy of June 2, 1947.

The subsidies were payable subject to all the conditions which appear in the statement of June 22, 1947, and if ratification of the specification of the date December 31, 1947, in the letter of October 22, 1947, be necessary, it is to be found in what is now stated. It is clear from the evidence that the date December 31, 1947, had been a matter of consideration for some time and in case there could be any doubt as to the conclusion stated in the last paragraph the Board itself on September 12, 1947, issued a further "Statement of Policy on Import Subsidies" containing the following:—

> Referring to the "Statement of Policy on Import Subsidies" effective June 2nd, 1947, as amended, notice is hereby given of the following further amendments to the said statement effective September 15, 1947:
>
> 1° Schedule I is hereby deleted.

As explained in the Board's "Notice to Users of Imported Cotton Fabrics", dated September 13, 1947, the statement of policy had the effect of cancelling regular subsidies. The notice reads:—"Effective September 15, 1947, imported cotton fabrics will become ineligible for regular subsidy and price ceilings will be suspended on all cotton goods". While it is not clear, I am inclined to agree with counsel for the respondent that this includes all subsidies, regular and special, notwithstanding the fact that the word "regular" is used in the notice. In any event, on December 18, 1947, the Corporation sent a notice to importers reading in part as follows:—

> TO IMPORTERS:—
>
> The Wartime Prices and Trade Board has advised the Corporation that effective at the close of business December 31, 1947, no subsidy will be available on goods made ineligible for subsidy and not invoiced and delivered by the importer on or before that date. The Board has instructed the Corporation to recover the subsidy content in the subsidized imported goods listed below, held in inventory at the time (whether in the same condition as imported, in process or in finished state) by the persons or firms who received regular or special subsidy thereon—
>
> Cotton goods, i.e., goods chiefly by weight of cotton.

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There can be no doubt that the goods in question come within the last line of this notice.

The appellant also takes the position that one sentence in the letter of October 22, 1947, was a holding out by the Corporation, and therefore by the Board, that if there would be a price increase by shirt manufacturers after December 31, 1947, "basic costs for special subsidy purposes will be adjusted upwards to reflect the amount of such an increase". In fact, the appellant repaid to the Corporation, or to the respondent, an amount which it calculated was repayable on what it states was its understanding of the meaning of that sentence. It is necessary to set out the whole of this letter:—

> We are in receipt of some 12 C. 29 Forms submitted in triplicate by your good selves in which in Section 4 of the Form we note that you have inserted the date April 30, 1948 as the "date prior to which applicant will sell goods". On the covering Advice Form on which you will be designated apppropriate Basic Costs for special subsidy purposes to be used on any application for subsidy on our Form C4A to be submitted covering these importations we would advise that we shall show in Section (*h*) at the bottom of the Advice Form the date December 31, 1947 as the date prior to which the goods must be invoiced and shipped in order to be priced for subsidy purposes at the figure designated in Section (*f*) of the Advice Form.
>
> At the present time we are able to designate the same basic costs that you have been given by pre-decontrol Price Notifications which take into account the selling price increases effective July 1, 1947. It is evident that such Advice Forms as are issued at the present time on this basis allow you to sell the garments on the same basis of subsidy as that in effect prior to decontrol, so long as the garments are invoiced and shipped prior to December 31, 1947, and that such an agreement will stand irregardless of any adjustments of the Canadian price level for comparable fabrics up to the date of December 31, 1947.
>
> You will appreciate that we are unable to afford subsidy assistance on the same basis as that in effect before September 15, 1947 for any longer period than up to the first of next year, since it is our understanding that no agreement has been entered into with the Wartime Prices and Trade Board by the Shirt Manufacturers to hold the price line at the pre-decontrol level beyond the first of next year. If there is any price increase on an industry-wide basis at that time basic costs for special subsidy purposes will be adjusted upwards to reflect the amount of such an increase.
>
> We have the alternative of holding the Forms C.29 in abeyance until such time as the Canadian market level for the fabric covered is clarified for the first quarter of 1948. However, we feel that you may wish to invoice and ship some of the goods prior to December 31st, 1947 and we advise that upon receipt of the Advice Forms covering the C.29's in question, you are quite free to apply for subsidy on the bases designated on the Advice Forms (showing in Col. J. (*a*) of our Form C4A the basic cost designated in Section (*f*) of the Advice Forms) on all garments

invoiced and shipped prior to December 31, 1947. On any garments invoiced and shipped subsequent to that date we shall have to await clarification of the Board's policy.

I think the trial judge was quite right in deciding that no supervising examiner of the Corporation had the authority to declare such a policy, and I also agree that in any event it is not open to the construction put forward on behalf of the appellant in view of the last sentence in the letter: "On any garments invoiced and shipped subsequent to that date we shall have to await clarification of the Board's policy". The date was, of course, December 31, 1947, and this was a clear and unequivocal notice to the appellant that, if it did not ship and invoice the goods prior to December 31, 1947, it would do so at its own risk.

The final point taken by the appellant was that the proceedings should have been instituted in the name of the Corporation instead of in the name of His Majesty. I am inclined to agree with the trial judge that that issue was not raised in the pleadings but without deciding the point on a question of pleading I am satisfied that the plaintiff was entitled to file the Information. The Corporation was his agent. Undoubtedly the allegation in the Information that the subsidies were paid by the Corporation "for and on behalf of His Majesty" was admitted by the statement of defence and a principal has a right to sue in his own name.

The appeal should be dismissed with costs.

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

RAND J.:—The information in these proceedings was filed by Her Majesty to recover the amount of certain subsidies paid to the appellants under formulations of the War-time Prices and Trade Board, acting generally by the Commodity Prices Stabilization Corporation Limited, to enable them as importers of cotton goods from the United States to continue their trade at the selling prices fixed by the Dominion Government in the early stages of the war. Admittedly there was no legal right on the part of an importer to demand a subsidy; any payment made was voluntary and on the condition that if ultimately the situation in relation to particular goods became changed

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by reason of policy considerations from time to time enunciated, the Government would be entitled to recover the whole or any part of what had been paid.

The communication to the trade of the bases proposed was by means of "Statements of Policy" and beginning with that made on November 25, 1946 there followed various modifications and restatements issued in the months of January, February, June, July, September and December of 1947. The scheme devised provided for a general subsidy on listed commodities, among them cotton goods, for the purposes of the computation of which the Board fixed a basic cost related to actual cost and to the controlled sale price of the products. The actual cost might of course be equal to or greater than that price and with the basic cost so related, the subsidy enabled the trade, in a broad sense, to maintain a supply deemed reasonably required by the country's economy.

Application for leave to import was made on what was known as Form C-28 and in them the quantity, the cost price, the date before which the goods would be imported and the limit date within which they would be sold were set out, and the approval given was limited to what was shown. It was required that the purchase order should be placed within a specified number of days from the receipt of the advice note of approval. Upon the entry of the goods in Customs, they became "eligible" for subsidy and notice of their arrival must have been given within ten days. At first the subsidies were not computed until after the goods had been sold, but this was found to be inconvenient and the practice changed. Thereafter, following importation, application could at once be made.

The applications for importation of the goods in question under Form C-28 were made prior to May 31, 1947. Throughout the first six months of that year the administration had been looking to the withdrawal of both controls and subsidies, and on June 2 a general statement was issued restating the position of the Board toward the rapidly changing conditions. It contained one clause of special significance. It foresaw from time to time the removal of goods from the schedule of those eligible for subsidy and declared that in cases where the entry at customs was made after the date of any change relating to eligibility for the

general or for a reduced subsidy, application for what was called "special subsidy" would be given consideration provided firm purchase commitments had been made prior to the changes. The following sentence expresses the purpose in view:—

> The special subsidy protection which may be available is designed to assure the importer that he will be subsidized, if subsidy is necessary, on a basis appropriate to the price at which, in the opinion of the Board, such goods can reasonably be expected to be sold in Canada in the changed circumstances.

By a notice given by the Board on September 12, Schedule I, annexed to the statement of June 2, which listed cotton goods, was deleted as of September 15, 1947; this was followed on September 13 by a notice to importers of cotton fabrics which dealt with "the recovery of subsidy in inventories". It declared that "effective September 15, 1947, imported cotton fabrics will become ineligible for regular subsidy, and price ceilings will be suspended on all cotton goods." The effect of this was that on cotton goods entered in customs on or after September 15 the regular subsidy was no longer available. Obviously, however, goods imported prior to that time pursuant to applications made under Form C-28 did not lose their eligibility which continued until a limit of time for sale had been declared.

On the other hand, as in the case of the goods with which we are concerned and which were entered after September 15 although ordered prior thereto, since subsidy was not available under Form C-28 new applications became necessary under Form C-29 to be made within ten days of the customs entry. From time to time they were accordingly made and the amount of subsidies referable to the goods covered by them was paid before the end of the year. The recovery of part of that amount is now sought here.

Under date of December 18, 1947, the Corporation issued a notice to importers upon the interpretation of which the controversy before us largely hinges. The opening paragraph reads:—

> The Wartime Prices and Trade Board has advised the Corporation that effective at the close of business December 31, 1947, no subsidy will be available on goods made ineligible for subsidy and not invoiced and delivered by the importer on or before that date. The Board has instructed the Corporation to recover the subsidy content in the subsidized imported

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goods listed below, held in inventory at the time (whether in the same condition as imported, in process or in finished state) by the persons or firms who received regular or special subsidy thereon—

Cotton goods, i.e., goods chiefly by weight of cotton . . .

Mr. Chauvin strenuously contends that his goods had not, prior to that date, been "made ineligible for subsidy", and that consequently he did not come within the requirement of sale on or before December 31, 1947. Strictly speaking, and if we give the same meaning to each use of the word "subsidy", it is a contradiction in terms to speak of a subsidy payable on goods "made ineligible for subsidy". Goods could be made ineligible either by specifying a date on or before which they must be imported as was done on September 13, or on or before which they must be disposed of as in the notice we are dealing with. To give the sentence intelligibility, therefore, we must look to the prior statements of policy in the light of which and the developing modifications, that final communication was made.

In the notice of September 13 it was stated that as it was desirable to stabilize cotton prices at existing levels, the Board was prepared to forego the recovery of subsidy in inventories as at the date of decontrol (September 15) provided the existing ceiling prices were not increased until the inventories of subsidized fabrics had been exhausted; and that being the case in relation to cotton fabrics, it announced that the Corporation would seek to recover subsidy in inventories only in cases where and to the extent that the prices were increased after decontrol. Up to December 31 the prices on fabrics were not altered, and consequently the period for the allowance of regular subsidies continued to that date.

The appellant having made application after September 15 for subsidy on Form C-29, the goods received by it after that date were in fact eligible for subsidy. When the statement of December 18 was issued, the subsidy available generally was related both to goods imported prior to September 15 under Form C-28 but as yet unsold, and to goods imported after that date under Form C-29. In the one case it was "regular" and in the other "special".

In the light of these circumstances, then, the meaning of the first sentence of the notice of December 18 becomes clear. "Goods made ineligible for subsidy" refers to goods removed from Schedule I and declared ineligible when

imported on or after September 15 by the notice of September 13. But the expression "no subsidy will be available" refers obviously both to regular subsidy on goods imported before September 15 and special subsidy on certain goods importer thereafter. In both cases, then, it was declared that the goods must be invoiced and delivered by the importer on or before December 31.

That is confirmed beyond controversy by the second sentence where it states that the Board has instructed the Corporation to recover the subsidy contained "in the subsidized imported goods" held in inventory on December 31 by the persons or firms "who receive regular or special subsidy thereon". There is further confirmation of this by the supplementary note of December 27 which extends the date December 31, 1947 to January 31, 1948 but declares that the change does not in any way affect Form C-29. This means that as to goods carrying special subsidy the date December 31 remains. The notice, therefore, expressly applies to the goods here in question.

Against this is raised certain advice contained in a letter to the company dated October 22 and signed by Shaver, Assistant Supervising Examiner of the Corporation. After acknowledging receipt of some twelve Forms C-29, he calls attention to the fact that the date "prior to which the applicant will sell the goods" is entered on the applications as April 30, 1948. He indicates that on the advice form to be returned the date within which the goods must be sold will be shown as December 31, 1947. Then he proceeds:—

> You will appreciate that we are unable to afford subsidy assistance on the same basis as that in effect before September 15, 1947 for any longer period than up to the first of next year, since it is our understanding that no agreement has been entered into with the Wartime Prices and Trade Board by the Shirt Manufacturers to hold the price line at the pre-decontrol level beyond the first of next year. If there is any price increase on an industry-wide basis at that time basic costs for special subsidy purposes will be adjusted upwards to reflect the amount of such an increase.
>
> We have the alternative of holding the forms C.29 in abeyance until such time as the Canadian market level for the fabric covered is clarified for the first quarter of 1948. However, we feel that you may wish to invoice and ship some of the goods prior to December 31, 1947 and we advise that upon receipt of the Advice Forms covering the C.29's in question, you are quite free to apply for subsidy on the bases designated on the Advice Forms (showing in Col. J(*a*) of our Form C4A the basic cost designated in Section (*f*) of the Advice Forms) on all garments invoiced

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and shipped prior to December 31st, 1947. On any garments invoiced and shipped subsequently to that date we shall have to await clarification of the Board's policy.

It is urged that in reliance upon this language the goods imported were not disposed of before the end of the year as they might have been, and that it results in depriving the company of the subsidy benefit which it could have earned. That basis could operate only as an estoppel by promise; whether or not such a legal device can, in any circumstances, be raised against the Crown, I have no doubt that the present circumstances do not admit of it. The last sentence of the letter gives warning that the matter lies within the judgment of the Board and that on goods sold after the specified date the subsidy situation will be precisely what the Board may decide. That was simply stating the known fact and the determination of the Board was contained in the statement of December 18. The absolute administrative power over these matters was committed to the Board; the justification was the emergency; the object of the administration was to be achieved by fair dealing with those affected by it. The prescriptions and conditions from time to time laid down were not hard and fast rules; they enunciated provisional bases which, in an administrative manner, would guide the Board. Shaver had no authority in the admitted absence of a declaration by the Board to do more than to indicate what the policy might be. The condition of the subsidy, as already observed, was that recovery could be made when resulting from rulings of the Board. The meaning of the ruling made in respect of the matters in controversy, that of December 18, is not open to doubt, and the ground for the recovery is established.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Walker, Martineau, Chauvin, Walker & Allison.*

Solicitor for the respondent: *Roger Ouimet.*

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*Apr. 27, 28, 29
*May 2, 3
*Oct. 19

HENRY BIRKS & SONS (MONTREAL) LIMITED AND OTHERS (*Plaintiffs*) .. APPELLANTS;

AND

THE CITY OF MONTREAL (*Defendant*) RESPONDENT;

AND

THE ATTORNEY GENERAL OF QUEBEC ..... INTERVENANT.

HENRY BIRKS & SONS (MONTREAL) LIMITED AND OTHERS (*Plaintiffs*) .. APPELLANTS;

AND

THE ATTORNEY GENERAL OF QUEBEC (*Intervenant*) ..... RESPONDENT;

AND

THE CITY OF MONTREAL ..... DEFENDANT.

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

Constitutional law—Provincial statute—Municipal by-law—Closing of stores on Holy Days—Whether legislation ultra vires—Criminal law—In relation to religion—Freedom of religion—The Early Closing Act, R.S.Q. 1941, c. 239—Act to amend the Early Closing Act, 1949, 13 Geo. VI, c. 61—B.N.A. Act, 1867, ss. 91 and 92—By-Law 2048 of the City of Montreal.

Held: The Quebec Statute, 13 Geo. VI, c. 61, purporting to authorize municipal councils of cities and towns to pass by-laws for the closing of stores on New Year's Day, the festival of Ephiphany, Ascension Day, All Saints' Day, Conception Day and Christmas Day, is *ultra vires* and accordingly By-Law 2048 of the City of Montreal passed under the said statute, is invalid.

(Judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec, Q.R. [1954] Q.B. 679, reversed).

Per Kerwin C.J., Taschereau, Estey, Cartwright, Fauteux and Abbott JJ.: In its true nature and character, the impugned statute authorizes municipal councils to compel Feast Day observance. Similar legislation in England is, as is Sunday observance legislation, assigned to the

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

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domain of criminal law. Furthermore, in its essence, the statute is prohibitory and not regulatory. As such, it is beyond the legislative competence of the legislature as infringing on criminal law. In these views, neither the abstinence of Parliament to legislate in the matter nor the territorial restriction as to the operation of the legislation can validate the same.

Per Rand J.: The history of the legislation relating to Sundays and Holy Days demonstrates their association, and the prohibition here, with sanctions, of carrying on business on days given their special and common characteristic by Church law being in the same category as the law of Sunday observance, is, likewise, within the exclusive field of the Dominion as criminal law.

The statute was also enacted in relation to religion since it prescribed what is in essence a religious obligation and, therefore, was beyond the provincial authority (*Saumur* v. *City of Quebec* [1953] 2 S.C.R. 299).

Per Kellock and Locke JJ.: The division of jurisdiction in 1867 by ss. 91 and 92 was on the footing of what would be understood by an English legislature at that time as falling within the domain of criminal law, and legislation in relation to Sundays and Holy Days at that time in England was part of the criminal law, and accordingly exclusively within the jurisdiction conferred upon Parliament by s. 91(27).

Even if it could be said that such legislation is not properly "criminal law", it would still be beyond the jurisdiction of a province as being legislation with respect to freedom of religion.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), reversing, Galipeault C.J.A. and Barclay J.A. dissenting, the decision of the trial judge declaring ultra vires the legislation and the by-law impugned.

J. A. Prud'homme, Q.C., G. A. Elder, Q.C. and C. A. Geoffrion for the appellants.

C. Choquette, Q.C. and *P. E. Belanger* for the City of Montreal.

L. E. Beaulieu, Q.C. for the Attorney General of Quebec.

The judgment of the Chief Justice, Taschereau, Estey, Cartwright, Fauteux and Abbott JJ. was delivered by:—

FAUTEUX J.:—Les faits donnant lieu à ce litige sont simples. En 1949, la Législature du Québec adoptait la loi

(1) Q.R. [1954] Q.B. 679.

13 Geo. VI c. 61 pour amender l'article 2 de la loi intitulée "Loi de la fermeture à bonne heure" (S.R.Q. 1941 c. 239), en y ajoutant l'article 2a édictant que:—

Le conseil municipal peut ordonner, par règlement, que ces magasins soient fermés toute la journée le premier jour de l'an, à la fête de l'Épiphanie, de l'Ascension, de la Toussaint, de l'Immaculée-Conception et de Noël.

S'autorisant de cet amendement de 1949, le Conseil de la cité de Montréal adoptait, le 2 novembre 1951, le règlement 2048 pour modifier le règlement 695, déjà établi sous l'autorité de la "Loi de la fermeture à bonne heure", en y insérant après l'article 2, l'article 2a décrétant que:—

Les magasins dans la cité de Montréal seront fermés toute la journée les jours de fête suivants: le premier jour de l'an, l'Épiphanie, l'Ascension, la Toussaint, l'Immaculée-Conception et Noël.

Dans une action conjointe, les appelants, contribuables et exploitants de magasins dans la cité, demandèrent que ce règlement 2048, aussi bien que la loi de 1949 en autorisant l'adoption, soient déclarés *ultra vires* respectivement de la Cité et de la Législature. Cette demande fut contestée par la Cité et le Procureur Général de la province.

Le Juge de première instance, vu la similitude des termes du règlement et de la loi, en est venu à la conclusion—et, sur ce point, les parties sont d'accord—qu'une décision sur la constitutionnalité de la loi serait décisive du litige; et ayant formé l'opinion que les objet et but véritables de la loi de 1949 étaient de contraindre, dans une certaine mesure, à l'observance des jours de fête religieuse y mentionnés, et qu'en Angleterre, pareille législation participait, au même titre que la législation relative à l'observance du dimanche, du domaine du droit criminel, décida qu'en raison du paragraphe 27 de l'article 91 de l'*Acte de l'Amérique Britannique du Nord (1867)*, la Législature n'avait pas la compétence législative en la matière et déclara la loi de 1949 (13 Geo. VI c. 61) et le règlement 2048 *ultra vires* respectivement de la Législature et de la Cité.

Porté en appel (1), cet arrêt fut cassé par un jugement majoritaire affirmant la validité de la loi et du règlement et ce pour des raisons diverses dont la seule commune aux trois Juges de la majorité, MM. les Juges Marchand, Casey et Rinfret, est qu'en raison des termes de l'*Acte de Québec*

(1) Q.R. [1954] Q.B. 679.

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(1774), la législation en Angleterre sur l'observance des jours de fête religieuse n'a jamais été introduite au Canada. M. le Juge en chef Galipeault, dissident, déclare simplement confirmer le jugment de première instance; et M. le Juge Barclay, également de la minorité, accepte, en substance, dans ses raisons de jugement, le raisonnement et la conclusion du Juge de première instance. D'où le pourvoi devant cette Cour.

Nature et caractère de la loi de 1949. Sur ce point qu'il est d'abord essentiel de déterminer pour pouvoir décider ensuite sous quel paragraphe des articles 91 ou 92 de l'*Acte de l'Amérique Britannique du Nord* se classe la loi incriminée (*Russell* v. *The Queen* (1)), les parties ont soumis les prétentions suivantes:—D'une part, disent les appelants, l'objet de la loi est d'ordre moral et religieux et le but poursuivi est la promotion de l'observance des jours de fête religieuse, autres que les dimanches, dans la province de Québec dont la population est, de façon prédominante, catholique. D'autre part, le Procureur Général soumet que cette loi tend à adoucir les conditions de travail des commis dont l'emploi consiste à vendre des marchandises au public, en leur accordant six jours additionnels de congé. Enfin, la Cité prétend que le véritable but de la réglementation autorisée est que tous les magasins dans la cité soient ouverts ou fermés à la même période de temps dans le meilleur intérêt des propriétaires de magasins, et qu'ils soient fermés durant certaines heures et certaines journées pour le bien-être de leurs employés.

Il est à peine nécessaire de rappeler que suivant la jurisprudence du Comité Judiciaire du Conseil Privé, il n'est pas toujours suffisant pour déceler la nature et le caractère d'une loi dont la constitutionnalité est attaquée, de s'arrêter à la détermination de son effet légal mais qu'il faut souvent rechercher dans le texte de la loi, dans son historique, dans les faits établis au dossier ou ceux tenus comme étant généralement de la connaissance judiciaire, s'il n'est pas de raisons de supposer que l'effet légal n'établit pas véritablement la nature, le but et l'objet de la loi. (*Russell* v. *The Queen* (1); *Union Colliery Co.* v. *Bryden* (2); *Attorney-General for Ontario* v. *Reciprocal Insurers and Others* (3);

(1) (1882) 7 A.C. 829. (2) [1899] A.C. 580.
(3) [1924] A.C. 328.

Attorney-General for Alberta v. *Attorney-General for Canada* (1); *Attorney-General for Alberta* v. *Attorney-General for Canada* (2); *Canadian Federation of Agriculture* v. *Attorney-General for Quebec and Others* (3)).

La loi avant l'amendement de 1949. Adoptée en 1894 (57 Vict. c. 50), "La loi de la fermeture à bonne heure" fut d'abord amendée en 1904 (4 Édouard VII c. 29) pour autoriser l'imposition d'une sanction pénale et, de nouveau, lors de la revision des statuts en 1925 (S.R.Q. 1925, c. 127) pour établir le titre sous lequel elle pouvait être citée; c'est sans autre changement qu'elle fut ensuite reproduite aux Statuts Revisés de 1941 (S.R.Q. 1941, c. 239). En somme, et dans l'état où elle se trouve avant l'amendement de 1949, seul l'article 2 est de droit substantif; il y est prescrit que:—

> Dans toute municipalité de cité ou de ville le Conseil municipal peut faire, amender ou abroger les règlements ordonnant que, pendant toute ou partie de l'année, les magasins d'une ou de plusieurs catégories dans la municipalité, soient fermés et restent fermés chaque jour ou quelque jour que ce soit de la semaine, après les temps et heure fixés et déterminés dans ce but par ledit règlement; mais les temps et heure ainsi fixés et déterminés par tel règlement ne doivent pas être plus tôt que six heures du soir, ni plus tard que sept heures du matin.

Cette loi, d'application générale, habilite donc tout Conseil municipal de toute municipalité de cité ou de ville, dans la province, de réglementer, comme le titre de la loi l'implique, la fermeture à bonne heure des magasins. Mais, on le remarquera, la Législature n'y autorise pas une fermeture durant toute la journée mais précise, au contraire, qu'aucune fermeture n'est autorisée entre sept heures du matin et six heures du soir; de plus, le choix des jours où cette fermeture peut être ordonnée reste à l'entière discrétion du Conseil municipal de chaque municipalité, discrétion dont l'exercice, suivant la loi, ne s'inspire ni s'entrave d'aucune considération d'ordre national, religieux ou autre. Attaquée et considérée dans *City of Montreal* v. *Beauvais* (4), la constitutionnalité de cette loi fut affirmée par cette Cour. A l'audition, on supporta la validité de cette loi d'avant 1949 en invoquant les paragraphes 13 et 16 de l'article 92 donnant aux Législatures le pouvoir exclusif de légiférer respectivement sur les droits civils et sur toute matière purement locale et de nature privée, dans la province, alors que

(1) [1939] A.C. 117.
(2) [1943] A.C. 356.
(3) [1951] A.C. 179.
(4) (1909) 42 Can. S.C.R. 211.

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pour soutenir l'invalidité, on prétendit que la législation tendait à réglementer le commerce au sens du paragraphe 2 de l'article 91. Écartant cette dernière prétention comme mal fondée, cette Cour en vint à la conclusion que, s'il était discutable de pouvoir affirmer avec justesse qu'il s'agissait de droits civils, il n'y avait aucune raison de décider qu'il ne s'agissait pas d'une matière strictement locale et de nature privée.

La loi avec l'amendement de 1949. La loi demeure toujours d'application générale et habilite, en plus, le Conseil municipal de toute municipalité de cité ou de ville dans la province à ordonner, à des jours spécifiés, et pendant les vingt-quatre heures de tels jours, la fermeture des magasins. En fait, il est avéré, et les intimés ne le contestent pas, que les six jours spécifiés par la loi de 1949 sont, suivant le droit canonique, tous des jours d'obligation et, de plus, les seuls jours d'obligation, autres que les dimanches, et qui ne tombent pas nécessairement toujours un dimanche, qui sont célébrés par l'Église catholique au Canada avec, pour les fidèles, une obligation d'observance, de mesure identique à celle imposée par le même droit pour les dimanches. De plus, la durée de la fermeture autorisée par la loi civile pour ces jours de fête religieuse est exactement la même que celle prescrite par la loi religieuse.

Cette mise en contraste de la loi d'avant et d'après 1949, aussi bien qu'une comparaison de la question constitutionnelle telle que posée dans la cause précitée et telle qu'elle se présente en l'espèce, marquent bien, quant au caractère et la nature de la législation, la différence radicale entre la loi d'avant et la loi d'après 1949, et entre la question constitutionnelle posée sous le régime de chacune de ces lois. Aussi bien, et sauf en tant que l'énoncé général de principes en matière constitutionnelle est concerné, la décision de cette Cour dans *City of Montreal* v. *Beauvais* (*supra*) n'est d'aucune pertinence à la solution de cette première question en l'espèce. De plus, et considérant la loi de 1949 en toute objectivité, il est impossible de ne voir dans ce conformisme intégral de cette loi civile à la loi religieuse, qu'un simple accident plutôt qu'une intention manifeste et adéquatement réalisée d'adapter la première sur la seconde en autorisant le Conseil de toute municipalité de cité ou de ville, peu

importe l'importance ou non de sa population, sa composition et son degré d'homogénéité au point de vue de dénomination religieuse, d'astreindre par règlement le propriétaire ou les copropriétaires de magasin, leurs employés s'il en est, et tout le public, à suspendre durant les vingt-quatre heures de ces jours de fête religieuse, toute opération de l'établissement. Le mot "fermés" dans la loi n'a pas le sens restreint que lui donne, par définition, le règlement de la Cité; et cette fermeture, que la loi autorise de décréter, n'est pas non plus assujettie aux exceptions qu'on retrouve aux dispositions du même règlement. L'exercice en plénitude de ce pouvoir donné dans la loi d'ainsi astreindre propriétaires, employés et public dans toute municipalité, n'a d'autre résultat recherché—et il n'est pas besoin d'entrer dans le domaine de la spéculation pour arriver à cette conclusion; cette adaptation intégrale de la loi civile à la loi religieuse manifeste cet objet—que de promouvoir, dans la mesure indiquée, l'observance de chacun de ces jours de fête religieuse qui, au calendrier de toute année, ne tomberait pas le dimanche. Dans ce résultat apparaissent véritablement cette nature et ce caractère de la loi de 1949.

Telle est aussi, sur ce premier point, la conclusion du Juge de première instance et des deux Juges de la minorité en Cour d'Appel. Quant aux Juges de la majorité, d'accord pour rejeter cette conclusion, ils adoptent sur la question des vues contradictoires. L'opinion de M. le Juge Casey apparaît à l'extrait suivant de ses notes:—

> It may be that the Legislature was inspired by the desire to see all the inhabitants of the province of Quebec observe these Feasts and it may be that it regarded this statute as a step in the right direction. But that is only conjecture and when one enters this field then one is permitted to explore other possibilities. Thus the Legislature enacted this law as an amendment to a statute which had been motivated by the desire of municipal councils to control within their own territories the working hours of certain classes and the time during which certain establishments might operate (see remarks of Archibald J. in *Beauvais* v. *Montreal* 30 S.C. 434). I am entitled to assume that the amendment was motivated by the feeling that in certain if not all areas further relief was needed. If the Legislature decided that this further relief consists in the granting of holidays, what could be more logical than to encourage the granting of those holidays on days which the majority regard as Feast Days?

A mon avis, soit dit en toute déférence, ce raisonnement s'inspire d'une interprétation donnée à la loi telle qu'elle était avant l'amendement et non de la loi telle qu'elle est

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devenue après; il ne tient pas compte, par conséquent, de la différence radicale déjà indiquée entre la loi d'avant et d'après 1949 et se conditionne, au surplus, non sur l'existence—car de cela, il n'y a dans le texte de la loi de 1949 ou dans les faits, aucune indication—mais sur l'hypothèse de l'existence d'une intention de la Législature d'accorder des adoucissements additionnels en réduisant les heures de travail de personnes engagées dans l'opération des magasins. Il n'y a donc, sur l'intention de la Législature, aucune conclusion définie mais simplement possible. Dans les vues plus précises soumises à l'audition de la part du Procureur Général, la Législature aurait voulu accorder six jours de congé additionnels aux employés de magasins. Pourquoi pas cinq ou sept ? Pourquoi le nombre des jours indiqué dans la loi et le caractère de ces jours correspondent-ils à tous et aux seuls jours de fête religieuse qui ne tombent pas nécessairement un dimanche ? Pourquoi la Législature n'a-t-elle pas, suivant la pratique législative normalement suivie pour assurer des congés, pourvu à ce que, dans le cas où ces jours de fête religieuse seraient un dimanche, cette fermeture de vingt-quatre heures ait lieu le lundi suivant ce dimanche ? Pourquoi au contraire et en telle éventualité, a-t-on virtuellement maintenu la prohibition de la loi d'avant 1949 de fermer entre sept heures du matin et six heures du soir ? Pourquoi cette loi d'application générale autorise-t-elle la fermeture des magasins, qu'il y ait ou non des employés ? Autant de questions auxquelles seule l'interprétation donnée par le Juge de première instance et ceux de la minorité en Cour d'Appel offre une réponse compatible avec le texte de la loi et les faits établis au dossier ou généralement tenus comme étant de la connaissance judiciaire. Les considérations qui précèdent sur ce point emportent une même conclusion quant aux prétentions déjà indiquées de la Cité de Montréal, lesquelles participent aussi de la substance de celles du Procureur Général.

Pour sa part, M. le Juge Rinfret, refusant de voir dans la législation l'intention d'accorder des congés additionnels, exprime l'avis qu'il s'agit de la réglementation de la vente de marchandises. Cette opinion s'appuie sur les dispositions du règlement de la Cité alors que c'est la validité de la loi qui est en question. Aussi bien, et en tout respect, je ne

puis, pas plus que les intimés d'ailleurs, y souscrire. Dans ses raisons, le savant Juge ajoute l'argument suivant:—

> Je peux, par exemple, facilement imaginer que la province de l'Alberta (ou une autre) aurait le pouvoir de passer une loi qui réglementerait la vente des marchandises le 8 décembre; cette loi serait valide dans l'Alberta, parce que le 8 décembre n'est pas jour de fête religieuse pour la majorité de ses citoyens. Parce que le 8 décembre est fête religieuse dans le Québec, l'on priverait cette province du droit d'exercer une juridiction dont serait investie la province d'Alberta?
>
> Pareille situation me paraîtrait totalement illogique.

Je ne puis trouver, dans cet argument, aucune assistance car la véritable question est de déterminer la nature et le caractère de la législation ou, en d'autres termes, de savoir si la loi incriminée est véritablement une législation tendant à promouvoir l'observance des jours de fête religieuse. Aussi bien, je ne vois pas en quoi il serait illogique qu'à une même question se posant à l'examen d'une législation d'une autre province, il faudrait, à raison d'éléments différents révélés par le texte de la loi et les circonstances de faits, donner une réponse également différente à celle qui s'impose en l'espèce.

Enfin, et aux notes de M. le Juge Marchand, on ne retrouve rien d'explicite sur ce premier point. Le concours qu'il donne généralement aux vues de MM. les Juges Casey et Rinfret saurait difficilement avoir pour objet une approbation de leurs points de vue sur cette première question, puisque celui de l'un contredit celui de l'autre.

Reste à déterminer si cette législation permettant de contraindre, par sanction pénale, l'observance des fêtes religieuses dans la mesure indiquée, participe du domaine du droit criminel, ainsi que l'affirment les appelants et que l'ont décidé le Juge de première instance et ceux de la minorité en Cour d'Appel, ou si, comme le soumettent les intimés et l'affirment les Juges de la majorité, il s'agit de droits civils ou d'une matière strictement locale et de nature privée.

On ne dispute plus qu'une législation sur l'observance du dimanche fait partie du droit criminel au Canada comme en Angleterre et est, comme telle, en notre pays, de la compétence exclusive du Parlement. (*Attorney-General for Ontario* v. *Hamilton Street Railway* (1); *Ouimet* v. *Bazin* (2); *Corporation de la Paroisse de St-Prosper* v. *Rodrigue* (3)). Il n'apparaît pas que le Parlement ait légiféré sur

(1) [1903] A.C. 524. (2) (1912) 46 Can. S.C.R. 502.
(3) (1917) 56 Can. S.C.R. 157; Q.R. 26 K.B. 396.

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l'observance des fêtes religieuses. Mais il est certain qu'en Angleterre, où il y a eu avant et depuis la Réforme, et où il y a encore une telle législation (Voir: (1354) 28 Ed. III cap. XIV; (1448) 27 Hen. VI cap. V; (1464) 4 Ed. IV cap. VII; (1551-2) 5-6 Ed. VI cap. III; (1762) 2 Geo. III cap. XV; (1833) 3 et 4 William IV cap. XLII), cette législation—dont cette loi d'avant la Réforme (1448) 27 Hen. VI cap. V, y est encore en vigueur (Voir: Statute Law Revision Act of 1948; Halsbury's Statutes of England, 2nd ed. (Burrows) vol. 14 p. 1040)—atteste du fait qu'on a considéré sur un même pied l'observance du dimanche et celle des jours de fête religieuse et qu'une telle législation fait partie du droit criminel ou, suivant l'expression du Vicomte Haldane dans *Board of Commerce* (1), à la page 198, est une législation dont le sujet "is one which by its very nature belongs to the domain of criminal jurisprudence." Aucun des Juges de la majorité ne conteste cette proposition; mais soit qu'on l'admette ou qu'on en assume simplement le bien-fondé, on dispose de l'argument qu'en tirent les appelants, savoir qu'il est impossible d'assigner, au Canada, une telle législation à une autre branche du droit qu'à celle dont elle fait partie en Angleterre, en affirmant qu'en raison des dispositions de l'Acte de Québec (1774) et de l'arrêt du Conseil Privé dans *Cooper* v. *Stewart* (2), et de celui de la Cour d'Appel d'Ontario dans *Shea* v. *Choat* (3), cette législation anglaise n'a jamais été introduite au Canada. A mon avis, la branche du droit à laquelle, en raison de sa nature et de son caractère, appartient une législation, et l'application ou non de cette législation dans un territoire donné, constituent deux questions absolument étrangères l'une à l'autre, et deux questions à la solution desquelles entrent des considérations totalement différentes. A la vérité et dans cet arrêt du Conseil Privé et dans celui de la Cour d'Appel d'Ontario, il n'y a aucune référence à la première question et la deuxième s'est présentée parce que, dans ces deux causes instituées ailleurs qu'en Angleterre, on recherchait l'application de lois édictées en ce dernier pays et le point à déterminer était de savoir si elles avaient été introduites

(1) [1922] 1 A.C. 191.
(2) 58 L.J. P.C. 93.
(3) (1846) 2 U.C. Q.B. 211.

dans le territoire où on les invoquait. De plus, et en ce qui concerne l'Acte de Québec (1774), il convient, je crois, d'ajouter ce qui suit. Le texte invoqué est le suivant:—

> And, for the more perfect Security and Ease of the Minds of the Inhabitants of the said Province, it is hereby declared, that His Majesty's Subjects, professing the Religion of the Church of Rome, of and in the said Province of Quebec, may have, hold, and enjoy, the free Exercise of the Religion of the Church of Rome, subject to . . .

Je ne vois pas que ce texte soit par lui-même attributif de compétence législative sur la matière indiquée; dans ses termes, il est plutôt suspensif de l'opération de toute loi passée ou à venir, dont l'objet serait d'entraver ou gêner le libre exercice de cette religion. Au surplus, cette assurance donnée spécifiquement aux sujets de Sa Majesté professant la religion indiquée, dans la province de Québec, du droit de l'exercer librement, n'emporte pas la négation d'un droit similaire pour les non Catholiques et n'attribue, encore moins, un pouvoir de légiférer pour astreindre les non Catholiques qui s'y trouvent aux obligations auxquelles les Catholiques sont assujettis par la loi religieuse les régissant. Nous n'avons pas à déterminer, en l'espèce, si les termes de ce statut impérial de 1774 ont l'effet de restreindre, dans son exercice, le pouvoir général subséquemment attribué exclusivement au Parlement par le paragraphe 27 de l'article 91; la seule question étant de savoir si, en raison du caractère et de la nature de l'amendement de 1949, la Législature du Québec a légiféré en matière criminelle et ainsi outrepassé ses pouvoirs.

Il reste donc que, dans la conception du Parlement impérial, une législation pour contraindre à une observance, même relative, des fêtes religieuses, appartient à la branche du droit criminel. On ne peut, sans raison, écarter cette conception qui est virtuellement celle du Législateur lui-même, et de ce même Législateur qui a défini les pouvoirs respectifs du Parlement et des Législatures. Aussi bien, et pour ce premier motif qui me paraît péremptoire, faut-il conclure que cette loi de 1949, en raison du caractère et de la nature qu'il est uniquement possible de lui attribuer, participe du droit criminel.

Indépendamment de cette première raison, je crois qu'il faut également arriver à la même conclusion. Dans *Proprietary Articles Trade Association* v. *A.-G. for Canada* (1),

(1) [1931] A.C. 310.

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Lord Atkin, aux pages 324-5, faisait les déclarations suivantes dont chacune, à mon avis, a, en l'espèce, une remarquable pertinence:—

;and if Parliament genuinely determines that commercial activities which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes. "Criminal law" means "the criminal law in its widest sense": *A.-G. for Ontario* v. *Hamilton Street Railway Company*. It certainly is not confined to what was criminal by the law of England or of any Province in 1867. The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?

Sans doute, la Législature, comme le Parlement, a le pouvoir de prohiber et punir la commission ou l'omission de certains actes; le paragraphe 15 de l'article 92 y pourvoit dans les termes suivants:—

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

Il faut, cependant, donner un sens aux mots "for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section." Et ce qui paraît bien distinguer la nature de l'action ou de l'omission ainsi défendue et punie par la Législature suivant ce pouvoir, et la nature de l'action ou de l'omission défendue et punie par le Parlement en vertu de la jurisdiction exclusive qui lui est donnée, en matière criminelle, au paragraphe 27 de l'article 91, c'est que, dans le premier cas, la prohibition avec sanction pénale est autorisée non comme fin mais uniquement comme moyen d'assurer la réalisation d'un ordre de choses qu'il est de la compétence de la Législature de réglementer et que, de fait, elle réglemente par la loi même qui impose la prohibition et la punition; e.g. la Loi des liqueurs alcooliques S.R.Q. (1941) c. 255, la Loi des véhicules moteurs S.R.Q. (1941) c. 142, etc.; alors que, dans le second cas,—sauf lorsqu'il s'agit de législation de réglementation, e.g. Loi des douanes S.R.C. (1952) c. 58, Loi d'accise S.R.C. (1952) c. 99, où en raison de la procédure prescrite pour la poursuite de la violation, celle-ci est tenue comme criminelle (Loi d'interprétation S.R.C. (1952) c. 158, article 28)—la prohibition et la peine sont imposées, non comme moyens d'atteindre une

fin, d'ordre réglementaire, dénoncée par la loi les imposant, mais en reconnaissance de ce que requièrent, aux vues du Parlement, le bien commun, la sécurité ou l'ordre moral, e.g. le meurtre, au Code criminel, les violations de la Loi sur le dimanche S.R.C. (1952) c. 171, etc. En ces derniers cas, c'est cette prohibition de l'Etat, accompagnée de sanction pénale, qui caractérise comme criminelle, ainsi que l'indique Lord Atkin dans la citation ci-dessus, l'action ou l'omission qui en est l'objet; et c'est ce caractère que nous retrouvons dans la prohibition, accompagnée de sanction pénale, prescrite par la loi de 1949. En ce sens, cette législation, comme celle de l'observance du dimanche, est essentiellement d'ordre prohibitif et non d'ordre réglementaire.

Dans ces vues, ni l'abstention du Parlement à légiférer sur le point (*Ontario Fisheries* (1); *Union Colliery* v. *Bryden* (*supra*), ni la restriction territoriale de l'opération de la loi incriminée (*City of Montreal* v. *Beauvais* (*supra*), au dernier paragraphe à la page 215), ne peuvent valider la loi incriminée.

Je maintiendrais l'appel et rétablirais le dispositif du jugement de première instance; le tout avec dépens de toutes les Cours.

RAND J.:—The statutory provision, on which the appeal is raised, reads as follows:—

> The municipal council may order, by by-law, that these stores be closed all day on New Year's day, on the festival of Epiphany, on Ascension day, All Saints day, Conception day and on Christmas day.

and the question is whether its enactment is a valid exercise of provincial legislative power.

The days mentioned are known as "Holy" or "Feast" days. They are, as the Oxford dictionary puts it, days set apart for religious observance usually in commemoration of some sacred person or event. The celebration is primarily a festival of consecration and rejoicing, in which the idea of worship is central. As stated in Vol. 9 of the Encyclopaedia Britannica at p. 127, the celebration might be "grave or gay, carnal as the orgies of Baal or Astarte or spiritual as the worship of a Puritan Sabbath"; but "it is to be regarded as a festival or Holy Day" so long as it is professedly held in the name of religion.

(1) [1898] A.C. 700.

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For the purpose here and without reference to their historical development, these recognitions and observances are ordained by religious bodies or churches. The Sabbath, the last day of the week, has been claimed by some teachers to be of Divine fiat and Sunday is, to most Christians, its present day equivalent. In the judgments of the Court of Queen's Bench these two days are somewhat confused; but it seems to be clear that Sunday is generally accepted as having been given its memorial character by the resolutions of men. The days enumerated are within the ordination of the Roman Catholic church and the observance of most of them is of religious obligation: thus, according to the Encyclopaedia Britannica, Conception day, December 8, in commemoration of the immaculate conception of the Virgin Mary; Christmas, the day of Christ's birth; New Year's day, His circumcision; Epiphany, January 6, His baptism; Ascension day, His ascent to heaven; All Saints' day, on which the memory of martyrs and saints is kept fresh.

Their compelled observance by any means involves the acknowledgment of the authority of a church to ascribe to them their special character, and of a duty in relation to them. Being the creation of a church, under a secular legislature and in the circumstances here they possess no significance unless by positive legislative enactment; and such an enactment cannot be taken otherwise than as having that character and that duty as the reason and purpose for the enjoined observance.

Centuries have witnessed the struggle between church and state for supremacy in human government which for England and this country was long ago settled. In the course of that strife, legislation forbidding or compelling religious professions or celebrations or creating disabilities was the subject of many statutes. The law relating to Sunday since the Conquest goes back to the reign of Edward III and through three centuries to that of Charles I. As an example, by c. 1 of the first year of the latter's reign, 1625, it was forbidden to have "any meetings of people outside their own parishes on the Lord's Day for any sports or pastimes whatsoever". Today we see the continuance of such enactments in the Lord's Day Act of Parliament.

The association of other "holy" days with Sunday is demonstrated by the history of this legislation. C. 14 of 28 Ed. III, (1354), entitled "Upon which days wooll may be shewed in the staple, and in which not", which remained in force until 1863, treated all holy days alike. In 27 Hen. VI, (1448), a statute still unrepealed, was entitled "Fairs and Markets shall not be holden on Sundays and upon high feast days". In this enactment Parliament was giving effect to the rules of the canon law prescribing the celebration of the principal feast days. In 1464, 4 Ed. IV, c. 7, repealed in 1863, was entitled "Shoemakers prohibited from selling shoes on Sunday and Holy Days". Following the Reformation, c. 56 Ed. VI, still in force, was entitled "An Acte for the keeping of Hollie Daies and Fastinge Daies". Legislation of this nature was paralleled by the jurisdiction of Ecclesiastical courts over such offences as heresy, blasphemy, brawling in churches or churchyards, profaning the Sabbath, etc.

That Sunday observance legislation is within the field of the Dominion as criminal law has long been settled: *Attorney General of Ontario* v. *The Hamilton Street Railway Company* (1). The enactments reflecting the religious struggles of the 14-18th centuries were of public law within the classification under our constitution of Criminal Law: they forbade or enjoined certain conduct under pain of punishment. I cannot distinguish the prohibition here, with sanctions for non-compliance, of carrying on business on days given their special and common characteristic by church law from those of that past. It is in the same category as the law of Sunday observance.

But these considerations show equally that the statute is enacted in relation to religion; it prescribes what is in essence a religious obligation. We are asked to find that the purpose of the legislation was either to give ease from labour to employees or to prevent the sale of goods as a measure of regulating local trade and commerce; but I regretfully find myself unable to treat either of these contentions as having the slightest basis or support in any pertinent consideration. In this aspect, for the reasons

(1) [1903] A.C. 524.

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given by me in the case of *Saumur* v. *City of Quebec* (1), as legislation in relation to religion the provision is beyond provincial authority to enact.

I would, therefore, allow the appeal and restore the judgment at trial with costs in the Court of Queen's Bench and in this Court.

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

KELLOCK J.:—On the question as to the true purpose and object of the legislation, the view of the learned trial judge was that it was to compel, so far as it went, the observance of the days mentioned because of their religious significance. In his opinion, the legislation was of the same nature as that relating to the observance of Sunday or the Lord's Day, both having formed part of the criminal law of England in 1774. He therefore concluded that the subject-matter fell within the exclusive jurisdiction of Parliament under head 27 of s. 91 of *The British North America Act* and was accordingly *ultra vires* the provincial legislature.

This judgment was reversed on appeal (2), Galipeault C.J., and Barclay J., dissenting, and it is relevant to consider the grounds upon which that result was reached by the majority. Marchand J. agreed with Casey and Rinfret JJ., but, in doing so, the learned judge appears to have overlooked that the other two learned judges differed from each other upon the vital point as to the object of the legislation.

Casey J., purporting to found himself upon a passage in the judgment of the Privy Council delivered by Lord Atkin in the *Proprietary Articles* case (3), held that the subject-matter in question was not criminal law for the reason that the only way of determining what acts are crimes "is by asking whether the particular act *has been* declared a crime by Parliament," and Parliament had not so declared.

The learned judge considered also, with which view Rinfret J., concurred, that while legislation with regard to the observance of the Lord's Day forms part of the criminal law of Canada, the days dealt with by the statute here in question were of an entirely different character "Since the Lord's Day is an institution of the Divine Law and it differs

(1) [1953] 2 S.C.R. 299. (2) Q.R. [1954] Q.B. 679.
(3) [1931] A.C. 310 at 324.

radically from Feast Days which have been brought into existence and can be abolished by the church." In his opinion, the English legislation with respect to the days other than Sunday having been enacted when the Church of England was the "established church", although, no doubt, part of English criminal law, could not be taken to have been introduced into Canada along with legislation dealing with Sunday observance as such a view would bring it into conflict with the freedom of worship granted Roman Catholics by the Act of 1774, as subjecting the latter to "legislation designed to enforce the laws of the Anglican Church."

The learned judge came to the conclusion that the purpose of the legislation was merely to grant further relief from work by constituting these days holidays. The legislation was, therefore, in his view, of the same nature as the statute it purported to amend, namely, "early closing" legislation, already held *intra vires* in *Montreal* v. *Beauvais* (1).

Rinfret J., differed from Casey J., on this point. The learned judge based his conclusion upon the definition of the word "closed" *in the by-law,* viz: "not open for the sale of merchandise". In his view an employer could comply with the by-law and at the same time compel his employees to work so long as his store was not open for the purpose of making sales. If, therefore, any employees did not work on such days, that would be because of the volition of their employers and not by the force of the by-law. This consideration, in the opinion of the learned judge, removed from the by-law all character of enforcing religious observance.

It may be observed, however, that the definition in the by-law is not in the statute, and that the learned judge had commenced his inquiry into the question of *ultra vires* by stating that

si la loi provinciale est ultra vires, le règlement sur laquelle il se base est également illégal et nul. L'on a donc, pour les fins de cette cause, abandonné l'arène municipale, pour ne considérer que le domaine provincial.

Neither of the respondents sought to support this view of the learned judge, the Attorney-General in his factum expressly rejecting it. In the opinion of Barclay J., it was this very interpretation of the statute enabling employers

(1) (1909) 42 Can. S.C.R. 211.

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to comply with the by-law by closing their stores so far as sales were concerned but retaining their employees at their posts, which rendered it impossible to contend that the legislative object was to provide additional days of rest for these employees.

Whether or not this be the correct construction of the legislation it is not necessary to decide, and the statute is not to be construed by some limiting provision in the by-law which the statute itself does not authorize. Even if the by-law definition could be said to be declaratory of the statutory intention, it would be erroneous, in my opinion, to say that the interference by the legislation with the ordinary carrying on of the business of a store was not the prime cause of the employees' cessation from work merely because their employers might see fit to put them at some work other than the sale of goods to the public. The legislature is not, in my opinion, to be credited with enacting the legislation from any such standpoint. The effect designed by the legislature must be taken to have been what the normal and natural effect of the legislation would be, namely, to bring about a cessation of work on the part of employees normally engaged in selling merchandise as well as to prevent the buying of such merchandise by the public.

In the view of Rinfret J., the purpose which the legislature had in enacting the legislation was merely the "réglementation de la vente de marchandise." This, however, could equally be said of legislation forbidding the sale of merchandise on Sunday but it has never been held that such a consideration was sufficient to render Sunday observance legislation within the competence of a provincial legislature.

It would appear that had the learned judge not been misled by his reference to the definition in the by-law, he would have been of opinion that the legislation had for its object compulsory abstention from work in order to free the employees for the observance of the days mentioned because of their religious significance. He says:

C'est justement cette élasticité, cette permission donnée au patron de faire travailler ses employés, s'il le désire, ou de leur donner congé, s'il le préfère, qui enlève en même temps au règlement tout caractère d'observance d'une fête religieuse.

Si, de fait, l'on avait passé une véritable loi de chômage; si le chômage, au lieu d'être optionnel et à la discrétion du patron, avait plutôt revêtu le caractère d'obligation pour le patron de faire chômer

l'ouvrier, alors on pourrait dire que véritablement la loi impose le chômage en vue de l'observance d'une fête religieuse, afin de libérer les employés pour leur permettre d'observer la fête religieuse.

Ce n'est pas le cas, l'employé n'est pas libéré, de par l'effet de la loi ni du règlement; s'il l'est, c'est par la volonté de son patron.

The learned judge also found difficulty in reaching the view that the legislation was *ultra vires* for the reason that he considered that in a province where a particular day could not be said to have a religious significance in the minds of any considerable portion of the inhabitants, there would be no ground upon which it could be held to be incompetent for the legislature of such a province so to legislate. His conclusion was that if this be so, then

Ici, l'on pourrait se trouver dans une situation bien cocasse qui permettrait à certaines provinces de légiférer sur certaine matière en certains jours, alors que ce même droit serait refusé à la province voisine.

With respect, this conclusion hardly follows as it is the purpose and object of the particular legislature in enacting the legislation which is the relevant inquiry in cases of this kind.

While the learned Chief Justice gave no expression to the reasons which prompted him to dismiss the appeal, Barclay J., considered that there was no doubt that the object of the legislation was "to enforce the observance by all persons covered by the legislation of the Holy Days or Feast Days therein enumerated at least to the extent of prohibiting shops in carrying on the principal object of their business and preventing the general public from doing their ordinary shopping on those days."

In considering this question, it may first be observed that the days which are dealt with are, like Sundays, all made feast days "of obligation" by canons 1247 and 1248 of the "Codex Juris Canonicus" of the Roman Catholic Church, namely, the day of the circumcision of Our Lord, January 1; Epiphany, January 6; Ascension Day (forty days after Easter Sunday); All Saints Day, November 1; Conception Day, December 8; and Christmas Day, December 25. These days are the only feasts of obligation, other than Sundays, required by the canons to be celebrated on the actual days on which they fall and they are dealt with on exactly the same footing as Sundays. While the celebration of four other feast days is also provided for in canon 1247, their celebration is to take place on the Sunday following the days on which they fall.

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It was also established in evidence that the great majority of the population of the Province of Quebec are adherents of the Roman Catholic faith and it is stated in the factum of the respondent city that it is a matter of public knowledge in the province that "most business men" used to close their establishments on these six days. That factum also contains the statement that the evil at which the impugned legislation is aimed is

> the chaotic situation arising out of the fact that on those statutory holidays, a few storekeepers, used to take advantage of the closing of stores by a great majority of their competitors;

Of all these feast days, only one, namely, Ascension Day always falls on a week-day, Thursday. Each of the others falls upon a Sunday approximately once every six or seven years. One would have expected consistently with modern legislative practice, that had the true purpose of the legislation been to provide holidays, it would have provided that where any of these days fell upon a Sunday, stores should be closed the day next previous or following. The legislation does not so provide. It is concerned with the observance of these days as holy days and not simply as holidays. Moreover, the spacing of the six days chosen hardly suggests that rest and recreation was the object of the legislature but rather that the element which all of these days have in common as feast days was the true reason for their selection. Their choice could hardly have been a matter of accident.

In my opinion, these circumstances clearly indicate that the object of the legislation was not to provide additional holidays for persons engaged in the retail trade but, because of the religious significance of the days to large numbers of people in the province, to compel by law their observance by all storekeepers to the extent at least of prohibiting the buying and selling of merchandise on the days mentioned.

That being the true legislative purpose, the contention of the appellants that the subject-matter falls within the field of s. 91(27) must next be examined.

In the passage in the judgment of Lord Atkin in the *Proprietary Articles* case (1), to which Casey J., referred, his lordship stated that

> Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State.

(1) [1931] A.C. 310 at 324.

The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?

In the view that the subject-matter of the legislation here in question did not form part of the criminal law of England introduced into Canada, it is sought to found upon this statement the conclusion that because Parliament has not legislated on the subject, head 27 of s. 91 does not apply. This was, as already indicated, the view of Casey J.

It is, however, trite to say that jurisdiction conferred by s. 91(27), or any of the other enumerated heads of the section, does not depend upon its exercise by Parliament. This needs no elaboration. It will be found that Lord Atkin was laying down nothing to the contrary but merely pointing out that the "domain of criminal jurisprudence", words used by Viscount Haldane in the *Board of Commerce* case (1), was not fixed.

While the subject-matter of Sunday observance has a legislative history in Canada, there is also a legislative history of both Sunday and religious holy day observance in England going back to early days.

By the Act 1448, 27 Hen. VI, c. 5, there is expressly included among the "high and principal Feasts", the Ascension, the Assumption, All Saints Day, and all Sundays, upon all of which the Act prohibits the holding of fairs and markets and the showing of goods and merchandise. In 1551, by 5 and 6 Ed. VI, c. 3, entitled, "An Act for the keeping Holidays and Fasting-Days", all Sundays, the day of the Feast of the Circumcision (New Year's Day), the Epiphany, the Purification of the Blessed Virgin, the Ascension, All Saints, the Nativity, were enjoined to be kept "Holy-days" and that "none other Day shall be kept and commanded to be kept Holy-day, or to abstain from lawful bodily Labour".

In 1762, by 2 Geo. III, c. 15, s. 7, fish carriages were permitted to travel on Sundays and holy days. Again, in 1833, by 3 and 4 Wm. IV, c. 42, s. 43, it was enacted that none of the days mentioned in the Act of 5 and 6 Ed. VI should be observed in the courts except Sundays, the Day of the Nativity, the three following days and Monday and Tuesday in Easter week.

(1) [1922] 1 A.C. 191 at 198.

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It may be observed that the Act of 1448 is still in force in England, having been amended in 1850 by 13-14 Vict., c. 23, and again in 1948 by 11-12 Geo. VI, c. 62, s. 1, schedule 1, when it was given the short title "The Sunday Fairs Act 1448". Similarly, the statute 5-6 Ed. VI, c. 3, was amended as to its title by the *Statute Law Revision Act* of 1948, 11-12 Geo. VI, c. 62, schedule 2, the title being "The Holy Days and Fasting Days Act, 1551". By the 1948 statute also, the statute 2 Geo. III, c. 15, was repealed and the Act 29 Car. II, c. 7, schedule 1, was amended in a minor respect. This latter Act, in the opinion of Fitzpatrick C.J., in *Ouimet* v. *Bazin* (1), was "part of the criminal law of England declared to be in force by the *'Quebec Act'*, 14 Geo. III, c. 83", while in the view of Anglin J., as he then was, in the same case at p. 528:

> In the criminal law of England, in 1867, was embraced the "Sunday Observance Act", 29 Car. II., ch. 7, and *other restrictive legislation.* 13 Encyc. Laws of Eng., p. 707.

In the work referred to the authors include in their list the Acts of 1448 and 1677.

In *Lord's Day Alliance* v. *Attorney General for Manitoba* (2), Lord Blanesburgh pointed out that for many years after 1867 it had been apparently assumed in Canada that the power of legislating with reference to Sunday observance within a Canadian province was by s. 92 of the Act exclusively committed to the provincial legislatures either under heads 13 or 16, and that appropriate penalties for non-observance might be enacted under head 15, but by the decision of the Judicial Committee in *Attorney General for Ontario* v. *Hamilton Street Ry. Co.* (3), it was authoritatively established that such was not the case, the Ontario statute of 1897, c. 246, being held to be *ultra vires* the province. In the course of his judgment, Lord Blanesburgh pointed out the difference between legislation having for its object the non-observance of Sunday, as the Judicial Committee held was the case with regard to the Manitoba statute there in question, as distinct from the assumption of power on the part of a provincial legislature to enforce by penalties the "observance" of that day. It is a matter

(1) (1912) 46 Can. S.C.R. 502. (2) [1925] A.C. 384 at 390.
(3) [1903] A.C. 524.

for comment that at the time of the decision in the *Hamilton Street Railway* case there was no legislation by Parliament on the subject-matter.

Following the decision of 1903, this court in *Ouimet* v. *Bazin, supra,* held that a Quebec statute prohibiting theatrical performances on Sunday was not of the character of local, municipal or police regulation but legislation designed to create offences against criminal law and consequently not within the provincial sphere.

Further, in *Corporation de la Paroisse de St. Prosper* v. *Rodrigue* (1), a by-law of the respondent municipality prohibiting the opening of restaurants on Sunday and the sale therein of any merchandise was declared *ultra vires* on the ground that such by-law was a direct dealing with Sunday observance, and therefore, an invasion of the domain of criminal law.

If, as Fitzpatrick C.J., and Anglin J., as he then was, considered in *Ouimet's* case, the statute 29 Car II, c. 7, was part of the common law of England introduced into this country in 1774, it is perhaps difficult to conclude that the legislation of 1448 and 1551, in so far as it enjoined the sale of merchandise or the doing of bodily labour, was not also introduced at the same time. As already pointed out, Sundays were treated by this legislation on no different footing from any of the other days specified therein, all being intended to be observed in precisely the same way as holy days.

It is, of course, no objection that the post-reformation legislation was enacted at a time when the Church of England had, legislatively speaking, taken the place of the Roman Catholic Church in England. This fact could not render the legislation inappropriate in Canada in 1774, nor constitute any conflict with the free grant of the exercise of their faith to the King's Roman Catholic subjects in Canada conferred by that Act, except in so far as such legislation might be said to call for the performance of anything inconsistent with the free exercise of that faith. In so far as the legislation enjoined what the canon law enjoined, it could have no such effect.

(1) (1917) 56 Can. S.C.R. 157.

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It is, however, not necessary, in my opinion, to decide the question as to whether the legislation with regard to days other than Sundays was or was not introduced into Canada. The trial judge did not do so. The basis of the appellants' submission is that having regard to the existing state of the law in England in 1867, the division of jurisdiction made by ss. 91 and 92 of *The British North America Act* was on the footing of what would be understood by an English legislature at that time as falling within the domain of "Criminal law". There was then an existing body of law in England with relation not only to Sundays but to feast days which was undoubtedly part of English criminal law and which became, in my opinion, exclusively part of the jurisdiction conferred upon Parliament by s. 91(27). Even if the true view be that this body of law, apart from Sunday observance legislation, was not introduced into Canada in 1774, legislation after 1867 upon that subject-matter could amount to nothing more than an attempt to give the force of law to ideas of religious morality then current in England and sanctioned by the criminal law. If this is to be done, it can only be done, in my opinion, by Parliament.

That legislation prohibiting the sale of merchandise on Sunday has always been recognized in Canada, as in England, as enacted upon moral or religious grounds, is well illustrated by the Statute of Lower Canada of 1805, 4-5 Geo. III, c. 10, which contains the recital that it was enacted "in order, therefore, to remedy such immoral and irreligious practices". If Sunday observance legislation was designed to enforce under penalty the observance of a day by reason of its religious significance, there is no basis for distinction, in my opinion, historically or othewise, with respect to legislation directed to the enforcement of the observance of other days from the standpoint of their significance in any religious faith. Legislation, to employ the language of Duff J., as he then was, in *Ouimet's* case at p. 526:

> . . . enacted solely with a view to promote some object having no relation to the religious character of the day . . .

may well be of a different character.

With respect to the view expressed in the court below that Sunday is of "divine" origin, whereas the other feast days originated with the church, it would appear that, for present purposes at least, there is no such distinction. Both

indiscriminately derive their origin from the Christian faith. While Sunday is often and popularly referred to as the Sabbath, the original Sabbath was, of course, not that day at all. Blackstone long ago pointed out (vol. 4, p. 63) that Sunday became a special object of the attention of Parliament not only because of its significance in the Christian religion but because the keeping of one day in seven "as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state, considered merely as a civil institution". No such twofold significance attaches to any of the six days mentioned in the present legislation. Their significance is based entirely on their religious aspect. To citizens of a faith other than Christian or of no faith, they have no significance. Accordingly, the enforcement of their observation as such by legislation of the character here in question can only be from the standpoint of the religious faith of those citizens to whom they have such significance and legislation from that standpoint or for that purpose is, in my opinion, competent only to Parliament.

Even if it could be said that legislation of the character here in question is not properly "criminal law" within the meaning of s. 91(27), it would, in my opinion, still be beyond the jurisdiction of a provincial legislature as being legislation with respect to freedom of religion dealt with by the statute of 1852, 14-15 Vict., c. 175, Can.

In my opinion, therefore, the learned trial judge reached the right conclusion upon proper considerations and his judgment ought not to have been disturbed. I would therefore allow the appeal with costs here and below.

Appeal allowed with costs.

Solicitors for the appellants: *Geoffrion & Prud'homme.*

Solicitors for the City of Montreal: *Choquette & Berthiaume.*

Solicitor for the A.G. of Quebec: *L. E. Beaulieu.*

1955

*Oct. 31
*Nov. 1
*Nov. 1

OKALTA OILS LIMITED .....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income tax—Assessment nil—Whether right to appeal to Income Tax Appeal Board—"Assessment" in ss. 69a and 69b of the Income War Tax Act, R.S.C. 1927, c. 97.

The word "assessment" in ss. 69*a* and 69*b* of the *Income War Tax Act*, R.S.C. 1927, c. 97, means the actual sum in tax for the payment of which the taxpayer is held liable by the decision of the Minister. If there is no tax claimed by such decision, there is no assessment within the meaning of s. 69*a* and therefore no right of appeal under s. 69*b*.

APPEAL from the judgment of the Exchequer Court of Canada (1), Cameron J., dismissing the appellant's appeal from the decision of the Income Tax Appeal Board.

J. M. Robertson for the appellant.

H. W. Riley, Q.C., J. Boland and *W. R. Lattimer* for the respondent.

The judgment of the Court was delivered by:—

FAUTEUX J.:—Originally assessed for one thousand dollars, in respect of its taxation year ending December 31, 1946, the appellant company, pursuant to section 69*a* of the *Income War Tax Act*, served a notice of objection to the Minister who, upon re-consideration, re-assessed the company at nil dollars. An appeal, purporting to be taken by the latter under section 69*b*(1), to the *Income Tax Appeal Board*, was disallowed and this decision was affirmed by the judgment of the Exchequer Court (1) now before us for review.

At the end of the hearing, the Court, indicating that reasons would be later delivered, dismissed the appeal with costs.

The substantial question considered below was whether, in computing its tax, the appellant had the right to apply the provisions of section 8(6) of the *Income War Tax Act*

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

(1) [1955] Ex. C.R. 66.

relating to certain deductions from taxes and applicable in certain circumstances with respect to drilling and exploration costs incurred on oil wells ultimately found unproductive and abandoned. Upon the consideration of this or any other question related to the merit of this case, we are precluded to enter, for there was no right of appeal from the decision of the Minister to the Board nor, therefore, to the Exchequer Court; the objection taken in this respect, by the respondent, before the Board and again in the Exchequer Court, should have been decided and maintained.

A right of appeal is a right of exception which exists only when given by statute. Under section 69*c*(1) of the *Income War Tax Act*, a right of appeal to the Exchequer Court is given from the decision of the Income Tax Appeal Board; and under section 69*b*(1), a taxpayer who has served a notice of objection to an assessment under s. 69*a* may, after "the Minister has confirmed the assessment or re-assessed", appeal to the Income Tax Appeal Board "to have such assessment vacated or varied."

It is the contention of the respondent that, construed as it should be, the word "assessment", in sections 69*a* and 69*b*, means the actual amount of tax which the taxpayer is called upon to pay by the decision of the Minister, and not the method by which the assessed tax is arrived at; with the result that if no amount of tax is claimed, there being no assessment within the meaning of the sections, there is therefore no right of appeal from the decision of the Minister to the Income Tax Appeal Board.

In *Commissioners for General Purposes of Income Tax for City of London and Gibbs and Others* (1), Viscount Simon L.C., in reference to the word "assessment" said, at page 406:—

> The word "assessment" is used in our income tax code in more than one sense. Sometimes, by "assessment" is meant the fixing of the sum taken to represent the actual profit for the purpose of charging tax on it, but in another context the "assessment" may mean the actual sum in tax which the taxpayer is liable to pay on his profits.

That the latter meaning attached to the word "assessment", under the Act as it stood before the establishment of the Income Tax Appeal Board and the enactment of Part VIIIA

(1) [1942] A.C. 402.

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OKALTA OILS LTD. v. MINISTER OF NATIONAL REVENUE

Fauteux J.

—wherein the above sections are to be found—in substitution to Part VIII, is made clear by the wording of section 58(1) of the latter Part, reading:—

> 58(1). Any person who objects to the *amount* at which he is assessed ...

Under these provisions, there was no assessment if there was no tax claimed. Any other objection but one ultimately related to an amount claimed was lacking the object giving rise to the right of appeal from the decision of the Minister to the Board. Under section 69*a*(1), there is a difference in the wording, as it was in prior section 58(1), but not one indicative of a change of view as to the substance in the matter. In Part VII, which deals with "assessment", a similar meaning is implied in section 54(1) providing that "the Minister shall send a notice of assessment to the taxpayer verifying or altering the amount of the tax . . ." and in section 55, providing that notwithstanding any "prior assessment, or if no assessment has been made, the taxpayer shall continue to be liable for any tax and to be assessed therefore, and the Minister may, at any time, assess any person for tax, interest and penalties . . ." In *Case No. 111 and Minister of National Revenue* (1), a similar objection was made and maintained. No argument was advanced by the appellant herein to justify the adoption of a contrary view in this case.

It was conceded by counsel for respondent—and with this view, we agree—that the action of the Minister in modifying the tax return submitted by the appellant, would have no future binding effect.

The appeal, as indicated, is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Fenerty, Fenerty, McGillivray, Robertson, Prowse & Brennan.*

Solicitor for the respondent: *A. A. McGrory.*

(1) 8 C.T.A.B.C. 440.

LARRY McNEA AND VIVIAN McNEA ..APPLICANTS; 1955 *Oct. 24 *Nov. 15

AND

THE CORPORATION OF THE TOWNSHIP OF SALTFLEET AND OTHERS } RESPONDENTS.

MOTION FOR LEAVE TO APPEAL AND MOTION TO QUASH FOR WANT OF JURISDICTION

Appeal—leave—Amount in controversy—The Supreme Court Act, R.S.C. 1927, c. 35, s. 36.

Whether the amount or value of the matter in controversy in an appeal exceeds $2,000 within the meaning of s. 36 of the *Supreme Court Act* is very often shown sufficiently in the allegations of fact in the statement of claim and in the amount claimed. In the circumstances of the present case, where the trial judge, had he considered the plaintiff entitled to succeed, would have fixed the damages at $500, the extravagant amounts inserted in the statement of claim are no criterion of such amount or value. It was not a case where leave to appeal should be granted.

MOTION by the applicants for leave to appeal to this Court from the judgment of the Court of Appeal for Ontario and MOTION to quash for want of jurisdiction made by the respondents.

C. Dubin, Q.C. for the applicants.

G. F. Henderson, Q.C. for the respondents.

THE COURT:—This is not a case where leave to appeal should be granted.

However, at the suggestion of the Court and with the consent of Counsel, the matter was treated as if the appellant had given notice of appeal *de plano* and the respondent had moved to quash. Very often the allegations of fact set forth in a statement of claim and the amount claimed may be sufficient to show that the amount or value of the matter in controversy in an appeal exceeds $2,000 within the meaning of s. 36 of The Supreme Court Act. This has been

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

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McNEA v. TOWNSHIP OF SALTFLEET AND OTHERS

adopted by the Court as a general rule and is exemplified in *Beaver Dam* v. *Stone* (1). Although there are exceptions as appears from the decision in *Kinkel* v. *Hyman* (2), it cannot be said, in the circumstances of the present case as they were explained, that the amount of damages asked for in the statement of claim is any indication that the amount or value of the matter in controversy exceeds the stated sum.

It appears that the plaintiffs purchased three acres of vacant land in the Township of Saltfleet and moved on it a building for which they had paid $75. They were using this building partly as a residence, but also for storing scrap metal, etc., the male plaintiff being a junk dealer. Upon complaint being made by neighbours, it was found by officials of the municipality that in many respects the building contravened the provisions of the Township Building By-law. The endeavours of the officials to co-operate with the plaintiffs by suggesting modifications of the building were unsuccessful, due to the attitude of the plaintiffs. Thereupon the Council instructed the Building Inspector and Chief of Police to carry out the provisions of s. 16 of the By-law and a notice was accordingly given, failure to comply with which was followed by the building being torn down. If the trial judge had considered that the plaintiffs were entitled to succeed, he would have fixed the total damages at $500. Under these circumstances the extravagant amounts inserted in the statement of claim are no criterion of the amount or value of the matter in controversy.

The motion to quash is granted and the application for leave to appeal is dismissed. There will be costs only as of one motion.

Leave to appeal refused.

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(1) [1932] S.C.R. 405.

(2) [1939] S.C.R. 364.

GULF AND LAKE NAVIGATION COMPANY LIMITED (*Plaintiff*) APPELLANT;

1955
*Jun. 7, 8
*Oct. 4

AND

MOTOR VESSEL *WOODFORD* (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, QUEBEC ADMIRALTY DISTRICT

Shipping—Salvage—Beneficial services rendered at request—Services contributed to eventual salving—Amount of reward.

In an action for salvage services following a maritime collision, the trial judge found that the respondent vessel was in a position of considerable danger up to the time that, at her request, she was taken in tow by the appellant's steamship *Birchton* and that she was brought by the *Birchton* to a position where she remained without damage until finally taken in tow by tugs and brought to port. He concluded that the appellant's services had been of a beneficial nature and had contributed to the eventual salving of the property and should be rewarded as such. Notwithstanding this he assessed the services on a lower basis, because of the fact that the services had been requested and had not been the sole instrument in the ultimate salving.

Held: The fact that, in response to a call for aid, either immediately or through an intermediary, assistance is asked and without more rendered, does not deprive the assisting ship of salvage. The appellant ship fell within the second proposition set forth in the judgment of Phillimore J. in *The Dart* (1899) 8 Asp. M.L.C. 481 at 483, "If a salvor is employed to complete a salvage and does not, but, without any misconduct on his part, fails after he has performed a beneficial service, he is entitled also to a salvage award." If the trial judge had not considered himself bound by what he wrongly conceived to be the applicable principle he would have allowed more than the $12,000 fixed by him. The appeal was therefore allowed and the amount increased to $20,000.

APPEAL from the judgment of the Exchequer Court of Canada, Quebec Admiralty District, Smith J., District Judge in Admiralty, in an action for salvage.

B. F. Clarke for the appellant.

R. C. Holden, Q.C. for the respondent.

The judgment of the Court was delivered by:—

THE CHIEF JUSTICE:—This appeal is concerned with the amount to be awarded the appellants for salvage services rendered the Motor Vessel *Woodford,* her cargo, freight,

*PRESENT: Kerwin C.J. and Taschereau, Rand, Fauteux and Abbott JJ.

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passengers and crew in July 1952. On the 27th of that month, the *Woodford* had come into collision with the S.S. *John A. France,* in dense fog in the St. Lawrence River, as a result of which the former was badly holed in the port-side of her engine room, the engine room became flooded and the vessel was almost immediately deprived of all power. It is unnecessary to set forth in detail all that happened thereafter, because on all substantial issues of fact the trial judge found in favour of the appellants and the respondents have not cross-appealed.

The trial judge found that the *Woodford* was in a position of considerable danger following the collision and up to the time she was taken in tow by the *Birchton,* owned by the appellant Gulf and Lake Navigation Company, Limited. He considered the argument on behalf of the respondents that the position in which the *Woodford* found herself after the towing was more dangerous than her situation had been before the towing commenced and decided that she had been removed from a position of some actual danger and from perils which could have been reasonably apprehended and was brought to a position where she remained without damage until she was finally taken in tow by certain tugs which eventually brought her to port in Quebec. On this point he concludes: "These services were of a beneficial nature and Court finds that they contributed to the eventual salving of the property". With this I agree.

However, he also held that even if it could not be concluded that the services rendered by the *Birchton* contributed to the ultimate salving of the *Woodford* that would not be sufficient to disentitle the appellants to salvage remuneration. He referred to the fact that a request had been made for the appellant's services, but stated that, as already mentioned, he had no doubt that the services rendered by the *Birchton* were in the nature of salvage services and should be rewarded as such. He pointed out that the case was to be distinguished from that of a ship who, without any request, undertakes to perform salvage services, as in the latter event, the right to salvage remuneration is dependent upon the success of her efforts, and that if her services do not bring about, or contribute, to the salving of

the property, it is entitled to nothing, but if successful her reward is greater than it would have been had her services been engaged by the owner of the property.

Mr. Clarke objected that the trial judge having found that the services were of a beneficial nature and had contributed to the eventual salving he should have awarded salvage on the usual basis and not on the lower one which he had adopted. The learned judge stated at p. 255 of the record:

> While therefore the plaintiffs whose services were rendered at the request of the *Woodford* and did not in themselves result in the *Woodford* being brought finally to a place of safety are not entitled to be rewarded to the same extent that they would have been had their services not been requested and had they been the sole instruments in the salving of the vessel, they are nevertheless entitled to a fair reward for hard work and services well, if not effectively, carried out. (*The Benlarig* (1888) 14 P.D. 3, Butt J. at page 6).

There, however, Butt J. decided that there had been a contract with the captain of the *Vesta* to do his best to tow the *Benlarig* to Gibraltar and that he had performed that contract. It is pointed out at p. 41 of the 3rd edition of Kennedy's "The Law of Civil Salvage" that in that case and in *The Cheerful* (1), the general principle of "no success no salvage" was applied somewhat strictly against the claimant.

In any event there was no contract in the present case and it must happen very often that if a ship in distress does not radio for aid there is no opportunity for any other to go to her assistance. The fact that in response to such a call, either immediately or through an intermediary, assistance is asked and without more rendered, does not deprive the assisting ship of salvage. In *The Dart* (2), Phillimore J. says at 483:

> If a salvor is employed to do anything and does it, and the property is ultimately saved, he may claim a salvage award, though the thing which he does, in the events which happen, produces no good effect. If a salvor is employed to complete a salvage and does not, but, without any misconduct on his part, fails after he has performed a beneficial service, he is entitled also to a salvage award. If a salvor is employed to do a thing and does not do it, and no doubt uses strenuous exertions and makes sacrifices, but does no good at all, then it seems to me he is not entitled to salvage.

(1) (1885) 11 P.D. 3.

(2) (1899) 8 Asp. M.L.C. 481.

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In The *Stiklestad* (1), Bateson J. sets for the above extract and concluded that the services rendered by the *Dampfem* to the *Stiklestad* fell within the first of these propositions and not the last. In the present case I think the *Birchton* falls within the second proposition.

In my view the trial judge therefore erred by allowing less than he otherwise would have done if he had not considered himself bound by what he conceived to be the applicable principle. While he noted that, apart from the fact that there was a dense fog, the weather was favourable and the sea calm and that those on board either vessel were not exposed to any great danger, having regard both to the proximity of land and of other vessels, he also pointed out that the towing of the *Woodford*, who was entirely without power and did not have the use of her rudder, was a difficult operation requiring considerable skill and care and that, having regard to the fog and strong currents, the operation involved the risk of damage to the *Birchton*, not only by way of collision but as the result of the extraordinary stress and strain put upon her hull and machinery.

On her arrival at Quebec on July 29, 1952, the combined value of the *Woodford* and her cargo was $2,094,850. It was decided by the Privy Council in *The Amerique* (2), referred to in Kennedy at 159, that the value of the property salved should not "raise the quantum to an amount altogether out of proportion to the services actually rendered". The tugs that took the *Woodford* to Quebec from the position in which she was finally left by the *Birchton* will have claims either for towing or for salvage and this is a circumstance that must be borne in mind. At the same time the first salvors should not be treated niggardly. In Kennedy at p. 209 it is stated:—

> Where the services of the different sets of salvors have not begun together, but a second set of salvors has either, with the consent of the first, joined at a later stage in the prosecution of the salvage adventure, or has taken up a salvage service which the first set of salvors, after rendering some assistance, has been obliged by the force of circumstances, and without fault on its part, to discontinue, the relative share of each set in the total award will be more or less affected by the consideration that the first salvors, if they have acted meritoriously, are on grounds of public policy, always to be treated with especial liberality in the apportionment. For such liberality is in two different ways of general benefit.

(1) [1926] P.D. 205. (2) (1874) 6 P.C. 468.

It serves, in the first place, to encourage that adventurous promptitude in rendering assistance to life or property in distress at sea which is always praiseworthy, and is often necessary for the accomplishment of the rescue. It serves, in the second place, to prevent a jealousy of second salvors which might otherwise exist, and tempt first salvors, injuriously to the interests to be salved, to shun co-operation when co-operation would ensure, or, at least, materially expedite, the success of the salvage undertaking.

To the same effect is the 2nd edition of Halsbury, Vol. 30, p. 910, para. 1234.

The trial judge allowed $2,199.82 as the cost of repairing the damage which the *Birchton* sustained during the towing operations and for out-of-pocket expenses. In view of what I conceive to be his error of principle, the sum of $12,000 awarded by him for salvage should be increased. It is always a difficult matter to fix a proper amount, but, after considering the cases to which we were referred and the circumstances in the present instance, I think that an allowance of $20,000 should be made. The appeal should be allowed with costs and, in lieu of the judgment below, judgment should go for the appellants in the sum of $22,199.82 and costs. The provision that the cost involved in furnishing bail in excess of $50,000 should be paid by the appellants may stand.

Appeal allowed with costs.

Solicitors for the appellant: *McMichael, Common, Howard, Ker & Cate.*

Solicitors for the respondent: *Heward, Holden, Hutchison, Cliff, McMaster & Meighen.*

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*May 4, 5, 6
*Nov. 15

ESYMIER CHAPUT (*Plaintiff*) ..... APPELLANT;

AND

EDMOND ROMAIN, LINDEN YOUNG and ROGER CHARTRAND (*Defendants*) ..... RESPONDENTS;

AND

THE ATTORNEY GENERAL OF QUEBEC ..... INTERVENANT;

AND

THE ATTORNEY GENERAL OF CANADA ..... INTERVENANT.

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

Damages—Religious meeting in house dispersed by police—Jehovah's Witnesses—Whether house owner has recourse against police officers—Moral damages—Provincial Police Force Act and Liquor Police Force Act, R.S.Q. 1941, c. 47—Magistrate's Privilege Act, R.S.Q. 1941, c. 18—Art. 1053 Civil Code—Art. 88 Code of Civil Procedure—Criminal Code, ss. 199, 200.

Acting on orders from their superior, the respondents, members of the provincial police, broke up an admittedly orderly religious meeting conducted by a minister of Jehovah's Witnesses in the appellant's house, seized a Bible, some hymn books and a number of booklets on religious subjects, and ordered those present to disperse. The entry and the seizure were made without a warrant. No charge was at any time laid against any of the participants including the appellant and the items seized were not returned.

The appellant took action against the three police officers for damages and for the value of the articles seized. This action was dismissed by the trial judge and by the Court of Appeal.

Held: The appeal should be allowed and the damages assessed at $2,000.

Per Kerwin C.J., Taschereau and Estey JJ.: The respondents committed an illegal act: a violation of ss. 199 and 200 of the *Criminal Code*, by obstructing a minister of Jehovah's Witnesses in officiating at a religious meeting.

The Provincial Police Force and *Liquor Police Force Act* and *The Magistrate's Privilege Act* afforded the respondents no protection. These Acts do not relieve the authors of a delict or quasi-delict from the

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

liability resulting from Art. 1053 C.C. Moreover, they grant certain privileges only when good faith is established by the evidence, which is not the case here. They, therefore, do not apply.

As the action of the respondents was forbidden by law, the defence of reasonable and probable cause cannot be invoked, nor in this particular case, can the defence that the respondents acted by order of a superior officer be raised. The appellant had the indisputable right to convene such a meeting at his house. In this country, there is no state religion and all denominations enjoy the same degree of freedom of speech and thought.

The action instituted by the appellant is not barred by any Quebec statute, and the appellant is entitled to moral damages. In the Province of Quebec, exemplary or punitive damages are not recognized. Damages that may be awarded in such a case as the present are of an exclusively compensatory nature.

Per Rand and Kellock JJ.: The *Magistrate's Privilege Act* and the *Police Force Act* provided no substantive defence to the actions of the respondents. Furthermore, from a procedural point of view, the *Magistrate's Privilege Act* had no application, since there was not only a total absence of authority for the conduct of the respondents but such conduct was specifically prohibited by law.

Per Locke J.: The actions of the respondents were wholly unlawful and criminal in their nature.

The *Provincial Police Force Act* and the *Magistrate's Privilege Act* had nothing to do with the substantive questions raised in the action, and Art. 88 of the *Code of Civil Procedure* was equally inapplicable.

The appellant was entitled to recover substantial general damages.

Per Cartwright and Fauteux JJ.: There was nothing to suggest that any violation of the law had been, was actually or about to be committed by anyone. By no text of law has it been sought to justify the authority assumed, in the circumstances, by the respondents. In itself, the intervention of the respondents was, at the least, unlawful if not criminal, and they must answer for the damages resulting therefrom. The operation of the *Magistrate's Privilege Act* is conditioned upon the existence of good faith and, in its substance, does not constitute a bar to the responsibility decreed under Art. 1053 C.C. The provisions of this special law imply, on the contrary, the application of Art. 1053.

Per Abbott J.: The respondents were acting in good faith and in the execution of their functions when they entered the appellant's house, as the meeting being held there was a public meeting advertised as such. When they dispersed this meeting however, they could no longer be considered in good faith and in the execution of their functions. They had no right to disperse such a meeting, and the *Magistrate's Privilege Act* provided them with no defence either on the merits or from a procedural point of view. The appellant was, therefore, entitled to moral damages.

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APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), affirming the trial judge's decision dismissing an action in damages.

W. Glen How for the appellant.

A. Labelle Q.C. for the respondents.

F. P. Varcoe Q.C., P. M. Ollivier and *D. H. Christie* for the Attorney General of Canada.

L. E. Beaulieu Q.C. for the Attorney General of Quebec.

The judgment of Kerwin C.J., Taschereau and Estey JJ. was delivered by

TASCHEREAU J.:—Le demandeur-appelant est un ministre du culte des Témoins de Jéhovah. Le 4 septembre 1949, un autre ministre qui professe la même religion, se rendit à Chapeau, et là, chez le demandeur, présida à une cérémonie religieuse. Dans le domicile de l'appelant, où étaient réunies environ trente ou quarante personnes, il exposa les doctrines auxquelles il croyait, lut certains passages de la Bible, et la preuve ne révèle pas qu'il n'y ait rien eu de dit qui fut séditieux. Tout se passa dans le calme le plus complet.

La réunion était convoquée pour deux heures de l'après-midi, mais trois-quarts d'heure plus tard, les trois défendeurs, membres de la Police provinciale et du service de la circulation de la Voirie, firent irruption chez l'appelant, ordonnèrent à tous de quitter les lieux, conduisirent le ministre invité Gotthold à Pembroke, et s'emparèrent de la Bible et de toute la littérature qui était sur la table, près de laquelle parlait l'orateur. Tous obéirent à l'odre donné, et se dispersèrent paisiblement.

Quelque temps après, le demandeur Chaput, propriétaire de la maison où se tenait la réunion, institua une action contre les trois policiers, réclama des dommages au montant de $5,000.00 en outre de $5.15, valeur des pamphlets saisis. La Cour Supérieure a rejeté cette action, et la Cour du Banc de la Reine (1) a unanimement confirmé ce jugement.

Le Juge de première instance est arrivé à la conclusion que la responsabilité des trois défendeurs n'était pas engagée. Après avoir cité l'article 7 des Statuts Revisés

(1) Q.R. [1954] Q.B. 794.

de la province de Québec, 1941, c. 18, qui est la "Loi régissant les privilèges des Juges de Paix, des Magistrats et autres Officiers, remplissant des pouvoirs publics", il a décidé que les intimés étaient de bonne foi, alors qu'ils agissaient sur l'ordre d'un officier supérieur. Cet article se lit ainsi:—

> Les juges de paix, officiers ou autres personnes ont droit à la protection et *aux privilèges accordés par la présente loi dans tous les cas où ils ont agi de bonne foi dans l'exécution de leurs devoirs,* bien qu'en faisant un acte, ils aient excédé leur pouvoir ou leur jurisdiction, et aient agi clairement contre la loi.

La Cour du Banc de la Reine a décidé qu'il n'y avait pas mal jugé dans le jugement rendu par la Cour Supérieure et a confirmé ce jugement. M. le Juge Bissonnette, qui a écrit le jugement unanime de la Cour, s'inspire de l'article ci-dessus, et dit que cette disposition mettait sur les épaules de l'appelant le fardeau de prouver la mauvaise foi des intimés de même que, sans cette loi particulière, il lui incombait d'établir absence de cause raisonnable et probable. Il conclut que sur les deux points, l'appelant a nettement failli à cette tâche, et que ceci suffit pour disposer du litige.

Dans leur factum, les intimés ont de nouveau invoqué cet article 7 du chapitre 18 des Statuts Revisés de Québec, et en plus le chapître 47 des mêmes Statuts Revisés qui est la "Loi de la Sûreté Provinciale", mais à l'audition leur procureur a justement affirmé qu'aucune de ces deux lois n'accordait d'immunité à ses clients et a refusé de s'en prévaloir. En effet, la "Loi des Privilèges des Officiers Publics" ne va pas au delà que de dire que les officiers *ont droit à la protection et aux privilèges accordés par la présente loi,* quand ils ont agi de *bonne foi;* mais les privilèges accordés par la loi sont très limités. Ils n'excusent en aucune manière la responsabilité délictuelle ou quasi-délictuelle qui résulte de l'artice 1053 du *Code Civil.* Leur cadre est très restreint. Ainsi, les officiers publics mentionnés à la loi ont droit au bénéfice de l'article 88 du *Code de procédure* civile, qui veut qu'ils ne peuvent être recherchés en justice à raison d'un acte dommageable fait dans l'exercice de leurs fonctions, à moins qu'avis de cette poursuite ne leur soit donné au moins un mois avant l'émission de l'assignation. Après réception de cet avis, ils peuvent offrir de payer une compensation à la partie lésée. Si l'offre est refusée, elle peut

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être renouvelée de nouveau et consignée en Cour, et l'action devra être rejetée quant au surplus, si elle est trouvée suffisante. De plus, l'action doit être institutée dans les six mois qui suivent la commission de l'infraction. En outre, avant d'intenter une action ou de prendre une procédure contre un juge de paix pour dommages-intérêts à raison des actes faits par lui dans l'exécution de ses fonctions, et avant de présenter une requête pour obtenir un bref de certiorari ou un bref de prohibition, le demandeur est tenu de déposer au greffe de la Cour un montant de $50.00 pour garantir des frais qui peuvent résulter de ces procédures. Si le demandeur qui poursuit un officier public, ne se conforme pas aux règles ci-dessus, les dispositions de l'article 177 et suivants du Code de procédure s'appliquent, *mutatis mutandis.* Enfin, au cours de l'instance sur motion du défendeur, le juge peut ordonner au demandeur de produire un dépôt additionnel dont il fixe le montant, et l'instance est alors suspendue jusqu'à ce que le dépôt additionel ordonné par le juge ou le tribunal ait été fait. Un article du même chapitre veut qu'il ne peut être adjugé de frais contre un juge de paix dans aucune instance sur un bref de certiorari ou de prohibition, à moins que sur preuve de mauvaise foi du juge de paix, le tribunal n'en ordonne autrement.

Il me semble clair que cette loi ne protège pas les intimés, et qu'ils ne peuvent l'invoquer pour s'excuser ou justifier les actes qu'ils ont posés. Tout ce que dit la loi, c'est que quand des officiers publics *ont agi de bonne foi,* dans l'exercice de leurs fonctions, ils ne beneficient que des privilèges accordés par ce statut spécial. *Il n'y a pas d'immunité contre les délits ou quasi-délits,* et c'est en conséquence ailleurs que les intimés doivent chercher leur justification, si elle existe.

La "Loi de la Sûreté Provinciale" ne s'applique pas davantage. Elle détermine les devoirs et les fonctions de la Sûreté, les services qu'elle doit rendre, la direction qui lui a été imposée, sa composition, ainsi que les conditions d'admission, de même que les règlements qui peuvent être adoptés. Nulle part y trouve-t-on une clause dont l'effet serait de disculper un officier public qui commet un délit ou un quasi-délit, qu'il agisse ou non dans l'exercice de ses fonctions.

L'appelant a voulu soutenir que ces deux lois étaient *ultra vires* des pouvoirs de la Législature, mais sur le Banc, cette Cour, parce qu'elle pensait que ces législations n'avaient pas d'application à la question essentielle, a refusé d'entendre des arguments qui n'auraient servi qu'à aider à la détermination de questions abstraites et académiques. Les défendeurs ont en plus prétendu qu'en se rendant à Chapeau comme ils l'ont fait, ils ont agi avec cause raisonnable et probable, et qu'ils n'ont qu'obéi aux instructions de leur officier supérieur.

Ici, un bref examen de la preuve s'impose. Les faits sont substantiellement les suivants:—L'un des défendeurs, Roger Chartrand, au cours du mois de septembre 1949, alors qu'il faisait partie du corps que l'on appelle la Police judiciaire, se tenait en permanence dans le district de Pontiac. La preuve révèle qu'il fut informé par quelques personnes et par le curé Harrington de Chapeau, qu'il devait se tenir chez l'appelant, le dimanche à deux heures de l'après-midi, le 4 septembre 1949, une réunion des Témoins de Jéhovah. Il téléphona à son officier supérieur à Montréal, le sergent Perreau, qui lui dit de se rendre chez l'appelant, de disperser l'assemblée et de saisir tous les pamphlets qui se trouveraient sur les lieux. Il se fit accompagner des deux autres intimés Young et Romain, tous deux attachés à la Sûreté provinciale en qualité d'afficiers de circulation, et qui, pour les fins judiciaires, relèvent de Chartrand. Rendus à Chapeau, vers 2:45 heures P.M. les trois officiers se rendirent chez l'appelant et stationnèrent leur voiture dans sa cour derrière sa maison. Pendant que Romain vérifiait le numéro de la licence de l'automobile de l'appelant, ce dernier sortit de sa maison, et on lui demanda s'il y avait une assemblée à l'intérieur. Ayant reçu une réponse affirmative, ils demandèrent la permission d'entrer, qui leur fut immédiatement donnée. Les intimées se tinrent debout dans la salle durant quelques minutes, et Chartrand demanda alors à Gotthold qui était le prédicateur, de discontinuer l'assemblée. Il s'empara d'une Bible, et avec l'aide de ses deux compagnons il saisit tous les autres pamphlets. Tous les auditeurs se levèrent et quittèrent paisiblement la maison. Il n'y eut aucun trouble, aucune manifestation. Quant à

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Gotthold, on le conduisit en automobile à Desjardinsville, afin qu'il puisse prendre le traversier pour se rendre à Pembroke et retourner en Ontario.

Je n'ai pas de doute que les trois intimés ont posé un acte hautement répréhensible, de nature à blesser profondément le demandeur-appelant. En effet, il avait le droit indiscutable de convoquer dans sa demeure, l'assemblée où se sont réunies environ quarante personnes, et d'y convier Gotthold en sa qualité de prédicateur. Dans notre pays, il n'existe pas de religion d'Etat. Personne n'est tenu d'adhérer à une croyance quelconque. Toutes les religions sont sur un pied d'égalité, et tous les catholiques comme d'ailleurs tous les protestants, les juifs, ou les autres adhérents des diverses dénominations religieuses, ont la plus entière liberté de penser comme ils le désirent. La conscience de chacun est une affaire personnelle, et l'affaire de nul autre. Il serait désolant de penser qu'une majorité puisse imposer ses vues religieuses à une minorité. Ce serait une erreur fâcheuse de croire qu'on sert son pays ou sa religion, en refusant dans une province, à une minorité, les mêmes droits que l'on revendique soi-même avec raison, dans une autre province.

Mais dans les circonstances de la présente cause, on ne faisait qu'exposer des doctrines religieuses, sans doute contraires aux vues de la majorité des citoyens de la localité, mais l'opinion d'une minorité a droit au même respect que celle de la majorité.

Les avocats des intimés ont soutenu que le 4 septembre 1949, date où la réunion fut dispersée, la Cour d'Appel de la province de Québec avait dans une cause de *Boucher* v. *Le Roi* (1), pratiquement déclaré hors la loi les Témoins de Jéhovah. Ceci constitue une interprétation erronée du jugement rendu dans cette cause, d'ailleurs infirmé par cette Cour (2). *Seul un certain pamphlet* distribué dans la province de Québec a été déclaré séditieux par la Cour d'Appel, mais ceci évidemment ne pouvait justifier qui que ce soit de généraliser, et de conclure qu'on doit nécessairement présumer une intention séditieuse à toutes les cérémonies religieuses de cette secte.

(1) Q.R. [1949] K.B. 238. (2) [1951] S.C.R. 265.

A moins qu'il faille se baser sur d'autres raisons que j'examinerai bientôt, pour en arriver à une opinion contraire, il est certain que l'appelant a droit à un dédommagement pour le préjudice subi. En vertu de 1053 C.C. l'obligation de réparer découle de deux éléments essentiels: un fait dommageable subi par la victime, et la faute de l'auteur du délit ou du quasi-délit. Même si aucun dommage pécuniaire n'est prouvé, il existe quand même, non pas un droit *à des dommages punitifs ou exemplaires, que la loi de Québec ne connaît pas,* mais certainement un droit à des *dommages moraux.* La loi civile ne punit jamais l'auteur d'un délit ou d'un quasi-délit; elle accorde une compensation à la victime pour le tort qui lui a été causé. La punition est exclusivement du ressort des tribunaux correctionnels. *French* v. *Hétu* (1), *Guibord* v. *Dallaire* (2), *Goyer* v. *Duquette* (3), *Duhaime* v. *Talbot* (4). Le dommage moral, comme tout dommages-intérêts accordés par un tribunal, a exclusivement un caractère compensatoire.

Il comprend certainement le préjudice souffert dans la présente cause. Il s'entend en effet de toute atteinte aux droits extrapatrimoniaux, comme le droit à la liberté, à l'honneur, au nom, à la liberté de conscience ou de parole. Les tribunaux ne peuvent refuser de l'accorder, comme par exemple, si les *sentiments religieux ou patriotiques ont été blessés.* (Dalloz, Nouveau Répertoire, Vol. 3, page 831).

Mais les intimés prétendent que même si leur acte est répréhensible, ils ont agi avec une cause raisonnable et probable, et suivant les ordres d'un officier supérieur. Le cas qui nous est soumis doit-il être assimilé au cas de dénonciation malicieuse? Dans la province de Québec, une jurisprudence constante et unanime veut que lorsque la preuve révèle l'existence de cette cause raisonnable et probable, et c'est sur le demandeur que repose le fardeau de prouver son absence, la victime ne peut réclamer. *Greffard* v. *Girard* (5), *Desmarteau* v. *Lord* (6), *Bowie* v. *Bolan* (7),

(1) Q.R. (1908) 17 K.B. 429.
(2) Q.R. (1931) 53 K.B. 123.
(3) Q.R. (1937) 61 K.B. 503 at 512.
(4) Q.R. (1937) 64 K.B. 386 at 391.
(5) Q.R. (1922) 33 K.B. 6.
(6) Q.R. (1923) 34 K.B. 130.
(7) Q.R. (1924) 36 K.B. 42.

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Roy v. *Silver* (1), *Plouffe* v. *Leblanc* (2), *Côté* v. *Côté* (3), *Normandeau* v. *Leroux* (4), *Renaud* v. *Dion* (5), *Légaré* v. *Gignac* (6), *Frawley* v. *Keefler* (7).

Mais ici, il existe une distinction qu'il est impératif de faire. Il ne s'agit nullement en effet d'un cas de dénonciation malicieuse, où, même si la victime souffre d'un préjudice, comme conséquence d'un acte erroné, l'auteur du quasi-délit ne peut être recherché en dommages. Si ce dernier a agi avec cause raisonnable et probable; lorsque l'acte dommageable est posé comme résultat d'informations qu'il a reçues d'une autre personne, en qui il a justement raison de mettre sa confiance, il ne commet pas de faute, et sa responsabilité civile n'est pas engagée. Mais il y a faute toutes les fois que l'acte dommageable est *expressément défendu par la loi* (Dalloz, Dictionnaire de Droit, 1951, p. 1108), et dans le cas qui nous occupe la violation de la propriété du demandeur-appelant était une contravention des dispositions du Code Criminel. En effet, en vertu des articles 199 et 200 C. Cr. est coupable d'une offense et passible de deux ans d'emprisonnement, celui qui cherche à détourner ou empêche illégalement un ecclésiastique ou autre pasteur de célébrer l'office divin, ou d'officier par ailleurs dans une église, chapelle, temple, maison d'école *ou autre lieu servant au culte pulic.*

Il me semble impossible de dire en conséquence que les intimés ont agi avec cause raisonnable quand un statut leur interdit de poser l'acte qui leur reproché.

De plus, on ne saurait invoquer le fait que les intimés auraient agi en obéissance à l'ordre d'un supérieur. L'obéissance à l'ordre d'un supérieur n'est pas toujours une excuse. Le subordonné ne doit pas agir inconsidérément, et quand il se rend raisonnablement compte du non-fondé des faits qui ont provoqué l'ordre qu'il a reçu, *il doit reculer.* (Mazeaud, Responsabilité Civile, Vol. 1, 4e ed. page 451) (Planiol et Ripert et Esmein, Les Obligations, Vol. 6 page 768). C'est bien le cas de l'intimé Chartrand. En arrivant sur les lieux, les trois intimés n'ont fait aucune enquête, n'ont lu aucun

(1) Q.R. (1924) 30 R.L. (N.S.) 41.
(2) Q.R. (1925) 63 S.C. 424.
(3) Q.R. (1926) 32 R.L. (N.S.) 344.
(4) Q.R. (1927) 33 R. de J. 306.
(5) Q.R. (1927) 66 S.C. 17.
(6) Q.R. (1929) 46 K.B. 188.
(7) Q.R. (1930) 36 R.L. (N.S.) 241.

des pamphlets, n'ont rien vu ni rien entendu qui fut séditieux ni même contraire à la loi. Evidemment, ils ont dû se rendre compte facilement de la futilité de la plainte du curé Harrington. Ils n'avaient aucune information sérieuse pour justifier leur acte, et je ne crois pas qu'ils puissent être excusés d'avoir agi comme ils l'ont fait.

Mais ceci ne dispose pas du litige. En vertu du chapitre 18 des Statuts Refondus de 1941, personne ne peut intenter une action en dommages-intérêts contre un officier public sans lui donner un avis, conformément aux dispositions de l'article 88 du *Code de procédure civile*. Or, cet article stipule que cet avis de la poursuite doit lui être donné au moins un mois avant l'émission de l'assignation. De plus, nulle action ne peut être intentée contre lui, à moins qu 'elle ne soit commencée dans les six mois qui suivent la commission de l'infraction.

Dans le cas qui nous occupe, le quasi-délit aurait été commis le 4 septembre 1949. Avis de cette action a été donné le 4 octobre 1949, à Romain et à Young, mais n'a été donné à Chartrand que le 18 mars 1950.

Le bref a été dirigé contre Young, Romain et *Albert Chartrand de Buckingham*. Il a été signifié à ce dernier le 9 décembre 1949, à Young le 10 décembre, et à Romain le 12 décembre de la même année. Evidemment, le demandeur s'est aperçu qu'il avait commis une erreur, car l'officier de la Police provinciale ne s'appelait pas *Albert Chartrand,* mais se nommait bien *Roger Chartrand de Gracefield.* Le demandeur a demandé permission d'amender son bref pour y substituer le nom de Roger au lieu d'Albert, et M. le Juge Rhéaume a rendu jugement sur cette motion le 20 mars 1951. Ce n'est que le 7 avril de la même année que l'action a été signifiée au présent défendeur Roger Chartrand.

Comme l'offense a été commise le 4 septembre, il s'ensuit que l'action contre Roger Chartrand, si on doit appliquer le chapitre 18 des Statuts Refondus de 1941, serait prescrite, vu qu'elle n'a pas été signifiée tel que le veut la loi dans les six mois qui suivent la commission de l'infraction. Le procureur du demandeur allègue qu'il s'agit d'un quasi-délit et qu'en vertu des dispositions de l'article 1106 du *Code Civil,* il y aura solidarité, et que dans le cas de solidarité l'action intentée contre l'un ou deux des auteurs solidaires, inter-

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rompt la prescription quant aux autres. (Code Civil 2222, 2224 et 2230). Ce raisonnement me semble erroné. En premier lieu, pour des raisons que j'expliquerai plus tard, je ne crois pas que le chapitre 18 des Statuts Refondus de 1941 s'applique; mais même s'il s'appliquait, la prescription n'existerait pas, car il s'agit dans le cas qui nous occupe d'une *déchéance d'action* et non pas de la prescription. Cette déchéance d'action est qualifiée de *délais prefix,* et ces délais sont impartis par la loi, et ont un caractère fatal. Une fois écoulés, le droit ne peut plus être exercé, et l'acte ne peut plus être accompli. Ces *délais prefix* sont régis par un tout autre statut que celui de la prescription. Ils ne comportent *ni suspension, ni interruption;* par définition même, ils doivent s'appliquer au jour dit, sans que la déchéance puisse être différée, et en conséquence, la règle *contra non valentem agere non currit prescriptio* est sans application. (Josserand, Cours de Droit Civil Positif Français, Vol, 2, page 528) (Dalloz, Jurisprudence Générale, 1934, recueil périodique, 2ème partie, page 33).

Mais comme je l'ai signalé précédemment, je ne crois pas que le chapître 18 des Statuts Revisés de 1941 trouve son application, et que le défendeur Chartrand puisse invoquer en sa faveur la déchéance de six mois. En effet, en vertu de l'article 7, un officier public agissant dans l'exercice de ses fonctions, ne peut bénéficier des privilèges de ce statut, qu'en autant qu'il a agi *de bonne foi.* S'il était de mauvaise foi, ce n'est pas cette loi spéciale, mais la loi générale qui doit régir le cas qui nous intéresse.

La bonne foi, c'est en quelques mots un état d'esprit consistant à croire par erreur que l'on agit conformément au droit, et dont la loi tient compte pour protéger l'intéressé contre les conséquences de l'irrégularité de son acte. Il se peut bien, mais il est permis d'en douter, qu'au début il y ait eu chez les intimés une apparence *de bonne foi,* mais je ne puis croire à la possibilité de sa persistance, si elle a jamais existé. Il me semble en effet inexplicable qu'un officier public investi d'assez graves responsabilités, et à qui incombe le devoir, non pas de remplir un rôle de persécuteur, mais bien d'appliquer les lois du pays, ne se soit pas aperçu quand il est arrivé sur les lieux, que tout se passait dans la plus stricte légalité. La situation eut peut-être été différente s'ils eussent été les porteurs d'un mandat, mais ici,

Chartrand, instigateur de cette malheureuse randonnée, ne pouvait pas ne pas constater, comme ses compagnons d'ailleurs, qu'ils avaient commis une erreur, et c'était une négligence engendrant une faute que de persister comme ils l'ont fait, malgré la constatation évidente de l'absence de toute illégalité, à saisir les pamphlets et à ordonner l'expulsion des gens que le demandeur avait légitimement conviés dans sa demeure. Ils ont posé un acte fautif, et ils doivent en subir les conséquences. Certainement, ils ne peuvent être absous. Ils n'avaient aucune justification de disperser cette paisible assemblée.

Vu l'absence de bonne foi, l'article 7 du chapître 18 S.R.Q. 1941, ne s'applique donc pas, mais c'est bien l'article 2261 du *Code Civil* qui ne dénie l'action qu'après deux ans de la commission du quasi-délit, qui doit nous gouverner. Or, comme le quasi-délit a été commis le 4 septembre 1949, et que l'action a été signifiée à Chartrand le 7 avril 1951, *soit moins de deux ans* après le fait dommageable, il n'y a pas de déchéance.

Quant au demandeur, il a subi des dommages moraux, pour lesquels il a droit à une réparation. Evidemment, comme dans toutes les causes de ce genre, il est difficile d'en déterminer exactement le montant, ainsi que s'il s'agissait de dommages pécuniaires. Les tribunaux, dans des cas semblabes, doivent agir comme un jury, et en tenant compte de toutes les circonstances qui ont entouré la commission du quasi-délit ainsi que du préjudice souffert, ils doivent accorder un montant suffisant pour justement compenser la victime, mais pas si élevé, qu'il soit disproportionné aux dommages subis. Je crois que les fins de la justice seront équitablement servies en fixant à $2000.00 le montant du préjudice moral souffert par le demandeur.

L'appel doit donc être maintenu jusqu'à concurrence de $2000.00 contre les défendeurs-intimés, conjointment et solidairement, avec dépens de toutes les cours. Il n'y aura pas d'ordonnance quant aux frais des intervenants.

The judgment of Rand and Kellock JJ. was delivered by

KELLOCK J.:—On the afternoon of Sunday, September 4, 1949, the three respondents, members, in uniform, of the provincial police, entered the yard of the appellant's premises at the village of Chapeau, Quebec. Within the

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house, a religious meeting, attended by some thirty people invited by the appellant, was being conducted by a Mr. Gotthold, a minister of "Jehovah's Witnesses", the denomination to which the appellant belonged. On observing the respondents, the appellant went outside and on being asked if they might enter his house, consented.

The respondents went inside and, according to them, after observing the proceedings for approximately two minutes, Chartrand told the minister, then reading from the Bible, to discontinue, that the meeting would have to be broken up and those present dispersed. Gotthold's request to be allowed to finish, which he said would take some twenty minutes, met with refusal, and he was compelled to stop. The respondents than seized the Bible Gotthold had been reading, the hymn books, a number of booklets on religious subjects published by Jehovah's Witnesses and the collection box, dispersed the meeting, and conducted Gotthold to the ferry which plies across the Ottawa River between Chapeau and Pembroke, Ontario, upon which they placed him. No charge of any kind was at any time laid against any of the participants in the meeting and none of the items seized have ever been returned.

Later the same day the respondents reported their action to the Director of the Provincial Police. This reads as follows:

LA SURETE PROVINCIALE DE QUEBEC
Quebec Provincial Police Force

Au Monsieur le Directeur. Date 4. Sept 1949
Att, Mr. Directeur Adjoint.
Surete Provincial de Quebec. Du Gend R. Chartrand
Montreal Pq. Mat 375

RE SAISIE DE LA JEHOVOH WETNESSED
ENDROIT. CHAPEAU
ACCUES. GOOTHOLD
ENDROIT. 113 ST. JAMES ST. OTTAWA, ONT.
ENDROIT DE LA SAISIE
CHEZ ESYMIR CHAPUT A CHAPEAU
CONTE DE PONTIAC P.Q.

Monsieur

En date du 3 Septembre Appres avoir recu un appel de Telephone de Mr. le Cure Arrington de Chapeau de bien vouloir se rendre a Chapeau pour 02.00 H.pm de la meme date. Qu'il avait une assebble de la de cette Nouvelle religeon qui etai pour avoir lieux chez Mr. Eseymir Chaput, a Chapeau.

Instruction

Et Appres avoir appele le Bureau de Montreal et sous les Instruction du SGT. Perreault de Montreal me disan de rencontre les deux Officier de la circulation qui sont L. Yong. et E. Romin de Fort Coulonge. et me donnat les Ordre comme suit. de se rendre a Chapeau pour 01.00 pm. de la meme journée et de tout saisir la papetrie et tout ce qui aurait puis servir dans cette assemble. en ce qui concerne la Jehovoh Religion. et la meme journee sous les ordre tel que donne j'ai rencontre les deux Officier de Circulation tout les trois nous somme parti pour chapeau. a notre arrive a chapeau nous somme dirige ver cette endroit C'est a dire Chez MR Eseymir Chaput et de la sous la Permission de Mr. Chaput nous somme entre dans la Maison et a ce Moment la MR. Gootthold F.A. etait en plin Coeur de son assemble appres S'etre Identifie Comme officier de la Police et bien poliment on lui demande de sesse L'assemble immediatement a ce moment il refuse mais Appres lui avoiu fait comprendre que C'etait les ordre que nous avion recu il Consenti Mais il ne voulait pas Q'il N'ait pas de cau contre lui. et nous avon tout saisie tout les livres qui avait dans la maison.

les Livres Saisies. etait une Sainte bible (I) livre Conspiracy aigainst democracy. et 48 libres de la Jehovoh et une boite Kindom Contribution. et appers avoir tout saisie nous avon demande a MR Gootthold de venir avec nous comme les ordres. etait de le reconduire au bateau pour Q'il retourne a Pembrook.

Conclusion

Acette assembel il avait 38 Personne. Tout C'est bien passe dans L'ordre et nous avon depose les Obgets saisie. au bureau de la police Provincial de Campbell Bay.

Esperant que ce report sera à votre entière satisfaction.

The report lists the books seized and was signed by the three respondents.

As to his instructions from Montreal, Chartrand said he was not told to "make any arrests or anything like that but "to keep law and order and prevent any trouble which might occur." Asked as to how he pretended his actions were "maintaining law and order", he said that according to his information

there was a lot of people against that and that is why we were sent down there to maintain law and order in case there would be trouble and to prevent trouble—we were ordered to dismiss the meeting.

Q. You told us a few minutes ago you were just sent there to maintain law and order. Now you are changing your story?

A. No, that is part of the instructions I had, to go inside of the house and abolish the meeting, *support the public.*

The respondent Romain testified that en route to Chapeau, Chartrand told them they were going to the appellant's house where there was a meeting of the Witnesses

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which was to be stopped. That was all Chartrand said about the matter and Romain asked no questions. As to his state of mind, he said:

Of course we understand that's illegal in Quebec, and that's the reason why there were no other questions necessary.

Q. You understand it is illegal in Quebec?

A. That's what I'm given to understand.

....

Q. What gave you the impression it was illegal for Jehovah's Witnesses to hold meetings in Quebec?

A. Well, I read it in the papers—I don't know—and their meetings were stopped.

Q. Where?

A. I read it in the paper; I don't know the place.

....

Q. You never bothered about the law, to see if it was illegal?

A. No; I have nothing to do with that.

On the other hand, Young says that Chartrand did not state the nature of the errand but that he "just went with Mr. Chartrand at his request; I did not definitely understand why we were going," but "there ought to be some reason for us going there . . . When he gets orders there must be something wrong."

On the respondents' arrival everything was quiet and peaceful inside and outside the appellant's premises and the meeting was admittedly perfectly orderly. The respondents also admit that no offence of any kind was being committed and that their entry and seizure were made without a warrant of any kind having been obtained or even applied for.

The respondents filed identical defences which, so far as material, allege that

(1) That the plaintiff belongs to an organization that had decided to distribute literature which contained seditious libel;

(2) Plaintiff was in possession of pamphlets containing seditious libel and was creating animosity and hate between different classes of society;

(3) The defendant, at the date mentioned in the declaration was a public officer fulfilling the duties of a peace officer belonging to the Provincial Police of Quebec and having been appointed in accordance with the Provincial Police Act for the maintenance of peace, order and public security, and he was on the date mentioned in the declaration acting in the scope of his duties as a member of Provincial Police;

(4) The defendant was acting in good faith with colour of right and without malice against the plaintiff;

(5) The defendant had received instructions from his superior officer to maintain law and order and to do what he did; in accordance with the Provincial Police force act;

(6) According to law a notice of intended action should have been served on the defendant personally indicating the cause of action and containing the name of the plaintiff's attorney, which was not done.

Chartrand set up the further defence that the proceedings had not been taken within six months after the events complained of. This refers to the *Magistrate's Privilege Act*, R.S.Q., 1941, c. 18, s. 5.

There was the further completely frivolous plea by all the respondents that

The defendant went to see the plaintiff concerning an infraction, which might have been committed by him against the Motor Vehicle act;

This was entirely unsupported by any evidence and, quite understandably, was not mentioned in the judgments below nor in the argument before this court.

No evidence was adduced in support of the allegation that the appellant belonged to an organization of the character mentioned, nor that he was in possession of any pamphlets of the description pleaded. The respondents expressly admitted that they had not read any of the pamphlets either before or after the seizure. If Perrault or any other official of the provincial police at Montreal had done so, they were not called. Moreover, it was not contended on behalf of the Attorney General or of any of the respondents that any of the material seized was of a seditious nature.

Chartrand deposed that he did not know why he had been instructed to seize the literature on the premises and it never occurred to him to ask.

As to the seized literature, Romain testified:

Q. Had you any reason to think that they were illegal publications?
A. Just in the fact that we were sent up there to do that, I figured there must be something wrong.

In fact the witness said as to the word "seditious" that he did not know "exactly what that word is."

Young's evidence was that before going into the house Chartrand told him that the literature would have "to be taken for evidence to find out if it was of a seditious nature or not."

There was therefore no evidence to support the first two grounds of defence pleaded. I therefore pass to the other grounds of defence.

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Nothing in the *Provincial Police Act*, R.S.Q., 1941, c. 47, which is pleaded by the respondents, is at all relevant to the issues raised, and we so determined at the hearing. The court also decided that the *Magistrate's Privilege Act* did not provide any substantive defence but reserved the question as to whether or not this statute has any bearing from a procedural point of view. Ss. 2, 5 and 7 are as follows:

2. Any justice of the peace, officer or other person fulfilling any public duty, and sued in damages by reason of any act committed by him in the execution thereof, may, at any time within one month after the service of the notice mentioned in article 88 of the Code of Civil Procedure, offer to pay a compensation to the party complaining or his advocate, by actual tender thereof; and, if the same be not accepted, may plead such offer in bar to the action brought against him, with any other plea, and deposit the amount offered.

If the court or jury find the amount tendered to have been sufficient, they shall find for the defendant.

If the court or jury find the amount insufficient, or that no offer of compensation was made, and also find the other issues against the defendant, or if they find against the defendant, where no offer of compensation is made or pleaded, then they shall give a judgment or verdict for the plaintiff with such damages as they think proper, and the plaintiff shall have his costs of suit.

5. *No such action* or suit shall be brought against any justice of the peace, officer or other person *acting as aforesaid,* for anything done by him *in the performance of his public duty,* unless commenced within six months after the act committed.

7. Any such justice of the peace, officer or other person, shall be entitled to the protection and privileges granted by this act in all cases where he has acted in good faith in the execution of his duty, although, in doing an act, he has exceeded his powers or jurisdiction, and has acted clearly contrary to law.

It will be observed that the statute proceeds upon the footing that the act of the defendant in excess of authority conferred upon him by the substantive law involves liability to the person injured. The statute affords no defence on the merits, and we so held on the hearing. As stated by Denman C.J., in *Hazeldine* v. *Grove* (1) "these statutory protections suppose an illegality, so that there is no defence on the merits."

The learned trial judge dismissed the action upon the "considerant" that

the main feature of the present litigation is the immunity acknowledged and established by the statutory law in favour of police officers of the province, acting in good faith in the execution of orders received from their superior, and acting reasonably, peacefully and without malice in performing only what has been asked them to do.

(1) (1842) 3 Q.B. 997 at 1008.

In so doing the learned judge misconceived the effect of the statute, failing to observe that the only assistance afforded to defendants is procedural.

In the Court of Appeal (1) the judgment of Bissonnette and Casey JJ., was delivered by Bissonnette J. The erroneous view of the learned trial judge appears also to have been the view of that learned judge. He concludes his judgment by stating:

En résumé, l'appelant n'a pas établi qu'il avait un intérêt légal personnel à ester en justice, il n'a pas non plus démontré l'absence de cause raisonnable et probable, pas plus qu'il a repoussé la présomption que les intimés ont agi de bonne foi et avec l'autorité légale qui s'attache à leurs fonctions.

In the course of his judgment, Bissonnette J., expressed the opinion that because the appellant had by circular invited members of the public to his home he had lost any right to complain. The learned judge does not amplify his view and I find no basis upon which it may be supported.

The learned judge also considered that the fact the respondents were acting under instructions constituted a complete defence but he did not refer to any authority in support of this view.

Bissonnette J. considered also, that it was "far from certain" that the respondents were without authority to break up the meeting and seize the literature. The learned judge said:

Il est prouvé que les témoins de Jéhovah avaient été chassés de cette localité et l'intimé Chartrand avait reçu des plaintes à leur sujet. Mais peu importe. Aux intimés comme à leur supérieur, comme à tout citoyen de cette province, il était notoire que les témoins de Jéhovah avaient des activités d'un caractère séditieux (art. 133a, al. c, C.Cr.), particulièrement en raison de leurs attaques inqualifiables contre la religion catholique. On n'ignorait pas à la Sûreté provinciale que des centaines de plaintes étaient pendantes devant les tribunaux. Tous savaient qu'ils étaient honnis du Québec et il n'y a rien de changé à leur égard.

Or, à l'époque où se situent les faits du litige, notre Cour d'appel avait, quelques mois auparavant, statué que les pamphlets de ce groupe étaient séditieux. *Boucher* v. *Regem,* 1949 B.R. 238. Quel était l'effet de ce jugement, tant pour les intimés que pour leur supérieur suprême, l'honorable Procureur général? C'était l'expression judiciaire formelle que l'action de ce groupement contrevenait à la loi du pays et que ses membres devaient en subir les sanctions. Aussi, quand une personne est dans la commission d'un acte criminel, tout agent de la paix a l'autorité et le devoir d'en réprimer l'accomplissement (art. 32, 35 et passim C.Cr.).

(1) Q.R. [1954] Q.B. 794.

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En conséquence, quand les intimés, sous l'autorité qui leur était déléguée, empêchaient cette réunion et saisissaient les pamphlets séditieux, ils savaient qu'ils pouvaient agir ainsi, puisque la plus haute autorité judiciaire autorisait leur acte auquel s'attachait une présomption irréfragable que ce qu'ils faisaient était légal. Que plus tard, après des débats dont on connaît la nature, les phases complexes, les opinions partagées à une égalité quasi mathématique, on ait statué que les témoins de Jéhovah ne sont pas des citoyens recourant à la sédition, il n'en découle certes pas que celui qui les considérait comme des fauteurs de la paix publique commettait une illégalité, quand il se faisait l'interprète de la loi que le plus haut tribunal de sa province lui permettait de faire respecter.

Du fait qu'aujourd'hui la situation ou davantage la solution juridique pourrait être différente, il n'en découle pas qu'entre janvier 1949, date de l'arrêt Boucher, et décembre 1950, date du jugement de la Cour suprême, les témoins de Jéhovah ne pouvaient être recherchés et poursuivis. Or, les faits de cette cause se situent dans cette période intermédiaire, soit septembre 1949.

Pour les intimés, rien ne devait leur apparaître une meilleure autorité que l'arrêt de la Cour d'appel et cette autorité valait bien un mandat.

When the learned judge says that it was proven that Jehovah's Witnesses had been chased away from the locality in question, he is speaking outside the record. There is no such evidence. Had there been it would have been entirely irrelevant, as he himself says.

When, however, the learned judge says that it was well known to the respondents and to their superior that Jehovah's Witnesses were carrying on activities of a seditious character, he is again speaking outside the record. None of the respondents so testified and the superior, Sergeant Perrault, was not called.

Nor am I able to say what the learned judge means by his statement that

Tous savaient qu'ils étaient honnis du Québec et il n'y a rien de changé à leur égard.

It can hardly be meant that such a fact, even if proved, would have deprived the appellant of the protection of the courts. Such a suggestion would amount to outlawry.

Further, Bissonnette J., as well as Hyde J., (who placed his judgment upon this ground), are under complete misapprehension as to what was actually decided by the Court of Queen's Bench in *Boucher* v. *Regem* (1). The charge in that case was that:

Le ou vers le 11 décembre 1946 à St. Joseph dans le district de Beauce, Aimé Boucher de Ste. Germaine a publié un libelle séditieux en le faisant lire, le montrant et le délivrant dans le but de le faire lire par plusieurs

(1) Q.R. [1949] K.B. 238.

personnes, lequel libelle était contenu dans des pamphlets ayant pour titre: "La haine ardente du Québec pour Dieu, pour Christ et pour la liberté, est un sujet de honte pour tout le Canada", . . .

Nothing else was in issue. Even the pamphlet mentioned in the charge in Boucher's case was not among those taken by the respondents from the appellant's premises.

The judgment below cannot, therefore, be supported and it becomes necessary to consider the right of the appellant to the damages which he claims.

The first question which arises is as to the true interpretation of the *Magistrate's Privilege Act,* for although the respondents Romain and Young received the statutory notice and were sued within six months of the conduct complained of, the same does not apply to Chartrand. What is the meaning to be given to the words in s. 2:

sued in damages by reason of an act committed by him in the execution thereof,

that is, "in fulfilling any public duty", in conjunction with the words in s. 7:

where he has acted in good faith in the execution of his duty, although, in doing an act, he has exceeded his powers or jurisdiction, and has acted clearly contrary to law.

In order to appreciate the question involved it is necessary to consider the history of the statute.

The statute was first enacted in 1851 and was modelled upon the Imperial statute of 1848, 11 & 12 Vict., c. 44. The provisions to be found in the present statute dealing with notice of action, tender of amends, payment into court, plea of tender and the pleading of the "general issue" by a defendant, as well as the limitation of the period within which an action may be brought to six months, are all traceable back through the statute of 1848 to the *Constables Protection Act,* 1750, 24 Geo. II, c. 44. The Act of 1848, which was a consolidating statute, did not extend to Canada; (see s. 15). For that reason the Act of 1851 was no doubt enacted as

An Act to amend and consolidate the Laws affording protection to Magistrates and others in the performance of public duties.

The statute recites that "there are divers Acts of Parliament in force in Canada, both public, local and personal, whereby certain protections and privileges are afforded to

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Magistrates and others", and the desirability of bringing about uniformity and reducing all these statutes to one Act. The Act applied both to Upper and Lower Canada.

By s. 2 it is enacted that no writ shall be issued against any justice or other officer or person fulfilling any public duty for anything done by him in the performance of such public duty.

whether such duty arises out of the common law, or is imposed by Act of Parliament, either Imperial or Provincial,

and the later sections contain the other matters already referred to.

It is therefore clear that this statute was enacted having in view the background of English common law and not the civil law, subject to such statute law as had the force of law in Canada. The reason for this is clear.

Lareau, in his "Histoire du Droit Canadien" says at p. 54:

Le changement de domination, subi en 1760 par la conquête et en 1763 par la cession définitive du Canada à l'Angleterre, a introduit dans la colonie le droit public anglais. Le droit public et politique du vainqueur remplace le droit public de la nation conquise, quand bien même elle conserverait sont droit privé.

Questions which concern the relation of the subject to the administration of justice in its broadest sense are part of the public law and, therefore, governed by the law of England and not by that of France; *Corporation d'Arthabaska* v. *Patoine* (1).

As Walton in his work on the "Scope and Interpretation of the Civil Code" says at p. 43:

It is a fundamental principle of our public law that if an official wrongs a private person he is accountable to the ordinary courts, and it is no defence that he acted in good faith, or in obedience to the order of a superior official.

The highest minister of the Crown and the humblest official are equally answerable for the legality of their acts to the ordinary tribunals.

Dicey puts the principle thus in his "Law of the Constitution", 9th Ed., p. 193:

. . . every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their

(1) Q.R. (1886) 4 Dorion Q.B. 364 at 370.

lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though *carrying out the commands of their official superiors,* are as responsible for any act which the law does not authorize as is any private and unofficial person.

The italics are mine.

In *Raleigh* v. *Goschen* (1), Romer J., as he then was, said at p. 77:

> It appears to me that if any person commits a trespass (I use that word advisedly as meaning a wrongful act or one not justifiable) he cannot escape liability for the offence, he cannot prevent himself being sued, merely because he acted in obedience to the order of the executive Government, or of any officer of State; and it further appears to me, as at present advised, that if the trespass had been committed by some subordinate officer of a Government Department or of the Crown, by the order of a superior official, that superior official—even if he were the head of the Government Department in which the subordinate official was employed, or whatever his official position—could be sued; but in such a case the superior official could be sued, not because of, but despite of, the fact that he was an officer of State.

By way of contrast, the law which prevailed in France was the Roman law, which, starting from the point of view of the government rather than from that of the individual, provided, in the interest of governmental efficiency, that the officers of government could during their term of office be brought to account and made responsible for damages only with the consent of their superior officer. In France, this consent was to be given by the council of the King, which, before granting such consent, determined the question of jurisdiction, i.e., whether the officer had acted contrary to the law; and the suits had to be brought before special tribunals over whose organization the King had full power, and not in the ordinary courts; *Dareste, La Justice Administrative en France,* 2nd ed., pp. 515 ff; *Pandectes Françaises,* s.v. *Autorité Administrative,* n. 8, and n. 215; *Goodnow, Comparative and Administrative Law,* pp. 169 ff. As an example, Goodnow cites, at p. 175, the case of a prefect who shut up a factory while acting in accordance with instructions issued by one of the Ministers in order to execute a law but who could not be held responsible before the ordinary courts even though his act was not authorized by the law.

This is utterly foreign to the footing upon which the Act of 1851 proceeds, which accepts the theory of the common law that the unauthorized act of a public officer is a wrong

(1) [1898] 1 Ch. 73.

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cognizable by the ordinary courts and confers upon the person wronged the right to recover damages. Accordingly, English authorities are relevant upon the question as to the proper construction of the statute; *Renaud* v. *Lamothe* (1).

It is obvious that if the words "sued in damages by reason of any act committed by him *in the execution thereof*", i.e., "in fulfilling any public duty", in s. 2 of the Act were to be read literally, the statute would be meaningless, as such acts need no protection proceduraly or otherwise. This was pointed out by Pollock B., in *Hughes* v. *Buckland* (2):

> One who acts in perfect execution of the Act of Parliament has no need to tender amends and does not stand in need of any protection. The protection is required by him who acts illegally but under the belief that he is right.

The Act there in question was 7 & 8 Geo. IV, c. 29, s. 75, which provided, *inter alia,* that "For the protection of persons acting in the execution of this Act," notice of action and suit within six months was required.

The English *Public Authorities Protection Act,* 1893, c. 61, s. 1, in using the words

> any act done in pursuance, or execution or intended execution of any Act of Parliament, or of any public duty or authority

merely restates the doctrine enunciated from the bench in numerous cases under earlier statutes in which the word "intended" was not included.

S. 7 of the Quebec statute makes it clear that it is subject to the same construction. It provides that the protection which the statute provides is limited to cases where the officer

> has exceeded his powers or jurisdiction and has acted clearly contrary to law,

but acted "in good faith in the execution of his duty."

What is required in order to bring a defendant within the terms of such a statute as this is a *bona fide* belief in the existence of a state of facts which, had they existed, would have justified him in acting as he did. This rule was laid down in *Hermann* v. *Seneschal* (3).

The contrast is with an act of such a nature that it is wholly wide of any statutory or public duty, i.e., wholly

(1) (1902) 32 Can. S.C.R. 357.
(2) (1846) 15 M. & W. 346 at 353.
(3) (1862) 13 C.B. (N.S.) 392 at 402.

unauthorized and where there exists no colour for supposing that it could have been an authorized one. In such case there can be no question of good faith or honest motive.

Lord Denman, C.J., in *Cann* v. *Clipperton* (1), held that a person would not be protected "if he has not some ground in reason to connect his own act with the statutory provision" (governing the existence or non-existence of the supposed duty).

In *Cook* v. *Clark* (2), Tindal C.J., in referring to the decision in *Edge* v. *Parker* (3) (in which assignees of a bankrupt entered premises of a third person to seize goods of the bankrupt, without a warrant) said at p. 21 that in so doing the officer "must have been conscious that he was not acting in discharge of his duty"; in other words, that the absence of grounds demonstrated absence of good faith.

Mere belief by a magistrate that he has authority to make an order is not sufficient; he must believe in the existence of facts which, had they existed, would have clothed him with the requisite authority. Thus, in *Agnew* v. *Jobson* (4), the defendant, a magistrate, ordered the plaintiff, who had been taken into custody on the charge of concealing the birth of an illegitimate child, to be medically examined. It was held by Lopes J., as he then was, that as there was a total absence of authority to do the act, although he acted *bona fide,* there was nothing upon which such a belief might be founded, and he was accordingly outside the statute there in question.

Reference may also usefully be made to the judgment of Letourneau J., as he then was, in *Trudeau* v. *Kennedy* (5), a decision of the Court of Appeal. As stated in the headnote:

1. Les dispositions de l'article 88 C.P. et celles du chapitre 146 des Statuts Revisés de Québec, 1925, sont de droit strict et elles ne doivent être invoquées que s'il apparaît au dossier de façon certaine que c'est bien à raison d'actes d'un officier public dans l'exercice de ses fonctions que l'action a été prise; qu'en tout cas, un doute sur ce point devrait être interprété en faveur du demandeur; vu qu'on lui oppose une exception au droit commun et que sa demande se fonde sur la malice et la mauvaise foi du demandeur.

(1) (1839) 10 A. & E. 582.
(2) (1833) 10 Bing. 19.
(3) (1828) 3 B. & C. 697.
(4) (1877) 47 L.J., M.C. 67.
(5) Q.R. (1938) 42 P.R. 258.

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In *Lachance* v. *Casault* (1), it was held by the Court of Appeal that a sheriff who seized books and papers in the hands of the appellant without listing them in detail, as required by the order of the court which alone was his authority to deal therewith, was not "un officier public dans le sens de cet article (art. 88)" and was not acting "dans l'exécution de ses devoirs."

In the case at bar it is not necessary to refer to the provisions of the *Code* providing for the granting and execution of search warrants and the right of arrest with or without warrant. The respondents were completely outside all of these provisions. Nor could the order of Chartrand avail the co-respondents any more than the order of Perreault could avail Chartrand. Moreover, it is specifically provided by the *Criminal Code,* s. 199, that:

> 199. Everyone is guilty of an indictable offence and liable to two years' imprisonment who, by threats or force, unlawfully obstructs or prevents, or endeavours to obstruct or prevent, any clergyman or other minister in or from celebrating divine service, or otherwise officiating in any church, chapel, meeting-house, school-house or other place for divine worship . . .

In *Cann* v. *Clipperton, ubi cit,* Patterson J., said at p. 589:

> It is not because a man chooses to think himself acting under a statute, that he can, by such mere fancy of his own, protect himself in an action.

Williams J., said on the same page:

> It would be wild work if a party might give himself protection by merely saying that he believed himself acting in pursuance of a statute.

This discussion raises the question as to what was the public duty here which the respondents were executing? not a duty to their superior to carry out his direction: the public duty is that annexed by law to the office of a peace officer, a duty to maintain the peace, to enforce the law by preventing violations of it and by taking appropriate action to bring transgressors to justice. Every proper act of an officer against or by way of invading the ordinary rights of a citizen must be done with such a purpose; there must be the existence or the belief in the existence of facts which give rise to the duty and call for action.

At the moment the respondents became aware of the nature and facts of the meeting—and there is no question of a belief in the existence of any other matter—what duty on

(1) Q.R. (1902) 12 K.B. 179.

their part arose? The total circumstances were innocent and the only duty that arose was to do nothing in the way of interfering with the owner, the meeting, or the other persons attending it. There was not a semblance of fact to call for any adverse or preventive action. What they did was not in execution of a public duty but in carrying out an illegal instruction.

I assume their belief was that, in some way or other, by holding the meeting, those present were committing an offence; but such a mistake, a mistake as to what is criminal, can never give rise to a public police duty, and cannot, therefore, bring within the protection of the statute an officer who acts upon it.

The same considerations govern the expression "good faith" in s. 7: it defines the state of mind in excuting a duty: the officer must have acted in "good faith", i.e., believing in facts which, if true, would have justified what he did.

It is therefore clear, in my opinion, that not only was there a total absence of authority for the acts of the respondents here complained of, but such conduct was specifically prohibited by law. It is therefore impossible for the respondents to bring themselves within the provisions of the statute. Accordingly, the respondents were not entitled to notice under the statute, and it has no application.

The appellant suffered an invasion of his home and his right of freedom of worship was publicly and peremptorily interferred with. In addition to that, his property was seized and kept. He was humiliated in his own home before a considerable number of people.

The appellant seeks the recovery of punitive damages but it is contended for the respondents that such recovery is not within the scope of Art. 1053, which is the governing article and provides for the recovery of "the damage caused by the fault of another."

In so far as recent decisions in the provincial courts are founded upon the view that the civil courts of the province have no "jurisdiction" to order recovery of anything in the nature of a penalty, it being for the criminal courts to

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impose punishments, they are not, in my opinion, to be accepted. I refer to *French* v. *Hetu* (1), *Guibord* v. *Dallaire* (2); *Savignac* v. *Boivin* (3); *Duhaime* v. *Talbot* (4).

In these decisions no reference appears to have been made to the provisions of head 15 of s. 92 of *The British North America Act* giving jurisdiction to provincial legislatures to legislate in relation to "the imposition of punishment by fine, penalty or imprisonment for enforcing *any* law of the province made in relation to *any* matter" coming within any of the classes of subjects enumerated in the section. In so far, however, as they are based upon the construction of Art. 1053, I respectfully agree. The language of the Article is "damage caused."

In *Lachance* v. *Casault, ubi cit,* the Court of Appeal, after argument on the point, felt entitled to award punitive damages and did so. Whether that result was in harmony with the view that the defendant had ceased to bear the character of a public officer engaged in the performance of his duty need not be here considered. In a case to which the statute is applicable it may be that the right to recover "such damages as they (the court or jury) think proper" (s. 2 R.S.Q., c. 18) is to be construed, like other provisions of the statute, in accordance with English law, and authorizes an award of common law damages. The statute is a special, while the *Code* is a general Act. Both have stood side by side since the enactment of the *Code* in 1866. It is, however, not necessary to decide that question on this occasion.

While the appellant is not, in my opinion, entitled to recover punitive damages, he is entitled to recover "moral" damages, a term, which, for present purposes, may be said to be analogous to "general" damages in the common law; Dalloz, *Nouveau Répertoire,* Vol. III, n. 205.

I would therefore allow the appeal and direct the entry of judgment in favour of the appellant for $2,000.00 against the respondents jointly and severally. The appellant should have his costs throughout. There should be no costs against either Attorney-General.

(1) Q.R. (1908) 17 K.B. 429 at 434.
(2) Q.R. (1931) 53 K.B. 123 at 132.
(3) Q.R. (1935) 58 K.B. 228 at 230.
(4) Q.R. (1937) 64 K.B. 386 at 391.

LOCKE J.:—The following passages from the evidence given by the appellant at the trial describe the occurrence which gave rise to the present action:—

They came in the yard with their car—I seen them from inside the house and I walked out to see what they wanted—they walked to the house to meet me—Mr. Chartrand asked me if there was a meeting at my house—I said yes—he asked if they could come in—I said yes.

Q. Chartrand alone came in your house?

A. The three police came in—they told me they were going to break up the meeting—they walked in—

Q. Just a minute. They asked you if they could come in before they said they were going to break up the meeting?

A. Yes—then they walked in—I walked in behind them and they stood alongside the speaker for two minutes I would say and Mr. Chartrand said he was going to break up the meeting—he asked the speaker, he told him he was going to break up the meeting so the speaker said he had twenty more minutes to go—they would not stand back and let him finish his sermon—so Mr. Chartrand said no—so they grabbed the Bible out of his hand—Mr. Chartrand stepped up ahead of the minister and he took the Catholic Bible out of his hand, which was a Douay version Bible, my own Bible and Mr. Young and Mr. Romain, they gathered up the literature which was on the table and also a small wooden box we have for contributions and they told him that the meeting was broken up—Mr. Chartrand and Mr. Young told the speaker that the meeting was broken up—the speaker kept on speaking ahead—the police went out—they put the literature in their car.

Q. Did they take the Bible also?

A. The Bible also—then they walked back in again, the three policemen—

Q. They took the Bible?

A. Yes—and the three policemen came back in again and told Mr. Gotthold, the minister that was with us delivering the talk that day, to stop preaching, that the meeting was broken up—so Mr. Gotthold asked if he was under arrest—he asked Mr. Chartrand—Mr. Chartrand says no—"Well", he says, "I am not going to stop until I am under arrest", so, as he said that, Mr. Young stepped up and he said, "Let us take Mr. Gotthold"—so they walked back to the people which was in my own home, told them all to get up and get out, of my own home, so they all got up and Mr. Chartrand and Mr. Young took Mr. Gotthold by the arms and took him out and they placed him in the car and took him away to the ferry.

Q. To take him out, did they take hold of him?

A. Yes, they took hold of him by the arms.

On September 4, 1949, when these acts were committed by the three respondents, ss. 199 and 120 of the *Criminal Code* read as follows:—

199. Every one is guilty of an indictable offence and liable to two years' imprisonment who, by threats or force, unlawfully obstructs or prevents, or endeavours to obstruct or prevent, any clergyman or other minister in or from celebrating divine service, or otherwise officiating in any church, chapel, meeting-house, school-house or other place for divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place.

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200. Every one is guilty of an indictable offence and liable to two years' imprisonment who strikes or offers any violence to, or arrests upon any civil process or under the pretense of executing any civil process, any clergyman or other minister who is engaged in or, to the knowledge of the offender, is about to engage in, any of the rites or duties in the last preceding section mentioned, or who, to the knowledge of the offender, is going to perform the same, or returning from the performance thereof.

The actions of the respondents were thus wholly unlawful and criminal in their nature and they were liable to prosecution and imprisonment.

With due respect to the learned judge by whom this action was tried and the three members of the Court of King's Bench who have expressed a contrary view, there is, in my opinion, no defence to this action.

Before the conclusion of the argument, counsel for the respective parties were informed that the Court was unanimously of the opinion that the *Magistrate's Privilege Act* (c. 18, R.S.Q. 1941) and the *Act respecting the Provincial Police Force* (c. 47, R.S.Q. 1941) had nothing to do with the substantive questions raised in the action. S.7 of the former Act says that any justice of the peace, officer or other person shall be entitled to the protection and privileges granted by the Act in all cases where he has acted *in good faith in the execution of his duty.* I must confess my inability to understand how it can be suggested that a police officer is acting in execution of his duty in committing a criminal offence. I am equally unable to understand how a person can deliberately commit a crime or a tort in good faith.

The only other suggested defence, and one which would be available to the respondent Chartrand alone, was under the provisions of Article 88 of the *Code of Civil Procedure,* which requires notice to be given to a public officer when damages are claimed "by reason of any act done by him in the exercise of his functions" at least one month before the issue of the writ of summons. As to this, it is sufficient to say that to commit torts or criminal offences is no part of the functions of any public officer and the article has no application.

Since the learned trial judge was of opinion that the action failed, there has been no assessment of damages. It is, in my opinion, in the interest of the due administration

of justice that this litigation, commenced nearly six years ago, should be brought to a conclusion and that damages should accordingly be assessed by this Court. I have had the advantage of reading the reasons for judgment to be delivered in this matter by my brother Taschereau, in which he has discussed the circumstances in which moral damages, as distinguished from punitive damages, have been allowed in the courts of Quebec, and indicated that, in his opinion, those awarded in the present matter should fall within the former category. The moral damages allowed in cases of this kind in Quebec do not differ in their nature from the general damages allowed at common law for wrongs such as those inflicted upon the appellant by the respondents in this matter.

In considering the nature and the extent of these injuries and the question of the quantum of damage, I obtain some assistance from the reasons for judgment delivered by Bissonnette J. (1). From these I learn that it was at that time well known to every citizen of the Province of Quebec that Jehovah's Witnesses were carrying on activities of a seditious nature and that:—

> Tous savaient qu'ils étaient bonnis du Québec et il n'y a rien de changé à leur égard.

It is further said that it had been decided by the Court of Appeal in *Boucher's Case* (2) that the pamphlets of the group were seditious and, as to this:—

> C'était l'expression judiciaire formelle que l'action de ce groupement contrevenait à la loi du pays et que ses membres devaient en subir les sanctions.

It is unnecessary to discuss the accuracy of the belief entertained by the citizens of the province or of the statement of the learned judge as to what had been decided in *Boucher's Case* by that court, or the accuracy of its conclusion. That these views as to the nature of the religious belief and practices of Jehovah's Witnesses were generally entertained in the neighbourhood means, of necessity, that when, in this small community and the surrounding country, it was learned that police officers had entered the appellant's house prevented the carrying on of a religious service.

(1) Q.R. [1954] Q.B. 794. (2) Q.R. [1949] K.B. 238.

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dispersed those assembled and ejected the Minister who had been conducting the service, it would be generally understood that the appellant had been carrying on activities of a criminal nature and, with others, participated in the commission of the offence of sedition. The fact that a so called "raid" had been made, that books and pamphlets had been seized and the meeting in the appellant's home broken up, also received wide publicity by being reported in both an Ottawa and a Pembroke newspaper.

The appellant, as a resident of the Province of Quebec, was entitled to the privileges enjoyed by all of His Majesty's subjects in that province under the provisions of c. 175 of the Statutes of Canada 1851, by which it is declared:—

> That the free exercise and enjoyment of Religious Profession and Worship, without discrimination or preference, so as the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, is by the constitution and laws of this Province allowed to all Her Majesty's subjects within the same.

The flagrant violation of that right by the respondents was a grievous wrong to the appellant and the damages sustained were undoubtedly greatly aggravated by the matters which I have above referred to. The offence was committed at the Village of Chapeau on September 4, 1949, and from that time until the trial of the action on April 22, 1952, the appellant suffered from the false imputation that he had been engaged in committing the criminal offence of sedition at the time referred to. The appellant's right to maintain his good name and to enjoy the privileges conferred upon him by the Statute of 1851 are absolute and very precious rights and he is entitled to recover substantial general damages.

While, in my opinion, the damages should be assessed at a higher amount, I defer to the views of the other members of the Court that they should be fixed at the sum of $2,000. I would allow this appeal, with costs throughout, and direct that judgment be entered against all of the respondents jointly and severally in that amount. There should be no order as to the costs of the intervenants.

The judgment of Cartwright and Fauteux J.J. was delivered by

FAUTEUX J.:—Comme mon collègue, M. le Juge Taschereau, et généralement pour des motifs substantiellement similaires, je maintiendrais cet appel.

Rien, dans le dossier ou de l'argument fait à l'audition, ne suggère qu'au cours, à l'occasion ou en raison de cette réunion paisible, tenue le 4 septembre 1949, dans la maison de l'appelant, au village de Chapeau, une violation quelconque de la loi ait été, était actuellement ou était sur le point d'être commise par qui que ce soit. A la vérité, l'unique information reçue par la police, suivant la preuve, était qu'on devait tenir, à la résidence de l'appelant, une réunion de témoins de Jéhovah; et, sur ce: l'ordre de disperser cette assemblée. Par nul texte de loi a-t-on cherché à justifier l'autorité assumée, en les circonstances, par les intimés pour interrompre et mettre fin à cette réunion, pratiquer une saisie et reconduire au traversier de Pembroke celui qui adressait la parole au groupe. En soi, cette intervention des intimés est pour le moins illicite si elle ne contrevient pas au Code pénal—ce qu'il n'est pas nécessaire de déterminer. En droit, cette intervention leur est également imputable, et, dès lors, ils doivent réparation pour le dommage en résultant. Les arguments invoqués ne peuvent, en l'espèce, les excuser. On a d'abord reconnu, à l'audition, que sous le régime de la Loi concernant les privilèges des juges de paix, des magistrats et autres officiers remplissant des devoirs publics (S.R.Q. 1941 c. 18), l'opération de cette loi est conditionnée par l'existence de la bonne foi et que, dans sa substance, cette loi spéciale ne constitue pas un obstacle à la responsabilité édictée à l'article 1053 du *Code civil;* les dispositions de cette loi spéciale impliquent, au contraire, l'application de cet article. De plus, ni l'ordre inconsidéré du sergent Perrault, supérieur immédiat des intimés, ni l'erreur alléguée quant à ce qu'on croyait être la loi—en raison d'une décision de la Cour d'Appel alors en revision devant cette Cour, et où l'unique question en litige était de savoir si un certain pamphlet était séditieux—ne peuvent valablement être invoqués au soutien de la prétention de bonne foi des intimés alors que, sur place, ils n'ont pu, de tout ce qu'ils y ont vu et entendu, assigner aucun

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caractère illégal à cette réunion que plus rien, dès lors, ne pouvait les justifier de disperser; d'ailleurs et par la suite, cette réunion ou cette saisie qu'à tout risque on y avait pratiquée ne donnèrent lieu à aucune action judiciaire contre l'appelant ou ses invités.

Comme réparation de tous dommages subis par l'appelant, la somme suggérée de deux mille dollars me paraît suffisante. Je maintiendrais l'appel et l'action de l'appelant contre les intimés, conjointement et solidairement, pour un montant de deux mille dollars; le tout avec dépens de toutes les Cours. Il n'y aura pas d'ordonnance quant aux frais des intervenants.

ABBOTT J.:—Les faits et les lois qui trouvent leur application sont exposés dans le jugement de mon collègue le Juge Taschereau, que j'ai eu l'avantage de considérer.

Dans mon opinion, il ne peut y avoir de doute que les intimés, qui sont tous officiers de la Police Provinciale de Québec, avaient le droit de se rendre à Chapeau, et d'assister à l'assemblée qui se tenait dans la maison de l'appelant. Il s'agissait d'une assemblée publique, annoncée comme telle, et en fait, comme le révèle la preuve, on ne s'est pas objecté à leur présence. En conséquence, jusqu'à ce moment, il semble clair que ces officiers agissaient de bonne foi et dans l'exécution de leurs devoirs.

La preuve établit que quand les intimés arrivèrent à l'assemblée, le ministre Gotthold était à lire des extraits de la Bible, et tout se passait d'une façon paisible. Après qu'il eut écouté durant quelques minutes, l'intimé Chartrand donna ordre au ministre d'interrompre l'assemblée, et avec l'aide des deux autres intimés, s'empara de la Bible ainsi que d'un certain nombre de pamphlets, et arrêta l'assemblée. Aucune tentative ne fut faite de mettre personne sous arrêt.

En arrivant à la réunion, les intimés purent immédiatement se rendre compte de son caractère religieux, et que tout se passait dans l'ordre et la paix. En dispersant l'assemblée, les intimés en conséquence, ne pouvaient plus être considérés comme agissant de bonne foi, et dans l'exercice de leurs fonctions. Ils devaient savoir qu'ils n'étaient

investis d'aucun droit les justifiant d'entraver cette réunion. Dans mon opinion, on ne peut faire de distinction entre Chartrand qui était en charge, et les deux autres officiers.

Il a été décidé par cette Cour lors de l'audition, (et admis par le procureur des intimés) que la Loi concernant les Privilèges des Officiers remplissant des devoirs publics, (S.R.Q. 1941, c. 18) n'accordait aucune défense fondamentale à l'action qui a été instituée. Pour les raisons données par mon collègue, M. le Juge Tachereau, je suis aussi d'opinion que les intimés ne peuvent davantage avoir recours à ce statut pour invoquer les privilèges qu'il confère et les règles de procédure qu'il édicte.

Je crois que l'appelant a le droit de réclamer des intimés des dommages pour le préjudice qui lui a été causé par leurs actions illégales, suivant les dispositions de la loi civile de la province de Québec, où la cause d'action a pris naissance. Comme le signale mon collègue M. le Juge Taschereau, il est depuis longtemps établi que le droit civil de Québec ne connaît pas les dommages punitifs ou exemplaires. Il admet cependant une compensation pour les dommages moraux.

Ainsi que le dit M. le Juge Rivard dans *Duhaime* v. *Talbot* (1):

> En droit civil, le préjudice causé par un délit ou un quasi-délit ne peut donner lieu à une condamnation devant servir uniquement de punition ou d'exemple; c'est là plutôt le domaine du droit pénal. Sous l'empire de l'article 1053 du Code civil, les dommages-intérêts qui peuvent être accordés à la victime d'un délit s'entendent de la compensation pour le tort subi; c'est la réparation pécuniaire d'un préjudice. Ce préjudice peut être matériel; les conséquences pécuniaires en sont aisément appréciées et doivent faire l'objet d'une preuve spécifique. Il peut aussi être moral: atteinte à l'honneur, à la réputation, chagrins, inquiétudes, etc. En soi, le préjudice moral se prête mal à une évaluation en argent; il ne donne pas moins ouverture à une indemnité pécuniaire, car, bien qu'il n'atteigne pas directement l'individu dans sa fortune ou dans son corps, il est susceptible d'avoir un contre-coup d'ordre économique, et il constitue donc une sorte de dommage matériel ayant une cause morale; l'appréciation de ce dommage moral, toujours plus ou moins arbitraire, peut être laissée à la discrétion du juge. Dans tous les cas qu'il soit matériel ou moral, le préjudice, pour devenir l'objet d'une réparation pécuniaire, ne doit pas moins être réel, actuel et appréciable en argent.

(1) Q.R. (1937) 64 K.B. 386 at 391.

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Abbott J.

L'appel doit donc être accueilli, l'action du demandeur maintenue contre les défendeurs, conjointement et solidairement, jusqu'à concurrence de $2,000.00 avec dépens de toutes les cours. Il n'y aura pas d'ordonnance quant aux frais des intervenants.

Appeal allowed with costs.

Solicitor for the appellant: *W. Glen How.*

Solicitor for the respondents: *Avila Labelle.*

Solicitor for the A. G. of Canada: *F. P. Varcoe.*

Solicitor for the A. G. of Quebec: *L. Emery Beaulieu.*

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*May 17, 18
*Oct. 19

WENDELL DAWSON (*Plaintiff*) .....APPELLANT;

AND

HELICOPTER EXPLORATION CO. LTD. (*Defendant*) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Performance subject to conditions—When bilateral rather than unilateral contract will be implied.

In an action for breach of contract based on correspondence exchanged between the parties it was held, Kerwin C.J. dissenting, that a bilateral agreement was entered into subject to two conditions in the performance thereof.

The question of interpreting an offer in a unilateral and bilateral sense, considered.

The Moorcock 14 P.D. 64 at 68; *McCall* v. *Wright* 133 App. Div. (N.Y.) 62; *Wood* v. *Lady Duff Gordon* 222 N.Y. 88 at 90; Williston on Contracts 1936 Ed. Vol I, 76, 77; *A. R. Williams Machinery Co.* v. *Moore* [1926] S.C.R. 692 at 705; Pollock on Contracts 13 Ed. p. 30; *Hellas & Co.* v. *Arcos Ltd.* 43 Ll. L.R. 349 at 364; Anson's Law of Contracts 20 Ed. 310-11, referred to. *The American National Red Cross* v. *Geddes Bros.* [1920] S.C.R. 143, distinguished.

Kerwin C.J. dissenting, concurred in the finding of the trial judge, Coady J., whose decision was affirmed by the Court of Appeal for British Columbia, that there was no contract.

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

APPEAL from the judgment of the Court of Appeal for British Columbia which dismissed the appellant's appeal from the judgment of Coady J. who had dismissed the appellant's action for damages for breach of contract.

J. W. deB. Farris, Q.C. and *M. A. Manson* for the appellant.

C. K. Guild, Q.C. and *K. L. Yule* for the respondent.

THE CHIEF JUSTICE (dissenting):—During the course of the argument of this appeal there was considerable discussion as to whether there was what was termed a unilateral or bilateral contract between the appellant and Springer, but, in my view, we are concerned with the problem as to whether there was any contract. All the letters between the appellant and Springer have been referred to in the reasons for judgment of the trial judge and, having considered them, I have come to the conclusion that Mr. Justice Coady was correct in his finding that there was no contract. This conclusion is reached without reference to the correspondence between the appellant and Fowler.

In the letter of January 17, 1951, from Springer to the appellant the writer states:—

> I would be interested in making some arrangement next summer to finance you in staking the claims for which we would give you an interest and would undertake development of the claims. I would suggest that we should pay for your time and expenses and carry you for a 10% non-assessable interest in the claims.

In his reply of January 22, 1951, the appellant states:—

> Your proposition as stated in your letter appeals to me as being a fair one. I would be pleased to meet you in Ogden.

and I agree with the trial judge that this was not an acceptance of the proposition made by Springer. In the letter of March 5, 1951, from Springer to the appellant it is stated:—

> I hereby agree that, if you take us in to the showings and we think they warrant staking, that we will stake the claims and give you a 10% non-assessable interest.

I also agree that at this stage the matter had not advanced beyond mere negotiation.

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Kerwin C.J.

As Mr. Justice Robertson pointed out, there is also a letter of February 28, 1951, from the appellant to Springer, in which the following appears:—

> As I informed you in a previous letter, your offer of a 10% non-assessable interest for relocating and find these properties is acceptable to me, provided there is a definite arrangement to this effect in the near future.

and the following counter-proposal made by Springer in his letter of March 5, 1951, was never accepted:—

> I hereby agree that, if you take us in to the showings and we think they warrant staking, that we will stake the claims and give you a 10% non-assessable interest. The claims would be recorded in our name and we will have full discretion in dealing with them—you to get 10% of the vendor interest.

For the reasons given by the Court of Appeal there was no object to be attained by granting the amendment to the pleadings asked for by the appellant.

The appeal should be dismissed with costs.

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

RAND J.:—Two questions arise in this appeal: the first is whether there was a concluded contract between the appellant, Dawson and the respondent company, and secondly, if so, was it thereafter so affected by the conduct of both or either of them that no cause of action arose on which these proceedings could be founded.

The existence and terms of the contract, if any, must be gathered from correspondence carried on between Dawson and agents of the respondent. It began with a letter dated December 28, 1950 from Dawson, an American citizen, then an officer in the United States Naval Reserve Engineering Corps, at Willard, Utah, to Kidd in Vancouver, a geologist with whom Dawson had had previous communications. It recalled the latter which concerned a mineral deposit at the head of Leduc River in British Columbia, in very rough country, which had been discovered and staked by Dawson, and claims filed which later lapsed, and had been described by him in a report made in 1931 to one Stewart which was later published in a British Columbia Mines Department report. Kidd was asked whether he thought it possible to interest Canadian mining men in the deposit. The opinion

was expressed that large quantities of high grade concentrate might be flown out to Tidewater and that there would be no difficulty in again locating the showings.

This was acknowledged on January 3, 1951. Kidd stated that, although they had been in the district, "our men" had not seen anything like that which the report describes, but that "one has been most keen to go back". It added,

> We now have our own helicopter which should be ideal for hopping over from Stewart. I will follow this up and write you again shortly.

In Dawson's reply of January 13, 1951, he expressed anxiety to "get some responsible party interested in these properties as soon as possible" and his willingness "to work with them" (the interested party) "toward that end."; and he stated that "A large mining company in Salt Lake is showing a definite interest. To protect my own interest, it will be necessary for me to arrive at some definite arrangement soon."

The next communication, of January 17, came from one Springer of Vancouver, an associate of Kidd, to whom the latter had turned over Dawson's letter of the 13th. After mentioning that he and Kidd had developed a gold property on the Unuk River, in the vicinity of the Leduc, and had been doing general exploration in the area and to the north which they expected to continue, he proceeds:—

> I would be interested in making some arrangement next summer to finance you in staking the claims for which we would give you an interest. I would suggest that we should pay for your time and expenses and carry you for a ten per cent non-assessable interest in the claims.
>
> I will probably be in the south-western states sometimes during the winter and will be pleased to call on you at Willard. In the meantime you could advise me if the arrangements as outlined above would be satisfactory to you.

To this Dawson replied on January 22 from Ogden, Utah. He says:—

> Your proposition as stated in your letter appeals to me as being a fair one. I would be pleased to meet you in Ogden.

On February 14, 1951, Dawson wrote Springer from San Francisco that he had been recalled to active duty and was under orders to leave for overseas (Pacific) about March 10, but that

> This abrupt change in my plans need not necessarily interrupt our plans regarding the Leduc R. plans. It is quite possible I can get away for a short time, and if not, I have a man who can locate these properties.

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On February 28 Dawson followed this with another letter to Springer. There had been a change in orders and he was leaving for overseas the next day. He suggested that if convenient and so desired by Springer, arrangements could be made through his wife in Ogden who had authority to handle his business affairs during his absence. She was said to have in her possession and to be familiar with all of his information concerning the Leduc properties consisting of maps and photographs "of generous size, extremely clear and well preserved". He concluded:—

As I informed you in a previous letter, your offer of a 10% non-assessable interest for re-locating and finding these properties is acceptable to me, provided there is a definite arrangement to this effect in the near future.

If it is not possible for me to get away for a month or so to personally undertake this work, I will send in a man with your party who knows the location of these properties. It is very probable that with your assistance and contact with the proper government agencies, that I can get some time off. Or you may prefer to use the information mentioned above and use your own party. Personally, I would prefer going in myself, if that is possible.

A postscript was added:—

The reason that I prefer going in is to personally check up the possibility of getting some of this ore out. I have some very definite information and ideas along this line.

On March 5, 1951, Springer directed a letter to Dawson at Ogden. After remarking that he had thought to see Dawson before that time and that he had just received the letter of February 28, he proceeds:—

I agree with you that the best arrangements would be to have you take us into the property, as you know definitely where your showings are.

I am expecting to operate the helicopter in that country this year. It would depend upon whether I get a pilot or not. If I am operating it, it will be a simple matter to go into this country, probably from Stewart or Summit Lake, north of the Premier.

I hereby agree that, if you take us in to the showings and we think they warrant staking, that we will stake the claims and give you a 10% non-assessable interest. The claims would be recorded in our name and we will have full discretion in dealing with them—you to get 10% of the vendor interest.

I do not think one should attempt to go into this country until about the first of August, so any time during August would do. You can keep me advised as to your movements and when you could get away during that month. If it is impossible to get away in August, the last half of July and all September would be alright.

My full name is Karl John Springer. I note you have been addressing me as Otto, due to my poor writing.

I wish you the very best of luck in your present activities.

To this, on April 12, 1951 from the Naval Operating Base, Dawson answered:—

Your recent letter regarding the Leduc R. properties was forwarded by my wife.

August or Sept. is the proper time to inspect this locality. The most ground can then be seen.

If you will inform me, if and when you obtain a pilot for your 'copter, I will immediately take steps for a temporary release in order to be on hand.

Should it appear that you will not be able to get a pilot I would appreciate it if you would so inform me.

This was followed by a letter of May 27, 1951:—

Would like to know if your plans for further exploration work in the Unuk River area have become definite. In your last letter you stated that you had obtained a helicopter, but did not yet have a pilot.

For me to get away from my present duties on a furlough, it may be necessary for me to have several weeks notice.

On June 7, 1951, Springer wrote as follows:—

Up to a little over a week ago it did not look as though we would be able to secure a pilot for our helicopter. However, we have a man now who we hope will be satisfactory.

I was talking to Tom McQuillan, who is prospecting for us this year; he said he had been over your showings at the head of the Leduc River, and in his opinion it would be practically impossible to operate there, as the showings were in behind ice fields, which along with the extreme snow falls made it very doubtful if an economic operation could be carried on.

We have also been delayed in getting away this year, due to pilot trouble, and have so much work lined up that I am doubtful whether we will have time to visit your showings, also I do not think we would be warranted in making the effort to get in there due to the unfavorable conditions. I must advise you therefore, not to depend on our making this trip, and suggest if you are still determined to go in, to make other arrangements.

To this no reply was sent by Dawson. On August 1 an exploration party of the respondent investigated the Leduc area and located the showings reported in 1931 by Dawson. This did not become known to Dawson until some time in 1952. In 1953 the respondent made arrangements to enter upon the development of the claims by a new company to which the claims were sold in exchange for paid-up shares of the capital stock. Later on Dawson took legal advice and the action was launched on November 23, 1953.

The substantial contention of the respondent is that any offer contained in the correspondence and in particular the letter of March 5 called for an acceptance not by promise but by the performance of an act, the location of the claims

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by Dawson for the respondent. It is based upon the well known conception which in its simplest form is illustrated by the case of a reward offered for some act to be done. To put it in other words, no intention was conveyed by Springer when he said "I hereby agree" that Dawson, if agreeable, should have replied "I hereby accept" or words to that effect: the offer called for and awaited only the act to be done and would remain revocable at any time until every element of that act had been completed.

The error in this reasoning is that such an offer contemplates acts to be performed by the person only to whom it is made and in respect of which the offeror remains passive, and that is not so here. What Dawson was to do was to proceed to the area with Springer or persons acting for him by means of the respondent's helicopter and to locate the showings. It was necessarily implied by Springer that he would participate in his own proposal. This involved his promise that he would do so and that the answer to the proposal would be either a refusal or a promise on the part of Dawson to a like participation. The offer was unconditional but contemplated a performance subject to the condition that a pilot could be obtained by the respondent.

Dawson's answer of April 12 was, as I construe it, similarly an unqualified promissory acceptance, subject as to performance to his being able to obtain the necessary leave. It was the clear implication that Springer, controlling the means of making the trip, should fix the time and should notify Dawson accordingly. As the earlier letters show, Dawson was anxious to conclude some arrangement and if he could not make it with Springer he would seek it in other quarters.

Although in the circumstances, because the terms proposed involve such complementary action on the part of both parties as to put the implication beyond doubt, the precept is not required, this interpretation of the correspondence follows the tendency of courts to treat offers as calling for bilateral rather than unilateral action when the language can be fairly so construed, in order that the transaction shall have such "business efficacy as both parties must have intended that at all events it should have":

Bowen L.J. in *The Moorcock* (1). In theory and as conceded by Mr. Guild, an offer in the unilateral sense can be revoked up to the last moment before complete performance. At such a consequence many courts have balked; and it is in part that fact that has led to a promissory construction where that can be reasonably given. What is effectuated is the real intention of both parties to close a business bargain on the strength of which they may, thereafter, plan their courses.

This question is considered in Williston on Contracts, 1936 Ed. Vol. 1, pp. 76 and 77, in which the author observes:—

> Doubtless wherever possible, as matter of interpretation, a court would and should interpret an offer as contemplating a bilateral rather than a unilateral contract, since in a bilateral contract both parties are protected from a period prior to the beginning of performance on either side—that is from the making of the mutual promises.
>
> At the opening of the present century the courts were still looking for a clear promise on each side in bilateral contracts. A bargain which lacked such a promise by one of the parties was held to lack mutuality and, therefore, to be unenforceable. Courts are now more ready to recognize fair implications as effective: "A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed," which the courts will regard as supplying the necessary reciprocal promise.

The expression "instinct with an obligation" first used by Scott J. in *McCall* v. *Wright* (2), is employed by Cardozo J. in *Wood* v. *Lady Duff Gordon* (3), in the following passage:—

> It is true that he does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her designs. We think, however, that such a promise is fairly to be implied. *The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal.* A promise may be lacking and yet the whole writing may be "instinct with an obligation" imperfectly expressed.

These observations apply obviously and equally to both offer and acceptance.

The question of an anticipatory breach by the letter of June 7 was raised, but that was superseded by the subsequent events. Dawson was bound to remain ready during a reasonable time prior to that mentioned for the trip to endeavour, upon notice from Springer, to obtain leave of

(1) (1889) 14 P.D. 64 at 68. (2) (1909) 133 App. Div. (N.Y.) 62
(3) (1917) 222 N.Y. 88 at 90.

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absence. But in promising Dawson that the company would co-operate, Springer impliedly agreed that the company would not, by its own act, prevent the complementary performance by Dawson. In doing what it did, the company not only violated its engagement, but brought to an end the subject matter of the contract. By that act it dispensed with any further duty of readiness on the part of Dawson whether or not he was aware of what had taken place. Even assuming the technical continuance of the obligations and the necessity of an affirmative step in order to treat an anticipatory breach as a repudiation, the action was not brought until long after the time for performance had passed. Being thus excused, Dawson's obtaining leave, apart from any pertinency to damages, became irrelevant to the cause of action arising from the final breach.

I would, therefore, allow the appeal and remit the cause to the Supreme Court of British Columbia for the assessment of damages. The appellant will have his costs throughout.

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

ESTEY J.:—The appellant contends that he and respondent entered into a contract under which he would endeavour to relocate certain mineral claims and was prevented from so doing by respondent's refusal to carry out its obligations thereunder and, in this action, claims damage suffered thereby. The learned trial judge held a contract had not been concluded and, even if it had, the plaintiff had abandoned it prior to the bringing of this action. The Court of Appeal for British Columbia unanimously dismissed appellant's appeal.

After preliminary correspondence relative to the relocating of these mineral claims, the appellant, on February 28, 1951, wrote to Springer, President and General Manager of the respondent, who at all relevant times conducted the correspondence on behalf of the respondent, in part:

> As I informed you in a previous letter, your offer of a 10% non-assessible interest for relocating and finding these properties is acceptable to me, provided there is a definite arrangement to this effect in the near future.

On March 5, 1951, Springer replied in part:

I agree with you that the best arrangements would be to have you take us into the property, as you know definitely where your showings are.

I am expecting to operate the helicopter in that country this year. It would depend upon whether I get a pilot or not. If I am operating it, it will be a simple matter to go into this country, probably from Stewart or Summit Lake, north of the Premier.

I hereby agree that, if you take us in to the showings and we think they warrant staking, that we will stake the claims and give you a 10% non-assessable interest. The claims would be recorded in our name and we will have full discretion in dealing with them—you to get 10% of the vendor interest.

I do not think one should attempt to go into this country until about the first of August, so any time during August would do. You can keep me advised as to your movements and when you could get away during that month. If it is impossible to get away in August, the last half of July and all September would be alright.

This letter was acknowledged by the appellant under date of April 12, 1951, reading as follows:

Your recent letter regarding the Leduc R. properties was forwarded by my wife.

August or Sept. is the proper time to inspect this locality. The most ground can then be seen.

If you will inform me, if and when you obtain a pilot for your 'copter, I will immediately take steps for a temporary release in order to be on hand.

Should it appear that you will not be able to get a pilot I would appreciate it if you would so inform me.

The appellant, a Lieutenant Commander in the United States Naval Engineering Corps, was stationed in the Marshall Islands from March, 1951, until the middle of December, 1951, and, therefore, the references to the letter being forwarded by his wife and to obtaining a temporary release.

The letter of March 5, 1951, was an offer on the part of the respondent made in response to appellant's request for "a definite arrangement" and, with great respect to those who hold a contrary view, the appellant's letter of April 12 constitutes an acceptance of that offer, more particularly as every portion thereof is consistent only with the appellant's intention that he was accepting and holding himself in readiness to perform his part. While it has been repeatedly held that an acceptance must be absolute and unequivocal, *McIntyre* v. *Hood* (1), *Oppenheimer* v. *Brackman & Ker Milling Co.* (2), *Harvey* v. *Perry* (3), it is equally clear that

(1) (1883) 9 Can. S.C.R. 556. (2) (1902) 32 Can. S.C.R. 699.
(3) [1953] 1 S.C.R. 233.

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such an acceptance need not be in express terms and may be found in the language and conduct of the acceptor. The learned author of *Pollock on Contracts,* 13th Ed., in discussing the rule that "the acceptance must be absolute and unqualified," states at p. 30:

> Simple and obvious as the rule is in itself, the application to a given set of facts is not always obvious, inasmuch as contracting parties often use loose and inexact language, even when their communications are in writing and on important matters. The question whether the language used on a particular occasion does or does not amount to an acceptance is wholly a question of construction, and generally though not necessarily the construction of a written instrument.

Lord Tomlin in *Hillas & Co., Ltd.* v. *Arcos, Ltd.* (1), stated:

> . . . the problem for a court of construction must always be so to balance matters that without violation of essential principles the dealings of men may as far as possible be treated as effective and that the law may not incur the reproach of being the destroyer of bargains. . . . It is in the application of them to the facts of a particular case that the difficulty arises, and the difficulty is of such a kind as often to afford room for much legitimate difference of opinion and to present a problem the solution of which is not as a rule to be found by examining authorities.

The respondent's undertaking would require that it make reasonable efforts to locate a pilot and, having done so, that it would convey the appellant into the area in August or September of 1951 and if, when relocated, the respondent staked the claims it would give to the appellant a 10% non-assessable interest. If, under this contract, the respondent did not obtain a pilot, the contract would be at an end. Moreover, if the claims were relocated and, in the opinion of the respondent, were not worth staking, the appellant would not receive the 10%. These terms were agreed upon and may be described as conditions subsequent.

> A contract may contain within itself the elements of its own discharge, in the form of provisions, express or implied, for its determination in certain circumstances. These circumstances may be the non-fulfilment of a condition precedent; the occurrence of a condition subsequent; or the exercise of an option to determine the contract, reserved to one of the parties by its terms.
>
> * * *
>
> In the second case the parties introduce a provision that the fulfilment of a condition or the occurrence of an event shall discharge either one of them or both from further liabilities under the contract. *Anson's Law of Contract,* 20th Ed., 310-11.

(1) (1932) 43 Ll. L. Rep. 359 at 364.

Moreover, when this correspondence is read as a whole, respondent's letter of repudiation dated June 7, 1951 (hereinafter set out) appears to be written on the basis that the parties had agreed with respect to taking the appellant into the area. It is not suggested that there was any term or item left in abeyance or to be subsequently agreed upon. The suggestion is rather that, because of the additional information, the project did not commend itself from an economic point of view, and, in any event, the respondent had not time to undertake it, and the letter concludes with the sentence:

> I must advise you therefore, not to depend on our making this trip, and suggest if you are still determined to go in, to make other arrangements.

The word "arrangements" is rather a general term with no precise meaning, but it is of some significance that the appellant, in his letter of February 28, 1951, asked for "a definite arrangement," which was concluded, and the respondent now suggests that appellant make other arrangements. A reading of this letter as a whole appears to corroborate that the parties had concluded a contract.

The learned trial judge further held:

> Alternatively if the correspondence establishes a contract, then there was a termination of it by Springer, accepted by the plaintiff, and a mutual abandonment of it by the parties.

The repudiation referred to is contained in respondent's letter to appellant dated June 7, 1951, reading as follows:

> Up to a little over a week ago it did not look as though we would be able to secure a pilot for our helicopter. However, we have a man now who we hope will be satisfactory.
>
> I was talking to Tom McQuillan, who is prospecting for us this year; he said he had been over your showings at the head of the Leduc River, and in his opinion it would be practically impossible to operate there, as the showings were in behind ice fields, which along with the extreme snow falls made it very doubtful if an economic operation could be carried on.
>
> We have also been delayed in getting away this year, due to pilot trouble, and have so much work lined up that I am doubtful whether we will have time to visit your showings, also I do not think we would be warranted in making the effort to get in there due to the unfavourable conditions. I must advise you therefore, not to depend on our making this trip, and suggest if you are still determined to go in, to make other arrangements.

The appellant made no reply to this letter and nothing passed between himself and the respondent until he called at the latter's office in Vancouver about December 15, 1952,

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when he and Springer had a conversation, during which, as the appellant deposes, Springer, in referring to the correspondence in 1951, said: ". . . it was not their original intention to go in but that Kvale had made an independent discovery of the copper back in 1948 and they decided to go back and check up on that." This statement is largely corroborated by Kvale and is not referred to by Springer. About April 4, 1953, appellant again interviewed Springer at respondent's office in Vancouver, when Springer made it clear that he would neither pay any amount to the appellant nor further discuss this matter. Appellant, in November of that year, put the matter in the hands of his solicitor.

It is contended that the appellant's silence, after his receipt of the letter of June 7, 1951, until his interview in December, 1952, constituted an abandonment of the contract. No authority was cited where silence alone has been held to constitute an abandonment. In *The American National Red Cross* v. *Geddes Brothers* (1), the Red Cross, upon receipt of the letter of repudiation, recorded in its books what amounted to an acceptance of the repudiation and, while it did not communicate its acceptance, its failure to complain with respect to the non-delivery of the yarn, as called for under the contract, was held sufficient to justify Geddes Brothers in concluding, as, in fact, they did, that the contract was abandoned. As stated by Duff J. (later C.J.) at p. 161:

> It is equally clear that the appellants intended to acquiesce in the abandonment of the contract by the respondents. We have here, then, a declared intention to abandon on part of the seller and a concurrence in fact on the other side accompanied by conduct which was treated by the seller as evidencing such concurrence.

Anglin J. (later C.J.) stated at p. 164:

> No explanation was made by them of these failures to carry out the contract and no complaint or demand for delivery came from the defendants. Indeed both parties acted as if the contract had ceased to exist—as if the defendants were acquiescing in the plaintiffs' request to be relieved from it and in their treating it as abandoned.

In construing this letter of June 7, 1951, it is desirable to look at the correspondence as a whole and endeavour, as far as possible, to place oneself in the position of the writer of the letter. As Newcombe J. stated:

> In order to interpret the correspondence we must look to the state of the facts and circumstances as known to and affecting the parties at the time. *A. R. Williams Machinery Co. Ltd.* v. *Moore* (2).

(1) (1920) 61 Can. S.C.R. 143. (2) [1926] S.C.R. 692.

Also at p. 705 his Lordship quotes from Lord Watson in *Birrell* v. *Dryer* (1):

> I apprehend that it is perfectly legitimate to take into account such extrinsic facts as the parties themselves either had, or must be held to have had, in view, when they entered into the contract.

This observation would be equally applicable when construing a letter of repudiation.

As already stated, Springer, at the outset of the correspondence, expressed his interest in appellant's claims and the respondent's financing him upon a percentage basis. In February, 1950, the respondent corporation was incorporated and Springer became President and General Manager. Both McQuillan and Kvale were employed by the respondent in 1951 and Kvale's contract is dated April 20 of that year. Springer, in the course of his evidence and in discussing the letter of June 7, 1951, stated:

> McQuillan was going out for us, and I had heard of these showings . . . I knew that McQuillan and Kvale had been up for another of my companies in that area and had looked over the showings, made discoveries. So I inquired of McQuillan about what he thought of Dawson's showings, and he said he didn't think they were of importance, and discouraged—and his report was quite discouraging.

The letter of repudiation is dated June 7, 1951, and during the next month Kvale and McQuillan were taken into the area by helicopter. They were again taken into the area where, on August 2 of that year, they staked a number of claims which were duly recorded. The record does not indicate when respondent changed its mind as indicated by Springer's remark to appellant at its office in December, 1952, but it is apparent that many of the difficulties emphasized in the letter of June 7 had either disappeared or been overcome by the following month. Upon this record it rather appears that the respondent concluded it could continue without assistance from the appellant and, therefore, wrote the letter of repudiation.

The respondent, in this letter of repudiation, set forth its reasons therefore which it would be difficult for the appellant, stationed as he was in the Marshall Islands, to effectively appraise. I do not think that under such circumstances a conclusion adverse to the appellant can be drawn from his failure to further press the respondent at that time. Immediately upon his return in December, 1950, he "wrote

(1) (1884) 9 App. Cas. 345 at 353.

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Estey J.

to the Mining Recorder at Prince Rupert" and apparently continued his examination to ascertain what had, in fact, taken place. He visited the premises in June and July, 1950, and relocated the three claims which he had found in 1931. When he had ascertained, at least in part, what had taken place, he made his position known to the respondent in December of 1952. Moreover, while silence may be evidence of repudiation, its weight must depend upon the circumstances and here I do not think his silence, coupled with the steps he took immediately upon his return from the Marshall Islands, sufficiently supports a conclusion that he, at any time, intended to abandon his rights under the contract.

Upon receipt of the letter of repudiation dated June 7, 1951, the appellant might have accepted it and forthwith claimed damages. Since, however, he did not accept it, the contract remained in force and binding upon both parties. It, therefore, remained the duty of the respondent, having obtained a pilot, to take the appellant into the area in August or September. Not only did the respondent not do so, but, notwithstanding the terms of its letter of repudiation, it, in fact, took Kvale and McQuillan into the area where they staked claims on behalf of the respondent. This conduct constituted a breach of its contract.

The appeal should be allowed with costs throughout and the matter referred back to the Supreme Court of British Columbia to determine the damages.

Appeal allowed with costs.

Solicitors for the appellant: *Mason & Lane.*

Solicitors for the respondent: *Guild, Lane, Sheppard, Yule & Locke.*

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DIVORCE—*Concluded*

The jury found adultery to have been committed and assessed damages. On appeal it was contended that the trial judge had not properly instructed the jury as to the degree of proof necessary to prove adultery; that in an action for criminal conversation an even heavier onus rested upon the plaintiff than in an action for divorce; that the trial judge should have instructed the jury that any admission, even if made, was no evidence against the co-respondent, and, in any event, that it was not evidence of the truth of the statement allegedly made. *Held:* 1. That the standard of proof required in proceedings brought under the *Divorce Act (Ontario)* R.S.C. 1952, c. 85, as to the commission of a marital offence, where no question of the legitimacy of offspring arises, is the same as in other civil proceedings, that is a preponderance of evidence, and the trial judge's charge complied with the rule laid down in *Smith* v. *Smith and Smedman* [1952] 2 S.C.R. 312. 2. That since counsel for the co-respondent had not objected that evidence as to the alleged admission by the wife was not admissible as against his client, he could not be heard on appeal to complain of non-direction on that point. *Nevill* v. *Fine Art and General Insurance Co.* [1897] A.C. 68 at 76 applied. *Per* Kerwin C.J. and Cartwright J.: No substantial wrong or miscarriage of justice occurred in connection with the alleged admission of the wife. *Per* Locke J.: In view of the position adopted by counsel for the co-respondent at the trial it was not open to him to complain of the admission of the evidence. *Scott* v. *Fernie Lumber Co.* 11 B.C.R. 91 at 96 approved in *Spencer* v. *Field* [1939] S.C.R. 36 at 42. BOYKOWYCH v. BOYKOWYCH..... **151**

2.—— *Divorce — Obtained by husband — Adultery of wife—Whether husband can oppose demand of wife for partition of common property—Civil Code, Art. 209.* The husband, who obtained a Canadian parliamentary divorce on the ground of the adultery of his wife, cannot, in an action subsequently instituted by the latter for partition of the common property, allege in defence the fact of this misconduct in order to have a judgment declaring, under Art. 209 C.C., that she has for that reason forfeited her right to demand partition. Such a divorce dissolves the juridical tie of marriage and this dissolution operates the dissolution of the community of property. PARADIS v. LEMIEUX..... **282**

EVIDENCE—*Divorce—Evidence—Adultery —Standard of Proof required in Ontario —Criminal Conversation—Admission by one alleged adulterer not in presence of other—Admissibility against latter where no objection raised by him.* In a suit by a husband for divorce, joined with a claim against the co-respondent for damages for alienation of his wife's affections and for criminal

EVIDENCE—*Continued*

conversation, the husband testified his wife had admitted to him having committed adultery with the co-respondent. The allegation was denied by both defendants. The jury found adultery to have been committed and assessed damages. On appeal it was contended that the trial judge had not properly instructed the jury as to the degree of proof necessary to prove adultery; that in an action for criminal conversation an even heavier onus rested upon the plaintiff than in an action for divorce; that the trial judge should have instructed the jury that any admission, even if made, was no evidence against the co-respondent and, in any event, that it was not evidence of the truth of the statement allegedly made. *Held:* 1. That the standard of proof required in proceedings brought under the *Divorce Act (Ontario)* R.S.C. 1952, c. 85, as to the commission of a marital offence, where no question of the legitimacy of offspring arises, is the same as in other civil proceedings, that is a preponderance of evidence, and the trial judge's charge complied with the rule laid down in *Smith* v. *Smith and Smedman* [1952] 2 S.C.R. 312. 2. That since counsel for the co-respondent had not objected that evidence as to the alleged admission by the wife was not admissible as against his client, he could not be heard on appeal to complain of non-direction on that point. *Nevill* v. *Fine Art and General Insurance Co.* [1897] A.C. 68 at 76, applied. *Per* Kerwin C.J. and Cartwright J.: No substantial wrong or miscarriage of justice occurred in connection with the alleged admission of the wife. *Per* Locke J.: In view of the position adopted by counsel for the co-respondent at the trial it was not open to him to complain of the admission of the evidence. *Scott* v. *Fernie Lumber Co.* 11 B.C.R. 91 at 96 approved in *Spencer v. Field* [1939] S.C.R. 36 at 42. BOYKOWYCH v. BOYKOWYCH..... **151**

2.——*Discovery, Examination for—Witness —Privilege against self-crimination—Validity of s. 5, Evidence Act (B.C.) Order 31A, r. 370 (c) matter of practice and procedure—Application of common law rule—Evidence Act (B.C.)—Evidence Act (Can.)—Court Rules of Practice Act (B.C.) ss. 2, 4(3).* S. 5 of the *Evidence Act*, R.S.B.C. 1948, c. 113 provides: "No witness shall be excused from answering any question upon the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person: Provided that if with respect to any question the witness objects to answer upon the ground that his answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this section the witness would therefore have been excused from answering the question, then, although the

PATENTS—*Continued*

patent for the process also claimed a patent to the product produced by such process. *Held:* There being nothing new about the product, the appellant was not entitled to obtain a patent therefor even on the basis of a process dependent product claim. *Von Heyden* v. *Neustadt* 14 Ch. D. 230; *Auer Incandescent Light Mfg. Co.* v. *O'Brien* 5 Ex. C.R. 243; *Toronto Auer Light Co. Ltd.* v. *Colling* 31 O.R. 18. *Per* Kerwin C.J. and Taschereau, Locke and Cartwright JJ.: S. 41 (1) of the *Patent Act*, S. of C. 1935, c. 32, prohibits a claim for a substance for which a claim might otherwise be made: it does not authorize a claim for any substance which is not authorized by the other provisions of the Act. *Per* Rand J.: The prohibition applies to a new substance alone but allows one for that substance as produced by the new process. The special protection afforded the latter by s-s. (2) would seem to confirm the view that both the substance and process are to be new, but at least the substance must be new, and no inference can be drawn from it of a process dependent product claim where the product is old. HOFFMAN-LAROCHE & CO. v. COMMISSIONER OF PATENTS..... 414

2.—— *Patents — Infringement — Claims — Language of claims differing from that of specification—Applicability of doctrine of mechanical equivalents.* The appellant, owner of the Canadian patent to a signal device known as a liquid level indicator, designed for indicating the liquid level in fuel tanks, claimed the purpose of its invention was to provide a continuous audible signal until the liquid introduced into a tank reached a predetermined level, and that it accomplished this by a whistle which commenced to operate as soon as the liquid was introduced and continued until the latter reached a point predetermined by the extension of a tube into the tank. The whistle was stopped by the trapping of the lower end of the tube by the rising liquid. The respondent's device was designed for the same purpose and the audible device was also provided by means of a whistle but the vented gas went from the tank directly to the opening in the whistle. No dependent tube was used and the whistle was stopped by means of a cork suspended below the level of a casing by a rod. The rising liquid caused the cork and the rod to float upward until it covered the lower opening in the whistle and thus shut off the sound. In the Exchequer Court, Cameron J. held that the dependent tube constituted an integral and essential part of the appellant's invention; that the doctrine of mechanical equivalents did not apply and that the appellant had failed to establish an infringement. *Held:* (Rand J. dissenting) that for the reasons given by the trial judge, the appeal should be dismissed. *Per* Estey J. Throughout the appellant contended that a dependent tube

PATENTS—*Concluded*

projecting into the fuel tank was not an essential part of its invention and that, as in all other essentials the respective inventions were identical, an infringement had been effected. Upon the evidence it would seem that in any practical sense the dependent tube was essential to the efficient operation of the invention. A reading of the specification as a whole not only did not suggest any alternative meaning but in fact, supported the finding of the trial judge that "a second vent passage of smaller capacity" in claim 9 meant the dependent tube. *Per* Rand J. (dissenting)— Although only the tube that extended into the tank was described as the means of signalling the required level, that circumstance could not be taken as intending to embody the tube as the essential means of the device for that purpose. The tube or the float being obviously means of completing the purpose of the invention, the latter as defined in claim 9 was infringed. The tube not being essential an element in the combination, the use of the float was that of a mechanical equivalent. SCULLY SIGNAL CO. v. YORK MACHINE CO... 518

PETITION OF RIGHT — *Petition of right—Sale of land to Crown—Crown's liability for municipal taxes—Former owner claiming reimbursement for taxes paid.* On April 27, 1949, by a deed of sale, to which was attached the order-in-council authorizing the purchase, the Crown bought a property in Montreal from the appellant. The deed provided that the Crown would pay all the taxes "à compter du 1er avril courant (1949)". The order-in-council authorized the payment of the purchase price "together with such amount as may be legally due by the Crown in respect of taxes or other adjustments . . .". The Crown reimbursed the appellant one twelfth of the municipal taxes for the year 1948-49. In October, 1949, the municipality claimed payment from the appellant of the municipal taxes which were due for the year commencing May 1, 1949. The by-law imposing that tax had been adopted in March 1949. Upon threat of legal action by the municipality, the appellant paid the tax and claimed from the Crown, by petition of right, the reimbursement of it. The Exchequer Court dismissed the appellant's claim. *Held:* The appeal should be dismissed. The taxes for which reimbursement was sought were not those which the Crown had consented to pay. By the terms of the order-in-council, the only obligation assumed in this respect by the Crown was to pay the taxes legally due by it, and the Crown is not liable for municipal taxes other than those levied for municipal services, which was not the case here. The representative of the Crown could not bind the Crown to make a payment which was not authorized, nor could or did the Minister, through the mandate given to the Crown's representative,

TAXATION—*Continued*

the contracts between the appellant and its customers: "Unless a different intention appears . . .". The circumstances do not take it out of the general rule, as stated in the 8th edition of Benjamin on Sale page 691, that the property passes only when the goods are put on board. Even if it could be said that there had been no physical delivery, the second proviso of s. 86(1) of the *Special War Revenue Act* does not apply, since the property did not pass to the purchasers. *Per* Taschereau and Locke JJ.: Liability for the tax would attach only when the goods were delivered in accordance with the contracts or the property in them passed to the purchasers and they became liable to payment of the purchase price. Here there was no delivery and the purchasers had not become liable. The evidence adduced by the Crown proved that the sales were made F.O.B. Port Arthur or Fort William, terms which have an accepted legal meaning: *Wimble* v. *Rosenberg* (1913) 3 K.B. 743, Benjamin on Sale, 8th Ed. p. 691: *Maine Spring Co.* v. *Sutcliffe* (1917) 87 L.J.K.B. 382. In view of the terms of the contracts the matter was not affected by s. 33(1) of the *Manitoba Sale of Goods Act*. *Per* Abbott J. (dissenting): The delivery by the appellant to the carrier was a delivery to such carrier as agent of the buyer within the meaning of s. 86(1)*(a)* of the *Special War Revenue Act*. The use of the term "F.O.B.", in this case, merely conditioned one of the constituent elements in the sale price. STEEL CO. OF CANADA v. THE QUEEN **161**

2.——*Revenue—Income Tax—Deductions—Borrowed capital used in the business to earn income—Borrower-lender relationship essential—Interest allowed only on amount actually so used—Depreciation allowance in Minister's discretion—The Income War Tax Act, R.S.C., 1927, c. 97, ss. 5(1),(b), 6 (1) (n).* By s. 5 (1) *(b)* of the *Income War Tax Act*, R.S.C. 1927, c. 97, "Income' as hereinbefore defined shall for the purpose of this Act be subject to the following deductions: *(b)* Such reasonable rate of interest on borrowed capital used in the business to earn income as the Minister in his discretion may allow .... The appellant in 1929 financed the erection of an office building by an issue or debentures secured by a deed of mortgage and trust bearing interest after as well as before maturity and after as well as before default. The debentures after discount and brokerage charges netted $90 per $100 bond. The appellant defaulted on the interest payments but, in its annual income tax returns, deducted the interest payable, including interest on interest, as a charge against operating revenue. In assessing the appellant in 1946, 1947 and 1948 the Minister disallowed the deductions of interest on unpaid interest and also interest on $10 of each $100 debenture issued and disallowed part of the depreciation claimed on the building. *Held:* 1. That the interest in default upon which, by the terms of the mortgage, the borrower was obligated to pay interest was not "borrowed capital used in the business to earn income" within the meaning of s. 5 (1) *(b)* of the *Income War Tax Act*. The relation of borrower and lender necessary to justify the allowance was absent. 2. that the borrowed capital referred to in s. 5 (1) *(b)* is the amount of money borrowed, not the extent of the obligation incurred in order to borrow it. The appellant was able to borrow 90 per cent of the face amount of the debentures and it was that amount alone which was used in the business and upon which interest was allowable as a proper deduction from income. *Montreal Light, Heat & Power Consolidated* v. *Minister of National Revenue* [1942] S.C.R. 89, followed. 3. that the amount of depreciation to be allowed in computing the amount of profits to be assessed was such amount as the Minister in his discretion may allow and there was no evidence adduced to establish that the Minister failed to exercise the discretion vested in him in good faith and upon proper principles. Decision of the Exchequer Court of Canada [1954] Ex. C.R. 230, affirmed. STOCK EXCHANGE BUILDING CORP. LTD. v. MINISTER OF NATIONAL REVENUE..... **235**

3.—— *Taxation — Revenue — Income Tax —Business and business premises inherited subject to personal covenant to pay annuity—Premises also charged with payment—Whether such payments allowable as Income Tax deductions—The Income War Tax Act, R.S.C. 1927, c. 97, ss. 6(1) (a), (b), (c)—The Income Tax Act, S. of C. 1948, c. 52, s. 12 (1) (a), (b), (d).* T by his will gave his business and the land on which it was carried on to his son, the appellant, subject to the son's entering into a covenant to pay T's widow an annuity and maintain two residences for her lifetime, the land being charged with the performance of the covenant. The appellant claimed the disbursements made by him in fulfilling the covenant as deductions from his income for the years 1946, 1947, 1948 and 1949. The respondent disallowed them on the grounds that they were not as regards *The Income War Tax Act*, R.S.C. 1927, c. 97 as amended, "disbursements and expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning income" within the meaning of s. 6(1) *(a)* of that Act but were "capital expenses" within the meaning of s. 6(1) *(b)* and that as regards *The Income Tax Act*, S. of C. 1948, c. 52 as amended, the disbursements were not "an outlay or expense incurred by the appellant for the purpose of gaining or producing income" within the meaning of s. 12 (1) *(a)* but a "capital outlay" within the meaning of s. 12 (1) *(b)* of that Act. *Held* (Estey and Locke JJ. dissenting): That for the purpose of determining the

appellant's taxable income the receipts from the business should be reduced to the extent of the rental value of the land charged. *Raja Bejoy Singh Dudhuria* v. *Commsr. of Income Tax* (1933) 1 I.T.R. 135; 60 Ind. App. 196, followed. *Per* Estey and Locke JJ. (dissenting): As the payments were made in discharge of personal covenants entered into to obtain the business and the business premises, they were not deductions allowable under s. 6 (1) *(a)* or s. 12 (1) *(a)* of the respective Acts. The *Raja Bejoy Singh Dudhuria case, supra*, distinguished. *Per* Locke J. (dissenting): There was no charge upon the business or the income from that business but upon the land alone. The income was accordingly not diverted to the widow nor did the appellant receive any part of it on her behalf. As the payments were not incurred in earning the income of the business no deduction was allowable for the annual value of the businesx premises under s. 6(1) *(c)* of the first Act or s. 12 (1) *(b)* of the second, and as the payments were on account of capital within the meaning of clause *(b)* of s. 6 (1) and 12 (1) of the respective Acts they were not properly deductible from income. Judgment of the Exchequer Court of Canada, Cameron J., [1954] Ex. C.R. 36, reversed. WILSON v. MINISTER OF NATIONAL REVENUE.... **352**

4.——*Assessment—Taxation—Powers and jurisdiction of Court of Revision, County Court Judge, Municipal Board, Court of Appeal—The Assessment Act, R.S.O. 1950, c. 24, ss. 80, 82 and 83—The British North America Act, s. 96.* The issue raised by this appeal was whether the respondent's bowling alleys formed part of the real estate as defined by the *Assessment Act*, R.S.O. 1950, c. 24, s. 1 (i) (iv) and were therefore assessable. *Held:* (Affirming the decision of the Court of Appeal for Ontario, Rand, Kellock, Locke and Cartwright JJ. dissenting): that the question was a question of law and that the Court of Appeal was right in determining that the Ontario Municipal Board had no power to decide it. *Toronto Ry. Co.* v. *Toronto Corp.* [1904] A.C. 809. *Bennett & White (Calgary) Ld.* v. *Municipal District of Sugar City No. 5* [1951] A.C. 786 distinguished. *Per* Estey, Fauteux and Abbott JJ.: The question could only be determined by a court presided over by a judge appointed under s. 96 of the *British North America Act*. *Quance* v. *Ivey* [1950] O.R. 397 approved. *Phillips & Taylor* v. *City of Sault Ste. Marie* [1954] S.C.R. 404 distinguished. *Per* Rand and Cartwright JJ. (dissenting): The series of special appeals from an original assessment is, on the present statutory language limited to the task of completing the assessment roll and does not extend to the judicial determination of liability to taxation, a function of the civil courts alone. Under s. 83 an appeal to the Court of Appeal does not

embrace the determination of taxability either appellate or original, the section gives an appeal only on a question of law properly arising before the lower tribunals. On an appeal to the Municipal Board that body would be concerned with administrative jurisdiction only in the sense of being the final tribunal in review of the original assessment, its decision having no greater effect judicially than the act of the assessor. On appeal it may (as here) revise the acts of the assessor, amend the assessment roll and give it administrative finality. The court in *Quance* v. *Ivey, supra*, did not consider the administrative function of the Board. On this view of the statute it was within the jurisdiction of this Court to review the appeal to the Court of Appeal on the question of the jurisdiction of the Board. *Per* Kellock J. (dissenting): The *Assessment Act* lays a statutory duty upon the assessor to determine whether a given piece of property is or is not "land" or is assessable or exempt. He is to form his own judgment and act upon it. The same is true of the several assessment tribunals charged with the statutory duty of preparing and settling the assessment roll. The function of the courts is to determine in any given case to what extent, if any, liability to taxation follows. The decision of the Privy Council in the *Sugar City* case, *supra*, was not, as wrongly decided in *Quance* v. *Ivey, supra*, that the legislation was to be construed as conferring upon the assessment tribunals a jurisdiction formerly exercised by the courts and therefore ultra vires, but upon the view that it did not confer any such jurisdiction at all. The same is true of the judgment of this Court in *Phillips and Taylor* v. *Sault Ste. Marie, supra*. *Per* Locke J. (dissenting): The powers given to the Court of Revision, the County Court Judge and the Municipal Board by s. 83 of the *Assessment Act* to decide whether property is or is not assessable, may properly be exercised by them respectively, in discharge of their statutory duties as administrative acts to enable the completion of assessment rolls with reasonable promptness. *Bennett & White* v. *Municipal District of Sugar City, supra*, at 811 and 812; *Ladore* v. *Bennett*, [1939] A.C. 468 at 480. *Quance* v. *Ivey, supra*, distinguished. CITY OF TORONTO v. OLYMPIA EDWARD RECREATION CLUB LTD..... **454**

5.—— *Assessment — Taxation, Municipal —Jurisdiction—Claim for refund of Business Tax—Plant closed by strike—Office Staff employed—Whether manufacturing business carried on—The Assessment Act, R.S.O. 1950, c. 24, s. 124 (e).* The appellant, a manufacturer of rubber goods, was forced to shut down its plant for a four-month period due to a strike. In the interval its office staff, housed in a separate building, continued in their employment in so far as they were able to do so. The appellant

TAXATION—*Continued*

subsequently applied under s. 124 *(e)* of the *Assessment Act*, R.S.O. 1950, c. 24, to the Court of Revision for a refund of the business assessment tax paid by it for the period of the shut-down. The application was granted. An appeal by the respondent was dismissed by the Ontario Municipal Board but the Court of Appeal for Ontario set aside the Board's order. The appellant appealed and contended that the Court of Appeal had assumed jurisdiction which was not conferred on it by the Act and had purported to determine a fact (whether the appellant occupied or used land for the purpose of a manufacturer) which was not within its jurisdiction. *Held:* That the appellant failed to establish that it did not, within the meaning of s. 124 *(e)* of the *Assessment Act*, carry on the business of a manufacturer for the period in question and its appeal should be dismissed. *Held* also by (Kerwin C.J. and Estey and Locke JJ.): That the Court of Appeal had jurisdiction. *Per* Kerwin C.J. and Estey J.: The finding of the Board that the business of a manufacturer had not been carried on within the meaning of s. 124 *(e)* raised a question of law as to whether there was evidence to support such a finding. *Per* Kerwin C.J. and Locke J.: If there was such evidence, it was also a question of law whether the evidence brought the case within the Statute. *Loblaw Groceterias* v. *City of Toronto* [1936] S.C.R. 249; *Rogers-Majestic Corp.* v. *City of Toronto* [1943] S.C.R. 440; *South Behar Ry. Co.* v. *Commsrs. of Inland Revenue* [1925] A.C. 476 at 485, referred to. Decision of the Court of Appeal [1954] O.R. 493, affirmed. FIRESTONE TIRE & RUBBER CO. OF CANADA v. CITY OF HAMILTON **604**

6.——*Assessment—Taxation — Income Tax —Capital cost allowance claimed by corporation on assets purchased from another—Whether corporations controlled by same persons—Whether dealing at arms length—The Income Tax Act, S. of C. 1948, c. 52, ss. 11(1)(a), 20(2), 127(5).* The respondent was incorporated under the *Companies Act* (Can.) in June, 1949, and by an agreement dated July 4, purchased the assets of Sheldon's Limited, an Ontario corporation. In its income tax return for that year it claimed, under s. 11 (1) *(a)* of *The Income Tax Act*, a deduction in respect to capital cost allowance (depreciation) based on the capital cost to the respondent of certain assets purchased from the old company. The claim was disallowed by the appellant on the ground that by virtue of s. 20 (2) of the Act, the capital cost for the purpose of paragraph *(a)* was deemed to be the capital cost to the old company since the transaction had not been one between "persons dealing at arm's length" within the meaning of that section. Sheldon's Ltd. was controlled by its president and secretary who held a majority interest which they agreed to sell to three minority

TAXATION—*Continued*

shareholders. The latter negotiated a loan with the Bank to finance the purchase and the Bank stipulated that the borrowers should deposit with and assign to it as collateral security eighty per cent of the issued shares of the old company, that a new company be formed to acquire the shares purchased from the majority interest and the assets of the old company, the new company to issue bonds to be applied toward retiring the loan and that an agreement be obtained with an underwriter to purchase the bonds when issued. The terms were complied with. A new company, the respondent, was incorporated and the shares of the old company deposited with the Bank which had them transferred into the names of its own nominees. The transaction between the two companies was completed on July 4 on which date the directors of the old company passed a by-law authorizing the sale and a winding-up and distribution of its assets. This action was ratified by a general special meeting of its shareholders at which the Bank's nominees were in control. The new company's directors then authorized the purchase of the assets and the bond issue and their action was ratified by its shareholders. The directors then authorized purchase of the controlling interest in the old company and assumption of the bank loan. The result was that the new company became entitled to a conveyance of all the assets of the old company, and by virtue of having acquired all of its issued shares, to the amount realized from the sale of its assets. *Held:* At the time the sale of the depreciable property in respect of which the capital cost allowance was claimed, was made, the old company was completely controlled by the Bank. In the circumstances ss. 20(2) and 127(5) of the *Income Tax Act* had no application and the parties were at arm's length within the commonly accepted meaning of that expression. *Partington* v. *The Attorney General* L.R. 4 H.L. 100 at 122. *Versailles Sweets* v. *Attorney General of Canada* [1924] S.C.R. 466 at 468, applied. Judgment of the Exchequer Court of Canada [1954] Ex. Cr. 504, affirmed. MINISTER OF NATIONAL REVENUE v. SHELDON'S ENGINEERING LTD. **637**

7.—— *Revenue — Income Tax — Whether transaction between shareholder and company was at arm's length—Onus—Income Tax Act, S. of C. 1948, c. 52, ss. 20(2), 127(5).* The appellant acquired a farm from one of its shareholders at a price far exceeding the original cost to the vendor. The appellant claimed a capital cost allowance based on the price paid. All the issued shares of the appellant, minus three, were owned by the vendor and his five brothers, with more than one-half of the shares being owned by the vendor and any three of his brothers. Considering that the purchase by the appellant was not a transaction "at

TAXATION—*Continued*

arm's length" but was one between a corporation and one of several persons by whom the corporation was controlled, the Minister rejected the claim and based the allowance on the original cost to the vendor. The appeals to the Income Tax Appeal Board and to the Exchequer Court respectively were dismissed. *Held:* The appeal should be dismissed. Under s-s. (5) of s. 127 of the *Income Tax Act, 1948*, c. 52, the appellant and the vendor were deemed not to have dealt with each other at arm's length. *Per* Kerwin C.J. and Fauteux J.: Since the appellant was controlled by the vendor and three of his brothers, the vendor was one of several persons by whom the appellant was directly or indirectly controlled. *Per* Taschereau, Kellock and Abbott JJ.: The appellant failed to show error in respect of the Minister's conclusion that the transaction was not one between persons dealing at arm's length. MIRON AND FRERES LTD. v. MINISTER OF NATIONAL REVENUE..... **679**

8.—— *Assessment — Taxation — Income Tax—Allowance deductible in respect of an oil or gas well in computing income—The Income Tax Act, 1948, Can. c. 52, s. 11(1)(b)—Income Tax Regulation No. 1201(1), (4)—Income Tax Amendment Act, 1949, Can. 2nd Sess., c. 25, s. 53.* The appellant is a corporation whose principal business is the production of petroleum and the exploring and drilling for oil or natural gas within the meaning of s. 53 of the *Income Tax Amendment Act*, (1949, Can. 2nd Sess., c. 25). In computing income for the years 1949 and 1950 for the purpose of calculating depletion allowance under s. 11(1)*(b)* of the *Income Tax Act* and Regulation No. 1201 of the Income Tax Regulations and s. 53 of the *Income Tax Amendment Act*, it deducted exploration, development and other expenditures incurred in respect of wells that had shown a profit on an individual well basis excluding similar expenditures incurred on wells operated at a loss. The respondent ruled that the latter expenditures, as well as the former, should be deducted but on an aggregate well basis. *Held:* That the deductions are to be related to the wells individually and that unless the items of expenditure under s. 53 are clearly related to a profit producing well, they are not to be taken into account in determining the allowance under Regulation No. 1201 in respect of that well. Appeal allowed and the matter remitted to the Minister for re-assessment on the basis indicated. Decision of the Exchequer Court [1954] Ex. C.R. 622 reversed. HOME OIL CO. v. MINISTER OF NATIONAL REVENUE..... **733**

9.—— *Revenue — Income and excess profits taxes—Company incorporated under Part I of the Companies Act, 1934, for purpose of training pilots under the British Commonwealth Air Training Plan—Whether income exempt—Income War Tax Act, R.S.C. 1927, c. 97, ss. 4(e) and 4(h).* The respondent was incorporated in 1940 as a private company under Part I of the *Companies Act*, S. of C. 1934, c. 33, for the purpose of giving flying training in conjunction with the British Commonwealth Air Training Plan. Its letters patent prohibited the declaration of dividends and the distribution of profits "during the hostilities or during the period that the company is required to carry on elementary training under the Training Plan". The shareholders made a declaration of trust to the effect that they held their shares in trust for the benefit of the St. Catharines Flying Club, a company whose objects were the promotion of flying and aviation in general and the teaching and training of persons in flying and aerial navigation and whose letters patent provided that all profits and accretions should be used in promoting its objects. The respondent entered into two contracts with the Crown in 1940 and in 1943. Both contracts provided the terms of payments to be made for the services to be rendered, and in the second it was provided further that any profit should be held in a reserve account until the termination of the contract to be then paid to a flying club approved by the Minister of National Defence, failing which it would revert to the Crown. The respondent made a profit on both contracts and this was assessed for income and excess profits taxes. The assessment was affirmed by the Minister of National Revenue, but set aside by the Exchequer Court. *Held:* The appeal should be allowed as to the profit made under the first contract and dismissed as to the second. Under the second contract, there was no income liable to taxation since the terms of that contract amounted to a declaration that any surplus would be held subject to the direction of or in trust for the Crown. Under the first contract, any profit realized under the powers granted to the company by its letters patent was income liable to taxation under the terms of the statute. The fact that the company was incorporated under Part I of the Companies Act and the reference to dividends in the letters patent indicated that profits were contemplated. These profits were the property of the company which could retain them and distribute them after the termination of the hostilities or the period during which it was required to carry on under the Training Plan. The income under this contract was not exempt from taxation under s. 4*(h)* or 4*(e)* of the *Income War Tax Act*. MINISTER OF NATIONAL REVENUE v. ST. CATHARINES FLYING TRAINING SCHOOL LTD..... **738**

10.—— *Assessment — Taxation — Income Tax—Whether sum reserved to pay Foreign exchange but not drawn on "income"—The Income War Tax Act, R.S.C. 1927,*

WILLS — *Wills — Annuities — Payable out of rents and profits of designated property —Continuing charge on income—Right of annuitant to Arrears—To accumulation of surplus income to meet actual or contemplated deficiencies.* A testatrix by her will gave to her husband a life interest in her whole estate and directed the payment of annuities out of the rents and profits of a certain property to her surviving daughters and a granddaughter. By a residuary gift the rest of her estate went to all her sons and daughters to be equally enjoyed by them during the terms of their natural lives, and after their deaths to their heirs and assigns forever. The testatrix died in 1893 and her husband in 1913. Following his death the annuities were paid out of the profits of the property charged with their payment and the surplus distributed under the residuary clause. Between 1932 and 1945 the revenue from the property fell below the amount required to meet the charges, and the advice of the court was sought, as to whether the deficiency arising in any year was payable out of the rents and profits of any other year or years. Judson J., to whom the application was made, held that it was, and his judgment was affirmed by the Court of Appeal for Ontario. *Held:* By Rand, Estey, Locke and Fauteux JJ.—That any existing deficiency in a share of the gross annuity was in the first instance to be made up out of that portion of the rents and profits corresponding to that share, and so far might be paid in priority to the payment of the current annuity attributable to that portion, but this was not to affect the payment of the share of the gross annuity out of the appropriate portion of the rents and profits in relation to which there was no deficiency. In any year a deficiency prevented payment in full of the annuity recourse could be had to the rents and profits accrued during the lifetime of the annuitant in the first instance in the proportion set out above. Any deficiency existing at the death of the last person entitled to the annuity to cease to be payable out of the rents and profits earned after the death of such person. The appeal was therefore allowed in part and the judgment amended accordingly. Kerwin C.J. would have dismissed the appeal *in toto* as he agreed with the conclusions of the trial judge and the Court of Appeal. *Held:* Further, that the costs in this court and in both of the courts below should be payable out of capital. Judgment of the Court of Appeal for Ontario [1953] O.R. 897 are affirmed, subject to a variation. BEARD v. BARRETT..... **93**

2.——*Wills—Residuary estate consisting of unauthorized securities—Trust for conversion with power to postpone—Rights of Tenant for life—Enjoyment in specie.* A testator gave the residue of his estate upon trust to convert with power to postpone conversion and directed his trustees to pay the income of his residuary estate to his widow

WILLS—*Continued*

for life and upon her death to set aside sufficient of the residue to yield certain annuities and subject thereto to divide the residue among the testator's nephews and nieces then alive. The major part of the residue consisted of shares in a company a type of security in which trustees were not by law authorized to invest. At the date of death the company had built up a large surplus which it proceeded to distribute to shareholders as a dividend. This raised the question as to whether the widow was entitled to enjoy the dividends in specie or whether an order similar to that in *In re Chaytor: Chaytor* v. *Horn* [1905] 1 Ch. 233 should be made. *Held:* (Estey and Cartwright JJ. dissenting): That upon a proper construction of the will it was to be presumed that the testator intended that the residue was to be enjoyed by different persons in succession and applying the rule in *Howe* v. *Dartmouth (Earl)* 7 Ves. 137, a duty rested on the trustees to convert. The rule might have been excluded if the will disclosed an intention either by express direction or necessary implication that the property should be enjoyed in specie but the onus of showing this had not been met. *Per* Estey and Cartwright JJ. (dissenting): By clause IV *(b)* of the will a power was conferred upon the trustees to retain until the trusts were completely executed. By clause IV *(e)* the testator gave to his widow the net annual income of all the securities representing the residue of his estate including income from unconverted property subject only to payment of specified annuities thereby excluding the rule in *Howe* v. *Dartmouth, Earl, supra. Re Thomas* [1891] 3 Ch. 482 at 486 approved in *In Re Chaytor, Chaytor* v. *Horn* [1905] 1 Ch. 233 at 238 referred to. ROYAL TRUST CO. v. CRAWFORD..... **184**

3.—— *Will — Ademption — Devise to executors for sale with direction to pay net proceeds into Trust Fund—Sale by testator—Proceeds deposited in bank—Subsequent withdrawals —Effect on legacy.* A testator by his will directed his executors to sell and convert into money all the assets of his estate and after the payment of debts and a legacy to the Flower Fund of a church "to pay the net proceeds from the sale of my automobile, furniture and Adelaide Street property in the said city of Saint John" to the appellant upon certain trusts, to pay certain other pecuniary legacies; and the residue to the respondents FitzGerald and Carloss. He finally directed that "Should the net proceeds of my estate at the time of my death be insufficient to pay the aforesaid legacies in full then I direct that they should be paid *pro rata* but that the gift for the Flower Fund and of the net proceeds of the sale of my automobile, furniture and real estate shall be paid in full." Prior to his death the testator sold the three last mentioned items and deposited the proceeds in his bank account. He later