1969

CANADA

LAW REPORTS

RAPPORTS JUDICIAIRES

DU CANADA

Supreme Court of Canada
Cour Suprême du Canada

Editors—Arrêtistes
FRANÇOIS des RIVIÈRES, C.R.
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PUBLIÉ CONFORMÉMENT À LA LOI PAR
KENNETH J. MATHESON, C.R., Registraire de la Cour

91314—1

JUDGES

OF THE

SUPREME COURT OF CANADA

The Right Honourable JOHN ROBERT CARTWRIGHT, P.C., *Chief Justice of Canada.*

The Honourable GÉRALD FAUTEUX.

The Honourable DOUGLAS CHARLES ABBOTT, P.C.

The Honourable RONALD MARTLAND.

The Honourable WILFRED JUDSON.

The Honourable ROLAND A. RITCHIE.

The Honourable EMMETT MATTHEW HALL.

The Honourable WISHART FLETT SPENCE.

The Honourable LOUIS-PHILIPPE PIGEON.

ATTORNEY GENERAL OF CANADA

The Honourable JOHN N. TURNER, Q.C.

SOLICITOR GENERAL OF CANADA

The Honourable GEORGE J. MCILRAITH, Q.C.

JUGES

DE LA

COUR SUPRÊME DU CANADA

Le Très honorable JOHN ROBERT CARTWRIGHT, C.P., *juge en chef du Canada.*

L'honorable GÉRALD FAUTEUX.

L'honorable DOUGLAS CHARLES ABBOTT, C.P.

L'honorable RONALD MARTLAND.

L'honorable WILFRED JUDSON.

L'honorable ROLAND A. RITCHIE.

L'honorable EMMETT MATTHEW HALL.

L'honorable WISHART FLETT SPENCE.

L'honorable LOUIS-PHILIPPE PIGEON.

PROCUREUR GÉNÉRAL DU CANADA

L'honorable JOHN N. TURNER, C.R.

SOLLICITEUR GÉNÉRAL DU CANADA

L'honorable GEORGE J. MCILRAITH, C.R.

91314—1½

ERRATA
in—dans le
volume 1969

Page 384, line 4 of caption. Read "c. 52" instead of "c. 152".

Page 659, replace line 17 by "to the plaintiff, the Appeal Court disagreed with the trial judge".

Page 774, footnote. Read "R.C.S." instead of "R.S.C.".

Page 828, the position of lines 10 and 11 from bottom should be interchanged.

Page 384, ligne 4 de l'en-tête. Lire "c. 52" au lieu de "c. 152".

Page 659, remplacer la ligne 17 par "to the plaintiff, the Appeal Court disagreed with the trial judge".

Page 774, renvoi. Lire "R.C.S." au lieu de "R.S.C.".

Page 828, les lignes 10 et 11 à compter du bas de la page doivent être mises l'une à la place de l'autre.

UNREPORTED JUDGMENTS—JUGEMENTS NON RAPPORTÉS

The following judgments rendered during the year will not be reported

Les jugements suivants rendus durant l'année ne seront pas rapportés

Asselin v. Lemelin (Que.), [1967] Que. Q.B. 893, appeal allowed with costs, March 3, 1969.

Bower v. Hudson (Alta.), appeal dismissed with costs, March 10, 1969.

Brisson et al. v. Vyvyan (Que.), [1969] Que. Q.B. 657, appeal dismissed with costs, November 20, 1969.

Conseil des Ports Nationaux v. Cité de Jacques-Cartier (Que.), [1968] Que. Q.B. 120, appeal dismissed with costs, October 1, 1968.

Commission de Transport de Montréal v. Schwartz (Que.), appeal dismissed with costs, November 20, 1969.

Couture (Belle Redifusion Reg.) v. Thetford Video Inc. et al. (C.R.T.C.), appeal dismissed with costs, November 28, 1969.

Craig v. The Queen (B.C.), appeal dismissed, October 28, 1969.

D.W.S. Corporation v. Minister of National Revenue (Exch.), [1968] 2 Ex. C.R. 44, appeal dismissed with costs, February 11, 1969.

Desjardins v. Hudon (Que.), [1969] Que. Q.B. 134, appeal dismissed with costs, May 22, 1969.

Dr. Barnardo's v. Minister of National Revenue (Exch.), [1968] 2 Ex. C.R. 492, appeal dismissed with costs, February 25, 1969.

Dominion Insurance Corporation v. One Hundred Simcoe Street Limited (Ont.), [1948] 1 O.R. 452, appeal dismissed with costs, January 30, 1969.

Down v. Down et al. (Ont.), [1968] 2 O.R. 16, appeal dismissed with costs, March 21, 1969.

Eklove & Starr Inc. et al. v. Lesa Realties Limited et al. (Que.), [1968] Que. Q.B. 646, appeal dismissed with costs, March 7, 1969.

Henry Morgan Company Limited et al. v. Holliday et al. (Ont.), appeal dismissed with costs, March 20, 1969.

Income Investments (Wentworth) Limited v. Elmore et al. (Ont.), appeal dismissed with costs, June 6, 1969.

Industrial Glass Company Limited v. Cité de LaSalle (Que.), [1969] Que. Q.B. 231, appeal dismissed with costs, November 21, 1969.

Industries E. Roy Limitée v. Aubin et Aubin (Que.), [1968] Que. Q.B. 77, appeal dismissed with costs, March 6, 1969.

Knitel v. Vermette (Que.), [1968] Que. Q.B. 931, appeal dismissed with costs, November 24, 1969.

Lachine, City of v. Dominion Engineering Works Limited (Que.), [1966] Que. Q.B. 621, appeal dismissed with costs, May 13, 1969.

Lapierre v. Ministre de l'Agriculture et de la Colonisation de la province de Québec et al. (Que.), [1968] Que. Q.B. 836, appeal dismissed with costs, November 18, 1969.

Montréal, Cité de v. Dutilly Dechabannes la Palice et al. (Que.), [1968] Que. Q.B. 643, appeals and cross-appeals dismissed with costs, May 21, 1969.

Murdock v. Canadian Superior Oil Limited et al. (Alta.), 65 W.W.R. 473, appeal dismissed with costs, October 31, 1969.

McRae (James D.) & Son et al. v. Black (Ont.), [1969] 1 O.R. 213, appeal dismissed with costs, June 5, 1969.

Nash v. Western Rock Bit Company Limited (Alta.), 68 D.L.R. (2d) 673, appeal dismissed with costs, February 13, 1969.

Pratt v. St. Albert Protestant Separate School District No. 6 (Alta.), 5 D.L.R. (3d) 451, appeal dismissed with costs, conditional cross-appeal dismissed without costs, November 4, 1969.

Producers Cold Storage Limited v. The Queen (Exch.), appeal dismissed with costs, June 18, 1969.

Rivtow Marine Limited v. McKenzie Barge & Derrick Company Limited (B.C.), 70 D.L.R. (2d) 409, appeal dismissed with costs, October 30, 1969.

Robitaille v. Flamand (Que.), [1966] Que. Q.B. 723, appeal dismissed with costs, February 29, 1969.

Southern Canada Power Company Limited v. Conserverie de Napierville Ltée (Que.) [1967] Que. Q.B., 907, appeal and cross-appeal dismissed with costs, March 5, 1969.

Stasun v. Nesteroff (Sask.), 61 W.W.R. 694, appeal allowed with costs, February 25, 1969.

York Lambton Corporation Limited et al. v. Genovese et al. (Man.), appeal dismissed with costs, March 20, 1969.

MOTIONS—REQUÊTES

Applications for leave to appeal granted are not included in this list.

Cette liste ne comprend pas les requêtes pour permission d'appeler qui ont été accordées.

Arbic v. The Queen (Que.), [1969] Que. Q.B. 420, leave to appeal refused, March 17, 1969.

Baillargeon v. Corpn. des Frères du Sacré-Cœur d'Arthabaska (Que.), [1969] Que. Q.B. 553, leave to appeal refused with costs, April 29, 1969.

Bazos et al. v. Bazos et al. (Ont.), notice of discontinuance filed, September 8, 1969.

Beattie v. The Queen (Ont.), 7 C.R.N.S. 116, leave to appeal refused, October 20, 1969.

Beaudoin v. Trottier (Que.), leave to appeal refused with costs, April 22, 1969.

Bélanger v. La Reine (Exch.), notice of discontinuance filed, June 18, 1969.

Béliveau v. The Queen (Ont.), leave to appeal refused, March 3, 1969.

Bell et al v. Smith (Ont.), motion to quash refused with costs, October 7, 1969.

Bell et al. v. Smith (Ont.), consent judgment allowing appeal granted, December 15, 1969.

Benzick v. Newman (Man.), 69 W.W.R. 382, notice of discontinuance filed, November 25, 1969.

Boissonneau v. Leblanc et al. (N.B.), 1 N.B.R. (2d) 396, leave to appeal refused with costs, June 16, 1969.

Bonin v. La Reine (Que.), leave to appeal refused, October 7, 1969.

Bottineau v. The Queen (B.C.), leave to appeal refused, May 20, 1969.

Boyer v. The Queen (B.C.), 64 W.W.R. 461, leave to appeal refused, March 17, 1969.

Brisson et al. v. Vyvyan (Que.), [1969] Que. Q.B. 657, application to adduce new evidence refused with costs, November 18, 1969.

Brown v. Minister of Manpower and Immigration (Immigration Appeal Bd.), leave to appeal refused, May 20, 1969.

Brown Camps Limited v. The Queen (Ont.), [1969] 2 O.R. 461, leave to appeal refused, May 20, 1969.

Burlington Industries (Canada) Limited v. Quebec Labour Relations Board (Que.), leave to appeal refused with costs, May 13, 1969.

Burrows et al. v. Becker et al. (B.C.), [1969] S.C.R. 162, application for rehearing refused with costs, February 3, 1969.

Canadian Imperial Bank of Commerce et al. v. Ontario-London Leaseholds Limited et al. (Ont.), notice of discontinuance filed, August 14, 1969.

Channel Islands Breeds Milk Producers Assn. v. Milk Commission of Ontario & Ontario Milk Marketing Board, 4 D.L.R. (3d) 490, leave to appeal refused with costs, April 22, 1969.

Cheung v. Minister of Manpower and Immigration (Immigration Appeal Bd.), leave to appeal refused, June 16, 1969.

Cloudfoam Limited et al. v. Toronto Harbour Commissioners (Ont.), [1969] 2 O.R. 194, notice of discontinuance filed, December 5, 1969.

Collins v. Dufour (Que.), [1969] Que. Q.B. 264, notice of discontinuance filed, October 27, 1969.

Cope, (A.) & Sons Ltd. v. Corporation of the City of Hamilton (Ont.), notice of discontinuance filed, January 20, 1969.

Croteau v. The Queen (Que.), leave to appeal refused, October 20, 1969.

Denis v. The Queen (Ont.), [1969] 2 O.R. 205, leave to appeal refused, February 20, 1969.

Desjardins et Sauriol Dessau Ltée v. Lord (Que.), leave to appeal refused with costs, December 1, 1969.

Desousa v. Minister of Manpower and Immigration (Immigration Appeal Bd.), leave to appeal refused, November 3, 1969.

Earles et al. v. Fuller at al. (Ont.), [1968] 2 O.R. 564, leave to appeal refused with costs, January 28, 1969.

Evans Lumber and Builders Supply Ltd. v. Chapleau High School Board et al. (Ont.), notice of discontinuance filed, June 25, 1969.

Faubert v. La Reine (Exch.), notice of discontinuance filed, June 17, 1969.

Filion v. Hopital Ste-Justine (Que.), notice of discontinuance filed, September 12, 1969.

Finacentres Limited v. Clark et al. (P.E.I.), notice of discontinuance filed, November 10, 1969.

Frank v. The Queen (B.C.), 69 W.W.R. 588, leave to appeal refused, November 3, 1969.

Gabriel v. Minister of Manpower and Immigration (Immigration Appeal Bd.), leave to appeal refused, December 22, 1969.

Gagnon v. La Reine (Que.), 1969 Que. Q.B. 766, notice of discontinuance filed, December 16, 1969.

Galardo v. Minister of National Revenue (Exch.), [1968] C.T.C. 127, notice of discontinuance filed, February 13, 1969.

Gattuso Investments Inc. v. Gattuso Corporation Limited (Exch.), application for leave to appeal under Winding-up Act refused with costs, April 10, 1969.

Genser & Sons Limited v. The Queen (Man.), 4 D.L.R. (3d) 389, leave to appeal refused, January 28, 1969.

Goronuk v. The Queen (B.C.), leave to appeal refused, April 22, 1969.

Green v. The Queen (Ont.), leave to appeal refused, January 29, 1969.

Grenier v. Norwich Union Fire Insurance Society Limited (Que.), [1969] Que. Q.B. 314, leave to appeal refused with costs, January 28, 1969.

Haits v. The Queen (Alta.), leave to appeal refused, March 17, 1969.

Halifax, City of, and Central Mortgage and Housing Corporation v. Provinces and Central Properties Limited (N.S.), 5 D.L.R. (3d) 28, notice of discontinuance filed, December 2, 1969.

Hallow v. The Queen (B.C.), 67 W.W.R. 211, leave to appeal refused, February 3, 1969.

Hamilton Motor Products (1963) Limited v. Minister of National Revenue (Exch.), notice of discontinuance filed, March 21, 1969.

Hamm v. The Queen (Ont.), leave to appeal refused, June 2, 1969.

Hardisty v. The Queen (Alta.), leave to appeal refused, December 15, 1969.

Heaton v. The Queen (Alta.), leave to appeal refused, February 3, 1969.

Horbas et al. v. The Queen (Man.), 67 W.W.R. 95, leave to appeal refused, January 28, 1969.

Hwa. v. Minister of Manpower and Immigration (Immigration Appeal Bd.), leave to appeal refused, November 17, 1969.

International Woodworkers v. Oliver Sawmills (B.C.), 69 C.L.L.C. 11, 925, leave to appeal refused with costs, October 27, 1969.

Island Prince, The Ship v. New England Fish Co. (Exch.), notice of discontinuance filed, June 2, 1969.

Jeng v. Minister of Manpower and Immigration (Immigration Appeal Bd.), leave to appeal refused, June 26, 1969.

Jones v. Spear (N.B.), 1 N.B.R. (2d) 729, notice of discontinuance filed, August 28, 1969.

Kline v. The Queen (Alta.), leave to appeal refused with costs, October 7, 1969.

Kurenoff v. The Queen (Sask.), leave to appeal refused, March 3, 1969.

L'Abbée et al v. Cité de Montréal et al. (Que.), [1968] Que. Q.B. 419, leave to appeal refused with costs, January 28, 1969.

Lachapelle v. Poulin (Que.), leave to appeal refused with costs, April 22, 1969.

Lachine, Cité de, et al. v. Cité de Montréal (Que.), leave to appeal refused with costs, December 1, 1969.

Laliberté v. Lond et al. (B.C.), notice of discontinuance filed, January 15, 1969.

Lewin (Jack) Co. v. Corpn. of Master Pipe Mechanics (Que.) et al. (Que.), leave to appeal refused with costs, December 1, 1969.

Longpré v. Commission municipale de Québec et al. (Que.), leave to appeal refused with costs, March 4, 1969.

Mariani v. Minister of National Revenue (Exch.), notice of discontinuance filed, February 13, 1969.

Marquest Industries Limited v. Willows Poultry Farms Limited (B.C.), 1 D.L.R. (3d) 513, notice of discontinuance filed, September 16, 1969.

Matteo Gattuso Limited et al. v. Gattuso Corporation Limited (Exch.), [1968] 2 Ex. C.R. 609, notice of discontinuance filed, April 28, 1969.

Minister of National Revenue v. Canada Starch Company Limited (Exch.), [1968] C.T.C. 466, notice of discontinuance filed, January 21, 1969.

Minister of National Revenue v. Crossley Carpets (Canada) Limited (Exch.), 1969 1 Ex. C.R. 405, notice of discontinuance filed, December 30, 1969.

Montréal, Cité v. Gagnon (Que.), notice of discontinuance filed, September 26, 1969.

Murphy v. C.P.R. (B.C.), 1 D.L.R. (3d) 151, leave to appeal refused, January 28, 1969.

Murphy v. The Queen (N.B.), 6 C.R.N.S. 353, notice of discontinuance filed, April 11, 1969.

McGroarty v. The Queen (Ont.), leave to appeal refused, May 20, 1969.

McWhirter v. The Queen (B.C.), 69 W.W.R. 572, leave to appeal refused, October 7, 1969.

Nadeau et al v. Insurance Corporation of Ireland Limited (N.B.), [1968] I.L.R. 232, notice of discontinuance filed, March 28, 1969.

National Capital Commission v. Major et al. (Exch.), [1969] 1 Ex. C.R. 327, notice of discontinuance filed, September 16, 1969.

Northcott et al. v. Boutland (Alta.), notice of discontinuance filed, March 12, 1969.

Northland Prince, The Ship v. Alaska Trainship Corpn. (Exch.), notice of discontinuance filed, June 2, 1969.

O'Shea et al v. Corpn. of City of Toronto (Ont.), leave to appeal refused with costs, April 22, 1969.

Palmer v. The Queen (B.C.), leave to appeal refused, December 15, 1969.

Parna et al. v. G. & S. Properties et al. (Ont.), [1969] 2 O.R. 346, application to adduce new evidence refused with costs, December 1, 1969.

Pasieka et al. v. Hasler & Trophy Silver Mines Limited (B.C.), leave to appeal refused with costs, June 16, 1969.

Peda v. The Queen (Ont.), [1969] 1 O.R. 90, motion to quash refused, January 29, 1969.

Pfrimmer v. Pfrimmer (Man.), 66 W.W.R. 574, leave to appeal refused with costs, March 17, 1969.

Pithamitsis v. Minister of Manpower and Immigration (Immigration Appeal Bd.), leave to appeal refused, November 3, 1969.

Plante v. Giroux (Que.), leave to appeal refused with costs, April 22, 1969.

Ponack v. The Queen (B.C.), leave to appeal refused, October 7, 1969.

Premier Trust Co. v. Hoyt et al. (Ont.), [1969] 1 O.R. 625, notice of discontinuance filed, September 3, 1969.

Prevezanos v. The Queen (Immigration Appeal Bd.), leave to appeal refused, February 17, 1969.

Queen, The v. Carnation Company (Alta.), 67 D.L.R. (2d) 215, motion to quash granted, May 20, 1969.

Queen, The v. Employers Liability Assurance Corporation Limited (Exch.), 1969 2 Ex. C.R. 246, notice of discontinuance filed, December 16, 1969.

Queen, The v. Gruhl & Brennan (Ont.), [1969] 2 O.R. 163, leave to appeal refused, February 17, 1969.

Queen, The v. Isaacs (Ont.), leave to appeal refused, February 20, 1969.

Queen, The v. Morry (B.C.), 69 W.W.R. 572, leave to appeal refused, October 7, 1969.

Queen, The v. Rosenberg (Ont.), [1969] 2 O.R. 54, leave to appeal refused, January 29, 1969.

Rafael v. Minister of Manpower and Immigration (Immigration Appeal Bd.), leave to appeal refused, November 17, 1969.

Reio v. The Queen (Ont.), leave to appeal refused, April 22, 1969.

Renaud v. The Queen (Ont.), leave to appeal refused, November 7, 1969.

Richards v. The Queen (Alta.), leave to appeal refused, December 15, 1969.

Rivershore Investments Limited v. Minister of National Revenue (Exch.), notice of discontinuance filed, February 10, 1969.

Robert v. The Queen (B.C.), [1969] 3 C.C.C. 165, leave to appeal refused, February 17, 1969.

St-Bruno de Montarville v. Potvin et al. (Que.), leave to appeal refused with costs, December 1, 1969.

Saint John, City of v. Palmer et al. (N.B.), 1 N.B.R. (2d) 193, notice of discontinuance filed, April 14, 1969.

St-Pierre v. Langelier (Que.), leave to appeal refused with costs, April 22, 1969.

Scott et al. v. McCready (B.C.), motion to quash granted with costs, March 3, 1969.

Seroff v. Minister of Manpower and Immigration (Immigration Appeal Bd.), leave to appeal refused, October 20, 1969.

Shaw v. The Queen (B.C.), 66 W.W.R. 626, leave to appeal refused, March 3, 1969.

Sheehan v. The Queen (Que.), leave to appeal refused with costs, May 20, 1969.

Sheran Manufacturing Co. of Canada Limited v. Noxzema Chemical Co. of Canada Limited (Exch.), [1968] 2 Ex. C.R. 446, notice of discontinuance filed, March 5, 1969.

Société de Publication Merlin Ltée v. Létourneau-Bélanger (Que.), leave to appeal refused, June 16, 1969.

Sokol v. Lennox (Alta.), notice of discontinuance filed, November 7, 1969.

Sorley v. The Queen, (B.C.), leave to appeal refused, January 28, 1969.

Stasun v. Nesteroff (Sask.), 67 W.W.R. 224, motion to quash refused with costs, February 3, 1969.

Steveross Holdings Limited v. Petrofina Canada Limited (Ont.), notice of discontinuance filed, December 1, 1969.

Stuart House International Limited et al. v. Warren (Ont.), notice of discontinuance filed, November 10, 1969.

Taveres v. Minister of Manpower and Immigration (Immigration Appeal Bd.), leave to appeal refused, October 20, 1969.

Tomalin v. Commercial Credit Corporation (Man.), 70 W.W.R. 240, leave to appeal refused with costs, December 1, 1969.

Tomlinson v. The Queen (Ont.), leave to appeal refused, October 21, 1969.

Tonner v. The Queen (Alta.), leave to appeal refused, May 5, 1969.

Trans North Turbo Air Limited v. Kenting Aircraft Limited (Cdn. Transport Comm.), notice of discontinuance filed, March 21, 1969.

Turnbull et al. v. Earle et al. (N.B.), notice of discontinuance filed, August 13, 1969.

Ulan v. Sproul (Ont.), notice of discontinuance filed, August 14, 1969.

United Amusement Corpn. Ltd. et al. v. Gilbert & Boisvert ((Que.), [1969] R.P. 128, leave to appeal refused with costs, October 7, 1969.

United Stores v. Immeubles Lomme (Que.), leave to appeal refused with costs, October 7, 1969.

Vinnal v. Sorra et al. (Ont.), notice of discontinuance of appeal against Renata Sorra filed, March 31, 1969.

Ward v. The Queen (Ont.), leave to appeal refused, December 15, 1969.

Weinstein v. Minister of National Revenue (Exch.), 68 D.T.C. 5232, notice of discontinuance filed, January 22, 1969.

Westmount Life Insurance Company v. Dennis Commercial Properties (Ont.), 1969 2 O.R. 850, motion to quash refused with costs, October 9, 1969.

Westmount Life Insurance Company v. Dennis Commercial Properties Limited (Ont.), 1969 2 O.R. 850, notice of discontinuance filed, December 23, 1969.

Whalen v. The Queen (N.S.), leave to appeal refused, February 17, 1969.

Whitelaw v. McDonald et al. (B.C.), 66 W.W.R. 522, leave to appeal refused, November 3, 1969.

Wimco Industry (Eastern) Ltd. v. Wimco (Ont.), leave to appeal refused with costs, March 27, 1969.

Winton (H.G.) Limited v. One Medical Place Limited et al. (Ont.), [1968] 2 O.R. 384, notice of discontinuance of cross-appeal filed, April 24, 1969.

Yellow-Horn v. The Queen (Alta.), leave to appeal refused, April 22, 1969.

York Lambton Corporation Limited et al. v. Genovese et al. (Ont.), leave to appeal refused with costs, October 20, 1969.

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THE SUPREME COURT OF CANADA

GENERAL ORDER

WHEREAS by virtue of Section 103 of the Supreme Court Act, R.S.C. 1952, c. 259, as amended by R.S.C. 1952, c. 335, and the Statutes of Canada, 1956, c. 48, the undersigned Judges of the Supreme Court of Canada are empowered to make general rules and orders as therein provided:

IT IS ORDERED that the Rules of the Supreme Court of Canada be and they are hereby amended in accordance with paragraphs numbered 1 to 9, both inclusive, which follow:

1. That subsection 7 of Rule 2 is repealed and the following substituted therefor:

(7) The word "printing" shall include reproduction by set type, by the offset process, by the stencil process, or any facsimile reproduction process provided, however, that the reproduced copy shall throughout be clear and legible, notwithstanding the state of the original and shall be on paper of good quality and suitable for the process used.

2. That Rule 2A and heading are added to follow Rule 2 as follows:

STYLE OF CAUSE

RULE 2A.

(*a*) The notice of appeal and the title page of the case on appeal, as well as a notice of motion to quash or for leave to appeal, shall have a style of cause without abbreviation of names.

(*b*) The name of the appellant shall be set out first indicating his status in the courts below and followed by his description "Appellant".

(*c*) Then shall follow the name of each party against whose interest the appeal is launched followed by his status in the courts below and he or they shall be designated "Respondent".

(*d*) Thereafter shall be mentioned any other party to the proceedings in this Court together with their status in the courts below, if they had any.

(*e*) Thereafter shall be listed each of the other parties to the proceedings in the courts below together with their status in those courts.

(*f*) The description of status in the courts below, referred to in this Rule shall relate to position in the proceedings and any special capacity and shall be in parentheses.

(*g*) Where a style of cause without abbreviation is not required, status in the courts below and names of parties in those courts not brought into this Court shall be omitted.

3. That subsection 9 of Rule 12 is repealed and the following substituted therefor:

(9) The title page shall be entitled "In The Supreme Court of Canada" and immediately thereunder shall appear the name of the

Court and the Province from which the appeal comes and the Style of Cause without abbreviation or translation. Thereafter shall appear "Case on Appeal" between appropriate parallel lines. When the Case on Appeal is printed in more than one volume, then below the words Case on Appeal and between the parallel lines shall be indicated in Roman numerals the volume number and after or below the volume number the page numbers of the first and last pages in that volume.

4. That Rule 20 is repealed and the following is substituted therefor:

RULE 20.(1)—The Registrar shall keep a book to be called "The Agents Book", in which all advocates, solicitors, attorneys and proctors representing parties to an appeal or to any other proceeding before the Supreme Court shall have entered the name of an agent (such agent being himself a person entitled to practise in the said Court) at Ottawa, or elect a domicile there. If no such entry is of record one shall be made forthwith after obtaining knowledge of proceedings before the Court.

(2) An Ottawa agent in a cause before the Court, shall enter his name (and also his business address at Ottawa) as agent for his principal, stating therein in brief form the style of cause, and such entry shall then be deemed to relate only to the cause so stated. If the Ottawa agent is to represent his principal in all matters in which the latter is concerned before the Court, except those referred to specifically, the agency shall be described "General" in The Agents Book.

(3) If any advocate, solicitor, attorney or proctor for a party to an appeal has not had entered in The Agents Book the name of his Ottawa agent, (and the entries in "The Agents Book" shall be conclusive with respect thereto) such advocate, solicitor, attorney or proctor may be served by posting a copy of the papers to be served, on the notice board kept for that purpose, in the Registrar's office and, in addition thereto, by mailing a copy of such papers by ordinary post to such advocate, solicitor, attorney or proctor directed to his last address of record in any of the proceedings in this Court, or, if no such address is available, the address shown in a current Law List, or otherwise known to the serving solicitor.

(4) Any such agency may be cancelled or altered by a further entry in The Agents Book.

5. That Rules 42 and 44 are repealed and the following respectively substituted therefor:

RULE 42.(1)—The Registrar shall prepare the formal judgment of the Court and shall, not earlier than two weeks after the pronouncement of the judgment, unless otherwise ordered, appoint a day for settling the same at his Chambers. A copy of the draft judgment shall be forwarded by ordinary post to the office of the agent at Ottawa of each of the parties who appeared at the proceedings together with a notice fixing the time and date when such judgment shall be settled.

(2) Such settlement shall not come on for hearing until at least seven days after the mailing of the notice.

RULE 44.—If there is no booked agent at Ottawa for any party, the judgment may be settled without notice to that party.

6. That Rules 54 to 57, both inclusive, are repealed and the following new Rules 54 to 57 are substituted therefor:

RULE 54.—Except as may be otherwise specifically provided or permitted, all interlocutory applications shall be brought by notice of motion in writing, and, such writing, shall be in the terms of a notice of motion in accordance with Form "Q".

RULE 55. (1)—An affidavit shall be provided only to substantiate any fact that is not a matter of record in the Court. When the records of the Court appealed from or the trial Court are deposited with the Registrar such records shall be deemed to be part of the record of the Supreme Court of Canada whilst so deposited for the purposes of this Rule.

(2) When it is intended to refer to papers of record in the Court upon a motion they shall be individually identified by description and date in the notice of motion.

(3) The deponent to an affidavit to be used to support a motion shall not be heard as counsel upon the presentation of the motion.

RULE 55A. (1)—Every notice of motion shall concisely enumerate every ground upon which it is based and shall not include any argument.

(2) All documents in support of a motion shall be reproduced in the manner accepted for a printed case and assembled in the following manner:—

(*a*) There shall be a cover page entitled: IN THE SUPREME COURT OF CANADA, followed by a reference to the court appealed from and the complete style of cause naming the applicant first; below the style of cause shall be stated the nature of the motion: thereunder shall appear the names and addresses of the respective solicitors for the parties on the left and their agents in Ottawa, if known, on the right;

(*b*) There shall follow a complete Table of Contents indicating the dates of listed material and all subsequent pages shall be enumerated in one series;

(*c*) After the Table of Contents the material shall be placed in the following order:

(i) Notice of motion;

(ii) Affidavit in support, if any;

(iii) Other material relied upon, other than judgments and reasons for judgment, in chronological order;

(iv) Formal judgments followed by the respective reasons for judgment in that order commencing firstly with the court of first instance followed consecutively and ending with those of the court last appealed from. If any court has delivered judgments without recorded reasons a note to that effect shall be so stated in the Table of Contents in lieu of a page number;

(v) Memorandum of argument in four parts, commencing with a short statement of facts in part I; a concise state-

ment of points for argument in Part II; a brief of argument in Part III; the nature of the order requested in Part IV;

(vi) On a separate page, a Table of Authorities anticipated to be referred to by counsel in the sequence mentioned in the argument, and

(vii) When it is intended to refer to any statute, article, regulation, rule, ordinance or by-law, other than those of the Court, copies of the relevant parts shall be printed at length as appendices to the memorandum or five copies thereof shall be filed in lieu of such appendices. Any appendices shall be listed in the Index.

(3) If papers respecting a motion are presented to the Registrar for filing without proof of service or that do not otherwise comply with the Rules, the same may not be received and filed without the leave of a judge.

(4) The respondent to a motion may, in his discretion, prepare serve and file a memorandum of his argument respecting the same and the number of copies to be filed shall be as for the applicant.

(5) A notice of motion or other papers with respect to any application may not be filed by mail but only through an Ottawa agent.

RULE 56. (1)—Unless otherwise ordered, where a motion for leave to appeal is to be heard in Court five copies of all material to be referred to upon the hearing, including such material as may be part of the record of the Court and as may be otherwise required, shall be filed with the Registrar. If the motion be one to quash, ten copies of all papers required to support the motion shall be filed with the notice of motion. If the motion is to come on for hearing before a single judge or the registrar, one copy additional to that already on the Court record is required.

(2) A notice of motion and all material required to be filed therewith as provided in the ss. (1) shall be served upon the solicitors for the opposing party or parties or their agents at Ottawa and filed four clear days before the time for hearing the motion.

(3) If there is no booked agent at Ottawa for the party to be served he may be served by posting the copy to be served upon the notice board at the Registrar's office and mailing another copy, by first class post, to the address of the person or the solicitor to be served, last known to the solicitor serving the notice of motion or the party if there is no solicitor.

(4) Unless otherwise directed by the Chief Justice, the time and date for hearing of a motion in Court shall be the first day of a session of the Court or any succeeding first or third Monday in a month of a session.

RULE 57.—Except in criminal cases, when a motion is withdrawn or otherwise is abandoned the opposite party or parties shall thereupon be entitled without any order to tax the costs thereof as an abandoned motion.

7. That the heading preceding former Rule 103 is also repealed.

8. That paragraphs 3, 4 and 5 of Form "H" are repealed and the following are substituted therefor:

3. For each typed copy of any document, paper or proceeding, or any extract therefrom per folio	.20
Where copying is by a facsimile reproduction process, per $8\frac{1}{2}'' \times 14''$ (or smaller) page	.20
The above charges shall not apply to reasons for decisions before the same shall have been reported in the Supreme Court Reports, but shall apply thereafter and in both instances there shall be a service charge of $5 for each copy of reasons for judgment.	
4. For drawing certificate and certifying any copy of any judgment or order when requested at the time issued	3.00
When such certificate is requested thereafter (*including search*)	5.00
5. When certificate of the Registrar is requested certifying as to the state of proceedings or that there are no proceedings in any matter (*including search*)	10.00
6. For copy of bulletins of disposition of cases, per annum or less	60.00

9. That new Form "Q" is added to the Rules as follows:

FORM "Q" (R. 54)

FORM OF NOTICE OF MOTION TO BE USED IN PREPARING APPLICATIONS PURSUANT TO THE SUPREME COURT ACT AND RULES

IN THE SUPREME COURT OF CANADA

(On appeal from the Court of Appeal for the Province of.....

.....)

(*herein insert the full style of cause in the manner approved for the Supreme Court of Canada*)

NOTICE OF MOTION

TAKE NOTICE that (*the appellant, applicant or respondent or as the case may be*) will apply to (*this Court or the Rota Judge of this Court or the Registrar of this Court, as the case may be*) at the hour of ..... o'clock on ..... day the ..... day of..... 19 ....., pursuant to (*here cite the statute and section or Rule pursuant to which the application is made*) for an order (*herein insert the nature of the order or relief asked*) or such further or other order that the said (*Court, Judge or Registrar*) may deem appropriate;

AND FURTHER TAKE NOTICE that in support of such application will be read (*here identify by description and date all papers to which it is intended to refer*) and such further or other material as counsel may advise and may be permitted;

AND FURTHER TAKE NOTICE that the said application shall be made upon the following grounds: (*here set out concisely and number each and every one of the grounds upon which the application is made.*)

Dated at (*name of City etc., and Province*) this ..... day of ..... 19 .....

(*Here type or write the name of the lawyer or firm of lawyers authorizing the application together with their postal address and the name of the party represented.*)

TO:—

THE REGISTRAR OF THIS COURT AND TO:—

(*The name and address of each person or firm to be served with this Notice of Motion and capacity in which served.*)

The said amendments shall come into force on the 27th January, 1970.

And the Registrar of the Court is directed to take all necessary action to effect the tabling of this Order before the Houses of Parliament in the manner provided in Section 103 of the Supreme Court Act.

DATED at Ottawa, this 26th day of January, 1970.

(Signed) J. R. CARTWRIGHT, C.J.C.
" GÉRALD FAUTEUX, J.S.C.C.
" D. C. ABBOTT, J.S.C.C.
" R. MARTLAND, J.S.C.C.
" W. JUDSON, J.S.C.C.
" ROLAND A. RITCHIE, J.S.C.C.
" E. M. HALL, J.S.C.C.
" WISHART F. SPENCE, J.S.C.C.
" LOUIS-PHILIPPE PIGEON, J.S.C.C.

COUR SUPRÊME DU CANADA

ORDONNANCE GÉNÉRALE

CONSIDÉRANT que l'article 103 de la Loi sur la Cour suprême, chap. 259 des Statuts revisés du Canada de 1952, modifiée par le chap. 335 des Statuts revisés du Canada de 1952 et le chap. 48 des Statuts du Canada de 1956, autorise les juges soussignés de la Cour suprême du Canada à édicter des règles et ordonnances générales de la manière y prévue;

IL EST ORDONNÉ que les Règles de la Cour suprême du Canada soient modifiées conformément aux paragraphes 1 à 9 inclusivement, comme suit, et elles sont par les présentes ainsi modifiées:

1. Que le paragraphe 7 de la Règle N° 2 est abrogé et remplacé par ce qui suit:

(7) Le terme «impression» comprend la reproduction par typographie, offset, stencil ou n'importe quel procédé de reproduction en fac-similé à condition cependant que chaque copie soit entièrement nette et lisible sans égard à l'état de l'original, et soit faite sur du papier de bonne qualité approprié au procédé employé.

2. Que la Règle N° 2A et en-tête sont ajoutés immédiatement après la Règle N° 2 comme suit:

INTITULÉ

RÈGLE 2A.

a) Dans l'avis d'appel, la page-titre du dossier imprimé, de même que dans un avis de requête en annulation ou pour autorisation d'appel, l'intitulé ne doit comporter aucune abréviation des noms.

b) Le nom de l'appelant doit figurer en premier lieu avec l'indication de sa position devant les tribunaux d'instance inférieure suivie de son titre: «Appelant».

c) Doit figurer ensuite le nom de chacune des parties contre qui l'appel est dirigé suivi de l'indication de sa position devant les tribunaux d'instance inférieure et de son titre: «Intimé».

d) Le nom de toute autre partie aux procédures devant cette Cour doit suivre avec l'indication de sa position devant les tribunaux d'instance inférieure, s'il y a lieu.

e) Le nom de toute autre partie aux procédures devant les tribunaux d'instance inférieure doit venir en dernier lieu avec indication de sa position devant ces tribunaux.

f) L'indication de la position devant les tribunaux d'instance inférieure mentionnée à la présente règle doit s'entendre du rôle de la partie devant ces tribunaux et de sa qualité spéciale le cas échéant, cette indication doit être entre parenthèses.

g) Quand il est permis d'abréger l'intitulé, il faut omettre l'indication de la position devant les tribunaux d'instance inférieure et le nom des parties devant ces tribunaux qui ne sont pas mis en cause devant cette Cour.

3. Que le paragraphe 9 de la Règle N° 12 est abrogé et remplacé par ce qui suit:

(9) La page liminaire porte en haut: «Cour suprême du Canada» et immédiatement au-dessous le nom de la cour et de la province d'où vient l'appel suivis de l'intitulé de l'affaire sans abréviation ni traduction. Y figure ensuite l'indication «Dossier imprimé sur appel» entre des lignes parallèles appropriées. Si le dossier imprimé sur appel se compose de plus d'un volume, il faut indiquer sur chacun au-dessous des mots «Dossier imprimé sur appel» entre les lignes parallèles le numéro du volume en chiffres romains suivi du numéro de la première et de la dernière page de ce volume.

4. Que la Règle N° 20 est abrogée et remplacée par ce qui suit:

RÈGLE 20. (1)—Le Registraire de cette Cour gardera un «Répertoire des correspondants», dans lequel les avocats, procureurs, avoués et avoués-procureurs représentant les parties dans un appel ou toute autre procédure devant la Cour suprême doivent inscrire le nom d'un correspondant en la ville d'Ottawa (ledit correspondant ayant lui-même droit d'exercer à ladite cour), ou élire un domicile à Ottawa. Si une telle inscription n'a pas été faite, on devra la faire sans délai dès que la connaissance des procédures en instance devant la cour a été obtenue.

(2) Un correspondant à Ottawa dans une cause dont la cour est saisie, doit inscrire son nom (de même que l'adresse de son bureau à Ottawa) en tant que correspondant de son commettant en l'espèce ainsi que le titre de la cause; une telle inscription ne sera censée valoir que pour la cause indiquée. Si le correspondant à Ottawa doit représenter son commettant dans toute affaire qui intéresse celui-ci, sauf les causes dont il est fait une mention particulière, l'agence sera qualifiée «correspondant général» dans le répertoire des correspondants.

(3) Si l'avocat, le procureur, l'avoué ou l'avoué-procureur d'une partie dans un appel n'a pas fait inscrire dans le «répertoire des correspondants» le nom de son correspondant à Ottawa (les inscriptions dans ledit répertoire seront probantes à cet égard) la signification de pièces à tel avocat, tel procureur, tel avoué ou tel avoué-procureur pourra se faire en affichant une copie des pièces sur le tableau tenu à cette fin dans le bureau du registraire et en envoyant une autre copie par poste ordinaire de première classe à l'avocat, procureur, avoué ou avoué-procureur, à sa dernière adresse inscrite à l'égard de toute procédure devant la cour, ou, à défaut d'une telle adresse, à celle qui est indiquée dans un annuaire courant du Barreau ou qui est connue de l'avocat qui fait signification.

(4) La mandat de correspondant peut être annulé ou modifié par une inscription subséquente dans le «répertoire des correspondants».

5. Que les règles N^{os} 42 et 44 sont abrogées et remplacées par ce qui suit:

RÈGLE 42. (1)—Le Registraire rédige la minute du jugement de la Cour et, sauf s'il en est autrement ordonné, il fixe, pas moins de deux semaines après le prononcé du jugement, une date pour en arrêter la rédaction définitive à son bureau. Une copie du projet de minute

est expédiée par la poste ordinaire à l'étude du correspondant à Ottawa de chacune des parties qui ont comparu au dossier avec un avis fixant l'heure et le jour où la rédaction définitive sera arrêtée.

(2) Cette rédaction définitive n'aura pas lieu moins de sept jours francs après la mise à la poste de l'avis.

RÈGLE 44.—Si l'une des parties n'a pas de correspondant à Ottawa, la rédaction de la minute du jugement peut avoir lieu sans avis à cette partie.

6. Que les Règles 54 à 57 inclusivement sont abrogées et remplacées par les nouvelles Règles 54 à 57 qui suivent:

RÈGLE 54.—Sauf disposition expresse à l'effet contraire ou permission spéciale, toute requête interlocutoire commence par un avis écrit rédigé selon la formule «Q».

RÈGLE 55. (1).—Une déclaration sous serment n'est produite que pour fournir la preuve d'un fait qui n'appert pas du dossier devant la Cour. Pour les fins de la présente règle, lorsque le dossier du tribunal de première instance ou de celui d'où vient l'appel est déposé au bureau du Registraire, ce dossier est censé faire partie de celui de la Cour suprême du Canada pendant qu'il est ainsi déposé.

(2) Lorsque, dans une requête on veut se référer à des pièces du dossier devant la Cour, chacune doit être désignée séparément dans l'avis par son titre et sa date.

(3) Celui qui souscrit une déposition sous serment à l'appui d'une requête ne peut agir comme avocat à l'audition de cette requête.

RÈGLE 55A. (1)—L'avis de requête doit énumérer, avec concision, tous les motifs sur lesquels elle repose, mais sans aucune argumentation.

(2) Toutes les pièces à l'appui d'une requête doivent être reproduites en la forme admise pour le dossier imprimé et assemblées de la façon que voici:

a) Une page-couverture portera les mots «COUR SUPRÊME DU CANADA», suivis de l'indication de la cour d'où vient l'appel et de l'intitulé complet où le nom du requérant sera le premier; sous l'intitulé, on indiquera la nature de la requête; enfin figureront au bas, à gauche les noms et adresses des procureurs respectifs des parties et à droite, s'ils sont connus, les noms et adresses de leurs correspondants à Ottawa.

b) Une table des matières suivra où sera indiquée la date de chaque pièce et toutes les pages suivantes seront numérotées consécutivement.

c) A la suite de la table des matières, les pièces seront placées dans l'ordre suivant:

(i) Avis;

(ii) Déposition à l'appui, s'il y en a une;

(iii) Pièces à l'appui, autres que les jugements et motifs de jugement, dans l'ordre chronologique;

(iv) Les minutes des jugements et les motifs de chacun en commençant par ceux du tribunal de première instance

pour finir dans l'ordre par ceux du tribunal d'où vient l'appel. Si un tribunal a rendu un jugement sans motifs écrits, ce fait sera noté dans la table des matières à la place du numéro de page;

(v) Un mémoire divisé en quatre parties, contenant en une Première Partie un bref exposé des faits, en une Deuxième Partie l'énoncé concis des questions soulevées, en une Troisième Partie la substance de l'argumentation et en une Quatrième Partie la nature de la décision demandée;

(vi) Sur une page distincte et dans l'ordre où ils sont cités dans l'argumentation, une Table des Arrêts et Ouvrages que l'avocat entend invoquer;

(vii) Lorsqu'une partie désire invoquer une loi, une règle, une ordonnance, un règlement ou un statut autre que ceux de la Cour, elle doit faire imprimer au long les parties pertinentes du texte en annexe à son mémoire ou en produire cinq exemplaires pour tenir lieu d'annexe. Toute annexe doit être mentionnée dans la table des matières.

(3) Si l'on présente au Registraire des pièces relatives à une requête sans preuve de signification ou sans se conformer pleinement aux Règles, la production n'en sera pas permise sans l'autorisation d'un juge.

(4) L'intimé peut, s'il le désire, préparer, signifier et produire un mémoire à l'encontre d'une requête; le nombre d'exemplaires requis est le même que pour le requérant.

(5) Un avis ou autre pièce relatifs à une requête ne peuvent pas être produits par la poste mais seulement par l'intermédiaire d'un correspondant à Ottawa.

Règle 56. (1)—Sauf déposition contraire, quand une requête pour autorisation d'appel doit être entendue par la Cour, cinq copies de toutes pièces requises à l'audition, y compris celles qui font déjà partie du dossier de la Cour doivent être produites au bureau du Registraire. Quand il s'agit d'une requête en annulation d'appel, dix copies de toutes les pièces nécessaires à l'appui doivent être produites avec l'avis. Quand la requête doit être entendue par un seul juge ou par le Registraire, une seule copie en outre de l'exemplaire au dossier suffit.

(2) L'avis avec toutes les pièces à produire conformément au paragraphe (1) doit être signifié aux procureurs de la partie adverse ou des parties adverses ou à leurs agents dans la ville d'Ottawa et produit au moins quatre jours francs avant l'audition de la requête.

(3) Si une partie à qui l'on doit signifier n'a pas de correspondant désigné dans la ville d'Ottawa, on peut lui signifier l'avis en affichant une copie sur le tableau à cette fin dans le bureau du Registraire et en expédiant une autre copie par poste ordinaire de première classe à la personne à qui signification doit être faite ou à son procureur, à sa dernière adresse connue du procureur tenu de faire la signification ou de la partie elle-même si elle n'a pas de procureur.

(4) A moins que le Juge en chef n'en ordonne autrement, la Cour entend les requêtes le premier jour de chaque session et, ensuite, les premier et troisième lundis de chaque mois pendant la session.

RÈGLE 57—Sauf dans les affaires criminelles, lorsqu'une requête est retirée ou autrement abandonnée, la ou les parties adverses ont alors droit, sans ordonnance, de faire taxer les frais comme dans le cas d'une requête abandonnée.

7. Que l'en-tête précédant immédiatement l'ancienne Règle N° 103 est aussi abrogé.

8. Que les paragraphes 3, 4 et 5 de la Formule «H» sont abrogés et remplacés par les paragraphes suivants:

3. Pour chaque copie dactylographiée de document, acte ou pièce de procédure, ou tout extrait, le folio	.20
Si la copie est faite au moyen d'un procédé en fac-similé, pour chaque page de $8\frac{1}{2}'' \times 14''$ (ou moins) ..	.20
Les frais ci-dessus ne s'appliquent pas aux motifs d'une décision avant qu'ils aient été publiés dans le Recueil des arrêts de la Cour suprême mais ils s'y appliqueront par la suite. Dans les deux cas, les frais de service sont de $5 pour chaque copie des motifs d'un jugement.	
4. Pour rédiger le certificat et attester toute copie de jugement ou décision lorsque la demande en est faite au moment où est rendu le jugement ou la décision ..	3.00
Lorsque ce certificat est demandé plus tard (*frais de recherches compris*)	5.00
5. Pour le certificat du Registraire attestant l'état des procédures ou l'absence des procédures dans une affaire quelconque (*frais de recherches compris*)	10.00
6. Pour l'abonnement au bulletin des affaires en marche, par année ou partie d'année	60.00

9. Une nouvelle formule «Q» est ajoutée aux Règles, savoir:

FORMULE «Q» (RÈGLE 54)

FORMULE D'AVIS DE REQUÊTE À UTILISER POUR LA RÉDACTION DE REQUÊTES EN VERTU DE LA LOI SUR LA COUR SUPRÊME ET LES RÈGLES DE CETTE COUR

COUR SUPRÊME DU CANADA

(En appel d'un jugement de la Cour d'appel de la province de .....
.....)

(*Incrire ici l'intitulé complet de la cause de la façon prescrite à la Cour suprême du Canada*)

AVIS DE REQUÊTE

VOUS ÊTES AVISÉS par les présentes, que (*l'appelant, le requérant, l'intimé, ou selon le cas*) s'adressera à (*la Cour, l'un des Juges de la Cour ou au Registraire de la Cour*) suprême du Canada, le (*jour de la semaine*) (*quantième*) de (*mois*) 19 ....., en vertu de (*indiquer la loi et l'article ou la règle sur laquelle se fonde la requête*)

pour obtenir une décision (*indiquer la nature de la décision ou directive demandée*) ou toute autre décision que (*la Cour, le Juge ou le Registraire*) jugera appropriée.

VOUS ÊTES DE PLUS AVISÉS que le requérant invoquera à l'appui de cette requête (*indiquer ici par leur titre et leur date toutes les pièces que l'on veut invoquer*) et avec autorisation si nécessaire toutes autres pièces que l'avocat jugera utiles.

VOUS ÊTES DU PLUS AVISÉS que ladite requête se fonde sur les motifs suivants: (*Indiquer ici de façon concise, par paragraphes numérotés, chacun des motifs sur lesquels se fonde la requête.*)

FAIT à (*nom de la ville et de la province*), ce .....

jour d ..... 19 .....

(*Inscrire ici à la main ou à la machine le nom de l'avocat ou étude d'avocats qui présente la requête et son adresse postale ainsi que le nom de son client.*)

AU:

REGISTRAIRE DE CETTE COUR ET À:

(*Inscrire le nom et l'adresse de chacune des personnes ou des études d'avocats à qui l'avis doit être signifié et à quel titre il leur est signifié.*)

Lesdites modifications entreront en vigueur le 27 janvier 1970.

Le Registraire de la Cour est chargé de prendre les mesures nécessaires pour effectuer le dépôt de la présente ordonnance devant les Chambres du Parlement, de la manière prévue par l'article 103 de la Loi sur la Cour suprême.

Datée, à Ottawa, ce 26e jour de janvier 1970.

(Signature) J. R. CARTWRIGHT, J.C.C.
" GÉRALD FAUTEUX, J.C.S.C.
" D. C. ABBOTT, J.C.S.C.
" R. MARTLAND, J.C.S.C.
" W. JUDSON, J.C.S.C.
" ROLAND A. RITCHIE, J.C.S.C.
" E. M. HALL, J.C.S.C.
" WISHART F. SPENCE, J.C.S.C.
" LOUIS-PHILIPPE PIGEON, J.C.S.C.

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

ARRÊTS

DE LA

COUR SUPRÊME DU CANADA

SUR

APPEL DE DÉCISIONS

DES

TRIBUNAUX FÉDÉRAUX ET PROVINCIAUX

91306—1

KEN LEFOLII, BORDEN SPEARS, BLAIR FRASER and MACLEAN-HUNTER PUBLISHING COMPANY LIMITED (*Defendants*) ..... APPELLANTS;

1968
*Mar. 19, 20
Oct. 1

AND

IGOR GOUZENKO (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Defamation—Libel action—Motion for nonsuit—Judge reserving decision on whether words capable of defamatory meaning until after jury's verdict—Charge to jury—Propriety of judge referring to motion and difficulties in deciding same.

The plaintiff brought an action for libel based upon an article in a national magazine. He alleged that a number of quotations from the article in their plain and ordinary meaning were defamatory of him and said that the words used were meant and were understood to have certain meanings. The defendants admitted publication of the said words but denied that they were defamatory. At the trial the defendants moved for a nonsuit. Instead of disposing of the motion for nonsuit, the trial judge reserved his decision and let the case go to the jury. Later, after the jury had brought in its verdict, he dismissed the motion. However, in his charge to the jury, he made several references to the difficulty he was having in deciding the motion.

The jury in a general verdict found that the plaintiff had been libelled and assessed the damages at $1. The plaintiff appealed to the Court of Appeal, basing his appeal against the award of $1 damages. The Court of Appeal ordered a new trial both as to liability and quantum. The defendants then appealed to this Court.

Held (Judson J. dissenting): The appeal should be dismissed; judgment of the Court of Appeal varied.

Per Martland, Ritchie and Hall JJ.: There should be a new trial on the issue of damages. The trial judge was in error when in his charge to the jury he referred to the fact that he was reserving his decision on the motion for nonsuit and that he was having difficulty in deciding whether or not the words were capable of a defamatory meaning. Agreement was expressed with the Court below that, reading the charge as a whole, the judge, time and again, must have confused and misled the jury on the matter of compensation. There was no reason for retrying the issue of libel or no libel. A jury had already made a valid finding on this aspect of the case.

Per Spence J.: The trial judge, despite what might be described as a classic charge on libel so far as libel was concerned, did not sufficiently stress the jury's function to come to their conclusion not only on the question of libel but on the question of damages without feeling in

*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

1968

LEFOLII *et al.* v. GOUZENKO

any way bound by his personal views as to the facts and, therefore, there should be a new trial which, however, should be limited to the assessment of damages only.

Per Judson J., *dissenting*: The appeal should be allowed and the judgment at trial restored.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Stark J. and ordering a new trial in a libel action. Appeal dismissed but judgment of the Court of Appeal varied, Judson J. dissenting.

J. Sedgwick, Q.C., and *J. A. Campbell*, for the defendants, appellants.

R. A. Harris and *H. W. Lebo*, for the plaintiff, respondent.

The judgment of Martland, Ritchie and Hall JJ. was delivered by

HALL J.:—The respondent's action is for libel based upon an article in the issue of MacLean's Magazine dated September 5, 1964. The article in question carried the title "These Were The Years That Made Our World". The respondent alleged that 17 quotations from the article as set out in para. 10 of the statement of claim, preceded by the following words:

> 10. In the said issue the Defendants printed or caused to be printed and falsely and maliciously published or caused to be published of the Plaintiff and of him in the way of his profession as an author, and in relation to his conduct, photographs and words as follows:

were libellous. He alleged that the quotations in their plain and ordinary meaning were defamatory of the respondent and in a subsequent paragraph said that the words used were meant and are understood to mean that the respondent:

(a) is a spend-thrift;
(b) a person whose contribution to the security of Canada was incidental and was of no great value;
(c) a trouble maker;
(d) a ward of the R.C.M.P.;
(e) a dishonest man seeking to have the government do his family chores;
(f) a lazy man and a work-shirker;

[1] [1967] 2 O.R. 262, 63 D.L.R. (2d) 217.

(g) a man deluded by delusions of great wealth;
(h) a washed out author;
(i) an ungrateful person;
(j) a person not worthy of the goodwill of his fellow Canadian citizens.

The appellants admitted publication of the words complained of but denied that they were defamatory, and further alleged by para. 8 of the defence that:

> 8. In so far as the words set out in paragraph 10 of the statement of claim consist of statements of fact they are true in substance and in fact and in so far as the said words consist of expressions of opinion they are fair and bona fide comment made without malice upon the said facts which are a matter of public interest.

The trial was a short one. Certain questions and answers from the examinations for discovery of appellants were put in evidence by the respondent. The appellants called no witnesses. They moved for a nonsuit. Instead of disposing of the motion for nonsuit, the learned trial judge reserved his decision and let the case go to the jury. Later, after the jury had brought in its verdict, he dismissed the motion. However, in his charge to the jury, he made several references to the difficulty he was having in deciding the motion, and I will be dealing with this aspect of the matter later in these reasons.

No defence evidence having been tendered in support of their pleas by the appellants, the learned trial judge correctly charged the jury that they were not concerned with the truth or falsity of the article, he put it this way:

> Now remember, we are not concerned, as I say, with the truth or falsity of that statement. We presume it is false, and there is no evidence about that, but the question is: did that photograph and do those words detract from his, Gouzenko's reputation? These are the questions that you are going to provide the answers for.

He further charged them that certain of the passages complained of were not capable of being defamatory. Then he told the jury of the motion made by counsel for the appellants "that I should stop the case right then and there, and he argued that the words were not capable of having a defamatory meaning". He went on to say:

> Now when the plaintiff finished his case yesterday you gentlemen were asked to leave the room for a while, you will recall, and counsel for the defence rose to his feet and urged upon me this very matter, that I should stop the case right then and there, and he argued that the words were not capable of having a defamatory meaning. In other words that the plaintiff hadn't even crossed that first bridge. I reserved my deci-

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sion and I have been giving this question a lot of thought and last night in the rather late hours I was reading these words over and over again to try and decide that preliminary question, and I hope I have made it clear what that preliminary question is, whether the words are capable of being construed by reasonable men as defamatory, and that is not a simple question like the obvious examples that I mentioned a few moments ago: the thief, the liar, the rogue, that type of example. The result of all this is that I am still reserving my decision on this question and I am going to give this matter further thought and all I am going to say at this time is I am not going to rule that these words or some of them are completely incapable of a defamatory meaning. In other words I may not be too impressed by the seriousness of these allegations but I must be scrupulously fair to the plaintiff and what I am saying is this: that I am not satisfied that there is not some evidence to go before you and I am not going to take it away from you. I am simply saying I am not going to rule that these words are completely incapable of a defamatory meaning. I am quite sure a lot of them are completely incapable. There may be some that are not and I am not going to take it away from the jury at this time. Regardless of what your verdict is I may still change my mind, or rather, I may still make up my mind one way or the other and for that reason I am reserving that portion of the decision. So all I am saying to you now is that I am puzzled, I am not sure whether these words are capable in the minds of reasonable men of being construed in a defamatory sense. I am not sure that they are incapable and so I am going to ask you as reasonable men to decide whether in fact they did libel the plaintiff.

In so doing, he was, in my view, in error. Comments such as these are not for the ears of the jury.

Instead of putting specific questions to the jury, the learned trial judge, with the consent of counsel, asked the jury for a general verdict. This procedure was criticized in the judgment of the Court of Appeal. I am of opinion that this was a case in which asking for a general verdict was eminently the right course to follow.

The jury brought in a general verdict as follows:

"Verdict libel. Damages $1. Foreman Lester Bolton."

The respondent appealed to the Court of Appeal for Ontario, basing his appeal against the award of $1 damages. The Court of Appeal[2] ordered a new trial both as to liability and quantum.

I am unable to agree with the Court of Appeal in so far as a new trial being required on the question of liability. The jury was properly charged on the question of libel or no libel. The verdict of "libel" justified the respondent's action. The Court of Appeal appears to have considered a

[2] [1967] 2 O.R. 262, 63 D.L.R. (2d) 217.

new trial necessary on the question of liability because in its view specific questions should have been put to the jury. Kelly J.A. said in this regard:

> Had the jury in this case been asked to answer specific questions, in all probability a new trial, limited to the assessment of damages, could have been appropriately ordered.

What the respondent Gouzenko was complaining of in the Court of Appeal was misdirection as to damages, and in this regard his argument in the Court of Appeal and here was that the learned trial judge had, at various times in his charge to the jury and particularly in discussing his own doubts in relation to the nonsuit motion, so denigrated the respondent's case for substantial damages and made light of the whole matter that what he did amounted to misdirection and resulted in the jury awarding nominal damages only.

In his reasons for judgment, Kelly J.A. said:

> In this action the duty of the jury was to determine liability and, having done so, to assess damages. These were separate functions and should not have been intermixed. The jury's finding as to liability should have been made with respect to words which the Judge had already ruled capable of being defamatory or instructed the jury to assume to be so. The assessment of damages should have been made uninfluenced by the charge with respect to liability. The effect of this charge was to invite the jury to belittle the damages by the doubt that was thrown on liability.

I agree with Kelly J.A. that, reading the judge's charge as a whole as one should do, the judge, time and again, must have confused and misled the jury on the matter of compensation. I am of opinion that there must be a new trial on the issue of damages. I see no reason for retrying the issue of libel or no libel. A jury has already made a valid finding on this aspect of the case.

I would, accordingly, dismiss the appeal but vary the judgment of the Court of Appeal by restricting the new trial to the issue of damages only. The respondent should have his costs of this appeal.

JUDSON J. (*dissenting*):—I would allow this appeal and restore the judgment at trial which allowed the plaintiff damages in the amount of $1 and the costs of the trial.

The plaintiff complained of libel in the issue of MacLean's Magazine dated September 5, 1964. The greater part of this issue contained an historical survey of the 1940's. As part of this survey there were approximately

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two columns devoted to the plaintiff. In his statement of claim the plaintiff referred to seventeen passages from these two columns as being libelous in their plain and ordinary meaning. This is all that we are concerned with in this appeal. There were no innuendoes, either pleaded or proved.

My opinion is that only two of these passages could possibly have been found to be capable of any defamatory meaning, including the one assigned by the plaintiff in his statement of claim, and there would have been no error if the trial judge had so instructed the jury. Instead of following this course he went through the passages one by one and expressed his opinion on them. He withdrew all but three passages from the jury's consideration and in leaving those three to the jury, he expressed a doubt whether they were capable of being defamatory. It was within his power to do this and that this power should not be restricted in the way proposed by the Court of Appeal. The jury brought in a general verdict of libel and assessed the damages at $1.

I do not agree that the course followed by the judge had the effect of belittling the damages. His instruction on damages was emphatic and correct and there were no objections taken to his charge by either side. This was a highly exaggerated claim and the jury must have appreciated that fact. The plaintiff did not give evidence.

I do not think that the new trial should be restricted to an assessment of damages. A jury assessing damages should not be restricted to a mere reading of the article in its context and to a hearing of whatever oral evidence is given on damages. If there is to be a new trial, the better course would be to direct that it be both on liability and damages.

SPENCE J.:—I have had the privilege of reading the reasons of my brother Hall and have come to the conclusion that I shall concur therein. I need not repeat the recital of the circumstances and the course of litigation outlined in those reasons. As did my brother Hall, I agree with the statement of Kelly J.A. in the Court of Appeal when he said:

> This statement of his difficulties in deciding whether the words were capable of a defamatory meaning was repeated three times in different

but equally compelling language. In the light of the statement of Lord Porter in *Turner v. M.G.M. Pictures Ltd.*, [1950] 1 All E.R. 449 at p. 454, I doubt if this is a case where the trial judge should have reserved his ruling on the issue of whether the words were capable of a defamatory meaning, but, assuming it was an appropriate case to reserve his ruling, he should simply have told the jury to assume that the words were capable of a defamatory meaning and that it was their duty to decide whether they were so in fact. He should not have told them of the motion made in their absence or have said anything about his difficulty in arriving at a conclusion as to whether the words were capable of a defamatory meaning. What happened in the jury's absence was wholly irrelevant to the function of the jury.

Had the jury returned an answer that there was no libel, the plaintiff (here the respondent) would have had a very grave cause to complain as to the learned trial judge's charge. The jury, however, answered that there was a libel and, surely, that answer completely disposes of the objection to the learned trial judge's charge except as to the question of damages, with which I shall deal hereafter.

Kelly J.A. in the Court of Appeal found that there were other reasons which would justify a new trial as to both libel and damages. The learned trial judge had excluded evidence which was urged by the plaintiff as being admissible to prove express malice and the judgment of the Court of Appeal approved that ruling so that issue need not be further considered. The plaintiff in addition to pleading the libel in the ordinary and natural meaning of the word had assigned in para. 12 of the statement of claim some ten different innuendoes. The learned trial judge withdrew from the consideration of the jury seven of the ten meanings ascribed in the said innuendoes. Kelly J.A. in his reasons for judgment said:

> . . . I do not think it desirable to say more than the words complained of taken in their entirety are capable of supporting some of the other innuendoes set out in the statement of claim in addition to those which the learned trial Judge left with the jury.

At the trial, the plaintiff did not appear and the only evidence adduced was on behalf of the plaintiff and consisted of the reading of the actual article complained of and certain limited portions of the examination for discovery of the three defendants Lefolii, Spears and Fraser. I cannot understand how under those circumstances any innuendoes, in the primary meaning of that word, could be supported. There was no one who appeared to say that because of some extraordinary circumstance the words

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meant something other than their natural and ordinary meaning: *Grubb v. Bristol United Press Ltd.*[3], *per* Upjohn L.J. at p. 392. This distinction was pointed out by the learned trial judge when he said when dealing with the submission of counsel for the defence that the consideration of the innuendoes should be taken from the jury as they had not been supported by the evidence:

> Then there is also a form of innuendo we commonly use whereby we do not much more than define the words or in fact the various meanings that the words may have.

In short, they were the mere extended definitions of the ordinary and natural meaning of the words. Therefore, a new trial as to liability is not required to deal with these alleged innuendoes. It must be remembered the jury, by its answer, did find a libel. The judge presiding at the new trial for the assessment of damages only could simply charge the jury that the words having already been found to be libel it was their function to determine the damages which accrued to the plaintiff as a result of the publication of such libel.

I turn now to the problem of whether the plaintiff should have a new trial limited to the assessment of damages only or whether the judgment at trial should be restored.

Kelly J.A. in his reasons for judgment in the Court of Appeal for Ontario followed the statement which I have quoted above with these words:

> The emphasis placed upon his difficulties in making up his mind could have one effect and one effect only on the jury to cause them to believe that, if the words were defamatory at all, the effect on the reputation of the appellant was trivial and that the damages suffered by the appellant were likewise trivial. It may be that what was said of the appellant was not serious: in a proper context a trial judge may properly express to the jury his own views in regard to the words used. But he should not permit his uncertainty as to the capability of the words to be defamatory, to influence the jury's assessment of the gravity of the injury to the appellant caused by those words.

I am in agreement with the view of Kelly J.A. that the effect of the emphasis to the jury by the learned trial judge of his difficulty in making up his mind as to the possible defamatory nature of the words could cause the members of the jury to believe that the damages suffered by the

[3] [1962] 2 All E.R. 380 (C.A.).

plaintiff were trivial. As Kelly J.A. notes, the trial judge may properly express to the jury his own view of the facts. That is so whether the said facts are relevant to either liability or damages. The rather unique feature of an action for libel is that the libel, *i.e.*, the thing which creates the liability, is also to a large degree the measure of the damages and, therefore, it is most important that in a libel action the warning, which it is the duty of the trial judge to give to the jury, that any expression of his personal view of the facts must be understood to be without any authority whatsoever and to be only an honest attempt to assist them in the performance of their duty should be stressed. He should be careful, in fact, to encourage the jury to disregard his personal views, which as I have said he had every right to express, at any time those views of the facts should fail to accord with his own.

I have come to the conclusion that the learned trial judge in the present case, despite what might be described as a classic charge on libel so far as libel is concerned, did not sufficiently stress the jury's function to come to their conclusion not only on the question of libel but on the question of damages without feeling in any way bound by his personal views as to the facts and that, therefore, there should be a new trial which, however, as my brother Hall has pointed out, should be limited to the assessment of damages only. It is this unique feature of a trial of an action for libel which makes a new trial limited only to the assessment of damages a procedure of doubtful efficiency. I am only moved to resort to such a procedure in the present case because of the unusual fashion in which the plaintiff put forward his case. The plaintiff not only gave no testimony on his own behalf but did not even appear at the trial. The defendant MacLean-Hunter Publishing Company Limited, admitted publication. The plaintiff, as I have said, read in portions of the examinations for discovery of the defendants Lefolii, Spears and Fraser. These defendants adduced no evidence. Therefore, no witness gave evidence under oath at the trial. Under these unusual circumstances, there would seem to be no good reason why an assessment of damages could not proceed by a mere reading to the jury of the whole article in the magazine followed by the address of counsel and the judge's charge. I do not wish to be understood as so directing but merely

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mention these factors as moving me to concur with my brother Hall to limiting the new trial to an assessment of damages only. I also agree with my brother Hall's disposition of costs.

Appeal dismissed but judgment varied, with costs, JUDSON J. *dissenting.*

Solicitors for the defendants, appellants: Smith, Rae, Greer, Toronto.

Solicitors for the plaintiff, respondent: Luck and Harris, Rexdale.

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*Oct. 19, 20, 23, 24

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Oct. 1

TAHSIS COMPANY LTD. (*Plaintiff*) .....APPELLANT;

AND

VANCOUVER TUG BOAT CO. LTD. (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Shipping—Contract for carriage of goods—Obligations of carrier and shipper—Seaworthiness—Loading instructions—Capsize of barge during loading—Expert advice subsequent to accident—Responsibility for loss.

Under a contract entered into by the plaintiff and the defendant, the latter undertook to provide tugs and scows for transporting pulp chips from the plaintiff's plant to their destination. The agreement provided, *inter alia,* that: "(a) Tugs and scows shall be approved by a representative of Marine Surveyors of Western Canada or other competent surveyor; (b) Carrier shall in all cases exercise due diligence to make and keep all vessels used seaworthy; (c) Shipper shall be responsible for all scows from the time they are made fast to moorings until carrier has placed a line aboard with intention of removing the same from the dock; (d) Scows shall be loaded and trimmed in accordance with loading instructions provided by carrier to shipper from time to time; (e) All shipments of pulp chips shall be carried subject to all the terms and conditions of carrier's bill of lading." The first condition on the reverse side of the form of bill of lading annexed to the contract was that "it shall have effect subject to the *Water Carriage of Goods Act*".

In the performance of this contract the defendant at first used barges of approximately 700 units carrying capacity, but the intention was that it would later use much larger barges. Due to their greater width, the plaintiff's loading equipment did not project far enough to make it possible to centre the load within the box of the larger barges, as

*PRESENT: Abbott, Martland, Ritchie, Spence and Pigeon JJ.

could be done with the smaller ones. It was agreed between the parties that the necessary alterations would not be made until some experience had been gained in the loading of the big barges. In the meantime, the load was to be put on eccentrically, the barge being turned around by a tug from time to time as the loading progressed. One of the defendant's scows capsized while it was moored to the plaintiff's dock and in the last stages of being loaded with chips through the plaintiff's equipment. Loading instructions with respect to permissible list had been given verbally by the defendant's superintendent to the plaintiff's mill foreman, who was also superintending the loading of the barges.

Judgment at trial was given in favour of the plaintiff. On appeal, the Court of Appeal unanimously allowed the appeal and dismissed the plaintiff's action and allowed the defendant's counterclaim. An appeal from the judgment of the Court of Appeal was then brought to this Court.

Held (Abbott and Ritchie JJ. dissenting): The appeal should be allowed and the judgment of the trial judge restored.

Per Martland and Pigeon JJ.: It was clear that the provision for responsibility for the scows during loading could not have the effect of suppressing during that period the obligation of the carrier to use due diligence to make the ship seaworthy and, accordingly, it was unnecessary to decide whether the *Water Carriage of Goods Act*, R.S.C. 1952, c. 291, applied. Seaworthiness requires more than structural soundness; it also requires proper instructions. Even if this was not a legal requirement, the contract between the parties would make it such under (*d*) above.

As to whether the defendant did in fact provide proper loading instructions or at least used due diligence to that end, it was obvious that it did not use due diligence. The defendant had failed to obtain the advice of a naval architect or of a person of equivalent qualifications, in respect of a vessel, a substantial part of which had not been designed by such a person. The loading instructions verbally given by the defendant's superintendent to the plaintiff's foreman prior to the accident were not proper and adequate. There was no reason to believe that if competent expert advice had been sought, as it should have been before the barges were put in service, such advice would have been any different from that which was subsequently given as suitable under the conditions of eccentric loading in which the defendant had acquiesced.

On the question of whether the capsize was in fact due to the insufficient and defective loading instructions or to the negligence of the plaintiff's foreman, the conclusion was reached, following an examination of the evidence, that the Court of Appeal was wrong in finding that the capsize was due to the plaintiff's negligence. On the contrary, the accident was due to the insufficient and imprudent loading instructions given by the defendant's representatives.

Per Spence J.: The obligations of the plaintiff and the defendant were fixed by the terms of the contract entered into by the parties and under the circumstances the bill of lading was merely a receipt. Under the contract the defendant had not merely a right but a duty to issue proper instructions as to loading and it was the breach of that duty which created the occasion for the capsize of the scow.

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Per Abbott and Ritchie JJ., *dissenting*: It was the agreement and not the *Water Carriage of Goods Act* which controlled the relationship between the parties. Under the agreement the responsibility for the scow while moored at the plaintiff's dock during loading rested with the plaintiff subject to the fact that it was required to comply with any instructions provided by the carrier as to loading and trimming. The carrier had the right but not the duty to give such instructions subject to the fact that any instructions which it did give must be such as to not endanger the safety of the scow or cargo, and even if the agreement be construed as imposing a duty upon the carrier to give loading instructions, there was no breach of such a duty in the present case.

Under all the circumstances of the case, before the defendant could be fixed with the responsibility for the loss it was incumbent on the plaintiff to show not only that the instructions given by the defendant's superintendent were wrong, but that this error was the cause of the mishap. The evidence indicated that there was nothing wrong with the instructions given as to permissible list.

The underlying causes of the collapse of the vessel were that the plaintiff company was employing loading equipment which was not thoroughly adapted to the loading of these large scows and that its superintendent was not exercising the care required to supervise the undertaking. The immediate cause of the capsizing was the negligence of the foreman who was responsible for the loading of this particular scow.

[*Standard Oil Co. of New York v. Clan Line Steamers Ltd.*, [1924] A.C. 100; *Canadian Transport Co. Ltd. v. Court Line Ltd.*, [1940] A.C. 934; *Kruger & Co. Ltd. v. Moel Tryvan Ship Co. Ltd.*, [1907] A.C. 272, considered.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], reversing a judgment of Collins J. Appeal allowed, Abbott and Ritchie JJ. dissenting.

W. J. Wallace, Q.C., and *D. B. Smith*, for the plaintiff, appellant.

D. McK. Brown, and *B. Trevino*, for the defendant, respondent.

The judgment of Abbott and Ritchie JJ. was delivered by

RITCHIE J. (*dissenting*):—I have had the benefit of reading the reasons for judgment of my brother Pigeon in which he has made an extensive analysis of a great deal of the evidence, but as I take a somewhat different approach to the problem involved and as I place a different interpretation on some of the facts, it is perhaps as well for me to

[1] (1967), 60 W.W.R. 65, 62 D.L.R. (2d) 371.

state independently the issues as I see them. I will endeavour to refrain from repetition in so far as is consistent with making my opinion clear.

This appeal arises out of the capsizing of one of the respondent's scows while it was moored to the dock at the appellant's plant and in the last stages of being loaded with wood chips through the appellant's equipment.

In my view the respective obligations of the appellant and the respondent concerning the supplying of scows and the loading thereof with pulp chips at the appellant's plant, are fixed by the terms of the contract (hereinafter referred to as the agreement) entered into between the parties on April 26, 1962, wherein it is recited that the carrier, *i.e.*, Vancouver Tug Boat Company Limited, has agreed with the shipper, *i.e.*, Tahsis Company Limited, to supply suitable tugs and scows to transport pulp chips from the shipper's plant to their destination. This is a contract to carry the appellant's goods in the respondent's scows between the Tahsis Company's plant and the St. Regis Paper Mill and in my view it has the character of a charter party covering a succession of voyages by these scows from the point of loading to the destination specified.

By clause 10 of the charter agreement it is provided that all shipments

> . . . shall be carried subject to all the terms and conditions of Carrier's Bill of Lading . . . which together with the provisions of this contract shall constitute the terms and conditions under which the said pulp chips are carried. In the event of any conflict between the said Bill of Lading and this Agreement, the terms of this Agreement shall govern.
>
> Carrier shall supply Shipper with Bill of Lading forms which shall be completed by Shipper and signed by each party hereto prior to the sailing of each scow . . .

I mention this clause because the learned trial judge took the view that the provisions of the "Rules Relating to Bills of Lading" which are a schedule to the *Water Carriage of Goods Act*, R.S.C. 1952, c. 291, governed the loading and carriage of the chips shipped under the agreement and as I disagree with this conclusion and consider the matter may be of some importance in determining the rights of the parties, it appears to me to be desirable to state at the outset the reasons for my disagreement.

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In this regard it is to be observed that the rules in question, with the exception of art. 6, only apply to "contracts of carriage" as defined in art. 1(b) of the schedule, and are therefore limited to:

> . . . contracts of carriage covered by a bill of lading or any similar document of title in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

In the present case it was the shipper, *i.e.*, Tahsis, who chartered the vessel directly from the owner as opposed to the common situation in which an owner has chartered his vessel and the charterer in turn contracts with the shipper. There is a long line of cases to the effect that where, as here, the shipper has chartered the vessel directly from the owner, the bill of lading in so far as it may differ from the terms of the charterparty, is to be treated as a mere receipt for the goods.

The effect of these cases is well summarized in the reasons for judgment of Lord Halsbury in *Kruger & Co. Ltd. v. Moel Tryvan Ship Co. Ltd.*[2] where he said:

> The bill of lading cannot control what has been agreed upon before between the shipowner and the merchant and what has been expressed in a written instrument which is the final and concluded agreement between the parties. It is in truth a bill of lading; it is somewhat inaccurately described as a contract in the Bills of Lading Act, but Bramwell L.J. said in *Wagstaff v. Anderson*, (1880), 5 C.P.D. 171, 177, that "to say it is a contract superseding, adding to or varying the former contract under the charterparty is a proposition of law to which I never can consent."

In Scrutton on Charterparties and Bills of Lading, 17th ed. at p. 397, the matter is dealt with in relation to the language used in the schedule to the *Water Carriage of Goods Act*. The learned author there says:

> For as between the charterer and the shipowner the operative document is the charterparty, the bill of lading being generally a mere receipt . . . . and there is between them no "contract of carriage" within the meaning of Article 1(b) and, therefore, the shipowner is not within the meaning of Article 1(a) a "carrier" (*i.e.*, a person who "enters into a contract of carriage") . . .

I am accordingly of the opinion that it is the agreement and not the *Water Carriage of Goods Act* which controls the relationship between the parties.

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[2] [1907] A.C. 272 at 278.

I have dealt with this matter at such length because counsel for the appellant invited us to adopt the conclusion of the learned trial judge that the respondent had failed to exercise due diligence "before and at the beginning of the voyage to make the ship seaworthy" as is required by art. 3(1) of the schedule to the *Water Carriage of Goods Act*. The word "seaworthy" is not defined in that Act or in the schedule thereto and it has been variously interpreted by the Courts having regard to the facts of the various cases before them, but the meaning of the word "seaworthy" as used in the agreement is fixed by the provisions of clause 1(b) thereof and the combined effect of that clause and clause 3(c) makes it clear that the obligation of Vancouver Tug in this regard was limited to exercising due diligence to make and keep the scow "in a normal condition, safe to tow in the trade for which" it was "being used and that the amount of water contained within the hull" did not "exceed the equivalent of 4 inches depth over the entire bottom of any single main compartment of" the scow.

The agreement itself describes in some detail the carrier's obligation to supply scows and to arrange towing operations so as to provide efficient transportation and the shipper's obligation to load the chips on the scows. The following provisions appear to me to be most relevant to the present inquiry:

Clause 3(a)

Carrier shall provide sufficient tugs and scows all of which shall be approved by a representative of Marine Surveyors of Western Canada, or other competent surveyor, for the purposes of transporting not less than 60,000 units, nor more than 80,000 units, of pulp chips per annum. Scows provided hereunder shall have a minimum aggregate carrying capacity of 3,000 units and a maximum aggregate carrying capacity of 4,500 units and shall be properly boxed and fitted for the transportation.

Clause 3(c)

Carrier shall in all cases exercise due diligence to make and keep all vessels used hereunder in good order and condition and in all respects seaworthy.

Clause 5(b)

Carriers shall deliver the scows to Shipper at loading places in good order and condition and in all respects ready to load.

Clause 5(e)

Shipper shall be responsible for all such scows from the time they are made fast to moorings as directed by Shipper until Carrier has placed a line aboard such scows with the intention of removing the same from the plant, whether loaded or empty.

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Ritchie J.

7. Loading.

(a) All pulp chips shall be loaded and trimmed by Shipper solely at the expense of Shipper, PROVIDED ALWAYS that Carrier shall bear any costs occasioned as a result of faulty equipment supplied by Carrier.

(b) Scows shall be loaded and trimmed in accordance with loading instructions provided by Carrier to Shipper from time to time.

(c) Loading shall be deemed to be completed when any loaded scow has been examined and accepted by the master of the tug.

(d) Shipper shall load each scow to capacity with all reasonable despatch.

11. *Risk and Liability.*

(a) Shipper shall be liable for and shall pay for all damage caused to vessels provided by Carrier hereunder which shall be caused by the negligence of Shipper, its servants or agents, and shall indemnify and save Carrier harmless from all loss and damage whatsoever caused by the negligence of St. Regis Paper Company, its servants or agents.

(b) Shipper shall procure and maintain at its expense, insurance on all pulp chips carried hereunder to the full insurable value thereof against all sea, fire and marine risks which may arise during the loading, transportation and discharge thereof.

It appears to me that the division of responsibility between the parties under this agreement was that the shipper would be responsible for the scows from the time they were made fast to the moorings at its dock until the tug master put a line aboard to tow them away, while the carrier undertook to provide scows approved by a representative of Marine Surveyors of Western Canada and accepted the responsibility for safe carriage of the cargo to the specified destination. In so doing, the carrier reserved the right to have the scows loaded and trimmed in accordance with its instructions from time to time. Loading was "deemed to be completed when any loaded scow" had "been examined and accepted by the master of the tug".

In my opinion, by virtue of the provisions of clause 7(d) the shipper accepted the responsibility of loading "each scow to capacity with all reasonable despatch" and further agreed under clause 7(a) to load and trim all pulp chips solely at its expense. As the carrier was responsible for the scow and its cargo during the voyage, it appears to me to be only reasonable that the agreement should contain a provision that the scows would be loaded and trimmed in accordance with such instructions as the carrier might, from time to time, provide and that the loading would not be deemed to be completed until the tug master had examined and accepted the loaded scow. Clause 7(b) undoubt-

edly placed the shipper under the obligation to load and trim in accordance with any instructions provided by the carrier, but I do not read it as creating any concomitant obligation on the carrier to provide such instructions. The loading was left to the shipper but the carriage at sea was left to the carrier. As will hereafter appear, instructions were in fact given by the carrier to the shipper as to the maximum permissible list to be allowed in loading the type of scow with which we are here concerned, and whether these instructions were wrong, and whether or not they were carried out by the shipper, are two of the questions involved in this appeal.

During the early months of the life of the agreement, the respondent was supplying barges of its 100 series with a carrying capacity of approximately 700 units which could be readily loaded with chips from the then existing chip conveyor and chip delivery spout at the appellant's plant, but it decided to acquire a much larger type of barge which was later known as its 150 series and which had a capacity of 1,680 units of chips. This decision was conveyed to the appellant with a view to determining what effect the change would have on the method of loading with its existing loading facilities.

The discussions between the parties at this stage of the proceedings are well described in the evidence of Mr. W. G. Beale, who was the superintendent and former manager of planning and engineering for the Tahsis company, and who said:

> We had previously received drawings of the proposed barges, the V.T. 150 and 151 in order to determine whether it was—whether these barges would present any difficulty in so far as loading with our facilities was concerned. As a result of having received these and made a preliminary investigation, we had determined that it was quite possible and practical to load these barges and this was discussed at this meeting. I conveyed to Mr. Plester and to Mr. Lindsay that we would load the barges with the present facilities in the initial stages, but that once we had seen physically what the barges looked like, what the problems were, we would then extend the conveyor then we could load the barges more economically.
>
> Q. What do you mean by more economically?
>
> A. I explained to Mr. Plester that we proposed to turn the barges during the process of loading. This was a fairly—this was something which we had done—that I had done during my stay in B.C. Forest Products in Victoria, and it was a fairly common type of procedure.

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He was later again asked:

> Q. Now, you mentioned that—I think I asked this question about—you mentioned something about being economical, that you would make changes to make it economical. What did you mean by that?
> A. Oh, we proposed to accept the cost during the initial stages of turning the barges during the loading, and this of course, was a direct cost. We proposed to use the local tug owned by Texada Towing at their going rates to turn the scow.

It is, I think, fair to conclude from this evidence that the problem in loading the V.T. 150 and 151 scows as opposed to the 100 series was created because Tahsis had not got the proper facilities for loading such large scows directly, that this problem was discussed before the scows were ever constructed, that it was the Tahsis managing engineer who suggested loading by turning the barges so as to cover first one side and then the other with chips, and that he had, on behalf of Tahsis, made a preliminary investigation as a result of which he determined that it was practical to so load the scows. Mr. Beale had had experience in loading in this fashion and it is clear that the whole operation was to be conducted independently of Vancouver Tug by the use of the "local tug" for turning. This procedure appears to have been adopted on a temporary basis until Tahsis had found out "what the problems were" after which it was contemplated that the conveyor would be extended.

It was not until October 13 that the first of the new barges arrived at the Tahsis plant. Captain Plester, who was port superintendent for the tug company had intended to be present during most of the loading but unfortunately his arrival was delayed until October 17 after the loading was practically completed and the scows had been turned end for end five times in order to assist in the distribution of the load.

It was at this time that Captain Plester had a conversation with Mr. Kovlaske, who was in charge of loading the 150 series scows for Tahsis under the direction of Mr. Beale, which he describes as follows:

> . . . I asked Mr. Kovlaske when he expected to turn the barge again as he had informed me that he would be turning her once more before completion, and he then asked me, and while he was asking me he was looking at the width of the barge, and he said, now he said, "How much list should I put on this barge before I

> turn her as this is an unfamiliar piece of equipment to me?" So I said, "Well, Al, two to three feet. You can go two to three feet to be quite safe, but you should not exceed three feet in any case."

It is with respect to this evidence that the learned trial judge made the following comment:

> However, he did not tell Kovlaske that in the final stages of loading the effect on stability by the placement of the latter part of the cargo could be controlled by watching to keep the list within the limit of three feet, nor how tricky this could become in the final stages of loading. I particularly find that although Captain Plester advised him not to allow a list to exceed three feet he did not advise him of any plan or sequence of placement of cargo which would enable Kovlaske to keep the list under three feet. In my view it is meagre advice to advise one to keep the list not more than three feet and to fail to explain how this can be done.

In quoting the evidence of the conversation between Plester and Kovlaske, the learned trial judge omitted to refer to what followed after Kovlaske had been told that he should not exceed three feet in any case. Mr. Plester's evidence, which is uncontradicted, continues:

> Q. Alright, and what did he say in response to that?
> A. And he said, "Okay," and I said, now, I said, "Due to the size the barges you should take measurements from time to time or have your loader take measurements to establish the list." I said, "These can be very confusing due to the size of the barge. You can get more than that if you don't watch." He said, "Okay. I'll watch that pretty carefully."

As I have indicated, the loading procedure adopted by Tahsis was on a temporary basis and to some extent was a question of trial and error to find out what the problems were, but whatever the exact instructions may have been which were given to Kovlaske by Captain Plester, it is clear that having received these instructions Kovlaske had successfully superintended the loading of six such scows eccentrically between October 15 and December 30 and that on December 27 when the V.T. 151 was delivered by Vancouver Tug, he was the only person who had had any actual experience in superintending the loading of these scows with the equipment available and he was in a better position than anyone else to know what was a safe load.

It is in my view highly significant and clearly indicative of the responsibility accepted by Tahsis for loading that after observing the first two loads, the superintendent and

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managing engineer of Tahsis decided to change the loading arrangements at the plant. As to this he gave the following evidence:

Q. Well, now, as a result of this loading and your experience what plans were made with respect to the conveyor?

A. After we had observed a couple of loadings of V.T. 150 we were still somewhat undecided as to exactly what action we should take. We then laid out again in great detail the barge at all water levels and all load conditions.

Q. What do you mean you laid it out?

A. We drew a sketch to scale showing the conveyor, the dock face, the water at high tide, the barge at full load and empty, to examine completely the relationship of the barge to the conveyor and to the spout. Having done this, we decided that we should then lengthen the conveyor and re-hang the spout and lengthen the spout.

It is to be remembered that Mr. Beale was a qualified engineer with years of experience in the loading of scows and his next answer deals with details of re-hanging the conveyor. He then says:

> We then would add one section to the conveyor spout so that the chips could be directed further away from the dock, further in all directions. This course of action was decided upon. It was uncertain at this point how much inconvenience we would run into in loading the scows this way. We determined for certain that we could load them, and I think below 5 or 6 foot tide we could load a scow in any condition. We would have to plan our loading so that the top load was built at tides so that the corners of the top loads would have to be built at tides below 5 or 6 feet, something in that order.
>
> If this proved to be inconvenient, which we did not anticipate, then it would be no more costly to raise the conveyor after these changes were made than to raise the conveyor before the changes were made, so we decided we would do it in 2 steps, we would make the 3 changes to the conveyor, and observe what happened for a period of time, and if we found it was inconvenient or costly, then we would raise the conveyor, and as a second step—
>
> Now, having decided this we then went ahead with it.

Q. What relative dates are involved there, Mr. Beale?

A. Well, in the middle of October we loaded the first scow. Some time in November we made these decisions after several sketches and some fairly detailed layouts. As to the exact timing, I am not sure, but between that time, between the middle of November and the end of December, we fabricated and installed a new support mechanism for the conveyor, in order to support the additional lengths, and this had been installed when the conveyor was knocked down by the barge.

I have quoted at considerable length from the evidence of Mr. Beale because he was the general superintendent of the Tahsis company and because it was he who suggested

the method of loading the scows "to a list" which was undoubtedly a factor contributing materially to the capsizing of the V.T. 151 at the dock side on December 31. It is to be noted that when he was called out to view the scow shortly before its collapse, his reaction was "that it may have been loaded very poorly."

As I have indicated, I take the view that the responsibility for the V.T. 151 while moored at the appellant's dock during loading rested with the appellant (see clause 5(e)) subject to the fact that it was required (under clause 7 (b)) to comply with any instructions provided by the carrier as to loading and trimming.

In the course of investigating the cause of the accident, both parties took the opinions of experts in naval architecture and I think it is fair to say that the effect of their evidence is that the scow was "tender" and the loading had to be closely watched even before the list reached the three feet specified by Captain Plester, although none of these experts was prepared to say that the scow would have capsized as the result of loading alone if Captain Plester's instructions had been followed and the list not allowed to exceed three feet.

Based on the very exhaustive analysis made by its experts after the event, it is now contended on behalf of the appellant that the scow was unseaworthy in that the loading instructions given by Plester to Kovlaske on October 17 were insufficient. It is to be remembered that under the provisions of clause 1(b) and 3(c) of the agreement, pursuant to which the loading was being conducted, the carrier's agreement was to exercise due diligence to keep the scow in all respects in "normal condition, safe to tow in the trade for which" it was "being used" and that the water contained in any main compartment of the bottom of any scow did not exceed four inches.

There is no suggestion that the scow was not in normal condition, or that it was unsafe to tow in the trade or that there was any water contained within the hull. The scow was in this sense seaworthy within the meaning of the agreement, but it is contended on behalf of the appellant that a ship which is structurally sound may nevertheless be unseaworthy if those who charter it are not instructed in the proper method of using it. The contention is based on

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the case of *Standard Oil Co. of New York v. Clan Line Steamers Ltd.*[3], (hereinafter called "*Clan Line*") and it is in my opinion important that this case should be analysed so as to determine whether it affords authority for the proposition that a structurally sound ship chartered by an owner for loading by a shipper is not seaworthy unless it is accompanied by detailed loading instructions embodying the conclusions of a marine architect based on stability data compiled by him concerning the ship. In *The "Hildina"*[4], Lord Merriman, who was then President of the Admiralty Division, had occasion to make the following explanatory comment on the *Clan Line* case. He said, at p. 258:

> This was the case, to put it quite shortly, of the turret ship which turned turtle and it is a little important, in comparing so far as possible one set of circumstances with another, to know that an earlier turret ship of the same construction had turned turtle. The whole point was this, that in a ship of that description it proved on subsequent investigation after the loss of the first ship that unless there was water ballast in two of the holds up to a certain measure the ship was unseaworthy. If she was properly ballasted she was perfectly seaworthy, and, as the result of the first loss, the builders had circularized elaborate instructions to those in whose possession their ships were, about the absolute necessity of keeping the water ballast intact. In the case of the second ship, some nine years later than the original casualty, it was proved that those instructions had not been passed on to her master, who had deliberately, but in absolute ignorance of the necessity for keeping these holds full of water ballast, pumped the ballast out . . .

It was under these circumstances that the House of Lords held "that the ship was inherently unseaworthy under certain not improbable conditions unless special precautions were taken which it was the duty of the owners to enjoin as being required by the structure of their ship and that the owners were therefore liable for the loss of their cargo".

When he came to consider the *Clan Line* case in relation to the facts of *The "Hildina"*, Lord Merriman observed, at p. 260:

> . . . I do not think there is anything in the circumstances of this case which remotely resembles the outstanding fact in the *Clan Line* case that nine years before the casualty in question another ship had turned turtle for lack of the very precaution with which the owners had in the case in question failed to acquaint the master of the ship involved in the second casualty. There is nothing comparable to that at all in this case.

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[3] [1924] A.C. 100.

[4] [1957] 2 Lloyd's Rep. 247.

With the greatest respect for those who may hold a different view, I think that this language of Lord Merriman is applicable to the present case, and I do not think that the *Clan Line* case affords authority for the proposition that when a shipowner delivers a structurally seaworthy scow into the hands of a shipper for loading and that shipper is experienced in the loading of the cargo to be carried, that the scow can be said to be unseaworthy because its owners have not retained naval architects to devise a detailed loading plan and conveyed detailed loading instructions to the shipper as to the point beyond which it becomes dangerous to overload the scow on one side. In the present case there had been no similar collapse of such a scow at its moorings while loading, the plant superintendent at Tahsis was a man of long experience in loading scows and only a very short time before the accident his company had prepared a scale sketch of the barge and loading facilities and had "laid out again in great detail the barge at all water levels and all load conditions".

In the case of the *Clan Line* the owners knew that the vessel was only seaworthy so long as the detailed instructions furnished by the builders were complied with, but they failed to convey these instructions to the master of the ship. The real question in that case was whether the owners had proved "that the loss occurred without their actual fault and privity" within the meaning of s. 503 of the *Merchant Shipping Act*, 1894, and it was held that the failure to give the instructions to the master brought the fault home to the owners.

It is, however, also contended that the provisions of clause 7(b) of the agreement placed upon the respondent the burden of providing the shipper with the kind of detailed instructions which were worked out by the marine architects after the event and in this regard it is to be observed that the right to control the manner in which a ship is to be loaded rests primarily with the shipowner as it has to protect its ship from being made unseaworthy, but that the obligation to discharge the function of loading may be shifted to the shipper by the terms of the contract of carriage. As I have indicated, I read the provisions of clause 7(b) as giving expression to the carrier's right to dictate loading instructions and I think that the shipper is required to comply with such instructions, but I do not

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think that the carrier is placed under any obligation to give them although if it does so, its instructions must be such as not to endanger the safety of the scow or cargo.

In my view there is a strong analogy between the circumstances of the present case and those which were considered in *Canadian Transport Co. Ltd. v. Court Line Ltd.*[5] In the present case clauses 7(b) and (c) of the agreement, when read together, provide that the cargo (*i.e.* pulp chips) "shall be loaded and trimmed solely at the expense of the Shipper—in accordance with loading instructions provided by the Carrier—from time to time" whereas in the *Court Line* case clause 8 of the charterparty provided in part that "charterers are to load, stow and trim the cargo at their expense under the supervision of the captain ...". In that case the captain stood in the place of the shipowners who brought the action against the charterers for damage due to improper stowage of cargo. In the course of his reasons for judgment, Lord Atkin said, at p. 937:

> The shipowners claimed to recover this sum which had been paid to the bill of lading holders from the charterers on the ground that they were liable to the owners for improper stowage under clause 8. The first answer which the charterers made was that there was no such liability because the duty of the charterers was expressed to be to stow, etc., "under the supervision of the captain". This, it was said, threw the actual responsibility for stowage on the captain; or at any rate threw upon the owners the onus of showing that the damage was not due to an omission by the master to exercise due supervision. This, we were told, was the point of commercial importance upon which the opinion of this House was desired. My Lords, it appears to me plain that there is no foundation at all for this defence; and on this point all the judges so far have agreed. The supervision of the stowage by the captain is in any case a matter of course; he has in any event to protect his ship from being made unseaworthy; and in other respects no doubt he has the right to interfere if he considers that the proposed stowage is likely to impose a liability upon the owners. If it could be proved by the charterers that the bad stowage was caused only by the captain's orders, and that their own proposed stowage would have caused no damage no doubt that might enable them to escape liability. But the reservation of the right of the captain to supervise, a right which in my opinion would have existed even if not expressly reserved, has no effect whatever in relieving the charterers of their primary duty to stow safely . . .

In that case the charterparty was in "time-charter" form but it was in fact a charter for a single voyage from Rotterdam to the Northern Pacific and return to the United Kingdom or the Continent. In my opinion the position

[5] [1940] A.C. 934.

of the charterers was analagous to that of the shippers in the present case and as I have said, the captain stood in the place of the owners. I therefore think the decision of the House of Lords, when applied to the interpretation of clause 7 of the agreement in the present case can be construed as meaning that the reservation of the right of the owner to give loading instructions from time to time and to require that the loaded scow be examined by its master (clauses 7(b) and (c)) has no effect whatever in relieving the shippers of their primary duty under clauses 5(e) and 7(a) to stow safely, and I think also that in order to succeed in the present action the shippers would have to prove that the bad stowage resulting in the collapse of the scow was caused only by the loading instructions given by the carrier and that their own proposed stowage would have caused no damage at all.

As I have indicated, I am of opinion that the shipper was required to comply with any instructions which were given to it by the carrier and that the carrier had the right but not the duty to give such instructions subject to the fact that any instructions which it did give must be such as to not endanger the safety of the scow or cargo. I am, however, in any event of opinion that even if clause 7(b) be construed as imposing a duty upon the carrier to give loading instructions, there was no breach of such a duty in the present case because, as will hereafter appear, I do not think that the instructions not to exceed a three-foot list "in any case", which were given by Captain Plester, can be said to have endangered the safety of the scow or that they were in any way inadequate having regard to the fact that they were being furnished to a company, the superintendent of which, who was in overall charge of the loading, had had previous experience in the eccentric loading of pulp chips and who regarded it as "a fairly common type of procedure".

It is true that in the present case if the loading instructions, prepared by marine architects after the accident, had been available and had been followed on December 31, they would have provided a greater margin of safety during loading operations, but the extent of the obligation undertaken by the carrier under clause 3(a) of the agreement was to provide scows "approved by a representative

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of Marine Surveyors of Western Canada or other competent surveyor" and there can be no doubt that the V.T. 151 had been so approved by Captain Brown, the principal surveyor for the Marine Surveyors of Western Canada, who had held that position for seventeen years and that it was according to the advice furnished by this expert that Captain Plester made his recommendation to Kovlaske with respect to the list not being allowed to "exceed three feet in any case". It may be that Captain Brown was not as skilled in the exact scientific preparation of stability data as the marine architects who examined the situation after the event, but I do not think it can be said that the respondent failed to exercise due diligence to make and keep the scow in a normal condition and safe to tow in the trade for which it was being used when it is considered that it was structurally seaworthy and that the respondent had obtained the opinion and approval of a marine surveyor as it was required to do in accordance with clause 3(a) of the agreement. There was no other obligation on the carrier to have the scows surveyed before delivery and I do not think that the decision in the *Clan Line* case or any other case which I have been able to find required it as a matter of law to consult marine architects before putting the scows in service.

The fact that amended loading instructions were given by the respondent after the accident in conformity with the advice which it received from the experts, cannot of itself be treated as any evidence of the inadequacy of the instructions given by Captain Plester. (See *Hart v. Lancashire and Yorkshire Railway Co.*[6].) It is appreciated, however, that the main argument in support of the appellant's position does not depend in any way upon the fact that amended instructions were given after the event, but is on the other hand founded on the contention that under the circumstances disclosed by the evidence, the respondent could and should have consulted marine architects with a view to a more accurate determination of the stability factors in the scows before they were put in service and that its failure to do so resulted in insufficient loading instructions being supplied by Captain Plester. I find myself unable to accept this view of the matter.

[6] (1869), 21 L.T. 261 at 263.

As I have indicated, I am of opinion that the Tahsis people accepted full responsibility for loading these scows and at the time when the accident occurred they were in the course of experimenting in order to achieve the best result. In my view, it was the superintent at Tahsis and the man who had been in charge of loading the last six scows of the 150 series who were best able to judge as to the effect of the permeability of chips to rain and as to the effect of wind and weather on the operation which they were conducting.

Under all the circumstances of this case, I am of opinion that before the respondent can be fixed with the responsibility for the loss it is incumbent on the appellant to show, not only that the instructions given by Captain Plester were wrong, but that this error was the cause of the mishap. It is not enough in my view to prove that the loading operation could have been conducted with greater safety if the instructions had been more elaborate, the question as I see it is whether the instructions were wrong in the sense that if they were followed the scow would be likely to capsize.

As I have indicated, I do not find in any of the evidence of the marine architects a statement that the loading to a 3-foot list would of itself cause the scow to capsize; whereas there is on the other hand evidence that six of these scows had been safely loaded in this fashion by Kovlaske without capsizing and that the very scow in question had been moored at the appellant's dock with a 3-foot list from 2 a.m. on December 29 to 7.30 a.m. on December 31, the day of its loss.

Without going into any further detail, I am prepared to agree with Mr. Justice MacLean when he says in the course of his reasons for judgment in the Court of Appeal for British Columbia:

> I can find no evidence to indicate that danger is involved in loading this barge to a three foot list.

I am accordingly of opinion that there was nothing wrong with the instructions as to permissible list given to Kovlaske by Captain Plester.

The evidence as to the cause of the mishap is contradictory because Kovlaske testified the scow was only listing 2 feet 2 inches at 12 noon and 2 feet 4 inches at about 12:15, shortly before it capsized and this would indicate that he

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had followed the respondent's instructions; whereas the loading experts were of opinion, after considering all the circumstances, that this estimate must have been wrong and that the scow by 12:15 was at a substantially greater list in excess of three feet and that it had become "hung up" on the dock or that the normal progression of the list had been interfered with in some other way so as to make it appear less than it actually was.

In my view the underlying causes of the collapse of the V.T. 151 on December 31 were that the Tahsis company was employing loading equipment which was not thoroughly adapted to the loading of these large scows and that its superintendent, Mr. Beale was not exercising the care required to supervise the undertaking. The immediate cause of the capsizing was, in my opinion, the negligence of Kovlaske who was responsible for the loading of this particular scow and whose actions at the critical times on the morning of December 31 are accurately described in the reasons for judgment of Mr. Justice MacLean where he says:

> At 11:30 A.M. he must have known that a critical stage in the loading was approaching, he left his post, did not reappear till 12:05 when he made a "visual" measurement for calculating list—left again to reappear at 12:15 p.m. at which time the barge was doomed. In the meantime an underling had been left in charge of the whole loading operation at the critical stage of loading.

For all these reasons I would dismiss this appeal with costs.

The judgment of Martland and Pigeon JJ. was delivered by

PIGEON J.:—The essential facts of this case are as follows:

On April 26, 1962, the parties entered into a contract whereby the respondent undertook to provide tugs and scows for transporting pulp chips from appellant's dock at Tahsis inlet, on the west coast of Vancouver Island, to the St. Regis paper mill in Tacoma, State of Washington. This agreement provided among other conditions that:

(a) Tugs and scows shall be approved by a representative of Marine Surveyors of Western Canada or other competent surveyor;

(b) Carrier shall in all cases exercise due diligence to make and keep all vessels used seaworthy;

(c) Shipper shall be responsible for all scows from the time they are made fast to moorings until carrier has placed a line aboard with the intention of removing the same from the dock;

(d) Scows shall be loaded and trimmed in accordance with loading instructions provided by carrier to shipper from time to time;

(e) All shipments of pulp chips shall be carried subject to all the terms and conditions of carrier's bill of lading.

The first condition on the reverse side of the form of bill of lading annexed to the contract was that "it shall have effect subject to the *Water Carriage of Goods Act*".

In the performance of this contract, respondent at first used mostly barges designated as the V.T. 100 series, carrying each approximately 700 units of chips (a unit is 200 cubic feet). However, they intended to use much larger barges known as the V. T. 150 and V. T. 151 which had been ordered built for this purpose. These were much larger barges intended to carry as much as 1,680 units.

The barges were loaded by means of an overhead conveyor at the end of which a movable spout directed the chips inside the box in which they were carried above the deck of the barge. Due to the greater width of the larger barges, the conveyor did not project far enough to make it possible to centre the load within the box of the larger barges, as could be done with the smaller ones. It was agreed between the parties that the necessary alterations would not be made until some experience had been gained in the loading of the big barges. In the meantime, the load was to be put on eccentrically, the barge being turned around by a tug from time to time as the loading progressed.

On the first voyage to Tacoma, the barge known as V.T. 151 suffered damage; one side of the box gave way and part of the cargo was lost. Subsequent examination established that the stanchions holding the planks forming the sides of the box were not strong enough, part of the flange of the steel beams making those stanchions having been cut away where they went through the steel deck. The barge was repaired and the defect corrected by strengthening the stanchions.

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The barge, however, was not returned to service as soon as expected, with the result that the appellant was without a barge for a few days before Christmas 1962. As a consequence, the production during those days went to the open air stock pile, and when the barge became available great effort was made to complete the loading in the three working days between Christmas and New Year; that is on Thursday and Friday, December 27 and 28, and Monday, December 31.

On this last day, the barge was first turned early in the morning having then a three-foot list to port. This degree of list was the maximum beyond which it was not safe to go according to instructions verbally given by Captain Plester, respondent's superintendent, to Kovlaske, appellant's chip mill foreman, who was also superintending the loading of the barges. During the morning, the list gradually changed to starboard; chips being loaded both from production and stock pile. At 11:30, the chip mill stopped for the lunch hour but loading was continued from stock pile. Sometime after noon, around 12:15, Kovlaske had the loading stopped and heard what he described as a creaking noise. He then saw that the cap of the box of the scow was touching a temporary scaffolding put up on the face of the conveyor tower in preparation for the contemplated extension. An effort was made to hold the barge by tightening the spring lines but the list kept on increasing until the cap of the box came to rest on what was called the "bull rail" on the front of the dock. The barge held this position for some little time but finally something gave way and the barge capsized, bringing down a part of the conveyor and of the dock.

The trial judge held that under the circumstances the *Water Carriage of Goods Act* applied and imposed upon Vancouver Tug the duty to exercise due diligence to make the ship seaworthy and that this required that the ship be accompanied by adequate loading instructions. He also held that the same obligation was imposed by the provision of the contract to which reference has already been made.

The respondent contended that the *Water Carriage of Goods Act* did not apply, and that the provision in the agreement that Tahsis would be responsible for the vessel

from the time it became fast to moorings overrode during that time, the obligation to use due diligence to make the ship seaworthy.

In my opinion, it is not necessary to decide whether the *Water Carriage of Goods Act* applies because I find it clear that the provision for responsibility for the scows during loading, cannot have the effect of suppressing during that period the obligation of the carrier to use due diligence to make the ship seaworthy. It is well established that seaworthiness requires more than structural soundness; it also requires proper instructions: *Standard Oil Co. of New York v. Clan Line Steamers Ltd.*[7] Even if this was not a legal requirement, the contract between the parties would make it such because it provides for "loading and trimming" in accordance with loading instructions provided by carrier to shipper from time to time. The provision for responsibility of the shipper during loading certainly cannot have been intended to displace the obligation to exercise due diligence to make the ship seaworthy by issuing proper and adequate loading instructions without which the ship would not be seaworthy during loading. Respondent's contention would result in putting on appellant's shoulders the burden of issuing to the loaders of the barge the instructions for loading that it was its legal and contractual duty to provide.

Having come to this conclusion, it is now necessary to consider whether respondent did in fact provide proper loading instructions or at least used due diligence to that end.

That it did not use due diligence is, I think, obvious. No naval architect was consulted to determine what those instructions should be. It must be noted in this connection that while the design for the barge itself had been prepared by a naval architect, this design involved not a chip box but an enclosed space for carrying newsprint. The design of the chip box was prepared by the builders without consultation with a naval architect. As we have seen, this resulted in such a poor design that on its first loaded trip the V.T. 151 lost a complete side of the box. Although the structural defect had been repaired prior to the accident,

[7] [1924] A.C. 100.

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the owners had not been provided with the data respecting stability that a naval architect would normally have provided.

The record shows that the loading instructions verbally given by Capt. Plester, respondent's superintendent, to Kovlaske, appellant's chip mill foreman, were the result of a discussion between Capt. Plester and Capt. Brown, principal surveyor of Marine Surveyors of Western Canada. Captain Brown, as he said himself, had practical experience only and did not possess the technical knowledge of a naval architect. His advice to Capt. Plester was not based on precise stability data pertaining to the new barges; it was in the nature of an educated guess based on practical experience. I, therefore, conclude that respondent has not used due diligence to provide proper loading instructions, having failed to obtain the advice of a naval architect or of a person of equivalent qualifications, in respect of a vessel, a substantial part of which had not been designed by such a person.

In considering whether the loading instructions given were adequate and proper, it is convenient to examine first the instructions that were issued after the accident.

Capt. Brown reacted as might be expected from a man relying essentially on practical experience. In his letter of January 24, 1963, he suggested: "that cargo box height be reduced by not less than 5 feet". The height of the box being 25 feet, this involved a reduction of 20 per cent in the volume of chips that might be carried.

Instead of acting on this haphazard advice, respondent on February 5, 1963, retained the services of a naval architect, J. G. German. In essence, his recommendations dated February 26, 1963, were that:

"(a) The height of bin, and consequently of load, be reduced by 2 feet.

(b) The maximum load permissible should be reduced to correspond to a loaded draft of 11′—0″ in salt water. This allows additional margin for such possibilities as moisture accumulation in the bin.

(c) When loading, the heeling angle should never be such as to permit entry of the underside of the fender in the water."

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These recommendations were acted upon and instructions issued in writing accordingly on February 28, 1963. It is important to note how far these instructions differed from those that had been given verbally prior to the accident:

Firstly, the height of the box and of the load was reduced by 2 feet, that is 8 per cent.

Secondly, the free-board was increased from 2 feet 6 inches to 3 feet, this being the free-board closely corresponding to a draft of 11 feet, as appears from the table annexed to the instructions dated April 9, 1964.

Thirdly, the maximum list at the critical stage was specified not as a difference of 3 feet between the free-board on one side and the free-board on the other, but by the requirement that the underside of the fender should not be in the water. This underside being 12 inches below the barge's deck, this last requirement preserved a margin of one foot between the moment eccentric loading should be stopped and the point where the stability of the barge would be endangered, namely deck edge immersion.

It should be observed that this margin of safety at the critical time was thus made approximately double that which existed under Capt. Plester's verbal instructions. These were to load with one foot trim aft, two feet six inches free-board, maximum heel during loading, three feet. With the trim specified, the mean free-board aft became 2 feet because a 3-foot list makes a difference of one foot 6 inches each side of the mean and, therefore, puts the aft end of the fender 6 inches in the water.

German was heard as expert witness for the respondent at the trial. He did not say that his above-mentioned recommendations had been unduly conservative or excessively cautious. What he said was that he did not then know that appellant's installation had been altered to prevent eccentric loading and that under conditions of off-centre loading he felt that his recommendations were necessary for a proper margin of stability. We, therefore, have it in the record that, on the basis of respondent's own expert's opinion, instructions to ensure a proper margin of stability during off-centre loading should have involved a reduction of 2 feet in the height of the box and, consequently, in the height of the load, an increase in the mean

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free-board to 3 feet instead of 2 feet 6 inches and a maximum list during loading defined by a prohibition against putting the underside of the fender below water level. Undoubtedly, such instructions would have made for greater stability and provided a much greater margin of safety during loading operations as German himself admitted.

As it was, the margin of safety under the new instructions was even greater because appellant's installation had, in fact, been altered so as to eliminate off-centre loading. In the latter part of March 1963, the appellant had the chip box restored to its original height. Revised loading instructions stipulated an average free-board of 3 feet and $\frac{3}{4}$ of an inch in the winter, 2 feet $6\frac{3}{4}$ inches, in the summer, with load lines 6 inches wide serving to indicate both limits. The prohibition against listing a barge so that the lower edge of the fender is immersed was retained, and it was added that the list should not exceed 30 inches.

In 1964, after "a thorough study of all trips made by the barges" since the last loading instructions, new instructions were issued by letter of April 9. These instructions did not embody any change in the box height nor in the maximum list allowable. However, the height of the top load was to vary according to the free-board by reference to two charts: one to be used in the summer, the other in the winter. These instructions being objected to as impracticable were replaced by another set specifying mean top load height and maximum top load height for five free-board heights only, instead of the close to forty different heights listed in the tables accompanying the previous instructions. The restrictions respecting allowable list were unchanged.

Thus, it will be seen that after more than a year of experience and elimination of off-centre loading, appellant still did not consider it prudent to list any barge during loading as much as Capt. Plester had told Kovlaske that it could safely be listed under conditions of off-centre loading which admittedly required a greater margin of stability.

I am therefore of the opinion that the loading instructions verbally given by Capt. Plester to Kovlaske prior to the accident were not proper and adequate. There is no reason to believe that if competent expert advice had been

sought, as it should have been before the barges were put in service, such advice would have been any different from that which was subsequently given as suitable under the conditions of eccentric loading in which respondent had acquiesced. If anything, the presumption would rather be that these initial instructions having to be issued in the absence of any experience in the use of those barges, restrictions designed to ensure the stability at dock side during loading would have been even more rigorous than those recommended by German in February 1963.

It remains now to be considered whether the capsize is in fact due to the insufficient and defective loading instructions supplied by Capt. Plester or to the negligence of Kovlaske.

At the hearing in this Court, the imputation of negligence was essentially predicated on the assertion that, irrespective of any other considerations, it is a fact that if the barge had not heeled to such an extent that the deck went under the water, it would never have capsized. All the experts who were heard have agreed that the barge's maximum righting moment was reached at deck edge immersion; beyond this point, the righting moment decreased; in so far as the heeling moment represented by the load could not be removed, capsize then became inevitable unless the barge could be restrained by mooring lines or other temporary supports. In fact, this is what was attempted but without success.

Before jumping to the conclusion that, under those conditions, the fact of the capsize is conclusive evidence of negligence on the part of the loader, one must consider that a barge, like all mechanical devices, must be operated with an adequate margin of security. Proper operation of all human-made implements requires some margin for safety. It is never safe to operate too close to the breaking point. While the breaking point is an ultimate datum determined with a degree of scientific accuracy, the safe working load is a matter of judgment resting, on the one hand, on a consideration of the ultimate theoretical load determined by scientific considerations, and on the other hand, on the experience of the proportion between the ultimate load and the working load that has been shown to be reasonably satisfactory as striking a proper balance between the economic advantage of maximum loading and

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the safety of an adequate margin. Of course, the width of this margin depends, in part, on the degree of accuracy to which the ultimate load is known and also on the degree of accuracy to which it is possible to work in practice, taking account of the human element and of unpredictables such as weather conditions.

Three naval architects were heard as expert witnesses at the trial. Professor Baier and Gordon Snyder, for the appellant, and John G. German, for the defendant. Baier and German both submitted elaborate reports based on slightly different estimates of the various factors involved and, naturally, came to different conclusions on many points, specially on the degree of instability of the barge at the time the loading was stopped. This is not surprising seeing that, as German put it in his first report, his letter of March 8, 1963: "Very slight variations to these basic assumptions can alter the critical angle by several degrees." When it is considered that the basic assumptions include such unascertainable factors as the permeability of chips to rain, it becomes obvious that the figures submitted by both experts can be considered as scientifically accurate only on the assumption that the data on which they are predicated also are accurate. It is abundantly clear that such is not the case, most data are only estimates made to an unstated degree of inaccuracy. For one thing, permeability to rain could not even be said to have been estimated, it was assumed; for another thing, the actual volume and disposition of the load could only be said to have been estimated to a fair degree of accuracy. When the evidence shows that the results of careful measurements of the volume of chip loads by the shipper and by the consignee were sometimes found to differ by as much as 2 per cent, some idea can be obtained of the possible margin of error when no measurements were taken and a highly irregularly shaped load was merely estimated.

It is obvious from what both experts have said that the margin of error in their computations was quite substantial. Their respective conclusions cannot be said to represent anything better than that which each of them judged to be most probable in the light of his knowledge of the facts, his estimate of various quantities and his assumptions of unknown or largely unknown facts.

Near the end of his cross-examination, the following question was put to Snyder:

> Then you would agree that, no matter how far off-centre a steadily increasing load may be applied, causing the vessel to increasingly heel over, if loading were stopped when the vessel reached a three-foot heel she would still have a positive righting moment for the remainder of heel angle up to the point of deck edge immersion?

His answer was:

> This is theoretically true. But we are dealing with margins here that are so small that you really can't count on what would happen.

Then this witness was made to agree that making no other assumptions than a mean draft of 11 feet 6 inches, a trim of not more than 1 foot, a list of not more than 3 feet and floating freely in the water, one would have to go on adding load off-centre to cause the barge to heel further than 3 feet. However, it should be noted that weather conditions are carefully excluded from the above assumptions, as was pointed out when the last question was put to the witness.

Concerning weather conditions, evidence was given by only one witness, Professor Baier. From his examination of one of the photographs taken by the witness Thompson while the barge was listing at an excessive angle before capsize, he estimated by the manner in which a flag was shown flowing, that there was a wind blowing across the barge towards the dock at force four, that is 20 m.p.h., and from this he deduced a resulting moment of 21 foot-tons. This evidence was not contradicted but, strangely enough, little attention seems to have been paid to it although Baier had explained that, with the void on the port side of the load, the wind pressure was sufficient to capsize the barge without the loading being carried beyond a 3-foot list.

The trial judge said that "The strong capsizing moment was created by the weight of that part of the load which was off-centre and high up on the starboard side coupled with the existence of a void aft on the port side." In other words "the load was built lopsided on the starboard side to such a degree that it tipped the barge over,...". But he said:

> In contrast to calculated and carefully planned loading instructions of such kind the only loading advice Tahsis received allowed Kovlaske to proceed with a haphazard system of fill it up, leaving voids, putting

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a large amount of the heaviest units on top and off centre due partly to inadequate loading facilities, and due largely to his landsman's ignorance of the inherent danger of doing so. It is true that he was advised by Captain Plester during the loading of barge "VT 150" not to allow the list on the barge to exceed three feet, but he was not advised or instructed of the danger of so doing or that a critical stage of loading might be reached when the inherent stability of the barge could be overcome in about eleven minutes. It is clear to me that such a critical stage of loading would never have been reached if adequate loading instructions had been given.

On that basis the trial judge held that the responsibility for the capsize was to be ascribed solely to the omission of adequate loading instructions. He paid scant attention to respondent's contention that the barge had become "hung up" during loading. He merely said that there was "a possibility" that the winch lines "may have to some degree retarded the development of the list to starboard".

In the Court of Appeal, Davey J.A. was of opinion that:

> there was an insufficient reserve of stability to permit the barges to be safely loaded eccentrically to a three-foot list. They were not fit to meet the perils of being loaded in that way, and so were not seaworthy, and I think there was a lack of due diligence on the part of the appellant to make them seaworthy, if its duty was not absolute.

However, he said that this was not a cause of the casualty and that the capsize was due to lack of care by Kovlaske:

> Either Kovlaske was quite wrong in his estimate of the list, or the barge was hung up. If he had been watching her list during loading he would have known she was hung up because of lack of normal progression in the list, and done something about it.

When this proposition is analysed, it becomes apparent in the first place that there is another possibility which is suggested by the evidence and completely overlooked by Davey J.A., namely that the wind started blowing towards the barge and, in its condition of very limited stability, increased the list by the few inches necessary to go beyond the point where it would be doomed to capsize, namely deck edge immersion.

In the second place, the result of this so-called dilemma is to have the appellant instead of the respondent bear the responsibility for appellant's failure to give instructions which would have ensured an adequate margin of stability during loading. In fact, the result is to say to appellant: "Irrespective of the insufficiency of the margin of stability which respondent's instructions provide, you are under

obligation to make up for such insufficiency by a high enough degree of care." In my opinion, this is contrary to the fundamental basis on which negligence is to be defined. It is not a failure to act in such a way as to prevent damage from occurring. It is a failure to act with reasonable care. What is reasonable care is to be determined not according to what will prevent the damage but according to what may properly be expected under the circumstances.

Respondent's representatives knew that Kovlaske was the chip mill foreman; therefore, he could not be expected to supervise the loading continuously. They also knew that Kovlaske had been loading smaller barges (the V.T. 100 series) without being required to pay too much attention to the degree of list during loading. In the conditions under which these smaller barges were being loaded their margin of stability was much greater than that of the V.T. 151. It was more than adequate so that the allowable list during loading was not at all critical. Captain Plester completely misjudged the situation in this respect. He believed the V.T. 151 to have a greater instead of a much smaller margin of stability during loading.

Counsel for the respondent sought to justify this by contending that if the V.T. 100 series had been operated with a smaller free-board than was in fact the case, their stability would have been no better than that of the V.T. 151. This reasoning is ill-founded for two reasons. Firstly, Captain Plester when he made that statement was specifically making the comparison on the basis of the same free-board. Secondly, the only meaningful comparison was to be made under actual conditions of operation. This was the only basis of which Kovlaske could have any knowledge and it also was the only material basis as between respondent and appellant. Capt. Plester having given his instructions to Kovlaske under a complete misapprehension of the relative stability of the two series of barges, certainly did not say anything from which Kovlaske could have inferred that much greater care and closer supervision were necessary in loading the V.T. 151; the contrary is the obvious inference.

In his reasons for judgment Maclean J.A. says: "It is fair to assume, I think, that Captain Plester's evidence as to the instructions he gave to Kovlaske was accepted by the learned trial judge for ... he said:" Then follows a

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long quotation in which the trial judge appears at first to make a finding concerning the instructions given by Captain Plester to Kovlaske as related by Plester in chief at the trial:

> You can go two to three feet to be quite safe, but you should not exceed three feet in any case.

In the end, however, the trial judge underlines what Captain Plester had stated in his examination on discovery:

> Try to keep the list during loading within two or three feet, not to go beyond three feet... *that would be a little too severe when turning.*

On the contrary, Maclean J.A. takes Plester's instructions as related at the trial and then stresses and underlines the words: *"in any case"*, instead of *"that would be a little too severe when turning"*. With respect, I consider this as an error. The trial judge having heard Captain Plester in chief and in his cross-examination with respect to his version of his instructions given in his examination on discovery clearly adopted this latter version as correct. His finding certainly did not justify relying on the other version which was very different in its implications respecting a crucial point in this case, namely the degree of care to be taken in loading and the danger involved in exceeding the permissible list.

In his reasons for judgment, Maclean J.A. further says:

> No doubt if Kovlaske himself had been present he would have noticed that although chips were pouring from the loading spout the list of the barge was not changing, which would have indicated that the barge was "hung up", that is, not floating free, and consequently that the freeboard measurements gave a false impression of the list of the barge.

There is absolutely no evidence that for any length of time during the loading the list of the barge was not changing. What was said by German was that the list was changing less than what he calculated should have been normal. This is quite a different thing. On what basis should a man like Kovlaske be expected to have knowledge of the normal rate of change of list of a barge when this involves such complex calculations as those made by Baier and German, which were beyond the competence of Capt. Plester and Capt. Brown?

On the basis of their stability calculations, both Baier and German expressed the opinion that the barge had

become hung up, that is restrained from listing as far as it would have gone under the load if floating freely. No means of support other than the lines holding the barge to the dock are suggested in the evidence. It is clearly established that the lines known as the "spring lines" were slack. This is not surprising seeing that it appears that from 9:30 a.m. to 12:15 p.m. the water level rose due to the tide from 6 feet above low water level to 8 feet 6 inches. However, it is also established that the winch lines were taut.

It is very hard to see how the winch lines could have substantially restrained the list of the barge unless it was practically in unstable equilibrium as Snyder said it was. The fact is that the winch lines ran longitudinally along the dock to bollards near each end of the barge. These winch lines were used to move the barge along the dock and this obviously required that they run as nearly parallel to the dock as possible. In that condition, those steel cables could restrain the downward movement only to the extent of a fraction of their breaking strength of 23 tons. The evidence shows that the winch gave way when the barge capsized. One cable remained attached to the barge and had to be cut to permit the capsized barge to be towed away in order to clear the dock. With a single exception, all the men who were at work on or around the barge were heard as witnesses and none of them having said anything that might suggest such an occurrence, I consider it most unlikely that the winch lines or their supports suddenly gave way before the capsize. Baier put it in this way:

> ...you can't calculate the effect of the lines which are still holding and if they get held forever the boat will still be sitting there. If the lines let go, which again was an outside force, as was the wind an outside force—there were three outside forces, your lordship, imposed on that ship which make any calculation a matter of simply assuming that free of those lines under the condition I assumed, she would still have a righting moment. Well, she didn't, which agrees with the fact that she held up there a little bit until, as I remember Kovlaske's about 12:15 he came back and the after deck edge was under water and it makes no difference; she would have started capsizing earlier and she would ultimately have gone unless those lines could continuously hold her up. That is—regardless of any assumptions necessary the facts to me indicate that she could not have been stable unless those lines were holding her up.

According to Baier, the barge lost its positive stability even before the deck edge went under. His opinion that to

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a certain extent which he considered undefinable the barge was restrained by the winch lines, affords no basis for a finding of negligence against Kovlaske.

In final analysis, this finding in the Court below rests solely on the evidence of German on which Maclean J.A. mainly relied. It might be sufficient to say that when expert opinion is conflicting and there is no clear error on one side, a fact is not to be considered established by such opinion. However, in this case, there is a fact which in my view discredits German's opinion on this point. This is the drawing which German prepared in an attempt to show that when Kovlaske heard "creaking noises" as he was stopping the loading, the barge had already listed a great deal more than the 3 feet which he estimated by visual inspection. On this drawing filed as Ex. 133, German shows the barge as separated from the dock by the floating fender logs, these logs being represented as floating between the fender of the barge and the fender piles of the dock. On that basis, German's drawing purports to show that the opposite side of the barge would have to be approximately 11 feet above the water for the cap of the chip box to touch the temporary support under the conveyor.

This was disproved by Beale who pointed out that because earlier in the day the barge had been listing the other way, the fender logs had then been under the barge's fender floating between the hull of the barge and the fender piles. Accordingly, on the plan which he made he assumed that the fender logs had remained in that position when the barge's fender reached water level. It is erroneous to assume, as German did, that the floating fender logs pushed the barge away from the dock 10 inches. To make this possible, the lines would have had to be slack. If, as German contends, the barge was hung up by the lines, then on account of the vertical angle between the bollards on the barge and the front of the dock, the barge must have been pressed very tightly against the dock. This shows that German's assumptions underlying Ex. 133 and his testimony respecting the list required for the cap of the chip box to touch the temporary supports under the conveyor, are irreconcilable with his theory that the barge was hung up by the winch lines. The correct position of the barge is clearly that shown by Beale's plan ex. 161. There the list

at deck edge immersion is shown as 4 feet with the fender logs between the hull and the fender piles under the barge's fender and the cap of the chip box is just touching the temporary supports.

On the whole, I come to the conclusion that the Court of Appeal was wrong in finding that the capsize of the barge was due to appelant's negligence. On the contrary, I am of opinion that the unfortunate accident is due to the insufficient and imprudent loading instructions given by respondent's representatives.

Captain Plester admitted that when he instructed Beale and Kovlaske on the loading of the V.T. 150 and V.T. 151 he did not have all the information he needed for formulating written instructions to control the loading procedure. He explained:

> After all what we were trying to establish was the characteristics of the barge, both when loading and at sea, and you cannot go and issue a bunch of instructions until you are sure of what you are saying.

Being thus ignorant of the characteristics of the barge and, as we have seen, under a complete misapprehension of its relative stability, he nevertheless insisted on having full loads when the prudent thing to do would have been to load no higher than two feet less.

In my view, what is clearly established is that respondent took the risk of putting the barge in service without ascertaining its stability characteristics. Haphazard instructions were then verbally given and full loads required when appellant would rather not have loaded so heavily. This did not leave an adequate margin of safety and the result of so trying to establish the characteristics of the barge when loading was that it capsized. It is true that there was some minimal margin of safety and that theoretically the mishap might have been avoided, but this is not evidence of negligence because one cannot expect from the others more than reasonable care, not such extreme care as might avert the consequences of one's own negligence or lack of due diligence.

I, therefore, conclude that the judgment of the Court of Appeal of British Columbia should be reversed and the judgment of the trial judge re-established with costs throughout against the respondent.

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SPENCE J.:—I have had the advantage of reading the reasons for judgment of my brothers Ritchie and Pigeon and I find it desirable to express some of my own views on this very complicated litigation. It will be unnecessary, however, for me to refer extensively to the evidence as both of my brethren have referred to or recited the portions thereof which are relevant to my consideration.

With respect, I adopt the view of Ritchie J. that the obligations of the appellant and respondent are fixed by the terms of the contract between the parties dated April 26, 1962, and that under the circumstances the bill of lading is merely a receipt. The particular terms of the said contract as to loading are as follows:

7. *Loading*

(a) All pulp chips shall be loaded and trimmed by Shipper solely at the expense of the Shipper, PROVIDED ALWAYS that Carrier shall bear any costs occasioned as a result of faulty equipment supplied by Carrier.

(b) Scows shall be loaded and trimmed in accordance with loading instructions provided by Carrier to Shipper from time to time.

(c) Loading shall be deemed to be completed when any loaded scow has been examined and accepted by the master of the tug.

(d) Shipper shall load each scow to capacity with all reasonable despatch.

It is the view of my brother Ritchie that under the said clause 7 the respondent had a right to give instructions as to the loading of the scow but the respondent was under no duty to do so. Ritchie J. quotes *Canadian Transport Co. Ltd. v. Court Line Ltd.*[8] citing Lord Atkin at p. 937. The charterparty which governed the rights and liabilities of the shipper and owner in that case by clause 8 provided that "the charterers are to load, stow and trim the cargo at their expense under the supervision of the captain ...". With respect, I am of the opinion that a decision under the circumstances in that case as to the proper meaning of those words is not applicable to the situation in the present case. It would appear to me that the words of clause 7 (b) of the agreement in this case "scows shall be loaded and trimmed in accordance with loading instructions provided by carrier to shipper from time to time" imply a duty on the carrier to give such instructions to the shipper and not a mere right to give such instructions. It must be

[8] [1940] A.C. 934.

remembered that the V.T. 150 series of barges had never been used to load chips prior to the present contract and that no matter what experience in loading other vessels the superintendent of the appellant company had it was necessary in order for the shipper, the appellant, to carry out its contract to have proper loading instructions from the carrier, the respondent, applicable to the particular and unique type of vessel to be used in carrying out this particular contract. Even on Ritchie J.'s view that clause 7 of the agreement between the parties gave the respondent a right to issue instructions as to loading but did not create a duty to do so, it must be noted that the respondent did issue instructions as to loading. As Ritchie J. states in his reasons, if the carrier does so, its instructions must be such as not to endanger the safety of the scow or cargo. I am of the opinion that even with this limited view of the respondent's responsibility it must be found to have been in breach of such responsibility. The present case does exhibit some of the exceptional features which were present in *Standard Oil Co. of New York v. Clan Line Steamers Ltd.*[9] and which are not present in the ordinary case of a vessel with well-established potential for receiving loads and carrying them being loaded by a shipper. In the *Clan Line* case, as Lord Merriman said in *The "Hildina"*[10], at p. 258, this was a "turret ship" so that the water ballast had to be retained at all costs under all conditions, and the failure of the owner to pass on to the master such instructions permitted the master in the perfectly normal course of his duties to pump out that ballast so that the ship rolled over. In the present case, the design of the barges to take a load of and to carry such a large quantity of chips resulted in the scow being very "tender" during loading, and if the list reached three feet then very quickly the list would go beyond three feet, the heeling momentum would overcome the stabilizing momentum and the scow would capsize. It is true that the characteristic could only have been discovered by the careful measurement and calculation carried out by marine architects, which was done after the event which, in my view, should have been done before the event.

As Pigeon J. points out, the failure to carry out that careful investigation by marine architects in order to

[9] [1924] A.C. 100.

[10] [1957] 2 Lloyd's Rep. 247.

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arrive at exact loading instructions caused the respondent to rely on advice given by Captain Brown, the principal surveyor for the Marine Surveyors of Western Canada, whose advice given to Captain Plester, the officer of the respondent, was passed on by him to the superintendent for the appellant and to the actual foreman in charge of the loading, Kovlaske. Captain Brown, no matter what his practical qualifications were, was certainly not a marine architect and was quite incapable of carrying out the complicated engineering calculations made prior to the trial, but of course after the disaster, by Mr. German and Professor Baier. His advice as to loading, which in short was not to permit a list of more than three feet, did allow loading up to the exact point where disaster would occur if the list went even a little bit beyond the three-foot limit. In other words, as Pigeon J. points out, there was no margin for safety whatsoever, and there being no margin for safety the instructions were not proper in that they were not practical. There must always be a margin for safety in any operation entailing the acts of human beings or subject to being affected by outside causes.

It is true that on the five previous occasions this scow or its fellow had been loaded with no more than a three-foot list and disaster had not occurred. It is also true that for five hours on the previous weekend this barge had stood with a three-foot list and had not capsized; but on none of those occasions had the list exceeded three feet and on none of those occasions had such extraneous forces as wind appeared to upset the hazardous balance of the scow. In my view, those circumstances simply show that the loadings were lucky on the previous occasions and the luck ran out on the occasion when the capsizing occurred. It is Pigeon J.'s opinion that the springing up of a wind of considerable force may well have contributed to the disaster but my brother does not find it necessary to so find nor do I do so. The loading instructions were not practical because they permitted listing up to the very maximum and, therefore, subjected the safety of the scow and its cargo to any extraneous danger.

Ritchie J. points out that the scows were approved by a representative of Marine Surveyors of Western Canada in accordance with the provisions of clause 3(a). With respect, in my view, that is not relevant to the problem concerned

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with the discharge of what I have found to be the respondent's duty to issue proper instructions under clause 7 (b). I am in accord with the view of Pigeon J. that it was the breach of that duty which created the occasion for the capsize of the scow and that, therefore, the appeal should be allowed and the judgment of the learned trial judge restored. The appellant is entitled to its costs throughout.

Appeal allowed with costs and trial judgment restored, ABBOTT *and* RITCHIE JJ. *dissenting.*

Solicitors for the plaintiff, appellant: Bull, Houser & Tupper, Vancouver.

Solicitors for the defendant, respondent: Russell & DuMoulin, Vancouver.

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*June 20, 21
Oct. 1

REGINALD LAKE .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Obtaining money by false pretences and with intent to defraud—Evidence of obtaining lesser sum than that mentioned in charge—Conviction of obtaining amount mentioned in charge—Whether conviction for obtaining smaller amount should be confirmed—Whether conviction should be amended—Criminal Code, 1953-54 (Can.), c. 51, ss. 304(1)(a), 592(3), 600(1).

The appellant was convicted on a charge of obtaining a sum of $285 by false pretences and with intent to defraud, contrary to s. 304(1)(*a*) of the *Criminal Code*. There was evidence on which the magistrate could find that the appellant had obtained by false pretences a sum of $56. The conviction was affirmed by the Court of Appeal. The appellant was granted leave to appeal to this Court.

Held: The appeal should be dismissed and a conviction entered for the lesser amount.

It was not possible to affirm the conviction as to the obtaining by false pretences of the entire sum of $285, but the conviction for obtaining the smaller amount should be affirmed. *R. v. Scott,* 34 C.C.C. 180 and *R. v. Castle,* 68 C.C.C. 78. It was proper to amend the conviction as it appears that upon the evidence the appellant should only have been convicted of obtaining the amount of $56. This Court has the jurisdiction to make the appropriate amendment by virtue of s. 600(1) of the Code.

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*PRESENT: Cartwright C.J. and Fauteux, Martland, Ritchie and Spence JJ.

1968

LAKE
v.
THE QUEEN

Droit criminel—Obtenir de l'argent par faux-semblants et avec intention de frauder—Preuve de l'obtention d'une somme moindre que celle mentionnée à l'acte d'accusation—Déclaration de culpabilité d'avoir obtenu le montant mentionné à l'acte d'accusation—Confirmation de la déclaration d'avoir obtenu le montant moindre—Amendement de la déclaration de culpabilité—Code criminel, 1953-54 (Can.), c. 51, art. 304(1)(a), 592(3), 600(1).

L'appelant a été déclaré coupable d'avoir obtenu une somme de $285 par faux-semblants et avec l'intention de frauder, contrairement à l'art. 304(1)(*a*) du *Code criminel*. Il y avait une preuve sur laquelle le magistrat pouvait se baser pour conclure que l'appelant avait obtenu une somme de $56 par faux-semblants. La déclaration de culpabilité a été confirmée par la Cour d'appel. L'appelant a obtenu la permission d'en appeler à cette Cour.

Arrêt: L'appel doit être rejeté et une déclaration de culpabilité doit être enregistrée pour le montant moindre.

Il n'est pas possible de confirmer la déclaration de culpabilité quant à l'obtention par faux-semblants du plein montant de $285, mais la déclaration de culpabilité d'avoir obtenu le montant moindre doit être confirmée. *R. v. Scott,* 34 C.C.C. 180 et *R. v. Castle,* 68 C.C.C. 78. Il s'agit ici d'un cas où la déclaration de culpabilité doit être amendée puisqu'il appert de la preuve que l'appelant n'aurait dû être déclaré coupable que d'avoir obtenu la somme de $56. Cette Cour a juridiction, en vertu de l'art. 600(1) du Code, pour faire l'amendement qu'il convient.

APPEL d'un jugement de la Cour d'appel de l'Ontario, confirmant une déclaration de culpabilité. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming the appellant's conviction. Appeal dismissed.

Reginald Lake, in person.

E. G. Achborn, for the respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal by leave of this Court from the judgment of the Court of Appeal for Ontario pronounced November 23, 1967. By that judgment the Court of Appeal dismissed the appeal from the conviction registered by the Magistrate at Ottawa on October 14, 1966, upon the charge that:

Reginald Lake between the 6th day of June A.D. 1966 and the twenty-eighth day of July A.D. 1966, at the City of Ottawa, in said

County of Carleton, did unlawfully obtain a sum of or about $285.00 from Wilfred Bauer, by false pretences and with intent to defraud, contrary to section 304(1)(a) of the Criminal Code.

The leave to appeal granted by this Court was upon the following questions of law:

1. Was there any evidence on which it was open to the learned Magistrate to hold that there was a false pretence made by the appellant which induced Wilfred Bauer to pay money to him?

2. Was there any evidence on which it was open to the learned Magistrate to hold that the appellant had the intent to defraud Wilfred Bauer?

3. Was there any evidence on which it was open to the learned Magistrate to hold that Wilfred Bauer was defrauded of anything?

It is not necessary for these purposes to recite the evidence in any detail, and it is sufficient to say that there was evidence on which the Magistrate could find reasonably that the appellant did obtain from the said Wilfred Bauer by false pretences the sum of about $56, the said false pretences being that the appellant falsely represented himself to be a bailiff of the Division Court at Ottawa acting on a process of that Court and in particular that he falsely represented that he was empowered to and did take a bond from the said Wilfred Bauer and demanded and obtained certain amounts of money for the "registration" of the said bond as fees therefor.

It is true that the Magistrate said in giving judgment after a recess:

Continuing my remarks regarding judgment in this case, and considering the evidence I would have to find that the whole of the monies obtained by Mr. Lake in this case—some $285.00—that all of that money was obtained by false pretences, and I say this because of the use of the word "bailiff" by the accused when he wasn't a bailiff and knew it.

Although this Court is not ready to affirm the conviction as to the obtaining by false pretences of the whole $285, it is apparent that the Magistrate had earlier in his reasons addressed his mind to the obtaining by false pretences of the smaller sum only when he said:

I find him guilty of obtaining funds by false pretences, and in particular, monies pertaining to the bond, six dollars whatever it was on this occasion, and the monies listed on those receipts for costs.

and that therefore the conviction for obtaining the smaller amount by false pretences should be confirmed. That such a course is a proper one is, I think, demonstrated by the

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judgments in *R. v. Scott*[1], Ontario Court of Appeal, as confirmed in this Court[2] in the same volume at p. 187, where at p. 186 Magee J. said:

> The amount charged as being stolen $7,835, no doubt corresponds with the total of the three credits; but if, instead of five cheques amounting to $755, the accused had cashed one, two, or three cheques for $7,000 in all, three days after the fraudulent entries, could it be said that, although his act amounted to theft, proof could not be given of it? What the Crown set out to prove, as I venture to think, is that Scott's employers had been defrauded out of $7,835, or some greater or less sum, by some act which amounted to theft. The evidence might fail to shew theft at all. It would be sufficient if part were stolen. The Criminal Code, sec. 857, allows proof of three distinct charges of theft.

(The underlining is my own.)

and the decision of the Ontario Court of Appeal in *R. v. Castle*[3], where at p. 80, Rowell C.J.O. said:

> In reference to the first ground of appeal, it is quite clear that a person accused of theft can be convicted upon an indictment charging theft upon proof of theft of a smaller sum than that charged in the indictment: Rex v. Scott (1920), 57 D.L.R. 309, 34 Can. C.C. 180, 48 O.L.R. 452, affirmed in the Supreme Court, 58 D.L.R. 242, 34 Can. C.C. 187.

The question arises whether this Court in dismissing the appeal and confirming the conviction should amend the latter. I am of the opinion that it is proper to do so. It would appear that upon the evidence the appellant should only have been convicted of obtaining by false pretences the amount of $56. The charge as laid contained a reference to a figure of about $285. This Court has the jurisdiction to make the appropriate amendment by virtue of s. 600(1) of the *Criminal Code* which provides:

> 600. (1) The Supreme Court of Canada may, on an appeal under this part, make any order that the court of appeal might have made and may make any rule or order that is necessary to give effect to its judgment.

The Court of Appeal for Ontario has power to amend the conviction to set out the smaller amount by virtue of s. 592(3) of the *Criminal Code* which provides:

> 592. (3) Where a court of appeal dismisses an appeal under subparagraph (i) of paragraph (*b*) of subsection (1), it may substitute the

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[1] (1920), 34 C.C.C. 180, 48 O.L.R. 452, 57 D.L.R. 309.

[2] (1920), 34 C.C.C. 187, 58 D.L.R. 242.

[3] (1937), 68 C.C.C. 78, [1937] O.W.N. 245.

verdict that in its opinion should have been found and affirm the sentence passed by the trial court or impose a sentence that is warranted by law.

The paragraph referred to therein, i.e., 592(1)(*b*)(i), provides:

> 592. (1) On the hearing of an appeal against a conviction, the court of appeal
>
> ...
>
> (*b*) may dismiss the appeal where
>
> (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,

(The underlining is my own.)

1. In *R. v. Norcross*[4], (B.C.C.A.), the Court amended a conviction of theft by reducing the amount mentioned in the charge.

I would therefore dismiss the appeal. Acting under the provisions of the *Criminal Code*, I would substitute a conviction that the appellant between the 6th day of June 1966 and the 28th day of July 1966, at the City of Ottawa, in the County of Carleton, did unlawfully obtain the sum of $56 from Wilfred Bauer by false pretences and with intent to defraud, contrary to s. 304(1)(*a*) of the *Criminal Code*.

Appeal dismissed.

Solicitors for the appellant: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitor for the respondent: The Attorney General for Ontario.

[4] (1957), 24 W.W.R. 160 at 165, 27 C.R. 220, 120 C.C.C. 108.

1968
*June 14
Oct. 1

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

AND

CONSOLIDATED MOGUL MINES LIMITED (now called MOGUL MINES LIMITED) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Deductions—Prospecting, exploration and development expenses—Mining and management company—Whether principal business "mining or exploring for minerals"—Income Tax Act, R.S.C. 1952, c. 148, s. 83A(3)(b).

The taxpayer company claimed that in each of the years 1957 to 1960 its principal business was "mining or exploring for minerals" and sought to deduct, under s. 83A(3) of the *Income Tax Act*, the "prospecting, exploration and development expenses" incurred by it in Canada during those years. The evidence disclosed that during the years in question, the taxpayer carried out exploration work on properties in which it held some kind of interest, but that its chief task was the development and management of properties owned by other companies. The Minister contended that the taxpayer's principal business was the management of its large investment portfolio and the providing of management, technical and financing services to other mining companies. The assessment was set aside by the Tax Appeal Board and by the Exchequer Court. The Minister appealed to this Court.

Held: The appeal should be dismissed.

The principal business of the taxpayer company in the years in question was mining or exploring for minerals within the meaning of s. 83A(3)(*b*) of the *Income Tax Act*. The taxpayer could be engaged in the business of mining or exploring for minerals just as well as the owner if, under its contract with that owner, it did the mining or exploring for minerals. The respondent was in fact engaged in mining or exploring for minerals.

Although the source of the income of a corporation is an important element to be considered in determining which is its principal business, it is not the only matter to be considered and not necessarily the determinant factor. As stated by the Tax Appeal Board, the financing function of a mining company is an integral part of its business.

Revenu—Impôt sur le revenu—Déductions—Dépenses de prospection, d'exploration et de mise en valeur—Compagnie minière—Son entre-

*PRESENT: Martland, Ritchie, Hall, Spence and Pigeon JJ.

prise principale est-elle «l'exploitation minière ou l'exploration pour la découverte de minéraux»—Loi de l'impôt sur le revenu, S.R.C. 1952, ch. 148, art. 83A(3)(b).

La compagnie intimée prétend que son entreprise principale durant chacune des années 1957 à 1960 était «l'exploitation minière ou l'exploration pour la découverte de minéraux» et tente de déduire, en vertu de l'art. 83A(3) de la *Loi de l'impôt sur le revenu*, les «dépenses de prospection, d'exploration et de mise en valeur» faites par elle au Canada durant les années en question. La preuve est à l'effet que durant ces années, la compagnie a fait des travaux d'exploration sur des propriétés sur lesquelles elle détenait certains droits, mais que son travail principal consistait à mettre en valeur et à gérer des propriétés appartenant à d'autres compagnies. Le Ministre a soutenu que l'entreprise principale de la compagnie se résumait à gérer ses portefeuilles de placements et à fournir à d'autres compagnies minières des services de gérance ainsi que des services techniques et financiers. La cotisation a été mise de côté par la Commission d'appel de l'impôt et par la Cour de l'Échiquier. Le Ministre en a appelé à cette Cour.

Arrêt: L'appel doit être rejeté.

L'entreprise principale de la compagnie intimée durant les années en question était l'exploitation minière ou l'exploration pour la découverte de minéraux dans le sens de l'art. 83A(3)(*b*) de la *Loi de l'impôt sur le revenu*. Le contribuable peut se livrer à l'exploitation minière ou l'exploration pour la découverte de minéraux aussi bien que le propriétaire de la propriété si, en vertu de son contrat avec ce propriétaire, il fait l'exploitation minière ou l'exploration pour la découverte de minéraux. La compagnie intimée, en fait, se livrait à cette occupation.

Quoique la source du revenu d'une corporation est un élément important dans la détermination de ce qu'est son entreprise principale, ce n'est pas la seule chose que l'on doit considérer et ce n'est pas nécessairement le facteur déterminant. Tel que constaté par la Commission d'appel de l'impôt, le financement d'une compagnie minière est une partie intégrale de son entreprise.

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada[1], rejetant un appel d'une décision de la Commission d'appel de l'impôt. Appel rejeté.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada[1], dismissing an appeal from a decision of the Income Tax Appeal Board. Appeal dismissed.

G. W. Ainslie and *M. A. Mogan,* for the appellant.

R. E. Shibley, Q.C., and *M. O'Brien,* for the respondent.

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[1] [1966] Ex. C.R. 350, [1966] C.T.C. 16, 66 D.T.C. 5008.

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MINISTER OF NATIONAL REVENUE v. CONSOLIDATED MOGUL MINES LTD.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the decision of Gibson J. in the Exchequer Court of Canada[1] pronounced on December 21, 1965, whereby that learned judge dismissed an appeal from the decision of the Income Tax Appeal Board made on February 9, 1965. By the latter decision, the board had allowed an appeal by the taxpayer from the assessments made by the Minister as to the years 1957, 1958, 1959 and 1960, and referred the said assessments back to the Minister for reassessment in accordance with the agreement of counsel.

As was said by Mr. Weldon, giving the reasons for judgment of the Tax Appeal Board, and repeated by Gibson J. in his reasons, there is only one issue to be decided in this appeal, namely, was the principal business of Mogul in the taxation years under appeal mining or exploring for minerals for the purposes of s. 83A(3)(*b*) of the *Income Tax Act*, R.S.C. 1952, c. 148? That section reads, in part, as follows:

> 83A (3) A corporation whose principal business is
>
> (*a*) production, refining or marketing of petroleum, petroleum products or natural gas, or exploring or drilling for petroleum or natural gas, or
>
> (*b*) mining or exploring for minerals,
>
> may deduct, in computing its income under this Part for a taxation year, the lesser of
>
> (*c*) the aggregate of such of
>
> (i) the drilling and exploration expenses, including all general geological and geophysical expenses, incurred by it on or in respect of exploring or drilling for petroleum or natural gas in Canada, and
>
> (ii) the prospecting, exploration and development expenses incurred by it in searching for minerals in Canada,
>
> as were incurred after the calendar year 1952 and before April 11, 1962, to the extent that they were not deductible in computing income for a previous taxation year,
>
> . . .

The respondent company was created by letters patent under the *Companies Act* of the Province of Ontario under date of May 29, 1945, with the name "Mogul Gold Mines Limited (No Personal Liability)". The name was subsequently changed to "Consolidated Gold Mines Lim-

ited" and, since the appeal to this Court was launched, to the name "Mogul Mines Limited". It is significant that the name has always made reference to mining.

The purposes and objects as set out in the letters patent are as follows:

(*a*) TO acquire, own, lease, prospect for, open, explore, develop, work, improve, maintain and manage mines and mineral lands and deposits, and to dig for, raise, crush, wash, smelt, assay, analyze, reduce, amalgamate, refine, pipe, convey and otherwise treat ores, metals and minerals, whether belonging to the Company or not, and to render the same merchantable and to sell or otherwise dispose of the same or any part thereof or interest therein; and

(*b*) TO take, acquire and hold as consideration for ores, metals or minerals sold or otherwise disposed of or for goods supplied or for work done by contract or otherwise, shares, debentures or other securities of or in any other company having objects similar, in whole or in part, to those of the Company hereby incorporated and to sell and otherwise dispose of the same.

Cameron J. in *American Metal Company of Canada Ltd. v. Minister of National Revenue*[2], in referring to the words of the Statutes of Canada, 1947, c. 63, s. 16(4) "a corporation whose chief business is that of mining or exploring for minerals . . .", said at p. 306:

"Chief business" is not defined in either of the Acts, and the phrase, so far as I am aware, has not been the subject of judicial interpretation. In my view, it is a question of fact to be determined by an examination and comparison of all the facts concerning each of the various types of business in which the company is engaged.

It is to be noted that the statute presently under consideration also contains no definition of "principal business" although "business" is defined in s. 139(1)(*e*) in a manner not here relevant. I adopt Cameron J.'s view and seek to apply the same tests.

The evidence of G. D. Pattison, the secretary-treasurer of the respondent company throughout, was that although the respondent had been inactive from the time of its incorporation until 1954, it had in that year entered actively into the business of mining generally and proceeded to develop one of its properties known as "Harvey Hill Mine" as well as to explore a great number of others. Harvey Hill Mine, in the District of Megantic, Quebec, was brought

[2] [1952] C.T.C. 302.

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into operation but its operations were suspended at the end of January 1957 due to a world-wide depression in the price of copper. The respondent's costs for exploration and development of the Harvey Hill Mine between the years 1955 and 1960 amounted to $588,469 and its general exploration expenses during the same years amounted to $430,892. Although it continued after the year 1957 to carry out considerable exploration work on properties in which it held some kind of interest, its chief task in the years which are now under appeal seems to have been the development and management of properties owned by other companies. In such companies the respondent had some share-interest usually acquired by the contract made between the respondent and such company. These contracts provided for the investment in the shares of the various companies and then the control of the expenditure of the proceeds of such sales of shares by the various companies in the exploration and development of the various mining prospects. The chief of those companies represented by such mining and management contracts were Consolidated Halliwell Limited with a mining property in Haiti, North Rankin Nickel Mines Limited at Rankin Inlet in the Canadian Northwest Territories, Coldstream Copper Mines Limited near Kashabowie, Ontario, St. Patrick's Copper Mines Limited in Ireland, and Silver Mines, Lead and Zinc Company Limited in County Tipperary in the Republic of Eire.

It should be noted that s. 83A(3) grants the right to make a deduction to a company whose "principal business is mining or exploring for minerals" without requiring that such mining or exploring for minerals should be done within Canada or should be done upon properties in which the taxpayer seeking the deduction has an interest in the property, although the deductions therefrom, if the taxpayer comes within the definition of one having its principal business as mining or exploring for minerals, can only be for drilling and exploration expenses incurred by it in Canada and prospecting, exploration and development expenses incurred by it in searching for minerals in Canada. Therefore, it is not relevant in determining whether the respondent comes within the definition that much of its

efforts were devoted to work in connection with properties outside of Canada and in connection with properties in which it had only a share-holding interest in the company owning such properties.

Counsel for the Minister took the position strongly that the respondent under its management and development contracts with such companies as Halliwell and North Rankin, etc., was not engaged in mining or exploring but in management, and that the mining and exploring was carried on by the company which owned the property. I am not ready to accept that distinction. The respondent may be engaged in the business of mining or exploring for minerals just as well as the owner of the property if, under the contract with that company, it does the mining or exploring for minerals.

I agree with the learned member of the Tax Appeal Board when he said:

> From the standpoint of: its corporate name; its purposes and objects as enumerated in said Letters Patent dated May 29, 1945; its Prospectus dated September 28, 1955; the development of its Harvey Hill Mine during the years 1955, 1956 and 1957 right to the point of production on a commercial basis at an expenditure of well over half a million dollars; its general and continuing mining, development and exploring activities during the relevant taxation years; its said management contracts under which it undertook very serious and extensive mining operations on behalf of several mining companies bringing them to a successful conclusion; the way so many mining companies seemed to turn to Mogul for scientific and technical services as well as for financing help, and its experienced and specialized officers and staff, to mention a few of the more obvious indications, Mogul unquestionably, gave every appearance of being, as was strongly argued by counsel for the appellant [here respondent], a company that was engaged in mining or exploring for minerals.

I am further of the opinion that the respondent not only "gave every appearance" but was in fact engaged in mining or exploring for minerals and that was certainly a large part of its business. Was that business, however, its principal business? Again counsel for the Minister stressed the large investment portfolio held by the respondent and submits that its principal business was the management of that investment portfolio. It may be said generally that although the source of the income of a corporation is an important element to be considered in determining which is its principal business it is not the only matter to be

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considered and not necessarily the determinant factor. See Cameron J. in *American Metal Company v. M.N.R., supra,* at p. 307.

As the learned member of the Tax Appeal Board remarked:

> So, it would appear to be reasonable to assume that the multiplicity of arrangements which exist between mining companies and the constant juggling of shareholdings for various necessary purposes is just part and parcel of the mining business. In my view, it shows lack of understanding of the mining business to point to the financing arrangements of a mining company as a separate business activity to that of mining. Obviously, the financing function of a mining company is an integral part of its business.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: D. S. Maxwell, Ottawa.

Solicitor for the respondent: J. G. McDonald, Toronto.

1968

*Mar. 8, 11
Oct. 1

LE CONSEIL DES PORTS NATIONAUX . . APPELLANT;

AND

JEAN LANGELIER, ARMAND J. LAVOIE, LARRY LAJOIE, HONORABLE JOSEPH JEAN et IMMEUBLES BOURGET INC. .... RESPONDENTS.

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

Crown—Injunction—Whether National Harbours Board subject to injunction—National Harbours Board Act, R.S.C. 1952, c. 187.

By a petition for interlocutory injunction, the respondents, owners of properties bordering on the St. Lawrence river, asked that the National Harbours Board be restrained from carrying out certain works on the river which, it was claimed, would injuriously affect their respective properties. The Board moved by way of declinatory exception to dismiss the petition on the ground that, being an agent of the Crown, it was not subject to injunction. The exception was dismissed at trial, and this judgment was affirmed by the Court of Appeal. The Board was granted leave to appeal to this Court.

Held: The appeal should be dismissed.

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*PRESENT: Fauteux, Martland, Ritchie, Spence and Pigeon JJ.

The appellant corporation has the capacity to be sued and is, for the purposes of the Act which created it, a servant of the Crown. But it does not thereby enjoy an immunity from claims in tort, if it acts wrongfully. A personal liability will result when a person, whether individual or corporate, although a Crown agent and purporting to act as such, commits an unlawful act. The position of an agent of the Crown is not different because the agent is a corporation and not an individual. If a corporation commits a wrongful act, it is liable therefor and it cannot escape liability by alleging that it is not responsible for anything done outside its corporate powers. This is true whether it is purporting to act as a Crown agent or not. If a corporation can be held liable civilly in damages for wrongs which it has itself committed or ordered, it is obvious that a person threatened with the commission of an unlawful act by a corporate Crown agent can seek the assistance of the Court to prevent the corporation from doing that which it is not authorized to do as a Crown agent. The appellant cannot prevent the Court from inquiring into the legal justification for its conduct merely by saying that because it is an agent of the Crown it is immune from suit.

Couronne—Injonction—Peut-on obtenir une injonction contre le Conseil des ports nationaux—Loi sur le Conseil des ports nationaux, S.R.C. 1952, c. 187.

Les intimés, ayant des propriétés le long du fleuve St-Laurent, ont demandé contre le Conseil des ports nationaux une injonction interlocutoire lui enjoignant de discontinuer certains travaux dans le fleuve qui, ils ont allégué, ruineront la valeur de leurs propriétés respectives. Le Conseil des ports nationaux a opposé une exception déclinatoire, demandant que la requête d'injonction soit rejetée pour le motif que, étant un mandataire de la Couronne, une injonction ne peut être décernée contre lui. L'exception a été rejetée par la Cour de première instance, et ce jugement a été confirmé par la Cour d'appel. Le Conseil a obtenu la permission d'en appeler à cette Cour.

Arrêt: L'appel doit être rejeté.

La corporation appelante est habile à ester en justice et est, pour les fins de sa loi constitutive, un serviteur de la Couronne. Mais, elle ne jouit pas de ce fait d'une immunité à l'égard des réclamations basées sur la faute, lorsqu'elle agit illégalement. Lorsqu'un individu ou une corporation, mandataire de la Couronne et agissant comme tel, commet un acte illégal, il en résulte une responsabilité personnelle. La condition de mandataire de la Couronne n'est pas différente lorsque ce mandataire est une corporation au lieu d'être un individu. Si une corporation commet un acte illégal, elle encourt une responsabilité, et elle ne peut pas échapper à cette responsabilité en alléguant qu'elle n'est pas responsable de ce qui est fait en dehors de ses capacités. Ceci est vrai, qu'elle prétende agir comme mandataire de la Couronne ou non. Si une corporation peut être tenue civilement responsable en dommages pour la faute qu'elle a elle-même commise ou ordonnée, il est évident qu'une personne, menacée de la commission d'un acte illégal de la part d'une corporation, mandataire de la Couronne, a droit d'obtenir l'aide des tribunaux pour

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empêcher la corporation de faire ce qu'elle n'est pas autorisée de faire comme mandataire de la Couronne. La corporation appelante ne peut pas empêcher les tribunaux d'examiner la légalité de sa conduite pour le seul motif qu'étant un mandataire de la Couronne elle est à l'abri de toute poursuite.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], confirmant un jugement du Juge Mitchell qui avait rejeté une exception déclinatoire. Appel rejeté.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], affirming a judgment of Mitchell J. dismissing a declinatory exception. Appeal dismissed.

Laurent E. Bélanger, Q.C., and *J. M. Jacques*, for the appellant.

Paul Trudeau, for the respondents.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Court of Appeal of the Province of Quebec[1], dismissing an appeal by the appellant from a decision of the Superior Court which dismissed a declinatory exception made by the appellant against a petition by the respondents for an interlocutory injunction. The circumstances which gave rise to these proceedings are stated by the learned trial judge as follows:

The petition for interlocutory injunction alleges in substance that the Petitioners are proprietors of properties in Pointe-aux-Trembles bordering the St. Lawrence river; that for several days Respondents National Harbours Board and Shell Canada Ltd. had been carrying out or procuring the carrying out illegally of the filling in of the St. Lawrence river for the purpose of creating a new and extensive parcel of land of a width of 500 feet and installing thereon reservoirs, thereby illegally displacing the limits of the river which borders Petitioners' property; that the continuation and realization of this work will cause serious and irreparable harm to the Petitioners, ruining for ever their properties, as well from the residential as from the commercial point of view; that the Respondent City of Pointe-aux-Trembles has issued a permit to construct in the immediate vicinity of Petitioners' property huge reservoirs of 48 feet in height even before the site had been prepared;

[1] [1968] Que. Q.B. 113.

praying for the issue of an interlocutory injunction, enjoining Respondents, their employees and representatives to cease and cause to cease all works of construction or preparation of the ground now in process on the bed of the St. Lawrence adjacent to the Petitioners' property.

Petitioners also requested the issue of an immediate interim injunction, and after hearing the parties, an interim injunction was issued as prayed for by Mr. Justice Caron on the 28th March 1966, to remain in force until the 14th April 1966, pending hearing and disposition of the prayer for the interlocutory injunction.

At the hearing for the interim injunction Respondent National Harbours Board appears to have orally objected to the jurisdiction of the Court as regards it, but no judgment having been rendered thereon, a formal motion by way of declinatory exception was duly filed and, after argument, was taken on délibéré. Pending judgment on the exception the interim injunction was continued in force until April 20th, 1966 and the petition for an interlocutory injunction continued to the same date.

The basis for the declinatory exception is that Respondent National Harbours Board is an emanation or instrumentality of the Crown, and is therefore exempt from any process, upon the principle that the King can do no wrong, the Court therefore being incompetent ratione materiae to adjudicate with respect to it.

The appellant is a body corporate created by the *National Harbours Board Act*, R.S.C. 1952, c. 187. The sections of that Act, which are relevant to this appeal, are the following:

3. (1) There shall be, under the direction of the Minister, a Board to be known as the "National Harbours Board" consisting of four members, namely, a Chairman, a Vice-Chairman and two other members, who shall be appointed by the Governor in Council to hold office during good behaviour for ten years.

(2) The Board is a body corporate and politic and shall be and be deemed to be, for all the purposes of this Act, the agent of Her Majesty in right of Canada.

(3) The Board has the capacity to contract and to sue and be sued in the name of the Board.

39. (1) Subject, as hereinafter provided any claim against the Board arising out of any contract entered into in respect of its undertaking or any claim arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Board while acting within the scope of his duties or employment may be sued for and prosecuted by action, suit or other proceeding in any court having jurisdiction for like claims between subjects.

(2) Any such action, suit or other proceeding may be commenced and prosecuted to judgment in the same manner and subject to the same rules of practice and procedure and to the same right of appeal as nearly as may be as in cases between subjects.

(3) The said court has the same jurisdiction to order or adjudge the payment of costs either by plaintiff or defendant as in like cases in the said court between subjects.

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The learned trial judge held that the claim in question here fell within s. 39(1), holding that the "negligence" referred to in that subsection meant tortious liability as understood at common law, or for fault, as contemplated by articles 1053 *et seq.* of the *Civil Code,* and that "injury to property" included injurious affection of property rights.

This decision was sustained on appeal, Pratte J. dissenting. Choquette J., with whom the other three members of the Court agree, said as follows:

> Outre l'article 39 de la loi précitée, il y a l'article 3, dont les paragraphes 2 et 3 se lisent comme suit:
>
> 3. (2) Le Conseil est un corps constitué et politique, et, pour toutes les fins de la présente loi, il est et est censé être le mandataire de Sa Majesté du chef du Canada.
>
> (3) Le Conseil est habile à passer des contrats ainsi qu'à ester en justice en son propre nom.
>
> Comme on le voit, ce n'est que «pour les fins de la présente loi» que le Conseil «est censé être le mandataire de Sa Majesté». Si le Conseil excède les pouvoirs que la loi lui confère, si, par exemple, il s'empare de «terrains ou d'un droit de propriété limité, ou d'un intérêt limité dans des terrains» sans l'autorisation préalable du gouverneur en conseil et sans l'expropriation ou le consentement prévus à l'article 11, il ne peut être dit que le Conseil agit comme mandataire de la Couronne. Dans ce cas, le Conseil est dans la position d'un ministre qui outrepasserait ses attributions, engageant ainsi sa responsabilité personnelle.
>
> Ce n'est donc pas contre la Couronne que les intimés demandent une injonction, mais contre le «corps constitué et politique» qui a excédé ses pouvoirs et qui est quand même «habile à ester en justice en son propre nom» pour se voir ramener dans les limites de son mandat. L'injonction est aussi dirigée contre les représentants et préposés du Conseil.

The appellant contends that s. 39 is not applicable, there being no claim for damages and no allegation of negligence as against any officer or servant of the appellant and there being no provision for remedy by way of injunction. It is also submitted that the appellant, being an agent of the Crown, enjoys all of the immunities of the Crown at law, and cannot be sued at all, save to the extent that such suit is specifically permitted by statute. It was also argued that the National Harbours Board, as such, was incapable of acting in any way, save as an agent of the Crown, and that if, in fact, its powers were exceeded, any such act could not be that of the Board, but would be only the act of the individuals involved.

These latter propositions raise a question of considerable importance. If correct, they would involve the conclusion that no subject, threatened with an unlawful act by a corporate Crown agent, would have any recourse to the courts against such corporation in order to prevent it.

The appellant is a corporation created by a statute which defines its corporate powers. It has the capacity to be sued. It is, for the purposes of the Act which created it, a servant of the Crown. Does it thereby enjoy an immunity, in the same manner as the Crown itself, from claims in tort, if it, i.e., the corporation itself, acts wrongfully?

A convenient starting point for the consideration of this matter is to be found in the well known statement by Dicey, "The Law of the Constitution", 10th ed., p. 193:

> In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us 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 lawful authority. A colonial governor, *Mostyn v. Fabrigas,* (1774) 1 Cowp. 161; *Musgrave v. Pulido,* (1879) 5 App. Cas. 102; *Governor Wall's Case,* (1802) 28 St. Tr. 51, a secretary of state, *Entick v. Carrington,* (1765) 19 St. Tr. 1030; K. & L. 174, a military officer, *Phillips v. Eyre,* (1867) L.R. 4 Q.B. 225; K. & L. 492, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person.

This principle was applied in this Court in *Roncarelli v. Duplessis*[2]. The quotation was cited in his reasons by Abbott J., at p. 184.

The proposition was clearly stated in *Feather v. The Queen*[3], by Chief Justice Cockburn, at p. 297:

> But in our opinion no authority is needed to establish that a servant of the Crown is responsible in law for a tortious act done to a fellow subject, though done by the authority of the Crown—a position which appears to us to rest on principles which are too well settled to admit of question, and which are alike essential to uphold the dignity of the Crown on the one hand, and the rights and liberties of the subject on the other.

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[2] [1959] S.C.R. 121, (1959), 16 D.L.R. (2d) 689.

[3] (1865), 6 B. & S. 257, 122 E.R. 1191.

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It was stated again by Viscount Finlay in *Johnstone v. Pedlar*[4]:

> It is the settled law of this country, applicable as much to Ireland as to England, that if a wrongful act has been committed against the person or the property of any person the wrongdoer cannot set up as a defence that the act was done by the command of the Crown. The Crown can do no wrong, and the Sovereign cannot be sued in tort, but the person who did the act is liable in damages, as any private person would be.

In *Nireaha Tamaki v. Baker*[5], the Privy Council considered a claim for an injunction by a person who claimed a native title of occupancy to certain lands in New Zealand. The respondent was the Commissioner of Crown Lands in the provincial district of Wellington. The Governor had advertised for sale lands, including those claimed by the appellant, and the appellant sued for a declaration that the land still remained land owned by natives, under their customs and usage, to which undisturbed possession had been guaranteed by treaty, and for an injunction against selling the same. The respondent objected that the interest of the Crown in the lands in question could not be attacked by this proceeding. At p. 575 Lord Davey says:

> The learned judges in the Court of Appeal thought that the case was within the direct authority of *Wi Parata v. Bishop of Wellington*, 3 N.Z.J.R. (N.S.) S.C. 72, previously decided in that Court. They held that "the mere assertion of the claim of the Crown is in itself sufficient to oust the jurisdiction of this or any other Court in the Colony. There can be no known rule of law," they add, "by which the validity of dealings in the name and under the authority of the Sovereign with the native tribes of this country for the extinction of their territorial rights can be tested". The argument on behalf of the respondent at their Lordships' bar proceeded on the same lines.
>
> Their Lordships think that the learned judges have misapprehended the true object and scope of the action, and that the fallacy of their judgment is to treat the respondent as if he were the Crown, or acting under the authority of the Crown for the purpose of this action. The object of the action is to restrain the respondent from infringing the appellant's rights by selling property on which he alleges an interest in assumed pursuance of a statutory authority, the conditions of which, it is alleged, have not been complied with. The respondent's authority to sell on behalf of the Crown is derived solely from the statutes, and is confined within the four corners of the statutes. The Governor, in notifying that the lands were rural land open for sale, was acting, and stated himself to be acting, in pursuance of the 136th section of the Land Act, 1892, and the respondent in his notice of sale purports to sell

[4] [1921] 2 A.C. 262 at 27.

[5] [1901] A.C. 561, 70 L.J.P.C. 66, 84 L.T. 633.

in terms of s. 137 of the same Act. If the land were not within the powers of those sections, as is alleged by the appellant, the respondent had no power to sell the lands, and his threat to do so was an unauthorized invasion of the appellant's alleged rights.

In the case of *Tobin v. Reg.*, 16 C.B. (N.S.) 310, a naval officer, purporting to act in pursuance of a statutory authority, wrongly seized a ship of the suppliant. It was held on demurrer to a petition of right that the statement of the suppliant shewed a wrong for which an action might lie against the officer, but did not shew a complaint in respect of which a petition of right could be maintained against the Queen, on the ground, amongst others, that the officer in seizing the vessel was not acting in obedience to a command of Her Majesty, but in the supposed performance of a duty imposed upon him by Act of Parliament, and in such a case the maxim "Respondeat superior" did not apply. On the same general principle it was held in *Musgrave v. Pulido,* (1879) 5 App. Cas. 102, that a Governor of a Colony cannot defend himself in an action of trespass for wrongly seizing the plaintiff's goods merely by averring that the acts complained of were done by him as "Governor" or as "acts of State". It is unnecessary to multiply authorities for so plain a proposition, and one so necessary to the protection of the subject. Their Lordships hold that an aggrieved person may sue an officer of the Crown to restrain a threatened act purporting to be done in supposed pursuance of an Act of Parliament, but really outside the statutory authority.

Part of this passage is cited by Newcombe J., who delivered the reasons of the majority of this Court in *Rattenbury v. Land Settlement Board*[6]. In that case the appellant complained of the imposition of taxes against his land in British Columbia and against himself under the *Land Settlement and Development Act,* R.S.B.C. 1924, c. 128, alleging that certain sections of that Act, relied upon by the respondent, were *ultra vires* of the provincial legislature. He claimed a declaration, damages and an injunction. The respondent pleaded, *inter alia,* that it was a branch of the provincial Department of Agriculture, a servant and agent of the Crown, that it possessed no other capacity, that its acts were done in that capacity and that it could not be sued.

At p. 62, Newcombe J. says:

For myself, I see no reason to doubt that the defendant Board is sued in its official capacity. It is described and identified in the action not otherwise than by its corporate name; it is thus the corporation, and not its individual members, which is the party defendant; and as a statutory body, it has no capacity other than that which it derives from its constituting Act. I do not question the general truth involved in the proposition expressed by Bankes L.J., in *Mackenzie-Kennedy v. Air Council,* (1927) 2 K.B. 517, at p. 523:

[6] [1929] S.C.R. 52, [1929] 1 D.L.R. 242.

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In the absence of distinct statutory authority enabling an action for tort to be brought against the Air Council, I am of opinion, both on principle and upon authority, that no such action is maintainable. The Air Council are not a corporation, and even if it were to be treated as one the respondent's position would not be improved. The learned Lord Justice mentions the case of *Roper v. Public Works Commissioners,* (1915) 1 K.B. 45; and he quotes from an Irish case, *Wheeler v. Public Works Commissioners,* (1903) 2 Ir. Rep. 202, a passage from the judgment of Palles C.B., as follows:

> Now, if a corporation be constituted for the sole purpose of doing acts for the Crown, it is *prima facie* outside its powers to do anything except for the Crown, and, as in law a wrongful act cannot be done for the Crown, such a corporation is not capable of doing such wrongful act in its corporate capacity. In such a case, therefore, the wrongful act cannot be deemed that of the corporation, but must be deemed the personal act of those who committed it.

With these observations, however, are to be contrasted what was said by Atkin L.J., at p. 533 of the *Air Council case,* (1927) 2 K.B. 517. But whatever may be said about the Air Council, and while it is certainly true that the revenues of the Crown cannot be reached by judicial process to satisfy a demand against an officer or servant of the Crown in any capacity, whether incorporated or not, it is common practice, founded upon general principle, that the court will interfere to restrain *ultra vires* or illegal acts by a statutory body, and, when it is charged, as in this case, that the proceedings in question, though authorized by the letter of the statute, are nevertheless incompetent, by reason of defect in the enacting authority of the legislature, the court must, I should think, have jurisdiction so to declare, and to restrain the *ultra vires* proceedings, although directed by the statute and in strict conformity with the legislative text. To this extent, in my view, the action is properly constituted; indeed, upon this point the authority is conclusive.

After citing from the *Tamaki* case, he goes on to say:

> It is not necessary for me to consider the position of the individual members of the Board, because I hold that, as such, they are not before the Court; but, upon the authorities, it seems to be established that the doer of a wrongful act cannot escape liability by setting up the authority of the Crown, unless in proceedings by a foreigner against a British subject, in which case an exception is introduced, as appears by *Feather v. The Queen,* (1865) 6 B. & S. 257, at pp. 279, 295, 296, in which Baron Parke's charge in *Buron v. Denman,* (1848) 2 Exch. 167, was explained. It seems to be only in such a case that it is of any use to justify upon the authority of an act of State. *Walker v. Baird.* (1892) A.C. 491.

In the *Mackenzie-Kennedy* case[7], to which he refers, it was held that the appellant's action in tort did not lie against the Air Council. The Air Council was not an incorporated body. Bankes L.J. said that it was a Department of State. It was held that an action for tort would not lie against the statutory body set up under that name.

[7] [1927] 2 K.B. 517, 96 L.J.K.B. 1145.

Bankes L.J. cited with approval what was said by Romer J. in *Raleigh v. Goschen*[8]:

I will state some general principles of law which I conceive govern this class of cases; and if you challenge any portion of what I am about to say, then I will hear you in reply. 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. I think it is clear that the head of a Government Departmen is not liable for the neglect or torts of officials in the Department, unless it can be shown that the act complained of was substantially the act of the head himself; in which case he would be liable as an individual, just as a stranger committing the same act would be.

Atkin L.J., at p. 532, has this to say, as to what might have been the position had the Council been incorporated:

Applying these considerations to this action it appears clear that unless the Air Council is incorporated the name is but a name for the individuals that compose it. I do not think that it can be used at all as the equivalent of the names of its members in a suit which is directed against the members in their private capacity. In any event in this case I think it is plain, plainer even than in the case of *Raleigh v. Goschen*, (1898) 1 Ch. 73, where at least the Lords Commissioners were individually named, that this present action is directed against the members of the Air Council in their official or, as I prefer to say, representative capacity as servants of the Crown, and therefore will not lie. If, however, the Air Council were incorporated different considerations might apply. The Crown may and does employ as its servant or servants, an individual, a joint committee or board of individuals, or a corporation. None can be made liable in a representative capacity for tort; the individuals may be made liable in their private capacity, and I see no reason why this liability should not extend to the juristic person, the corporation, as well as to the individual. It may be true that the corporation in such a case will have no private assets available to meet execution, but that may also be true of the individual. One must also face the difficulty that such a corporation will have no servants, for as in the case of individual officials, those who serve under it are not its servants, but servants of the Crown. It is, therefore, only for torts actually committed by it, or to which it is directly privy, as by giving orders for their performance, that it can be made liable. But for such a tort proved, for example, by a minute of an incorporated board expressly commanding the commission of a tort, in principle, as it appears to me, an action would lie, however unprofitable such an action would be.

[8] [1898] 1 Ch. 73 at 77, 67 L.J. Ch. 59, 77 L.T. 429.

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The case chiefly relied upon by the appellant was *City of Halifax v. Halifax Harbour Commissioners*[9]. That case, however, only held that the Commissioners, who occupied Crown property in Halifax for the exercise of their powers, were not assessable for business tax as an "occupier" because their occupation of the property was for the Crown.

This case was followed in *Cour de Recorder et Cité de Montréal v. Société Radio-Canada*[10] in respect of the respondent's liability for municipal sales tax.

These cases are not of assistance in respect of the issue which is before us. They illustrate that, where a Crown agent is properly exercising its function as such, its acts, being those of its principal, the Crown, are to be dealt with on that basis.

What is in issue here is the responsibility of a person, whether individual or corporate, who, though a Crown agent, and purporting to act as such, commits an act which is unlawful. My understanding of the law is that a personal liability will result. The liability arises, not because he is an agent of the Crown, but because, though he is an agent of the Crown, the plea of Crown authority will not avail in such event.

There are some authorities which have stated, in terms which I consider to be too broad, the proposition that an instrumentality of the Crown enjoys the same immunity, from an action in tort, as does the Crown itself. Thus, as an example, in *Peccin v. Lonegan and T. & N.O. Railway Commission*[11], Davis J.A. says this:

> The principle is that the privileges enjoyed by departments of State and by the officials thereof are so enjoyed by virtue of the Crown's prerogative, such departments and their officers being, as it were, representatives of the Crown and deriving their powers therefrom. As it was put in *Gilbert v. Corporation of Trinity House* (1886), 17 Q.B.D. 795, at p. 801: "All the great officers of state are ... emanations from the Crown. They are delegations by the Crown of its own authority to particular individuals."

On the facts of that case, however, the decision went no further than to say that the Temiskaming and Northern

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[9] [1935] S.C.R. 215, [1935] 1 D.L.R. 657.

[10] (1941), 70 Que. K.B. 65.

[11] [1934] O.R. 701 at 707, 43 C.R.C. 199, [1934] 4 D.L.R. 776.

Ontario Railway Commission, a body appointed by the Crown to administer a public undertaking of the Crown, enjoyed the Crown immunity from suits in tort for the tortious acts of its servants or agents.

As to the phrase "emanation from the Crown", I would refer to what is said by Luxmoore L.J., in the Privy Council, in *International Railway Co. v. Niagara Parks Commission*[12]:

> Kelly J. in his judgment referred to the Commission not only as being the agent or servant of the Crown but also as "an emanation of the Crown". The latter phrase is also used by McTague J.A. Their Lordships are unable to appreciate the precise meaning intended to be attributed to this phrase by the Courts below. If it is intended to refer to the Commission in some capacity other than that of agent or servant it is impossible to ascertain from the judgments delivered what the legal significance of that capacity may be. The word "emanation" is hardly applicable to a person or a body having a corporate capacity. Its primary meaning is "that which issues or proceeds from some source" and it is commonly used to describe the physical properties of substances (e.g. radium) which give out emanations of recognizable character. The words seem first to have been used by Day J. in *Gilbert v. Trinity House* (1886), 17 Q.B.D. 795.

After referring to the judgment of Day J., in which the phrase is used, he goes on to say:

> The learned Judge in the passage quoted seems to use the word as synonymous with servant or agent and in no other sense. Their Lordships are of opinion that it would avoid obscurity in the future if the words agent or servant were used in preference to the inappropriate and undefined word "emanation".

After reviewing the authorities cited by counsel, and a number of other cases, which I do not think it is necessary to list, my understanding of the position of servants or agents of the Crown, at common law, in respect of a claim in tort, is this:

First is the proposition that the Crown itself could not be sued in tort.

Second is the proposition that Crown assets could not be reached, indirectly, by suing in tort, a department of government, or an official of the Crown. As to a government department, there was the added barrier that, not being a legal entity, it could not be sued.

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[12] [1941] 3 D.L.R. 385 at 393, [1941] A.C. 328, [1941] 2 W.W.R. 338 [1941] 2 All E.R. 456, 53 C.R.T.C. 1.

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Third is the proposition that a servant of the Crown cannot be made liable vicariously for a tort committed by a subordinate. The subordinate is not his servant but is, like himself, a servant of the Crown which, itself, cannot be made liable.

Fourth is the proposition that a servant of the Crown, who commits a wrong, is personally liable to the person injured. Furthermore, if the wrongful act is committed by a subordinate, at his behest, he is equally liable, not because the subordinate is his servant, but because the subordinate's act, in such a case, is his own act. This is what is said in the passage from *Raleigh v. Goschen,* previously cited.

Is the position any different because the agent in this case is not an individual, but a corporation? I think not, and I agree with the reasoning of Atkin L.J. in the *Mackenzie-Kennedy* case.

As Choquette J. has pointed out, in the reasons for judgment of the Court of Appeal, s. 3(2) of the *National Harbours Board Act* declares that the Board "shall be and be deemed to be, *for all the purposes of this Act,* the agent of Her Majesty in right of Canada". (The italicizing is my own.) It is only when the Board is lawfully executing the powers entrusted to it by the Act that it is deemed to be a Crown agent.

I am not prepared to accept the proposition enunciated in *Wheeler v. Public Works Commissioners*[13], *supra,* that a corporation constituted for the sole purpose of doing acts for the Crown is not capable of doing a wrongful act in its corporate capacity, unless that statement is to be limited in its meaning to say that such a wrongful act is not authorized by its corporate powers. Otherwise the statement subscribes to the theory that a corporation cannot be made liable in tort because its corporate powers do not authorize it to commit a wrong. In my opinion, if a corporation, in the purported carrying out of its corporate purposes, commits a wrongful act, it is liable therefor and it cannot escape liability by alleging that it is not responsible for anything done outside its corporate powers. This is true whether it is purporting to act as a Crown agent, or not.

[13] [1903] 2 I.R. 202.

This view appears to be implicit in the statement of Duff J., as he then was, in *The Quebec Liquor Commission v. Moore*[14]:

> The broad principle, of course, is that the liability of a body created by statute must be determined by the true interpretation of the statute. It is desirable, perhaps, to advert first of all to a discussion of the subject in *The Mersey Docks and Harbour Board Trustees v. Gibbs* (1864) L.R. 1 H.L. 93. Mr. Justice Blackburn, delivering the opinion of the judges in that case, proceeded upon the principle stated by him in these words (p. 107):
>
> > It is well observed by Mr. Justice Mellor in *Coe v. Wise,* (1864) 5 B. & S. 440; 4 New Rep. 352, of corporations like the present, formed for trading and other profitable purposes, that though such corporations may act without reward to themselves, yet in their very nature they are substitutions on a large scale for individual enterprise. And we think that in the absence of anything in the statutes (which create such corporations) showing a contrary intention in the legislature, the true rule of construction is, that the legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works.
>
> An exception is recognized, however, in the judgment of Mr. Justice Blackburn, as well as in the speeches of the Lords in the case of public officers who are servants of the Government; that is to say, officers fulfilling a public duty, appointed directly by the Crown and acting as officers of the Crown. Such a public officer is not responsible for the acts of inferior servants or officials merely because the superior officer has the right of the selection and appointment, as well as the right of removal at pleasure. *Canterbury v. The Attorney-General,* (1842) 1 Ph. 306 at p. 324. It is now recognized also that there is nothing to prevent the Crown being served by a corporation, and nothing to prevent such a corporation claiming the same immunity as an individual. *Bainbridge v. The Postmaster General,* (1906) 1 K.B. 178 at pp. 191-192, and *Roper v. The Commissioners of His Majesty's Works and Public Buildings,* (1915) 1 K.B. 45.

What he is saying here is that a corporation which is a servant of the Crown enjoys the same immunity as an individual servant of the Crown, and is not vicariously liable for torts committed by its servants. It follows that, its immunity being no greater, its liability is also the same as that of an individual servant of the Crown.

In the matter of liability for the acts of its servants, the matter has now been dealt with, so far as the appellant is concerned, by s. 39 of the Act.

If it can be held liable civilly in damages for wrongs which it has itself committed or ordered, it is obvious that

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[14] [1924] S.C.R. 540 at 551, [1924] 4 D.L.R. 901.

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Martland J.

a person threatened with the commission of an unlawful act by a corporate Crown agent can seek the assistance of the Court to prevent the corporation from doing that which it is not authorized to do as a Crown agent. This is clearly the principle laid down in the *Tamaki* and the *Rattenbury* cases.

In the present case the respondents allege that the appellant commenced to engage in and intended to continue the commission of an unlawful act which injuriously affected them. They seek an injunction to prevent it. If that which the appellant seeks to do is lawfully justified that is the end of the matter. But in my opinion the appellant cannot prevent the Court from inquiring into the legal justification for its conduct merely by saying that because it is an agent of the Crown it is immune from suit.

I have reached my conclusions without reference to s. 39 of the *National Harbours Board Act*. The purpose of that section was, I think, to make it clear that actions of the kind described in it were not to be subject to the exclusive jurisdiction of the Exchequer Court. That Court, when the *National Harbours Board Act* was passed, had exclusive jurisdiction in respect of claims arising out of contracts entered into by or on behalf of the Crown and claims against the Crown arising out of death or injury to person or property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

The Board was given capacity to contract, but, as it was an agent of the Crown, it might have been considered, therefore, as contracting on behalf of the Crown. At common law, an agent of the Crown was not vicariously liable for the acts of his subordinates, who were not his servants, but were servants of the Crown.

Section 39 made it clear that the Board itself could be sued on its contracts and, also, as vicariously liable for the negligence of its officers and servants, and the recourse in such event was not limited to proceedings in the Exchequer Court against the Crown.

But, as already stated, there was always recourse in the common law courts in respect of acts done, without legal justification, by an agent of the Crown, and the Board, on that principle, is liable if it commits itself, or orders or

authorizes its servants to commit, an act done without legal justification. Equally, if it threatens to commit an act, without legal justification, a subject, whose legal rights are thereby threatened, has recourse to the Courts to restrain the commission of such act.

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I would dismiss this appeal with costs.

Appeal dismissed with costs.

Attorney for the appellant: J. M. Jacques, Montreal.

Attorneys for the respondents: Prévost, Trudeau & Bisaillon, Montreal.

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

1968

*Mar. 15, 18
Oct. 1

AND

HENRY J. FREUD ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Deductions—Capital outlay or deductible expense—Expenses incurred by individual in trying to develop and sell prototype of sports car—Adventure in the nature of trade or investment—Corporation formed to promote venture—Whether existence of corporation affects deductibility of loss from other income—Business losses to be deducted from other income in year in which they were incurred—Income Tax Act, R.S.C. 1952, c. 148, ss. 12(1)(a), (b), 27(1)(e), 139(1)(e), (x).

In 1958 the taxpayer, practising law in Detroit and residing in Windsor, conceived, with an associate, the idea of designing and developing a prototype of a sports car with the intention of selling their concept, embodied in the prototype, to a manufacturer of cars who could be interested in putting it into production. A corporation was formed to carry out the project and shares were issued to the two associates and others who put money in the undertaking. In 1960, the taxpayer advanced to the corporation a sum of $13,840.47 in a final attempt to sell the idea to a manufacturer. Part of this money was paid to the corporation and part consisted of direct payments for labour, materials and expenses. When the venture became a total loss in 1960, the taxpayer sought to deduct the $13,840.47 from his other income for that year. The Tax Appeal Board upheld the Minister's assessment and ruled that the money was not deductible as it was to be regarded as a capital outlay. This judgment was reversed by the Exchequer Court which held that the moneys were spent by the taxpayer for the purpose of obtaining an income. The Minister appealed to this Court.

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*PRESENT: Cartwright C.J. and Fauteux, Hall, Spence and Pigeon JJ.

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Held: The appeal should be dismissed.

The amount in question must be considered as an outlay for gaining income from an adventure in the nature of trade and not as an outlay or loss on account of capital. It could not be considered as an investment. From its inception, the venture was not for the purpose of deriving income from an investment but for the purpose of making a profit on the sale of the prototype. The payments made by the taxpayer were purely speculative. If a profit had been obtained it would have been taxable irrespective of the method adopted for realizing it. The fact that a corporation was formed to carry out the venture did not affect the matter. If the taxpayer and his friends had been successful in selling the prototype, they might well have done it by selling their shares in the company instead of having the corporation sell the prototype. There can be no doubt that if they had thus made a profit it would have been taxable. The same rule must be followed when a loss is suffered. The payments made by the taxpayer could not be considered as a separate operation isolated from the initial venture and had none of the characteristics of a regular loan. In the circumstances, the loss should be deducted from the other income of the taxpayer in the year in which it was sustained, namely 1960.

Revenu—Impôt sur le revenu—Déductions—Déboursé de capital ou dépense déductible—Sommes dépensées par un individu dans le but de construire et de vendre un prototype d'une automobile de sport —Affaire d'un caractère commercial ou placement—Compagnie constituée pour l'affaire—L'existence de la corporation n'empêche pas de déduire la perte des autres revenus du contribuable—Perte commerciale déductible des autres revenus dans l'année dans laquelle elle est subie—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 12(1)(a), (b), 27(1)(e), 139(1)(e), (x).

En 1958 le contribuable, un avocat de Détroit résidant à Windsor, et une autre personne ont conçu l'idée de construire un prototype d'une automobile de sport avec l'intention de vendre leur idée, réalisée dans le prototype, à un fabricant d'automobiles qui pourrait être intéressé à en faire la fabrication. Une compagnie a été constituée pour mettre ce projet à exécution et des actions ont été émises aux deux associés et à d'autres personnes ayant mis de l'argent dans l'entreprise. En 1960, dans une dernière tentative de vendre l'idée à un fabricant, le contribuable a avancé une somme de $13,840.47 à la compagnie. Une partie de cette somme a été versée à la compagnie et une partie a été payée directement pour main-d'œuvre, matériaux et dépenses. Lorsque l'opération est devenue une perte totale en 1960, le contribuable a cherché à déduire le montant de $13,840.47 de ses autres revenus pour l'année en question. La Commission d'appel de l'impôt a maintenu la cotisation et a jugé que la somme n'était pas déductible parce qu'elle devait être considérée comme une perte de capital. Ce jugement a été infirmé par la Cour de l'Échiquier qui a statué que la somme avait été dépensée par le contribuable en vue d'obtenir un revenu. Le Ministre en appela à cette Cour.

Arrêt: L'appel doit être rejeté.

Le montant en question doit être considéré comme une somme déboursée en vue de gagner un revenu provenant d'une affaire d'un caractère commercial et non pas comme un déboursé ou une perte de capital. Le montant ne peut pas être considéré comme un placement. Dès ses débuts, l'opération n'avait pas pour but de tirer un revenu d'un placement mais de faire un profit sur la vente du prototype. Les paiements faits par le contribuable étaient purement spéculatifs. Si un profit avait été obtenu il aurait été imposable quelle qu'ait été la méthode employée pour le réaliser. Le fait qu'une compagnie a été constituée pour mettre l'affaire à exécution ne change rien. Si le contribuable et ses amis avaient réalisé un profit en vendant le prototype, ils auraient pu le réaliser aussi bien en vendant leurs actions dans la compagnie au lieu que ce soit la compagnie qui vende le prototype. Il n'y a aucun doute que si un profit avait été ainsi réalisé il aurait été imposable. On doit suivre la même règle lorsqu'une perte a été subie. Les paiements faits par le contribuable ne peuvent pas être considérés comme une opération distincte et isolée de l'entreprise initiale et n'avaient aucune des caractéristiques d'un prêt régulier. Dans les circonstances, la perte doit être déduite des autres revenus du contribuable dans l'année dans laquelle elle a été subie, c'est-à-dire 1960.

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada[1], infirmant une décision de la Commission d'appel de l'impôt. Appel rejeté.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada[1], reversing a judgment of the Tax Appeal Board. Appeal dismissed.

Alban Garon and *Pierre H. Guilbault,* for the appellant.

P. N. Thorsteinsson and *M. J. O'Keefe,* for the respondent.

The judgment of the Court was delivered by

PIGEON J.:—The facts of this case are somewhat unusual. The respondent who resided in Windsor, Ontario but practised law in Detroit, Michigan had, in conjunction with one Kettlewell, a tool and die maker, conceived the idea of designing a small personal sports car. Their intention was not to start a manufacturing operation but to interest a manufacturer to produce such a car. Together with one Porritt, a retired mechanical engineer, they embarked upon the project in 1958 and a first prototype was made in that year.

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[1] [1967] 1 Ex. C.R. 293, [1966] C.T.C. 641, 66 D.T.C. 5414.

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The monies put up in carrying on this project were advanced by respondent and Kettlewell to a company incorporated in Michigan. Shares were issued to them and also to some of their friends who were persuaded to put money in the undertaking. Further prototypes were made and contacts were had with various corporations in an unsuccessful attempt to sell the idea to one of them. In 1960, the other shareholders declined to put up any further monies. The respondent, however, spent a sum of $13,-840.47 in a final attempt to sell to the Seagrave Corporation the concept of the small personal sports car embodied in the last prototype which was driveable. Part of this money was disbursed by cheques to the company and another part by direct payments for labour, materials and expenses. For some months the Seagrave Corporation expressed interest but, in the end, it made no offer and the venture became a total loss.

The issue on this appeal is whether the sum of $13,-840.47 expended by respondent in the circumstances above described, is deductible from his other income in the year 1960 for the purpose of computing his taxable income. The assistant chairman of the Tax Appeal Board held that it was not deductible saying that it must be regarded as a capital outlay that, it was hoped, would bring about a marketable asset. On appeal to the Exchequer Court[1] this was reversed, Gibson J. holding that the monies paid out in 1960 by the respondent were monies spent by him for the purpose of obtaining an income. In this Court it was contended on behalf of the appellant that:

(1) the corporate existence of the company cannot be ignored;

(2) the company alone was engaged in the development of a sports car;

(3) the sum spent was not an outlay for gaining income from a business, property or other source; and

(4) this amount was an outlay or loss on account of capital.

Before dealing specifically with these contentions, some general observations appear desirable.

[1] [1967] 1 Ex. C.R. 293, [1966] C.T.C. 641, 66 D.T.C. 5414.

In 1952, Parliament eliminated from the *Income Tax Act* the rule in s. 13 (s. 10 of the *Income War Tax Act*) whereby the deduction of losses incurred in accessory business ventures was prohibited by providing that a taxpayer's income "shall be deemed to be not less than his income for the year from his chief source of income", and in 1958 s. 27(1)(*e*) was amended to provide for business losses being carried back or forward against income from any business instead of income from the same business only. Thus our law no longer looks askance at taxpayers who do not believe in "the adage that the cobbler should stick to his last". They are not subjected to discriminatory fiscal treatment by being taxed if successful but denied a deduction if unsuccessful.

It must also be noted that the *Income Tax Act* defines business so as to include "an adventure or concern in the nature of trade" (s. 139 (1)(*e*)). By virtue of this definition, a single operation is to be considered as a business although it is an isolated venture entirely unconnected with the taxpayer's profession or occupation. This consequence of the definition has been recognized and given effect to in many cases but I will refer only to one of them namely *McIntosh v. Minister of National Revenue*[2] in which it was held that a single venture of speculation in land gave rise to taxable income when profit was obtained as a result of an acquisition made with a view to a profit on the resale. Kerwin C.J. said (at pp. 120-121):

> It is quite true that an individual is in a position differing from that of a company and that, as stated by Jessel M.R. in *Smith v. Anderson* (approved by this Court in *Argue v. Minister of National Revenue*),
>
> > So in the ordinary case of investments, a man who has money to invest, invests his money and he may occasionally sell the investments and buy others, but he is not carrying on a business.
>
> However, it is also true, as well in the case of an individual as of a company, that the profits of an isolated venture may be taxed: *Edwards (Inspector of Taxes) v. Bairstow et al.* It is impossible to lay down a test that will meet the multifarious circumstances that may arise in all fields of human endeavour. As is pointed out in *Noak v. Minister of National Revenue,* it is a question of fact in each case, referring to the *Argue* case, *supra,* and *Campbell v. Minister of National Revenue,* to which might be added the Jugment of this Court in *Kennedy v. Minister of National Revenue,* which affirmed the decision of the Exchequer Court.

[2] [1958] S.C.R. 119, [1958] C.T.C. 18, 58 D.T.C. 1021, 12 D.L.R. (2d) 219.

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In the present case I agree with Mr. Justice Hyndman's findings with reference to the appellant that:

> Having acquired the said property there was no intention in his mind to retain it as an investment, but to dispose of the lots, if and when suitable prices could be obtained.

Such being the principles to be applied in cases when a profit is obtained, the same rules must be followed when a loss is suffered. Fairness to the taxpayers requires us to be very careful to avoid allowing profits to be taxed as income but losses treated as on account of capital and therefore not deductible from income when the situation is essentially the same.

In the present case, appellant does not deny that the venture in itself was an adventure in the nature of trade so that if respondent and his friends had embarked upon it in their own names, the loss would be deductible. It is in this light that the four contentions advanced on behalf of appellant must now be examined.

On the first question, the decision of this Court in *Fraser v. Minister of National Revenue*[3] appears to be in point. It was there held that where real estate operators had incorporated companies to hold real estate, the sale of shares in those companies rather than the sale of the land was merely an alternative method of putting through the real estate transactions and the profit was therefore taxable. This decision does not in my view necessarily imply that the existence of the companies as separate legal entities was disregarded for income tax assessment purposes. On the contrary, it must be presumed that the companies remained liable for taxes on their operations and their title to the land, unchallenged. I must therefore consider that the decision rests on the view that was taken of the nature of the outlay involved in the acquisition of the companies' shares by the promoters.

It is clear that while the acquisition of shares may be an investment (*Minister of National Revenue v. Foreign Power Securities Corp. Ltd.*[4]), it may also be a trading operation depending upon circumstances (*Osler Hammond*

[3] [1964] S.C.R. 657, [1964] C.T.C. 372, 64 D.T.C. 5224, 47 D.L.R. (2d) 98.

[4] [1967] S.C.R. 295, [1967] C.T.C. 116, 67 D.T.C. 5084.

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and Nanton Ltd. v. Minister of National Revenue[5]; *Hill-Clarke-Francis Ltd. v. Minister of National Revenue*[6]). Due to the definition of business as including an adventure in the nature of trade, it is unnecessary for an acquisition of shares to be a trading operation rather than an investment that there should be a pattern of regular trading operations. In the *Fraser* case, the basic operation was the acquisition of land with a view to a profit upon resale so that it became a trading asset. The conclusion reached implies that the acquisition of shares in companies incorporated for the purpose of holding such land was of the same nature seeing that upon selling the shares instead of the land itself, the profit was a trading profit not a capital profit on the realization of an investment. This principle appears equally applicable in the circumstances of this case. If the respondent and his friends had been successful in selling the prototype sports car, they might well have done it by selling their shares in the company instead of having the company sell the prototype, and there can be no doubt that if they had thus made a profit it would have been taxable. Because no sale could be made, respondent and his friends obviously never reached the point at which consideration would be given to the method to be adopted for realizing the profit. This should not alter the situation because the decision in the *Fraser* case implies that, irrespective of the method adopted, any profit would have been income, not capital gain. Also in that case it must be noted that the companies alone held the land just as in the present case the company owned the prototype sports car. This appears to dispose of the first two questions raised by appellant.

Appellant further contends that the disbursements made by respondent should be considered as a loan to the company. This is somewhat doubtful because while reimbursement of the sums advanced to the company could probably have been claimed as money had and received, the sums paid direct to third parties might well have been considered as voluntary payments and not recoverable (Halsbury's Laws of England, 3rd ed., vol. 8, p. 231).

[5] [1963] S.C.R. 432, [1963] C.T.C. 164, 63 D.T.C. 1119, 38 D.L.R. (2d) 178.

[6] [1963] S.C.R. 452, [1963] C.T.C. 337, 63 D.T.C. 1211.

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Assuming that the whole amount should properly be considered as a debt due by the company, this does not necessarily imply that the outlay was an investment. Obligations to pay money can be trading assets just like other things (*Scott v. Minister of National Revenue*[7]; *Minister of National Revenue v. MacInnes*[8]; *Minister of National Revenue v. Curlett*[9]). It is true that in those cases the conclusion that the acquisition of mortgages at a discount was a speculation, not an investment, rests upon a consideration of the large number of operations of a similar nature that were effected. But, on account of the definition of "business", this is not the only basis on which this conclusion can be reached. As previously pointed out, a single venture in the nature of trade is a business for the purposes of the *Income Tax Act* "as well in the case of an individual as of a company".

It is, of course, obvious that a loan made by a person who is not in the business of lending money is ordinarily to be considered as an investment. It is only under quite exceptional or unusual circumstances that such an operation should be considered as a speculation. However, the circumstances of the present case are quite unusual and exceptional. It is an undeniable fact that, at the outset, the operation embarked upon was an adventure in the nature of trade. It is equally clear that the character of the venture itself remained the same until it ended up in a total loss. Under those circumstances, the outlay made by respondent in the last year, when the speculative nature of the undertaking was even more marked than at the outset due to financial difficulties, cannot be considered as an investment. Whether it is considered as a payment in anticipation of shares to be issued or as an advance to be refunded if the venture was successful, it is clear that the monies were not invested to derive an income therefrom but in the hope of making a profit on the whole transaction.

At this point, the decision of this Court in *Minister of National Revenue v. Steer*[10] must be considered. In that

[7] [1963] S.C.R. 223, [1963] C.T.C. 176, 63 D.T.C. 1121, 38 D.L.R. (2d) 346.

[8] [1963] S.C.R. 299, [1963] C.T.C. 311, 63 D.T.C. 1170.

[9] [1967] S.C.R. 280, [1967] C.T.C. 62, 67 D.T.C. 5058, 60 D.L.R. (2d) 752.

[10] [1967] S.C.R. 34, [1966] C.T.C. 731, 66 D.T.C. 5481.

case, it was held that a guarantee given to a bank for a company's indebtness was a deferred loan to the company and that a large sum paid to the bank to discharge this indebtedness was a capital loss. The decision cannot imply that loans are always investments but only that such was the character of the loan in the circumstances of that case because, as we have seen, there are at least three recent cases in this Court where loans were held to be trading operations with the consequence that profits and losses were on income not capital account. It must also be added that the decision cannot imply that an outlay for the acquisition of an interest in an oil well drilling venture such as the company involved in the *Steer* case, can never be a trading venture because in *Dobieco Ltd. v. Minister of National Revenue*[11] such an interest was treated as a trading asset of an underwriting and trading firm. As we have seen while there is a presumption against an isolated operation having such a character in the hands of an individual, this presumption can be rebutted and it may be shown that even a single operation is in fact a venture in the nature of trade and therefore a "business" for income tax purposes.

In the present case as we have seen, the basic venture was not the development of a sports car with a view to the making of a profit by going into the business of selling cars but with a view to a profit on selling the prototype. Therefore, the venture, from its inception, was not for the purpose of deriving income from an investment but for the purpose of making a profit on the resale which is characteristic of a venture in the nature of trade. Nothing indicates that the character of the operation had changed when the outlays under consideration were made. On the contrary, the venture had become even more speculative, it was abundantly clear that respondent could have no hope of recovering anything unless a sale of the prototype could be accomplished. The outlays cannot be considered as a separate operation isolated from the initial venture, they have none of the characteristics of a regular loan.

In my view, the payments made by respondent could not properly be considered as an investment in the circumstances in which they were made. It was purely specula-

[11] [1966] S.C.R. 95, [1965] C.T.C. 506, 65 D.T.C. 5300.

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tion. If a profit had been obtained it would have been taxable irrespective of the method adopted for realizing it. Such being the situation, these sums must be considered as outlays for gaining income from an adventure in the nature of trade, that is a business within the meaning of the *Income Tax Act*, and not as outlays or losses on account of capital.

I now find it necessary to point out that while s. 27(1)(*e*) of the *Income Tax Act* as amended in 1958 clearly provides for the deductibility of business losses in the taxation year immediately preceding and in the five taxation years immediately following the year in which they are sustained, there is no explicit provision for such deductibility in that last mentioned year. Due to s. 2(3), this is a matter of no small difficulty although the definition of loss in s. 139(1)(*x*) clearly contemplates such deductibility. Seeing that the loss in question if not deductible in the year in which it was sustained would undoubtedly be deductible in six other years from income of the kind from which it is sought to be deducted, namely professional fees which come within the definition of income from a business, and that appellant does not contend that if the loss is deductible it cannot be deducted in the year in which it was sustained but, on the contrary, that it must be applied against any other income in that year, this appears to be the proper conclusion for the purpose of this case.

I am therefore of the opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: D. S. Maxwell, Ottawa.

Solicitors for the respondent: Martin, Laird & Cowan, Windsor.

PORT ARTHUR SHIPBUILDING COMPANY ..... APPELLANT;

1968
*Feb. 1, 2
Oct. 1

AND

HARRY W. ARTHURS, DWIGHT STOREY, A. W. MALONEY, UNITED STEELWORKERS OF AMERICA LOCAL 5055, JOHN W. BEAUCAGE, JACK GERAVELIS AND PATRICK MANDUCA ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Labour relations—Arbitration—Collective agreement—Right to discharge for proper cause—Employees dismissed for absenting themselves to work for another employer—Whether board of arbitration exceeded jurisdiction in substituting suspension in place of dismissal.

Certiorari—Legislation compelling recourse to arbitration board—Board a statutory creation and therefore subject to review in Courts by certiorari—The Labour Relations Act, R.S.O. 1960, c. 202, s. 34.

Three employees of the appellant company stayed away from their employment for the purpose of taking temporary employment with another employer and in absenting themselves gave false reasons for so doing. When the company discovered these breaches of duty, it discharged the three employees. The employees then filed grievances that they had been unjustifiably discharged. A board of arbitration, by a majority, held that the employees' conduct did not constitute proper cause for dismissal. The board substituted periods of suspension in the place of dismissal.

The award was quashed on *certiorari*. On appeal the Court of Appeal, by a majority, restored the award of the board of arbitration. The company then appealed to this Court, asking for the restoration of the order made at trial quashing the award.

Held: The appeal should be allowed.

Under the terms of the collective agreement, the company had the right to discharge for proper cause. The task of the board of arbitration was to determine whether there was proper cause. On the facts there was only one proper legal conclusion, namely, that the employees had given the management proper cause for dismissal. The board, however, did not limit its task in this way. It assumed the function of management. It determined, not whether there had been proper cause, but whether the company, having proper cause, should have exercised the power of dismissal. The board substituted its judgment for the judgment of management and found in favour of suspension.

*PRESENT: Cartwright C.J., Abbott, Martland, Judson and Hall JJ.

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The sole issue in the case was whether the three employees left their jobs for someone else and whether this fact was a proper cause for discipline. Once the board had found that there were facts justifying discipline, the particular form chosen was not subject to review on arbitration.

As to the question whether this Court had by *certiorari* a power of review over the award made by this board of arbitration, the wording of the provisions of s. 34 of *The Labour Relations Act*, R.S.O. 1960, c. 202, was clear and unambiguous. The parties to a collective agreement were required to arbitrate their dispute. There was no alternative course of action open to them. The legislation compelled recourse to an arbitration board and that board was therefore a statutory creation and hence subject to review in the Courts by *certiorari*.

Quite apart from this, the board's award was subject to review in this Court. Under the common law an ordinary motion could be made to the Court to set aside an award on the ground that there was error of law on the face of it.

[*Re International Nickel Co. of Canada Ltd. and Rivando*, [1956] O.R. 379, approved and applied; *R. v. Northumberland Compensation Appeal Tribunal, Ex p. Shaw*, [1952] 1 K.B. 338; *R. v. National Joint Council for the Craft of Dental Technicians (Disputes Committee) et al., Ex p. Neale*, [1953] 1 Q.B. 704; *Howe Sound Co. v. International Union of Mine, Mill and Smelter Workers (Canada), Local 663*, [1962] S.C.R. 318; *Re Ewaschuk, Western Plywood (Alberta) Ltd. v. International Woodworkers of America, Local 1-207* (1964), 44 D.L.R. (2d) 700; *R. v. Board of Arbitration, Ex p. Cumberland Railway Co.* (1968), 67 D.L.R. (2d) 135, referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Brooke J. Appeal allowed.

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

John H. Osler, Q.C., for the respondents.

The judgment of the Court was delivered by

JUDSON J.:—Three employees of the appellant, Port Arthur Shipbuilding Company, stayed away from their employment for the purpose of taking temporary employment with another employer. Two of them, Jack Geravelis and Patrick Manduca, left work before the end of their shifts on Monday, April 11, 1966. They gave sickness as their reason for so doing. This was an untrue statement. They both then drove to Terrace Bay where, according to arrangements that they had already made, they worked for

[1] [1967] 2 O.R. 49, 62 D.L.R. (2d) 342, *sub nom. R. v. Arthurs, Ex p. Port Arthur Shipbuilding Co.*

F. W. Brunwin Welding Limited on April 11, 12 and 13, 1966. John W. Beaucage was absent from work from April 11 to April 15, 1966, both days inclusive. During that time he was working for Barnett-McQueen Company Limited at Marathon, Ontario. He told the company that he intended to take a week off without pay.

When the company discovered these breaches of duty, it discharged the three employees. The employees then filed grievances that they had been unjustifiably discharged. A board of arbitration made the findings of fact which I have just summarized but held by a majority that they did not constitute proper cause for dismissal. The board substituted periods of suspension in the place of dismissal.

The company then applied before a judge of the Supreme Court of Ontario to quash the award. This was done by the judgment of Mr. Justice Brooke. On appeal by the union on behalf of the men, the Court of Appeal[1], by a majority, restored the award of the board of arbitration. The company in this appeal asks for the restoration of the order made by Mr. Justice Brooke quashing the award.

The collective agreement in force at the time of dismissal provides in art. III for Management Rights:

> 3.01 The Union recognizes the Management's authority to manage the affairs of the Company, to direct its working forces, including the right to hire, transfer, promote, demote, suspend and discharge for proper cause any Employee and to increase, or decrease the working force of the Company, provided that the Company shall not exercise these rights in a manner inconsistent with the terms of this Agreement.
>
> 3.02 An employee affected by the exercising of this authority who feels that he has cause for dissatisfaction may have the complaint dealt with in accordance with the "Grievance Procedure".

Article VIII deals with Grievance Procedure and Arbitration. Section 8.17 provides:

> 8.17 The Board of Arbitration shall not alter, modify, amend or make any decision inconsistent with the terms of this Agreement.

The proceedings in this case relating to a discharge were begun under s. 8.20:

> 8.20 In all cases of grievance over layoff or discharge, a written grievance naming the individual grievor must be submitted by the Grievance Committee to Management within two (2) working days after the termination of employment and the settlement procedure is to continue as specified above starting at Sub-Section 8.08.

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[1] [1967] 2 O.R. 49, 62 D.L.R. (2d) 342.

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The sections beginning with s. 8.08 and continuing to s. 8.14 deal with the institution and conduct of proceedings on arbitration.

The reason why I have set out or summarized these sections is that the arbitration was concerned only with a grievance over discharge, as mentioned in s. 8.20. It was not an arbitration at large contemplated by s. 8.03, which reads:

> 8.03 Any difference arising between the Union and the Company relating to the interpretation, application or administration of this Agreement, or where an allegation is made that the Agreement has been violated, shall be resolved in accordance with the provisions of Article VIII, commencing at Sub-section 8.08.

The provisions relating to seniority, absence and leave of absence are next set out. Section 9.03(b) reads:

> 9.03 (*b*) Seniority Holders will be recalled, in the reverse order of lay-off, as required by the work at hand. Such recall shall be through the Personnel Office and shall be recorded.

Section 9.04 provides for cancellation of seniority rights and one of the grounds is:

> 9.04 (*d*) If an Employee is absent for five (5) consecutive working days without establishing a satisfactory reason with the Personnel Office.

Section 11.03, dealing with leave of absence, reads:

> 11.03 Leave of absence shall not be granted to any employee for the purpose of engaging in employment elsewhere or to engage in his own business.

It is apparent that in the case of Beaucage, he lost his seniority under s. 9.04 (*d*) and that all three employees were in breach of s. 11.03, which prohibited the granting of leave of absence to any employee for the purpose of engaging in any employment elsewhere.

The proposition of the appellant company is that the board had no power to substitute suspension for dismissal. I deliberately avoid the term "jurisdiction". The company, under art. III dealing with management rights, has the right to discharge for proper cause. I draw no distinction between "proper" cause and "just" cause. This is subject only to s. 3.03, which gives the employee a right to have his case dealt with according to grievance procedure. The only limitation on the power of management is that it

shall not be exercised "in a manner inconsistent with the terms of this agreement". In this case there cannot be any suggestion that there was anything in the agreement that the company breached.

The task of the board of arbitration in this case was to determine whether there was proper cause. The findings of fact actually made and the only findings of fact that the board could possibly make establish that there was proper cause. Then there was only one proper legal conclusion, namely, that the employees had given the management proper cause for dismissal. The board, however, did not limit its task in this way. It assumed the function of management. In this case it determined, not whether there had been proper cause, but whether the company, having proper cause, should have exercised the power of dismissal. The board substituted its judgment for the judgment of management and found in favour of suspension.

The sole issue in this case was whether the three employees left their jobs to work for someone else and whether this fact was a proper cause for discipline. Once the board had found that there were facts justifying discipline, the particular form chosen was not subject to review on arbitration. This was the opinion of Mr. Justice Brooke and Mr. Justice Schroeder, dissenting on appeal, and with this opinion I agree.

Notwithstanding obvious and serious breaches of the collective agreement by these three individuals, the board has, in effect, said "We will hold that these breaches are not a proper cause for dismissal but call for suspension".

A collective agreement is binding on employer and employees. These were not trivial breaches and the board had no power to substitute its own judgment for that of management in the circumstances of this case. If this kind of review is to be given to a board under s. 3.03, it should be given in express terms, namely, that the management's authority to demote, suspend or discharge will be subject to full review by the board of arbitration. Management would then understand what its position would be. But as the agreement is presently drawn, the board's power is limited to a determination whether management went beyond its authority in this case. The question before them

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was, could an honest management, looking at the group of employees as a whole and at the interests of the company, have reached the conclusion that they did? In other words, did management go beyond its rights? There is only one answer to this question and the answer is "No". It was the board that exceeded its authority in reviewing the decision of management by purporting to exercise a full appellate function.

After the conclusion of argument the question was raised whether this Court had by *certiorari* a power of review over the award made by this board of arbitration. Counsel were invited to submit written argument on this point.

It is clear that the prerogative writs of prohibition and *certiorari* will not lie against a non-statutory tribunal. The reasons for this are mainly historical and are explained by Lord Denning in *R. v. Northumberland Compensation Appeal Tribunal, Ex. p. Shaw*[2]. At one point in his judgment the learned judge referred specifically to awards of arbitrators and pointed out that, (p. 351),

> The Court of King's Bench never interfered by certiorari with the award of an arbitrator, because it was a private tribunal and not subject to the prerogative writs.

Similarly in *R. v. National Joint Council for the Craft of Dental Technicians (Disputes Committee) et al, Ex p. Neale*[3], where the question was whether the Council was a private arbitration body constituted by agreement or a statutory entity, Lord Goddard C.J, after some general remarks on the scope of the prerogative writs, said, at p. 708:

> There is no instance of which I know in the books where certiorari or prohibition has gone to any arbitrator except a statutory arbitrator, and a statutory arbitrator is one to whom by statute the parties must resort.

Thus, the question is whether the board of arbitration whose award is the subject of this litigation is a statutory body to which the parties to a collective agreement must resort. This depends upon what interpretation is to be given to certain provisions of the Ontario *Labour Relations Act*, R.S.O. 1960, c. 202.

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[2] [1952] 1 K.B. 338.

[3] [1953] 1 Q.B. 704.

Section 34(1) of that Act provides:

> Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

This provision is supported by nine other subsections all of which (with the exception possibly of the tenth subsection) are directed towards ensuring that the arbitration process is carried through to its conclusion. And although somewhat general in nature, they do provide a clear and defined framework within which the parties must conduct the process of arbitration.

In *Re International Nickel Co. of Canada Ltd. and Rivando*[4], the Court of Appeal for Ontario considered these provisions and came to the conclusion that the parties to a collective agreement were compelled to arbitrate their differences. Aylesworth J.A., who delivered the judgment of the Court, said at pp. 386-387:

> Consideration of these statutory provisions makes it abundantly clear that the parties are under compulsion to arbitrate their differences. The parties are directed by statute as to the matters which must be governed by arbitration; they are told that they must abide by the award and they are also told, (a) that if they fail to include in their collective agreement an arbitration provision, then the statutory provision in subs. (2) will form part of their agreement, subject in proper cases to modification of the provision by the Labour Relations Board, and (b) that if they fail to appoint an arbitrator or to constitute a Board of Arbitration, the necessary appointments will be made by the Minister of Labour.
>
> With respect, it seems to me that the element and degree of compulsion inherent in the *Labour Relations Act* regarding arbitration of industrial disputes establishes the instant Board of Arbitration as a statutory Board. If this be so, then admittedly *certiorari* may issue to it from this Court.

This decision was referred to in this Court in *Howe Sound Co. v. International Union of Mine, Mill and Smelter Workers (Canada), Local 663*[5]. In that case this Court considered the same question as confronted the Court of Appeal of Ontario, but under the relevant provisions of the British Columbia *Labour Relations Act*, 1954 (B.C.), c. 17,

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[4] [1956] O.R. 379, 2 D.L.R. (2d) 700.

[5] [1962] S.C.R. 318.

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and held that *certiorari* would not lie against the arbitration board as it was a private tribunal constituted by agreement between the parties. Cartwright J., who delivered the judgment of the Court, adopted and endorsed what was said by Tysoe J.A. in the Court of Appeal[6]. Tysoe J.A., in his reasons for judgment, said at pp. 78-79:

> *Certiorari* does not lie against an arbitrator or Arbitration Board unless the arbitrator or board is a statutory arbitrator or statutory board —that is a person or board to whom by statute the parties must resort. Prerogative writs of *certiorari* and prohibition do not go to ordinary private Arbitration Boards set up by agreement of parties: *R. v. Nat'l. Joint Council for the Craft of Dental Technicians,* [1953] 1 Q.B., 704. We must, therefore, decide whether this Arbitration Board is a private arbitration body set up by agreement, or a statutory board.
>
> In my opinion, if the Arbitration Board qualifies as a statutory board, it does so only by reason of the provisions of s. 22 of the *Labour Relations Act.* Without them, I doubt if anyone would suggest the Board would be other than a private arbitration body. The question would, therefore, seem to be, does s. 22 have the effect of constituting the Arbitration Board to which the parties to the collective agreement have agreed to refer for the final settlement of differences, a statutory arbitral tribunal? In my opinion, the answer to this question is in the negative.
>
> Section 22 does not create an arbitral tribunal or any other tribunal or body. It merely requires the parties to a collective agreement to agree between themselves on a method for finally and conclusively settling any differences without stoppage of work, and to embody their agreement in the collective agreement. If they do not do this, the Minister is to do it for them and his method becomes embodied in and forms part of the collective agreement. The method may be "by arbitration or otherwise". The parties may select and provide their own method and the only condition is that it shall achieve the desired result, namely, the final and conclusive settlement of differences without stoppage of work. The Legislature has not said the parties must resort to an Arbitration Board or to any particular person or body of persons. It has left the parties complete freedom of choice in this respect. All the Legislature has said is that there must be a method by which disputes will be finally and conclusively determined without stoppage of work. To find the method one turns to the agreement.

It is true that the British Columbia legislation is very similar to that in effect in Ontario. But there are differences, the most important of which is that the British Columbia legislation provides for the settlement of disputes under the collective agreement *by arbitration or otherwise,* whereas the Ontario legislation provides for no alternative except *arbitration.* This was recognized by Cartwright J., who expressly reserved his opinion on

[6] (1961), 29 D.L.R. (2d) 76, 36 W.W.R. 181.

whether the Court of Appeal of Ontario in *Rivando* were correct in their interpretation of the Ontario legislation. He said at p. 329:

> In support of this submission the appellant relies, amongst others, on the case of *Re International Nickel Company of Canada Limited and Rivando*, [1956] O.R. 379; 2 D.L.R. (2d) 700, a unanimous decision of the Court of Appeal for Ontario.
>
> Whether this argument is entitled to prevail must depend chiefly on the wording of the statute which is said to compel the creation of the tribunal and to require the parties to resort to it, and there are differences between the Ontario legislation and that in force in British Columbia.

The *Howe Sound* decision was referred to and followed by Riley J. in the Alberta decision of *Re Ewaschuk, Western Plywood (Alberta) Ltd. v. International Woodworkers of America, Local 1-207*[7]. However, the relevant provision of the *Alberta Labour Act*, R.S.A. 1955, c. 167, is substantially the same as that of the British Columbia Act, and Riley J. noted that the Ontario legislation was different. He said at p. 702:

> Section 22(1) of the British Columbia *Labour Relations Act* and s. 73(5) [rep. & sub. 1960, c. 54, s. 21] of the *Alberta Labour Act*, R.S.A. 1955, c. 167, are substantially the same in that neither section sets up arbitration as the only means for settling disputes. Conversely, in Ontario, the *Labour Relations Act* requires that every collective agreement provide for the final settlement of grievances solely by arbitration. Consequently, Arbitration Boards in that Province have been held to be statutory boards against which *certiorari* will run: *Re International Nickel Co. and Rivando* (1956), 2 D.L.R. (2d) 700, [1956] O.R. 379.

To the same effect is the recent Nova Scotia decision of *R. v. Board of Arbitration, Ex p. Cumberland Railway Co.*[8], where the relevant provision was s. 19(1) of the *Industrial Relations and Disputes Inventigation Act*, R.S.C. 1952, c. 152, which is substantially the same as that of the British Columbia Act. McKinnon J.A., who delivered the judgment of the Court, after a consideration of the *Howe Sound* decision, said at pp. 141-142:

> An examination of the above sections will show that the wording of s. 19(1) of the *Industrial Relations and Disputes Investigation Act*, with which we are concerned herein, is, for our purposes the same as the British Columbia section which was under consideration in the *Howe Sound* case, and which the Court found did not constitute the board a statutory one.

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[7] (1964), 44 D.L.R. (2d) 700, 47 W.W.R. 426.
[8] (1968), 67 D.L.R. (2d) 135.

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On the other hand, the Ontario Act, being the *Labour Relations Act*, R.S.O. 1960, c. 202, s. 34(1). is as follows:

> "34(1) Every collective agreement shall provide for the final and binding settlement *by arbitration*, without stoppage of work, of all differences between the parties ..."

This was the section which the Court took under consideration in the *International Nickel & Rivando* case.

Considering the above, it would seem that the Courts have distinguished private and statutory arbitration boards by the wording of the statutes which provided for the setting up of such boards, and where such statutory provision included the words "or otherwise" following the words "by arbitration", this did not create a statutory tribunal or body. "It merely requires the parties to a collective agreement to agree between themselves on a method for finally and conclusively settling any differences ...": *Howe Sound Co. v. International Union*, 29 D.L.R., (2d) at p. 79.

The Courts of Ontario have consistently followed *Rivando*. This Court reserved its opinion on the correctness of that decision in the *Howe Sound* case and made no comment upon it apart from a reference to it in *Imbleau et al. v. Laskin et al.*[9]. It is therefore open to this Court to adopt the reasoning of Aylesworth J.A. and I propose to do so. The wording is clear and unambiguous. The parties to a collective agreement must arbitrate their dispute. There is no alternative course of action open to them. The legislation compels recourse to an arbitration board and that board is therefore a statutory creation and hence subject to review in the Courts by *certiorari*.

Quite apart from this, I am of the opinion that the board's award is subject to review in this Court. In *R. v. Northumberland Compensation Appeal Tribunal, supra*, Lord Denning pointed out that under the common law an ordinary motion could be made to the Court to set aside an award on the ground that there was an error of law on the face of it. He said at p. 351:

> Leaving now the statutory tribunals, I turn to the awards of arbitrators. The Court of King's Bench never interfered by certiorari with the award of an arbitrator, because it was a private tribunal and not subject to the prerogative writs. If the award was not made a rule of court, the only course available to an aggrieved party was to resist an action on the award or to file a bill in equity. If the award was made a rule of court, a motion could be made to the court to set aside for misconduct of the arbitrator on the ground that it was procured by corruption or

[9] [1962] S.C.R. 338.

other undue means: see 9 & 10 Will. 3, c. 15. At one time an award could not be upset on the ground of error of law by the arbitrator, because that could not be said to be misconduct or undue means; but ultimately it was held in *Kent v. Elstob* (1802) 3 East 18, that an award could be set aside for error of law on the face of it. This was regretted by Williams J. in *Hodgkinson v. Fernie* (1857), 3 C.B.N.S. 189, but is now well established. This remedy by motion to set aside is, however, confined to arbitrators.

And in the *Howe Sound* decision, Cartwright J. said:

> In my view it is open to the parties should occasion arise, to question the jurisdiction of the board or the validity of any award it makes in such manner as is permitted by the *Arbitration Act,* R.S.B.C. 1960, c. 14 or by the common law.

The main consequence of s. 34(10) of the Ontario Act which provides that the *Arbitrations Act,* R.S.O. 1960, c. 18, does not apply to arbitrations under collective agreements, is that the power of the Supreme Court of Ontario to review and quash awards of private arbitrators and boards of arbitration comes from the common law. It is an inherent power not affected nor limited in any way by the *Arbitrations Act.* This was made clear by Wright J. in his reasons for judgment in *Beach v. Hydro-Electric Power Commission of Ontario*[10], which were affirmed on appeal[11], but on other grounds. However, the Court of Appeal did not dispute his opinion on this point.

In Ontario relief by way of *certiorari* is obtained in an originating motion and no writ is issued. This is the same procedure that is used to quash an award of a private arbitrator or arbitration tribunal. The notice of motion in these proceedings makes it clear that the relief asked for is an order quashing the award. It does not seem to me to be of any consequence that the motion contains a reference to *certiorari.* The procedure is the same and in my opinion this notice of motion is sufficient to justify an order quashing the award.

Furthermore, and as I have already indicated, there is no doubt in my mind that the award should be quashed. An arbitration board of the type under consideration has no inherent powers of review similar to those of the Courts. Its only powers are those conferred upon it by the collective agreement and these are usually defined in some

[10] (1924), 56 O.L.R. 35.

[11] (1925), 57 O.L.R. 603.

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detail. It has no inherent powers to amend, modify or ignore the collective agreement. But this is exactly what this board did in this case and it was clearly in error in so doing, and its award should be quashed.

I would allow the appeal and restore the order of Brooke J. quashing the award, with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: McCarthy and McCarthy, Toronto.

Solicitors for the respondents: Jolliffe, Lewis & Osler, Toronto.

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*Mars 12
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LEVIS MUSHROOM FARM INC. / FERME DE CHAMPIGNONS DE LÉVIS INC. (*Demanderesse*), APPELANTE;

ET

LA CITÉ DE LÉVIS (*Défenderesse*) .....INTIMÉE.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Vente—Cession conditionnelle d'un terrain par la Couronne—Vente par le cessionnaire de ses droits aux risques et périls de l'acheteur—Violation de la condition—Annulation de la cession—Acheteur n'a pas de recours—Code civil, art. 1507, 1509, 1510.

En 1949, le gouvernement du Canada a fait cession à la défenderesse de certains terrains situés à Lévis à la condition, entre autres, que les terrains servent uniquement comme parc public sous peine d'annulation de la cession. En 1955, les auteurs de la demanderesse ont acheté à leurs risques et périls tous les droits que la défenderesse possédait sur ces terrains pour y faire, avec l'approbation de la défenderesse, la culture des champignons. En 1960, la Cour de l'Échiquier a fait droit à la demande de la Couronne qui avait demandé l'annulation de la cession pour défaut d'en satisfaire les conditions. La demanderesse a poursuivi la défenderesse pour obtenir l'annulation de la vente de 1955 en alléguant fraude et les dommages lui résultant de son éviction. La Cour supérieure a rejeté l'action et son jugement fut confirmé par la Cour d'appel. La demanderesse en appela à cette Cour.

Arrêt: L'appel doit être rejeté.

C'est avec raison que les deux Cours inférieures ont rejeté l'allégation de fraude et de mauvaise foi.

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*CORAM: Les Juges Fauteux, Martland, Judson, Ritchie et Spence.

La défenderesse a vendu aux auteurs de la demanderesse non pas les immeubles désignés à l'acte de vente mais tous les droits que la défenderesse possédait alors dans ces immeubles, et la vente a été consentie aux risques et périls des acquéreurs. Les parties ont exclu toute forme de garantie, légale aussi bien que conditionnelle. Au regard du contrat auquel les auteurs de la demanderesse ont donné leur accord, la demanderesse ne peut être reçue à se plaindre de l'éviction et la défenderesse ne lui doit rien.

Il n'y a pas lieu de s'arrêter à la prétention que lors de la vente la demanderesse n'avait aucune connaissance des conditions restrictives contenues à l'acte de cession. L'acheteur qui a acheté à ses risques et périls est traité par l'art. 1510 du *Code civil* sur un pied d'égalité avec celui qui connaissait le danger d'éviction.

La prétention, basée sur les dispositions de l'art. 1509 du Code, que l'éviction fut causée par les faits personnels de la défenderesse ne peut pas être soutenue. L'éviction dans le cas présent ne résulte pas d'un droit exercé ou créé par la défenderesse, mais d'un droit exercé par la Couronne et que celle-ci s'était réservé dans l'acte de cession.

La vente de 1955 n'était pas une convention nulle *ab initio* comme ayant été dépourvue d'objet, de cause et de considération pour le motif qu'au moment de la vente la défenderesse n'avait aucun droit vu l'utilisation des terrains pour des fins autres que comme parc public. La défenderesse avait des droits sur les terrains. La prétention que le vendeur, qui a vendu ses droits à un acheteur qui les a achetés à ses risques et périls, a fait une convention dépourvue d'objet, de cause et de considération, parce qu'il arrive subséquemment que les droits qu'il croyait avoir sont judiciairement déclarés nuls ou annulés, dépouille de tout sens, portée et effet la stipulation que l'acheteur a acheté à ses risques et périls et permet à l'acheteur de prendre contre le vendeur les recours que la stipulation a précisément pour objet d'écarter.

Sale—Lands conditionally ceded by the Crown—Sale by transferee of his rights at the risk of the purchaser—Violation of the condition—Annulment of the grant—Purchaser has no recourse—Civil Code, art. 1507, 1509, 1510.

In 1949, the Crown in the right of Canada ceded to the defendant certain lands in the city of Lévis on condition, *inter alia*, that these lands would be used only as a public park failing which they would revert to the Crown. In 1955, the plaintiff's predecessors purchased at their risks all the rights that the defendant had in the lands with the intention, as approved by the defendant, of cultivating and selling mushrooms. In 1960, the Exchequer Court maintained an action taken by the Crown to annul the grant for failure to abide by the conditions. The plaintiff instituted an action to set aside the sale of 1955 for fraud and claimed damages arising from the eviction. The Superior Court dismissed the action and its judgment was affirmed by the Court of Appeal. The plaintiff appealed to this Court.

Held: The appeal should be dismissed.

The two lower Courts rightly dismissed the allegation of fraud.

The defendant sold to the plaintiff's predecessors not the immoveables designated in the deed of sale but all the rights it had in these

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immoveables, and the sale was made at the risks of the buyers. The parties excluded all form of warranty, legal as well as conventional. Considering the contract to which the plaintiff's predecessors gave their consent, the plaintiff cannot complain of the eviction and the defendant has no obligation towards the plaintiff.

Whether the plaintiff had knowledge at the time of the sale of the restrictive covenants was immaterial. The purchaser who purchases at his own risk is considered by art. 1510 of the *Civil Code* on the same footing as the purchaser who knew the danger of eviction.

The contention, based on art. 1509 of the Code, that the eviction resulted from the personal acts of the defendant is untenable. The eviction in the present case was not the result of a right exercised or created by the defendant, but was the result of a right exercised by the Crown and which it had reserved to itself in the deed of cession.

The sale of 1955 was not a contract null *ab initio* as having no object, cause and consideration on the ground that the defendant had no rights in the lands at the time of the sale in view of the use which was made of the lands. The defendant city had rights in these lands. The contention that the vendor, who sells his rights to a buyer who buys them at his own risk, made a contract without object, cause and consideration, because subsequently the rights which he thought he had were judicially declared null or annulled, deprives the stipulation that the buyer bought at his own risk from all meaning and effect and allows the buyer to have against the seller the very recourses which the stipulation was intended to take away.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], affirming a judgment of Dorion C.J. Appeal dismissed.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], confirmant un jugement du Juge en Chef Dorion. Appel rejeté.

Jean Martineau, c.r., pour la demanderesse, appelante.

Bernard Lesage, pour la défenderesse, intimée.

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:—Lévis Mushroom Farm Inc., ci-après appelée la compagnie, a poursuivi la Cité de Lévis pour obtenir l'annulation d'une vente d'immeubles pour cause d'éviction, ainsi que les dommages lui en résultant. La Cour supérieure a rejeté cette action avec dépens. Son jugement fut confirmé par une décision unanime de la Cour d'appel[1]. La compagnie se pourvoit à l'encontre de cette décision.

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[1] [1966] B.R. 918.

Voici les faits conduisant à ce litige. Le 20 juillet 1949, le Gouvernement du Canada octroyait et cédait, par lettres patentes, à la Cité de Lévis, pour une considération nominale de un dollar, certains terrains situés à Lévis, connus ou désignés sous le nom de Fort nº 2 et sur lesquels se trouvent érigées de vieilles fortifications. Ces lettres patentes furent émises aux conditions suivantes:

a) que la concessionnaire préserve et entretienne en bon état de réparation les vieilles fortifications situées sur lesdits terrains et que les terrains susdits servent uniquement comme parc public;

b) que si les terrains susmentionnés sont employés à toute autre fin que celle d'un parc public ou si les vieilles fortifications ne sont pas préservées et entretenues en bon état de réparation, le titre desdits terrains reviendra à Nous.

Cet acte de concession fut publié par enregistrement aux Bureaux du Secrétariat d'État le 31 août 1949 et à celui de la Division d'enregistrement de Lévis le 19 octobre 1949.

Le 30 décembre 1953, la Cité loua sept des voûtes de pierre souterraines du Fort, pour une période de dix ans, à une société en nom collectif intéressée à la production et vente de champignons de couche et faisant affaires sous le nom de Lévis Mushroom Reg'd. Au bail intervenu entre les parties, on trouve les stipulations suivantes:

1. Que les dites voûtes devront servir uniquement pour la production et la vente de champignons de couche à défaut de quoi le présent bail sera nul de plein droit;

6. Que l'empaquetage, l'expédition et la mise en boîtes se fassent à Lévis, à défaut de quoi le présent bail deviendra nul et sans effet;

7. Que la dite société utilise le plus possible de la main d'œuvre de Lévis;

Le 12 juillet 1955, la société Lévis Mushroom Reg'd vendit son entreprise au prix de $50,000 à Ludger Audet et Amédée Labonté et renonça à son bail. Le même jour, la Cité vendit, pour une considération nominale de $1,000 à Audet et Labonté, qui les achetèrent à leurs risques et périls, tous ses droits sur les lieux originairement loués à Lévis Mushroom Reg'd et la plupart des autres voûtes et une grande partie des terrains. L'acte de vente, signé devant le notaire Pierre Lemieux, alors greffier de la Cité, comporte, entre autres, les conditions ci-après:

Le toit du Fort No. 2 qui a été incendié devra, soit être réparé ou soit être enlevé pour poser de la pelouse ou de l'asphalte, et le travail devra être fait dans l'année qui suit la signature des présentes.

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Advenant que les acquéreurs n'opèrent plus, aux lieux vendus, le commerce pour la production et la vente de champignons, les lieux vendus retourneront de plein droit à la Cité de Lévis, sans que la Cité soit tenue de payer quoi que ce soit;

Les lieux vendus ne pourront être vendus ou transférés à quiconque sans la permission de la Cité de Lévis, à moins que les ventes ou les transferts soient faits (sic) pour la continuation de la production et la vente des champignons, auxquels cas la vente ou le transfert sera permis, mais les acquéreurs ou leurs représentants futurs seront soumis à toutes et chacune des clauses du présent contrat.

Ce contrat fut enregistré au Bureau d'enregistrement de la Division de Lévis le 19 juillet 1955.

Le 2 septembre 1955, Audet acheta les intérêts de Labonté et devint, en conséquence, le seul propriétaire de l'entreprise qu'il revendit lui-même en juin 1956, pour $9,500 payés en actions, à la compagnie appelante qu'il avait organisée. Par la suite, Audet continua, comme avant, à conduire l'entreprise.

Dès le 23 juillet 1955, la validité de la vente intervenue entre la Cité et l'appelante fut mise en question dans une lettre de protestation que le Président du Comité d'urbanisme de la Cité adressa au Maire. L'affaire fit manchette dans un journal hebdomadaire de la région. C'est alors que les autorités municipales qui avaient participé à autoriser cette vente, ainsi que le notaire Lemieux qui n'avait pas vérifié le titre de la Cité et s'était limité à référer à l'index aux immeubles, et que Audet lui-même auraient appris que le droit de propriété concédé par la Couronne à la Cité était assujetti à certaines restrictions.

En présence de cette situation, la Cité informa immédiatement les autorités fédérales du fait de cette vente et les pria de renoncer aux conditions restrictives de la concession. Celles-ci répondirent le 31 août 1955, qu'elles ne pouvaient se rendre à cette demande. Ce n'est toutefois que plusieurs années après, soit le 30 mars 1960, qu'invoquant ces conditions restrictives, elles logèrent en Cour de l'Échiquier une information dirigée contre la Cité, l'appelante et ses auteurs pour faire constater le défaut de la Cité de satisfaire à ces conditions, et demander l'annulation de la concession, la rétrocession du Fort et des terrains et, si

nécessaire, l'expulsion par justice. Ces procédures ne furent pas contestées et, par jugement rendu le 18 octobre 1960, la Cour fit droit à la demande de la Couronne.

Bien que l'appelante n'ait abandonné ses opérations qu'au début de 1960, elle avait institué contre la Cité l'action qui nous concerne, à la fin de décembre 1958. Dans cette action, elle prétend principalement avoir été victime de fraude et de mauvaise foi de la part de la Cité de Lévis et demande l'annulation de la vente du 12 juillet 1955 et les dommages lui résultant de son éviction. La Cour supérieure et la Cour d'appel furent unanimes à rejeter, comme mal fondée, cette allégation de fraude et de mauvaise foi. Rien au dossier ne justifie, à mon avis, de faire exception à la règle de non-intervention, suivie en cette Cour, dans les cas où, sur une question de fait, il y a accord de vues entre la Cour supérieure et la Cour d'appel. Je trouve d'ailleurs bien fondée l'opinion des deux Cours voulant que l'acte de vente du 15 juillet 1955 ait été consenti de bonne foi, suivant l'acceptation générale de ce terme. Ainsi donc, c'est dans cette optique que doivent être considérées les stipulations auxquelles les parties ont donné leur accord, ainsi que les propositions soumises par l'appelante à l'encontre du jugement de la Cour d'appel.

Le contrat est, ainsi que la preuve l'établit, conforme au modèle de contrat généralement suivi par la Cité de Lévis. Il ne réfère pas au titre de la venderesse. Il spécifie clairement ce qui fait l'objet de la vente, ainsi que les conditions auxquelles les parties y ont consenti. L'on y voit que ce que la Cité a vendu aux auteurs de l'appelante et ce que ces derniers ont accepté d'acheter, ce ne sont pas les immeubles désignés à l'acte, mais tous les droits que la Cité possédait alors dans ces immeubles. Cela apparaît au premier paragraphe du contrat.

> LA CITÉ DE LÉVIS vend aux dits Amédée Labonté et Ludger Audet, ce acceptant tous les droits qu'elle possède dans les immeubles suivants, savoir:—(suit la désignation).

Il appert, de plus, aux derniers paragraphes de la convention que la Cité, d'une part, n'a entendu prendre aucune responsabilité et que les acheteurs, d'autre part, ont acheté les droits de la Cité à leurs risques et périls:

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De plus la dite vente est faite sujette à toutes autres charges pouvant affecter lesdites parties de lot, et sans aucune responsabilité de la Cité, les acquéreurs déclarant bien connaître les lieux présentement vendus et n'en point désirer plus ample désignation.

La présente vente est consentie aux risques et périls des acquéreurs.

Ces stipulations sont claires, non ambiguës et ne requièrent aucune interprétation. Elles expriment la commune intention et font la loi des parties. Ainsi donc et tel qu'elles en avaient le droit et la liberté (1507 C.C.), celles-ci ont exclu toute forme de garantie, la garantie légale aussi bien que la garantie conventionnelle. En droit, leurs stipulations équivalent à une stipulation de non-garantie ou rendent celle-ci superflue; le vendeur demeure quand même obligé à garantir l'acheteur de l'éviction de la chose vendue en raison de son fait personnel (1509 C.C.), et si telle n'est pas la cause de l'éviction et que l'acheteur connaissait, lors de la vente, le danger de l'éviction ou qu'il a acheté à ses risques et périls, le vendeur n'est même pas tenu à la restitution du prix de la chose vendue (1510 C.C.). Dans ce cas, il ne doit rien à l'acheteur. C'est que ce dernier a fait un contrat aléatoire et le prix de la chose vendue a été fixé en conséquence. Ce qu'il a acquis, c'est moins la chose elle-même que la prétention plus ou moins certaine du vendeur, c'est la chance de devenir propriétaire incommutable. *Mignault—Droit civil canadien,* vol. 7, p. 88; *Trudel—Traité de Droit civil du Québec,* vol. 11, p. 247, n° 277; *Beaudry-Lacantinerie—Droit civil, De la vente et de l'échange,* 2e éd., p. 346, n° 409; *Planiol et Ripert—Droit civil,* vol. 10, 2e éd., p. 133, n° 124; *Colin et Capitant—Droit civil français,* 3e éd., tome 3, p. 476; *Juris-Classeur civil,* art. 1627-1629, p. 10, n° 67; *Girard et al. v. Villeneuve*[2].

En fait, et bien que cette portée juridique du contrat n'en puisse être altérée, il n'est pas sans à-propos de constater au dossier qu'après avoir appris en août 1955 que le droit de propriété consenti par la Couronne à la Cité était affecté de restrictions, Audet n'en continue pas moins les opérations; il poursuit les travaux de réparations du toit incendié le 23 avril 1955; en septembre 1955, il informe la

[2] [1957] B.R. 281.

Cité d'un programme d'expansion; en octobre suivant, il décide de faire des constructions nouvelles; en novembre 1957, il reconstruit les installations qu'un nouvel incendie vient de détruire sur une longueur de 200 pieds; enfin, il n'abandonne les opérations qu'en janvier 1960. Ces faits, nonobstant certaines attitudes qu'il prend de temps à autre, soi-disant pour ne pas compromettre ou pour réserver ses droits ou ceux de l'appelante, permettent, à mon avis, de penser qu'on a persisté, pendant plusieurs années et jusqu'à ce que la Couronne décide de prendre action, à courir la chance que les difficultés soient favorablement solutionnées. Quoi qu'il en soit et au regard du contrat auquel les auteurs de l'appelante ont donné leur accord, je suis, à l'instar du Juge de la Cour supérieure et de ceux de la Cour d'appel, clairement d'avis que l'appelante ne peut être reçue à se plaindre de l'éviction et que la Cité ne lui doit rien.

A l'encontre du jugement de la Cour d'appel, l'appelante soumet, en premier lieu, qu'elle n'avait, au moment de la vente, aucune connaissance, actuelle ou présumée, des conditions restrictives du droit de propriété concédé à la Cité par la Couronne. En présence des faits, des stipulations au contrat et de leur portée juridique, je ne crois pas qu'il y ait lieu de s'arrêter à considérer la question. Il importe peu, à mon avis, que cette prétention de l'appelante soit fondée ou non. L'article 1510 C.C. distingue, en fait, et traite sur un pied d'égalité, en droit, le cas de celui qui a acheté à ses risques et périls et le cas de l'acheteur qui, lors de la vente, connaissait le danger d'éviction. La connaissance du danger d'éviction n'est pas le seul fait qui donne ouverture à l'application des dispositions de cet article.

L'appelante prétend ensuite que son éviction fut causée par les faits personnels de la Cité, soit par le bail que celle-ci a consenti le 30 décembre 1953 à la société Lévis Mushroom Reg'd, et la vente qu'elle a consentie le 15 juillet 1955 à Audet et Labonté, les auteurs de l'appelante. Elle invoque les dispositions de l'article 1509 C.C. Cet article prescrit que le vendeur demeure toujours obligé à la garantie de ces faits qui lui sont personnels et que toute convention contraire est nulle. La raison de cette nullité

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apparaît, particulièrement, au passage suivant de *Beaudry-Lacantinerie*, vol. 19, n° 403, p. 410:

> Le vendeur ne peut donc, par aucune stipulation, s'affranchir de la garantie à raison des faits qui lui sont personnels. Ainsi le vendeur répondrait, nonobstant toute stipulation contraire, de l'éviction résultant d'une aliénation par lui consentie antérieurement ou postérieurement à la vente et qui serait opposable à l'acheteur comme ayant été transcrite la première. A ce sujet, la garantie est de l'essence de la vente. Le législateur a considéré que la stipulation par laquelle le vendeur chercherait à se soustraire à la garantie de l'éviction résultant de son fait personnel équivaudrait à la stipulation qu'il ne serait pas responsable de son dol; or *illud nulla pactione effici potest ne dolus praestetur*...

Comme déjà indiqué, ce que la Cité a vendu aux auteurs de l'appelante et ce que ceux-ci ont accepté d'acheter à leurs risques et périls, ce ne sont pas les immeubles dont l'appelante fut évincée, mais ce sont les droits que la Cité possédait dans ces immeubles. Ces droits, la Cité les a livrés à l'appelante. Le sens propre qu'il faut donner aux mots *fait personnel* dans ces dispositions du Code, est ainsi précisé au *Juris-Classeur civil*, art. 1627-1529, p. 8, n° 51:

> Par les mots «fait personnel», on doit entendre l'effet d'un droit exercé par le vendeur lui-même ou une personne au profit de laquelle il l'a créé...

L'éviction, dont se plaint l'appelante, ne résulte pas d'un droit exercé ou créé par la Cité, mais d'un droit exercé par la Couronne et que celle-ci s'est constitué ou réservé en conditionnant l'acte de concession à des restrictions afférentes au droit de propriété concédé, par lettres patentes, à la Cité de Lévis.

L'appelante soumet enfin, comme dernière proposition, que la vente du 12 juillet 1955 est une convention nulle *ab initio*, parce que dépourvue d'objet, de cause et de considération. Cette proposition a comme prémisse la prétention, qu'au moment de la vente, la Cité n'avait aucun droit quelconque sur ces terrains, vu leur utilisation à des fins autres que comme parc public et vu la présence, aux lettres patentes, de la clause de réversion du titre à la Couronne. A mon avis, cette prétention ne peut être accueillie. La Cité avait des droits. Elle était alors en possession paisible des terrains; elle pouvait soutenir, avec succès, une action possessoire contre les tiers qui auraient voulu les occuper

sans son consentement et la Couronne,—qui avait la faculté mais non l'obligation de reprendre son titre et qui laissa d'ailleurs passer plusieurs années sans s'en prévaloir,—ne pouvait, à moins d'obtenir et jusqu'à ce qu'elle obtienne un jugement annulant ou déclarant nuls les droits de la Cité, s'emparer de ces terrains ou en disposer sans l'acquiescement de celle-ci. La prétention que le vendeur, qui a vendu ses droits à un acheteur qui les a achetés *à ses risques et périls,* a fait une convention dépourvue d'objet, de cause et de considération, parce qu'il arrive subséquemment que les droits qu'il croyait avoir sont judiciairement déclarés nuls ou annulés, dépouille de tout sens, portée et effet la stipulation que l'acheteur a acheté à *ses risques et périls* et permet à l'acheteur de prendre contre le vendeur les recours que la stipulation a précisément pour objet d'écarter.

Pour ces raisons, et après avoir attentivement considéré tous les moyens invoqués par l'appelante, à l'audition et dans son factum, je dois conclure, à l'instar du Juge de la Cour supérieure et de tous les Juges de la Cour d'appel, au mal fondé de l'action instituée par l'appelante contre la Cité intimée.

Je rejetterais l'appel avec dépens.

Appel rejeté avec dépens.

Procureurs de la demanderesse, appelante: Martineau, Walker, Allison, Beaulieu, Tetley & Phelan, Montréal.

Procureurs de la défenderesse, intimée: Germain, Pigeon, Thibaudeau & Lesage, Québec.

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*May 29, 30
Oct. 1

IDA RUCH and WILLIAM RUCH (*Plaintiffs*) ..... APPELLANTS;

AND

COLONIAL COACH LINES LIMITED (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Standard of care—Passenger reclining on rear seat of bus—Injuries sustained when bus passed over bump—Whether carrier negligent in failing to warn of danger in using rear seat in reclining position.

The female plaintiff suffered injuries while she was a passenger on an overnight trip in a bus owned by the defendant company. The plaintiff stated that at the time she was injured she was "reclining" with her back propped against the side of the bus and her legs stretched out across the three rear seats when the vehicle went over a bump and she was bounced around, causing her to hit her hip and back on the window ledge. The jury found no negligence on the part of the driver, but found that the defendant was negligent in failing to warn the plaintiff of the hazard inherent in using the back seats of the bus in a reclining position. No such negligence had been pleaded but after the verdict the trial judge permitted an amendment to the statement of claim whereby such negligence was alleged. The judgment rendered at trial was reversed on appeal to the Court of Appeal. An appeal from the Court of Appeal's judgment was then brought to this Court.

Held (Spence J. dissenting): The appeal should be dismissed.

Per Martland, Judson, Ritchie and Hall JJ.: In the circumstances of this case no duty lay upon the carrier to warn its passengers not to recline on the back seat of its bus. Nor was it in any other way in breach of its undertaking to take all due care of its passengers and to carry them safely as far as reasonable care and forethought could attain that end.

Per Spence J., *dissenting*: The amendment to the statement of claim was proper and the plaintiffs were entitled to recover on the basis of negligence found by the jury. The company's driver and its depot employees, realizing that passengers almost inevitably would doze or sleep as the bus proceeded during the night, should have warned the passengers that they might recline safely in the seats on either side of the aisle but that it was most dangerous to lie along the unprotected rear seat. Failure to do so was failure to meet the standard of care set by this Court in *Day v. Toronto Transportation Commission*, [1940] S.C.R. 433.

[*Kauffman v. Toronto Transit Commission*, [1960] S.C.R. 251, applied; *De Courcey v. London Street Railway*, [1932] O.R. 226, distinguished.]

*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

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APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from, and setting aside, a judgment of Costello Co.Ct.J. Appeal dismissed, Spence J. dissenting.

Edward J. Houston, Q.C., and *Gordon P. Killeen*, for the plaintiffs, appellants.

E. Peter Newcombe, Q.C., and *John I. Tavel*, for the defendant, respondent.

The judgment of Martland, Judson, Ritchie and Hall JJ. was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] allowing an appeal from, and setting aside, the judgment rendered at trial by Costello Co.Ct.J., pursuant to the verdict of a jury whereby the female appellant was awarded $15,000 and the male appellant $6,093.85 in respect of damage suffered by Mrs. Ruch when she was a passenger in a bus owned by the respondent Colonial Coach Lines Limited.

At the time when she was injured, Mrs. Ruch has stated that she was "reclining" with her back propped against the side of the bus and her legs stretched out across the three rear seats when the bus went over a bump and she was bounced around, causing her to hit her hip and back on the window ledge. By its verdict the jury found that the plaintiff's injuries were not caused by any negligence on the part of the bus driver, but gave the following particulars of the negligence which they found against the appellant:

> The defendant Colonial Coach Limited was negligent in not warning Ida Ruch of the danger inherent in using the back seats of the bus in a reclining position. This warning could have been given by a suitable sign posted over the seats or by other means.

No such negligence had been pleaded by the appellants but after the verdict they were given leave to amend the statement of claim by adding para 5(*a*) in the following terms:

> In the further alternative the plaintiffs say that the defendant Colonial Coach Limited was negligent in not warning its passengers of the danger inherent in using the back seats of the bus when in a reclining position.

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[1] [1966] 1 O.R. 621, 54 D.L.R. (2d) 491.

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Ritchie J.

I am in complete agreement with the reasons for judgment rendered on behalf of the Court of Appeal by Mr. Justice MacGillivray and I have very little to add to those reasons.

It does, however, seem to me to be desirable to adopt the clear statement regarding the duty of carriers to their passengers which is to be found in the reasons for judgment rendered by Kerwin C.J., on behalf of himself and Mr. Justice Judson in this Court in *Kauffman v. Toronto Transit Commission*[2], where he said:

> While the obligation upon carriers of persons is to use all due, proper and reasonable care and the care required is of a very high degree, *Readhead v. Midland Railway Co.* (1869), L.R. 4 Q.B. 379, such carriers are not insurers of the safety of the persons whom they carry. The law is correctly set forth in Halsbury, 3rd ed., vol. 4, p. 174, para. 445, that they do not warrant the soundness or sufficiency of their vehicles, but their undertaking is to take all due care and to carry safely as far as reasonable care and forethought can attain that end.

Like Mr. Justice MacGillivray, I do not feel that in the circumstances of this case any duty lay upon the carrier to warn its passengers not to recline on the back seat of its bus, or that it was in any other way in breach of its undertaking to take all due care of its passengers and to carry them safely as far as reasonable care and forethought could attain that end, but the appellant's counsel has laid great stress on one passage in the reasons for judgment of Fisher J.A. in *De Courcey v. London Street Railway*[3], where it was held that the carrier was liable to a passenger who fell forward from the front seat of a bus when it came to a sudden stop and it was found that there was a lack of care and foresight on the part of the carrier in not having a rail or guard in front of the unprotected front seat. The passage from Mr. Justice Fisher's decision upon which the appellant relies reads as follows:

> The fact that the passenger was thrown from the seat on which she was invited to sit without negligence on her part is proof that the seat was not safe, and under the cases the onus was on the company to show it could not have been made safer than it in fact was.

This appears to me to be tantamount to saying that whenever a passenger is thrown from one of the seats of a

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[2] [1960] S.C.R. 251 at 255.

[3] [1932] O.R. 226, 2 D.L.R. 319.

public vehicle without negligence on his part, the rule embodied in the maxim *res ipsa loquitur* applies so as to place upon the carrier the burden of proving that the seat could not have been made safer than it in fact was, and if the learned judge intended to give expression to any such general proposition, then with all respect I feel it desirable that such a proposition should be rejected. It was proved through the respondent's general manager that the bus seats in the present case were up to date and of a type in general use in the industry and I do not think that the mere fact of a passenger being thrown from such a seat through collision or sudden stop necessarily affords proof that the seat itself was unsafe.

The facts of the *De Courcey* case were, in my opinion, clearly distinguishable from those with which we are here concerned because the unguarded front seat in the London Street Railway bus did obviously present a hazard to a passenger occupying it when the bus came to a sudden halt, but it should also be remembered that in the *De Courcey* case there was a finding that the driver was negligent whereas in the present case the jury has absolved the driver from any negligence whatever.

As I have indicated, I adopt the reasoning of Mr. Justice MacGillivray in the Court of Appeal and would therefore dismiss this appeal with costs.

SPENCE J. (*dissenting*):—This is an appeal from the judgment of the Court of Appeal for Ontario[4] pronounced on October 20, 1965, whereby that Court allowed the appeal of the defendants from the judgment of the County Court of the County of Carleton delivered on November 23, 1964, after a trial in that Court with a jury. By such judgment of the County Court, the plaintiff William Ruch recovered from the defendant the sum of $6,093.85 and the plaintiff Ida Ruch recovered from the defendant the sum of $15,000.

The plaintiff Ida Ruch had purchased from Allan's Travel Service in Ottawa a ticket for a return trip from Ottawa to New York City by bus and for a two-day stop

[4] [1966] 1 O.R. 621, 54 D.L.R. (2d) 491.

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over in the latter city. The plaintiff testified that she was assigned a seat in the bus, when it was departing from Ottawa for New York City, by an office employee of Allan's Travel Service. That seat was the one which was situated across the rear end of the bus and was capable of bearing three passengers. The seat was a straight seat with no arm rests and it ran from the one side wall of the bus to the wall of the powder room in the other corner of the bus. A small aisle which the plaintiff said was about two feet in width ran across the front of that seat and then the main aisle of the bus ran forward to the front with seats on each side of it, in rows, for two persons each. Those seats running up the bus had arm rests on the outside, that is, close to the wall of the bus, and also on the side next to the aisle, but no arm rests between the two passengers occupying the seats.

The bus left Ottawa at about 8:00 p.m. on Friday and, driving all night, arrived at New York City early the next morning. At the end of the holiday weekend on October 11, 1960, at about 8:00 p.m., the bus left the New York terminal for its return overnight trip to Ottawa. The plaintiff Ida Ruch, although she sat in another seat in the bus for the first half-hour or so after leaving New York, returned to her original seat at the back of the bus and sat in that seat until about 2:00 a.m. when, according to the evidence of the driver one Lewis Shane, the bus developed a defective tire and the driver was forced to make a stop of about one hour while the tire was changed. The bus then proceeded on its way. This occurred near Booneville in the State of New York.

The plaintiff, when she retired to the rear seat of the bus, stretched out along the length of the seat. It being for the accommodating of three persons was too short to permit her to lie at full length on the seat so she occupied a semi-reclining position with her back against the opposite wall of the bus and her legs and feet along the seat her feet being toward the powder room. According to her evidence at trial, she was dozing but more awake than asleep when the bus struck either some obstruction in the road or some

pothole, and she was thrown in the air coming down with her back and side against the side wall of the bus, and thereby sustaining the injury which was the basis of her action.

The bus driver, giving evidence at trial in November 1964, had no memory whatsoever of the bus having struck any such object.

It was the plaintiff's evidence that no one and particularly not the driver Shane had given her any instructions or advice or suggestion as to how she should occupy the seat in the bus. Of course, this bus and for that matter no other bus had any seat belts and there was no protection whatsoever to prevent the passengers on the rear seat of the bus falling forward or in any other direction. The passengers who sat in the seats at either side of the main aisle, of course, were sitting only a very short distance behind the seat of the row in front and if tossed forward or upward by the motion of the bus had means of steadying themselves by grasping the upholstered seat in front of them or by grasping the arm rests, one being available to each such passenger. Neither of these protections was available to any passenger occupying this rear seat. In addition, of course, the rear seat being at the end of the bus body any motion of the bus upward due to unevenness of the road would have its maximum effect there. The seats on either side of the aisle were so arranged that the occupant of each seat could place the back of the seat in a sloping position and then the passenger occupying such seat would recline in an angle which was said to be even as much as 45 degrees, and yet be sitting in the seat facing forward, so that a tossing motion would leave such passenger able to protect himself in any of the fashions which I have outlined. The passenger stretched along the rear seat, that is, lying at right angles to the line of travel of the bus, with no protection by way of arm rests or the back of the seat in front of him, would be in the very hazardous position of having no opportunity to protect himself if the bus made a sudden stop or if the rear of the bus were tossed in the air as it went over any kind of a

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bump in the road. In travel on a highway, the necessity of making a rapid decrease in the speed of the vehicle may occur on many occasions. No highway is so perfect that there may not occur occasions when the vehicle receives a heavy bump when passing over the road such as will inevitably cause passengers to be tossed around. In either of those cases, the passengers in the seats to each side of the aisle have a considerable measure of protection available to them. The passenger stretched out on the rear seat, as was the plaintiff, has none.

This bus had been travelling all night from Ottawa to New York City and was returning to Ottawa from New York City by night. Such a course was not unusual. The driver, Lewis Shane, swore that he had taken the trip about ten times a year and that about half of those trips had been night trips. A fellow passenger, Mrs. Warren, giving evidence for the plaintiff swore that she had taken seven such previous trips to New York and that they were usually at night. One occupant after another of the bus gave evidence that the lights were dimmed and that nearly everyone in the bus appeared to be asleep. In short, it was the regular course of the defendant Colonial Coach Ltd. to encourage occupants of the bus during this all night trip to recline and to sleep. The seats along the aisle were designed to permit such reclining. The lights in the bus were dimmed for this reason and it was the usual thing for the passengers to board and then sleep or doze as the bus drove through the night between the two cities.

The learned trial judge submitted to the jury the following questions:

1. Were the injuries to the Plaintiff caused by any negligence on the part of the Defendant Colonial Coach Lines Limited. Answer "yes" or "no".

ANSWER: Yes.

2. If your answer to question one is "yes", state fully in what such negligence consisted.

ANSWER: The Defendant, Colonial Coach Limited was negligent in not warning Ida Ruch of the hazard inherent in using the back seats of the bus in a reclining position. This warning could have been given by a suitable sign posted near the seats or by other means.

3. Were the injuries to the Plaintiff caused by any negligence on the part of the Defendant's driver, Lewis Shane? Answer "yes" or "no".

ANSWER: No.

4. If your answer to question three is "yes" state fully in what such negligence consists.

ANSWER:

Therefore, the jury's answers were that there was negligence on the part of the defendant Colonial Coach Limited and the jury outlined that negligence in their answer to question 2 in the fashion I have set out. The jury, however, negatived any negligence on the part of the driver. The allegations of the plaintiff that the driver drove negligently and caused the vehicle to bump over some obstruction or pothole in the road having thus been negatived by the jury need not be further considered, and the sole question this Court has to determine is whether the plaintiffs are entitled to recover upon the jury's answers to questions 1 and 2 on its finding against the defendant Colonial Coach Limited.

In the Court of Appeal, McGillivray J.A., giving the reasons for judgment of the Court, accepted the grounds for appeal cited by the appellant as follows:

4. The finding of negligence was not a proper one.

5. The finding of negligence made was not supported by the evidence.

Although McGillivray J.A. cited many English authorities, I think it may be said that he relied on the decision of the Court of Appeal for Ontario in *Kauffman v. Toronto Transit Commission*[5], as later affirmed in this Court in [1960] S.C.R. 251. Although, of course, general principles as enunciated in the reasons for judgment in that case are applicable, the case must be understood as being one upon the facts there in issue. Those facts were very different from those which are present in this appeal. In the *Kauffman* case, the plaintiff had been a passenger on an escalator in one of the local subway stations in Toronto and immediately ahead of her was a man preceded by two

[5] [1959] O.R. 197.

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boisterous youths. The latter engaged in some juvenile horseplay with the result that they fell against the man riding up the escalator behind them and then all three tumbled against the plaintiff with the result that the four fell to the bottom of the escalator. The issues considered in all Courts in the *Kauffman* case were the sufficiency of the handrail on the side of the escalator and the necessity or non-necessity of having a guard posted at each escalator. I do not regard the circumstances in that case as having the slightest resemblance to those in the present appeal, and I am of the opinion that the question the Court must determine here is as to whether there should be liability upon the carrier if that carrier provides equipment for overnight travel, encourages sleeping and reclining during that overnight travel, and then fails to warn passengers of the danger of taking any such extremely hazardous position in the vehicle as was occupied by the plaintiff in the present case.

I am of the opinion that the liability of the carrier is supported by some of the authorities to which McGillivray J.A. referred in his reasons. McGillivray J.A. quoted and adopted Morden J.A.'s judgment in the *Kauffman* case, and that learned justice in turn relied on the words of Lord Dunedin in *Morton v. Dixon*[6], at p. 809, as follows:

> Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of the fault of omission should be one of two kinds, either—to shew that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or—to shew that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it.

And then Morden J.A. continued at p. 203:

> After quoting these words, Lord Normand said in *Paris v. Stepney*, [1951] A.C. 367 at p. 382:—
>
> > The rule is stated with all the Lord President's trenchant lucidity. It contains an emphatic warning against a facile finding that a precaution is necessary when there is no proof that it is one taken by other persons in like circumstances. But it does not detract from the test of the conduct and judgment of the reasonable and prudent man.

[6] [1909] S.C. 807.

> If there is proof that a precaution is usually observed by other persons, a reasonable and prudent man will follow the usual practice in the like circumstances. Failing such proof the test is whether the precaution is one which the reasonable and prudent man would think so obvious that it was folly to omit it.

It is true that in the present case there was no proof that a precaution such as warning signs or some other means was used customarily in other examples of bus travel, but even in the absence of any such evidence surely the second test, as put by Lord Normand in *Paris v. Stepney,* quoted above, is whether the precaution is one which the reasonable and prudent man would think so obvious that it was folly to omit it as applicable. Surely the driver of this bus, and surely the employees in the bus depot in Ottawa before the first overnight trip had commenced, realizing that passengers almost inevitably would doze or sleep as the bus proceeded during the night, should have warned the passengers that they might recline safely in the seats on either side of the aisle but that it was most dangerous to lie along the unprotected rear seat. In my view, failure to do so was failure to meet the standard of care set by this Court in *Day v. Toronto Transportation Commission*[7], in the words of Hudson J. at p. 441:

> Although the carrier of passengers is not an insurer, yet if an accident occurs and the passenger is injured, *there is a heavy burden on the defendant carrier to establish that he had used all due, proper and reasonable care and skill to avoid or prevent injury to the passenger.*

(The italicizing is my own.)

That statement was adopted by this Court in *Harris v. Toronto Transportation Commission*[8], *per* Ritchie J. at p. 464.

I am further of the opinion that the respondent Colonial Coach and its driver Shane could not rely on any employee of Allan's Travel Service to discharge the respondent's duty to warn its passengers of such a hazard.

Therefore, subject to what I shall say herein as to the form of the pleadings, it would seem to me that the finding of negligence as against the defendant Colonial Coach Lim-

[7] [1940] S.C.R. 433.

[8] [1967] S.C.R. 460.

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ited is the proper finding of negligence, that is, a finding of a breach of its duty toward its passenger the plaintiff Ida Ruch and that is fully supported by the evidence.

The endorsement of the writ of summons issued by the plaintiff reads as follows:

> The plaintiffs claim from the Defendant damages representing personal injuries sustained by the Plaintiff, Ida Ruch, and out-of-pocket expenses sustained by the Plaintiff, William Ruch. The Plaintiffs say that the said damages were the result of the failure of the Defendant to carry the Plaintiff, Ida Ruch, safely in one of its motor vehicles on a voyage between the City of New York, in the State of New York and the City of Ottawa, in the Province of Ontario. In the alternative, the Plaintiffs claim is for negligence on the part of the operator of the said motor bus, in the manner in which the said motor bus was being operated.

The plaintiffs in their statement of claim in paragraphs 4 and 5 said:

> 4. The female Plaintiff says, as the fact is, that the injuries which she sustained which are more particularly hereinafter set forth, were caused by the negligence of the operator of the bus acting within the scope of his employment and whose negligence the Defendant is responsible in law in that:
>
> (a) He was operating the said bus at a high and improper rate of speed;
>
> (b) He was not keeping a proper lookout;
>
> (c) He failed to apply his brakes in a timely and proper manner or at all.
>
> 5. In the alternative, the Plaintiffs say that the Defendant was guilty of a breach of its contract with the female Plaintiff for the safe carriage of her in the said bus.

Counsel for the plaintiffs in his opening remarks to the jury said:

> We expect to prove to your satisfaction that these injuries were sustained on this bus and arose from the negligence of the Defendant carrier and through the breach of this contract for safe carriage of Ida Ruch. We will lead evidence of fellow passengers on the Colonial Coach Lines bus to establish how that accident happened of which she sustained her injuries and we have to show by a balance of probabilities, or a preponderance of evidence, which His Honour will explain to you as a matter of law, we have to show to you that the Defendant company is fully responsible for those injuries sustained by the Plaintiff, Ida Ruch, and we hope to show you by way of the evidence of the female Plaintiff and her husband and some of the other witnesses I have indicated, she has suffered substantial damages and we will ask you to award substantial damages to her on the basis of the evidence led in this case.

Upon the jury returning the verdict which I have outlined above, counsel for the plaintiffs moved for leave

to amend the statement of claim by the addition of paragraph 5(a). After some considerable argument, that motion was allowed and the said para. 5(a) was added, reading as follows:

> 5(a) *In the further alternative, the Plaintiffs say that the Defendant Colonial Coach Lines Ltd. was negligent in not warning its passengers of the hazards inherent in using the back seats of its bus in a reclining position.*

That amendment was the subject of serious objection in the Court of Appeal and again in this Court, and it was said that the plaintiffs by such amendment were in effect introducing a new cause of action and that such new cause of action was in fact introduced after the limitation period provided by the Ontario *Highway Traffic Act* had elapsed.

I am of the opinion that in view of the terms of the endorsement on the writ of summons which I have quoted above, the plaintiffs were not introducing any new cause of action but were simply outlining a new particular of negligence. The plaintiffs could not rely on para. 5 of the statement of claim as originally delivered as that paragraph alleges a contract of carriage between the plaintiffs and the defendant and the contract was made between the plaintiffs and Allan's Travel Service, which latter entity was not a party to the action. I am of the opinion that the plaintiffs, therefore, require the allegation in the amendment to the statement of claim wrought by para. 5(*a*) of the statement of claim in order to be permitted to recover against the defendant. It is true that that allegation was only added after the verdict but it is difficult to see how the defendant was in any way prejudiced. If the proof of the allegation had depended on the production of evidence of what was customarily done by way of warning then I am ready to agree that it has not been clearly demonstrated that the defendant had notice and opportunity to produce such evidence. The fact was noted by McGillivray J.A. in his reasons for judgment in the Court of Appeal for Ontario. In my view, however, the defendant's liability is established not on the basis of what was customary in other cases but on the basis of what was lacking was a precaution which a reasonable and prudent man would think so obvious that it was folly to omit it. Such a finding

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needed no demonstration by evidence and was in fact made by the jury simply acting as persons of ordinary common sense.

For these reasons, I would allow the amendment as did the learned trial judge.

It is true that in this Court, counsel for the appellants sought to put the appellants' case on the basis of the maxim *res ipsa loquitur* pointing out in the words of Hudson J. in *Day v. Toronto Transportation Commission, supra,* what was a heavy burden on the defendant carrier to establish the use of the necessary skill and care and that the defendant had failed to discharge such a burden. I am, however, of the opinion that counsel for the respondent supplied an adequate answer to that submission when he pointed to the opening to the jury made by counsel for the plaintiffs where the counsel did not purport to rely in any way on the maxim and on the other hand assumed the burden of proof. In *Spencer v. Field,*[9] Davis J. said at p. 42:

> It is unnecessary for us in this case to consider whether or not that doctrine has any application to this case. It is sufficient in our view to observe that the case for the respondents was formulated in the pleadings and developed at the trial as an action of negligence against the appellant without any reference to the rule of *res ipsa loquitur*. And the case went to the jury, without any objection, on the basis of an action for negligence in which the burden lay upon the respondents. That being so, the respondents are not entitled upon an appeal to recast their case and put it upon a basis which had not been suggested at the trial.

However, having come to the conclusion that the amendment to the statement of claim was proper, I am of the opinion that the plaintiffs are entitled to recover on the basis of the negligence found by the jury and I would, therefore, allow the appeal with costs in this Court and in the Court of Appeal and restore the judgment of the County court.

Appeal dismissed with costs, SPENCE J. *dissenting.*

Solicitors for the plaintiffs, appellants: Soloway, Wright, Houston, Galligan & McKimm, Ottawa.

Solicitors for the defendant, respondent: Gowling, MacTavish, Osborne & Henderson, Ottawa.

[9] [1939] S.C.R. 36.

D. R. JONES ET J. A. MAHEUX (*Défendeurs*) ..... APPELANTS;

ET

HERMAN E. GAMACHE (*Demandeur*) ..... INTIMÉ.

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*Avr. 24, 25
Oct. 1

HERMAN E. GAMACHE (*Demandeur*) ..... APPELANT;

ET

LE MINISTRE DES TRANSPORTS (*Défendeur*) ..... INTIMÉ.

EN APPEL DE LA COUR DE L'ÉCHIQUIER DU CANADA

Couronne—Pilote—Classement des pilotes—Pouvoir de l'autorité de pilotage de faire des règlements—Invalidité des règlements établissant des classes de pilotes—Action en déclaration de nullité—Jugement, dispositif, opinion sur questions secondaires—Compétence de la Cour de l'Échiquier—Assignation du Ministre des Transports—Fonctionnaire—Loi sur la marine marchande du Canada, S.R.C. 1952, c. 29—Loi sur la Cour de l'Échiquier, S.R.C. 1952, c. 98, art. 29(c).

En juin 1960, les Règlements généraux de la circonscription de pilotage de Québec ont été modifiés par un arrêté du Gouverneur général en conseil pour autoriser l'autorité de pilotage de la circonscription à classer les pilotes au début de chaque saison de navigation, à les affecter selon leur classe à des navires de dimensions plus ou moins grandes et à déclasser ceux qui, de l'avis de l'autorité, sont incompétents ou inaptes. Au mois d'avril 1966, le demandeur, qui détenait un brevet de pilote dans la circonscription de pilotage de Québec depuis 1948, a été nommé dans la classe «A» par le défendeur Maheux, le surintendant des pilotes de la circonscription. En juillet 1966, le demandeur a été reclassifié pilote «B» sur l'instance du défendeur Jones qui était surintendant du pilotage au Ministère des Transports pour le motif que sa conduite, lors d'une collision survenue en 1963, avait été négligente bien qu'aucune sanction ne lui ait été imposée par le commissaire qui avait tenu l'investigation.

Dans son action dirigée contre Maheux et Jones et, par amendement subséquent, contre le Ministre des Transports en sa qualité d'autorité de pilotage du district, le demandeur a attaqué la validité des règlements en question. La Cour de l'Échiquier a maintenu l'action quant à Maheux et Jones, a prononcé l'invalidité des règlements et, alternativement, au cas où l'établissement de classes serait valide,

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*CORAM: Le Juge en Chef Cartwright et les Juges Fauteux, Ritchie, Spence et Pigeon.

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a déclaré que le demandeur avait droit d'être classé pilote «A». Cependant l'action a été rejetée à l'égard du Ministre. A l'audition de l'appel, cette Cour a accordé au demandeur la permission de former un contre-appel à l'encontre du rejet de l'action contre le Ministre, et le sous-procureur général du Canada, qui représentait les appelants, a accepté de comparaître pour le Ministre.

Arrêt: L'appel et le contre-appel doivent être accueillis.

Les dispositions de la *Loi sur la marine marchande du Canada* ont pour effet de donner à tout pilote breveté un droit acquis permanent. Cette loi ne permet pas à l'autorité de pilotage de modifier ce droit en établissant des classes de pilotes jouissant de droits inégaux dans une circonscription de pilotage. Les règlements établissant ces classes sont donc invalides.

L'action en déclaration de nullité des règlements était de la compétence de la Cour de l'Échiquier. Il ne s'agit pas ici d'une question purement théorique. Le demandeur subit dans l'exercice de sa profession des restrictions importantes et préjudiciables comme conséquence directe des règlements invalides qui lui sont appliqués.

Il faut retrancher du jugement la conclusion relative au classement du pilote pour le cas où l'établissement des classes serait valide. L'opinion du juge sur cette question devait se trouver dans les motifs non dans le dispositif.

L'action ne pouvait être dirigée, dans l'espèce, que contre le Ministre des Transports. Une telle action doit être dirigée contre la personne investie du pouvoir dont il s'agit de définir les limites. Ce pouvoir de faire des règlements est attribué à l'autorité de pilotage qui, dans la circonscription de Québec, est le Ministre des Transports, un «fonctionnaire» au sens du para. (*c*) de l'article 29 de la *Loi sur la Cour de l'Échiquier.*

L'action ne pouvait être intentée contre Jones. Rien ne démontre de façon satisfaisante qu'il ait des pouvoirs juridiques justifiant son assignation comme défendeur dans une telle action.

Quant à Maheux, n'étant pas chargé du classement des pilotes, il paraît douteux que l'on puisse le considérer apte à répondre à l'action en déclaration de nullité.

Crown—Pilot—Classification of pilots—Power of Pilotage Authority to make by-laws—Invalidity of by-laws establishing classes of pilots—Action asking for a declaration of nullity—Judgment, conclusion, opinion on secondary questions—Jurisdiction of the Exchequer Court—Action against Minister of Transport—Officer—Canada Shipping Act, R.S.C. 1952, c. 29—Exchequer Court Act, R.S.C. 1952, c. 98, s. 29(c).

In June 1960, the General By-laws of the Quebec Pilotage Authority were amended by order in Council so as to authorize the district pilotage authority to grade the pilots at the commencement of each season of

navigation, to assign them to vessels of various categories according to their grade and to reclassify pilots who, in the opinion of the authority, are incompetent or unsuitable. In April 1966, the plaintiff who had been a licensed pilot in the Quebec pilotage district since 1948, was classified as a grade "A" pilot by the defendant Maheux, the district supervisor of pilots. In July 1966, the plaintiff was reclassified as a grade "B" pilot at the instance of the defendant Jones, the superintendent of pilotage in the Department of Transport, on the ground that his conduct in a 1963 collision had been negligent although he had not been penalized therefor by the investigation Commissioner.

In his action against Maheux and Jones and, by subsequent amendment, against the Minister of Transport in his capacity as the Pilotage Authority for the district, the plaintiff contested the validity of the by-laws in question. The Exchequer Court maintained the action as against Maheux and Jones, declared the by-laws invalid and, alternatively, on the assumption that the establishment of a system of classes was valid, declared that the plaintiff was entitled to be classified as a class "A" pilot. The action was dismissed as against the Minister. At the hearing of the appeal, this Court granted leave to the plaintiff to cross-appeal as to the dismissal of the action against the Minister, and the Deputy Attorney General, who was representing the appellants, agreed to represent the Minister.

Held: The appeal and the cross-appeal should be allowed.

Every licensed pilot acquires, by virtue of the provisions of the *Canada Shipping Act*, a permanent vested right. The statute does not authorize the pilotage authority to modify this right by setting-up classes of pilots having unequal rights in a pilotage district. The by-laws setting-up these classes are invalid.

The Exchequer Court had jurisdiction to hear the action asking for a declaration of nullity. This case does not deal with a theoretical question. Important and prejudicial restrictions in the exercise of his profession are inflicted upon the plaintiff as a direct consequence of the application of the invalid by-laws.

The alternative conclusion respecting the plaintiff's classification on the assumption that classes were validly established must be struck from the judgment. A judge's opinion on such a question should be expressed in his reasons only not in the formal judgment.

The declaratory action could only be instituted, in this case, against the Minister of Transport. Such an action must be instituted against the person who has the power the limits of which are to be defined. This power to make the by-laws is given to the Pilotage Authority who, in the pilotage district of Quebec, is the Minister of Transport, an "officer" within the meaning of para. (*c*) of s. 29 of the *Exchequer Court Act*.

The action could not be instituted against Jones. There is nothing in this case to show properly that he had legal powers qualifying him as a defendant in such an action.

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As to Maheux, as he was not entrusted with the classifying of pilots, it seems doubtful that he could be considered as qualified to defend a declaratory action.

APPEAL and CROSS-APPEAL from a judgment of Noël J. of the Exchequer Court of Canada[1]. Appeal and cross-appeal allowed.

APPEL et CONTRE-APPEL d'un jugement du Juge Noël de la Cour de l'Échiquier du Canada[1]. Appel et contre-appel accueillis.

D. S. Maxwell, c.r., P. M. Troop and *P. Coderre* pour les défendeurs, appelants.

L. Langlois, c.r. et *R. Langlois* pour le demandeur, intimé.

Le jugement de la Cour a été rendu par

LE JUGE PIGEON:—L'intimé Herman E. Gamache est pilote dans la circonscription de pilotage de Québec depuis le 9 juillet 1948, date du brevet qui lui a été délivré par le Ministre des Transports du Canada agissant en qualité d'autorité de pilotage de cette circonscription. Suivant le Règlement général de la circonscription établi par ce ministre le 30 janvier 1957, le principe général régissant l'affectation des pilotes était le suivant (art. 15, par. 2):

> Les pilotes sont normalement affectés selon la pratique en vigueur pour la péréquation des voyages.

D'un autre côté, sous le titre «Service spécial», on trouvait entre autres les dispositions suivantes:

> 24 (1)—Tout pilote qui y consent peut être nommé au service spécial de toute ligne régulière de navigation.
>
> * * *
>
> (3)—Les pilotes du service spécial sont astreints au tour de rôle, déterminé par le Surintendant.

Le 2 juin 1960, par l'arrêté 1960-756, le Gouverneur général en conseil a approuvé trois modifications de ce Règlement. La première ajoute à l'article 15, après le paragraphe 2, le suivant:

> (2a) Les pilotes sont affectés aux navires de la façon suivante:
>
> a) Pilotes de classe A, à tout navire quelles qu'en soient les dimensions;

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[1] [1968] 1 R.C. de l'É. 345.

b) Pilotes de classe B, à tout navire dont la jauge ne dépasse pas dix mille tonneaux;

c) Pilotes de la classe C:

(i) moins d'un an après l'obtention du brevet de pilote, à tout navire d'une jauge d'au plus deux mille tonneaux;

(ii) pendant la deuxième année après l'obtention du brevet de pilote, à tout navire d'une jauge d'au plus trois mille tonnneaux;

(iii) pendant la troisième année après l'obtention du brevet de pilote, à tout navire d'une jauge d'au plus quatre mille tonneaux.

La seconde remplace l'article 24 par des dispositions dont l'essentiel est comme suit:

24(1)—Tout pilote de la circonscription sera classé par l'Autorité pilote de l'une des classes A, B ou C et, au début de chaque saison de navigation, l'Autorité publiera une liste des pilotes sur laquelle sera indiquée la classe de chacun.

* * *

(5)—Tout pilote de classe A qui, de l'avis de l'Autorité, est incompétent ou inapte peut être reclassé pilote de classe B par l'Autorité.

La dernière modification ajoute au texte fixant les droits de pilotage ce qui suit:

(11) Un droit supplémentaire de vingt-cinq dollars pour le pilotage

a) de tout navire d'une jauge de plus de dix mille tonneaux; et

b) de tout autre navire que l'Autorité peut désigner.

Des changements sans importance dans ce litige ont été approuvés par l'arrêté 1961-425.

Il est admis que lorsque les modifications ont été décrétées, il y avait dans la circonscription 77 pilotes brevetés; 10 ont été mis dans la classe A et les autres, dans la classe B. L'intimé était de ceux-là. Le 6 avril 1966, l'appelant J. A. Maheux qui exerçait les fonctions de surintendant des pilotes de la circonscription, adressa au secrétaire trésorier de la Corporation des pilotes du Bas-Saint-Laurent une lettre se lisant comme suit:

Nous désirons vous informer que les Pilotes Olivier Paquet et H.-E. Gamache ont été nommés dans la classe «A», en attendant d'autres développements.

Le 27 avril, l'appelant D. R. Jones qui est surintendant du pilotage au ministère des Transports, demandait à Maheux de lui faire connaître à quelle date l'intimé et un autre pilote avaient été classés «A». Le renseignement lui fut aussitôt fourni en indiquant la date de la lettre ci-dessus.

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Le Juge Pigeon

Le 5 mai, le capitaine Guy LaHaye, se décrivant comme surintendant régional des pilotes, adressait de Montréal à Jones un mémoire dans lequel il recommandait que l'intimé fût reclassifié «B» à cause de la collision entre le *Tritonica* et le *Roonagh Head*. Le dossier fait voir que cette collision survenue le 20 juillet 1963 a fait l'objet d'une «investigation formelle» par le juge Smith et deux assesseurs. Le rapport du commissaire est au dossier. On y constate que l'intimé était pilote sur le *Roonagh Head* et a été jugé négligent mais qu'aucune sanction ne lui a été imposée en vertu de l'article 568 de la *Loi sur la marine marchande* (ci-après désignée la «Loi»).

Le dossier fait voir que le 8 juillet 1966, Jones a adressé au capitaine LaHaye un mémoire contenant ce qui suit:

> We concur with your action in reclassifying Mr. H. E. Gamache as a grade B pilot, taking into account his action on the occasion of the *Tritonica-Roonagh Head* collision.

Le 22 juillet, le capitaine LaHaye adresse à Maheux une lettre où l'on lit:

> L'Autorité considère que M. H. E. Gamache soit reclassifié de la catégorie A à B en raison de son comportement lors de la collision *Tritonica-Roonagh Head.*

Là-dessus, le 25 juillet, Maheux adresse à l'intimé la lettre suivante:

> Je reçois, ce jour, l'instruction que le Ministère a réétudié la liste que j'ai fait parvenir en regard des classes de pilotes.
>
> On m'informe que le Ministère n'approuve pas votre statut de pilote classe «A» et que vous êtes, à partir d'aujourd'hui, classé dans la classe de pilote «B».

A partir de ce moment-là l'intimé a été considéré pilote de classe «B» et par conséquent affecté exclusivement au pilotage de navires de dix mille tonnes ou moins.

Par son action en Cour de l'Échiquier l'intimé demandait en premier lieu qu'il fût déclaré qu'il avait droit d'être classé pilote «A» à compter du 6 avril 1966 et qu'au besoin un bref de *mandamus* soit délivré à cette fin. Par amendement il a ensuite demandé à la Cour que les arrêtés en conseil 1960-756 et 1961-425 soient déclarés invalides pour excès de pouvoir. Par un autre amendement, celui qui était alors Ministre des Transports a été joint comme défendeur

en sa qualité d'Autorité de pilotage du district. L'admission de faits versée au dossier constate que la personne ainsi assignée était bien le ministre des Transports et l'Autorité de pilotage au temps dont il s'agit.

Par le jugement qui nous est déféré en appel, la Cour de l'Échiquier[1] a tout d'abord prononcé l'invalidité du paragraphe 2a de l'article 15 et des paragraphes 1 et 5 de l'article 24 du Règlement général de la circonscription de pilotage de Québec comme ils ont été approuvés par les arrêtés en conseil 1960-756 et 1961-425.

Au fond, cette première conclusion est inattaquable. Le pouvoir de faire des règlements attribué aux autorités de pilotage par l'article 329 de la Loi est bien loin d'être illimité. On a même pris la peine en le leur attribuant de faire une réserve expresse des dispositions de la partie de la Loi où il se trouve ainsi que de celles de toute loi en vigueur dans la circonscription.

Lorsque l'on examine les textes auxquels le législateur a ainsi voulu que tout règlement fût subordonné, on y trouve des articles qui ont pour effet de donner à tout pilote breveté un droit acquis permanent. En effet l'article 333 décrète que tout pilote qui a reçu un brevet «peut le garder en vertu et sous réserve des dispositions de la présente Partie» et ajoute qu'il «est pendant qu'il le garde un pilote breveté ... de la circonscription à laquelle s'étend son brevet». Dire qu'il est pilote breveté signifie qu'il jouit en commun avec les autres pilotes brevetés du droit exclusif de piloter des navires dans la circonscription. En effet, sauf dans certaines circonstances très spéciales, c'est une infraction que de piloter un navire sans être pilote breveté (art. 354 et 356). De plus, en vertu de l'article 345, le paiement des droits de pilotage est obligatoire sauf les exceptions prévues aux articles suivants. Ensuite, il faut signaler que la Loi prévoit expressément aux articles 336 à 339 la déchéance du brevet, l'âge de retraite et le droit de renouvellement à payer annuellement. Aux articles 368 à 372 on trouve des dispositions relatives aux infractions et peines et, dans certains cas, il est prévu qu'advenant déclaration

[1] [1968] 1 R.C. de l'É. 345.

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de culpabilité l'autorité de pilotage peut suspendre ou annuler le brevet du pilote. Enfin, comme on l'a déjà indiqué, au cas de sinistre, l'article 568 permet à la Cour d'annuler ou suspendre un brevet de pilote si au moins un des assesseurs se rallie à cette conclusion, mais il y a droit d'appel de cette décision (art. 576, par. 3).

On voit qu'indubitablement un brevet de pilote donne naissance à des droits protégés par la loi et qui, au regard d'une législation nouvelle, devraient être considérés comme des droits acquis de telle sorte que le Parlement lui-même ne serait pas présumé y porter atteinte à moins que l'intention de le faire soit clairement exprimée. Suivant un principe d'interprétation bien connu, toute nouvelle législation devrait être interprétée si possible de façon à respecter ces droits acquis. Le même principe doit être appliqué dans l'interprétation des dispositions qui permettent de faire des règlements. De même que l'on ne doit pas présumer qu'une loi nouvelle est destinée à porter atteinte à ces droits, on ne doit pas présumer que le Parlement a entendu autoriser l'autorité de pilotage à le faire. D'ailleurs, le Parlement a pris la peine de le dire expressément.

Peut-on trouver un texte ayant clairement pour effet d'autoriser l'autorité de pilotage à faire un tel règlement? Le seul texte que l'on ait invoqué devant nous c'est cette partie du paragraphe *f*) de l'article 329 de la Loi qui permet d'«établir des règlements concernant la gouverne des pilotes ...»; en anglais: «make regulations for the government of pilots». Dans l'une ou l'autre langue, ce texte ne vise que la conduite des pilotes. Littré définit «gouverne»: «ce qui doit servir de règle de conduite dans une affaire». «Government» a plus d'un sens mais dans le contexte il est clair qu'il est pris dans celui que le Shorter Oxford English Dictionary indique en second lieu: «the manner in which one's action is governed».

On nous a signalé que le paragraphe *n*) (remplacé par l'article 12 de la loi de 1956, 4-5 Eliz. II, ch. 34) attribue à l'autorité de pilotage le pouvoir suivant: «limiter la période de validité de tout brevet accordé à un pilote». Cela ne signifie point que l'autorité peut réduire à volonté

la durée de validité des brevets déjà accordés. Le texte interprété comme il se doit à la lumière de la présomption contre toute atteinte aux droits acquis permet seulement un règlement en vertu duquel des brevets pour un temps limité seront à l'avenir délivrés au lieu du brevet permanent prévu par la Loi. Il faudrait un texte explicite pour permettre de réduire la durée des brevets en vigueur. La décision de cette Cour dans *Le Procureur Général du Canada c. La Compagnie de Publication La Presse, Ltée*[2] n'implique pas une négation du principe de la non-rétroactivité. Ce qui a été décidé c'est que, vu la nature du droit octroyé par un permis de poste privé de radiodiffusion, le pouvoir attribué au Gouverneur général en conseil de modifier l'honoraire exigible peut valablement être exercé pendant l'année en cours. Le juge Abbott dit à la page 77:

> In view of the nature of the right held by a person licensed to operate a private commercial broadcasting station, I am of opinion that the Governor in Council can validly increase or decrease the fees payable by such a licensee at any time during the currency of the licence.

Il n'y a aucune analogie entre les deux situations. Ici nous sommes en présence de droits acquis depuis longtemps consacrés par législation et auxquels il ne peut être porté atteinte que d'une façon également prévue. D'après la Loi, le commissaire faisant enquête sur un sinistre maritime ne peut suspendre ou révoquer un brevet de pilote qu'à des conditions prescrites et il y a appel de cette décision. Par le règlement contesté le pilote serait exposé à voir son classement modifié par décision administrative sans formalité, sans recours et les conséquences de ce changement de classe pourraient être presque aussi graves qu'une révocation, car si l'on peut faire des classes à volonté, rien n'empêche d'en faire une qui restreigne un pilote à une activité insignifiante.

Il faut donc dire que la Loi ne permet pas à l'autorité de pilotage de modifier les droits découlant du brevet de pilote en établissant des classes de pilotes jouissant de droits inégaux dans une circonscription.

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[2] [1967] R.C.S. 60, 66 D.T.C. 5492, 63 D.L.R.(2d) 396.

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Cette première conclusion dispense évidemment d'examiner les autres questions faisant l'objet du litige car, si le règlement établissant des classes est invalide, on ne peut pas rechercher dans quelle classe l'intimé doit être placé. Sous ce rapport le jugement de la Cour de l'Échiquier doit être modifié. En effet, après avoir déclaré l'invalidité de deux dispositions du règlement, le savant juge a accordé une conclusion relative au classement du pilote pour le cas où l'établissement des classes serait valide. Même s'il est possible qu'un jugement soit modifié en appel, la cour qui le rend doit le rédiger en forme définitive. Le demandeur peut bien présenter des conclusions alternatives mais le juge qui statue sur la demande doit choisir selon son opinion sur le droit et sur les faits et il ne peut pas admettre de conclusions contradictoires. Cela ne veut pas dire qu'il doit s'abstenir d'exprimer son opinion sur des questions qu'il n'est pas rigoureusement nécessaire de trancher. Au contraire, il est généralement désirable qu'il le fasse car il est souvent très commode pour une cour d'appel d'avoir l'avis du juge de première instance sur ces questions-là. Ainsi, lorsqu'une action en dommages a été rejetée parce que le juge de première instance en est venu à la conclusion que la responsabilité n'était pas prouvée, la Cour d'Appel qui en vient à une conclusion contraire sur ce point-là a grand avantage à trouver dans le dossier une estimation du préjudice faite par le tribunal qui a recueilli la preuve. Cependant, cette estimation, tout comme une conclusion alternative, ne doit pas se trouver dans le dispositif du jugement.

Il faut maintenant signaler que la demande en Cour de l'Échiquier a été tout d'abord dirigée contre deux défendeurs, (les appelants) décrits comme suit:

D.-R. JONES, as Superintendent of Pilotage, pursuant to Part VI of the Canada Shipping Act, residing and domiciled at Ottawa, Province of Ontario,

AND

J.-A. MAHEUX, as local Supervisor of Pilots for the Quebec Pilotage District, pursuant to Part VI of the Canada Shipping Act, residing and domiciled at Quebec, Province of Quebec.

Du consentement des parties, on a ultérieurement apporté la modification suivante:

J. W. PICKERSGILL, in his capacity as Pilotage Authority pursuant to section 327 of the Canada Shipping Act (is) added as co-defendant.

Dans les très longues notes de jugement de la Cour de l'Échiquier (une cinquantaine de pages), on ne voit pas très bien pour quel motif l'action déclaratoire a été accueillie contre les deux fonctionnaires et rejetée sans frais à l'égard du ministre. En effet, après avoir exposé les motifs pour lesquels le règlement est invalide, le juge passe immédiatement à l'examen de la validité du déclassement de l'appelant dans l'hypothèse où le règlement serait valide. Ce n'est qu'après cela qu'il en vient à parler de la prétention que le ministre des Transports ne serait pas «un fonctionnaire de la Couronne» («an officer of the Crown») au sens du paragraphe (*c*) de l'article 29 de la *Loi sur la Cour de l'Échiquier*, S.R.C. 1952, c. 98. Ayant fait mention de la décision en ce sens du président dans *Pouliot c. Le Ministre des Transports*[3], il cite un long passage du jugement du juge Angers dans *Gariépy c. Le Roi*[4], où comme dans *Harris H. Himmelman c. Le Roi*[5], on dit qu'en tant qu'autorité de pilotage, le ministre est un fonctionnaire de la Couronne. Cependant, il exprime ensuite l'avis qu'il n'a pas besoin de se prononcer sur cette question parce qu'il a été prouvé qu'en fait le ministre n'a jamais lui-même participé au classement ni au déclassement de l'appelant. C'est apparemment pour ce motif lié à la conclusion alternative et non à la conclusion principale, que l'action quant à lui est rejetée mais sans frais.

Afin que la question principale qui est de grande importance puisse être jugée en tout état de cause, la Cour a, lors de l'audition, accordé à l'appelant la permission de former un contre-appel à l'encontre du rejet de l'action contre le ministre des Transports. Là-dessus, le sous-procureur général du Canada qui représentait les appelants à l'audition a accepté de comparaître pour le ministre sur ce contre-appel. Il n'est peut-être pas hors de propos de signaler qu'il est conforme à la tradition britannique que de collaborer ainsi à une procédure destinée à faciliter la décision d'un litige intéressant le gouvernement. Dans *Dyson v. Attorney General*[6], Farwell L.J. dit à la page 424:

I will quote the Lord Chief Baron in *Deare v. Attorney General* (1 Y. & C. Ex. at p. 208): "It has been the practice, which I hope will never be

[3] [1965] 1 R.C. de l'É. 330, [1965] R.P. 49.
[4] [1940] 2 D.L.R. 12.
[5] [1946] R.C. de l'É. 1.
[6] [1911] 1 K.B. 410, [1912] 1 Ch. 158.

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discontinued, for the officers of the Crown to throw no difficulty in the way of proceedings for the purpose of bringing matters before a Court of justice when any real point of difficulty that requires judicial decision has occurred".

Il faut donc voir maintenant si la déclaration de nullité du règlement est de la compétence de la Cour de l'Échiquier et, dans l'affirmative, contre quelle personne elle peut être prononcée.

C'est dans l'affaire *Dyson* que le principe de l'action en déclaration de la nullité d'une ordonnance gouvernementale a été consacré. Il est inutile de citer les arrêts ultérieurs car cette Cour l'a admis plus d'une fois, notamment dans *L'Alliance des Professeurs catholiques de Montréal c. La Commission des Relations ouvrières de Québec*[7]. Contrairement à ce que l'on semble croire en certains milieux, l'arrêt subséquent dans *Saumur c. Le Procureur Général de la Province de Québec*[8] n'implique pas la négation de l'existence de ce recours. En effet, le juge en chef au nom du tribunal a dit: (à la page 259)

> Ce qui importe de retenir dans la présente cause c'est que l'action déclaratoire n'existe pas, *sauf en quelques cas isolés*. Il est donc impossible, dans le droit de Québec, d'instituer une action comme celle qui l'a été, où l'on demande au tribunal, sans qu'il y ait de litige et sans qu'aucun droit ne soit lésé, de déclarer inconstitutionnelle une loi de la Législature.

J'ai souligné les mots «sauf en quelques cas isolés». Ils font voir que l'on n'a pas mis de côté l'arrêt antérieur rendu dans un cas où il y avait litige et que ce que l'on a décidé dans la dernière cause c'est que l'action ne peut pas être accueillie quand la question est purement théorique. Dans le cas présent, il est évident que ce n'est pas la situation: l'intimé subit dans l'exercice de sa profession de pilote des restrictions importantes et préjudiciables comme conséquence directe du règlement invalide qui lui est appliqué.

Il faut maintenant se demander contre qui cette action pouvait être valablement dirigée. Dans l'affaire *Dyson,* il s'agissait d'un rapport exigé par les Commissioners of

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[7] [1953] 2 R.C.S. 140, 107 C.C.C. 183.

[8] [1964] R.C.S. 252, 45 D.L.R. (2d) 627.

Inland Revenue. C'est l'Attorney-General qui a été assigné parce que depuis des siècles en Angleterre, l'usage veut que l'on procède ainsi. Cozens-Hardy M.R. dit: (à p. 415)

> It has been settled for centuries that in the Court of Chancery the Attorney-General might in some cases be sued as a defendant as representing the Crown, and that in such a suit relief could be given against the Crown. *Pawlett v. Attorney-General* (Hardres' Rep. 465) is a very early authority on this point. *Laragoity v. Attorney-General* (2 Price, 172) is a case where this matter was a good deal discussed. In *Deare v. Attorney-General* (1 Y. & C. Ex. 197) the Attorney-General demurred to such a bill. Lord Abinger (Ibid. at p. 208) said: "I apprehend that the Crown always appears by the Attorney-General in a Court of justice, especially in a Court of Equity, where the interest of the Crown is threatened. Therefore a practice has arisen of filing a bill against the Attorney-General, or of making him a party to a bill, where the interest of the Crown is concerned," and the demurrer was overruled.

Lorsqu'il s'agit de faire prononcer la nullité d'un règlement fait par une autorité gouvernementale autre que le gouvernement lui-même, on ne voit pas bien pourquoi l'action en déclaration de nullité ne pourrait être dirigée contre la personne investie du pouvoir dont il s'agit de définir les limites. Dans *Healey v. Minister of Health*[9], Denning L.J. dit: (à p. 237)

> . . . the Queen's courts can grant declarations by which they pronounce on the validity or invalidity of the proceedings of statutory tribunals."

Ici il importe de noter que le pouvoir de faire les règlements n'est pas attribué au gouverneur général en conseil mais bien à l'autorité de pilotage. Il est vrai que la Loi requiert l'approbation du gouverneur général en conseil mais il est bien évident que cette approbation ne saurait valider un règlement invalide pour excès de pouvoir et celui-ci reste l'acte de l'autorité qui l'a fait.

L'autorité de pilotage pour la circonscription de Québec étant le Ministre des Transports, il faut maintenant se demander si un ministre peut être assigné en Cour de l'Échiquier en vertu du paragraphe (*c*) de l'article 29 de la loi qui la régit. Ce paragraphe se lit comme suit dans les deux versions:

> *c*) dans tous les cas où une demande est faite ou un recours est cherché contre un fonctionnaire de la Couronne pour une chose faite ou omise dans l'accomplissement de ses devoirs comme tel;

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[9] [1955] 1 Q.B. 221.

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c) in all cases in which demand is made or relief sought against any officer of the Crown for anything done or omitted to be done in the performance of his duty as such officer.

Dans *Pouliot c. Le Ministre des Transports*[10], le président de la Cour de l'Échiquier, citant *Belleau c. Le Ministre de la Santé Nationale et du Bien-Être*[11], a déclaré qu'un ministre n'était pas un fonctionnaire de la Couronne au sens de cette disposition disant que cette expression ne s'applique qu'aux fonctionnaires que l'on désigne habituellement en anglais comme «civil servants».

A ce sujet, il faut tout d'abord faire observer que la disposition dont il s'agit a été originairement décrétée en 1887 par l'article 17 de la loi 50-51 Victoria, chapitre 16. Dans le texte primitif qui n'a fait l'objet d'aucune modification décrétée par le Parlement, l'expression employée dans la version française est «officier de la Couronne». C'est dans la préparation des Statuts Revisés du Canada 1927 que le mot «fonctionnaire» a été substitué au mot «officier». Il est bien évident que cela a été fait par la Commission de revision uniquement dans l'intention de corriger la loi sous le rapport du langage comme le permettait l'article 3 de la Loi concernant les Statuts Revisés du Canada (14-15 Geo. V, ch. 65) et il faut tenir compte de l'article 8 de la même loi d'après lequel les Statuts Revisés doivent être interprétés «à titre de refonte».

Au surplus, il faut observer que le mot «fonctionnaire» n'a pas nécessairement le sens de «civil servant». C'est bien celui que présentement l'on donne ordinairement à ce mot. Néanmoins, il est indubitable qu'au sens premier de cette expression, les ministres sont des fonctionnaires car ils remplissent une fonction publique. On peut noter qu'ils sont ainsi désignés dans une loi de la législature du Québec originairement décrétée quelques années avant l'article 29, savoir la Loi de l'exécutif (45 Victoria, c. 2, art. 2). A la même époque une autre loi du Québec (48 Victoria, c. 6, art. 2) décrétait que «le procureur général et le solliciteur général... sont les officiers reconnus de la couronne et men-

[10] [1965] 1 R.C. de l'É. 330, [1965] R.P. 49.
[11] [1948] R.C. de l'É. 288, [1948] 2 D.L.R. 632.

tionnés dans l'article 19 du code de procédure civile». Cet article du code de 1867 dit:

19. Personne ne peut plaider avec le nom d'autrui, si ce n'est le souverain par ses officiers reconnus ...

19. No person can use the name of another to plead, except the crown through its recognized officers ...

Il y a plus que cela. Dans le même volume des statuts du Canada (50-51 Victoria) qui renferme la loi par laquelle l'article 29 a été originairement décrétée, on trouve au chapitre 14 ce qui suit:

1. Le Gouverneur en conseil pourra nommer un fonctionnaire, qui sera appelé «Le Solliciteur général du Canada», et qui aidera au ministre de la Justice ...

1. The Governor in Council may appoint an officer, who shall be called "The Solicitor General of Canada", and who shall assist the Minister of Justice ...

Le solliciteur général du Canada n'est sûrement pas un «civil servant» et cependant on l'appelle en français «un fonctionnaire», en anglais «an officer». Voilà qui paraît tout à fait décisif. Rien n'indique qu'au chapitre 16 le mot «officer» devrait avoir un sens différent de celui qu'il a au chapitre 14. On voit très bien maintenant comment la Commission de revision de 1927 a été amenée à substituer dans la version française du chapitre 16 le mot «fonctionnaire» au mot «officier», «dans l'intérêt de l'uniformité» selon que le lui prescrivait la loi régissant la refonte.

Ces textes ne sont pas les seuls où le mot «fonctionnaire» s'applique aux ministres comme aux subalternes. Dans *Sommers c. La Reine*[12], cette Cour a statué qu'un ministre d'un gouvernement provincial est un «fonctionnaire» («official») au sens de l'article 158 (par. 1(*e*)) de l'ancien *Code criminel*, comme au sens de la loi 46 Victoria, chapitre 32 où la version anglaise utilise le mot «officer». On y a signalé que les paragraphes *l* et *m* de l'article 31 de la Loi d'interprétation (S.R.C. c. 158) impliquent qu'un ministre de la Couronne est un fonctionnaire («officer») tout comme la Loi sur la transmission de la couronne (S.R.C.

[12] [1959] R.C.S. 678, 31 C.R. 36, 124 C.C.C. 241.

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c. 65). On a également relevé l'emploi du mot «official» appliqué aux ministres du gouvernement provincial dans le «Constitution Act» de la Colombie-Britannique où, depuis 1897, on l'avait substitué au mot «officer» utilisé dans le texte primitif de 1871. Il n'a pas alors été nécessaire de se prononcer sur le bien-fondé des décisions de la Cour de l'Échiquier dans *Belleau c. Le Ministre de la Santé Nationale et du Bien-Être*[13] et dans *MacArthur c. Le Roi*[14], on a seulement fait observer qu'il s'agissait de cas où il avait paru possible de restreindre le sens du mot.

En effet, si l'on recherche au dictionnaire le sens de l'expression «officer of the Crown», il est impossible de ne pas y faire entrer les ministres. Ils sont essentiellement les «grands officiers de la Couronne» pour employer une expression que l'on trouve dans Littré. Dans le grand dictionnaire Oxford, on trouve comme deuxième définition d'«officer»:

> 2. One who holds an office, post or place. *a.* One who holds a public, civil, or ecclesiastical office, a servant or minister of the king.

Des nombreux exemples qui suivent cette définition, deux sont spécialement à retenir. Il y a tout d'abord un passage d'un ouvrage écrit vers 1430 par Sir John Fortescue, The governance of England:

> De grete officers of de lande, as chaunceler, tresaurer, and prive seell.

Il y a ensuite une phrase tirée de Stubbs, Constitutional History (1874):

> The great officers of the household. . . furnish the king with the first elements of a ministry of state.

Il faut donc conclure que les ministres sont des «fonctionnaires» («officers») au sens du paragraphe (*c*) de l'article 29. Précisons que cela ne veut pas dire que cette disposition permet l'institution de toute espèce de poursuite contre eux car, pour qu'elle reçoive son application, il faut que, par ailleurs, on ait droit d'exercer un recours contre eux, et cette absence de recours justifie au fond la plupart des décisions où l'on a refusé de les considérer visés

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[13] [1948] R.C. de l'É. 288, [1948] 2 D.L.R. 632.
[14] [1943] R.C. de l'É. 77.

par le paragraphe (*c*) de l'article 29. Cette conclusion sur le sens de la disposition juridictionnelle dispense d'examiner le bien-fondé de la distinction entre les recours contre le ministre en tant que ministre et les recours contre lui en tant qu'autorité de pilotage.

Il reste cependant à considérer si l'action en déclaration de nullité du règlement pouvait être intentée contre Jones et Maheux. Le premier est décrit comme «Surintendant du pilotage». C'est une fonction dont il n'est mention ni dans la partie VI de la Loi ni dans le règlement de la circonscription. La preuve qui s'y rapporte est très peu satisfaisante car elle consiste uniquement en des réponses à certaines questions lors d'un interrogatoire préalable. Quoique le dossier conjoint ne l'indique pas, celui de la cour de première instance fait voir que quelques-unes seulement de ces questions et réponses ont été mises en preuve lors de l'audition devant le tribunal. Il suffit de dire que rien ne démontre de façon satisfaisante que cette personne ait des pouvoirs juridiques qui justifient son assignation comme défendeur dans une action en déclaration de nullité du règlement.

Pour ce qui est de l'autre appelant, Maheux, la situation est un peu différente car, à titre de personne exerçant les fonctions de Surintendant des pilotes de la circonscription, il est investi par le règlement de pouvoirs importants. Ainsi, l'article 3 lui attribue la direction des pilotes. Cependant, ce n'est pas lui qui était chargé du classement par le règlement invalide. Il était seulement chargé d'y donner effet dans l'affectation des pilotes. A l'égard du classement, sa fonction était donc subalterne et, cela étant, il me paraît douteux que l'on puisse le considérer comme apte à répondre à l'action en déclaration de nullité quoique, par ailleurs, cette déclaration le concerne au plus haut point dans l'exercice de ses fonctions. Il n'est pas nécessaire de trancher cette question car, comme Singleton L.J. l'a dit dans *Barnard v. National Dock Labour Board*[15]:

> It is a matter for the discretion of the court, and that discretion should be used sparingly.

[15] [1953] 2 Q.B. 18 à 38, [1953] 1 All E.R. 1113.

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Comme le juge de première instance il me paraît que, dans les circonstances, le demandeur doit recouvrer ses frais du défendeur contre lequel il réussit.

Sur le tout, il me paraît qu'il y a lieu d'accueillir l'appel et le contre-appel aux fins suivantes:

1° Retrancher du jugement le paragraphe 2 relatif au classement de l'intimé dans l'hypothèse de la validité des dispositions du règlement déclarées invalides par le paragraphe 1;

2° Supprimer l'adjudication des frais contre les défendeurs Jones et Maheux;

3° Rejeter l'action sans frais à l'égard des défendeurs Jones et Maheux;

4° Adjuger la totalité des dépens en Cour de l'Échiquier contre le Ministre des Transports.

Pour ce qui est des dépens en cette Cour, il me paraît qu'ils doivent être accordés en entier à l'intimé sur l'appel principal vu que le dispositif essentiel du jugement est confirmé, mais il n'y a pas lieu de lui en accorder sur le contre-appel.

Appel et contre-appel accueillis.

Procureur des défendeurs, appelants: D. S. Maxwell, Ottawa.

Procureurs du demandeur, intimé: Langlois & Langlois, Québec.

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*Feb. 19, 20
Oct. 1

THE BOARD OF INDUSTRIAL RELATIONS OF THE PROVINCE OF ALBERTA and SHEET METAL AUTO BODY, MOTOR MECHANICS, AND ALLIED PRODUCTION WORKERS, LOCAL NO. 414, EDMONTON, ALBERTA ..... APPELLANTS;

AND

STEDELBAUER CHEVROLET OLDSMOBILE LTD. ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Labour relations—Certification of appellant union as bargaining agent—Error of law by Board of Industrial Relations on face of record—Application by way of certiorari to quash certificate—The Alberta Labour Act, R.S.A. 1955, c. 167.

An application was made to the Alberta Board of Industrial Relations to secure certification of the Sheet Metal Workers' International Association, Local 414, as bargaining agent for a unit of employees of the respondent company. After a hearing before the Board it certified, not the applicant, but the appellant union, as bargaining agent for the unit in question. Objection was taken by the respondent before the Board to certification because, *inter alia,* none of the employees in the proposed unit was properly eligible for membership in the Sheet Metal Workers' International Association in view of the definition of the trade jurisdiction of that union, contained in its constitution. An application, by way of *certiorari,* to quash the certificate issued by the Board was refused by the trial Judge. The respondent's appeal from the trial Judge's decision was allowed by the Appellate Division of the Supreme Court of Alberta. The Board and the appellant union then appealed to this Court.

Held: The appeal should be dismissed.

There was no privative section in *The Alberta Labour Act,* R.S.A. 1955, c. 167, giving to the Board exclusive jurisdiction to determine all questions of fact and law and prohibiting removal of proceedings into any Court by *certiorari.* A review of the proceedings of an administrative Board by way of *certiorari* could be made, not only, on a question of jurisdiction, but also in respect of an error of law on the face of the record, even though the error did not go to jurisdiction.

In the instant case there had been an error of law. The Act contemplated that a trade union, to be a proper bargaining agent, must be one whose objects and membership requirements are in harmony with the interests of the employees in the proposed unit and which permit

*PRESENT: Abbott, Martland, Hall, Spence and Pigeon JJ.

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them to become members of it. Where the Board erred was in construing the constitution of the applicant union as permitting its general president to authorize the international organizer to organize a local union, *i.e.*, the appellant union, to take in classes of workers not included in the general classification defined in the constitution of the applicant union.

Accordingly, there having been an error of law by the Board, which error appeared on the face of the record, the certification order could be quashed.

[*R. v. Northumberland Compensation Appeal Tribunal, Ex p. Shaw,* [1951] 1 K.B. 711, affirmed [1952] 1 K.B. 338, applied; *Baldwin & Francis Ltd. v. Patents Appeal Tribunal,* [1959] A.C. 663; *R. v. Nat Bell Liquors Ltd.,* [1922] 2 A.C. 128, referred to.]

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], allowing an appeal from a judgment of Dechene J., dismissing an application by way of *certiorari* to quash a certificate of the Alberta Board of Industrial Relations. Appeal dismissed.

W. S. Ross, Q.C., and *D. A. Stewart,* for the appellants.

John C. Prowse and *William A. Wiese,* for the respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta[1] which allowed the respondent's appeal from the decision of the learned trial judge, who had refused the respondent's application, by way of *certiorari,* to quash a certificate of the Alberta Board of Industrial Relations issued on August 10, 1965. The certificate certified the appellant, Sheet Metal Auto Body, Motor Mechanics, and Allied Production Workers, Local No. 414, Edmonton, Alberta (hereinafter referred to as "the appellant union"), as bargaining agent for a unit of employees of the respondent comprising "All employees of the Company with the exception of office workers, salesmen and supervisory personnel." The judgment of the Appellate Division quashed this certification.

The facts are not in dispute. An application was made in June, 1965, to the Board of Industrial Relations (hereinafter referred to as "the Board") to secure certification of the Sheet Metal Workers' International Association, Local 414, as bargaining agent for the employees of the respond-

[1] (1967), 59 W.W.R. 269, 61 D.L.R. (2d) 401.

ent in the unit above described. After a hearing before the Board it certified, not the applicant, but the appellant union, as bargaining agent for that unit. Objection was taken by the respondent before the Board to certification because, *inter alia,* none of the employees in the proposed unit was properly eligible for membership in the Sheet Metal Workers' International Association in view of the definition of the trade jurisdiction of that union, contained in its constitution.

Section 105 of *The Alberta Labour Act,* R.S.A. 1955, c. 167, requires each trade union and each branch or local of a trade union to file with the Minister of Industries and Labour a duly certified copy of its constitution, rules and by-laws.

Section 55(1)(*b*) defines a "bargaining agent" as a trade union that acts on behalf of employees in collective bargaining, or as a party to a collective agreement with their employer.

Section 55(1)(*j*) defines a trade union as meaning

> an organization of employees formed for the purpose of regulating relations between employers and employees which has a written constitution, rules or by-laws setting forth its objects and purposes and defining the conditions under which persons may be admitted as members thereof and continue in such membership.

Section 61 requires the Board, upon receipt of an application for certification of a bargaining agent, to inquire into whether the trade union that claims to have been selected by a majority of the employees in a unit is a proper bargaining agent.

Section 63 of the Act provides as follows:

> 63. If the Board is satisfied
>
> (*a*) that the applicant for certification as a bargaining agent is a proper bargaining agent,
>
> (*b*) that the unit of employees is an appropriate unit for collective bargaining, and
>
> (*c*) that a majority of the employees in the unit have selected the applicant to be a bargaining agent on behalf of the employees of the unit
>
> (i) by membership in good standing according to the constitution and by-laws of the applicant or by having applied for membership and by having paid the initiation fee required by the constitution and by-laws of the applicant on or not longer than three months before the date of the application for certification was made, or

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(ii) by the result of a vote conducted or supervised by the Board, of those who were employees in the unit on the date the application was made or such other date as may be fixed by the Board,

the Board shall certify the applicant to be a bargaining agent on behalf of the employees in the unit, but if the Board is not satisfied in respect of any of the matters set out in clauses (*a*) to (*c*) the Board shall refuse to certify the applicant.

The return filed by the Board to the *certiorari* proceedings, in compliance with Rule 865 of the Alberta Rules of Court, which requires the return to include all papers or documents touching the matter, included the minutes of its own meetings, the Constitution and Ritual of the Sheet Metal Workers' International Association and Affiliated Local Unions, its certificate certifying the appellant union as bargaining agent and its reasons for decision in the case of the appellant and Turnbull Motors Ltd., which dealt with the same issue as had been raised in the present proceedings and which, in substance, represented the reasons for its decision in the present case.

Dealing with the issue raised by the respondent that the Sheet Metal Workers' International Association, the union which was the applicant for certification before the Board, had no jurisdiction to accept the employees in the unit as members, because they were all mechanics and not body repair men, the learned trial judge said this:

> In dealing with the question raised in the first ground of objection the return to the certiorari proceedings contains the reasons for decisions delivered by the Board in a previous application by the same Union in which it dealt with the employees of Turnbull Motors Limited, Edmonton, Alberta, and which contained the following paragraphs:
>
> "Dealing with the question of jurisdiction, counsel for the respondent stated that in so far as he had been able to ascertain, the only reference to automobiles in the trade jurisdiction appeared in Article 1, Section 5(*s*) as follows:
>
> "Any and all types of sheet metal work and coppersmith work in connection with or incidental to the manufacture, fabrication, assembling, maintenance and repair of automobiles, airplanes, pontoons, dirigibles, blimps and other types of air craft and equipment, and all types of aircraft hangars."
>
> The representatives of the applicant referred the Board to Article 3, Section 1, which reads in part as follows:
>
> "The General President shall preside at all meetings and Conventions of this Association and at meetings of the General Executive Council. He shall preserve order and in all cases where the vote is equally divided in a Convention or meeting of the General Executive Council he shall cast the deciding vote. He shall

> enforce all laws of the Association, decide all questions of order and usage, interpret and decide all points of law and controversies and decide all constitutional questions."

He also referred to Article 3, Section 2(*g*) which reads in part as follows:

> "The General President shall have full authority to specify, designate or change the specific territory and classes of work over which each local union or district council shall exercise jurisdiction, to organize and charter additional local unions or district councils in accordance with this Constitution and to determine the specific territory and classes of work over which newly chartered locals or district councils shall have jurisdiction ..."

He submitted that in view of the authority granted the General President that officer had the discretion to allocate jurisdiction to a local union covering the classifications of work falling within the jurisdiction of the applicant. The representatives also advised the Board that at the 1962 International Convention, representations were made to the Constitution Law Committee to include in Article 1, Section 5(*s*) of the constitution mechanics and it was the decision of that committee, upheld on the convention floor, that it was not necessary to amend that portion because it was provided for in the general part of the constitution. He also submitted that since 1956 locals of the applicant have been organizing on a production basis, industrial basis and on the basis of plant maintenance."

That decision refers to a letter from the General President of the Sheet Metal Workers' International Association to Mr. Raymond A. Gall, International Organizer at Edmonton, dated 29 January, 1965, which is stated to be applicable to the present case, and which reads as follows:

> "Please be advised that you have my permission under Article 10, Section 2(*e*) of the International Association's Constitution to organize Auto Body Workers, Motor Mechanics and other Allied Production Workers in the Province of Alberta, and that all such persons are eligible for membership upon application and the payment of the initiation fee which, pursuant to the said section, is hereby set at $1.00."

I am of the opinion, with respect, that the Board's decision is wrong. The General President's authority to "Interpret and decide all points of law and controversies and decide all constitutional questions" (see Article 3, Section 1 of the Union's Constitution above cited), cannot reasonably be wide enough to include an altogether different class of workers than that which is originally covered by the Constitution. There can often be difficult questions arising from the interpretation of a Constitution such as this and it is probably wise that an officer be given the right to decide. But to allow that officer to extend the classes of employees, renders the Constitution itself useless. It removes all meaning from the provisions of Section 55(1)(*j*) of *The Alberta Labour Act*, which defines a "trade union" as an organization having a written constitution and from Section 105 of the Act which requires the constitution to be filed with the Minister of Labour.

The applicant's affidavit shows that it does not have a single employee who could be classified within the terms of the Union's written constitution. The authority given to the General President by Article 3, Section 2(*g*) supra, "to specify, designate or change the specific territory and classes of work over which each local union or district council shall exercise jurisdiction", must, I believe be subject to the *ejusdem generis* rule. He

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may designate and alter territorial jurisdiction, and vary the classes of workers which local unions may include in their organization, but, in the view I take, he cannot extend the classes of workers to some who are not included in the general classifications listed in Article 1, Section 5(*s*) of the Constitution which is cited above in full.

If, therefore, this were an appeal and I was to substitute my judgment for that of the Board, I would find in favour of the applicant.

Reference should also be made to the following paragraph in the Board's reasons:

> It was the opinion of the Board that in view of the authority vested in the General President under Article 3, Section 2(*g*) that officer did not exceed his powers in issuing the charter to the applicant and allocating the jurisdiction as set out in his letter of January 29, 1965, quoted above.

The learned trial judge went on to say that as this was an application by way of *certiorari* it must rest on lack of jurisdiction, breach of natural justice or an error on the face of the record. In concluding that *certiorari* would not lie he took the view that if the Board had erred it was in respect of a finding of fact, apparently as to the question of whether a majority of the employees in the unit had selected the appellant union as the bargaining agent, and he appears to have decided that the application for membership in the appellant union by a majority of the employees was sufficient for the purposes of s. 63(*c*)(i) whether or not they could obtain membership in the Sheet Metal Workers' International Association under the provisions of its constitution. He does not refer to the requirement of s. 63(*a*) as to the Board being satisfied that the applicant for certification is a proper bargaining agent.

The Appellate Division agreed with the view expressed by the learned trial judge that the Board's decision as to the interpretation of the union's constitution was wrong and also held that, on the record, the Board had erred in law in giving to the word "proper", in s. 63(*a*), a meaning which it would not bear, and the Board order was, accordingly, quashed.

The appellants, before this Court, did not seriously dispute the conclusion of law reached by both the Courts below in respect of the interpretation of the union's constitution. Their position was that the error in law by the Board would not warrant the quashing of its order because it did not relate to the Board's jurisdiction. In the present

case, it was said, the Board's decision was in respect of a matter specifically referred to it by the statute and it could not be disturbed because, in reaching it, there had been an error of law.

I am not in agreement with this submission. *The Alberta Labour Act* does not contain a privative section, such as that contained in the British Columbia *Workmen's Compensation Act*, R.S.B.C., c. 370, s. 76(1), referred to in the judgment of this Court in *Farrell v. Workmen's Compensation Board*[2], giving to the Board exclusive jurisdiction to determine all questions of fact and law and prohibiting removal of proceedings into any Court by *certiorari*. The question, in this case, is as to the extent to which the proceedings of an administrative Board may be reviewed by way of *certiorari*.

In my opinion, such a review can be made, not only on a question of jurisdiction, but in respect of an error of law on the face of the record. That *certiorari* would issue to quash the decision of a statutory administrative tribunal for an error of law on the face of the record, although the error did not go to jurisdiction, was clearly stated in *R. v. Northumberland Compensation Appeal Tribunal, Ex p. Shaw*[3]. That case was referred to by Kerwin J. (as he then was) in *Toronto Newspaper Guild v. Globe Printing Company*[4].

In *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*[5], Lord Reid said, at p. 683:

> Procedure by way of certiorari is available both where there has been "excess of jurisdiction" (which is not a very adequate description) and where error of law appears on the face of the record.

In the *Northumberland* case the Court applied, in respect of a decision of an administrative tribunal, what had been stated in the Privy Council by Lord Sumner in *R. v. Nat Bell Liquors, Limited*[6].

At p. 154, Lord Sumner said:

> There is no reason to suppose that, if there were any difference in the rules as to the examination of the evidence below on certiorari before a superior Court, it would be a difference in favour of examining

[2] [1962] S.C.R. 48.
[3] [1951] 1 K.B. 711, approved, an appeal, [1952] 1 K.B. 338.
[4] [1953] 2 S.C.R. 18 at 24.
[5] [1959] A.C. 663.
[6] [1922] 2 A.C. 128.

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it in criminal matters, when it would not be examined in civil matters, but, truly speaking, the whole theory of certiorari shows that no such difference exists. The object is to examine the proceedings in the inferior Court to see whether its order has been made within its jurisdiction. If that is the whole object, there can be no difference for this purpose between civil orders and criminal convictions, except in so far as differences in the form of the record of the inferior Court's determination or in the statute law relating to the matter may give an opportunity for detecting error on the record in one case, which in another would not have been apparent to the superior Court, and therefore would not have been available as a reason for quashing the proceedings. In this connection, reliance was placed on a passage in the opinion of Lord Cairns in *Walsall Overseers v. London and North Western Ry. Co.* (1878) 4 App. Cas. 30, 39. The question for decision there was simply whether or not the Court of Appeal had jurisdiction to entertain an appeal from an order of the Court of Queen's Bench, discharging a rule nisi for a certiorari to quash an order of Quarter Sessions in a rating matter. Lord Cairns, speaking of certiorari generally, said: "If there was upon the face of the order of the Court of Quarter Sessions anything which showed that that order was erroneous, the Court of Queen's Bench might be asked to have the order brought into it, and to look at the order, and view it upon the face of it, and if the Court found error upon the face of it, to put an end to its existence by quashing it." He then turned to the kind of order under discussion, and after stating how much in that matter, both of fact and of law, the Sessions were bound to set out on the face of their order, he proceeded to point out that the statement of what had led to the decision of the Court made the order "not an unspeaking or unintelligible order," but a speaking one, and an order which on certiorari could be criticised as one which told its own story, and which for error could accordingly be quashed.

At p. 156, dealing with the jurisdiction of the superior Court to review the decision of an inferior Court, he said:

> That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise.

I agree with the Court below in holding that there was, in this case, an error of law. A trade union, which seeks to be certified as a bargaining agent, must have a written constitution, rules or by-laws which, in addition to setting forth its objects, defines the conditions under which persons may be admitted and continue as members (s. 55(1)(*j*)). In my opinion, when that provision is read along with ss. 61(*a*) and 63, the Act contemplates that a trade union, to be a proper bargaining agent, must be one whose objects and membership requirements are in harmony with the interests of the employees in the proposed unit and which permit them to become members of it.

I do not accept the submission of the appellants that, when s. 63(*c*)(i) was amended, in 1964, to speak of "mem-

bership in good standing according to the constitution and by-laws of the applicant or by having applied for membership . . .", this contemplated that an application for membership in a union whose constitution prevented membership being granted would be a sufficient compliance with that paragraph.

The Board was quite properly concerned, in this case, with the matter of the employees' right to membership in the union which had applied for certification. Where it erred was in construing the constitution of the applicant union as permitting its General President to authorize the international organizer to organize a local union, *i.e.*, the appellant union, to take in classes of workers not included in the general classification defined in the constitution of the applicant union. In the result, it certified as a bargaining agent, not the union which had applied, but a local union which purported to have been created by the international organizer of the applicant union by authorization of its General President.

There having been an error of law by the Board, was it on the face of the record? The return, in compliance with the Rules of Court, included the reasons of the Board in the case of Turnbull Motors Ltd., which had raised the same issue as in the present case. This was properly filed by the Board, and thereby it stated the reasons which had led it to grant a certificate in the present case. In my opinion, this made the Board's certificate, to quote Lord Sumner again, " 'not an unspeaking or unintelligible order,' but a speaking one and an order which on certiorari could be criticised as one which told its own story, and which for error could accordingly be quashed".

In my opinion the appeal should be dismissed, with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Ross, McLennan & Ross, Edmonton.

Solicitors for the respondent: Prowse & Wiese, Edmonton.

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May 1, 2
Oct. 1

CANADIAN FINA OIL LIMITED .....APPELLANT;

AND

TEXAS GULF SULPHUR COMPANY ....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, TRIAL DIVISION

Contracts—Agreement to purchase natural gas—Provisions governing method of determination of price to be paid—Price related to sale price of sulphur in which parties "have an interest"—Meaning of word "interest"—Whether pecuniary as well as proprietary interest included.

An agreement dated January 1, 1962, and amended on January 1, 1965, to which the appellant and the respondent were parties, contained provisions governing the method of determination of the price to be paid by the respondent to the appellant and two other companies for acid gas delivered by them to the respondent. Action was initially commenced by the respondent against the other three parties to the agreement for a declaration as to the proper interpretation of the clauses in question, but a settlement was effected by the respondent with the other two parties, before trial.

The parties other than the respondent agreed to deliver acid gas to the respondent's plant, retaining for themselves the other products of the gas which they produced. The respondent agreed to pay the other parties, for the acid gas which they delivered to it, a price to be determined by multiplying the number of long tons of sulphur produced by the respondent from such acid gas by a price, per long ton of sulphur, established in the manner provided in the agreement. It was the interpretation of an amended sub-clause of the payment clause of the agreement which was in dispute, and the question in issue was as to the meaning in its context, of the word "interest". The meaning of that word was in dispute in respect of the application of the clause to certain factual situations.

An appeal, by leave of the Appellate Division of the Supreme Court of Alberta, pursuant to s. 39 of the *Supreme Court Act,* R.S.C. 1952, c. 259, was brought from the judgment of the trial judge to this Court.

Held: The appeal should be dismissed.

The word "interest", as used in the amended clause of the agreement, was not limited in its meaning to a proprietary interest, but included a pecuniary interest. Where sales of sulphur were made by a company with which both the appellant and the respondent (and others) had entered into gas sales contracts, and where part of the money received by each owner contracting with the company was paid on the basis of the sulphur derived from its gas, all sales made by that company would properly be included in making the required price computation.

In the case of a plant in which one or more of the parties were joint owners with others, and therefore had an interest in the plant and a right to receive sulphur therefrom out of the common inventory, all sales from that plant should be considered in applying the price computation provisions of the agreement.

*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

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APPEAL from a judgment of Milvain J., now C.J.T.D., Supreme Court of Alberta, interpreting the language of a contract for the sale of natural gas. Appeal dismissed.

W. A. McGillivray, Q.C., and *E. D. D. Tavender*, for the appellant.

D. P. McLaws, Q.C., and *R. S. Dinkel*, for the respondent.

The judgment of the Court was delivered by:

MARTLAND J.:—This appeal, by leave of the Appellate Division of the Supreme Court of Alberta, pursuant to s. 39 of the *Supreme Court Act*, R.S.C. 1952, c. 259, is brought from the judgment of the learned trial judge in these proceedings. Such an appeal lies only in respect of a question of law. The legal issue involved in this case is as to the proper interpretation of the provisions contained in an agreement dated January 1, 1962, and amended on January 1, 1965, to which the appellant and the respondent were parties, governing the method of determination of the price to be paid by the respondent to the appellant and two other companies for acid gas delivered by them to the respondent at the "West Whitecourt plant" near Whitecourt, Alberta. The two other parties to the agreement were Pan American Petroleum Limited and Hudson's Bay Oil and Gas Company Limited.

The action was initially commenced by the respondent against the other three parties to the agreement for a declaration as to the proper interpretation of the clauses in question, but a settlement was effected by the respondent with the other two parties, before trial.

The three parties to the agreement, other than the respondent, who are referred to in the agreement as "West Whitecourt Owners", built the West Whitecourt plant to treat acid gas which they were producing. Among the products of the plant is sulphur. Under the agreement the West Whitecourt Owners conveyed to the respondent, for a stated consideration, that part of the plant which produced sulphur.

The West Whitecourt Owners agreed to deliver acid gas to the respondent's plant, retaining for themselves the other products of the gas which they produced. The respondent agreed to pay the West Whitecourt Owners, for

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the acid gas which they delivered to it, a price to be determined by multiplying the number of long tons of sulphur produced by the respondent from such acid gas by a price, per long ton of sulphur, established in the manner provided in the agreement, which was as follows:

9. PAYMENT

Subject to the provisions of Clause 10 hereof, Texas Gulf shall make payment to Pan American on behalf of the West Whitecourt Owners for all acid gas delivered hereunder, the amount of such payment to be determined by multiplying the number of Long Tons of sulphur produced at the Sulphur Plant from the said acid gas by the prices per Long Ton for such sulphur established in accordance with the following terms and provisions:

(1) At the beginning of each calendar year Texas Gulf shall estimate a reasonable F.O.B. Price which may be expected for sulphur sold from plants in the Province of Alberta during such calendar year, having regard for the F.O.B. Price at which sulphur was sold from plants in the Province of Alberta during the preceding calendar year.

(2) On the basis of the aforesaid estimated F.O.B. Price, Texas Gulf shall, within twenty (20) days following the end of each calendar month, make payment for acid gas delivered during such calendar month, in Canadian currency, in accordance with the following scale:

When the estimated F.O.B. Price is within the range of:	Amount payable for acid gas expressed as a price per Long Ton for sulphur produced therefrom shall be:
$ 0 to $ 5.00	$1.00
$ 5.01 to $ 8.00	$1.00 plus 100% of the amount by which F.O.B. Price exceeds $5.00.
$ 8.01 to $ 9.00	$4.00 plus 50% of the amount by which F.O.B. Price exceeds $8.00.
$ 9.01 to $13.50	$4.50
$13.51 or more	$4.50 plus 50% of the amount by which F.O.B. Price exceeds $13.50.

(3) At the end of each calendar year Texas Gulf shall determine the actual F.O.B. Price for the preceding calendar year which shall be the greater of:

(*a*) the weighted average F.O.B. Price at the Sulphur Plant received by Texas Gulf for sulphur sold from the Sulphur Plant during such calendar year, or

(*b*) the weighted average F.O.B. Price received for all sulphur sold from plants in the Province of Alberta during such calendar year, exclusive of sulphur sold from the Sulphur Plant, in which sulphur the parties hereto, or any of them, have an interest and which price can be verified from actual statements from the sellers of such sulphur. It is agreed, however, that for the purpose of determining the weighted

average sales price pursuant to this Clause 9(3)(*b*) the quantity of sulphur sold by Texas Gulf from plants in the Province of Alberta in which sulphur Texas Gulf has an interest, exclusive of the Sulphur Plant, shall be a maximum of Fifty (50%) percent of the total sulphur sales under consideration or Fifty Thousand (50,000) Long Tons, whichever is the greater,

and immediately following such determination shall calculate the difference, if any, in the payments which would have been made to Pan American on behalf of the West Whitecourt Owners for acid gas delivered during such preceding calendar year if this actual F.O.B. Price had been substituted for the estimated F.O.B. Price in the schedule set forth in Clause 9(2) hereof, and the parties hereto shall make settlement for any such difference within thirty (30) days of the determination thereof.

(4) Texas Gulf shall, if requested so to do by the West Whitecourt Owners, verify the price received by Texas Gulf for sulphur sold from the Sulphur Plant by Statutory Declarations made by virtue of The Canada Evidence Act.

Under the original agreement, the West Whitecourt Owners had an option to purchase 50 per cent of the sulphur produced at the West Whitecourt plant at the price set out in cl. 9(3)(*a*).

The agreement was amended by the agreement of January 1, 1965. The option to purchase, just mentioned, was eliminated, and cl. 9(3) was amended, so as to read as follows:

(3) At the end of each calendar year Texas Gulf shall determine the actual F.O.B. Price for the preceding calendar year which shall be the greatest of:

(*a*) the weighted average F.O.B. Price at the Sulphur Plant received by Texas Gulf for sulphur sold from the Sulphur Plant during such calendar year, or

(*b*) the weighted average F.O.B. Price received for sulphur sold from plants in the Province of Alberta during such calendar year, exclusive of sulphur sold from the Sulphur Plant, in which sulphur the parties hereto, or any of them, have an interest and which price can be verified from actual statements from the sellers of such sulphur. It is agreed, however, that for the purpose of determining the weighted average sales price pursuant to this Article 9(3)(*b*) the quantity of sulphur sold by Texas Gulf from plants in the Province of Alberta in which sulphur Texas Gulf has an interest, exclusive of the Sulphur Plant, shall be a maximum of fifty percent (50%) of the total sulphur sales under consideration or fifty thousand (50,000) Long Tons, whichever is the greater, or

(*c*) the weighted average F.O.B. Price received for sulphur sold during such calendar year from EXISTING PLANTS in the Province of Alberta, exclusive of sulphur sold from the

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> Sulphur Plant, in which sulphur the West Whitecourt Owners, or any of them, have an interest and which price can be verified from actual statements from the sellers of such sulphur. It is agreed that the term "EXISTING PLANTS", as used in this Article 9(3)(*c*), hereof, shall be limited to include only plants in the Province of Alberta in existence on the 1st day of January, 1965 which have actually produced sulphur prior to that date,
>
> and immediately following such determination Texas Gulf shall calculate the difference, if any, in the payments which would have been made to Pan American on behalf of the West Whitecourt Owners for acid gas delivered during such preceding calendar year if this actual F.O.B. Price had been substituted for the estimated F.O.B. Price in the schedule set forth in Article 9(2) hereof, and the parties hereto shall make settlement for any such difference within thirty (30) days of the determination thereof.

It is the interpretation of the amended cl. 9(3) which is in dispute in these proceedings, and the question in issue is as to the meaning, in its context, of the word "interest". The meaning of that word is in dispute in respect of the application of the clause to three factual situations.

The first of these relates to sulphur produced and sold by Petrogas Processing Ltd. (hereinafter referred to as "Petrogas"). This company was incorporated to construct and operate a gas processing plant, located near Calgary. It entered into contracts, identical in form, with most of the owners of natural gas in what is known as the East Calgary Field. Under the terms of the contract, the owner agreed to sell gas to Petrogas, which agreed to pay for it from the proceeds which it received from the sale of the plant products, one of which is sulphur. Each owner receives his proportion of the total sale proceeds, as computed under the terms of the agreement, less applicable processing charges, in the determination of which Petrogas is entitled to show only a nominal profit.

Each owner of gas contracting for its sale to Petrogas is entitled to become a shareholder of Petrogas, the size of the share holding being determined on a proportionate basis. In essence, Petrogas provided a convenient vehicle for the disposition of their natural gas by owners in the East Calgary Field. Both the appellant and the respondent had entered into sales contracts with Petrogas and owned shares in it.

The sales agreement provided, with respect to sulphur, that:

> The value of elemental sulphur shall be the average sales price per long ton actually received in cash in each month by Buyer (Petrogas) F.O.B. the Plant.

The value of the sulphur ascribed to each owner and sold by Petrogas is an element in determining the price for gas to be paid to such owner.

It is the contention of the respondent that, in applying the formula provided in paras. (*b*) and (*c*) of the amended cl. 9(3), the price received for all sulphur sold by Petrogas in any calendar year is to be taken into account in determining the weighted average F.O.B. price. The appellant contends that the price received by Petrogas from sulphur sold by it cannot be taken into account because neither the appellant nor the respondent has any "interest" in such sulphur. It takes the position that "interest" means a proprietary interest. The respondent submits that the word, as used in this agreement, was intended to have a broad application and would include, not only a proprietary, but also a pecuniary interest.

The appellant has cited a number of authorities, which deal with the meaning of the term, but none of these is a precedent. Rather they are illustrations of the application of the word in various factual circumstances.

Reliance is placed on *Macaura v. Northern Assurance Co. Ltd.*[1]. This case is authority for the proposition that neither a shareholder nor a creditor of a company has an insurable interest in any of its assets. It holds that no shareholder has any property right in any item of property owned by the company. This, of course, merely reaffirms the fact that the company is a legal entity, separate and apart from its shareholders.

On the other hand, in *City of London Electric Lighting Co. Ltd. v. Mayor, &c., of London*[2], the House of Lords had to consider the application of a statutory provision which prohibited a commissioner or a member of the Court of Aldermen or of the Common Council of the City from

[1] [1925] A.C. 619.

[2] [1903] A.C. 434.

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being directly or indirectly interested in any contract made by the Commissioners of Sewers. It was held that a contract with a company, in which any of the commissioners, members of the Court of Aldermen or of the Common Council were shareholders, would be within this provision and would be null and void.

The appellant cited *Smith v. Hancock*[3], which held, on the facts of that case, that the defendant was not interested in a business operated by his wife and nephew so as to be in breach of a covenant in an agreement made by the defendant with the plaintiff, that the defendant, within a specified area, would not carry on or be in anywise interested in any similar business to that described in the agreement, which the defendant had sold to the plaintiff. What the defendant had done was to introduce his wife to his bankers, assist her in obtaining a lease of a shop in her name, introduced the nephew to wholesale suppliers who had supplied the old business and to write, for his wife, who was prevented by a physical infirmity from writing, a circular inviting "old friends" to come to the shop. The defendant put no money into the business and took no share in its profits.

At p. 386, Lindley L.J. says this:

> When a person sells a business and agrees not to carry on, or be in any way interested in, any similar business, the word "interested" is used to prevent him, not only from carrying it on, but also from having any proprietary or pecuniary interest in it.

Similarly, in *Gophir Diamond Co. v. Wood*[4], it was held that a covenant not to become directly or indirectly interested in a similar business did not prevent the defendant from becoming an employee in such a business at a fixed salary. It was, however, stated that if the defendant's remuneration had in any way depended on the profits or gross returns of the business he would have been interested in it.

In my opinion, an interest may, in certain circumstances, consist of a pecuniary interest as distinct from a proprietary interest. The meaning of the word, in any specific agreement, must be ascertained in the context in which it appears.

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[3] [1894] 2 Ch. 377.

[4] [1902] 1 Ch. 950.

In considering this issue, it is desirable to refer to the whole of cl. 9 of the agreement, and not only to the portion of it which was amended by the second agreement. Under this clause, the respondent agrees to pay the West Whitecourt Owners, not for sulphur, but for "all acid gas delivered hereunder". The respondent is obligated to pay for such gas whether or not the sulphur produced from it by the respondent is sold or not. The provisions of the clause dealing with the price of sulphur relate only to the method for determination of the price to be paid for acid gas. Such price is determined by multiplying the number of long tons of sulphur produced by the respondent by a price per ton determined under the clause.

The initial payments to the West Whitecourt Owners are determined on the basis of an estimate by the respondent, at the beginning of the calendar year, of a reasonable F.O.B. price to be expected for sulphur sold from plants in the Province of Alberta having regard to the F.O.B. price for which sulphur was sold from plants in that province during the previous year (cl. 9(1)).

The final price is to be ascertained at the end of the year, as the highest of three prices as determined by three methods of computation. The first, described in para. (*a*) of cl. 9(3), is the actual selling price of sulphur produced at the West Whitecourt plant.

The second, described in para. (*b*), is based on the sale price of all sulphur sold from plants in Alberta, exclusive of the West Whitecourt plant, and is thus somewhat similar to the provisions of cl. 9(1), but it contains the restriction which limits "all sulphur sold from plants in the Province of Alberta" by the words "in which sulphur the parties hereto or any of them have an interest".

The third, described in para. (*c*), is essentially the same as para. (*b*), but the restrictive words refer to sulphur in which the West Whitecourt Owners, or any of them (and not the respondent) have an interest, and it is limited to "existing plants", as defined.

If the provisions of para. (*b*) had been intended to be limited to sales from plants in Alberta, exclusive of the Whitecourt plant, of sulphur actually owned by any of the

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parties, the wording used appears to be unnecessarily cumbersome. The paragraph, to achieve that object, could have read:

> The weighted average F.O.B. price received for all sulphur sold by any of the parties hereto from plants in the Province of Alberta, exclusive of sulphur sold from the Sulphur Plant.

But the paragraph does not say this. Its terms are broader in their scope. It is significant that it contains the provision which reads: "which price can be verified from actual statements from *the sellers of such sulphur*". (The italicizing is my own.) This obviously indicates that the paragraph is applicable to sales of sulphur made by parties other than the parties to the agreement. The parties to the agreement are described, in the very same sentence, as "the parties hereto", and, quite clearly, verification of their sales prices could be required as a term of the agreement. But verification of the sale price of sulphur sold by a third party would depend on his willingness to provide a statement.

Furthermore, when we come to para. (*c*), which refers to sulphur in which "the West Whitecourt Owners or any of them have an interest", there is the specific exclusion therefrom of "sulphur sold from the Sulphur Plant". Clearly the West Whitecourt Owners have no proprietary interest in sulphur produced from that plant and, therefore, if the word "interest", in para. (*c*), meant a proprietary interest, no such exclusion would be necessary. That sulphur is produced by the respondent from the acid gas sold and delivered to it by the West Whitecourt Owners and is the property solely of the respondent. But the West Whitecourt Owners do have a pecuniary interest in that sulphur in that its sale, by the respondent, may determine, under para. (*a*), the price which they receive for their acid gas.

In my opinion, the word "interest", as used in paras. (*b*) and (*c*), is not limited in its meaning to a proprietary interest, but includes a pecuniary interest.

My understanding of the meaning of para. (*b*) is that, in making the computation contemplated by it, one is to take into account, in each calendar year, the prices received on all sales of sulphur from those sulphur plants in Alberta from which sulphur, in which any party to the agreement has some proprietary or pecuniary interest, has been sold.

The paragraph does not stipulate that such interest must exist at the time a particular sale is actually effected. All that is required is that the plant in question be one from which sales are made of sulphur in which the party to the agreement has an interest.

I should add that the words "and which price can be verified from actual statements from the sellers of such sulphur" restrict the computation made under para. (*b*) to prices received from sales made by sellers who are prepared to give actual statements so as to verify the prices obtained.

Turning now to the sales of sulphur made by Petrogas, it is my view that all the sales made by that company would properly be included in making the computation required under para. (*b*). It is true that such sales were of sulphur owned by Petrogas and not by the appellant or the respondent, and that what was sold by them to Petrogas was gas. However, Petrogas is essentially an instrument for the processing and sale of the gas and its derivatives of those companies with whom it contracts. The sulphur extracted from the gas delivered by the appellant and by the respondent was a part of the total volume of sulphur to be marketed by Petrogas. Part of the money received by each owner contracting with Petrogas was paid on the basis of the sulphur derived from its gas. Both of the parties had a pecuniary interest in the sulphur sold from that plant.

What I have said above in relation to para. (*b*) applies equally to the computation to be made under para. (*c*), since the appellant, one of the West Whitecourt Owners, had the required interest under that paragraph.

The next factual situation is in connection with sales of sulphur from plants in which one or more of the West Whitecourt Owners are joint owners with others. In such a case, the appellant, for example, would sell acid gas to the plant and receive, in kind, its share of the products, proportionate to the volumes of gas which it delivered to the plant. One of the products would be sulphur. The gas received at the plant from the various suppliers would be intermingled. The sulphur produced from it would be placed in a common stock pile from which each would be entitled to withdraw its proportionate share.

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In substance, the appellant's contention is that it is only sales of sulphur from the stock pile made by the appellant itself, or in which it has itself participated along with others, which can be taken into account in making the computations required under paras. (*b*) and (*c*).

I do not agree with this submission. The sulphur produced in plants of the kind under consideration, in a common inventory, is sulphur in which the appellant or other West Whitecourt Owner has joint ownership, which clearly constitutes an interest. In my opinion, any sale from the joint stock pile is a sale of sulphur in which a West Whitecourt Owner has an interest, within the meaning of paras. (*b*) and (*c*), and the fact that, for purposes of delivery, the sulphur sold must be removed from the stock pile, does not prevent the application of those paragraphs. Their application extends to all sales from a plant of any sulphur in which the appellant or other West Whitecourt Owner has an interest and the "interest" is not to be determined solely at the time of segregation and delivery to the buyer. What these paragraphs contemplate is a broad base for the ascertainment of price not limited only to those sales effected by the West Whitecourt Owners themselves.

The third factual situation is in respect of sales of sulphur sold from the Okotoks plant. This is a plant in which the respondent has an interest. It supplies gas to this plant and is entitled to sulphur produced therefrom in proportion to the gas which it supplies. This situation is the same as the one just considered, save only that in this case it is the respondent, and not a West Whitecourt Owner, which has an interest in the plant, and a right to receive sulphur therefrom out of the common inventory. For the same reasons as those already given, it is my view that all sales from that plant should be considered in applying para. (*b*).

I am, therefore, of the opinion that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Fenerty, Fenerty, McGillivray, Robertson, Prowse, Brennan & Fraser, Calgary.

Solicitors for the respondent: McLaws & Company, Calgary.

ABRAHAM WEINBLATT (*Defendant*) ...APPELLANT;

AND

THE CORPORATION OF THE CITY OF KITCHENER (*Plaintiff*) ..... RESPONDENT.

1968
*Feb. 6
Oct. 1

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real property—Agreement providing for reconveyance in certain events—Whether rule against perpetuities offended—Failure of one party to provide agreed services attributable to default of other party—Subsequent purchaser taking with full notice of vendor's future interest.

An agreement between the plaintiff municipal corporation and one H, a predecessor in title of the defendant in respect of a certain parcel of land, provided for the reconveyance of the said land, upon repayment of the purchase price, if H failed to commence construction thereon of a seven-storey building within a specified period. Under the agreement the city was required to carry out certain undertakings involving the demolition of buildings, the construction of a new roadway and the installation of a sewer and watermain, all of which were to be completed by a given date. An application by the defendant's immediate predecessor in title for a building permit to erect a two-storey rather than a seven-storey building and a similar application made by the defendant, after he had acquired the property, were refused. Subsequently, an action founded on the above agreement was brought by the city to recover from the defendant the land in question on payment of the required sum. The city's claim having been upheld by both the trial judge and the Court of Appeal, the defendant appealed to this Court.

Held: The appeal should be dismissed.

As to the defence that the agreement offended the rule against perpetuities, this was not a case where a contingent interest in property might arise outside the perpetuity period. If it was to arise at all, it had to be on the date stated or within a reasonable time thereafter.

The second defence, *i.e.* that the city had lost its rights by reason of failure to complete the installation of the stipulated municipal services within the specified time, was also without merit, as any default in that regard was directly attributable to the failure of the defendant and his predecessors in title to comply with the terms of the agreement respecting the erection of a building.

The third defence, *i.e.* that the covenant in a reconveyance was a personal contract between the original parties and cannot be enforced against the subsequent purchaser because it does not fall within that class of negative covenants which run with the land and bind subsequent purchases with the burden, did not arise on the facts of this case. The defendant took with full notice of the city's future interest in the property.

[*City of Halifax v. Vaughan Construction Co. Ltd.*, [1961] S.C.R. 715, applied.]

*PRESENT: Cartwright C.J. and Judson, Ritchie, Hall and Spence JJ.

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WEINBLATT v. CITY OF KITCHENER

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Moorhouse J. Appeal dismissed.

J. J. Carthy, for the defendant, appellant.

D. K. Laidlaw, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by:

JUDSON J.:—This is an action by the Corporation of the City of Kitchener against Abraham Weinblatt to recover from him a certain parcel of land in the city on payment of the sum of $33,000. The action was founded on an agreement made between the city and Weinblatt's predecessor in title which provided for such a reconveyance in certain events. Both the trial judge and the Court of Appeal[1] have upheld the city's claim. Weinblatt appeals to this Court for a reversal of these judgments and a dismissal of the action. In my opinion, the appeal fails and should be dismissed with costs.

The city assembled a parcel of land in its centre at a cost of $130,000 for the purpose of redevelopment. It sold part of this land, which had a value of approximately $75,000, to one Robert E. Hart for the sum of $33,000. Hart was acting as nominee for Noy Construction Limited. The city's deed to Hart was registered on November 17, 1960, and on the same date Hart conveyed to Noy Construction Ltd. Noy Construction Ltd. conveyed to Abraham Weinblatt on August 3, 1961, nearly eight months later. The deed was registered the same day. Both Noy Construction Ltd. and Weinblatt took with full notice of the agreement made between the city and Hart when the property was conveyed to Hart in November of 1960. This agreement is dated October 25, 1960, between the city, as vendor, and Hart as purchaser. The following are its terms:

1. The Vendor (City) shall demolish to ground level all buildings presently situate on the premises and remove all demolished materials from the said premises.

2. The Vendor (City) further covenants and agrees to construct a new roadway and sidewalk on the Vendor's (City's) property adjacent

[1] [1966] 2 O.R. 740, 58 D.L.R. (2d) 332.

to and fronting on the premises, between Queen Street and Benton Street, and to install Sewer and Watermain and arrange for all other necessary public services along the same, all to be completed by October 1st, 1961.

3. The Purchaser (Hart) or his assigns covenants and agrees to sign all petitions that may be necessary to permit such adjacent roadway to be constructed and such services to be installed and further covenants and agrees to pay all taxes that may be levied against the said Purchaser (Hart) or his assigns pursuant to the provisions of The Local Improvement Act.

4. The Purchaser (Hart) and/or his assigns covenants and agrees to commence the erection upon the aforesaid premises of a building substantially in compliance with the Plan of George A. Robb, Architect, dated August, 1960, under Job No. 6012, attached as Schedule "B" to the aforementioned Offer and forming part of this Agreement, within twelve months from the date of completion of this transaction, namely, October 31st, 1960; failing commencement of construction pursuant to this covenant by the Purchaser (Hart) or his assigns within the time limit specified herein, the Vendor (City) may repurchase the land for the sum of THIRTY-THREE THOUSAND DOLLARS ($33,000.00) provided the Vendor (City) has fulfilled all covenants made by it herein.

5. The Vendor (City) may extend the time for performance by the Purchaser (Hart) of any of the matters hereinbefore described and agreed to be performed by the said Purchaser (Hart).

6. The Vendor (City) shall be entitled to reserve the necessary land required for the proposed widening of Queen Street, South.

This agreement was registered on June 28, 1961.

Noy Construction applied for a building permit on November 23, 1960. The preliminary plans submitted were not in conformity with those of the architect mentioned in para. 4 of the agreement. They proposed the construction of a two-storey building instead of a seven-storey building and they were not sufficiently detailed to enable the city even to consider the issue of any building permit. There were subsequent discussions between Noy Construction Ltd. and the city but these ended in February 1961. Following this no further attempts were made by Noy Construction Ltd. to procure a permit for the building contemplated in para. 4 of the agreement. On April 12, 1961, Noy Construction Ltd. entered into an agreement to sell the property to Abraham Weinblatt for $37,000. They gave him a deed on August 3, 1961, and it was registered the same date.

Weinblatt applied for a building permit in the month of July 1961 and had certain discussions with officials of

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the city in the month of August 1961. He too was proposing to erect a building which was not in conformity with the agreement between the city and Hart. He was told that his plans were not acceptable. In the month of October he had further discussions with the city. He was asking to be relieved of the obligation to build in accordance with the agreement. The city rejected his suggestions.

By the end of 1962 the city had completed all the requirements under the agreement as to demolition, construction of new roadway and the installation of the sewer and watermain. The city demanded a reconveyance. The writ was issued on October 15, 1962. The statement of claim was delivered on January 11, 1963. The judgment of Moorhouse J. directing the reconveyance is dated March 3, 1964.

The defence of the action is threefold. First, it was said that the agreement offended the rule against perpetuities; second, that the city had not performed its part of the agreement in time; and third, that Weinblatt was not bound by Hart's covenants in the agreement.

All three defences are without merit. The defence based upon infringement of the rule against perpetuities was rejected by the judgment of this Court in *City of Halifax v. Vaughan Construction Co. Ltd.*[2]. The two cases are indistinguishable both on fact and law. As in the *Vaughan* case, this is not a case where a contingent interest in property may arise outside the perpetuity period. If it is to arise at all, it must be on the date stated or within a reasonable time thereafter.

The second defence is that the city has lost its rights by reason of its failure to perform the matters referred to in para. 2 of the agreement by the stated date, October 1, 1961. I have set out in detail what was done by Hart, Noy Construction and Weinblatt in an attempt to persuade the city to change the requirements of para. 4 of the agreement. It is apparent that there was no effort on the part of these people, nor was there any intention on their

[2] [1961] S.C.R. 715, 30 D.L.R. (2d) 234.

part, to comply with para. 4. The Court of Appeal has dealt with this point in the following paragraph, and, in my opinion, correctly:

> The evidence clearly supports the inference that the defendant and his predecessors in title did not intend to construct a seven-storey building as agreed. They sought permission to amend the agreement to a two-storey building and were refused. Any default by the Plaintiff in failing to complete the installation of the stipulated municipal services within the time specified is directly attributable to the action or rather lack of action on the part of the defendant. To permit the defendant to take advantage of a default which is clearly the result of the expressed intention of the defendant or his predecessors in title would be unjust and cannot be allowed.

The third defence was that the covenant in a reconveyance was a personal contract between the original parties and cannot be enforced against the subsequent purchaser because it does not fall within that class of negative covenants which run with the land and bind subsequent purchases with the burden. This defence does not arise on the facts of this case.

What the city had by virtue of this contract was an interest in the property to arise at a future date. Weinblatt took with full notice of this future interest. There is here no question of purchase for value without notice. Weinblatt, if he does not perform under the agreement—and he had no intention of performing—must reconvey on the terms of the agreement.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the defendant, appellant: Allan C. Wilson, Toronto.

Solicitors for the plaintiff, respondent: Bray, Schofield, Mackay & Kelly, Kitchener.

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*Feb. 12, 13
14, 15
Oct. 1

ANNIE BLANCHE BURROWS *et al.* (*Plaintiffs*) ..... APPELLANTS;

AND

OTTO WILHELM BECKER *et al.* (*Defendants*) ..... RESPONDENTS;

AND

OCEAN TOWERS LTD. .....(*Defendant*).

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Corporations—Representative action brought by minority shareholders—Internal affairs of company complained of—Issues between company and promoters—Cause of action, if any, properly belonging to company and not to shareholders.

Appeal—Appellant complying with part of judgment under which benefits accrued to him—Whether precluded from appealing other part.

The plaintiffs were minority tenant-shareholders in a company which owned and operated a large "self-owned apartment block". Before possession of the building was transferred to the company, the building was managed by the company's promoters and during this period the loss arising from the parking spaces was charged against the company. Similarly, the rent of the suite allotted to the caretaker was also charged against the company.

In a dispute which arose between the plaintiffs and the promoters and the directors, the substantial issues related to (i) the portion of the mortgage which was to be paid off by revenue from the garage and (ii) the caretaker's suite. Having first expressed their dissatisfaction at an annual meeting, the plaintiffs brought a representative action and were afforded substantial relief at trial. An appeal was allowed by the Court of Appeal and the action was dismissed on the ground that the action was precluded by the rule in *Foss v. Harbottle* (1843), 2 Hare 461, 67 E.R. 189. The plaintiffs then appealed to this Court.

Held: The appeal should be dismissed.

The issues relating to the caretaker's suite and to the portion of the mortgage attributable to the garage were the only issues involving money between the company and the promoters. They were questions of accounting which depended on the company's recognition of its obligations, if any, with respect to these matters. Such a cause of action properly belonged to the company and not to the shareholders. The question of the application of the funds of the company was within the powers of the company. A group of shareholders could not complain of acts which were valid if done by the majority of the shareholders or were capable of being confirmed by the majority.

It was necessary, therefore, that the company be the plaintiff in any action to redress this wrong, if it existed, and the Court had no jurisdiction

*PRESENT: Abbott, Judson, Ritchie, Hall and Spence JJ.

to interfere with the internal management when the company was acting within its powers. If a majority of the shares were controlled by those against whom relief was sought, the complaining shareholders might sue in their own names but in that case they had to show that the acts complained of were either fraudulent or *ultra vires*. The Court below had made a clear finding that it had not been shown in this case that the majority of the shares were controlled by the promoters.

In dismissing the preliminary objection whereby the plaintiffs argued that the defendants having complied with the trial judgment as to the issue to them of a new allotment of shares in place of an issue held to be illegal and void, they had taken and enjoyed the benefits to them under this portion of the judgment and were, therefore, precluded from appealing, the Court agreed with the Court below that: (*a*) the actions of the defendant promoters did not bring them within the principles of estoppel enunciated in *Lissenden v. C.A.V. Bosch Ltd.*, [1940] A.C. 412, and (b) the defendant promoters had done no more than comply with the judgment which they were bound to do.

On a further subsidiary issue, the Court also agreed with the Court below that in the particular circumstances no unauthorized reduction in capital or trafficking in shares was involved in a proposal that the company should purchase the caretaker's suite. The shares appurtenant to that suite had already been beneficially owned and held for the company but by an irregular allotment, and the intention was merely to extinguish them.

APPEAL and CROSS-APPEAL from a judgment of the Court of Appeal for British Columbia[1], allowing an appeal from a judgment of Munroe J. Appeal and cross-appeal dismissed.

C. C. I. Merritt, Q.C. for the plaintiffs, appellants.

John L. Farris, Q.C. and *Ronald C. Bray*, for the defendants, respondents.

The judgment of the Court was delivered by:

JUDSON J.:—In 1956 a group of real estate promoters formed three private holding companies, namely, B & W Apartments Ltd., owned by the defendants Becker and Walsh, W & E Apartments Ltd., owned by the defendants Walsh and Enders, and F & N Apartments Ltd., owned originally by Forst and Nemetz but subsequently acquired by the defendants F. A. Lockwood and W. W. Lockwood (hereafter called the "Vendor Companies") for the purpose of financing and building a large "self-owned apartment block".

[1] (1967), 63 D.L.R. (2d) 100.

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The promoters entered into a construction contract with Becker Construction Co. Ltd., a company wholly owned by the defendant Becker, and on November 25, 1957, incorporated Ocean Towers Ltd., as a private company authorized to issue 2,020 shares without nominal or par value. Ocean Towers was to be the owner of the apartment building. Its articles of association provided that no corporation except a trust company could be a shareholder and that all shares should be allotted, and could only be transferred, in units of 26 and 32 shares respectively and in one unit of 50 shares. Each unit represented an apartment suite and each purchaser was to get a 50-year renewable lease. On the same day the vendor companies made an agreement to sell the apartment building to Ocean Towers. The building was to have 18 floors with a total of 69 suites, including a penthouse, and 108 covered automobile parking spaces.

The construction contract provided for a price to include the cost of construction plus a fee of $100,000. A mortgage for $900,000 was arranged with an insurance company. The promoters intended that the mortgage, both as to principal and interest, was to be paid off in this way:

(a) As to $738,000 by monies provided from the sale of blocks of shares representing suites;

(b) As to $162,000 by the revenue from the parking spaces.

Agreements were made to sell some suites at a price based upon the estimated cost of the building. As the building progressed, it became apparent that the estimated cost would be exceeded. Those who had agreed to buy suites based upon the original estimated cost were given the option to cancel their purchases. Only one person took advantage of this offer. The prices of the suites were increased to take care of the increased costs. Nothing turns on this rearrangement and the rearrangement itself requires statement only in outline. The number of shares was increased to 2,421. The 26-share suites became 31-share suites; the 32 became 38; the penthouse suite rose from 50 to 75. The price of each share remained at $1,000. The mortgage arrangements remained the same. An amending agreement was made between the three vendor companies

and Ocean Towers to give effect to these changes and the memorandum and articles of association of Ocean Towers were also amended. Some adjustments were made for the small number of tenant-shareholders who had agreed to purchase their suites under the old agreement. However, most of the tenant-shareholders, including the plaintiffs, purchased their suites under the new agreement. It is clear that nearly all, if not all, the tenant-shareholders signed an acknowledgment that they had received, read and approved the amended "particulars of the transaction" as well as the revised memorandum and articles of association.

In the absence of what is now known as *condominium* legislation, these financial arrangements exposed the purchasers of suites to real hazards. Their security of tenure depended upon everything going according to plan. If suites were unsold, someone had to assume responsibility for the payments attributable to these suites. In this case the vendor companies assumed the responsibility. When the amending agreement was made in January 1957, they took up 776 shares. These shares were issued to Canada Trust Company in trust for the vendor companies who now held a total of 828 shares. These shares were paid for by a cash payment of $278,400, which was credited to the purchase price of the building, and promissory notes totalling $417,600 dated to coincide with the commencement of mortgage payments on April 1, 1960. These shareholdings were reduced from time to time by the sale of suites and at the time when this action was commenced in November 1964, the vendor companies still held 543 shares.

It had been expected that the building would be completed and possession and management transferred to Ocean Towers by November 1, 1959. This transfer was not made until January 1, 1964, and until this date the promoters managed the building. Until the first annual meetting of the company on January 31, 1961, the board of directors were appointees of the promoters but on this date the board was increased from three to seven and a new board was elected consisting of two promoters and five tenant-shareholders. The trial judge found that this was an independent board and it is apparent from the evidence that it was an able and conscientious board.

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The three plaintiffs, who are the appellants in this Court, are shareholders in Ocean Towers. They own 62 shares. They claim to have the support of 22 tenant-shareholders who own 759 shares. Their combined holdings are, therefore, 821 shares out of a total of 2,421.

The action is brought against two main groups of defendants. The first group were those who were promoters and the three companies that they formed for this purpose. At the date of the writ, the promoters had a total of 688 shares. There were four individual defendants who were not promoters. They held a total of 181 shares. No appeal has been taken against the judgment of the Court of Appeal dismissing the claim against these defendants. The two other directors who were sued were W. W. Lockwood and John Leslie Bartram. Lockwood was a promoter and Bartram represents the estate of Frank Wallace Walsh, who was a promoter. Again, the Court of Appeal dismissed the action against these two and no appeal has been taken from this dismissal.

The judgment at trial afforded substantial relief to the plaintiffs. The Court of Appeal allowed the appeal and dismissed the action on the ground that the action was precluded by the rule in *Foss v. Harbottle*[2]. I think it better to begin with to state what the substantial issues were. The first of these was the liability of Ocean Towers to take care of that part of the mortgage which was attributable to the parking spaces. This amounted to $162,000. The expectation was that revenues from the parking spaces would be sufficient to repay this sum over a certain period. This expectation was not realized because for a time there were many empty suites. Subsequently, after possession of the building was turned over to Ocean Towers on January 1, 1964, there were rearrangements made in the parking spaces and two increases made in the rentals. These increases and rearrangements were sufficient from then on to take care of this portion of the mortgage.

But, in the meantime, while the promoters were managing the apartment until January 1, 1964, the loss arising from the garage was charged to operating expenses and against Ocean Towers. When the property was turned over

[2] (1843), 2 Hare 461, 67 E.R. 189.

on January 1, 1964, it was apparent from the statement of adjustments, and the directors had known this for at least three years, that the retirement of the $162,000 portion of the mortgage was being looked after in this way. They also knew that there was a deficit and that the deficit had been charged as operating expenses. There can, in my opinion, be no doubt about this and the directors do not suggest otherwise. The statement of adjustments had been prepared by an independent firm of auditors who had been appointed to examine the accounts of the promoters. This was not the firm of auditors that had represented previously both the company and the promoters. The accounts were prepared and submitted on the basis that the $162,000 portion of the mortgage was the responsibility of the company and that this had been so from the beginning. These accounts were accepted by the directors. They had been aware from the time of their election that this was the way the garage was being financed and there was no question in their minds of the propriety of this. The suggestion of impropriety seems to have arisen for discussion at the annual meeting of shareholders held on March 19, 1964, and adjourned to April 2, 1964. At this time the dissident group raised the question.

To summarize, the judgment of the learned trial judge found that the promoters were liable for the $162,000 portion of the mortgage attributable to the garage. He reopened the accounts which had been finally approved by the directors on February 13, 1964, for the purpose of reversing the charges already made up to the date of the take-over of the building and for the subsequent period from January 1, 1964, up to the date of judgment, May 1, 1966. He awarded the sum of $23,231.68 by way of indemnity. In other words, under this judgment the promoters and not the company are responsible for the payment of this portion of the mortgage.

On this issue the trial judge found that there had been a breach of fiduciary duty on the part of the promoters in that they had failed to disclose to the applicants for shares in Ocean Towers that the responsibility for the payment of the $162,000 portion of the mortgage would be on Ocean Towers out of garage revenues and that any deficiency would have to be made good by the company.

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The Court of Appeal did not make any finding on this branch of the case as it was not necessary for their decision because they founded their judgment on the application of the rule in *Foss v. Harbottle* and their conclusion that the plaintiffs had not brought this within the exceptions to that rule enunciated in *Burland v. Earle*[3]. Mr. Justice Norris indicated that in his view there had been breaches of fiduciary duty. Mr. Justice Bull indicated that he would not have found any breach of fiduciary duty. Mr. Justice Tysoe declined to express an opinion on this issue on the ground that it might be an embarrassment if there were future litigation in a properly constituted action. However, his analysis for the financial set-up is the same as my own, and to me, it is clear that this $162,000 that I have been dealing with was not the obligation of the promoters and if it were necessary for me to express an opinion, I would not agree with the trial judge. The documentary evidence makes it plain that free parking was not to be provided and was not included in the price of the suites. The course of dealing is strong affirmation of the impossibility of any misunderstanding on this point. An independent and experienced board of directors never had any doubt.

In my opinion, the financial set-up was accurately stated in the particulars which were given to each shareholder. Briefly, the price of the building was the amount received from the sale of the treasury shares plus the sum of $162,000 "representing the cost of the covered parking spaces". The particulars also went on to say that "the covered parking spaces have been valued at $162,000 and as no provision has been made for the allocation of stock with respect to same, the purchase price of said parking spaces shall be paid from the proceeds of the mortgage aforesaid. The company will on request allot parking spaces to shareholders at a monthly rental to be determined." In other words, Ocean Towers was mortgaged for $900,000, and $162,000 from this mortgage was used to pay the sum of $162,000, which was part of the purchase price in addition to the amount received from the sale of treasury shares.

[3] [1902] A.C. 83.

I have examined the record for the purpose of discovering what tenant-shareholders signed certificates which stated that they had read certain documents which really composed the "prospectus" of the company. Munroe J. had this to say on the matter:

> A reading of the memorandum and articles of association of Ocean and of the forms of lease, when read in conjunction with the said agreement, together with a statement of "particulars" prepared by the solicitor of Ocean—all of which documents each applicant for shares certified that he (or she) had read—and which certificate is, I hold, binding upon them...

Tysoe J.A. agreed:

> In view of the above changes, a new form of memorandum for use in the sale of suites was prepared consisting of "particulars" of the transaction accompanied by copies of the memorandum and articles of association (as amended) of the company, a conformed copy of the executed new agreement, ex. 12, and a copy of the draft 50-year lease to be signed by a tenant-shareholder. These were delivered to prospective purchasers of suites and most, if not all, applicants were required to and did sign thereon an acknowledgment that same had been received, read, and approved. The learned trial judge found, correctly in my opinion, that those who signed such acknowledgments were bound thereby, notwithstanding evidence given by some that they did not receive and/or read the documents.

Taking as a starting point the list of shareholders dated December 31, 1963, there is evidence that all the original shareholders except three signed certificates stating that they had read the documents. There is no evidence that R. G. Buchanan or Tucker signed a certificate. Neither was called to give evidence. Mrs. Burrows bought by way of sublease and assignment from Becker and she gave evidence that she never saw any documents until March 1964.

There are cases where an original tenant-shareholder assigned his lease and shares to a third party. There is no evidence that any of the assignees signed a certificate. Mrs. Burrows appears to be in this position.

The other ground of complaint on the part of the plaintiff-shareholders related to the caretaking services. There could be no doubt on the material before the Court and before all the shareholders that maintenance costs were for the company and its shareholders and not for the promoters. The form of lease provided for a monthly payment for these costs of $69 for inside suites and $86 for outside suites. What has been referred to as a prospectus stated

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that there would be a 24-hour caretaking service. The original intention was to employ three shifts of caretakers. This was found to be more expensive than having a man and his wife live on the premises in one of the suites. This arrangement began in May of 1960 and suite 202 was allotted to the caretaker and his wife. It was shown by the evidence that this arrangement was cheaper than the 24-hour service originally contemplated. The shares representing suite 202 were in the hands of the promoters along with the other shares that they had taken up to keep the building going.

The learned trial judge found misrepresentation on the part of the promoters with reference to this suite and he reopened the accounts for the purpose of reversing the charges made for it to operating expenses. In my opinion, in so doing he was plainly in error. There was nothing in the material before the shareholders and before the Court to justify any conclusion that the promoters were to provide a caretaker's suite in perpetuity at their own expense. Once the board of directors had decided to do the caretaking in this way instead of by non-residential employees, the rent of the caretaker's suite was a proper charge to operating expenses.

The learned trial judge concluded that equity required of the promoters frank disclosure to each applicant for shares that Ocean would have to purchase from the promoters the suite now occupied by the caretaker if it desired to have him continue in residence. He further found that a failure to make such disclosure amounted to a misrepresentation of a material fact if, as the promoters said, it was not within their contemplation that suite #202 should be made available without cost to Ocean as a place of residence for the caretaker. He did not refer to the uncontradicted evidence that the cost of providing the suite, together with the caretaker's remuneration, was less than the $600 per month originally estimated to be included in the maintenance to cover the cost of a 24-hour caretaker service. He also held that the proposal that Ocean should purchase this suite would be *ultra vires,* it being contrary to the principle of *Trevor v. Whitworth*[4].

[4] (1887), 12 App. Cas. 409.

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On this point the Court of Appeal held that in the particular circumstances no unauthorized reduction in capital or trafficking in shares was involved in the proposal that Ocean Towers should purchase the caretaker's suite.

The issues relating to the $162,000 portion of the mortgage and the caretaker's suite are the only issues involving money between the company and the promoters. All others were of a subsidiary nature. I have dealt with the two money issues in detail because the Court of Appeal founded its judgment on the rule in *Foss v. Harbottle* and not on the merits of the case, but the facts of this case show that the rule is a salutary rule and not one of mere technicality. Here was a group of shareholders which wanted the company to litigate these two issues. Their dissatisfaction was first expressed at the annual meeting held on March 19, 1964, and adjourned to April 2, 1964. They made their own nominations for the board of directors but failed to secure their election. Instead, the meeting elected five tenant-shareholders and two representatives of the promoter group. There were three resignations of directors on April 28, 1964. Replacements were made, one of whom was a member of the plaintiff's group. At no time was there any requisition for a special general meeting to instruct the directors to bring this action. It is, I think, clear from the evidence that the directors had little confidence in the outcome of a company action. They were taking legal advice when the writ of summons was issued on November 30, 1964.

It is true that the plaintiffs as shareholders and tenants along with all the others were interested in these two issues. But they were not seeking to assert personal claims as shareholders against the promoters such as damages for fraud or rescission of their contracts to purchase shares. They were insisting that the company, as plaintiff, should litigate these issues and that if the company failed to do so, they had the right to bring the action. These money issues were between the company and the promoters. They were questions of accounting which depended upon the company's recognition of its obligations, if any, with respect to the $162,000 portion of the mortgage and the caretaker's suite. Such a cause of action properly belongs to the company and not to the shareholders. The question of the

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application of the funds of the company was within the powers of the company. A group of shareholders cannot complain of acts which are valid if done by the majority of the shareholders or are capable of being confirmed by the majority.

The company, therefore, must be the plaintiff in any action to redress this wrong, if it exists, and the Court has no jurisdiction to interfere with the internal management when the company is acting within its powers. If a majority of the shares are controlled by those against whom relief is sought, the complaining shareholders may sue in their own names but in that case they must show that the acts complained of are either fraudulent or *ultra vires*. The Court of Appeal in the reasons of Tysoe J.A. made a clear finding that it had not been shown in this case that the majority of the shares were controlled by the promoters. The independence of the board of directors after January 31, 1961, is beyond question.

Tysoe J.A. summarized the facts relating to control in the following passage:

> When all is said and done I remain faced with the following stark facts. At the relevant time the promoters did not possess a majority of the shares of the company and even if their shares are added to those of the directors and four former directors the total does not represent a majority. There were an unidentified number of shareholders who had not declared themselves—an uncommitted group holding over 20 per cent of the issued share capital of the company. No one of this group was a witness at the trial. The Court was not directed to any evidence indicating how any of the members of this floating group of uncommitted shareholders would or might have voted on the crucial question of whether the company should bring action against the promoters, with or without sufficient information to enable them to form an intelligent judgment. Nor is there evidence from which the Court might infer, rather than speculate, that some members of the floating group would have given proxies to others to vote their shares either for or against the bringing of an action against the promoters. In this situation it is much easier to hazard a guess than to speak with any certainty.

I agree with his conclusions and they fully support his judgment in declining to interfere with the internal affairs of this company and his finding that the "plaintiffs have not shown that any attempt to have the company bring this action in its own name would have been futile". I accept his analysis of the facts of this case and their relevancy in connection with the rule in *Foss v. Harbottle*.

They are set out in his reasons for judgment contained in (1967), 63 D.L.R. (2d) 100, and I refrain from repeating them. This is sufficient to dispose of the appeal on these two points.

The next issue in this appeal relates to a block of 543 shares which at the time of the institution of the action were in the hands of the promoters. I have mentioned these shares earlier in the reasons. They were the rest of the block of 776 shares issued pursuant to a resolution of January 29, 1959, to Canada Trust Company in trust for the three vendor companies. These shares were issued in breach of arts. 3 and 4 of the articles of association and the issue was, therefore, illegal and void. The trial judge rectified this illegality by directing the cancellation of these 543 shares and the issue of the same number in units of 31 and 38 shares to the defendant promoters personally and the delivery of their joint and several promissory notes to secure the unpaid balance of the purchase price. The reason for this was that the promoters, if they bought shares pending their further sale to tenant-shareholders, were to adhere to the form of agreement which the tenant-shareholders who did not pay for their shares in full were to sign.

I do not think that this issue requires further discussion. Tysoe J.A. said:

> The effect of this judgment is simply to correct the irregularities resulting from the breaches of arts. 3 and 4 of the articles of association of the company and to produce such a result that "the original resolution of January 29, 1959 will be adhered to as nearly as possible". With respect, it appears to me that this was a sensible way of dealing with this matter and I am unable to see any error in what was done. In my opinion this claim must fail.

According to Tysoe J.A., the defendants were bound to comply with the provisions of this part of the judgment and they did so. In the Court of Appeal the plaintiffs argued that by complying with the judgment, the defendants had taken and enjoyed the benefits accruing to them under this portion of the judgment and were, therefore, precluded from appealing. The same point was argued in this Court by way of preliminary objection and I would dismiss this preliminary objection for the same reasons that were given in the majority judgment in the Court of Appeal.

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Mr. Justice Tysoe and Mr. Justice Bull dismissed the motion on two grounds:

(a) that the actions of the defendant promoters did not bring them within the principles of estoppel enunciated in *Lissenden v. C.A.V. Bosch Ltd.*[5];

(b) that the defendant promoters had done no more than comply with the judgment which they were bound to do.

Mr. Justice Norris dismissed the motion on the first ground. Again, I have nothing to add to the reasons for judgment of Tysoe J.A. on this point.

On the question of the *ultra vires* issue of these shares, I do, however, wish to state that in my opinion this was an action that any shareholder could bring and that the rule in *Foss v. Harbottle* has no application.

There is one further subsidiary issue to be dealt with, namely, the 31 shares appurtenant to suite 202, the caretaker's suite. When Ocean Towers was converted into a public company, 455 shares were allotted to Canada Trust Company in trust for Ocean Towers. All of these shares except the 31 shares appurtenant to suite 202 were sold to tenant-shareholders but the 31 shares were still outstanding in the name of Canada Trust Company in trust for Ocean Towers when the action was instituted. The trial judge ordered the cancellation of these shares on the ground that they had been illegally issued. The Court of Appeal stated that the cancellation raised no problems and that it was not attacked and must therefore stand.

There was, however, an agreement made on December 31, 1963, between the vendor companies and Ocean Towers under which Ocean Towers was to keep possession of suite 202 subject to payment of a purchase price of $28,000. The agreement was conditional upon its approval by a resolution of shareholders and this has never been done. The agreement was declared to be illegal and void by the trial judge. The declaration of illegality was set aside by the Court of Appeal and, in my opinion, correctly.

The Court of Appeal pointed out that the agreement was not a purchase of these 31 shares from the vendor

[5] [1940] A.C. 412.

companies. The vendor companies had never taken them nor showed them in their accounts as being owned. The shares had always been beneficially owned by and held for the company but by an irregular allotment. They had never been issued. The gist of the judgment of the Court of Appeal on this point is contained in the following passage:

> In effect, the agreement constituted a purchase of a leasehold interest, or leasehold entitlement, vested in the Vendor Companies by their obligation under ex. 12 to take over all unsold suites in part payment on the purchase price of the building. The $28,000 took the place of and recompensed the Vendor Companies for the loss of the purchase price of the suite and the shares appurtenant to it which would have been added to the purchase price of the building had the suite with its shares been taken over by the Vendor Companies. Neither the form nor the intention thereof was to purchase shares. Only the company had any interest in the shares, and the intention was merely to extinguish them. In my view, under the peculiar circumstances of this matter, no unauthorized reduction in capital or trafficking in shares was involved, and the learned trial Judge's finding that ex. 37 was *ultra vires,* illegal and void, and that it be cancelled, cannot stand.

Again, I agree in full.

There was a cross-appeal by the promoters in which it was argued that the rule in *Foss v. Harbottle* applied to every cause of action asserted in this litigation and that the Court of Appeal should have simply ordered a dismissal of the action. The attack was directed against the order of the trial judge, affirmed by the Court of Appeal, relating to the 543 shares. I have already stated my opinion that the rule in *Foss v. Harbottle* has nothing to do with this cause of action. The cross-appeal fails and must be dismissed.

I would dismiss the appeal and the cross-appeal both with costs.

Appeal and cross-appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: Bull, Housser & Tupper, Vancouver.

Solicitors for the defendants, respondents: Clark, Wilson, White, Clark & Maguire, Vancouver.

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CANADIAN WAREHOUSING ASSOCIATION ..... APPELLANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Combines—Transportation and storage of household goods—Whether included in definition of "article" in the Act—Combines Investigation Act, R.S.C. 1952, c. 314, ss. 2(a), 32(1)(c), 32(2), as amended by 1960 (Can.), c. 45, ss. 1, 13—Exchequer Court Act, R.S.C. 1952, c. 98, s. 18(1)(g).

Jurisdiction—Supreme Court of Canada—Question of law submitted to Exchequer Court by agreement between parties—Whether answer binds "rights in future"—Exchequer Court Act, R.S.C. 1952, c. 98, s. 83.

The appellant association represents some 300 firms engaged in the business of transporting and storing household goods. By an agreement in writing between it and the Crown, made pursuant to s. 18(1)(*g*) of the *Exchequer Court Act*, that Court was asked to determine the following question: "Subject to section 32(2) of the *Combines Investigation Act* is a person who conspires, combines, agrees or arranges with another person to prevent, or lessen, unduly competition in the storage or transportation of household goods, guilty of an offence under section 32(1)(c) of the *Combines Investigation Act*?" The Exchequer Court answered the question in the affirmative, and the association was granted leave to appeal to this Court.

Held: The appeal should be dismissed.

This Court had jurisdiction to hear the appeal. As a direct result of the judgment of the Exchequer Court, it is no longer open to the appellant to contend in other judicial proceedings that the storage or transportation of household goods does not come within the purview of s. 32(2) of the Act. Such a result binds substantial "rights in future" of the appellant within the meaning of s. 83(*b*) of the *Exchequer Court Act* which enacts that an appeal from a judgment of the Exchequer Court lies when the action, suit, cause, matter or other judicial proceeding relates "to any matter or thing where rights in future might be bound".

As to the merits, household goods are "articles" within the definition of that word in s. 2(*a*) of the *Combines Investigation Act*, as being commodities "that may be the subject of trade or commerce". The word "article" does not apply only to commodities in the stream of commerce. If Parliament had intended that commodities that are actually in the stream of commerce only would be articles within the meaning of the definition, the word "is" would be expected to be found instead of "may be".

Coalition—Transport et entreposage de meubles de maison—Sont-ils visés par la définition du mot «article» dans la loi—Loi relative aux

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*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Pigeon JJ.

enquêtes sur les coalitions, S.R.C. 1952, c. 314, art. 2(a), 32(1)(c), 32(2), amendée par 1960 (Can.), c. 45, art. 1, 13—Loi sur la Cour de l'Échiquier, S.R.C. 1952, c. 98, art. 18(1)(g).

Juridiction—Cour Suprême du Canada—Question de droit déférée à la Cour de l'Échiquier par une entente entre les parties—La réponse se rattache-t-elle à des «droits futurs»—Loi sur la Cour de l'Échiquier, S.R.C. 1952, c. 98, art. 83.

L'association appelante représente quelque 300 sociétés commerciales dont l'entreprise consiste à faire le transport et l'entreposage de meubles de maison. L'association et la Couronne ont convenu par écrit, conformément à l'art. 18(1)(*g*) de la *Loi sur la Cour de l'Échiquier*, que la question suivante soit déterminée par la Cour: «Sous réserve de l'art. 32(2) de la *Loi relative aux enquêtes sur les coalitions*, est-ce qu'une personne qui complote, se coalise, se concerte ou s'entend avec une autre pour empêcher ou diminuer indûment la concurrence dans l'entreposage ou le transport de meubles de maison, est coupable de l'infraction prévue à l'art. 32(1)(*c*) de la *Loi relative aux enquêtes sur les coalitions*?». La Cour de l'Échiquier a répondu affirmativement à cette question, et l'association a obtenu la permission d'en appeler à cette Cour.

Arrêt: L'appel doit être rejeté.

Cette Cour a juridiction pour entendre l'appel. Comme conséquence directe du jugement de la Cour de l'Échiquier, l'appelante ne peut plus soutenir dans d'autres procédures judiciaires, que l'entreposage ou le transport de meubles de maison ne tombe pas sous la portée de l'art. 32(2) de la Loi. Un tel résultat se rattache à des «droits futurs» substantiels de l'appelante dans le sens de l'art. 83(*b*) de la *Loi sur la Cour de l'Échiquier* qui déclare qu'il y a appel d'un jugement de la Cour de l'Échiquier lorsque l'action, poursuite, cause, affaire ou autre procédure judiciaire se rapporte à «une affaire ou chose à laquelle peuvent se rattacher des droits futurs».

Sur le fond, les meubles de maison sont compris dans la définition du mot «article» de l'art. 2(*a*) de la *Loi relative aux enquêtes sur les coalitions* à titre d'articles «susceptibles de faire l'objet d'échanges ou d'un commerce». Le mot «article» ne s'applique pas seulement aux articles qui sont actuellement dans le commerce. Si telle avait été l'intention du Parlement, on trouverait les mots «qui font» au lieu de «susceptibles de faire».

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada[1], en réponse à une question de droit concernant l'application de la *Loi relative aux enquêtes sur les coalitions*. Appel rejeté.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada[1], in answer to a question of law as to the application of the *Combines Investigation Act*. Appeal dismissed.

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[1] [1968] 1 Ex. C.R. 392, 2 C.R.N.S. 204, 54 C.P.R. 35.

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CANADIAN WAREHOUSING ASSOCIATION v. THE QUEEN

Keith E. Eaton and *Brian A. Crane,* for the appellant.

C. R. O. Munro, Q.C., and *S. M. Leikin,* for the respondent.

The judgment of the Court was delivered by

PIGEON J.:—By agreement in writing made as contemplated in sub-para. (*g*) of s. 18 (1) of the *Exchequer Court Act,* the parties, after stating that "the transportation and storage of goods commonly described as household goods, being goods owned by householders and used in their households, is a substantial business . . .", have submitted to the Exchequer Court of Canada the following question:

> Subject to section 32(2) of the *Combines Investigation Act* is a person who conspires, combines, agrees or arranges with another person to prevent, or lessen, unduly, competition in the storage or transportation of household goods, guilty of an offence under section 32(1)(*c*) of the *Combines Investigation Act*?

The question was answered in the affirmative by Gibson J. An appeal is now brought to this Court by leave granted by Fauteux J. under s. 83 of the *Exchequer Court Act* as relating to a "matter or thing where rights in future might be bound".

At the hearing, argument was heard first on the question of jurisdiction because, as far as could be determined, this appeared to be the first case of an appeal under such circumstances.

A declaratory judgment is undoubtedly binding on the parties as *res judicata,* not merely by application of the doctrine of *stare decisis.* As a direct result of the judgment of the Exchequer Court it is no longer open to the appellant to contend in other judicial proceedings that the storage or transportation of household goods does not come within the purview of s. 32(2) of the *Combines Investigation Act.* In considering whether such a result binds "rights in future", it must be observed that when what is presently sub-para. (*b*) of s. 83 of the *Exchequer Court Act* was first enacted (1887, 50-51 Vict., c. 16, s. 52), it read as follows:

> (*b*) Relates to any fee of office, duty, rent, revenue or any sum of money payable to Her Majesty, or to any title to lands or tenements, annual rents or such like matters or things where the rights in future might be bound.

The words "such like" explicitly required the application of the *noscitur a sociis* rule as they did at that time in s. 29 of the *Supreme and Exchequer Courts Act*, R.S.C. 1886, c. 135. However, Parliament amended in a different manner the two provisions after Taschereau J. (as he then was) had said of s. 29, in *Gilbert v. Gilman*[2]:

> we are asked to read this section as if it read "Or in any matters or things where the rights in future might be bound." But the words the legislature has used are "such like matters," thereby qualifying them to such matters or things as are precedently mentioned.

By s. 8 of 54-55 Vict., c. 26, the provision in the *Exchequer Court Act* was made to read as it now does, Parliament adopting substantially the wording indicated as not implying a restriction, namely:

> (*b*) Relates to any fee of office, duty, rent, revenue or any sum of money payable to Her Majesty, or to any title to lands, tenements or annual rents, or to any question affecting any patent of invention, copyright, trade mark or industrial design, or to any matter or thing where rights in future might be bound.

But concerning the jurisdiction of this Court, the amendment made two years later (56 Vict., c. 29) consisted in substituting the words "and other" for the words "or such like". It is the provision as thus amended that was held to require the application of the *noscitur a sociis* rule in *O'Dell v. Gregory*[3], a decision which was followed in a long line of cases culminating in *Greenlees v. Attorney General of Canada*[4].

In view of the difference between the two enactments it seems clear that these decisions can have no application to the instant case. It is moreover obvious that the rights in future of the appellant that are bound by the decision appealed from are substantial. As a result of the decision it is unlawful for it to conduct its business otherwise than subject to the prohibitions enacted in the *Combines Investigation Act*, whereas in the absence of such a decision it would be open to it to contend that as respects the storage or transportation of household goods, it is not subject to such prohibitions. It is also apparent that in those matters it is subject to the exercise of the powers of investigation

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[2] (1889), 16 S.C.R. 189 at 194-5. [3] (1895), 24 S.C.R. 661.
[4] [1946] S.C.R. 462, [1947] 1 D.L.R. 798.

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contemplated in that Act without any possibility of contending that these matters are not within its proper scope.

On the merits, the argument submitted by appellant is essentially that household goods are not "articles" within the definition of that word in para. (*a*) of s. 2 of the *Combines Investigation Act*:

> (*a*) "article" means an article or commodity that may be the subject of trade or commerce.

It is contended that the general intention of the Act is that it shall apply only to commodities in the stream of commerce. The fatal weakness of this argument is that it really invites us to construe the definition as if it read "that is" instead of "that may be". It is true that the result of the literal reading is that the definition embraces every conceivable commodity but it is no reason for departing from the clear meaning of the Act. If Parliament had intended that commodities that are actually in the stream of commerce only would be articles within the meaning of the definition, we would expect to find the word "is" instead of "may be". There is no basis for not presuming that the wording used was intended precisely to make it certain that commodities not actually in the stream of commerce would be covered.

Our attention was drawn to s. 33 of the *National Transportation Act* (14-15-16 Eliz. II, c. 69) whereby provision is made for the filing of a tariff of tolls by an association of motor vehicle operators on their behalf subject to the authority of the Canadian Transport Commission. Nothing in that provision, which is not yet in force, lends any support to the contention that the *Combines Investigation Act* should be construed otherwise than as above indicated.

The appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitor for the respondent: D. S. Maxwell, Ottawa.

LAWRENCE WILLARD BROSSEAU .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

*1968
Nov. 15
Nov. 28

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Plea of guilty—Charge of non capital murder—Accused represented by counsel—Whether Court should have questioned the accused before accepting plea.

The appellant, who was a 22 year old Cree Indian with a Grade II education, was charged with capital murder to which he pleaded not guilty. The charge was subsequently reduced to non capital murder, and in the presence of his counsel, the appellant pleaded guilty thereto and was sentenced to life imprisonment. The Court of Appeal dismissed his application for leave to withdraw that plea and affirmed the conviction on the charge of non capital murder. The appellant was granted leave to appeal to this Court on the question as to whether the trial judge erred in law in accepting the plea of guilty without making inquiry as to whether the appellant understood the nature of the charge and the effect of such plea.

Held (Spence J. dissenting): The appeal should be dismissed.

Per Cartwright C.J. and Martland, Judson and Ritchie JJ.: When a plea of guilty is offered and there is any reason to doubt that the accused understands what he is doing, there is no doubt that the judge will make inquiry to ascertain whether he does so; and the extent of the inquiry will vary with the seriousness of the charge to which the accused is pleading. Failure to make due inquiry may well be a ground on which the Court of Appeal will exercise its jurisdiction to allow the plea of guilty to be withdrawn if it is made to appear that the accused did not fully appreciate the nature of the charge or the effect of his plea or if the matter is left in doubt. However, it cannot be said that where, as in the case at bar, an accused is represented by counsel and tenders a plea of guilty to non capital murder, the trial judge is bound as a matter of law to interrogate the accused before accepting the plea.

Per Spence J., *dissenting*: It is the duty in law of the trial tribunal to satisfy itself that the accused understands the nature of the charge and the effect of the plea before it is entitled to accept a plea of guilty. The trial judge could not, in the circumstances of this case, in exercising his discretion to accept the plea of guilty, rely only on the fact that the accused was represented by counsel. In so doing, he could not satisfy himself that the accused knew either the nature of the plea or the consequences thereof.

Droit criminel—Plaidoyer de culpabilité—Accusation de meurtre non qualifié—Accusé représenté par un avocat—Est-ce que la Cour aurait dû questionner l'accusé avant d'accepter le plaidoyer.

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*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Spence JJ.

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L'appelant, un Indien Cri âgé de 22 ans et ayant une éducation allant jusqu'au grade II, a été accusé d'un meurtre qualifié auquel il a plaidé non coupable. L'accusation a été subséquemment réduite à celle de meurtre non qualifié, et en présence de son avocat, l'appelant a plaidé coupable à cette accusation et a été condamné à l'emprisonnement à vie. La Cour d'appel a rejeté sa demande pour obtenir la permission de retirer ce plaidoyer et a confirmé la déclaration de culpabilité sur l'accusation de meurtre non qualifié. L'appelant a obtenu la permission d'appeler à cette Cour sur la question de savoir si le juge au procès a erré en droit en acceptant le plaidoyer de culpabilité sans faire une enquête pour déterminer si l'appelant comprenait la nature de l'accusation et l'effet d'un tel plaidoyer.

Arrêt: L'appel doit être rejeté, le Juge Spence étant dissident.

Le Juge en Chef Cartwright et les Juges Martland, Judson et Ritchie: Lorsqu'un plaidoyer de culpabilité est offert et qu'il y a raison de douter que l'accusé comprend ce qu'il fait, il n'y a aucun doute que le juge fera une enquête pour s'assurer qu'il comprend; et l'étendue de cette enquête variera selon la gravité de l'accusation à laquelle l'accusé plaide. Le défaut de faire l'enquête requise peut être un motif sur lequel la Cour d'appel s'appuiera pour exercer la juridiction qu'elle possède de permettre que le plaidoyer de culpabilité soit retiré s'il appert que l'accusé n'a pas complètement apprécié la nature de l'accusation ou l'effet de son plaidoyer ou si la chose est laissée dans le doute. Cependant, on ne peut pas dire que lorsqu'un accusé est, comme dans le cas présent, représenté par un avocat et offre un plaidoyer de culpabilité à une accusation de meurtre non qualifié, le juge au procès est tenu en droit d'interroger l'accusé avant d'accepter le plaidoyer.

Le Juge Spence, *dissident:* En droit, le juge au procès doit s'assurer que l'accusé comprend la nature de l'accusation et l'effet du plaidoyer avant qu'il lui soit permis d'accepter un plaidoyer de culpabilité. Dans les circonstances de cette cause, le juge au procès ne pouvait pas, dans l'exercise de sa discrétion d'accepter le plaidoyer de culpabilité, s'appuyer uniquement sur le fait que l'accusé était représenté par un avocat. En ce faisant, il ne pouvait pas s'assurer que l'accusé connaissait la nature du plaidoyer ou ses conséquences.

APPEL d'un jugement de la Cour d'appel de l'Alberta confirmant une déclaration de culpabilité pour meurtre non qualifié. Appel rejeté, le Juge Spence étant dissident.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division, affirming a conviction for non-capital murder. Appeal dismissed, Spence J. dissenting.

Ian H. Baker, for the appellant.

Brian A. Crane, for the respondent.

The judgment of Cartwright C.J and of Martland, Judson and Ritchie JJ. was delivered by

THE CHIEF JUSTICE:—This appeal is brought, pursuant to leave granted by this Court on October 17, 1968, from a judgment of the Appellate Division of the Supreme Court of Alberta pronounced on September 10, 1968, dismissing, without recorded reasons, the application of the appellant for leave to withdraw his plea of guilty, granting leave to appeal and dismissing the appellant's appeal from his conviction on a charge of non-capital murder.

Leave was granted to appeal on the following question:

> Did the learned trial judge err in law in accepting the Appellant's plea of guilty to non-capital murder without making inquiry to satisfy himself that the Appellant understood the nature of the charge and the effect of such a plea?

It appears that the appellant was indicted on the charge that on or about March 11, 1967, he unlawfully killed Robert George Sidener, thereby committing capital murder. The indictment is dated September 5, 1967. The appellant appeared before Primrose J. on September 5, 1967, was arraigned and pleaded not guilty and the case was remanded to October 30, 1967, for the purpose of fixing a date for trial. The appellant appeared on October 30 before Greschuk J.; he appeared on January 2, 1968, before Primrose J.; he appeared on January 15, 1968, before Manning J.; on each of these occasions the case was further remanded for the purpose of fixing a date for trial. The appellant appeared on February 26, 1968, before Greschuk J. and was remanded to March 11, 1968, for trial. On March 11, 1968, he appeared before O'Byrne J. and the notation on the back of the indictment as to what occurred on that day is as follows:

> Monday March 11th, 1968
> Mr. Justice M. B. O'Byrne
> Mr. W. J. Stainton—Crown
> Mr. P. Mousseau for the Accused
> Indictment amended to read
> "NON-CAPITAL MURDER"
> Accused arraigned.
> Pleads "NOT GUILTY"
> Mr. L. Pearce—reporter
> Case adjourned to 2:00 p.m. for election & continuation

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Monday, March 11th, 1968
2:00 p.m. Mr. Justice M. B. O'Byrne
Mr. W. J. Stainton—Crown
Mr. P. Mousseau for the Accused
Mr. G. F. Remedios—reporter
Mr. Patrick Callihoo—interpreter sworn
Accused re-arraigned on the amended indictment—
Pleads "GUILTY"
Sentence LIFE IMPRISONMENT

The transcript of the proceedings on March 11, 1968, opens as follows:

MR. STAINTON: In this case, my Lord, might the amendment which has been proposed and which has been written into the indictment be granted so that the charge will read non-capital murder instead of capital murder?

THE COURT: Yes, the amendment is granted.

MR. STAINTON: Might the accused be rearraigned, my Lord?

THE COURT: Yes. Mr. Clerk:

THE CLERK OF THE COURT: Lawrence Willard Brosseau, you stand charged that you on or about the 11th day of March, A.D. 1967, at or near Tulliby Lake in the Judicial District of Edmonton, did unlawfully kill and slay Robert George Sidener, thereby committing non-capital murder contrary to the provisions of the Criminal Code. How say you to this charge, do you plead guilty or not guilty?

THE ACCUSED: Not guilty.

THE CLERK OF THE COURT: Harken to your plea as the Court doth record it, Lawrence Willard Brosseau, not guilty.

MR. MOUSSEAU: My Lord, if we may, would the Court grant a five-minute adjournment?

THE COURT: Yes, we will adjourn for five minutes.

The Court adjourned at 10.05 a.m. and reconvened at 10.20 a.m., at which time Mr. Mousseau asked the Court to stand the matter over to two o'clock in the afternoon, Mr. Stainton stated that he had no objection, and the trial Judge adjourned the matter accordingly. The transcript as to what occurred at 2 p.m. is as follows:

MR. MOUSSEAU: I might at this time, my Lord, before Mr. Brosseau arrives, explain that whilst Mr. Brosseau appears to have a sufficient command of the English language, I have on prior occasions interviewed him with an interpreter, and when I spoke with Mr. Brosseau earlier this morning he did indicate to me that he preferred that the present proceedings be interpreted to him. Mr. Callihoo, who is an ex-agent of the then Department of Indian Affairs, has agreed to do so, and I would request of Your Lordship that he be sworn in order to perform his function.

THE COURT: Very well.

PATRICK CALLIHOO, sworn in as English/Cree interpreter.

THE COURT: It's just a matter of reading the charge again to the accused, Mr. Mousseau?

MR. MOUSSEAU: It is, yes, my Lord.

THE CLERK: Lawrence Willard Brosseau, you stand charged that you on or about the 11th day of March, A.D. 1967, at or near Tulliby Lake, in the Judicial District of Edmonton, did unlawfully kill and slay Robert George Sidener, thereby committing non-capital murder, contrary to the provisions of the Criminal Code. How say you to this charge, do you plead guilty or not guilty?

THE ACCUSED: Guilty.

THE CLERK: Harken to your plea as the Court doth record it, Lawrence Willard Brosseau, guilty.

Mr. Stainton then outlined the circumstances of the killing to the trial Judge at some length. The trial Judge then asked Mr. Mousseau if he wished to say anything and Mr. Mousseau addressed the Court as follows:

MR. MOUSSEAU: Only to indicate to the Court that the accused is describable only in terms of an absolute primitive. I don't pretend to have any particular understanding of his mind or of his intent. I can point out to evidence given in the preliminary both by the wife of the deceased as well as by Mr. Wendt, that there was absolutely no antagonism or ill feeling between the accused and Mr. Sidener. I can point out also the accused's evidence to the effect that he drank what for him was a substantial amount of beer. I can point out also the fact that whilst he did give one profession or did make certain admissions to Mr. Nolin, as my friend has pointed out, he gave a totally different reason for the commission of the act when speaking to the police.

These factors, of course, in view of the statutory penalty, do not involve this Court presently. However, this Court, to the extent that it is a Court of law, is involved with the matter of justice generally, and whilst I am not absolutely certain as to the Court's powers with respect to cases of like nature, I would ask of the Court that it recommend that this matter be gone into by the Parole Board and that it may, upon examination, prove to be one of the special cases that the enactment setting out the Parole Board envisages. That is my submission, my Lord.

The transcript continues as follows:

THE COURT: Thank you, Mr. Mousseau.

Stand up, Mr. Brosseau. Section 206(2) of the Criminal Code provides that a person guilty of non-capital murder shall be sentenced to imprisonment for life. I have no discretion in the matter. I sentence you to imprisonment for life. At the request of Mr. Mousseau a report will be made to the Parole Board along the line suggested by him.

MR. MOUSSEAU: Thank you, my Lord.

THE COURT: That's all, Mr. Stainton?

MR. STAINTON: Yes, my Lord.

THE COURT: Thank you.

(Court adjourned at 3:01 p.m.)

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It will be observed that no inquiry was made by the learned trial Judge either of the appellant or of his counsel as to whether the appellant understood the charge and the consequences of his plea of guilty.

On March 18, 1968, the appellant gave a written notice of appeal to the Appellate Division of the Supreme Court of Alberta stating that he wished to apply "for leave as required" and to appeal his conviction and sentence on the following grounds:

> (*a*) I wish to appeal my conviction and sentence on the grounds that I only have a grade 2 education and my lawyer told me that if I didn't plead guilty to the charge that they would sentence me to hang. When he told me this I was scared and pleaded guilty.

On August 26, 1968, the appellant swore an affidavit stating that he is a Cree Indian, that he reached only grade 2 in school and left school when he was fifteen years old, that he is now twenty-two years old, that he was drunk at the time of the offence and did not know what he did, that he was drunk when he gave a statement to the police, that he understood that for capital murder he would be hanged but that non-capital murder was not so serious, that his lawyer told him in February 1968 that he might get five or seven or eight years but did not say on what charge he could get this sentence, that, in March 1968, his lawyer told him that if he was found guilty they would sentence him to be hanged, that he pleaded not guilty in Court and the case was put over till two o'clock and that his lawyer told him that if he was found guilty he could be sentenced to be hanged but that if he pleaded guilty, he would get life imprisonment; that he pleaded guilty because he was scared of being hanged, that when he pleaded guilty he did not understand that the Judge had no choice but to impose a life sentence. He concluded by saying that he did not believe he had killed Robert George Sidener as he always got along well with him when he worked for him over six years and that he had no grudge against him.

Mr. Mousseau, at the specific request of counsel then acting for the appellant and with the written authorization of the appellant, made an affidavit which appears to have been sworn on September 12, 1968. (This would seem to be

in error as the judgment of the Appellate Division refers to the affidavit of Mr. Mousseau). In this affidavit, Mr. Mousseau states that he arranged the delays in the case being brought to trial in the expectation of a change in the legislation regarding capital crimes, "that the amendments made the Criminal Code, and relevant to the proceedings at bar, were not of a nature as would assist the Appellant", that subsequent to the enacting of the amendment aforesaid a tentative arrangement was entered into between counsel for the Crown and himself, as a result of which it was suggested that the charge should be reduced to non-capital murder.

The amendments referred to were doubtless those contained in *Statutes of Canada 1967-68*, c. 15, and by virtue of s. 3 of that Act, as the date of the killing of Sidener was March 11, 1967, and the indictment was dated September 5, 1967, prior to the date that the amendments were brought into force, December 29, 1967, it is clear that had the appellant been convicted on the indictment for capital murder the imposition of a sentence of death would have been mandatory.

The affidavit continues as follows:

6. THAT subsequent to the above, I met with my client on a number of occasions (the last of those meetings took place on either of the 9th or the 10th days of March, A.D. 1968); we together reviewed the facts of the matter; I discussed with him the nature of the charge with which he was faced, as well as the consequences attendant upon a finding of guilty thereon; I also indicated that, on the evidence, the charge might, at trial, be reduced to one of either 'non-capital murder' or 'manslaughter'—I explained to him the nature of these charges as well as the consequences attendant thereon; I recommended that, in my opinion, his interests would best be served by his pleading guilty to a reduced charge of 'non-capital murder'—I indicated to him that the sentence in a case of this nature was dictated by the Statute; that, notwithstanding, the Parole Regulations permitted review and release upon his having served seven years of his sentence or, in the event that special circumstances be shown to exist, at the Board's discretion—I was able, in this last regard, to assure him of the co-operation and assistance of officials of the Native Friendship Centre as well as to indicate to him that I would move that the Court, in its 'Report', recommend review in the light of the very peculiar nature of his person and circumstances; MR. BROSSEAU indicated that he would be guided by my recommendation.

7. On March 11th, A.D. 1968, MR. BROSSEAU appeared before O'BYRNE, J., and was re-arraigned on a charge of non-capital murder he recorded a plea of "not guilty"; in view of the circumstances surrounding the reduction of the charge as well as of my uncertainty as to whether he was fully cognizant of that which he had done—I requested adjournment of the matter to the afternoon.

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8. I then called upon P. CALIHOO, an interpreter, and together with MR. CALIHOO, attended upon MR. BROSSEAU at the R.C.M. Police cells; at that time, through the intermediary of MR. CALIHOO I clearly indicated to MR. BROSSEAU that he was wholly at liberty to proceed to trial and that, should he so desire, I would request a further adjournment of the proceedings; I again reviewed the circumstances of the occurrence; explained the consequences attendant upon a finding of "guilty" on each of the three charges aforementioned; I reiterated my advice to the effect that his best interests would be served by his pleading "guilty" to the reduced charge as it presently stood; I requested that he indicate his desire and assured him that I would do as he requested; at 2:00 o'clock that afternoon he again appeared before The Honourable, Mr. Justice M. B. O'BYRNE, the charge was re-read to him and translated into the Cree language by MR. CALIHOO—he recorded a plea of "guilty" thereto.

9. THAT MR. BROSSEAU'S circumstances are such that, in my opinion, notwithstanding the above, it may well be that he was throughout incapable of understanding or appreciating the nature and consequences of the plea instantly recorded; that his background is such that he cannot be regarded other than as a true 'primitive'.

There was also before the Appellate Division an affidavit exhibiting a letter from an M.D., a psychiatric consultant, concluding with the sentence:

> Certainly he (the appellant) would not rate higher than a Borderline I.Q.—that is, just above the Defective level.

and a psychological report of which the last sentence reads:

> It can be concluded that he is functioning within the borderline group.

I have recited the evidence which was before the Appellate Division at perhaps undue length. It was within the powers of that Court, if it saw fit to do so, to make an order permitting the appellant to withdraw his plea of guilty and directing a new trial but their decision not to do so was one involving questions of fact or mixed fact and law, not a question of law in the strict sense, unless it can be said that the question on which leave to appeal to this Court was granted should be answered in the affirmative.

The question before us is whether the learned trial Judge erred in law in accepting the plea of guilty without making inquiry as to whether the appellant understood the nature of the charge and the effect of such plea.

No doubt when a plea of guilty is offered and there is any reason to doubt that the accused understands what he is doing, the judge or magistrate will make inquiry to ascertain whether he does so and the extent of the inquiry will vary with the seriousness of the charge to which the

accused is pleading. An illustration of the care exercised in a case where the accused pleaded guilty to murder at a time when the imposition of the death sentence was obligatory, is furnished by the case of *Rex v. Bliss*[1].

The extent of the duty of inquiry resting on a judge or magistrate before whom a plea of guilty is offered is discussed in *R. v. Johnson and Creanza*[2] and in *Rex v. Hand (No. 1)*[3], both decisions of the Court of Appeal for British Columbia. In the second of these, Bird J.A., as he then was, speaking for the Court said at page 389:

> This Court in two recent cases has had occasion to express the opinion that a plea of guilty ought not to be accepted unless the Judge or Magistrate is sufficiently informed in open Court of the facts upon which the accused pleads guilty, to provide assurance that the accused understands the offence to which his plea relates: *Cf. R. v. Theriault* (unreported) and *R. v. Johnson & Creanza*, (1945) 4 D.L.R. 75, 85 Can. C.C. 56. This course is more particularly essential where the offence, as here, involves a maximum sentence of life imprisonment and whipping.

In *Rex v. Milina*[4], the Court of Appeal for British Columbia consisting of Sloan C.J.B.C. and O'Halloran, Robertson, Sidney Smith and Bird JJ.A. again considered the cases above referred to. Sidney Smith J.A., with whom Sloan C.J.B.C. and Robertson J.A. agreed, said at page 592, after referring to the language used in the *Hand* case:

> But however that may be, it is desirable to state now quite plainly that in my opinion when an accused person pleads guilty it is not the law that the magistrate must go into the facts in order to satisfy himself that the accused is in fact guilty. If that were so there would be an end at once to any efficacy in a plea of guilty.
>
> What the quoted language does mean is that upon a plea of guilty the magistrate should satisfy himself that the accused knows exactly what he is doing when he so pleads, and knows and understands the exact nature of the offence with which he is charged. And the accused must plead guilty in "plain, unambiguous and unmistakable terms" (*Rex v. Golatham* (1915) 84 L.J.K.B. 758, 112 L.T. 1048, per Lord Reading, C.J.). The cases will be rare indeed in which a magistrate will feel himself obliged to make any special inquiry when the accused, as here, is represented by counsel. The circumstances which are contemplated by the expressions used in the above cases are those in which the accused may be a foreigner, or illiterate, or the charge is one of unusual complexity or of an unusually grave nature. Instances of these are to be

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[1] (1936), 67 C.C.C. 1, [1937] 1 D.L.R. 1.

[2] (1945), 85 C.C.C. 56, [1945] 3 W.W.R. 201, 62 B.C.R. 199, [1945] 4 D.L.R. 75.

[3] (1946), 85 C.C.C. 388, [1946] 1 W.W.R. 421, 1 C.R. 181, 62 B.C.R. 359, [1946] 3 D.L.R. 128.

[4] [1946] 2 W.W.R. 584, 2 C.R. 179, 86 C.C.C. 374.

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found in *Crankshaw's Criminal Code*, 6th ed., pp. 1062-3. The practice in England is to the same effect and is thus stated in *Kenny's Outlines of Criminal Law*, 15th ed., at p. 558:

> If he confesses, i.e., 'pleads guilty', he may be at once sentenced. But in certain cases, lest he should be confessing under some misapprehension as to the law or even as to the facts of his case, the Court often advises him to withdraw his plea of guilty, and so let the matter be fully investigated.

This passage, in my view, furnishes a useful guide to the practice which should be followed when a plea of guilty is offered and there is reason to doubt that the accused understands what he is doing. Failure to make due inquiry may well be a ground on which the Court of Appeal will exercise its jurisdiction to allow the plea of guilty to be withdrawn if it is made to appear that the accused did not fully appreciate the nature of the charge or the effect of his plea or if the matter is left in doubt; but in my opinion, it cannot be said that where, as in the case at bar, an accused is represented by counsel and tenders a plea of guilty to non-capital murder, the trial Judge before accepting it is bound, as a matter of law, to interrogate the accused.

I have reached the conclusion that the question on which leave to appeal was granted should be answered in the negative.

I would dismiss the appeal.

SPENCE J. (*dissenting*):—I have read the reasons of the Chief Justice as set out herein. In those reasons, the facts are set out with considerable clarity and detail and there is no need to repeat them in these reasons. With respect, I am of the opinion that it is the duty in law of the trial tribunal, whether it be magistrate or judge, to satisfy himself that the appellant understands the nature of the charge and the effect of the plea before he is entitled to accept a plea of guilty. I am in accord with the analysis made by Sidney Smith J.A. in *Regina v. Milina*[5], when he said, referring to the language used in *Rex v. Hand* (No. 1)[6]:

> What the quoted passage does mean is that upon a plea of guilty the magistrate should satisfy himself that the accused knows exactly what he is doing when he so pleads, and knows and understands the exact nature of the offence with which he is charged.

[5] [1946] 2 W.W.R. 584, 2 C.R. 179, 86 C.C.C. 374.

[6] (1946), 85 C.C.C. 388, [1946] 1 W.W.R. 421, 1 C.R. 181, 62 B.C.R. 359, [1946] 3 D.L.R. 128.

I realize, as Avory J. said, in *Vent v. The Queen*[7]:

> It is only in a case where there is some reason to doubt whether an accused person appreciates the nature of his confession or the consequences resulting from it that a jury is empanelled to try that issue.

I also agree with Smith J.A. when he pointed out in *Rex v. Milina, supra,* that the cases will be rare indeed in which a magistrate will feel himself obliged to make any special inquiry when the accused, as here, is represented by counsel; but Smith J.A. pointed out that one of those cases may well be where "the accused may be a foreigner or illiterate or the charge is of unusual complexity or of an unusually grave nature". Certainly even the reduced charge of non-capital murder was a charge of an unusually grave nature. Moreover, the accused man, a Cree Indian, was certainly an illiterate, an illiterate who was described by counsel to the learned trial judge as a "primitive".

I am of the opinion that the present case is not one in which the learned trial judge exercised his discretion. Perhaps, to put it more accurately, if it is such a case then it is one in which the learned trial judge failed to exercise his discretion in accordance with judicial principles. It would appear that the judge, in exercising the discretion to accept the plea of guilty, relied only on the fact that the accused was represented, and apparently very adequately represented, by counsel. I am of the respectful opinion that he could not, under the circumstances, so rely on counsel for in doing so he could not satisfy *himself* that the accused knew either the nature of the plea or the consequences thereof. Therefore, in failing to so satisfy himself, the learned trial judge was wrong in law.

I would grant the appeal and direct a new trial.

Appeal dismissed, SPENCE J. *dissenting.*

Solicitors for the appellant: McClung & Baker, Edmonton.

Solicitor for the respondent: The Attorney General of Alberta, Edmonton.

[7] (1935), 25 Cr. App. R. 55 at 58.

1968
*Oct. 23
Nov. 18

BENSON & HEDGES (CANADA) LIMITED ..... APPELLANT;

AND

ST. REGIS TOBACCO CORPORATION RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade marks—Registration—Opposition on ground of confusion—"Golden Circlet" in association with cigarettes—"Gold Band" previously registered with respect to cigars, cigarettes and tobaccos—Whether decision of Registrar an exercise of discretion—Appeal to Exchequer Court from Registrar's decision—Whether Exchequer Court can substitute its decision for that of Registrar—Trade Marks Act, 1952-53 (Can.), c. 49, ss. 6(2),(5), (12)(1)(d), 37.

The appellant filed an opposition under s. 37 of the *Trade Marks Act* to the registration of the respondent's trade mark "Golden Circlet" to be used in association with cigarettes. The opposition was on the ground that the proposed mark was confusing with the appellant's trade mark "Gold Band" which was already registered for use in connection with the sale of cigars, cigarettes and tobaccos. The Registrar of Trade Marks rejected the opposition and granted the registration. The Exchequer Court found that the Registrar had not acted on any wrong principle or otherwise than judicially and dismissed the appeal. The Court was of the opinion that the trade marks were confusing but decided that it was precluded by the decision in *Rowntree Co. Ltd. v. Paulin Chambers Co. Ltd.*, [1968] S.C.R. 134, from substituting its conclusion for those of the Registrar under the circumstances. The appellant appealed to this Court.

Held (Cartwright C.J. dissenting): The appeal should be allowed and the registration refused.

Per Martland, Ritchie and Hall JJ: The decision as to whether or not a trade mark is confusing within the meaning of s. 6 of the *Trade Marks Act* involves a judicial determination of a practical question of fact and does not involve the exercise of the Registrar's discretion. It was open to the Exchequer Court in the circumstances of this case to substitute its conclusion for that of the Registrar and it was not precluded from doing so by the decision in the *Rowntree* case, *supra*. The Exchequer Court has rightly found that the proposed trade mark was "confusing" with the other.

Per Pigeon J.: From what the Registrar has said, the appellate tribunal could not ascertain the grounds of his decision and therefore could not see whether they were well founded in law. It therefore became its duty to form its own opinion as to the proper conclusion to be reached. The Exchequer Court's finding that confusion would be likely to occur was amply supported.

Per Cartwright C.J., *dissenting:* It was open to the Exchequer Court in this case to substitute its judgment for that of the Registrar and

*PRESENT: Cartwright C.J. and Martland, Ritchie, Hall and Pigeon JJ.

the decision in the *Rowntree* case, *supra*, did not preclude it from so doing. The question to be determined in this case involves the exercise of personal judgment. Confusion was unlikely in this case.

Marques de commerce—Enregistrement—Opposition pour motif de confusion—«Golden Circlet» à l'égard de cigarettes—«Gold Band» antérieurement enregistré à l'égard de cigares, cigarettes et tabacs—La décision du registraire est-elle rendue dans l'exercice d'une discrétion judiciaire—Appel à la Cour de l'Échiquier de la décision du registraire—La Cour de l'Échiquier peut-elle substituer sa propre opinion à celle du registraire—Loi sur les marques de commerce, 1952-53 (Can.), c. 49, art. 6(2),(5), 12(1)(d), 37.

La compagnie appellante a produit une déclaration d'opposition, en vertu de l'art. 37 de la *Loi sur les marques de commerce*, à l'enregistrement par la compagnie intimée de la marque de commerce «Golden Circlet» pour être employée à l'égard de cigarettes. L'opposition est fondée sur le motif que cette marque créerait de la confusion avec la marque «Gold Band» de l'appelante déjà enregistrée pour être employée à l'égard de la vente de cigares, cigarettes et tabacs. Le registraire des marques de commerce a rejeté l'opposition et a permis l'enregistrement. La Cour de l'Échiquier a statué que le registraire n'avait pas décidé d'après un faux principe ou sans discernement et elle a rejeté l'appel. Elle était d'avis que les marques créaient de la confusion mais a elle décidé que, dans les circonstances, elle était empêchée par l'arrêt dans *Rowntree Co. Ltd. c. Paulin Chambers Co. Ltd.*, [1968] R.C.S. 134, de substituer son opinion à celle du registraire. D'où l'appel à cette Cour.

Arrêt: L'appel doit être accueilli et l'enregistrement refusé, le Juge en Chef Cartwright étant dissident.

Les Juges Martland, Ritchie et Hall: La conclusion qu'une marque de commerce crée ou non de la confusion dans le sens de l'art. 6 de la *Loi sur les marques de commerce* nécessite une décision judiciaire sur une question pratique de fait et non pas l'exercice d'une discrétion judiciaire de la part du registraire. Dans les circonstances de cette cause, il était loisible à la Cour de l'Échiquier de substituer son opinion à celle du registraire et elle n'était pas empêchée de le faire par l'arrêt *Rowntree, supra*. La Cour de l'Échiquier a jugé avec raison que la marque en question créait de la confusion.

Le Juge Pigeon: Le tribunal d'appel ne pouvait pas, en se basant sur ce que le registraire a dit, se rendre compte des motifs de sa décision et, par conséquent constater s'ils étaient bien fondés en droit. Il lui incombait donc de former sa propre opinion sur la conclusion à laquelle il devait en arriver. Sa conclusion que les marques seraient susceptibles de créer de la confusion était amplement justifiée.

Le Juge en Chef Cartwright, *dissident:* Il était loisible à la Cour de l'Échiquier de substituer son opinion à celle du registraire et l'arrêt *Rowntree, supra,* ne l'empêchait pas de le faire. La question à trancher dans le cas présent nécessite l'exercice d'un jugement personnel. La confusion n'était pas probable en l'occurrence.

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BENSON & HEDGES (CANADA) LTD. v. ST. REGIS TOBACCO CORPN.

APPEL d'un jugement du Président Jackett de la Cour de l'Échiquier du Canada[1] confirmant une décision du registraire des marques de commerce. Appel accueilli, le Juge en Chef Cartwright étant dissident.

APPEAL from a judgment of Jackett P. of the Exchequer Court of Canada[1], affirming a decision of the Registrar of Trade Marks. Appeal allowed, Cartwright C.J. dissenting.

John C. Osborne, Q.C., and *R. M. Perry*, for the appellant.

Donald F. Sim, Q.C., and *R. T. Hughes*, for the respondent.

THE CHIEF JUSTICE (*dissenting*):—The relevant facts and the questions raised in this appeal are set out in the reasons of my brother Ritchie.

I agree with his conclusion that it was open to Jackett P. in the circumstances of this case to substitute his judgment for that of the Registrar and that he was not precluded from doing so by the decision of this Court in *The Rowntree Company Limited v. Paulin Chambers Co. Ltd. et al.*[2]

It appears to me that the question whether the degree of resemblance between two trade marks in appearance or sound or in the ideas suggested by them would be likely to lead to the inference that the wares associated with such trade marks are manufactured by the same person, is one involving the exercise of personal judgment in the light of all the evidence and with particular regard to the surrounding circumstances as set out in Clauses (a) to (e) of s. 6(5) of *the Trade Marks Act* quoted by my brother Ritchie. I have no doubt that in arriving at their conclusions in the case at bar both the learned President and the learned Registrar had all these provisions in mind.

Bearing in mind the directions of s. 6(5) of the *Trade Marks Act* and assuming, contrary to the fact, in favour of the appellant that it had continuously manufactured and marketed cigarettes under its trade mark "Gold Band", I

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[1] [1968] 2 Ex. C.R. 22, 37 Fox Pat. C. 83, 54 C.P.R. 49.
[2] [1968] S.C.R. 134, 37 Fox Pat. C. 77, 54 C.P.R. 43.

would still be of opinion that it is unlikely in the extreme that either a retail dealer in cigarettes purchasing from a wholesaler or the average customer buying cigarettes at a tobacconist's counter would be likely to draw the inference that cigarettes contained in a package bearing the trade mark "Golden Circlet" were manufactured by the appellant. The question is one of a class in the determination of which judges will naturally differ, as is evidenced by the present case. With every respect for the opinion of those who entertain the contrary view, I find myself in agreement with the conclusion of the learned Registrar which was affirmed, although unwillingly under the supposed compulsion of the *Rowntree case,* by the judgment of the Exchequer Court.

I would dismiss the appeal with costs.

The judgment of Martland, Ritchie and Hall JJ. was delivered by

RITCHIE J.:—This is an appeal from a judgment of Mr. Justice Jackett, the President of the Exchequer Court of Canada[3], dismissing an appeal from a decision of the Registrar of Trade Marks by which he had rejected the opposition filed by the appellant under the provisions of s. 37 of the *Trade Marks Act,* 1952-53 (Can.), c. 49 (hereinafter called the Act) to the registration of the respondent's trade mark "GOLDEN CIRCLET" to be used in association with "cigarettes".

The ground of opposition which gives rise to this appeal is the allegation that the trade mark applied for is confusing with the appellant's trade mark consisting of the words "GOLD BAND" which was registered for use in connection with the sale of "cigars" in September 1928, and with respect to the sale of "cigars, cigarettes and tobaccos of every kind and description" on September 12, 1958.

Under the provisions of s. 12(1)(*d*) of the Act, a trade mark is not registrable if it is "confusing with a registered trade mark" and the question of whether it is confusing or not is to be determined in accordance with the standard fixed by s. 6(2) of the Act which reads as follows:

> 6. (2) The use of a trade mark causes confusion with another trade mark if the use of both trade marks in the same area would be likely to lead to the inference that the wares or services associated with such trade

[3] [1968] 2 Ex. C.R. 22, 37 Fox Pat. C. 83, 54 C.P.R. 49.

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marks are manufactured, sold, leased, hired or performed by the same person, whether or not such wares or services are of the same general class.

I have underlined the words "would be likely to lead to the inference" as it appears to me to be clear that in opposing an application for registration, the holder of a trade mark which is already registered is not required to show that the "mark" which is the subject of the application is the same or nearly the same as the registered mark, it being enough if it be shown that the use of this mark would be likely to lead to the inference that wares associated with it and those associated with the registered trade mark were produced by the same company.

In deciding whether a trade mark is "confusing" within the meaning of the Act, both the Court and the Registrar are governed by the provisions of s. 6(5) which reads:

6. (5) In determining whether trade marks or trade names are confusing the *court or the Registrar,* as the case may be, shall have regard to all the surrounding circumstances including

(*a*) the inherent distinctiveness of the trade marks or trade names and the extent to which they have become known;

(*b*) the length of time the trade marks or trade names have been in use;

(*c*) the nature of the wares, services or business;

(*d*) the nature of the trade; and

(*e*) the degree of resemblance between the trade marks or trade names in appearance or sound or in the ideas suggested by them.

In the present case, after reciting the grounds for the appellant's opposition, the learned Registrar concluded by saying:

I have duly considered the evidence and the written arguments filed by both parties. Neither party requested a hearing. Having regard to the circumstances of the case on the basis of the evidence adduced, I have come to the conclusion that the grounds of opposition are not well founded. The marks are sufficiently different in appearance, in sound and in the ideas suggested by them to preclude confusion within the meaning of Section 6 of the *Trade Marks Act.*

The opposition is accordingly rejected pursuant to section 37(8) of the *Trade Marks Act.*

It was suggested in the argument before us that because the learned Registrar appeared to confine his reasons for rejecting the opposition to the ground that the requirements of s. 6(5)(*e*) had not been met, it should therefore be assumed that he had ignored the provisions of s. 6(5)(*a*) to (*d*) inclusive. In view of the fact that these grounds

are specifically dealt with in the evidence and that the Registrar expressly says that he reached his conclusion "on the basis of the evidence adduced", I do not think that this contention is tenable and, like Mr. Justice Jackett, I am unable to find that the Registrar acted on any wrong principle or otherwise than judicially.

In the course of his reasons for judgment in the Exchequer Court, the learned President, having reviewed the evidence, expressed himself as follows:

> Giving all due weight to the decision of the Registrar, who, I realize, has had infinitely more experience in this very specialized field than I have had, when I have regard to all the surrounding circumstances, including
>
> (*a*) the fact that the trade mark "GOLD BAND", while it is not what is apparently referred to as a strong mark, had, before the respondent's application, become very well known in Canada, and the fact that the trade mark "GOLDEN CIRCLET" was not known at all,
>
> (*b*) the fact that the trade mark "GOLD BAND" had been used in Canada for at least six years before the application was made, and the fact that the trade mark "GOLDEN CIRCLET" has not been used at all
>
> (*c*) the fact that cigars and cigarettes are closely related wares,
>
> (*d*) the fact that the wares in question are ordinarily sold by the same retailer over the same counter, and
>
> (*e*) the fact that there is a very substantial resemblance between the trade mark "GOLD BAND" and the trade mark "GOLDEN CIRCLET" (when they are considered on a first impression basis and not by way of a detailed comparison) in appearance, sound and the ideas suggested by them,
>
> I cannot escape the conclusion that if those two trade marks were used in the same area it would be very likely to lead to the inference that the wares associated with them were manufactured by the same person and thus that, by virtue of section 6(1), the one is 'confusing' with the other for the purposes of the *Trade Marks Act*.
>
> If, therefore, it were my duty on this appeal to come to a conclusion as to what the Registrar should have decided, and to substitute my conclusion for his if I come to a different one, I would allow this appeal.

Mr. Justice Jackett, however, treated the decision of this Court in *The Rowntree Company Limited v. Paulin Chambers Co. Ltd., et al.*[4] as a binding authority which precluded him from interfering with the conclusion reached by the Registrar of Trade Marks on such an application unless it could be shown that the Registrar had "proceeded on some wrong principle or that he failed to exercise his discretion judicially".

[4] [1968] S.C.R. 134, 37 Fox Pat. C. 77, 54 C.P.R. 43.

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In the *Rowntree* case the application for registration of the Trade mark SMOOTHIES in respect of candy had been refused by the Registrar on the ground that it was confusing with the Rowntree Company's registered trade marks SMARTIE and SMARTIES, but in the Exchequer Court Mr. Justice Gibson reached the opposite conclusion and allowed the registration.

On appeal to this Court it was found that in determining the question of confusion the Registrar of Trade Marks had directed himself in accordance with the provisions of s. 6 and had therefore adopted the proper approach to the question before him, whereas the finding of Mr. Justice Gibson that there was "no probability of confusion" between the trade mark applied for and the registered trade marks and his further finding that the meaning of the words "Smoothies" and "Smarties" is "entirely dissimilar" were based in large measure on the definition of these words in Webster's 3rd New International Dictionary. In this regard the Court expressed the opinion that the essential question to be determined did not necessarily involve the resemblance between the dictionary meaning of the words used in the trade mark applied for and those in the registered trade marks and concluded:

> It is enough . . . if the words used in the registered and unregistered trade marks are likely to suggest the idea that the wares with which they are associated were produced or marketed by the same person. This is the approach which appears . . . to have been adopted by the Registrar of Trade Marks.

The appeal might well have been disposed of on this basis without further comment but in the course of his argument before this Court, counsel for Paulin Chambers Company Limited made the following submission:

> In respondent's submission, the learned trial judge, who by reason of s. 55(5) of the *Trade Marks Act* was entitled to exercise any discretion vested in the Registrar, correctly came to the conclusion that the trade marks are not confusing.

This contention was made the subject of very full argument on both sides and it was accordingly dealt with in the reasons for judgment where it was said:

> It is contended on behalf of the respondent that the conclusion reached by the learned trial judge should not be disturbed having regard to the terms of s. 55(5) of the Act which provides that 'on the appeal . . . the Court may exercise any discretion vested in the Registrar'. I do not, however, take this as meaning that the Court is entitled to sub-

stitute its view for that of the Registrar unless it can be shown that he proceeded on some wrong principle or that he failed to exercise his discretion judicially.

In the present case the learned President construed this paragraph as deciding that in reviewing findings of fact made by the Registrar as well as in reviewing any exercise of his discretion, the Exchequer Court could only interfere on the ground that there had been an error in principle or a failure to act judicially. It is not difficult to appreciate this misunderstanding of the passage, but it should be made plain that this Court was there concerned exclusively with the effect to be given to the words 'on the appeal... the Court may exercise any discretion vested in the Registrar' as these words occur in s. 55(5) of the Act. It is to be observed that in the paragraph directly following the passage above quoted, reference is made to the decision of Lord Evershed *In the Matter of Broadhead's Application for Registration of a Trade Mark*[5], in which he cited the well-known statement made by Lord Dunedin in *George Banham and Company v. F. Reddaway and Company Limited*[6], where he said:

> Now it is true that an appeal lies from the decision of the Registrar, but, in my opinion, unless he has gone clearly wrong, his decision ought not to be interfered with. The reason for that is that it seems to me that to settle whether a trade mark is distinct or not—and that is the criterion laid down by the statute—is a practical question, and a question that can only be settled by considering the whole of the circumstances of the case.

In my view, the decision as to whether or not a trade mark is confusing within the meaning of s. 6 of the Act involves a judicial determination of a practical question of fact and does not involve the exercise of the Registrar's discretion. The provisions of s. 49(7), (9) and (10) which are concerned with the registration of a person as a registered user of a trade mark, afford illustrations of cases in which a discretionary power is vested in the Registrar, but this is not such a case.

I adopt what was said by Lord Dunedin in the last-quoted passage as applying to an appeal from a decision of the Canadian Registrar of Trade Marks on the question of whether or not an application for the registration of a trade mark should be refused on the ground that it is con-

[5] (1950), 67 R.P.C. 209.

[6] [1927] A.C. 406 at 413.

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fusing with a registered trade mark, subject, however, to the qualification expressed by Lord Wright in *In the Matter of an Application by J. & P. Coats Limited for Registration of a Trade Mark*[7], where he commented on Lord Dunedin's statement, saying, at page 375:

> With great respect to the learned Lord, the word 'clearly' may perhaps be regarded as tautologous. If, in the view of the Court, examining all the circumstances, the Registrar has gone wrong, then that must mean that he has gone clearly wrong. The only matter to observe is that *prima facie* the Registrar's decision will be regarded as correct.

In my view the Registrar's decision on the question of whether or not a trade mark is confusing should be given great weight and the conclusion of an official whose daily task involves the reaching of conclusions on this and kindred matters under the Act should not be set aside lightly but, as was said by Mr. Justice Thorson, then President of the Exchequer Court, in *Freed and Freed Limited v. The Registrar of Trade Marks et al*[8]:

> . . . reliance on the Registrar's decision that two marks are confusingly similar must not go to the extent of relieving the judge hearing an appeal from the Registrar's decision of the responsibility of determining the issue with due regard to the circumstances of the case.

I am accordingly of the opinion that it was open to Mr. Justice Jackett in the circumstances of this case to substitute his conclusion for that of the Registrar and I do not think that he was precluded from doing so by the decision of this Court in *The Rowntree Company Limited v. Paulin Chambers et al., supra.*

The learned President has made an extensive review of the evidence and has stated in the clearest terms his reasons for finding that if the two trade marks here in issue

> . . . were used in the same area it would be very likely to lead to the inference that the wares associated with them were manufactured by the same person and thus that, by virtue of section 6(1), one is 'confusing' with the other for the purposes of the *Trade Marks Act*.

I am in full agreement with the reasoning and conclusion of Mr. Justice Jackett in this regard and I have nothing to add to what he has said.

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[7] (1936), 53 R.P.C. 355.

[8] [1950] Ex. C.R. 431 at 437, 11 Fox Pat. C. 50, 14 C.P.R. 19, [1951] 2 D.L.R.7.

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I would accordingly allow this appeal and give effect to the opposition filed by the appellant with the result that the respondent's application for registration of the trade mark in the words "GOLDEN CIRCLET" is refused.

The appellant will have its costs of this appeal and of the appeal to the Exchequer Court of Canada.

PIGEON J.:—I agree with Ritchie J. and wish to add the following.

As my brother Fauteux has pointed out in *Dorval v. Bouvier*[9], the rule that an appellate court should not review the evidence in view of substituting its appreciation for that of the trial judge unless he is clearly wrong, is subject to the following qualification, namely, that his reasons must be explicit enough to enable the appellate tribunal to assess their legal value ("encore faut-il, cependant, ... que ces raisons soient en termes suffisamment explicites pour permettre à une Cour d'appel d'en apprécier la valeur au point de vue juridique").

This condition was fully met in the "Smoothies" and "Smarties" case[10], the Registrar having indicated as follows on what basis he found the two marks "confusing":

> The nature of the wares and the nature of the trade in both cases is identical and the wares are distributed through the same channels of trade. Both marks are slang terms commonly used to describe a 'smart aleck' or a 'smooth operator'.

In the instant case, however, the reasons given by him do not indicate what weight he gave to each of the factors that he considered and, especially, they do not reveal on what basis he concluded that the obvious similarities between the two marks were unlikely to lead to the inference that the wares to which they would be applied were manufactured by the same person. In effet, the Registrar did not really give explicit reasons: he summarized the case and stated his conclusion. From what he said, the appellate tribunal could not ascertain the grounds of his decision and therefore could not see whether these were well founded in law. Under those circumstances it became its duty to form its own opinion as to the proper conclusion to be reached.

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[9] [1968] S.C.R. 288.

[10] [1968] S.C.R. 134, 37 Fox Pat. C. 77, 54 C.P.R. 43.

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Pigeon J.

Having had the advantage of reading the reasons of the Chief Justice I find myself, with the greatest respect, unable to concur in his opinion that confusion is unlikely. In my view, the situation in this case is almost identical with that which obtained in *The Matter of Broadhead's Application*[11]. The mark sought to be registered was "Alka-vescent". The opposition came from "Alka-Seltzer". The Court of Appeal upheld the objection although the latter trade mark was admittedly "weak" because "Alka" being descriptive could not be monopolized any more than "Gold" can be in the circumstances of the present case. It was held that confusion was likely to arise because the idea suggested by the two marks was substantially the same, "vescent" being intended to suggest "effervescent" and "Seltzer" meaning a particular kind of effervescent mineral water. Here the situation is almost exactly the same. There is no substantial difference between "gold" and "golden" and a "circlet" is a kind of "band". Of course, the sound of the second word is different as in the English case, but I think this was rightly considered by the learned President as insufficient to avoid any risk of confusion when the meaning is similar.

It is no doubt true that if one examines both marks carefully, he will readily distinguish them. However, this is not the basis on which one should decide whether there is any likelihood of confusion.

> The tribunal must bear in mind that the marks will not normally be seen side by side and guard against the danger that a person seeing the new mark may think that it is the same as one he has seen before, or even that it is a new or associated mark of the proprietor of the former mark. (Halsbury's Laws of England, 3rd ed., vol. 38, No. 989, p. 590).

In *The Matter of McDowell's Application*[12], Sargant L.J. said at p. 338:

> Even if the very slight distinction between "Nujol" and "Nuvol" were noticed, yet, having regard to the ordinary practice of large producers to register a series of similar marks to denote various grades of their produce, it seems to me highly probable that an inference of identity of origin would be drawn.

The practice referred to in this quotation is sanctioned by the provisions of s. 15 of the *Trade Marks Act* respecting "associated trade marks" and it should be borne in mind in considering the issue of confusion.

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[11] (1950), 67 R.P.C. 209.

[12] (1926), 43 R.P.C. 313.

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Pigeon J.

In the present case there is a distinct possibility that "Golden Circlet" would appear as a sort of diminutive of "Gold Band", especially on account of the meaning of "circlet". This, as well as the other considerations above stated, in my opinion, further supports the learned President's finding that confusion would be likely to occur.

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

Appeal allowed with costs, CARTWRIGHT C.J. *dissenting.*

Solicitors for the appellant: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitors for the respondent: McCarthy & McCarthy, Toronto.

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*Apr. 26, 29, 30 Oct. 1

F. T. DEVELOPMENTS LIMITED (*Plaintiff*) ..... APPELLANT;

AND

HARRY M. SHERMAN and JOHN J. SHULMAN and E. MICHAEL LEWIN (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real property—Sale of land—Specific performance—Offer to purchase conditional upon purchaser obtaining rezoning—Alleged oral agreement of waiver of rezoning condition not proved—No unilateral right to waive condition—No basis for estoppel against vendors.

The plaintiff company entered into an agreement to purchase certain land. Under the terms of the agreement the offer to purchase was conditional upon the purchaser obtaining rezoning of the property within a stipulated period. Prior to the expiration of this period the purchaser's solicitor notified the vendors' solicitor by letter of his client's inability to obtain the rezoning and he asked for an extension of time. There were subsequent negotiations but the extension was never granted. The day following the closing date the plaintiff's solicitor purported to waive the condition as to rezoning. The vendors' solicitor, who was himself one of the vendors, denied the right of the plaintiff to waive this condition.

An action by the plaintiff for specific performance was dismissed by the trial judge and this dismissal was affirmed by the Court of Appeal.

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*PRESENT: Cartwright C.J. and Judson, Ritchie, Hall and Pigeon JJ.

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Both the trial judge and the Court of Appeal found that there was no extension of time and no agreement to waive the condition. The plaintiff appealed further to this Court.

Held: The appeal should be dismissed.

The findings of fact by the Courts below against the plaintiff's submission that there was an oral agreement of waiver of the rezoning condition should not be disturbed.

The plaintiff could not unilaterally waive the condition, and there was no basis for an estoppel against the defendants.

Turney et al. v. Zhilka, [1959] S.C.R. 578, followed.

APPEAL from a judgment of the Court of Appeal for Ontario dismissing an appeal from a judgment of Wilson J. Appeal dismissed.

J. T. Weir, Q.C., and *G. J. Smith,* for the plaintiff, appellant.

W. J. Smith, Q.C., for the defendants, respondents.

THE CHIEF JUSTICE:—I agree with the conclusion of my brother Judson and, subject to one reservation, with his reasons.

I do not find it necessary to decide whether, in the particular circumstances of this case, the appellant could have invoked the maxim, *quilibet potest renunciare juri pro se introducto,* waived unilaterally the condition as to obtaining a rezoning of the lands agreed to be purchased and elected to pay the purchase price in full in cash instead of giving back a mortgage to secure part of that price. On the evidence and the findings of fact made in the Courts below it cannot be said that the appellant declared such waiver and election until after the date set for closing the transaction had passed.

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

The judgment of Judson, Ritchie, Hall and Pigeon JJ. was delivered by

JUDSON J.:—This is an action by a purchaser of land for specific performance. The trial judge dismissed the action. His dismissal was affirmed by the Court of Appeal for reasons substantially in accordance with those given at trial.

The property in question was owned by the defendants Harry M. Sherman and E. Michael Lewin, each having an undivided half interest. The other defendant, John J. Shulman, was a trustee for E. Michael Lewin. The contract was made on December 17, 1963. The property was a block of land in the Township of North York. The purchase price was $102,500, payable $2,500 as a deposit, $32,500 on closing, with a mortgage back for the balance of $67,500. The mortgage was to contain the privilege of paying part or all of the principal sum at any time without notice or bonus.

The agreement was subject to the following condition:

> This offer is conditional upon the Purchaser obtaining the rezoning of the said lands on a M-5 zoning basis. Such rezoning to be obtained within 6 months from the date of the acceptance of the Offer. Provided that should the rezoning be approved by the Municipality of the Township of North York, and should it be before the Municipal Board within a six-month period, a further extension for the approval of the Municipal Board will be given for a period of 90 days, if the Municipal Board has not had an opportunity of giving its approval prior to the said extension date.

It is agreed that "M-5" is a misdescription in this condition and that it should read "M-6". Nothing turns on this. It is also agreed that the closing date was June 17, 1964.

The purchaser submitted requisitions on title and these were answered promptly. The vendors never submitted a draft deed or a statement of adjustments. The purchaser never submitted a draft mortgage. The purchaser was trying to obtain the necessary rezoning but it became apparent that this could not be obtained before the date of closing. On June 6, 1964, the purchaser's solicitor notified the vendors' solicitor of his client's inability to obtain the rezoning and he asked for an extension of six months. The extension was never granted.

Motek Fischtein, the secretary-treasurer of the plaintiff company, telephoned Sherman direct about June 11 and swore that he subsequently went to Sherman's office and had an interview with him. Sherman admitted the telephone call asking for an extension which was not granted and in the course of which Fischtein was advised that he, Sherman, was dealing with the plaintiff's solicitor, Mr. Wilson. Sherman had no recollection of the interview in the

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Judson J.

office. The plaintiff relies on the evidence of Fischtein as to what was said in Sherman's office to establish an agreement of waiver of the rezoning condition.

Following the letter of June 6, which had asked for the extension of time, there were a number of telephone conversations between Mr. Wilson, solicitor for the plaintiff, and Mr. Sherman, one the defendants who was a half-owner of the property and also solicitor for his other partner in the enterprise. Wilson was pressing for the extension and Sherman was not committing himself. He was saying that he could not get the consent of his other partner. The last of these conversations was on June 16, 1964. Sherman was still saying that he was not in a position to grant an extension of time although in fact he had been told earlier that his partner was unwilling to grant it. Wilson undoubtedly had the impression that Sherman would telephone him on the 17th for the purpose of saying whether or not the extension would be granted. There was no such call but on June 17, Sherman wrote to Wilson refusing an extension and claiming that the transaction was at an end.

Wilson received this letter on June 18, 1964, and he immediately sent a reply complaining that Sherman had promised to telephone on June 17 and had not done so. He denied Sherman's right to terminate the contract. He wished a new date to be set for closing and suggested July 3. Although he did not expressly say so in his letter, he was purporting to waive the condition as to rezoning. Sherman's reply on the following day, June 19, denied the right of the plaintiff to waive this condition.

On June 24, 1964, Wilson tendered an executed mortgage with interest running from June 17, 1964, and a cheque for the balance due pursuant to a statement of adjustments prepared by him and dated as of June 17, 1964, and, in the alternative, tendered a further cheque for the whole balance due under the contract including the amount to be secured by mortgage. The tender was not accepted. The following day the plaintiff issued its writ for specific performance.

Both the trial judge and the Court of Appeal have found that there was no extension of time and no agreement to waive the condition. The plaintiff sought to establish an

oral waiver from the evidence of Fischtein, who seems to have been the controlling force in the plaintiff company. The concurrent findings of fact against this submission are clear and they do not altogether depend upon an assessment of the credibility of Fischtein and Sherman. If there had been such an agreement, there would inevitably have been some reference to this in Wilson's letters to Sherman. There is no such reference. To me, the findings of fact of the trial judge and the Court of Appeal on this point cannot be disturbed.

The next question is whether there was a unilateral right to waive the condition. I do not think that there was. By its express terms the offer was conditional upon the purchaser obtaining rezoning of the lands on a named zoning basis. The condition was very carefully drawn. It provided for a term of six months from the date of acceptance together with a right to an extension in a certain event. The obligations of both parties under this contract were conditional upon the happening of these events. This depended upon the will of the Township of North York. The case is squarely within the decision of this Court in *Turney et al. v. Zhilka*[1].

For the first time in this litigation it was argued before us that there was an estoppel against the defendants. It was not pleaded. There is no basis for an estoppel in this case. There is no representation or promise on which it could be founded. There was in the conversation between Wilson and Sherman on June 16, 1964, a lack of frankness on the part of Sherman. This is a charitable description of his conduct. But he did not waive the condition or extend the time or promise to do so.

The appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Arnup, Foulds, Weir, Boeckh, Morris & Robinson, Toronto.

Solicitors for the defendants, respondents: Sherman & Midanik, Toronto.

[1] [1959] S.C.R. 578, 18 D.L.R. (2d) 447.

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*May 30, 31
*June 3
Dec. 20

GEORGES CUISENAIRE (*Plaintiff*) .....APPELLANT;

AND

SOUTH WEST IMPORTS LIMITED (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Copyright—Infringement—Coloured rods for the teaching of arithmetic—Explanatory book written by plaintiff—Whether rods subject to copyright—Copyright Act, R.S.C. 1952, c. 55, ss. 2(v), 4(1), 20(3).

The plaintiff sued the defendant company for infringement of an alleged copyright in coloured rods used for teaching arithmetic in primary school grades. These rods were made in conformity with a method of teaching arithmetic which was fully described in a book written by the plaintiff, and were referred to in the plaintiff's pleadings as "works". The plaintiff is not alleging the infringement of a copyright in any part of his book. The Exchequer Court dismissed the action and held that the rods were not a proper subject matter of copyright in this country. The plaintiff appealed to this Court.

Held: The appeal should be dismissed.

The rods are not things in which copyright can be had. The originality consisted in the ideas as they were expressed in the book and the rods are merely devices which afford a practical means of employing and presenting the method. The "original" work or production, whether it be characterized as literary, artistic or scientific, was the book. In seeking to assert a copyright in the rods which are described in his book as opposed to the book itself, the plaintiff is faced with the principle that one may have a copyright in the description of an art; but, having described it, you give it to the public for their use; and there is a clear distinction between the book which describes it, and the art or mechanical device which is described.

Droit d'auteur—Violation—Réglettes coloriées pour servir à l'enseignement de l'arithmétique—Livre d'explication écrit par le demandeur—Réglettes ne sont pas susceptibles de faire l'objet d'un droit d'auteur—Loi sur le droit d'auteur, S.R.C. 1952, c. 55, art. 2, 4(1), 20(3).

Le demandeur a poursuivi la compagnie défenderesse pour violation d'un droit d'auteur qu'il prétend avoir sur des réglettes coloriées employées pour enseigner l'arithmétique dans les écoles primaires. Ces réglettes ont été fabriquées d'après une méthode d'enseigner l'arithmétique, décrite en détail dans un livre écrit par le demandeur, et sont désignées dans la plaidoirie du demandeur comme étant des «œuvres». Le demandeur ne prétend pas qu'il y a eu violation d'un droit d'auteur découlant de son livre. La Cour de l'Échiquier a rejeté l'action et a statué que les réglettes ne pouvaient pas faire l'objet d'un droit d'auteur dans ce pays. Le demandeur en appela à cette Cour.

Arrêt: L'appel doit être rejeté.

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*PRESENT: Cartwright C.J. and Fauteux, Martland, Ritchie and Hall JJ.

Les réglettes ne sont pas de objets sur lesquels on peut avoir un droit d'auteur. L'originalité se trouve dans les idées telles qu'elles sont exprimées dans le livre et les réglettes ne sont que des dispositifs fournissant un moyen pratique d'employer et de présenter la méthode. L'œuvre ou la production «originale», qu'elle soit caractérisée comme littéraire, artistique ou scientifique, c'était le livre. En cherchant à revendiquer un droit d'auteur dans les réglettes qui sont décrites dans le livre par opposition au livre lui-même, le demandeur va à l'encontre du principe qu'on peut avoir un droit d'auteur dans la description d'un art; mais, une fois que vous avez décrit l'art, vous le donnez au public pour son usage; et il y a une distinction claire et nette entre le livre qui décrit cet art, et l'art ou le dispositif mécanique qui est décrit.

APPEL d'un jugement du juge Noël de la Cour de l'Échiquier du Canada[1] dans une action pour violation d'un droit d'auteur. Appel rejeté.

APPEAL from a judgment of Noël J. of the Exchequer Court of Canada[1] in an action for infrigement of copyright. Appeal dismissed.

Christopher Robinson, Q.C. for the plaintiff, appellant.

John C. Osborne, Q.C. and *R. M. Perry,* for the defendant, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of Mr. Justice Noël of the Exchequer Court of Canada[1] on a "special case" directed to be tried by order of the President of that Court, in accordance with the rules thereof, for the purpose of determining certain issues which were common to four separate actions brought by the plaintiff and consolidated for the purpose of determining the issues raised by the "special case".

The actions were for the infringements of the plaintiff's alleged copyright in two sets of "coloured rods of uniform square at centre cross section and of ten different lengths and colours for the teaching of the science of arithmetic in primary school grades". The issues raised by the "special case" were:

1. Is there a copyright in the plaintiff's "rods" which he described as "works" in his various statements of claim?

[1] [1968] 1 Ex. C.R. 493, 37 Fox Pat. C. 93, 54 C.P.R. 1.

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2. Who is the author?

3. Who owns the copyright?

It is obvious that a negative answer to the first question is sufficient to dispose of the case and Mr. Justice Noël, in a most comprehensive decision, concluded by saying that the "rods are not a proper subject matter of copyright in this country".

The rods in question were made in conformity with a system or method of teaching arithmetic which is fully described in a book written by the appellant and entitled *Les Nombres en Couleurs,* and, as has been indicated, they were referred to in the plaintiff's pleadings as "works". Paragraph 8 of the Statement of Claim reads as follows:

> Each of the said works is an original production in the scientific domain and is one of the works referred to by the expression 'every literary, dramatic, musical and artistic work' in section 4(1) of the *Copyright Act.*

The relevant provisions of the *Copyright Act,* R.S.C. 1952, c. 55, read as follow:

> 4. (1) Subject to the provisions of this Act, copyright shall subsist in Canada for the term hereinafter mentioned, *in every original literary, dramatic, musical and artistic work,...*

The italics are my own.

Section 2.(*v*) provides that:

> 'every original literary, dramatic, musical and artistic work' includes every original production in the literary, *scientific* or artistic *domain,* whatever may be the mode or form of its expression, such as books, pamphlets, and other writings, lectures, dramatic or dramatico-musical works, musical works or compositions with or without words, illustrations, sketches, and *plastic works* relative to geography, topography, architecture, or *science.*

The italics are my own.

In aid of the construction which appellant's counsel seeks to place upon these sections of the statute, he relies upon the presumption which he contends is created by s. 20(3) of the Act which reads:

> 20. (3) In any action for infringement of copyright in any work, in which the defendant puts in issue either the existence of the copyright, or the title of the plaintiff thereto, then, in any such case,
>
> (*a*) the work shall, unless the contrary is proved, be presumed to be a work in which copyright subsists; and
>
> (*b*) the author of the work shall, unless the contrary is proved, be presumed to be the owner of the copyright;...

The question which lies at the threshold of this appeal is whether the rods in question are things in which copyright can be had, and if that question is answered in the negative, it does not appear to me to be necessary to comment on the close analysis to which the learned trial judge has subjected the various statutory provisions.

The evidence discloses, and indeed it appears to me to have been admitted, that the plaintiff is not alleging the infringement of copyright in any part of his book *Les Nombres en Couleurs*. I take, for example, one question and answer on cross-examination where Mr. Osborne asked:

> Q. Here is Exhibit No. 5, a book entitled "Les Nombres en Couleurs". Do you claim that any defendant in Canada has copied any part of this book? A. No, I do not think so; my book, no. They are using my book to illustrate the rods that they are manufacturing.

Even if Mr. Cuisenaire's method of teaching could be considered as an "original production... in the... scientific domain" within the meaning of s. 2(*v*) of the Act, the originality consisted in the ideas as they were expressed in his book and in my opinion the rods are merely devices which afford a practical means of employing the method and presenting it in graphic form to young children. The "original" work or production, whether it be characterized as literary, artistic or scientific, was the book. In seeking to assert a copyright in the "rods" which are described in his book as opposed to the book itself, the appellant is faced with the principle stated by Davey L.J. in the case of *Hollinrake v. Truswell*[2], where he says:

> No doubt one may have copyright in the description of an art; but, having described it, you give it to the public for their use; and there is a clear distinction between the book which describes it, and the art or mechanical device which is described.

This principle was discussed and adopted by President Thorson in the Exchequer Court of Canada in *Moreau v. St. Vincent*[3], where he said:

> It is, I think, an elementary principle of copyright law that an author has no copyright in ideas but only in his expression of them. The law

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[2] [1894] 3 Ch. 420 at 428.

[3] [1950] Ex. C.R. 198 at 203, 10 Fox Pat. C. 194, 12 C.P.R. 32, 3 D.L.R. 713.

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of copyright does not give him any monopoly in the use of the ideas with which he deals or any property in them, even if they are original. His copyright is confined to the literary work in which he has expressed them. The ideas are public property, the literary work is his own. Every one may freely adopt and use the ideas but no one may copy his literary work without his consent.

This principle is recognized by Dr. Fox in the 2nd edition (1967) of his work *The Canadian Law of Copyright and Industrial Designs* where he says, at page 45:

> Not only is it not required that there should be any originality in the idea of the work, but a novel idea as distinct from the form in which the idea is expressed is not capable of being the subject of copyright protection.

I have considered the many Canadian cases cited by Dr. Fox, all of which appear to illustrate this principle.

What is alleged in the present case is that the respondent has distributed to school trustees and others sets of rods which are substantially the same as those which the appellant claims to have made and that the respondent has thereby "without consent of the plaintiff reproduced and authorized the reproduction of the said works or a substantial part thereof . . ." What has in fact happened is that the respondent has adopted and used the ideas contained in the appellant's literary work and I find that its actions come directly within the language employed by President Thorson in the above quoted excerpt from his reasons for judgment. The matter is graphically illustrated by the brief quotation from the reasons for judgment of Page J. in *Cuisenaire v. Reed*[4], cited by the learned trial judge, where the question at issue was whether the use and distribution of "rods" made in conformity with the directions contained in the present appellant's book, constituted a breach of copyright under the *Copyright Act* then in force in Australia. Pape J. said, at page 735:

> Were the law otherwise, every person who carried out the instructions in the handbook in which copyright was held to subsist in *Meccano Ltd. v. Anthony Hordern and Sons Ltd.* (1918) 18 S.R. (N.S.W.) 606, and constructed a model in accordance with those instructions, would infringe the plaintiff's literary copyright. Further, as Mr. Fullagar put it, everybody who made a rabbit pie in accordance with the recipe of *Mrs. Beeton's Cookery Book* would infringe the literary copyright in that book.

[4] [1963] V.R. 719.

For these reasons I do not think that the "rods" in question are things in which copyright can be had and I would accordingly dismiss this appeal with costs.

Appeal dismissed with costs.

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Solicitors for the plaintiff, appellant: Smart & Biggar, Ottawa.

Solicitors for the defendant, respondent: Gowling, MacTavish, Osborne & Henderson, Ottawa.

MILAN "MIKE" KOLNBERGER .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1968

*Nov. 15

Dec. 20

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Rape—Complainant's evidence uncorroborated—Identity of accused—Misdirection as to burden of proof—Criminal Code, 1953-54 (Can.), c. 51, s. 134.

The complainant, a married woman, accepted an offer of a ride home by a stranger, while waiting for a bus. Having refused to have sexual intercourse, she was physically and sexually assaulted and then forced from the stranger's automobile. When interviewed in the hospital, she described her attacker and the automobile. Some four months later, she identified the appellant as her attacker. The appellant's car was different from the one described as the car which the attacker drove. The appellant did not testify nor was any evidence called on his behalf. The evidence of the complainant was uncorroborated. It appears from the record that the trial judge was in some doubt that he had to apply s. 134 of the *Criminal Code* to the question of identity as well as to the assault. The appellant's conviction was affirmed by the Court of Appeal. Leave to appeal to this Court was granted on the question as to whether the trial judge, having regard to the terms of s. 134, misdirected himself as to the burden of proof.

Held: The appeal should be allowed and a new trial ordered.

Per Cartwright C.J. and Hall and Spence JJ.: The trial judge had to instruct himself in accordance with s. 134 of the Code not only as to the fact of the rape but also on the matter of identity. The record discloses that either the judge concluded that corroboration was not necessary on the question of identity, or he found that he could satisfy himself beyond a reasonable doubt that the complainant's story (her identification of the appellant) was true from the fact

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that the appellant offered no explanation or contradiction. In either case, the judge was in error. The appellant's failure to deny the charge could not be corroboration under s. 134. A burden was placed on the appellant which the law says does not exist.

Per Cartwright C.J. and Fauteux and Martland JJ.: It was necessary for the trial judge, as a judge of the facts, to instruct himself in accordance with s. 134 of the *Criminal Code*. There is, in the judge's reasons for judgment, the implication that he was finding the appellant guilty not because he was satisfied beyond a reasonable doubt that the complainant's evidence was true, but partly because the appellant had not gone into the witness box to deny what she had said. It was not enough, in order to find guilt, to have evidence tending toward the appellant's guilt. It was necessary for the Court to be satisfied beyond a reasonable doubt that the complainant's evidence was true. There was not due compliance with the requirements of s. 134 of the Code.

Droit criminel—Viol—Témoignage de la plaignante non corroboré—Identité du prévenu—Directives erronées quant au fardeau de la preuve—Code criminel, 1953-54 (Can.), c. 51, art. 134.

La plaignante, une femme mariée, a accepté alors qu'elle attendait un autobus, l'offre faite par un étranger de la reconduire chez elle en automobile. Ayant refusé d'avoir des rapports sexuels, elle a été attaquée physiquement et sexuellement, et, après coup, elle a été forcée hors de l'automobile de l'étranger. A l'hopital, elle a décrit son assaillant ainsi que l'automobile. Quelque quatre mois plus tard, elle a identifié l'appelant comme étant celui qui l'avait attaquée. L'automobile de l'appelant était différente de celle qu'elle avait précédemment décrite. L'appelant n'a pas témoigné et aucune preuve n'a été offerte en sa faveur. La preuve de la plaignante n'était pas corroborée. Le dossier fait voir que le juge au procès n'était pas certain que l'art. 134 du *Code criminel* s'appliquait à la question d'identité aussi bien qu'à celle de l'assaut. La déclaration de culpabilité a été confirmée par la Cour d'appel. L'appelant a obtenu la permission d'appeler à cette Cour sur la question de savoir si le juge au procès, vu les termes de l'art. 134, s'était donné des directives erronées quant au fardeau de la preuve.

Arrêt: L'appel doit être accueilli et un nouveau procès ordonné.

Le Juge en Chef Cartwright et les Juges Hall et Spence: Les directives que le juge au procès devait se donner devaient être conformes à l'art. 134 du Code non seulement sur le fait du viol mais aussi sur la question d'identité. Le dossier montre soit que le juge a conclu que la corroboration n'était pas nécessaire sur la question d'identité, ou qu'il pouvait se convaincre au delà d'un doute raisonnable que la version de la plaignante (sur l'identification de l'appelant) était véridique du fait que l'appelant n'a offert aucune explication ou contradiction. Dans l'un ou l'autre cas, le juge a erré. Le défaut de l'appelant de nier l'accusation ne peut pas être une corroboration sous l'art. 134. Un fardeau que la loi dit ne pas exister a été placé sur les épaules de l'appelant.

Le Juge en Chef Cartwright et les Juges Fauteux et Martland: Il était nécessaire que le juge au procès, comme juge des faits, se donne des

directives conformes à l'art. 134 du *Code criminel*. Il est implicite dans les notes de jugement du juge qu'il déclarait l'appelant coupable non pas parce qu'il était convaincu au delà d'un doute raisonnable que la preuve de la plaignante était véridique, mais en partie parce que l'appelant n'a pas témoigné pour réfuter ce qu'elle a dit. Pour conclure à la culpabilité, il n'était pas suffisant d'avoir une preuve tendant à la culpabilité de l'appelant. Il était nécessaire que la Cour soit convaincue au delà d'un doute raisonnable que le témoignage de la plaignante était véridique. Les conditions requises par l'art. 134 du Code n'ont pas été suivies.

APPEL d'un jugement de la Cour d'Appel de l'Alberta confirmant une déclaration de culpabilité pour viol. Appel accueilli.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division, affirming the appellant's conviction for rape. Appeal allowed.

Ian G. Scott, for the appellant.

Brian Crane, for the respondent.

Cartwright C.J. and Spence J. concurred with the judgment delivered by

HALL J.:—The accused was charged with rape and tried by Manning J. in the Supreme Court of Alberta without a jury. He was convicted and sentenced to ten years in prison. An appeal to the Appellate Division of the Supreme Court of Alberta was dismissed. This appeal is by leave on the following question of law:

> Did the learned trial judge, having regard to the terms of Section 134 of the Criminal Code, misdirect himself as to the burden of proof?

On August 22, 1966, the complainant, a married woman, Dorothy Rose Smith, spent the late evening in a beverage room in the Royal Hotel at the City of Edmonton. After leaving the hotel at approximately 11:00 p.m. and while waiting for a bus, she was offered a ride homeward by a stranger who was alone in an automobile. After some hesitation, she accepted and got in the car. They had only driven a short distance when the driver proposed intercourse which she refused. The automobile was then driven into a laneway where the complainant was physically and sexually assaulted. The assault was a vicious one, and having had intercourse the driver shoved the complainant

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from the automobile and abandoned her in a semi-nude and hysterical condition. The complainant ran to the nearest house and was given assistance. The police were called and the complainant taken to Misericordia Hospital. The complainant's story of the attack was wholly credible and the place where she had been attacked was identified by parts of her clothing and effects which were found there. There is no question but that a rape took place. This appeal is concerned solely with the question of the identity of the appellant as the assailant.

As a new trial is being ordered, I will not refer to the evidence except in general terms.

Mrs. Smith was interviewed in the hospital by Detective Waite. She described her assailant as a man with blonde, bushy hair, 5 feet 8 inches in height, 160 pounds, wearing dark pants and a white shirt, who talked with an accent, German or Hungarian. She also described the automobile as one she believed to be an older model Chrysler product, cream or off-white in colour and very dirty.

On December 21, 1966 four months later, Mrs. Smith purported to identify the appellant as the man who had attacked her. Prior to the lineup, she was shown an automobile which she said she identified as the one in which she had been attacked. This automobile which belonged to the appellant was a 1957 Chevrolet, blue body with white top, very dirty both inside and out.

The appellant did not testify nor was any evidence called on his behalf. In his summation, counsel for the appellant drew Manning J.'s attention to s. 134 of the *Criminal Code* which reads:

> 134. Notwithstanding anything in this Act or any other Act of the Parliament of Canada, where an accused is charged with an offence under section 136, 137, subsection (1) or (2) of section 138 or subsection (1) of section 141, the judge shall, if the only evidence that implicates the accused is the evidence, given under oath, of the female person in respect of whom the offence is alleged to have been committed and that evidence is not corroborated in a material particular by evidence that implicates the accused, instruct the jury that it is not safe to find the accused guilty in the absence of such corroboration, but that they are entitled to find the accused guilty if they are satisfied beyond a reasonable doubt that her evidence is true.

Even though this was not a jury case, it is beyond question that the learned trial judge had to instruct himself in accordance with this section, not only as to the fact

of the rape but also on the matter of identity: *Regina v. Ethier*[1]. In *Regina v. McMillan*[2], which was a case of an appeal from a magistrate who had convicted on a complainant's uncorroborated testimony, Kirby J. quashed the conviction. The headnote in the case reads:

> It was *held* that, in the absence of any words by the magistrate indicating that he had directed himself as to the danger of convicting in the absence of any corroboration of complainant's story, the appeal must be allowed and the conviction quashed. Such a direction must be given, and must appear to have been given, no less in the case of a judge sitting alone, than in the case of a judge sitting with a jury, not only in cases of charges under the *Criminal Code*, 1953-54, ch. 51, but in all judicial inquiries involving sexual offences; ...

The same point was dealt with by the Privy Council in *Chiu Nang Hong v. Public Prosecutor*[3], where Lord Donovan said at p. 1285:

> Their Lordships would add that even had this been a case where the judge had in mind the risk of convicting without corroboration, but nevertheless decided to do so because he was convinced of the truth of the complainant's evidence, nevertheless they do not think that the conviction could have been left to stand. For in such a case a judge, sitting alone, should, in their Lordship's view, make it clear that he has the risk in question in his mind, but nevertheless is convinced by the evidence, even though uncorroborated, that the case against the accused is established beyond any reasonable doubt. No particular form of words is necessary for this purpose: What is necessary is that the judge's mind upon the matter should be clearly revealed.

It appears from the record that Manning J. was in some doubt that he had to apply the provisions of s. 134 of the *Criminal Code* to the question of identity as well as to the assault. This is made manifest in the record where the following appears:

> THE COURT: Mr. Buchanan, it is dangerous to convict on the uncorroborated evidence, dangerous to convict, does this apply also to the question of corroboration, not corroboration, but as to identity?
>
> MR. BUCHANAN: Yes, it does My Lord, if I may refer Your Lordship to the case of—
>
> THE COURT: Where identity is not denied.
>
> MR. BUCHANAN: Each issue must be corroborated.
>
> THE COURT: When the accused does not deny identity?

Having heard further submissions from counsel for the appellant which concluded with, "however I do base my

[1] [1959] O.R. 533 at 536, 31 C.R. 30, 124 C.C.C. 332.
[2] (1966), 57 W.W.R. 677.
[3] [1964] 1 W.L.R. 1279.

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final argument on the question of identity sir." the learned trial judge said: "I would like to think this over until two o'clock. We will adjourn until that time."

When Court reconvened at 2:00 o'clock, the record is as follows:

> THE COURT: Gentlemen, it seemed to me at the conclusion of the evidence this morning and at the conclusion of the arguments that I have heard from you two that I could not come to any other conclusion than that the charge had been established, and this was after taking into consideration the provisions of Section 134. However, as you know I wanted to consider this over the noon adjournment, and having given it more careful consideration I still feel that I should not come to any other conclusion than that the charge has been established.
>
> I particularly refer to this statement of the law in Regina and Coffin, 1956 Supreme Court Reports at Page 228 in which Mr. Justice Kellock has referred with approval to a statement of Lord Tenterden in which Lord Tenterden said this:
>
> > "No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends?"
>
> And accordingly I find the accused guilty of the offence with which he has been charged.

It seems clear that when Manning J. said in the extract just quoted:

> Gentlemen, it seemed to me at the conclusion of the evidence this morning and at the conclusion of the arguments that I have heard from you two that I could not come to any other conclusion than that the charge had been established, and this was after taking into consideration the provisions of Section 134.

he was referring to the assault aspect of the case and not to the question of identity. Were it otherwise, there was no need for him to give the matter further consideration and that becomes even clearer when he found it necessary to consider the effect of appellant's failure to deny the charge.

I cannot but hold that in applying the statement of Lord Tenterden as he did, and concluding with "And *accordingly* I find the accused guilty of the offence with which he has been charged." (Emphasis added) the learned trial judge erred in law and misdirected himself as to the bur-

den of proof. It is manifest either that he concluded that corroboration was not necessary on the question of identity or, alternatively, that he found he could satisfy himself beyond a reasonable doubt that the complainant's story (her identification of the appellant) was true from the fact that the appellant offered no explanation or contradiction. In either case, he was in error.

Appellant's failure to deny the charge could not be corroboration under s. 134, and in imposing an onus on the appellant to offer an explanation or contradiction he was placing a burden on him which the law says does not exist.

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

Cartwright C.J. and Fauteux J. concurred with the judgment delivered by

MARTLAND J.:—The essential facts in this case have been stated in the reasons of my brother Hall. I am in agreement with him that this appeal should be allowed and a new trial ordered.

My reasons for reaching this conclusion are these. The offence with which the appellant was charged was under s. 136 of the *Criminal Code*. Section 134 of the Code provides:

> 134. Notwithstanding anything in this Act or any other Act of the Parliament of Canada, where an accused is charged with an offence under section 136, 137, subsection (1) or (2) of section 138 or subsection (1) of section 141, the judge shall, if the only evidence that implicates the accused is the evidence, given under oath, of the female person in respect of whom the offence is alleged to have been committed and that evidence is not corroborated in a material particular by evidence that implicates the accused, instruct the jury that it is not safe to find the accused guilty in the absence of such corroboration, but that they are entitled to find the accused guilty if they are satisfied beyond a reasonable doubt that her evidence is true.

As has been pointed out by my brother Hall, although the trial in this case was by judge alone, it was necessary for the learned trial judge, as a judge of the facts, to instruct himself in accordance with this section.

The only evidence in this case which implicated the appellant was that of the complainant. Her evidence, in that respect, was not corroborated by any evidence which implicated the appellant.

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In these circumstances, while it was open to him to find the appellant guilty of the offence charged, it was only proper for him to do so if he was satisfied beyond a reasonable doubt that her evidence was true.

The learned trial judge, in stating his reasons at the conclusion of the trial, had this to say:

> Gentlemen, it seemed to me at the conclusion of the evidence this morning and at the conclusion of the arguments that I have heard from you two that I could not come to any other conclusion than that the charge had been established, and this was after taking into consideration the provisions of Section 134. However, as you know I wanted to consider this over the noon adjournment, and having given it more careful consideration I still feel that I should not come to any other conclusion than that the charge has been established.
>
> I particularly refer to this statement of the law in Regina and Coffin, 1956 Supreme Court Reports at Page 228 in which Mr. Justice Kellock has referred with approval to a statement of Lord Tenterden in which Lord Tenterden said this:
>
> > "No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends?"
>
> And accordingly I find the accused guilty of the offence with which he has been charged.

There is, to me, in this statement, the implication that he was finding the appellant guilty not because he was satisfied beyond a reasonable doubt that the complainant's evidence was true, but partly because the appellant had not gone into the witness box to deny what she had said. The passage quoted from Lord Tenterden's judgment in *R. v. Burdett*[4], as applied in the circumstances of this case, meant that the learned trial judge, in a situation where the appellant had offered no explanation or contradiction, felt that he could not "do otherwise than adopt the conclusion to which the proof *tends*" (the italics are my own).

In my view this reasoning is not satisfactory in a case to which s. 134 applies. It was not enough, in order to find guilt, to have evidence tending toward the appellant's guilt, coupled with the absence of any denial by him. It

[4] (1820), 4 B. & Ald. 95 at 161, 106 E.R. 873.

was necessary for the Court to be satisfied beyond reasonable doubt that the complainant's evidence was true.

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As I am not satisfied that there was due compliance with the requirements of s. 134, I feel the appeal should be allowed and a new trial ordered.

Appeal allowed and new trial ordered.

Solicitors for the appellant: Cameron, Brewin & Scott, Toronto.

Solicitor for the respondent: The Attorney General for Alberta.

SUNBEAM CORPORATION (CANADA) LIMITED ..... APPELLANT;

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*Apr. 25, 26
Nov. 1

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Appeal to Court of Appeal—Question of law alone—Minimum resale price specified by manufacturer—Whether acquittal of attempt resale price maintenance subject to appeal—Presumptions—Whether sufficiency of evidence question of fact or law—Combines Investigation Act, R.S.C. 1952, c. 314, ss. 34(2), 41(2)—Criminal Code, 1953-54 (Can.), c. 51, s. 584(1)(a).

The appellant corporation, a manufacturer of electrical appliances, was indicted on four counts of attempting to induce retail dealers to resell its products at prices not less than the minimum prices specified by it, contrary to s. 34(2)(*b*) of the *Combines Investigation Act*, R.S.C. 1952, c. 314. The evidence tendered consisted in large measure of documents such as letters addressed to all dealers in certain commodities, price lists distributed to dealers and inter-departmental correspondence. The appellant was convicted on two counts and an order of prohibition was granted. The trial judge acquitted on the other two counts on the ground that there was insufficient evidence of inducement. An appeal by the Crown from the acquittal was allowed by a majority judgment of the Court of Appeal which also varied the order of prohibition. The corporation appealed to this Court.

Held (Judson, Spence and Pigeon JJ. dissenting): The appeal should be allowed in part and the verdict of acquittal restored.

Per Cartwright C.J. and Fauteux, Martland and Ritchie JJ.: The finding by the trial judge that the case presented by the Crown did not

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*PRESENT: Cartwright C.J. and Fauteux, Martland, Judson, Ritchie, Spence and Pigeon JJ.

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establish the appellant's guilt beyond a reasonable doubt does not involve "a question of law alone" so as to entitle the Attorney General to appeal to the Court of Appeal under the provisions of s. 584(1)(*a*) of the *Criminal Code*. Section 41(2)(*c*) of the *Combines Investigation Act* provides that documents, such as the letters in this case, which were in the possession of the accused "shall be admitted in evidence without further proof thereof and shall be *prima facie* evidence" that the accused had knowledge of the documents and their contents and that anything recorded in them as having been done, said or agreed upon by the accused or its agent, was done, said or agreed upon. The trial judge is in no way precluded by that section from considering the weight to be attached to that evidence in considering the issue of the accused's guilt or innocence. Accepting the view of the Court of Appeal that the evidence here was sufficient to support a conviction, the further question of whether the guilt of the accused should be inferred from that evidence, was one of fact within the province of the judge. It is well settled that the sufficiency of evidence is a question of fact and not a question of law. However wrong the Court of Appeal or this Court may think that the trial judge was in reaching the conclusion that the evidence was not sufficient to satisfy him beyond a reasonable doubt, this error cannot be determined without passing judgment on the reasonableness of the verdict or the sufficiency of the evidence, and these are not matters over which the Court of Appeal has jurisdiction under s. 584(1)(*a*) of the Code.

Per Judson, Spence and Pigeon JJ., *dissenting:* The evidence contained in the documents produced at the trial amounted to an admission of an attempt to induce dealers to sell at not less than a specified minimum price. There was no evidence which could give rise to a reasonable doubt that the accused had committed the offence so as to rebut the presumption created by s. 41 of the *Combines Investigation Act*. Reasonable doubt must be based upon evidence adduced at the trial. There was therefore no course but to convict the accused.

The Court of Appeal had jurisdiction to consider the appeal from the acquittal by the trial judge. It was an error in law for the trial judge to charge himself, as it would appear that he did, that the Crown in order to support the charges had to prove an inducing by agreement, threat or promise. The Crown had only to prove the intent to induce and an overt act toward the accomplishment of that intent. These were proven on prima facie evidence which by lack of contradiction became conclusive evidence. When there is, as in the present case, a statutory presumption to be applied, once the facts necessary to give rise to it are found by the trial judge to be established beyond reasonable doubt, the question whether the inference of guilt should be made is no longer anything but a question of law alone.

Droit criminel—Appel à la Cour d'appel—Question de droit seulement—Prix minimum de revente spécifié par fabricant—Acquittement de l'accusation de tentative de maintenir un prix de revente est-il susceptible d'appel—Présomptions—Suffisance de la preuve est-elle une question de fait ou de droit—Loi relative aux enquêtes sur les coalitions, S.R.C. 1952, c. 314, art 34(2), 41(2)—Code criminel, 1953-54 (Can.), c. 51, art. 584(1)(a).

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La compagnie appelante, qui fabrique des appareils électriques, a été poursuivie par acte d'accusation sous quatre chefs d'avoir tenté d'engager des marchands au détail à revendre ses produits à un prix non inférieur à un prix minimum spécifié par elle, le tout contrairement à l'art. 34(2)(*b*) de la *Loi relative aux enquêtes sur les coalitions*, S.R.C. 1952, c. 314. La preuve offerte consistait en grande partie en documents tels que des lettres adressées à tous les marchands de certains produits, en listes de prix distribuées aux marchands et en correspondance interdépartementale. L'appelante a été déclarée coupable sous deux chefs et un ordre de prohibition a été émis. Le juge au procès a rendu un verdict d'acquittement sur les deux autres chefs pour le motif que la preuve d'incitation était insuffisante. Un appel de la Couronne du jugement d'acquittement a été accueilli par un jugement majoritaire de la Cour d'appel qui a aussi modifié l'ordre de prohibition. La compagnie en a appelé à cette Cour.

Arrêt: L'appel doit être accueilli en partie et le verdict d'acquittement rétabli, les Juges Judson, Spence et Pigeon étant dissidents.

Le Juge en Chef Cartwright et les Juges Fauteux, Martland et Ritchie: La conclusion du juge au procès que la preuve de la Couronne n'établissait pas hors d'un doute raisonnable la culpabilité de l'appelante ne comporte pas une «question de droit seulement» permettant au procureur général d'en appeler à la Cour d'appel en vertu des dispositions de l'art. 584(1)(*a*) du *Code Criminel*. L'article 41(2)(*c*) de la *Loi relative aux enquêtes sur les coalitions* stipule que les documents qui, tels que les lettres dans cette cause, étaient en la possession du prévenu «font foi sans autre preuve et attestent prima facie» que le prévenu connaissait les documents et leur contenu et que toute chose inscrite dans ces documents comme ayant été accomplie, dite ou convenue par le prévenu ou son agent, l'a été ainsi que le document le mentionne. Cet article n'empêche pas le juge au procès de considérer le poids qu'il doit attaché à cette preuve lorsqu'il considère la question de la culpabilité du prévenu. Si on accepte le point de vue de la Cour d'appel que la preuve était suffisante pour permettre de conclure à la culpabilité, la question supplémentaire de savoir si on doit tirer de cette preuve une conclusion de culpabilité, est une question de fait de la compétence du juge. D'après une jurisprudence bien établie, la suffisance de la preuve est une question de fait et non pas une question de droit. Même si la Cour d'appel ou cette Cour sont d'avis que le juge au procès a erré en concluant que la preuve n'était pas suffisante pour le convaincre hors d'un doute raisonnable, cette erreur ne peut pas être constatée sans passer un jugement sur le caractère raisonnable du verdict ou la suffisance de la preuve, et ce ne sont pas là des questions sur lesquelles la Cour d'appel a juridiction en vertu de l'art. 584(1)(*a*) du Code.

Les Juges Judson, Spence et Pigeon, dissidents: La preuve qui se trouve dans les documents produits au procès équivaut à l'aveu d'une tentative d'engager les marchands à vendre à pas moins qu'à un prix minimum spécifié. Il n'y a aucune preuve pouvant faire naître un doute raisonnable que le prévenu a commis l'infraction de manière à ce que la présomption créée par l'art. 41 de la *Loi relative aux enquêtes sur les coalitions* puisse être réfutée. Le doute raisonnable doit être basé sur la preuve produite au procès. Dans le cas présent, il n'y avait pas d'autre alternative qu'une déclaration de culpabilité.

La Cour d'appel avait juridiction pour déterminer l'appel du verdict d'acquittement. Le juge au procès a erré en droit en se donnant les

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directives, ainsi qu'il semble l'avoir fait, que la Couronne devait, en vue de supporter les chefs d'accusation, prouver une incitation par entente, menace ou promesse. La Couronne n'avait qu'à prouver l'intention d'engager les marchands et un acte manifeste en vue de l'accomplissement de cette intention. Ces choses ont été prouvées par une preuve prima facie qui, vu l'absence de contradiction, est devenue une preuve concluante. Lorsqu'il s'agit, comme dans le cas présent, de l'application d'une présomption statutaire, et que le juge a conclu que les faits nécessaires pour la faire naître sont établis hors d'un doute raisonnable, la question de savoir si on doit en tirer une conclusion de culpabilité est une question de droit seulement.

APPEL d'un jugement de la Cour d'Appel de l'Ontario[1] accueillant un appel de la Couronne à l'encontre d'un verdict d'acquittement. Appel accueilli en partie, les Juges Judson, Spence et Pigeon étant dissidents.

APPEAL from a judgment of the Court of Appeal for Ontario[1] allowing an appeal by the Crown from an acquittal. Appeal allowed in part, Judson, Spence and Pigeon JJ. dissenting.

George D. Finlayson, Q.C. and *Burton Tait,* for the appellant.

B. J. MacKinnon, Q.C. and *R. B. Tuer,* for the respondent.

The judgment of Cartwright C.J. and of Fauteux, Martland and Ritchie JJ. was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] (Laskin J.A. dissenting) whereby that Court allowed an appeal by the Crown from the acquittal of the appellant on the 3rd and 4th counts of an indictment charging attempted resale price maintenance contrary to s. 34(2)(*b*) of the *Combines Investigation Act,* which reads as follows:

34. (2) No dealer shall directly or indirectly by agreement, threat, promise or any other means whatsoever, require or induce or attempt to require or induce any other person to resell an article or commodity

(*b*) at a price not less than a minimum price specified by the dealer or established by agreement.

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[1] [1967] 1 O.R. 661, 1 C.R.N.S. 183, [1967] 3 C.C.C. 149, 53 C.P.R. 102, 62 D.L.R. (2nd) 75.

The indictment contains four counts, each specifying offences contrary to s. 34(2)(*b*) and the evidence tendered consisted in large measure of documents such as letters addressed to "all dealers" in certain commodities, price lists distributed by the appellant to various dealers, and inter-departmental correspondence between some of the appellant company's salesmen and the company's head office.

The circumstances giving rise to these charges were that the appellant had devised and was seeking to implement a plan which it described as its "minimum profitable resale price plan" or "M.R.P." plan. This plan purported to be conceived in conformity with the provisions of s. 34(5) of the Act which are generally accepted as having been enacted in order to enable dealers to control the practice employed by some retailers of selling a product or products at a loss in order to induce customers to patronize their sales outlet for other products. Section 34(5) reads as follows:

(5) Where, in a prosecution under this section, it is proved that the person charged refused or counselled the refusal to sell or supply an article to any other person, no inference unfavourable to the person charged shall be drawn from such evidence if he satisfies the court that he and any one upon whose report he depended had reasonable cause to believe and did believe

(*a*) that the other person was making a practice of using articles supplied by the person charged as loss-leaders, that is to say, not for the purpose of making a profit thereon but for purposes of advertising;

(*b*) that the other person was making a practice of using articles supplied by the person charged not for the purpose of selling such articles at a profit but for the purpose of attracting customers to his store in the hope of selling them other articles;

(*c*) that the other person was making a practice of engaging in misleading advertising in respect of articles supplied by the person charged; or

(*d*) that the other person made a practice of not providing the level of servicing that purchasers of such articles might reasonably expect from such other person.

There was ample evidence to show that in putting its "M.R.P." plan into effect, in purported compliance with this section, the appellant had in fact violated s. 34(2)(*b*) of the Act in the cities of Toronto and St. Catharines in the Province of Ontario in the manner alleged in the 1st

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and 2nd counts of the indictment upon which it was convicted, but the 3rd and 4th counts related to attempts to induce retailers in the City of Vancouver to comply with the plan in the same fashion and, as I have indicated, the learned trial judge did not find that these charges had been proved beyond a reasonable doubt.

The evidence has been extensively reviewed in the judgment rendered by Mr. Justice Schroeder on behalf of the majority of the Court of Appeal and I do not find it necessary to deal with it in any detail because I am satisfied that the point to be determined on this appeal is a very narrow one and turns on the question of whether or not the grounds of appeal alleged before the Court of Appeal involved "a question of law alone" so as to give that court jurisdiction under the provisions of s. 584(1) of the *Criminal Code* which read as follows:

> 584. (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal
>
> (*a*) against a judgment or verdict of acquittal of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone, ...

In support of the allegations of attempted inducement contained in the 3rd and 4th counts, the Crown produced correspondence between two of the Company's salesmen in Vancouver, (Schell and Thompson) and the Company's head office which described their dealings with the Army and Navy Department Store Limited and ABC Television & Appliances Limited respectively in furtherance of the Company's "M.R.P." plan.

As to the allegation respecting the Army and Navy Department Store Limited, (count 3), the learned trial judge, after reviewing the Schell correspondence and pointing out that the Company's representative at head office had written to say that he had never called on this retailer during the whole time that he was in Vancouver, went on to say:

> This would indicate that Army & Navy was not a Sunbeam retailer and may not have received copies of Exhibits 4 and 5. While it would appear that the period of three weeks in which the calls were made by Schell on Army & Navy Stores was within the period set out in the count,

such fact is not clear. The evidence as to inducement on this count does not bear that quality of certainty that ought to exist in the case of a criminal charge and it will therefore be dismissed.

In considering the 4th count, the learned trial judge reviewed the evidence contained in the letter from Thompson to his head office concerning ABC Television & Appliances Limited and concluded:

> There is here neither *sufficient* evidence of inducement on the part of the accused nor that the alleged offence took place within the time charged. This charge must therefore be dismissed.

The italics are my own.

As the evidence on the 3rd and 4th charges was almost entirely documentary, the judgment of the majority of the Court of Appeal turns in some measure on the meaning to be attached to the provisions of s. 41(2) of the Act which read as follows:

> (2) In a prosecution under Part V,
>
> (*a*) anything done, said or agreed upon by an agent of a participant shall *prima facie* be deemed to have been done, said or agreed upon, as the case may be, with the authority of that participant;
>
> (*b*) a document written or received by an agent of a participant shall *prima facie* be deemed to have been written or received, as the case may be, with the authority of that participant; and
>
> (*c*) a document proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and shall be *prima facie* evidence
>
> (i) that the participant had knowledge of the document and its contents,
>
> (ii) that anything recorded in or by the document as having been done, said or agreed upon by any participant or by an agent of a participant was done, said or agreed upon as recorded and, where anything is recorded in or by the document as having been done, said or agreed upon by an agent of a participant, that it was done, said or agreed upon with the authority of that participant,
>
> (iii) that the document, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written by an agent of a participant, that it was written with the authority of that participant.

In the course of his reasons for judgment, Mr. Justice Schroeder expressed the view that the Crown's proof as to the 3rd and 4th counts was "*sufficiently* clear and cogent to support a conviction on these charges" (the italics are

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my own) and that as no evidence was called on behalf of the defence, the trial judge was not justified as a matter of law in acquitting the accused. In reaching this conclusion, Mr. Justice Schroeder cited, amongst other cases, the decision of this Court in *Girvin v. The King*[2] where Sir Charles Fitzpatrick C.J.C., speaking for the Court at page 169, said:

> I have always understood the rule to be that the Crown in a criminal case is not required to do more than produce evidence which if unanswered and believed is sufficient to raise a *prima facie* case upon which the jury might be justified in finding a verdict.

I do not think that any authority is needed for the proposition that, when the Crown has proved a *prima facie* case and no evidence is given on behalf of the accused, the jury *may* convict, but I know of no authority to the effect that the trier of fact is *required* to convict under such circumstances. The *Girvin* case was an appeal from the verdict of a jury which had found that the Crown's evidence established the accused's guilt beyond a reasonable doubt, and it was held that there was sufficient evidence to support that verdict. In the present case the learned trial judge found that the case presented by the Crown did not establish the appellant's guilt beyond a reasonable doubt, and as I have indicated, the main question raised by this appeal is whether that finding involved a question of law alone so as to entitle the Attorney General to appeal to the Court of Appeal under the provisions of s. 585(1)(*a*) of the *Criminal Code,* or whether it was a finding of fact or one of mixed fact and law.

In dealing with the evidence contained in the letters from the appellant's salesmen in which reference was made to their conversations with the retailers named in counts 3 and 4 of the indictment, Mr. Justice Schroeder, applying the provisions of s. 41(2), found that the statements so made by the salesmen "constitute direct proof by way of admissions of the attempts charged against the respondent in both counts" and he went on to say:

> That evidence is not only *sufficient* to get the case past the judge to the jury, but there being no issue as to the *weight* or credit to be given to

[2] (1911), 45 S.C.R. 167.

it, it is *sufficient* to counterbalance the general presumption of innocence and require affirmative action by the court in convicting the accused where, as here, it is not countered or controlled by evidence tending to contradict it or render it improbable, or to prove facts inconsistent with it.

The italics are my own.

With the greatest respect I cannot agree with Mr. Justice Schroeder that the provisions of s. 41(2) in any way preclude a judge or jury from considering the *weight* to be attached to the evidence contained in the letters in question in determining the issue of whether the Crown has proved its case beyond a reasonable doubt.

Section 4(2)(*c*) simply provides that documents, such as these letters, which were in the possession of the accused "shall be admitted in evidence without further proof thereof and shall be *prima facie* evidence" that the accused had knowledge of the documents and their contents and that anything recorded in them as having been done, said or agreed upon by the accused or its agent, was done, said or agreed upon. This does not mean that the trial judge, having accepted the letters as *prima facie* evidence of their contents, is precluded from assessing the weight to be attached to that evidence in considering the issue of the accused's guilt or innocence.

Mr. Justice Schroeder, however, went on to say:

> Looking at the correspondence between these two salesmen and the Assistant General Sales Manager of the respondent in the light of all the evidence as to the formulation of its carefully conceived plan and the various steps taken to put it into execution across the country, there is no ground upon which their statements—in effect admissions—should be disbelieved. In simply basing his dismissal of the charge against the accused on counts 3 and 4 on the doctrine of reasonable doubt, the learned Judge failed to direct his mind to the fact that the Crown had raised a *prima facie* case against the accused which clearly afforded evidence of facts from which the accused might have cleared itself, but which it did not even attempt to answer or explain. In the absence of such explanation or contradiction the Crown's proof was confirmed and became *sufficiently* clear and cogent to support a conviction. The learned Judge's failure to direct himself upon this well-settled principle was nondirection amounting to misdirection, and his consequent non-observance of it constituted an error in law which afforded the Crown a right of appeal against the acquittal.

The italics are my own.

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It appears to me that Mr. Justice Schroeder's reasoning in the last quoted paragraph is predicated on his finding that the Crown's proof was "sufficiently clear and cogent to support a conviction". This may well be so and if a judge or jury had convicted the accused on the 3rd and 4th counts on the evidence tendered by the Crown, I doubt very much whether such a conviction could have been set aside, but we are not dealing with an appeal from a conviction; here the accused was acquitted by the trial judge and the appeal to the Court of Appeal for Ontario was an appeal from that acquittal. While the reasoning employed by Mr. Justice Schroeder would be sound in the case of an appeal from a conviction it is not, in my respectful opinion, applicable to such an appeal as this.

In considering whether or not this appeal "involves a question of law alone" I think that reference may usefully be had to what was said by Rinfret J., speaking on behalf of this Court in *Fraser v. The King*[3], where he was considering the submission made on behalf of the accused that circumstantial evidence adduced by the Crown was equally consistent with innocence as with guilt, and he had occasion to say of that argument, at p. 301:

> To a certain extent, this would assimilate verdicts based on circumstantial evidence 'as consistent with the innocence as with the guilt of the accused' to verdicts where it is claimed that there is no evidence at all to support them, the view being that the court of appeal is empowered to set aside those verdicts on the ground that they are unsatisfactory, whether on account of a total lack of evidence or for want of sufficient legal evidence to support them.
>
> Let it be granted, however, that such a question should be deemed a question of law, or of mixed law and fact, when once it is established that the evidence is of such a character that the inference of guilt of the accused might, and could, legally and properly be drawn therefrom, the further question whether guilt ought to be inferred in the premises is one of fact within the province of the jury...

I think that these observations have a direct bearing on the present case and that, accepting the view of Mr. Justice Schroeder that the evidence here was sufficient to support a conviction, the further question of whether the guilt of the accused should be inferred from that evidence, was one of fact within the province of the judge.

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[3] [1936] S.C.R. 296, 66 C.C.C. 240, [1936] 3 D.L.R. 463.

The law applicable to the meaning to be placed on s. 584(1)(*a*) under the present circumstances is stated in the judgment of this Court delivered by Taschereau J. in *Rose v. The Queen*[4], where he said at p. 443:

> The trial judge sitting without a jury was fulfilling a dual capacity. He had, therefore, to discharge the duties attached to the function of a judge and also the duty of a jury. As a judge he had to direct himself as to whether any facts had been established by evidence from which criminal negligence may be reasonably inferred. As a jury he had to say whether from these facts submitted, *criminal negligence ought to be inferred. Metropolitan Railway Company v. Jackson,* 1877 3 A.C. 193 at 197, *The King v. Morabilo,* 1949 S.C.R. 172 at 174. I think that the trial judge directed himself properly and that when he decided on the facts submitted to him that criminal negligence *ought not to be inferred,* he was fulfilling the functions of a jury *on a question of fact.*

The italics are in the original judgment.

In the quotations which I have taken from the judgment of the trial judge and of Mr. Justice Schroeder, I have italicized the words "sufficient" and "sufficiently" wherever they occur, as it appears to me that the fundamental difference between the trial judge and the majority of the Court of Appeal was that the Court of Appeal was of opinion that the evidence on the 3rd and 4th counts was *sufficient to require* a verdict of guilty, whereas the trial judge did not consider it to be *sufficient* to support such a verdict. It is well-settled that the *sufficiency* of evidence is a question of fact and not a question of law and the law in this regard is well stated by Trenholme J., speaking on behalf of the Quebec Court of King's Bench in *Rex v. White*[5], where he said at p. 75:

> We hold White had gone through his trial legally and the question of sufficiency of the evidence to convict is a question of fact for the judgment of the magistrate. A question of no evidence is a question of law. But it is a question of sufficiency of evidence here; it is not a question of law. Sufficiency of evidence, is always a matter for the jury to decide, or the Judge in place of the jury, and the Judge is entitled to say there is no evidence to go to the jury, but as to whether the evidence brought before the jury supports the condemnation or acquittal is for the jury alone, and is a question of fact. Therefore, the question of the sufficiency of the evidence in the case is a question of fact and not a question of law, . . .

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[4] [1959] S.C.R. 441, 31 C.R. 27, 123 C.C.C. 175.

[5] (1914), 21 R.L.N.S. 23, 24 C.C.C. 74.

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The reasons for judgment of Mr. Justice St. Jacques in *Regina v. Boisjoly*[6] are to the same effect. He there said, at page 23:

> Alors, le jury a rendu son verdict et a déclaré le prévenu non coupable, et cela a été dit par chacun des jurés. Il y a donc eu un verdict et c'est, en effet, ce verdict que la Couronne demande à la Cour d'Appel de mettre de côté.
>
> Comment cette Cour peut-elle le faire, à moins de prendre connaissance de toute la preuve versée au dossier, afin de déclarer, contrairement à l'opinion du juge et au verdict du jury, qu'il y avait suffisamment de preuve pour rendre un autre verdict que celui qui a été prononcé? Est-ce là un appel en droit uniquement? Assurément non, puisque la Cour aurait à étudier les faits prouvés pour déduire une autre conclusion que celle à laquelle le jury en est arrivé.

These cases were both followed in the Quebec Court of Queen's Bench in 1961 in the case of *Regina v. Ferland*[7], and it will be found that the courts of the other Provinces have been uniform in their adoption of the views above expressed. See for example, *Rex v. Gross*[8], per Roach J.A., page 19; *R. v. J.*[9] (Alberta); *The King v. Toubret and Davis*[10] (N.S.); *Rex v. F. W. Woolworth Company*[11] (B.C.), in which latter case the respondent company was charged with discriminating against its employees contrary to s. 4(2)(*a*) of the *Industrial Conciliation Arbitration Act*, 1947 (B.C.), c. 44, and Chief Justice Sloan, speaking on behalf of the Court of Appeal for British Columbia, said, at page 176:

> I am unable to see how we can say that the learned judge below erred in finding that the Crown had failed to prove the offence charged, unless we ourselves weigh the evidence and reach our own and differing conclusions of fact thereon.
>
> This, however, as a Crown appeal, is limited to questions of law alone. It follows therefore that in my opinion we have no jurisdiction to entertain it.

In the case of *The Queen v. Warner*[12], the Court of Appeal of Alberta had allowed an appeal from a conviction of murder on the ground that the evidence at trial was not sufficient to support it and this Court decided that

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6 (1956), 22 C.R. 19, 115 C.C.C. 264.
7 (1964), 41 C.R. 1, [1961] Que. Q.B. 819.
8 [1946] O.R. 1, 86 C.C.C. 68.
9 (1957), 21 W.W.R. 248, 26 C.R. 57, 118 C.C.C. 30.
10 (1951), 29 M.P.R. 260, 14 C.R. 54, 102 C.C.C. 226.
11 [1949] 1 W.W.R. 175.
12 [1961] S.C.R. 144, 34 C.R. 246, 128 C.C.C. 366.

that ground did not raise a question of law so as to give it jurisdiction to hear a further appeal. In the course of the reasons for judgment which he rendered on behalf of himself, Taschereau and Abbott J., Chief Justice Kerwin said, at page 147:

> In my opinion there is no jurisdiction in the Court to hear this appeal. The first two sentences of the reasons for judgment of the Chief Justice of Alberta, speaking on behalf of the Appellate Division, are as follows:
>
> > I am strongly of opinion that the verdict of murder cannot be supported by the evidence. But I feel I must go further, and set out other reasons for setting aside the conviction.
>
> I read the first sentence as meaning that the Chief Justice considered that the evidence was not sufficient to support a conviction,—which is a question of fact.

In the same case, the present Chief Justice, with whom Taschereau and Abbott J. agreed, said, at page 149:

> I do not find it necessary to consider the several errors of law alleged by the appellant to have been made by the Appellate Division as I think it is clear that the Appellate Division allowed the appeal on two main grounds:
>
> (1) that, in the opinion of the Appellate Division, the verdict of guilty of murder should be set aside on the ground that it could not be supported by the evidence, and
>
> (2) that there had been errors in law in the charge of the learned trial judge.
>
> So far as the judgment of the Appellate Division is based on the first ground mentioned, this Court is powerless to interfere with it. The question whether the Appellate Division was right in proceeding on this ground is not a question of law in the strict sense. It is a question of fact or, at the best from the point of view of the appellant, a mixed question of fact and law.

The effect of these observations, which represent the view of the majority of the Court, is that the question of whether or not the evidence was sufficient to support a conviction is a question of fact.

Mr. Justice Schroeder, however, while recognizing that there was nothing in the reasons for judgment of the learned trial judge to "disclose *ex facie* what may be denoted as a positive error of law . . ." went on to say:

> It is not essential that a misconception of law should appear on the face of the judgment or the reasons therefor if the determination upon the evidence was such that, in the opinion of a reviewing court, no person acting judicially and properly instructed as to the relevant principles of law could have reached. If that is readily apparent, as I believe it is here, then this Court is entitled to assume that some misconception of law is responsible for the decision.

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It appears to me that Mr. Justice Schroeder has cited an excerpt from the reasons delivered on behalf of this Court by Anglin C.J., in *Belyea and Weinraub v. The King*[13] as some authority in support of this proposition. That was a case in which the trial judge had acquitted the appellants on charges of offences against the *Combines Investigation Act*, R.S.C. 1927, c. 26, and of conspiracy contrary to the provisions of s. 498 of the *Criminal Code* and, holding that the error of the trial judge raised a question of law, this Court affirmed the judgment of the Appellate Division of the Supreme Court of Ontario which had reversed the acquittal on the following grounds:

> . . . the Appellate Division . . . was of the opinion that the learned trial judge had misdirected himself, in that he held that, although it was proven, if not admitted, that they (the appellants) 'took an active part in the original scheme,—the conspiracy which formed the basis for the prosecution, . . . because (they) were not proved to have taken part in subsequent overt acts,' they should be acquitted, . . .

In my view that case is distinguishable from the case at bar because the trial judge had there made a clear finding of fact against the accused, (*i.e.*, that they had participated in the formation of the combine or agreement which was charged as a conspiracy) from which it followed as a matter of law that they were guilty of the offence with which they were charged. The trial judge did not appear to appreciate the fact that the agreement was the essence of the offence and seems to have thought that in order to find the accused guilty there had to be evidence from which he could conclude beyond a reasonable doubt that they had participated in overt acts done in furtherance of the agreement. This was a manifest error in law which raised a question over which the Court of Appeal had jurisdiction. I cannot see that any such question as was there decided arises in the present case because here there was no finding of fact against the accused in respect of the 3rd and 4th counts which, as a matter of law, required the trial judge to convict.

In the present case the trial judge accepted the evidence as contained in the letters above referred to and thus gave

[13] [1932] S.C.R. 279, 57 C.C.C. 318, [1932] 2 D.L.R. 88.

full effect to s. 41(2) of the *Combines Investigation Act*, but he concluded that this evidence was not sufficient to satisfy him beyond a reasonable doubt that the accused were guilty on the 3rd and 4th counts. However wrong the Court of Appeal or this Court may think that he was in reaching this conclusion, I am of opinion, with all respect for those who hold a different view, that this error cannot be determined without passing judgment on the reasonableness of the verdict or the sufficiency of the evidence, and in my view these are not matters over which the Court of Appeal has jurisdiction under s. 584(1)(*a*) of the *Criminal Code*.

Mr. Justice Schroeder, however, further relies upon the case of *Edwards (Inspector of Taxes) v. Bairstow*[14] and he makes particular reference to the reasons for judgment of Lord Radcliffe in that case. That was an appeal from a decision of the Commissioners for the General Purpose of the Income Tax Act on a case stated by them. The facts were not in dispute and the sole question was whether a taxpayer's profits arose out of an "adventure or concern in the nature of trade" within the meaning of s. 237 of the English *Income Tax Act*, 1918.

In the course of his reasons for judgment, Lord Radcliffe said, at page 33:

> My Lords, I think that it is a question of law what meaning is to be given to the words of the Income Tax Act 'trade, manufacture, adventure or concern in the nature of trade' and for that matter what constitute 'profits or gains' arising from it. Here we have a statutory phrase involving a charge of tax, and it is for the courts to interpret its meaning, having regard to the context in which it occurs and to the principles which they bring to bear upon the meaning of income.

His Lordship then observed that:

> . . . the law does not supply a precise definition of the word 'trade': . . .

and went on to say:

> In effect it lays down the limits within which it would be permissible to say that a 'trade' as interpreted by section 237 of the Act does or does not exist.
>
> But the field so marked out is a wide one and there are many combinations of circumstances in which it could not be said to be wrong to arrive at a conclusion one way or the other. If the facts of any particular case are fairly capable of being so described, it seems

[14] [1956] A.C. 14.

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to me that it necessarily follows that the determination of the Commissioners, Special or General, to the effect that a trade does or does not exist is not 'erroneous in point of law'; and, if a determination cannot be shown to be erroneous in point of law, the statute does not admit of its being upset by the court of appeal. I except the occasions when the commissioners, although dealing with a set of facts which would warrant a decision either way, show by some reason they give or statement they make in the body of the case that they have misunderstood the law in some relevant particular.

All these cases in which the facts warrant a determination either way can be described as questions of degree and therefore as questions of fact.

Lord Radcliffe was, however, of the opinion that the agreed facts in the *Bairstow* case were consistent only with the conclusion that the profit there in question "was the profit of an adventure in the nature of trade". In concluding his judgment, Lord Radcliffe made the following general observation concerning appeals from income tax commissioners at page 38:

> As I see it, the reason why the courts do not interfere with commissioners' findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the commissioners of greater experience in matters of business or any other matters. The reason is simply that by the system that has been set up the commissioners are the first tribunal to try an appeal, and in the interests of the efficient administration of justice their decisions can only be upset on appeal if they have been positively wrong in law. The court is not a second opinion, where there is reasonable ground for the first. But there is no reason to make a mystery about the subjects that commissioners deal with or to invite the courts to impose any exceptional restraints upon themselves because they are dealing with cases that arise out of facts found by commissioners. Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado.

I am satisfied, after having read the reasons for judgment of Lord Radcliffe, that the *Bairstow* case was one in which the court was required to decide whether the facts found by the Commissioners were such as to bring the taxpayer within the language employed in s. 237 of the English *Income Tax Act*, 1918, and that the question of law upon which the House of Lords decided that case was "what is the meaning to be given to the words of the *Income Tax Act* of 'trade, manufacture, adventure or concern in the nature of trade' "? I must say, with all respect, that that case does not appear to me to afford any authority

for the proposition that in an appeal against a judgment of acquittal under s. 584(1)(*a*) of the *Criminal Code* "a question of law alone" is involved whenever a reviewing court is of opinion that the finding of the trial judge was unreasonable and improper having regard to the evidence.

If the phrase "a question of law alone" as it occurs in that section were to be so construed, then the result in my opinion would be not only to extend the Attorney General's right to appeal under that section, but also to enlarge the meaning of the phrase "a question of law" as it occurs in other sections of the *Criminal Code* dealing with appeals not only to the Court of Appeal but to this Court. In my opinion such an interpretation could result in a broadening of the scope of appellate jurisdiction under the *Criminal Code* beyond the limitations which are stipulated in the express language of the Code itself.

The provisions of s. 592(1)(*a*) of the Code provide that:

> 592. (1) On the hearing of an appeal against a conviction, the court of appeal
>
> (*a*) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is *unreasonable or cannot be supported by the evidence.*
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice; . . .

The italics are my own.

Parliament has thus conferred jurisdiction on the Court of Appeal to allow an appeal against a conviction on three separate grounds, one of which is the very ground upon which the Court of Appeal allowed the present appeal, i.e., that "the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence". The fact that s. 592(1)(*a*) recognizes this ground as being separate and distinct from "the ground of a wrong decision on a question of law" appears to me to be the best kind of evidence of the fact that Parliament did not intend the phrase "a question of law" as it is used in the Code to include the question of whether the verdict at trial was unreasonable or could not be supported by the evidence. It is noteworthy that having accorded the Court of Appeal

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jurisdiction to hear appeals against conviction on the ground that the verdict was unreasonable, Parliament did not confer the same jurisdiction on that Court in appeals by the Crown. No authority is needed for the proposition that appellate jurisdiction must be expressly conferred and with all respect for those who may hold a different view, I am of opinion that the Court of Appeal has exceeded its jurisdiction by allowing this appeal on a ground reserved for appeals against conviction which does not extend to appeals by the Attorney General.

For all these reasons I would allow the appellant's appeal against the verdict of guilty on counts 3 and 4 of the indictment which was substituted by the Court of Appeal for the verdict of acquittal at trial on these counts and I would set aside the judgment of the Court of Appeal in this regard.

The appellant has also appealed from that part of the judgment of the Court of Appeal which varied the Order of Prohibition made by the learned trial judge. As Mr. Justice Laskin has said:

> The heart of the variation lies in extending the prohibition to cover the commission of the like offence in respect of any person other than the retailers particularly mentioned in the counts on which convictions were made and to cover the use of any other means by which, within the definition of the offence, it may be committed. In my view, section 31 of the Combines Investigation Act is ample enough to comprehend a prohibitory order in such terms.

I would not disturb the order of the Court of Appeal in this regard.

In the result, I would allow the appellant's appeal in part.

The judgment of Judson, Spence and Pigeon JJ. was delivered by

SPENCE J. (*dissenting*):—This is an appeal from the judgment of the Court of Appeal for Ontario[15] delivered on March 31, 1967, whereby that Court in a majority judgment allowed an appeal from the judgment of Grant J. delivered

[15] [1967] 1 O.R. 661, 1 C.R.N.S. 183, [1967] 3 C.C.C. 149, 53 C.P.R. 102, 62 D.L.R. (2d) 75.

on March 18, 1966, by which he convicted the accused (here appellant) on counts 1 and 2 in the indictment and acquitted the accused (here appellant) on counts 3 and 4 in the said indictment.

From the acquittal on counts 3 and 4, the Crown appealed to the Court of Appeal and the accused (here appellant) cross-appealed from the conviction on counts 1 and 2.

At the hearing of the appeal before the Court of Appeal for Ontario, the accused abandoned its appeal against the conviction on counts 1 and 2. The Court of Appeal for Ontario by reasons delivered by Schroeder J.A. and concurred in by Porter C.J.O., F. G. MacKay and J. L. McLennan JJ.A., allowed the appeal of the Crown and registered a conviction upon the said counts 3 and 4, and also altered and extended the form of the order for prohibition which had been granted by Grant J. after trial. Laskin J.A., dissenting, would have dismissed the appeal by the Crown.

The accused corporation was charged as follows:

1. The Jurors for Her Majesty the Queen present that Sunbeam Corporation (Canada) Limited, a corporation having its chief place of business at the City of Toronto, in the County of York and being a dealer within the meaning of Section 34 of The Combines Investigation Act, between the 1st day of September, 1960 and the 31st day of December, 1960, by actions taking place partly in the Municipality of Metropolitan Toronto in the County of York, in the Province of Ontario and culminating in the City of St. Catharines, in the Province of Ontario, unlawfully did by agreement, threat, promise or other means attempt to induce Cavers Brothers Limited, sometimes known as Cavers Bros., of the said City of St. Catharines to resell articles or commodities, to wit, electric shavers at prices not less than the minimum prices specified therefor by said Sunbeam Corporation (Canada) Limited and did thereby contravene the provisions of The Combines Investigation Act, Section 34(2)(*b*).

2. The said Jurors further present that Sunbeam Corporation (Canada) Limited, a corporation having its chief place of business at the City of Toronto, in the County of York and being a dealer within the meaning of Section 34 of The Combines Investigation Act, between the 1st day of September, 1960 and the 31st day of December, 1960 at the Municipality of Metropolitan Toronto in the County of York, unlawfully did, by agreement, threat, promise or other means attempt to induce New Era Home Appliances Limited sometimes known as New Era, of the City of Toronto, to resell articles or commodities, to wit, electric floor conditioners at prices not less than the minimum prices specified therefor by Sunbeam Corporation (Canada) Limited and did thereby contravene the provisions of The Combines Investigation Act, Section 34(2)(*b*).

3. The said Jurors further present that Sunbeam Corporation (Canada) Limited, a corporation having its chief place of business at the City of

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Toronto, in the County of York and being a dealer within the meaning of Section 34 of The Combines Investigation Act, between the 1st day of September, 1960 and the 31st day of December, 1960, by actions taking place partly in the Municipality of Metropolitan Toronto in the County of York, in the Province of Ontario and culminating in the City of Vancouver, in the Province of British Columbia, unlawfully did by agreement, threat, promise or other means attempt to induce Army & Navy Department Store Limited, sometimes known as Army & Navy Stores, of the said City of Vancouver to resell articles or commodities, to wit, electric fry pans at prices not less than the minimum prices specified therefor by said Sunbeam Corporation (Canada) Limited and did thereby contravene the provisions of The Combines Investigation Act, Section 34(2)(*b*).

4. The said Jurors further present that Sunbeam Corporation (Canada) Limited, a corporation having its chief place of business at the City of Toronto, in the County of York and being a dealer within the meaning of Section 34 of The Combines Investigation Act, between the 1st day of September, 1960 and the 31st day of December, 1960 by actions taking place partly in the Municipality of Metropolitan Toronto in the County of York, in the Province of Ontario and culminating in the City of Vancouver, in the Province of British Columbia, unlawfully did by agreement, threat, promise or other means attempt to induce ABC Television & Appliances Ltd., sometimes known as ABC T.V. to resell articles or commodities, to wit, electric floor conditioners at prices not less than the minimum prices specified therefor by said Sunbeam Corporation (Canada) Limited and did thereby contravene the provisions of The Combines Investigation Act, Section 34(2)(*b*).

At trial, before Grant J. sitting without a jury, as directed by s. 40(3) of the *Combines Investigation Act*, R.S.C. 1952, c. 314, the Crown's case was put simply by the production of the admission of the accused given under the provisions of s. 562 of the *Criminal Code*, and by producing and having filed as exhibits a very large number of documents which had been seized by investigators in the premises of the accused corporation in Toronto, Ontario, and which were submitted as proof under the provisions of s. 41 of the said *Combines Investigation Act*, as amended. Specified reference will be made to this section hereafter.

Section 34 of the said *Combines Investigation Act* was amended in the year 1960 by c. 45 of the Statutes of Canada for that year by the addition of subs. (5) thereto. This section, which has been referred to from time to time as the "loss leader section", was as Schroeder J.A. points out in his reasons for judgment, enacted as a measure of relief to a dealer who had refused to sell or supply or who had counselled the refusal to supply of commodities contrary to s. 34(3) of the statute if he could establish certain things.

Almost immediately thereafter the accused corporation evolved a scheme known as the Minimum Profitable Resale Price Scheme, to which I shall refer hereafter as MPRP, and proceeded to put into effect throughout Canada the said MPRP scheme.

The representatives of the accused attended meetings with retail dealers in many cities throughout Canada, forwarded, first to their distributors and later to the retail dealers, literature outlining the scheme making statements therein which statements proved relevant to the counts in the indictment.

To summarize very briefly, the scheme was as follows: The accused corporation was in the business of manufacturing and selling a very large range of electrical appliances including such things as electric razors, toasters, coffee percolators, floor polishers, and many others. The accused corporation sold directly to a very limited number of large retailers such as the T. Eaton Company Limited, the Robert Simpson Company Limited, the Hudson Bay Company and some few others. The remainder of its sales was made by the accused corporation to distributors throughout Canada and those distributors in turn sold the products to retail dealers who again resold to the consuming public. The accused corporation purported, through its long experience in the marketing of electrical appliances, to know the average gross profit which a distributor needed in order to carry on its business profitably and also the average gross profit which a retail dealer, in turn, needed to carry on its own business profitably. The accused corporation having fixed its selling price on each of the appliances to the distributors calculated the gross profit which in its opinion any distributor should obtain on the sale of such appliances to a retail dealer and thereby to use its own words, "establish the distributors' price". Then again it calculated the gross profit which a retail dealer should obtain upon its cost on the purchase of an appliance from the distributor and established what it calls the Minimum Profitable Resale Price, i.e., the MPRP. The circular which was forwarded to all the distributors and with which was

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enclosed a schedule showing the various appliances and in successive columns the distributors' net price, the suggested dealers' price (i.e., the price from distributor to dealer), the Minimum Profitable Resale Price (i.e., the price from dealer to consumer), the fair retail value and sales tax allowance, concluded with a paragraph:

> hereafter if we find that sales are being made at prices less than those suggested above, we shall give consideration as to whether such sales are loss leader sales and assess our position as it relates to the marketing of our products.

Similarly, the circular to retail dealers in which was included a price list containing in columns the suggested dealer price, the minimum profitable resale price (MPRP), and fair retail value, contained these two paragraphs:

> It is our opinion that a person loss-leads our products when he sells them at a gross margin less than his average cost of doing business plus a reasonable profit.
>
> We have drawn conclusions from evidence available as to the operating costs of a variety of dealers who sell appliances and are efficiently organized to merchandise effectively and provide reasonable service. These conclusions are set forth specifically in the column headed "Minimum Profitable Resale Price" in our new Dealer Price Sheet enclosed, effective September 15, 1960. The offering of our products below these prices will be investigated as cases of loss-leading. It is our intention to withhold supply, from persons who make a practice
>
> —of loss leading our products...

It was the contention of counsel for the accused corporation throughout that this MPRP scheme was only intended as notice that distributors and dealers advertising for sale and selling at less than that MPRP price would be investigated as possible examples of loss leading and that if after investigation such loss leading were established then supply could be cut off from the offending dealer.

The Crown showed as to the first two counts involving Cavers Brothers Limited of St. Catharines, and the New Era Home Appliances Limited of Toronto, that in fact the said corporation had attempted to induce the dealer to sell the article at not less than a specified minimum price. The learned trial judge therefore convicted the accused corporation on those counts which were, it should be noted, counts of breach of s. 34(2)(*b*) of the *Combines Investigation Act*, which provides:

34. (2) No dealer shall directly or indirectly by agreement, threat, promise or any other means whatsoever, require or induce or attempt to require or induce any other person to resell an article or commodity

(*b*) at a price not less than a minimum price specified by the dealer or established by agreement.

Count 3 in the indictment laid exactly the same charge against the accused corporation as to the Army and Navy Stores of the City of Vancouver, and count 4 of the said indictment again laid the same charge against the accused corporation as to ABC Television and Appliances Limited, also of the City of Vancouver. It should be noted that the charge was of an attempt to induce the specified dealer to resell appliances at not less than the specified minimum price. The same evidence as to those two counts as had been relevant to counts 1 and 2, was adduced, i.e., the circular letter to the distributor with its attached price list and the circular letter to the dealer with its attached price list. I have already referred to these documents.

There was in addition as to count 3, the count in reference to the Army and Navy Stores, a letter from one A. R. D. Schell, an employee of the accused corporation in British Columbia, to one J. C. Hall, an officer in the head office of the corporation in Toronto, dated October 9, 1960, which I quote in full:

Dear Joe:

Army & Navy Stores, Vancouver, have been stocking some of our items and selling them at very low prices. For instance, they have the S 5 iron on at $14.49, FPM—$15.95 FPL $19.49 and a few other items.

I have called on Mr. Ludwig who is in charge of this department and presented our resale pricing programme to him. Each time I called, he would agree to bring the prices up to the minimum, but when I went back, they were exactly the same. This has now been going on for three weeks, in which time I have called on Mr. Ludwig five times.

As yet I have had no complaints from any Account on this matter, but I feel should we let it go, it just might start something. He has been giving G.E. the same run around.

They have been buying their Sunbeam and G.E. from Mc. & Mc.

Joe, these are the details, and am passing them on to you for your advice.

R. D. Schell.

(The underlining is my own.)

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The learned trial judge pointed out that that letter had been replied to by one from Mr. J. C. Hall to R. D. Schell, dated October 14, 1960, which read, in part:

> I would suggest, Dick, that seeing you are going in and calling on this Mr. Ludwig that you continue to do so endeavouring to obtain his co-operation by pointing out that no one will be selling any less than he is and doing your best to get him to come up to our prices on this basis.

The trial judge pointed out that there is no evidence that Schell ever made any further calls on Ludwig or in any way thereafter attempted to carry out Hall's suggestion or passed on any of the contents of Hall's letter to Ludwig, and the learned trial judge then concluded:

> The evidence as to inducement on this count does not bear that quality of certainty that ought to exist in the case of a criminal charge and it will therefore be dismissed.

It must be remembered that the evidence at trial as I have pointed out consisted so far as the Crown's case was concerned of the admissions and of the production of all of these documents. Counsel for the accused corporation called two witnesses neither of whom in his evidence dealt with the two letters of October 9 and of October 14, 1960, to which I have just referred.

Section 41 of the *Combines Investigation Act* provides:

> 41. (1) In this section,
>
> (*a*) "agent of a participant" means a person who by a document admitted in evidence under this section appears to be or is otherwise proven to be an officer, agent, servant, employee or representative of a participant,
>
> (*b*) "document" includes any document appearing to be a carbon, photographic or other copy of a document, and
>
> (*c*) "participant" means any accused and any person who, although not accused, is alleged in the charge or indictment to have been a co-conspirator or otherwise party or privy to the offence charged.
>
> (2) In a prosecution under Part V,
>
> (*a*) anything done, said or agreed upon by an agent of a participant shall *prima facie* be deemed to have been done, said or agreed upon, as the case may be, with the authority of that participant;
>
> (*b*) a document written or received by an agent of a participant shall *prima facie* be deemed to have been written or received, as the case may be, with the authority of that participant; and
>
> (*c*) a document proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and shall be *prima facie* evidence

(i) that the participant had knowledge of the document and its contents,

(ii) that anything recorded in or by the document as having been done, said or agreed upon by any participant or by an agent of a participant was done, said or agreed upon as recorded and, where anything is recorded in or by the document as having been done, said or agreed upon with the authority of that participant,

(iii) that the document, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written by an agent of a participant, that it was written with the authority of that participant.

Therefore, by virtue of s. 41(2)(*c*), the documents, *i.e.*, those two letters of the 9th and 14th of October 1960, having been proved to be in the possession of the accused or on its premises, were *prima facie* evidence (1) that the accused had knowledge of the documents and their contents, and (2) that anything recorded therein as having been done was done and was done by the agent with the authority of the accused. Therefore, the only evidence before the learned trial judge as to count 3 was the evidence that the agent Schell with the authority of the accused, had on five occasions in the three weeks prior to October 9, 1960, called on Mr. Ludwig in the Army and Navy Stores in Vancouver and presented to him a resale pricing programme and that on each of those occasions Ludwig "would agree to bring the prices up to the minimum". Under those circumstances, it matters not whether Mr. Ludwig or the Army and Navy Stores had ever received a copy of the circular to dealers to which I have referred above, or had any previous knowledge of the MPRP programme, the plain statement in the letter reporting is that on five different occasions Schell had attempted to have Ludwig agree to increase his prices to a specified minimum price.

There can be no doubt as to the occasions having been within the time specified in the indictment and that therefore the attempt in count 3 was between September 1, 1960, and December 31, 1960. The letter reporting was dated October 9, 1960, and it speaks of actions within the previous three weeks, *i.e.*, commencing some time after September 1, 1960. In fact, the letters to distributors had only gone out on September 14, 1960, and the report by the head office

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of the accused corporation in Toronto to the U.S. head office in Chicago, Illinois, outlining the MPRP scheme which was produced at trial as an exhibit was only forwarded on September 14, 1960.

As I have already pointed out, this was the only evidence before the learned trial judge. Reasonable doubt must be based upon evidence adduced at the trial and there was, therefore, no basis upon which reasonable doubt that the accused had committed the offence as charged in the indictment could arise.

In prosecuting on the 4th count, *i.e.*, that dealing with ABC Television, the Crown relied on the said circulars to distributors and dealers to which reference has been made above, and also on a letter from one Bill Thompson, an agent of the accused corporation in Vancouver, to Mr. J. C. Hall, dated September 20, 1960, the third paragraph of which read:

> I have been checking with dealers, and not one of the dealers I have contacted have received the letter from Sunbeam that I understood was to be sent out the 15th. Has there been a change of plans? Dick and I are trying to get prices set here, and without actual price sheets it is a difficult job. As far as my Floor Care Div dealers go, the only dealer that is cutting our polishers at present (that I know about) is Collin Ryan of A.B.C. TV. I talked to Collin today, but he wouldn't assure me of raising and I hesitate to do anything until the before-mentioned letters and price sheets are here.

Mr. Hall replied to that letter by his of September 29, 1960. The third paragraph of that letter reads as follows:

> I can imagine that Collin Ryan of A.B.C. Television is causing you a problem. I have had similar ones with him in the past, Bill, but after a lot of hard talking I have managed to persuade him to come up to the price that I wanted him to do so. I can only suggest first that you try every means you can to get him to raise his prices to our minimum profitable resale prices, then if he absolutely refuses and if he runs any ads, let us have them and we will take action immediately. I would like you to keep me posted on this or any other discrepancies there may be with other dealers in the British Columbia area.

(The underlining is my own.)

The learned trial judge in dealing with count 4 concluded:

> There is no evidence that Thompson carried out Hall's instructions concerning Ryan except that the latter had put his prices up after a

long talk. There is here neither sufficient evidence of inducement on the part of the accused nor that the alleged offence took place within the time charged. This charge must therefore be dismissed.

Therefore, the only evidence upon this count in addition to the outline of the scheme as contained in the circulars to dealers and distributors was Thompson's report of September 20, in which he said "I talked to Collin today but he wouldn't assure me of raising and I hesitate to do anything until the before mentioned letters and price sheets are here" and his report of October 15 where he said Ryan had put his price up yesterday "after quite a long talk". Surely, this being the only evidence, it is the plain statement by Thompson, the agent of the accused corporation, that he had attempted, before the 20th of September, to induce Ryan to raise his sale price to a specified minimum price and that he had again made an attempt, which was successful, on October 13, 1960, there can be no other conclusion than that none of the acts took place prior to the 1st of September 1960 as the scheme only went into effect in the middle of that month and since the inducement and successful inducement was reported on October 14, 1960, and that the acts took place within the period charged. Again I point out that the charge was a charge of attempting to induce and these letters amount to an admission of an attempt to induce a dealer to sell at not less than a specified minimum. That such minimum was the MPRP price is shown clearly by Mr. Hall's letter to Bill Thompson dated September 29, 1960 which I have quoted. Since a reasonable doubt must be based on evidence and there was no evidence which could give rise to any such reasonable doubt to rebut the presumption created by s. 41 of the *Combines Investigation Act*, there was no course but to convict the accused.

The problem arises as to the jurisdiction of the Court of Appeal to consider the appeal from the acquittal by the learned trial judge. The appeal to the Court of Appeal was taken by virtue of s. 584 of the *Criminal Code* which provides:

584. (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

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(a) against a judgment or verdict of acquittal of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone, . . .

(The underlining is my own.)

Counsel for the accused corporation took the position before the Court of Appeal for Ontario and before this Court that the appeal of the Crown was not based on a ground of law alone but at best was upon a ground of mixed law and fact and upon such ground no appeal lay.

Schroeder J.A. in his reasons sets out the grounds of law advanced by the Crown in the Court of Appeal for Ontario as follows:

1. He erred in law in refusing to consider the entire documentation as relevant to each count;
2. He erred in law in failing to give effect to uncontradicted documentary evidence which had made out a prima facie case under section 41 and which, not having been contradicted or explained by the accused, became conclusive;
3. He erred in the effect which he gave to the words "attempt to induce" as they are used in section 34(2)(b).

With respect, I agree with Schroeder J.A. that it does not appear from the record that the learned trial judge erred in refusing to consider the entire documentation as relevant to each count and that ground, therefore, need not be considered further.

I turn next to ground 3 in the list above. Laskin J.A. said in his reasons:

> Counsel for the Crown did not press the third ground because it did not involve a question of law alone on the basis on which he proposed to argue it.

I am unable to understand this statement. It would appear at any rate that counsel for the Crown held no such view before this Court as in the first paragraph of the argument in the respondent's factum it is set out:

> 37. It is respectfully submitted that the learned trial judge misdirected himself as to the meaning and effect of Section 34(2)(b) of The Combines Investigation Act in considering the evidence relating to inducement and thereby erred in law.

Schroeder J.A. in reference to the third ground of appeal said:

> The third ground of error assigned by counsel is more serious, since in stating that the "evidence of inducement" in counts 3 and 4 was

inadequate to support a criminal charge, the learned Judge either overlooked the fact that the charge was confined to attempted inducement or disregarded the decision of this court in *Regina v. Moffatts Limited.* (1957) O.R. 93, as stated at p. 106, ...

With respect, I agree with Schroeder J.A. Although the learned trial judge on the same page of his reasons said:

> The substance of the third count is that the accused within the same period of time by actions taken [sic] place partly in Metropolitan Toronto, partly in the City of Vancouver, unlawfully by agreement, threat, promise or other means attempted to induce Army and Navy Department Stores to resell . . .

(The underlining is my own.)

when he concluded his consideration of the third count, he said:

> The evidence as to inducement on this count does not bear that quality of certainty that ought to exist in the case of a criminal charge and it will therefore be dismissed.

(The underlining is my own.)

The learned trial judge pointed out earlier in his reasons what Estey J. said in this court in *Rex v. Quinton*[16]:

> This section requires that one to be guilty of an attempt must intend to commit the completed offence and to have done some act toward the accomplishment of that objective, that act must be beyond preparation and go so far toward the commission of the completed offence that but for some intervention he is prevented or desists from the completion thereof. It is the existence of both the intent and the act in such a relationship that the former may be regarded as the cause of the latter. The intent unaccompanied by the act does not constitute a criminal offence.

In the present case, the charge in count 3 was that the accused, here appellant, "... unlawfully did by agreement, threat, promise or other means, attempt to induce Army and Navy Department Stores ... to resell articles or commodities ... at prices not less than the minimum prices specified ...".

The intention to commit the completed offence is quite clearly demonstrated by Mr. Hall's letter to Mr. Schell dated October 14, 1960, to which I have referred, when he states:

> I would suggest, Dick, that seeing you are going in and calling on this Mr. Ludwig that you continue to do so endeavouring to obtain his

[16] [1947] S.C.R. 234 at 235-6, 88 C.C.C. 231, [1948] 3 D.L.R. 625.

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co-operation by pointing out that no one will be selling any less than he is and doing your best to get him to come up to our prices on this basis.

(The underlining is my own.)

Again, in his general reporting letter dated September 13, 1960, to Mr. R. P. Gwinn, the chief officer of the U.S. head office, E. F. Bond, the vice-president of the appellant corporation said, in part:

> We have held and will hold distributor meetings in all major marketing centres throughout Canada for the purpose of explaining our programme. Actually it is similar to GE's in that we will do the following two things:
>
> (1) Establish maximum discounts allowed by distributors for quantity purchases by dealers (5% on any assortment of 12)
>
> (2) Establish minimum profitable resale prices for dealers.

The second item is a clear statement of the intent. The acts toward the accomplishment of the objective in the case of count 3 were Schell's five attendances upon Mr. Ludwig in an attempt to obtain Ludwig's agreement to sell only at the specified minimum prices. Whether or not Schell was successful in such attempt is irrelevant. I accept the law as outlined in *Regina v. Moffatts Limited*[17] that it is not essential on an attempt charge under s. 34(2)(*b*) of the *Combines Investigation Act* to prove that the attempt was successful.

Similarly, when one deals with count 4 which was that the appellant, "unlawfully did by agreement, threat, promise or other means attempt to induce ... ABC Television and Appliances Ltd. to resell articles or commodities ... at prices not less than the minimum prices specified ...", one finds the attempt specified in the Bond letter to Gwinn of September 13, 1960, to which I have referred, and also in the paragraph I have quoted from the letter of Bill Thompson to J. C. Hall dated September 20, 1960. The overt act toward the accomplishment of the objective is set out in the same letter, *i.e.*, the attendance upon Collin Ryan, and in the further report of October 15,

[17] [1957] O.R. 93, 25 C.R. 201, 118 C.C.C. 4, 28 C.P.R. 57, 7 D.L.R. (2d) 405.

1960 "Collin Ryan of ABC TV took his price up to that figure yesterday after quite a long talk". Again, in this case, both elements necessary to prove an attempt to induce, which was the offence charged, are proved conclusively in the documentation. There was no evidence given to contradict them although Mr. Bond was called as a witness for the defence. The prima facie case wrought by s. 41(2)(*c*) of the *Combines Investigation Act* being the only evidence upon the topic therefore becomes the uncontradicted evidence and it was the duty of the learned trial judge upon such uncontradicted evidence to register convictions. It was an error in law to charge himself as, with respect, it would appear that the learned trial judge had charged himself, that the Crown in order to support the charges had to prove an inducing by agreement, threat or promise. "Other means" seems to have been forgotten. In order to prove the offence charged all the Crown had to prove was the intent to induce and an overt act toward the accomplishment of that intent. As I have said the Crown in each of the counts proved these on prima facie evidence which by lack of contradiction became conclusive evidence.

There is, therefore, in this ground 3 submitted by the appellant an error in law sufficient to give the Court of Appeal jurisdiction under the provisions of s. 584(1) of the *Criminal Code*. It will be realized that in coming to this conclusion I have in fact dealt with the second ground of appeal in that I have stated that the prima facie evidence wrought by the provisions of s. 41 of the *Combines Investigation Act* not having been contradicted became conclusive. It has been objected by counsel that such a view of the effect of s. 41 takes from the learned trial judge the right and the duty to weigh all the evidence and to come to his conclusion upon the whole case whether the Crown has proved the necessary ingredients of the offence beyond a reasonable doubt.

I, of course, agree that the Court is always under the duty of so weighing all the evidence in order to come to that conclusion. The learned trial judge had already con-

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sidered in reference to counts 1 and 2 and in his general outline of the MPRP scheme the establishment of the intent to induce the dealers to resell at not less than the minimum specified prices and before he could have registered a conviction on counts 1 and 2 had come to the conclusion that such intent had been established beyond reasonable doubt. The intent was exactly the same in the case of counts 3 and 4 as it had been in the case of counts 1 and 2. If it were established beyond reasonable doubt as to counts 1 and 2 it had been established also beyond reasonable doubt as to counts 3 and 4.

The only evidence as to the overt act toward the accomplishment of that end in the case of counts 3 and 4 is in the correspondence to which I have referred. If the learned trial judge had weighed that evidence upon the question as to whether it proved beyond reasonable doubt that such overt act had taken place rather than upon the question of whether or not there had been an inducing then he could not have failed to find such an overt act proved beyond reasonable doubt as there was no evidence to weigh contra. The faults which the learned trial judge cites as to this evidence were faults as to its evidentiary value in proving beyond reasonable doubt the inducing and not the overt act in a charge of attempting to induce.

In my view, my conclusion, therefore does not infringe on the right and duty of a trial judge to weigh all the evidence in order to determine whether the Crown has proved its case beyond reasonable doubt.

So in *Girvin v. The King*[18], as pointed out by Schroeder J.A. in his reasons for judgment, Fitzpatrick C.J. said at p. 169:

> I have always understood the rule to be that the Crown, in a criminal case is not required to do more than produce evidence which, if unanswered, and believed, is sufficient to raise a prima facie case upon which the jury might be justified in finding a verdict.

And in *Belyea v. The King*[19], the learned trial judge had found as a fact upon the evidence and this Court was of

[18] (1911), 45 S.C.R. 167.

[19] [1932] S.C.R. 279, 57 C.C.C. 318, [1932] 2 D.L.R. 88.

the opinion that such was fully justified on the evidence, that the accused took an active part in the original scheme —the conspiracy which formed the basis of the prosecution—but acquitted him on the ground that there was no evidence which connected him with any of the illegal operations subsequent thereto. The Appellate Division was of the opinion that the learned trial judge had misdirected himself in that he held that the latter finding entitled the accused to an acquittal. This Court upheld the decision of the Appellate Division finding that there was a ground of error in law which entitled the Crown to appeal to the Appellate Division.

In that case as in the instant case, it must be noted, the trial judge's error in law was not expressly formulated in his judgment. On the contrary he had, as here, expressed his erroneous conclusion as resting on a question of fact:

> In arriving at this conclusion I have in mind the provisions of s. 69 of the Criminal Code, but, notwithstanding that section, I cannot find upon the evidence that there was any participation or complicity by O'Connor in the offences established in evidence and therefore a verdict of not guilty must be found in this case.

(The underlining is my own.)

However, having quoted, among others, the above passage, Anglin C.J.C. speaking for the Court had no difficulty in holding that on the basis of the whole judgment and record, the acquittal was not actually based on wrong findings of fact nor on an incorrect weighing of the evidence, but on an unstated error of law that should be inferred. He said at p. 292:

> Presumably on the ground that the purpose of the organization was "professedly" (i.e., ostensibly) lawful, and that there is not sufficient evidence that the appellants participated in, or were privy to, the subsequent admittedly illegal acts of the Windsor group, the learned judge acquitted them.

And at p. 296:

> Here, the learned trial judge apparently had already found facts from which the conclusion was inevitable that there was participation on the part of Belyea and Weinraub in the formation of the illegal combine and the conspiracy, the existence of which he had already found to be proven. On these findings, coupled with the admissions made by Belyea

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and Weinraub in their testimony, and the documents of which they were proved to have had knowledge, their convictions, as was held by the Appellate Division, were a necessary consequence.

Concerning the extent of the jurisdiction of this Court in such a case, the Chief Justice said on the same page:

> The right of appeal by the Attorney-General, conferred by s. 1013(4), Cr.C., as enacted by c. 11, s. 28, of the Statutes of Canada, 1930, is, no doubt, confined to "questions of law". That implies, if it means anything at all, that there can be no attack by him in the Appellate Divisional Court on the correctness of any of the findings of fact. But we cannot regard that provision as excluding the right of the Appellate Divisional Court, where a conclusion of mixed law and fact, such as is the guilt or innocence of the accused, depends, as it does here, upon the legal effect of certain findings of fact made by the judge or the jury, as the case may be, to enquire into the soundness of that conclusion, since we cannot regard it as anything else but a question of law,—especially where, as here, it is a clear result of misdirection of himself in law by the learned trial judge.

It is contended that even if the evidence is found to be sufficient to support a conviction, the further question of whether the guilt of the accused should be inferred from that evidence is a question of fact and reference is made to *Fraser v. The King*[20] and *Rose v. The Queen*[21]. Those were cases in which facts necessary to establish the guilt of the accused had to be inferred, in the first, from circumstantial evidence, in the other, from other proven facts. In neither case was there a statutory provision enacting that the proven facts would constitute *prima facie* evidence of the other facts required to establish the guilt of the accused and, therefore, the making or not making of an inference was not a question of law alone although it might be unreasonable. However, when there is, as in this case, a statutory presumption to be applied, once the facts necessary to give rise to it are found by the trial judge to be established beyond reasonable doubt, the question whether the inference should be made is no longer anything but a question of law alone: the statute does not provide that the facts to be inferred *may* be deemed to exist but that they *shall* be. To say that such evidence does not bear the quality of certainty that ought to exist

[20] [1936] S.C.R. 296, 66 C.C.C. 240, [1936] 3 D.L.R. 463.
[21] [1959] S.C.R. 441, 31 C.R. 27, 123 C.C.C. 175.

in the case of a criminal charge is to ignore or contradict the statute and is, therefore, an error in law and nothing else.

As against this, it is contended that the legal presumption is not a presumption of guilt but a presumption of some facts and that the trier of the facts has to weigh the evidence before reaching a final conclusion.

In *Rose v. The Queen, supra,* Taschereau J., as he then was, said at p. 443:

> The trial judge sitting without a jury was fulfilling a dual capacity. He had, therefore, to discharge the duties attached to the functions of a judge, and also the duties of a jury. As a judge he had to direct himself as to whether any facts had been established by evidence from which criminal negligence may be reasonably inferred. As a jury he had to say whether, from those facts submitted, *criminal negligence ought to be inferred. Metropolitan Railway Company v. Jackson,* (1877), 3 App. Cas. 193 at 197, *King v. Morabito,* [1949] S.C.R. 172 at 174. I think that the trial judge directed himself properly, and that when he decided on the facts submitted to him that criminal negligence *ought not to be inferred,* he was fulfilling the functions of a jury *on a question of fact.*

However, in that case, the trial judge in coming to his decision that the accused should have been acquitted was performing a function of weighing the evidence. The charge was one of causing death by the operation of a motor vehicle, and the evidence dealt with the conduct of the accused in driving his automobile against a red traffic signal. The learned trial judge found that the accused was not keeping a proper lookout but that his speed was not above the normal at the intersection and reached the conclusion that the accused had not seen the red light. The trial judge, weighing those facts, came to the conclusion that they did not show the wanton or reckless disregard for the lives or safety of other persons required for conviction of the offence charged. Therefore, the learned trial judge had evidence one way and the other way to weigh and a conclusion to arrive at as a result of that weighing whether such conduct showed the standard of negligence required by the provisions of the *Criminal Code.* In the present case, the learned trial judge had no such task of weighing. There was no evidence contra; there was nothing which needed to be inferred

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beyond the inference required by the section of the statute. There was a simple admission established as prima facie evidence by the provisions of s. 41 of the *Combines Investigation Act* that the accused through its agent had attempted to induce these persons to sell at not less than the specified minimum price. I am, therefore, of the opinion that the enunciation of the varying duties of the judge and jury as set out above with which, with respect, I agree, do not apply in the present case to make the learned trial judge's acquittal of the accused a mere matter of fact.

With respect, I agree with the view expressed by Evans J.A. in *Regina v. Torrie*[22] where he said at p. 11:

> I recognize that the onus of proof must rest with the Crown to establish the guilt of the accused beyond a reasonable doubt, but I do not understand this proposition to mean that the Crown must negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused.

For these reasons, I would dismiss the appeal and confirm the judgment of the Court of Appeal for Ontario including its direction as to the amendments of the Order of Prohibition issued by Grant J.

Appeal allowed in part, JUDSON, SPENCE *and* PIGEON JJ. *dissenting.*

[22] [1967] 2 O.R. 8, [1967] 3 C.C.C. 303.

RODOJKA PETIJEVICH and MIKE PETIJEVICH (*Plaintiffs*) APPELLANTS;

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*Oct. 10, 11
Nov. 21

AND

RICHARD JOHN LAW (*Defendant*) RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Motor vehicles—Negligence—Pedestrian struck in crosswalk of traffic-controlled intersection—Failure of driver to give right-of-way—Motor-vehicle Act, R.S.B.C. 1960, c. 253, s. 128(9)(b), (11)(a).

Trial—Questions to jury as to negligence of parties—Usual order reversed—Effect thereof—Indication by trial judge that ultimate negligence doctrine could be invoked—Jury misled.

Evidence—Witness identifying injured person as woman seen running at intersection ten minutes before accident—Evidence improperly admitted.

The female plaintiff was injured when she was struck by an automobile owned and driven by the defendant while she was crossing an intersection of a main arterial highway running north and south and a road running east and west. The said intersection was a controlled intersection within the meaning of s. 128 of the *Motor-vehicle Act*, R.S.B.C. 1960, c. 253. It was dark at the time of the accident and the plaintiff was crossing to the west in a crosswalk. She was wearing a long, light coloured winter coat. She testified that she looked to the north and to the south, and seeing no vehicles approaching, started to cross. She remembered taking a few steps but nothing more. She was rendered unconscious, sustaining extremely serious injuries.

The defendant was travelling southward on the west side of the highway. He said that he saw a form darting from his left to his right in the crosswalk area and immediately applied his brakes. The plaintiff was hit by the front of the car towards the left centre. She had travelled westward some 55 feet in the crosswalk before she was struck. The defendant knew of the crosswalk and that pedestrians might be expected to be crossing the highway at this point. He had been travelling at about 50 m.p.h. as he came southward, and as he approached the intersection took his foot off the accelerator and poised it over the brake pedal.

At the trial of the plaintiffs' action for damages, the jury found that the accident was caused solely by the negligence of the female plaintiff. The judgment dismissing the action was affirmed by the Court of Appeal and the plaintiffs then appealed to this Court.

Held: The appeal should be allowed and a new trial held limited to the question of damages.

The first question put to the jury should have been as to whether there was any negligence on the part of the defendant which caused or contributed to the accident. If the jury found negligence on the part

*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Hall JJ.

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of the defendant and gave particulars, the next question would be whether there was any contributory negligence on the part of the plaintiff which caused or contributed to the accident. The reversing of this order had a serious effect upon the manner in which the trial judge charged the jury and in the jury's consideration of the whole question of liability.

It was a serious error on the part of the trial judge to indicate that the ultimate negligence doctrine could be invoked in this case, and evidence given by the driver of another car to the effect that some ten minutes before the accident he had seen a woman, whom he later identified as the injured person, run out from a curb at the intersection and then dart back was improperly admitted.

There was no evidence on which the jury could find or infer that the female plaintiff left a curb or other place of safety or that she walked or ran into the path of the defendant's vehicle and, accordingly, s. 169(2) of the *Motor-vehicle Act* did not apply.

The defendant had failed in his duty to (1) keep a proper look-out; (2) to enter the intersection at such a speed that he could slow down or stop, if necessary, before striking a pedestrian who was lawfully in the pedestrian crosswalk; and (3) to yield right-of-way to the pedestrian as he was required to do by s. 128(11)(*a*) of the Act. There being no evidence upon which a finding could be made that the female plaintiff started across the highway without looking to see if it was safe to do so or that she did anything to jeopardize her own safety, she was entitled to assume that the driver of the motor vehicle in question would obey the law and yield right-of-way.

Jardine v. Northern Co-operative Timber and Mill Association, [1945] 1 W.W.R. 533; *Toronto Railway Co. v. King*, [1908] A.C. 260, applied.

APPEAL from a judgment of the Court of Appeal for British Columbia, rejecting an appeal from a judgment of Macdonald J. with a jury, dismissing the appellants' action for damages. Appeal allowed and new trial ordered.

Thomas Braidwood and *Robert Brewer*, for the plaintiffs, appellants.

R. E. Ostlund, for the defendant, respondent.

The judgment of the Court was delivered by

HALL J.:—This is an appeal from the Court of Appeal of British Columbia which rejected an appeal from a judgment of Macdonald J. with a jury, dismissing the appellants' action for damages. The appellants are husband and wife.

The female appellant was injured when she was struck by an automobile owned and driven by the respondent while she was crossing from east to west on the King George Highway near Vancouver at the intersection of the highway with what is known as Kennedy Road (88th

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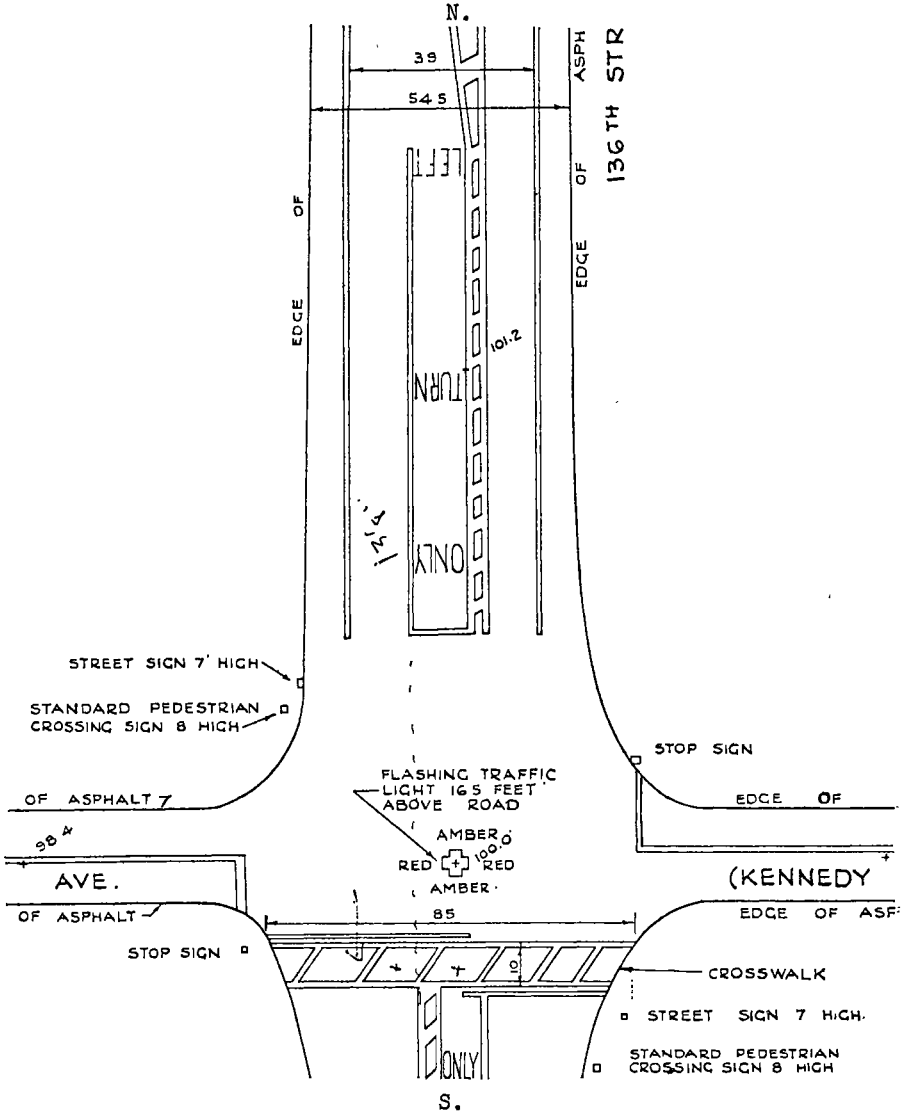
Avenue). King George Highway is a main arterial highway. There are residential areas on either side. Provision for pedestrians to cross was made at the intersection of Kennedy Road by a pedestrian crosswalk on the south side of the intersection. This crosswalk was outlined by lines painted on the pavement.

The situation at the intersection in question was as shown on the following plan:



There was no safety island or curbed area in the centre of the highway, only the painted lines as indicated.

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At or about 5:30 p.m. on December 16, 1963, the female appellant, age 51, was on her way home from visiting her daughter who lives in the area east of the King George Highway. She had to cross the highway to reach her home which was on Kennedy Road west of the highway. On her way home she purchased some loaves of bread and arrived at the south-east corner of the intersection of the highway and Kennedy Road where she proceeded to cross to the west in the crosswalk shown on the plan. It was dark at this time. She was wearing a long, light coloured winter coat and carrying the bread in a paper bag. She testified that she looked to the north and to the south, and seeing no vehicles approaching, started to cross. She remembers taking a few steps but nothing more. She was rendered unconscious, sustaining extremely serious injuries and she remained unconscious for several days.

The respondent was travelling southward on the west side of the highway, and as he came towards the intersection in question he was in the lane to the west of the left turn lane as shown on the plan. He knew the intersection well and that there was a pedestrian crosswalk on the south side of the intersection. It was the only pedestrian crosswalk for a considerable distance north or south of the area. He had driven over this intersection a great many times. He said he saw "this form darting from my left to my right" in the crosswalk area and immediately applied his brakes. Skid marks extending from 40 feet north of the crosswalk were identified and traced to his car which came to rest some 91 feet south of the crosswalk. The overall skid marks measured 141 feet. The skid marks north of the crosswalk came in a straight line, showing that the car had not been turned nor had it swerved either to right or to left. The respondent said that his car struck this form or object at about the south side of the crosswalk at a point some 8 to 10 feet into the lane for southbound traffic. It was only then that he realized that it was a pedestrian that had been hit. His evidence as to this was as follows: "Yes, I hit at this time an object. I understand later it was a pedestrian, and I carried her on the hood of my car for some distance..." The female appellant was hit by the front of the car towards the left centre. The distance from the edge of the asphalt at the north side of the crosswalk

was, as the plan shows, some 85 feet. This means that the pedestrian had travelled westward at least 55 feet in the cross-walk before she was struck. The respondent also testified that when he first saw her, she was running and that she moved about 8 or 9 feet from when he first saw her until the car hit her. His testimony as to the impact was as follows:

Q. How many steps would you say you saw this object move before you struck it?
A. I don't believe I would even attempt to—as soon as I saw this object I tried to avoid it.

Q. Did you continue to look at this object or did you direct your attention to something else?
A. I tried to avoid it.

Q. I am asking you what you did with your eyes, with your vision. Did you continue to look at this object or did you direct—
A. You naturally look at it.

Q. You did continue to look at it until you struck it?
A. Yes.

Q. And you cannot say how far you saw it move or how many steps at any rate?
A. No.

Q. Can you say how far you saw it move in terms of feet or yards?
A. Well, it was—I first saw it in through my windshield running from my left to my right.

Q. Yes. How far did you see it?
A. Now, it hit the left front of my car.

Q. Or may we also put it this way, the left front of your car hit the pedestrian?
A. Well, I say the pedestrian was running.

Q. Yes?
A. My car, we'll put it this way, my car came in contact or vice versa, we came in contact.

Q. How far did you see this object move, can you say?
A. A very short distance from when I first saw it.

On his examination for discovery he said:

175 Q. Now, what was she doing when you first saw her?
A. Moving rapidly from my left to my right, and I presume she was running.

The respondent said that he did not see the pedestrian (object) sooner because the lighting conditions at the intersection were bad; that the intermittent flashing amber light suspended above the intersection as indicated on the plan caused a blind area to the south which was the area which contained the crosswalk. He knew the crosswalk was there and that pedestrians might be expected to be crossing

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the highway at this point. He had been travelling at about 50 miles per hour as he came southward, and as he approached the intersection took his foot off the accelerator and poised it over the brake pedal. He estimates that his speed was reduced to about 45 miles per hour. However, it must be noted that the highway in question has a slight downhill grade from north to south at this point which could negative the effect of taking the foot off the accelerator. Other than the respondent, no eye witness gave evidence as to the impact.

As the intersection in question was a controlled intersection within the meaning of s. 128 of the *Motor-vehicle Act*, R.S.B.C. 1960, c. 253, the provisions of subss. 9(*b*) and 11(*a*) apply. These read:

> (9) When rapid intermittent flashes of red light are exhibited at an intersection by a control signal,
>
> (*b*) A pedestrian facing the flashes of red light may proceed across the roadway within a marked or unmarked crosswalk with caution.
>
> (11) When rapid intermittent flashes of yellow light are exhibited at an intersection by a traffic-control signal,
>
> (*a*) The driver of a vehicle facing the flashes of yellow light may cause the vehicle to enter the intersection and proceed only with caution, but shall yield the right-of-way to pedestrians lawfully within the intersection or an adjacent crosswalk;

The learned trial judge put the following questions to the jury and these questions were answered as shown:

> THE CLERK: Number one, was the plaintiff Rodojka Petijevich guilty of negligence which caused or contributed to the cause of the accident? Yes. If so, what was her negligence? One, proceeded without reasonable caution through crosswalk. Two, by running through crosswalk. Three, did not employ an evasive action, such as stopping or stepping back.
>
> Two, was the defendant guilty of negligence which caused or contributed to the cause of the accident? No. If so, what was his negligence? None.

It will be observed that the usual order of questions was reversed. The first question should have been as to whether there was any negligence on the part of the defendant which caused or contributed to the accident. This is the prime question. If the answer is "No" that ends the matter. The foundation of the action are the allegations of negligence made against the defendant. Then, if the jury finds

negligence on the part of the defendant and gives particulars, the next question would be whether there was any contributory negligence on the part of the plaintiff which caused or contributed to the accident. This reversing of the order had, I think, a serious effect upon the manner in which the learned trial judge charged the jury and in the jury's consideration of the whole question of liability.

Although a question involving ultimate negligence was not put to the jury, the learned trial judge, in charging the jury, indicated that the ultimate negligence doctrine could be invoked, and he proceeded to tell the jury that they might, in effect, find that the female appellant had had the last clear chance to avoid the accident. This was not a case for the application of the ultimate negligence doctrine. It was a serious error which, apart from everything else, must have misled the jury and which, according to the record, caused the jury to ask questions which showed that they did not correctly understand the law applicable to the case.

Evidence was tendered on behalf of the respondent and received without objection from one Jack Melvin Shaw to the effect that some minutes before the female appellant was struck he had been driving westward on Kennedy Road intending to turn north on the King George Highway. He had come to a stop before entering the highway as he was required to do and he said that as he started up a woman ran out from the curb at the north-east corner of the intersection and that when she saw his vehicle was moving towards her, she darted back. He continued northward, picked up a passenger and returned some 10 minutes later to the intersection, and seeing that an accident had happened, stopped and said he identified the injured person as the woman he had seen a few minutes before by recognizing the coat she was wearing. That was his only item of identification. Now, regardless of whether he was able to identify the woman or not, his evidence was not admissible and its admission was, in my view, fatal to the verdict because not only was the evidence improperly admitted, but in his charge to the jury the learned trial judge said:

> Then the defendant says to you that she failed to take reasonable care for her own safety because she was running, and points out to you

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that this is the evidence that the defendant Law gave. The defendant says that you should infer from what happened according to Mr. Shaw's evidence, when he testified that he saw the female plaintiff running from the northeast corner in a westerly direction, and from evidence suggesting that she was late in getting home, that from these things you should infer that she was running just before impact in this case.

Norris J.A., in his reasons for judgment in the Court of Appeal, stated that in his opinion the evidence of Shaw was admissible as part of the *res gestae*. I cannot agree. He also said that in any event, even if the evidence was not admissible, no substantial wrong or miscarriage of justice was occasioned thereby. With respect, I am of the view that the admission of this evidence, coupled with the reference thereto in the learned trial judge's charge to the jury, was bound to have an adverse effect on the appellants' case with the jury.

In addition to quoting the relevant subsections of s. 128 to the jury, the learned trial judge instructed the jury that s. 169(2) of the *Motor-vehicle Act* of British Columbia applied in the instant case and had to be considered. Section 169(2) reads:

> No pedestrian shall leave a curb or other place of safety and walk or run into the path of a vehicle that is so close that it is impracticable for the driver to yield the right-of-way.

There was no evidence on which the jury could find or infer that the female appellant left a curb or other place of safety or that she walked or ran into the path of respondent's vehicle. She was more than half way across the intersection when she was hit and was at least 55 feet from the curb or east edge of the highway and had only two or three steps to go before she would be clear of the path of respondent's vehicle and out of harm's way. Accordingly, s. 169(2) was not applicable in the circumstances of this case.

Section 128(11)(*a*) says that the driver of a vehicle facing flashes of yellow (amber) light may cause his vehicle to enter the intersection and proceed only with caution but *shall* yield right-of-way to pedestrians lawfully within the intersection or an adjacent crosswalk. The female appellant was lawfully in the crosswalk and the respondent was, accordingly, required to yield right-of-way to her. The reason he gave for not doing so was because he did not see

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her soon enough and he did not see her sooner because the lighting conditions at the intersection in question were such that the crosswalk area was a blind area to him as he came from the north. His duty in those circumstances was to enter the intersection at such a speed and keeping such a look-out that if a pedestrian should be in the crosswalk he would be able to yield the right-of-way to that pedestrian. There is nothing in the evidence to justify any suggestion that the female appellant ran from the east side of the highway because she says she started across walking slowly, and the evidence as to her running comes at a time almost coincident with being struck and perhaps she was making a last second effort to avoid being hit.

I have no doubt that the jury's verdict cannot stand. The next question is whether there should be a new trial on the question of liability and damages or as to damages only. The Court of Appeal of British Columbia has the power to give the judgment which the trial court could have given: *Rex v. Hess (No. 2)*[1]. The power of the Court is discussed by O'Halloran J.A. at pp. 597 and 598 and this Court has the power to do the same. The principle to be applied in determining whether there should be a new trial as to liability or as to damages only was discussed by O'Halloran J.A. in *Jardine v. Northern Co-operative Timber and Mill Association*[2], where he says at p. 535:

> Where as here the evidence is of such a character that only one view can reasonably be taken of its effect, it is not a case for a new trial, see *McPhee v. E. & N. Ry. Co.* (1913) 5 W.W.R. 926, 49 S.C.R. 43, Duff, J. at p. 55 (with whom Sir Charles Fitzpatrick, C.J. and Brodeur, J. concurred) and also the decision of the old Full Court (Hunter, C.J., Irving and Martin, JJ.) in *Yorkshire Guar. & Securities Corpn. v. Fullbrook & Innes* (1902) 9 B.C.R. 270, but we ought now give the judgment which the plain facts proven conclusively at the trial demanded, and that is, judgment for the plaintiff-appellant as asked for in the statement of claim, less the sum of $286.48, mentioned shortly; see also *Paquin Ltd. v. Beauclerk* [1906] A.C. 148, 75 L.J.K.B. 395 (H.L.) and also *Canada Rice Mills Ltd. v. Union Marine and Gen. Insur. Co.* (No. 1) [1941] 3 W.W.R. 401, [1941] A.C. 55, 110 L.J.P.C. 1, Lord Wright at 65.

In the instant case all the evidence that could have any bearing on the liability of the respondent or on the contributory negligence, if any, of the female appellant was before the Court. There is no suggestion that anything new

[1] [1949] 1 W.W.R. 586.

[2] [1945] 1 W.W.R. 533.

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in the way of evidence would be forthcoming if the question of liability were to be retried. Any verdict which would exonerate the respondent from negligence in this case would, in my view, be perverse because on the evidence of the respondent himself, it is incontrovertible he failed in his duty to (1) keep a proper look-out; (2) to enter the intersection at such a speed that he could slow down or stop, if necessary, before striking a pedestrian who was lawfully in the pedestrian crosswalk; and (3) to yield right-of-way to the pedestrian as he was required to do by s. 128(11)(*a*) of the *Motor-vehicle Act*. On the other hand, the only evidence lawfully before the Court regarding the contributory negligence, if any, of the female appellant is that of the respondent that as he saw her she was running or walking very fast and this was, as he says, within "a very very short time" of the impact. There is no evidence upon which any finding could be made that the female appellant started across the highway in question without looking to see if it was safe to do so or that she did anything to jeopardize her own safety once she had made a substantial entry into that intersection. She was then entitled to assume that the driver of a motor vehicle coming from the north would obey the law and yield her right-of-way: *Toronto Railway Co. v. King*[3].

I would accordingly allow the appeal and direct a new trial limited to the question of damages only. The appellants will have judgment against the respondent for the damages so assessed. The appellants are entitled to their costs in this Court and in both Courts below.

Appeal allowed and new trial ordered with costs.

Solicitors for the plaintiffs, appellants: Braidwood, Nuttall & MacKenzie, Vancouver.

Solicitors for the defendant, respondent: Russell & DuMoulin, Vancouver.

[3] [1908] A.C. 260, 7 C.R.C. 408.

ANNA MAUD CRAMPSEY, PATRICIA ELIZABETH CRAMPSEY McDONNELL, JAMES GERRARD CRAMPSEY and MARY TERESA CRAMPSEY (*Defendants*) ..... APPELLANTS;

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*Oct. 9, 10
Dec. 20

AND

FREDERICK DEVENEY (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Agency—Estoppel—Lands transferred to mother and adult children as joint tenants—Property managed exclusively by mother and later listed for sale without children being consulted—Offer to purchase accepted—Failure of children to protest after learning what mother had done—Repairs and improvements by purchaser—Subsequent refusal of children to close when formal tender made—Action for specific performance.

In 1943, pursuant to the will of the husband of the appellant A, the executor transferred a property, consisting of 14 acres and a house, to A and her three adult children as joint tenants. For the next twenty years A managed the property exclusively and although the children realized that they had some sort of interest in it, they did not interfere with or even question the management thereof by A. In 1960 she listed the property for sale without notifying the children of what she intended to do and only two actually knew of the listing. Early in 1963 she accepted, in the presence of one of her daughters, the plaintiff's offer to purchase. The other two children were subsequently informed of the sale, but there was a failure on the part of all the children to make any protest when they learned what their mother had done. However, on being informed that their signatures were required on the deed, they refused to sign, and later refused to close when formal tender was made on the closing date.

The plaintiff had previously been granted permission by A, again without consulting her children, to enter the property and make repairs on the basis that such permission was not to be construed as possession. The plaintiff carried out the repairs as well as substantial renovations to the house and later he and his family moved in without obtaining permission to do so. A's children having refused to close, the plaintiff commenced an action for specific performance. His action was successful at trial and, on appeal, the decision of the trial judge was upheld by a majority of the Court of Appeal. The plaintiffs then appealed to this Court.

Held: The appeal should be allowed.

No agency relationship existed between the mother and her children at the time of sale. She had no express authority to bind the children to the contract; nor was it possible to draw any inference of actual authority.

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*PRESENT: Cartwright C.J., Martland, Judson, Hall and Spence JJ.

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The children were not estopped by their silence and inaction after they had learned of the contract from denying that their mother had authority to sell their interests in the property. Silence and inactivity in the circumstances of this case were not a representation to a third party that their mother had authority to sell. Nor did the silence of the three children amount to ratification of their mother's act. The mother did not purport to act as agent for the others.

Accordingly, the appeal by the children against the decree of specific performance as to their respective interests in the property succeeded and it was held that specific performance against the mother's interest should not be granted. The plaintiff's alternative claim for damages against the mother for breach of warranty of authority was allowed. A counterclaim for occupation rent for the period during which the property was occupied less an allowance to the plaintiff for the amount expended by him by way of repairs was also allowed.

APPEAL from a judgment of the Court of Appeal for Ontario[1], upholding by a majority, a decision of Parker J. that respondent was entitled to specific performance of an agreement for the purchase and sale of certain lands and premises. Appeal allowed.

W. J. Smith, Q.C., for the defendants, appellants.

R. N. Starr, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

JUDSON J.:—This is an appeal from a judgment of the Court of Appeal of Ontario[1] upholding by a majority, a decision of Parker J. that the respondent was entitled to specific performance of an agreement for the purchase and sale of a property consisting of fourteen acres and a house.

In 1943, pursuant to the will of William James Crampsey, the husband of the appellant Anna Maud, the Capital Trust Corporation, as executor, transferred the property to Anna and her three children, Patricia, Teresa and James (all of whom were then of age) as joint tenants and not tenants in common. Capital Trust had managed the property from 1921, the date of William Crampsey's death, to 1943, the date of the transfer to the four beneficiaries. From 1943 to 1963, the year of the purported sale, Anna managed the property exclusively and received the rents from it, some of which she distributed among the children. They did not

[1] [1967] 1 O.R. 647, 62 D.L.R. (2d) 244.

at any time interfere with or even question her management of the property although they realized that they had some sort of interest in it.

In May 1960, Anna, without consulting any of her children, listed the property for sale with a real estate firm at $4,000 per acre for a term of six months. Patricia and Teresa knew of the listing but James was never aware of it. No one was attracted by the offer. However, in February 1963, Deveney offered to purchase the property for $2,400 per acre. By this time Anna was very eager to sell. She had had trouble with a tenant of the house. She signed an agreement dated February 19, 1963, accepting the offer, which provided for a down payment of $250, $7,800 cash payable on the closing date of August 1, 1963, and the balance secured by mortgage. Teresa was present when her mother signed the agreement. The day after Anna telephoned Patricia and informed her of the sale. James was not informed immediately but he came to know of it some time before the actual closing date, which, after a number of extensions, was finally fixed at November 15, 1963.

In April, at the request of the purchaser's solicitor, the vendor's solicitor sent a draft deed which indicated that all four of the appellants were grantors. The former immediately wrote back asking for proof that the grantors were in fact the widow and all the children of William James Crampsey. In May, Deveney's solicitor asked for permission for his client to enter the property and make repairs on the basis that such permission was not to be construed as possession. Anna, without consulting any of the children, through her solicitor, granted permission on these terms. Deveney carried out the repairs as well as substantial renovations to the house and in September he and his family moved in without obtaining permission to do so. In late October, after numerous extensions of the closing date had been agreed upon, Anna's solicitor asked for an extension so that he might obtain the signatures of the children. This was granted. The children, however, on being informed that their signatures were required, refused to sign, and later refused to close when formal tender was made on the closing date. The respondent commenced an action for specific performance.

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Two questions are raised by this appeal. Was Anna an agent for her children with authority to sell the property on the above-recited terms, and if not, were the children estopped from denying that she had the authority to sell their respective interests in the property? In my view, no agency relationship existed between Anna and her children at the time of the sale. It is true that she had managed the property and collected the rents for many years. She always asserted her right to do this and that she alone had the right to sell and to sign the deed. No one in the family questioned her assertions. The fact that Anna had the property listed for sale in 1960 does not take the matter any further. She had no authority from the children to do so. Indeed, she did not even notify them of what she intended to do and only two actually knew of the listing.

On these facts, which are but a brief summary of the findings of the trial judge and the Court of Appeal, Anna had no express authority to bind the children to this contract of sale. Nor is it possible to draw any inference of actual authority. Indeed, her position was all to the contrary—that she did not need their authorization. None of the children presumed to contradict her.

The majority in the Court of Appeal affirmed the trial judge's order for specific performance against all four joint tenants by applying the doctrine of agency by estoppel. This doctrine is defined in 1 Hals., 3rd ed., pp. 158-9 in the following terms:

> Agency by estoppel arises where one person has so acted as to lead another to believe that he has authorised a third person to act on his behalf, and that other in such belief enters into transactions with the third person within the scope of such ostensible authority. In this case the first-mentioned person is estopped from denying the fact of the third person's agency under the general law of estoppel, and it is immaterial whether the ostensible agent had no authority whatever in fact, or merely acted in excess of his actual authority.

The majority judgment held that the three children negligently or culpably stood by and allowed their mother to contract on the faith of a fact which they could have contradicted. They could not afterwards dispute that fact in an action against them. (*Freeman v. Cooke*[2].)

McGillivray J.A., in his dissent, would have held that the three inactive joint tenants, who believed their mother's

[2] (1848), 2 Exch. 654.

honest but mistaken assertions of her right to sell and who did not know the precise nature of the interest which they had taken in the property under their father's will, were not estopped by their silence and inactivity after they had learned of their mother's acceptance of the offer to purchase.

We have nothing in this case except the following:

(a) The knowledge of the children that the property had been listed for sale in 1960. Whether they knew of the precise terms of that listing does not appear from the evidence.

(b) The knowledge of one daughter, Teresa, that her mother was contemplating a sale early in 1963 and her presence with her mother in the real estate agent's office when the mother signed her acceptance of the offer.

(c) The failure on the part of all the children to make any protest when they learned what their mother had done.

When Deveney made his offer, all that he knew was that a certain person had listed for sale a 14-acre property at a price of $4,000 per acre. He knew nothing of three other persons who were interested in the property and whom he seeks to bind by his contract. They made no representations to him. I agree with McGillivray J.A. that their silence and inaction after all three had learned of the contract cannot be built up into a representation by them to the purchaser that their mother had authority to sell their interests in the property. Silence and inactivity in the circumstances of this case are not a representation to a third party that their mother had authority to sell.

It was also argued that the silence of the three children amounted to ratification of their mother's act. Only the trial judge made a finding of ratification. I agree with the Court of Appeal that ratification cannot be found on the facts of this case. The silence and inactivity are not evidence of approval and adoption of the contract but rather of disquiet disapproval and ignorance of rights and, in the case of one of them, lack of knowledge that a contract had been made. It is unnecessary to discuss *Keighley, Maxsted & Co. v. Durant*[3], although the case is directly

[3] [1901] A.C. 240.

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in point. The mother did not purport to act as agent for the others. She was acting for herself and asserting that she had that right.

The appeal by the children against the decree of specific performance as to their respective interests in the property succeeds. I agree with McGillivray J.A. that specific performance against Anna's interest should not be granted and I can add nothing to what was said by him on this point. There remains the question of whether Deveney's alternative claim for damages against Anna for breach of warranty of authority should succeed.

The draft deed was drawn by the vendor's solicitor to show all four joint tenants as grantors. This was sent on April 8, 1963. The purchaser's solicitor, on April 9, sent in his requisitions, one of which was a requirement of proof that the grantors were the widow and all the children of William James Crampsey, deceased. At this time the purchaser's solicitor knew that his client had signed a contract with only one of four joint tenants.

In spite of this, on May 8, 1963, the purchaser's solicitor wrote to say that his client wanted to repair the house on the property before closing and he sought permission to do this subject to the condition that it was not to be construed as taking possession. Permission was given on these terms. This was a very hazardous thing to do with knowledge of the state of the title, although the solicitor may have been lulled into a feeling of security by the delivery of a draft deed showing all the joint tenants as grantors. In spite of the possible difficulties, Deveney made the repairs and more, in the form of substantial additions and renovations. He moved his family in in September without any further authorization and he was still in possession at the date of the trial. The defendants did not know that he was in possession until November 1, 1963.

The vendor's solicitor had not found out that Anna was not the sole owner until October 29, 1963, the eve of the date of closing as extended. The explanation is that the title had been searched and the draft deed drawn by a law clerk. The date of closing was then extended to November 15, 1963, but on November 7, 1963, he was compelled to inform the purchaser's solicitor that three of the joint owners refused to sign.

Deveney understood throughout that Anna was the sole owner of the property. His solicitor had not informed him of the draft deed showing all four joint tenants as grantors. Even in October, when he wanted to make some change in the contract to provide for a payment of less cash, he negotiated directly with Anna.

On the question of damages, again I agree with McGillivray J.A. This is not a case of failure to convey through defective title. One joint tenant was purporting to contract to sell the complete interest. This was the cause of the inability to convey. McGillivray J.A. made the following award:

(a) Return of deposit	$ 250.00
(b) Loss of bargain	2,000.00
(c) Repairs and improvements	12,130.00
	$14,380.00

There was a counterclaim in this action for occupation rent at $100 per month for the period during which it was occupied, less a fair allowance to the plaintiff for the amount expended by him by way of repairs and improvements.

I would therefore give judgment in this Court in the terms specified by McGillivray J.A., as follows:

> I would allow the appeal and vary the judgment by striking out the order for specific performance and provide in its stead judgment against Anna Maud Crampsey for $14,450 [this figure should be $14,380] and costs less any sum which this plaintiff recovers for repairs in the counterclaim with a direction that the plaintiff have a lien against the interest of Anna Maud Crampsey for the amount by which this award exceeds that on the counterclaim. The action should be dismissed against her co-defendants without costs.
>
> The judgment dismissing the counterclaim will be struck out and judgment entered for the plaintiffs by counterclaim for occupation rent at $100 per month for the period of occupation and for costs of the counterclaim less an allowance to the defendant by counterclaim for the amount expended by him by way of repairs. The plaintiffs by counterclaim are to be allowed their costs.
>
> In the event that the parties fail to agree regarding the amounts awarded a reference is directed to the Master.
>
> The defendants other than Anna Maud Crampsey will be allowed costs of the appeal.

In this Court the appellants are entitled to their costs. The costs in the Court of Appeal are dealt with in the reasons of McGillivray J.A., which I propose to adopt. The

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judgment for costs at the trial should be against Anna Maud Crampsey only and the defendants are entitled to their costs on the counterclaim.

Appeal allowed with costs.

Solicitor for the defendants, appellants: W. J. Smith, Toronto.

Solicitors for the plaintiff, respondent: Pallett & Pallett, Port Credit.

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*Nov. 18

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CAUSEWAY SHOPPING CENTRE LTD. (*Plaintiff*) ..... APPELLANT;

AND

THOMAS C. MUISE (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA, APPEAL DIVISION

Contracts—Purported lease signed by parties—Defendant "or his nominee" named as lessee—Whether document a valid lease.

The plaintiff company was the owner of a shopping centre, a section of which had been set aside for use as a bowling alley. With a view to leasing this space, the company entered into negotiations with the defendant who expressed the intention that he would not incur any personal liability but would form a company to enter into the lease. The parties signed a document in which the lessee was named as "Thomas C. Muise or his nominee". Shortly thereafter, the company's solicitor forwarded to the defendant a copy of the document together with a letter which referred to an interpretation by the landlord permitting the defendant to assign the lease to his nominee. This letter was accepted and confirmed by the defendant.

Subsequently, the defendant's nominee went into possession and paid rent for a time. It later fell into arrears and finally ceased operations. The plaintiff then brought action against the defendant for the arrears of rent, additional rent required by the lease and for damages. The trial judge dismissed the plaintiff's action and on appeal the Court of Appeal by a majority decision dismissed the appeal. The plaintiff then appealed to this Court.

Held: The appeal should be dismissed.

APPEAL from a judgment of the Supreme Court of Nova Scotia, Appeal Division[1], dismissing an appeal from a judgment of Bissett J. Appeal dismissed.

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*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Spence JJ.

[1] (1967), 63 D.L.R. (2d) 26.

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CAUSEWAY SHOPPING CENTRE LTD. v. MUISE

C. Denne Burchell, Q.C., and *Allan E. Sullivan*, for the plaintiff, appellant.

D. Merlin Nunn, for the defendant, respondent.

The following judgment was delivered by

THE CHIEF JUSTICE (*orally for the Court*):—Mr. Nunn, we do not find it necessary to call upon you. We are satisfied that the document ex. M-1 referred to during the argument as a lease is not a lease because the lessee is named as "Muise or his nominee".

Under this document Muise was not liable as a lessee. He subsequently named Olympic as his nominee and this company went into possession and paid rent for a time. No assignment of the purported lease was necessary or attempted to bring about this result. The letter ex. M-2 in referring to an interpretation permitting Muise to assign the lease to his nominee does not transform Muise into a lessee under the original document.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Burchell, Sullivan, Smith & Campbell, Sydney.

Solicitor for the defendant, respondent: D. Merlin Nunn, Halifax.

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Nov. 19

NORMAN W. OXNER (*Plaintiff*) .....APPELLANT;

AND

BANK OF MONTREAL (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA, APPEAL DIVISION

Guarantee and suretyship—Guarantee of bank loan—Securities pledged—Demand notes renewed from time to time at increased rates of interest—Guarantor not consulted—Steps taken to realize on securities—Withdrawal of funds from guarantor's account involved—Action by guarantor for moneys had and received.

In 1952 the plaintiff agreed to provide security for the full amount of a loan from the defendant bank to his son-in-law L and in this

*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Spence JJ.

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connection signed certain pledge forms. The loan was advanced in two parts and for each advance L signed a demand note in favour of the defendant. The security delivered to the bank consisted of a certified cheque and two government bonds. A change in the form of holding the cash portion of the pledge was made in 1954, and the plaintiff's bonds were converted to a new issue in 1958.

During the period from 1952 to 1962 the defendant dealt actively with the principal debtor without consulting the plaintiff. The notes were renewed from time to time at increased rates of interest, and in 1957 the bank took from L a new note for the amount of principal then owing in substitution for the two original notes.

In 1962 the defendant's manager, after making efforts to get L to pay off the balance of the principal or to reduce that balance, took steps to realize on the pledged securities. A transaction was carried out which involved the withdrawal of funds from the plaintiff's account. An action subsequently brought by the plaintiff for moneys had and received by the defendant in trust for the use of the plaintiff was successful at trial. On appeal, the Court of Appeal reversed the decision of the trial judge and dismissed the action. The plaintiff then appealed to this Court.

Held: The appeal should be dismissed.

APPEAL from a judgment of the Supreme Court of Nova Scotia, Appeal Division[1], allowing an appeal from a judgment of Fielding J. Appeal dismissed.

G. C. Bardon, for the plaintiff, appellant.

W. H. Jost, Q.C., for the defendant, respondent.

At the conclusion of the argument of counsel for the appellant the Court retired and on returning the following judgment was delivered by

THE CHIEF JUSTICE (*orally for the Court*):—Mr. Jost, we do not find it necessary to call upon you. We agree with the conclusions and the reasons of the Appeal Division[1]. The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitor for the plaintiff, appellant: G. C. Bardon, Bridgewater.

Solicitor for the defendant, respondent: A. D. MacAdam, Halifax.

[1] (1967), 61 D.L.R. (2d) 599.

GEORGE ERNEST PASCOE JONES (*Plaintiff*) ..... APPELLANT;

AND

WILLIAM ANDREW CECIL BENNETT (*Defendant*) ... RESPONDENT.

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*Nov. 5, 6, Dec. 11

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Slander—Defamation—Speech given by Premier at meeting of political supporters—Newspaper reporters present—Failure of defences of qualified privilege and fair comment.

The plaintiff was Chairman of the Purchasing Commission established by the *Purchasing Commission Act*, R.S.B.C. 1948, c. 281, from February 15, 1956, until March 26, 1965, and the defendant, at all material times, was the Premier of British Columbia. On October 2, 1964, the Attorney-General of the province caused criminal charges to be laid against the plaintiff alleging his unlawful acceptance of benefits in his capacity as chairman of the Purchasing Commission. On the same day an Order in Council was passed purporting to relieve the plaintiff from all his duties with respect to the Commission until further notice. On January 15, 1965, the criminal charges against the plaintiff were dismissed and on March 8, 1965, an appeal of the Attorney-General from the acquittal of the plaintiff was, on motion made by counsel on behalf of the plaintiff, stricken out as frivolous and vexatious.

The plaintiff having refused to vacate his office, the Provincial Secretary on February 25, 1965, introduced a government bill in the Legislature entitled: "An Act to Provide for the Retirement of George Ernest Pascoe Jones". This bill passed the Legislature and received the assent of the Lieutenant-Governor on March 26, 1965.

On March 5, 1965, the defendant in the course of a speech which he delivered at a meeting of supporters of his political party used the following words: "I'm not going to talk about the Jones boy. I could say a lot, but let me just assure you of this; the position taken by the government is the right position."

In an action for slander based on the words spoken by the defendant at the meeting of March 5, 1965, the plaintiff was successful at trial. On appeal, the Court of Appeal in a unanimous judgment allowed the defendant's appeal and dismissed the action. The plaintiff then appealed to this Court.

Held: The appeal should be allowed.

The Court agreed with the trial judge and the Court of Appeal that the words in question in their natural and ordinary meaning were defamatory and calculated to disparage the plaintiff in his office as Chairman of the Purchasing Commission.

The defence of qualified privilege failed. The Court was not prepared to assent to the proposition asserted by the defence that whenever

*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Hall JJ.

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the holder of high elective political office sees fit to give an account of his stewardship and of the actions of the government of which he is a member to supporters of the political party to which he belongs he is speaking on an occasion of qualified privilege. However, assuming, but far from deciding, that had no newspaper reporters been present the occasion would have been privileged, any privilege which the defendant would have had was lost by reason of the fact that the defendant must have known that his words would be communicated to the general public because while he was speaking two reporters sat at a press table in full view of the speaker's table.

As to the defence of fair comment, it was clear that the controversy between the plaintiff and the government was a matter of public interest and a proper subject for comment by any member of the public but the sting of the words complained of did not appear to be comment at all.

Douglas v. Tucker, [1952] 1 S.C.R. 275; *Globe and Mail Ltd. v. Boland,* [1960] S.C.R. 203, applied; *Adam v. Ward,* [1917] A.C. 309, distinguished.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], allowing an appeal from a judgment of Ruttan J. Appeal allowed.

Thomas R. Berger, for the plaintiff, appellant.

John J. Robinette, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is an appeal from a judgment of the Court of Appeal for British Columbia[1] pronounced on January 15, 1968, allowing the appeal of the defendant from a judgment of Ruttan J. pronounced on March 3, 1967, whereby the plaintiff had been awarded $15,000 damages for slander. The judgment of the Court of Appeal directed that the action be dismissed.

It is necessary to state the facts in some detail.

The plaintiff was appointed on February 15, 1956, to be a member and Chairman of the Purchasing Commission established by the *Purchasing Commission Act,* R.S.B.C. 1948, c. 281. Under this Act all supplies needed in the public service of British Columbia were required to be purchased through the Purchasing Commission.

On October 2, 1964, the Attorney-General of British Columbia caused criminal charges to be laid against the plaintiff alleging his unlawful acceptance of benefits in his capacity as Chairman of the Purchasing Commission. On

[1] (1967), 63 W.W.R. 1, 66 D.L.R. (2d) 497.

the same day an Order in Council was passed purporting to relieve the plaintiff from all his duties with respect to the Commission until further order. The plaintiff refused to move out of his office, having been appointed to hold office during good behaviour and being removable only by the Lieutenant-Governor on address of the Legislative Assembly. These events were given widespread publicity throughout British Columbia.

On January 15, 1965, the criminal charges against the plaintiff were dismissed after trial at Victoria in County Court Judges' Criminal Court.

On February 10, 1965, the Attorney-General of British Columbia filed a notice of appeal against the acquittal on a ground involving a question of law alone although the acquittal of the plaintiff was based on the merits as well as on the legal ground that the plaintiff was not "an official of the Government" within the meaning of the section of the Criminal Code under which the charges had been laid.

On February 25, 1965, the Provincial Secretary introduced a Government bill, No. 34, in the Legislature of British Columbia entitled "An Act to Provide for the Retirement of George Ernest Pascoe Jones". The bill provided that the plaintiff be deemed to have been retired and removed as a member and Chairman of the Purchasing Commission as of October 8, 1964, and it provided that he should receive $15,675 in lieu of salary and remuneration from October 1, 1964, to February 15, 1966, less deductions for income tax and superannuation contributions. The bill also provided that the plaintiff would have an option to take either a refund of his past contributions to the Civil Service Superannuation Fund or to receive a superannuation allowance under that statute as if he had remained in office until February 1966. The introduction of this bill created, in the words of one witness, "a storm of controversy".

On March 5, 1965, when Bill 34 was still under debate in the Legislature, the defendant, who was and is the Premier of British Columbia, addressed a meeting of the Social Credit Association at Victoria, B.C., concerning various matters relating to the public affairs of the Province of British Columbia and of political interest and concern to the electors and to the members of his party. Most of the

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persons present were either members or supporters of the Social Credit Party. The Attorney-General and the Minister of Mines as well as several members of the Legislature were present. Two newspaper reporters were also present. The defendant spoke to the meeting briefly commenting on several matters that were then of current interest to the public including the proposed Bank of British Columbia, the generally bright future of the province, the year's budget and the conduct of the members of the opposition parties in the Legislature. During his speech the defendant also made reference to the plaintiff and to the action of the government in introducing Bill 34 with respect to him and, as found by the learned trial Judge, used the following words:

> I'm not going to talk about the Jones boy. I could say a lot, but let me just assure you of this; the position taken by the government is the right position.

On March 8, 1965, the appeal of the Attorney-General from the acquittal of the plaintiff was, on motion made by counsel on behalf of the plaintiff, stricken out as frivolous and vexatious.

On March 15, 1965, the plaintiff in the course of an address to the students of the University of Victoria said that he did not think that the defendant was anxious to get rid of him but that the government had had bad legal advice on the case from its own "non-practising lawyers", and that there were four persons in the government who wanted to get him out.

On March 26, 1965, Bill 34 passed the Legislature and received the assent of the Lieutenant-Governor. On the same day the plaintiff commenced this action for slander based on the words spoken by the Premier at the meeting in Victoria on March 5, 1965, which have been quoted above.

In the statement of claim the substance of the facts recited above, other than the making of the plaintiff's statement to the students of Victoria University, is set out and the pleading continues:

> 17. The Defendant never publicly gave any explanation or any reason for retiring and removing the Plaintiff from office at any time, either in the Legislative Assembly or outside the Legislative Assembly.
>
> 18. All of the facts hereinbefore recited were widely publicized by the press and other news media and were well known to the public.

19. At a meeting of the Social Credit Association of Victoria held on the 5th day of March, 1965, at Victoria, B.C., the Defendant, referring to the Plaintiff, falsely and maliciously spoke and published of the Plaintiff the following words:

"I'm not going to talk about the Jones boy. I could say a lot, but let me just assure you of this; the position taken by the government is the right position."

20. By the aforementioned words the Defendant meant, in addition to their natural and ordinary meaning, and was understood to mean that the Plaintiff was dishonest and unfit to act as Chairman of the Purchasing Commission and that the Plaintiff ought to be removed from office.

21. The Defendant spoke and published the aforementioned words well knowing that newspaper reporters were present at the meeting and with the knowledge that his words would be printed and published in newspapers throughout the Province and disseminated by other news media throughout the Province, and the aforementioned words were printed and published in newspapers throughout the Province and disseminated by other news media throughout the Province.

22. The aforementioned words were calculated to disparage the Plaintiff in his office as Chairman of the Purchasing Commission.

23. By reason of the premises the Plaintiff has been greatly prejudiced and injured in his credit and reputation and has suffered damage.

In the statement of defence the defendant pleaded

(i) a denial that he had spoken the words complained of;

(ii) that the words in their natural and ordinary meaning are not actionable and did not disparage the plaintiff in his office;

(iii) that the words complained of are incapable of bearing the meaning alleged in the innuendo set out in para. 20 of the Statement of Claim;

(iv) a denial that the defendant "had any knowledge that reporters were present at the alleged meeting or that such words would be printed or disseminated as alleged or at all";

(v) a plea of qualified privilege;

(vi) a plea of fair comment.

The plea of qualified privilege is set out in para. 24 of the statement of defence in the following words:

24. The Defendant repeats paragraphs 19, 20 and 22 of this Statement of Defence and in the alternative the Defendant says in answer to the whole of the Statement of Claim that if he spoke or published the aforesaid words (which is not admitted but is specifically denied) the same

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were spoken or published to certain electors and members of the Social Credit Association on an occasion of qualified privilege, particulars of which are as follows, namely:

> The Defendant as the Premier of the Province of British Columbia and also as the head of a political party, namely the Social Credit Party of British Columbia, had a duty to communicate the position of the Government to electors and to members of his political party who had a legitimate interest in legislation before the Legislature of the Province of British Columbia concerning and regarding the removal from public office of the Plaintiff. The said words were spoken in good faith and in the honest belief that they were true and were spoken without malice towards the Plaintiff and in the premises the Defendant and the aforesaid electors and members of the Defendant's political party had a common and corresponding interest in the subject matter and publication of the said words.

The plea of fair comment is contained in para. 25 of the statement of defence which reads:

> 25. In the further alternative and in further answer to the whole of the Statement of Claim the Defendant repeats paragraph 24 of this Statement of Defence and says that if he spoke or published the aforesaid words (which is not admitted but is specifically denied) the said words were a fair and bona fide comment upon a matter of public interest namely the aforesaid legislation regarding the removal of the Plaintiff from public office and the said words were published by the Defendant without malice and the publication thereof was for the public benefit.

There was no plea of justification.

The action was tried before Ruttan J. without a jury. At the trial counsel for the plaintiff stated that he was not relying on the innuendo which had been pleaded, his submission being that the words complained of in their natural and ordinary meaning, taken in all the circumstances of the case, were defamatory and disparaged the plaintiff in his office of Chairman of the Purchasing Commission.

After a careful review of the evidence the learned trial judge found as a fact that the defendant had spoken the words complained of, as pleaded in para. 19 of the statement of claim quoted above, and went on to hold that, applying the test of what the ordinary man would infer from them, the words in their natural and ordinary meaning were defamatory and calculated to disparage the plaintiff in his office as Chairman of the Purchasing Commission. These findings were accepted by the Court of Appeal and I agree with them. On this branch of the matter I do not find it necessary to add anything to what has been said in the Courts below.

The learned trial Judge rejected the defence of qualified privilege. He held that there was no need or duty which

required the defendant to make the statement complained of and concluded his reasons on this point with the paragraph:

> In any event the occasion was not used to communicate information, for the premier specifically stated he was not going to say anything. In fact he did leave them only with a slanderous imputation against Jones which cannot be justified on the grounds of interest or duty.

The Court of Appeal unanimously reached a contrary conclusion. In that Court during the oral argument counsel for the plaintiff made a concession which is recited and relied on in the reasons of each member of the Court. Bull J.A. refers to it as follows:

> In my respectful view, the learned trial judge took too narrow a view both of the occasion and the revelations made thereat, in the light of all the surrounding circumstances. It is unnecessary to express my reasons for this conclusion, as counsel for the respondent conceded before us, in my opinion correctly, that the dinner meeting at which the appellant's speech was made, was, under the circumstances, an occasion of qualified privilege, and that the "affair" with respect to the respondent could have been, if properly dealt with, a proper subject of qualified privilege protected within that privileged occasion. On this branch of the appeal, the respondent submits that any privilege was lost relying on two general contentions: (1) That apart from malice the appellant did not take advantage of the privileged occasion to make statements about the respondent that would have been within and protected by that privilege, but, on the contrary, uttered defamatory words not reasonably necessary or germane to the occasion and therefore in "excess" or "abuse" thereof; and (2) That there was sufficient evidence before the learned trial judge to support a finding of *express malice,* which the learned trial judge should have found proven, thereby displacing or rendering nugatory the defence of qualified privilege.

It is clear that no such concession was made at any stage of the trial.

At the opening of the appeal we informed counsel that each member of Court had read all of the reasons for judgment in the Courts below, that we did not regard ourselves as bound by the admission made by counsel in the Court of Appeal and that we wished to hear full argument on the question whether the occasion on which the words complained of were uttered was one of qualified privilege having regard especially to the fact that, to the knowledge of the defendant, newspaper reporters were present at the meeting. Following this, we had the advantage of hearing full and able argument from both counsel.

Paragraph 24 of the statement of defence in which the defence of qualified privilege is set up has already been

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quoted. It involves the assertion that whenever the holder of high elective political office sees fit to give an account of his stewardship and of the actions of the government of which he is a member to supporters of the political party to which he belongs he is speaking on an occasion of qualified privilege. I know of no authority for such a proposition and I am not prepared to assent to it. I will assume for the purposes of this appeal that each subject on which the defendant spoke to the meeting was one of public interest. It is not suggested that at the date of the meeting an election was pending. The claim asserted by the defence appears to me to require an unwarranted extension of the qualified privilege which has been held to attach to communications made by an elector to his fellow electors of matters regarding a candidate which he honestly believes to be true and which, if true, would be relevant to the question of such candidate's fitness for office. It is, of course, a perfectly proper proceeding for a member of the Legislature to address a meeting of his supporters at any time but if in the course of addressing them he sees fit to make defamatory statements about another which are in fact untrue it is difficult to see why the common convenience and welfare of society requires that such statements should be protected and the person defamed left without a remedy unless he can affirmatively prove express malice on the part of the speaker.

However, I do not find it necessary to pursue this line of inquiry further because, assuming, although I am far from deciding, that had no newspaper reporters been present the occasion would have been privileged, I am satisfied that any privilege which the defendant would have had was lost by reason of the fact that, as found by the learned trial judge:

> The Premier must have known that whatever he did say would be communicated to the general public. The two reporters sat at a press table in full view of the speaker's table.

This finding was concurred in by the Court of Appeal and is amply supported by the evidence.

In view of the unanimous judgments of this Court in *Douglas v. Tucker*[2], particularly at pp. 287 and 288, and in *Globe and Mail Ltd. v. Boland*[3], it must be regarded as settled that a plea of qualified privilege based on a ground

[2] [1952] 1 S.C.R. 275.

[3] [1960] S.C.R. 203.

of the sort relied on in the case at bar cannot be upheld where the words complained of are published to the public generally or, as it is sometimes expressed, "to the world".

The case at bar must be distinguished from such cases as *Adam v. Ward*[4], where a false charge had been published to the world and it was held that in refuting it the defendant was entitled to address the same audience as had been chosen by the maker of the charge.

In my opinion the defence of qualified privilege fails.

Turning next to the defence of fair comment, it is clear that the controversy between the plaintiff and the government was a matter of public interest and a proper subject for comment by any member of the public but the sting of the words complained of does not appear to me to be comment at all. I am content to adopt the reasons of the learned trial judge for rejecting this defence. The Court of Appeal did not find it necessary to deal with the defence of fair comment as they had upheld the defence based on qualified privilege.

It was submitted that the amount of damages awarded by the learned trial judge was excessive but I can find no ground for interfering with his assessment.

I would allow the appeal with costs in this Court and in the Court of Appeal and restore the judgment of the learned trial judge.

Appeal allowed with costs.

Solicitor for the plaintiff, appellant: Thomas R. Berger, Vancouver.

Solicitor for the defendant, respondent: George L. Murray, Vancouver.

[4] [1917] A.C. 309.

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*Mars 4
Déc. 20

LORENZO TURGEON (*Demandeur*) .....APPELANT;

ET

ATLAS ASSURANCE COMPANY LIMITED (*Tierce-saisie*) ..... INTIMÉE;

ET

MARC FORTIN (*Défendeur*)

DAME LUCILLE BOLDUC et LORENZO TURGEON (*Demandeurs*) ..... APPELLANTS;

ET

ATLAS ASSURANCE COMPANY LIMITED (*Tierce-saisie*) ..... INTIMÉE;

ET

MARC FORTIN (*Défendeur*)

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Assurance—Automobile—Renouvellement de police d'assurance—Omission de déclarer qu'un permis de conduire avait été suspendu temporairement—S'agit-il d'un fait matériel—Est-ce une cause de nullité de la police—Code civil, arts 2485, 2487, 2488.

La compagnie intimée a délivré au défendeur Fortin au mois d'août 1959 une police d'assurance-automobile. Dans la proposition d'assurance, le défendeur a déclaré que son permis de conduire n'avait pas été suspendu au cours des trois années antérieures. Le 31 juillet 1961, à la suite d'une contravention à l'art. 223 du *Code criminel*, son permis de conduire fut suspendu pour une période de trois mois. Le 7 août 1961, sa police fut renouvelée pour une autre année. Au certificat de renouvellement, il était stipulé que «l'assuré renouvelle et réaffirme au jour dudit renouvellement les déclarations que contient la proposition qu'il a signée pour obtenir la police renouvelée par les présentes». A la suite d'un accident de la route survenu le 14 octobre 1961, le défendeur a été condamné à payer des dommages aux demandeurs. Une saisie-arrêt fut prise entre les mains de la compagnie intimée qui fit une déclaration négative dans laquelle elle allégua la nullité de la police et du renouvellement. La Cour supérieure statua que la saisie-arrêt était bien fondée et que la police et le certificat de renouvellement étaient en vigueur le jour de l'accident. Ce jugement fut infirmé par un jugement majoritaire de la Cour d'appel. Les demandeurs en appelèrent à cette Cour.

Arrêt: Les appels doivent être rejetés, les Juges Hall et Pigeon étant dissidents.

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*CORAM: Les Juges Fauteux, Martland, Judson, Hall et Pigeon.

Les Juges Fauteux, Martland et Judson: Le défendeur Fortin a induit en erreur la compagnie intimée en acceptant le renouvellement de la police sans dévoiler que son permis de conduire avait été suspendu. Ce renouvellement est nul et n'a pas eu pour effet de lier la compagnie. Dans le contexte du certificat de renouvellement, la stipulation en question ne peut avoir de sens et de portée que si elle opère non pas en fonction d'un contrat ou d'une police d'assurance dont le terme est expiré mais en fonction d'un contrat ou d'une police d'assurance dont le terme est renouvelé. Le défendeur a virtuellement représenté à la compagnie que son permis de conduire n'avait pas été suspendu au cours des trois années antérieures. Ceci était faux et était un fait matériel important et pertinent en ce qui a trait à l'appréciation de la nature et de l'étendue du risque. La preuve établit que la compagnie n'aurait pas émis le certificat de renouvellement si le défendeur lui avait dénoncé ce fait comme il y était tenu tant par la convention d'assurance que par les dispositions de l'article 2485 du *Code civil*. La compagnie ne doit pas subir les conséquences de la négligence du défendeur de lire la police qu'il a signée et le certificat de renouvellement qu'il a accepté, et sa bonne ou mauvaise foi est sans importance vu les articles 2487 et 2488 du *Code civil*.

Les juges Hall et Pigeon, *dissidents*: Textuellement et comme la compagnie intimée l'a rédigée, la stipulation dans le certificat de renouvellement «les déclarations que contient la proposition» signifie ces déclarations-là et pas autre chose. Il ne paraît pas exact de dire que sans cela le texte n'a pas de sens ni de portée. De toute façon cela ne saurait constituer une raison de s'écarter de ce qui paraît clairement être le sens littéral; à plus forte raison quand c'est l'assureur qui invoque le texte du contrat qu'il a rédigé. Lorsqu'un assureur, suivant l'usage suivi en assurance-automobile mais non pas en assurance-incendie, consigne dans un formulaire les questions auxquelles il exige une réponse avant de délivrer une police, il limite par le fait même l'obligation qu'a l'assuré de lui déclarer les faits pertinents. Le même principe doit s'appliquer au cas de renouvellement.

L'assurance n'est pas invalidée du fait que l'assuré n'a pas informé son assureur de la suspension de son permis de conduire. La définition des mots «modification du risque essentielle au contrat» que l'on trouve à l'article 3 des conditions de la police, même si elle n'est pas limitative, n'a pas moins le résultat d'attirer uniquement l'attention sur une catégorie de modifications, savoir celles qui ont trait au véhicule lui-même et non pas au conducteur. Il n'y a rien dans la proposition signée par l'assuré qui soit de nature à faire connaître à l'assuré qu'il doit déclarer une suspension de permis survenant ultérieurement. Il n'y a rien non plus qui tende de quelque manière à détruire l'impression qui se dégage du papillon imprimé sur la police ainsi que des notes marginales, que l'assuré n'avait pas à déclarer la suspension de son permis.

Insurance—Automobile—Renewal of policy—Failure to declare that driver's permit had been temporarily suspended—Whether material fact—Whether cause of nullity of policy—Civil Code, arts. 2485, 2487, 2488.

The respondent company issued a policy of automobile insurance to the defendant Fortin in August 1959. In his application for insurance, the defendant declared that his driver's permit had not been suspended

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during the previous three years. On July 31, 1961, he was convicted on a charge under s. 223 of the *Criminal Code* and his driver's permit was suspended for three months. On August 7, 1961, his policy was renewed for another year. The renewal certificate stipulated that the insured renewed and reaffirmed as of the day of the renewal the representations contained in the application which he signed to obtain the policy renewed by the present certificate. Following an accident on October 14, 1961, the plaintiffs were awarded damages against him. A writ of attachment was served on the respondent company which made a negative declaration in which it alleged the nullity of the policy and of the renewal. The Superior Court held that the attachment was well-founded and that the policy and the certificate of renewal were in force on the day of the accident. This judgment was reversed by a majority judgment of the Court of Appeal. The plaintiffs appealed to this Court.

Held (Hall and Pigeon JJ. dissenting): The appeals should be dismissed.

Per Fauteux, Martland and Judson JJ.: By accepting the renewal without revealing that his permit had been suspended, the defendant Fortin misled the respondent company. The renewal was null and did not bind the company. In the context of the certificate of renewal, the stipulation in question can only have a meaning and effect if it operates not with relation to a contract or an insurance policy the term of which has expired but with relation to a contract or insurance policy the term of which is renewed. The defendant has virtually represented to the company that his permit had not been suspended during the three previous years. This was false and was a material fact important and pertinent to the appreciation of the nature and extent of the risk. The evidence shows that the company would not have issued the certificate of renewal if the defendant had disclosed that fact as he was obliged to do as much by the contract of insurance as by the provisions of art. 2485 of the *Civil Code*. The company must not suffer the consequences of the defendant's failure to read the policy which he signed and the certificates of renewal which he accepted, and his good or bad faith is of no importance in view of arts. 2487 and 2488 of the *Civil Code*.

Per Hall and Pigeon JJ., *dissenting*: Textually and as worded by the company, the stipulation in the certificate of renewal "les déclarations que contient la proposition" means these declarations and nothing else. This gives meaning and effect to the text. In any event, that interpretation could not constitute a reason to depart from the clear litteral meaning; all the more so when the insurer invokes the text of a contract which he drafted. When an insurer, as is customary in automobile insurance but not in fire insurance, formulates the questions and insists upon answers to them before issuing a policy, he limits by this very act the insured's obligation to declare the pertinent facts. The same principle must apply in the case of renewal.

The policy is not void for the reason that the insured did not disclose the suspension of his permit. Even if the definition of the words found in article 3 of the conditions "modification du risque essentielle au contrat" is not restrictive, nevertheless it draws attention to only one category of modifications, namely those referring to the vehicle itself and not to the driver. In the application signed by the insured, there is nothing which is likely to inform the insured that he must disclose a suspension occurring subsequently. Furthermore, there is nothing

susceptible to take away the impression arising from the rider printed on the policy as well as from the marginal notes, that the insured was not obliged to disclose the suspension of his permit.

APPEALS from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Ouimet J. Appeals dismissed, Hall and Pigeon JJ. dissenting.

APPELS d'un jugement de la Cour du banc de la reine, province de Québec[1], infirmant un jugement du Juge Ouimet. Appels rejetés, les Juges Hall et Pigeon étant dissidents.

Raynold Bélanger, c.r., pour les demandeurs, appelants.

Jean Turgeon, c.r., pour la tierce saisie, intimée.

Le jugement des Juges Fauteux, Martland et Judson fut rendu par

LE JUGE FAUTEUX:—Victimes d'un accident de la route, le 14 octobre 1961, les appelants, Lorenzo Turgeon et son épouse, Lucille Bolduc, ont, le premier, dans une cause portant le numéro 115-341 des dossiers de la Cour supérieure du district de Québec et l'autre, dans une cause portant le numéro 115-342 des mêmes dossiers, poursuivi Marc Fortin et les héritiers de Fernand Cloutier et obtenu contre eux, le 2 avril 1964, un jugement les condamnant conjointement et solidairement à la réparation du préjudice subi par chacun.

En exécution de jugement, une saisie-arrêt fut prise, dans chacun des cas, entre les mains de Atlas Assurance Company Ltd., dont Fortin détenait un certificat de renouvellement d'une police d'assurance automobile. La tierce-saisie, par son représentant Antoine Berthiaume, fit une déclaration négative. Dans cette déclaration, elle invoque, en substance, certaines clauses de la proposition d'assurance, de la police et du certificat de renouvellement et déclare que, lors du renouvellement, Fortin ne lui a pas révélé, comme il y était tenu en vertu de la convention d'assurance, le fait que son permis de conduire venait d'être suspendu. Elle précise qu'il s'agit là d'un fait

[1] [1967] B.R. 631.

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Le juge Fauteux

matériel important et pertinent en ce qui concerne l'appréciation et l'acceptation du risque par l'assureur et qu'en fait, elle n'aurait pas émis le certificat de renouvellement, ni renouvelé la police si ce fait eut été porté à sa connaissance. En conséquence, ajoute-t-elle, elle avisa Fortin qu'elle considérait nuls et non avenus ce certificat ainsi que le renouvellement et lui retourna, en même temps, un chèque visé à son ordre au montant de $230.00 en remboursement de la prime. Enfin, la tierce-saisie conclut qu'elle est bien fondée à demander que le certificat de renouvellement MFQ-200475, émis le 7 août 1961, et le contrat d'assurance renouvelé par ce certificat soient déclarés nuls et annulés à toutes fins que de droit, ce qu'elle a demandé, déclare-t-elle, dans sa défense sur l'appel en garantie logé contre elle par Fortin, dans l'action prise par chacun des appelants.

Les appelants ont contesté la déclaration de la tierce-saisie et demandé, particulièrement, à la Cour de déclarer que la police et ses renouvellements n'ont jamais été annulés. En réponse, la tierce-saisie lia contestation et conclut à ce que sa déclaration soit maintenue et la contestation des appelants rejetée.

La Cour supérieure considéra, en substance, que les clauses d'assurance invoquées par la tierce-saisie étaient ambiguës, que le doute devait bénéficier à l'assuré, que ce dernier était de bonne foi et que ce n'était pas *sciemment* qu'il avait omis de déclarer le fait de la suspension de son permis. Elle déclara que la police et ses renouvellements n'avaient jamais été annulés et que la saisie-arrêt était bien fondée.

Ce jugement fut porté en appel et cassé par une décision majoritaire de la Cour du Banc de la Reine[2]. La majorité, composée de M. le Juge en Chef et de MM. les Juges Pratte, Rivard et Salvas, jugea que Fortin avait induit en erreur sa compagnie d'assurance en ne révélant pas, lors du renouvellement, le fait de la suspension de son permis et que partant, le renouvellement de la police, émis le 7 août 1961, était nul et n'avait pas eu pour effet de lier la Compagnie. Dissident, M. le Juge Montgomery fut d'avis que si Fortin avait omis de révéler ce fait, c'est qu'il n'avait pas cru nécessaire de le faire vu qu'il entendait s'abstenir

[2] [1967] B.R. 631.

—comme il a témoigné s'être abstenu—de conduire pendant la période de suspension et que, dans ces circonstances, on ne peut dire qu'il a omis *sciemment* d'informer la compagnie du fait de la suspension de son permis. La Cour d'appel accueillit la déclaration de la tierce-saisie et rejeta la contestation des appelants. De là le pourvoi de ceux-ci à cette Cour.

Le dossier révèle ce qui suit. En août 1959, l'intimé, Atlas Assurance Company Ltd, ci-après appelée la compagnie, accepta, en considération du paiement d'une prime spécifiée, des déclarations contenues dans la proposition d'assurance signée par Fortin et sous réserve des limites, dispositions et conditions inscrites à la police, d'émettre et émit, en faveur de celui-ci, une police d'assurance automobile où cette proposition est incorporée comme en faisant partie. Cette police, comme la proposition, porte la signature de Fortin. A l'article 4.(A) de cette proposition, la question suivante est posée au proposant:

> 4. (A) Est-ce que, au su du proposant, un permis, une licence, un certificat d'enregistrement ou une autorisation analogue émis à son nom ou au nom d'un membre de sa famille ou de sa maison, conformément à la législation de quelque province, état ou pays sur les automobiles, a été annulé ou suspendu ou l'est demeuré au cours des trois années antérieures à la présente proposition? Si oui, expliquer.

A cette question, Fortin répondit «non». A cette date, cette réponse était exacte.

Cette police d'assurance, couvrant la période du 7 août 1959 au 7 août 1960, fut renouvelée, au moyen de certificats de renouvellement livrés à Fortin et acceptés par lui, une première fois le 7 août 1960 pour une période d'un an, en vertu du certificat portant le n° MQF-191821 et une deuxième fois, pour une autre année, soit du 7 août 1961 au 7 août 1962, en vertu du certificat portant le n° MQF-200475. Ce dernier certificat fut transmis à l'assuré qui l'accepta le 23 août 1961 et paya la prime le 31 août suivant.

Or, quelques semaines à peine avant cette acceptation, soit le 31 juillet 1961, Fortin avait plaidé coupable à St-Jean, district d'Iberville, à l'accusation d'avoir, le 30 juillet 1961, dans ce district, conduit un véhicule moteur sur un chemin public et d'en avoir eu la garde et le contrôle alors que sa capacité de conduire était affaiblie par l'effet de l'alcool, le tout en contravention de l'article 223 du Code

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criminel; pour cette offense, il fut condamné le même jour à payer une amende de $50 et son permis de conduire fut suspendu pour une période de trois mois. Fortin n'a pas déclaré ces faits lors du renouvellement. A la vérité, il ne les a révélés qu'après l'accident dont les appelants furent victimes le 14 octobre 1961. Non pas qu'il les ait oubliés, mais parce que, ainsi qu'il appert de l'extrait ci-après de son témoignage, il n'aurait pas réalisé la conséquence de son défaut d'en informer la compagnie ou son représentant.

> Q. Pourquoi ne l'avez-vous pas averti?
> R. Je n'ai pas vu la conséquence de ça.

Le renouvellement de la police, fait au moyen du certificat émis le 7 août 1961, et accepté par Fortin le 23 août 1961, constitue un nouveau contrat succédant au précédent dont le terme était expiré. Ce renouvellement fut consenti sur la foi que les déclarations et représentations originales, faites dans et lors de la proposition d'assurance,—dont la déclaration précitée relative au permis de conduire,—étaient encore exactes au moment de l'acceptation du certificat de renouvellement et du paiement de la prime. Ce renouvellement fut aussi consenti sujet à toutes les dispositions et conditions de la police initiale, non modifiées par voie d'avenant. Tout ceci appert au certificat du 7 août 1961 où se trouvent, comme dans le certificat précédent, les deux stipulations suivantes.

La première:

> Par l'acceptation du certificat de renouvellement, l'Assuré renouvelle et réaffirme au jour dudit renouvellement les déclarations que contient la proposition qu'il a signée pour obtenir la police renouvelée par les présentes, sous réserve de toute modification apportée par voie d'avenant.

La seconde:

> Sous réserve du présent certificat, toutes les dispositions et conditions de la police restent pleinement en vigueur.

En Cour supérieure, on a jugé que la première stipulation était ambiguë et ce parce que, a-t-on dit, elle est susceptible d'être interprétée tout comme si on avait stipulé que par l'acceptation du certificat, l'assuré confirme que ce qu'il a déclaré dans la proposition signée par lui pour obtenir la police originale était exact à la date de cette proposition. En toute déférence, je ne vois pas que cette interprétation soit possible. Dans le contexte du certificat de renouvelle-

ment, la stipulation ne peut avoir de sens et de portée que si elle opère non pas en fonction d'un contrat ou d'une police d'assurance dont le terme est expiré mais en fonction d'un contrat ou d'une police d'assurance dont le terme est renouvelé. A la vérité, cette stipulation ne fait qu'exprimer ce qu'on a généralement reconnu comme étant implicite dans le cas de polices accident ou incendie, où l'assureur peut décliner de renouveler la police originale à l'expiration du terme d'icelle. *Sun Insurance Office v. Roy*[3]. Ainsi donc, en gardant le silence ou en omettant de déclarer ce qu'il était tenu de déclarer, lors de l'acceptation du renouvellement du 7 août 1961, Fortin a virtuellement représenté à la compagnie intimée que son permis de conduire n'avait pas été suspendu au cours des trois années antérieures. Ceci était faux.

Parmi les dispositions et conditions de la police qui, en vertu de la deuxième stipulation du certificat de renouvellement, demeuraient pleinement en vigueur, il y a lieu de retenir celles de l'article 3. (1) et celles de l'article 8.

L'article 3. (1) est en ces termes:

> 3. (1) L'Assuré nommément désigné dans la police doit avertir promptement l'Assureur ou son représentant local, par écrit, de toute modification du risque essentielle au contrat qui vient à sa connaissance.

On sait que ce n'est qu'après l'accident dont les appelants furent victimes le 14 octobre 1961 que Fortin révéla à l'assureur le fait que son permis de conduire avait été suspendu le 31 juillet 1961 pour une période de trois mois par suite d'une contravention au Code criminel. Ce fait, tel qu'il appert aux témoignages d'Antoine Berthiaume, ancien employé de la Compagnie intimée, et d'André Lévesque, expert désintéressé, et ainsi qu'en a jugé la Cour d'appel, est un fait matériel important et pertinent en ce qui a trait à l'appréciation de la nature et l'étendue du risque. C'est un fait qui peut empêcher l'assureur de l'assumer ou influer sur le taux de la prime. En fait, la preuve établit que la compagnie intimée n'aurait pas émis le certificat de renouvellement ou renouvelé la police si Fortin le lui eut dénoncé, comme il y était tenu tant par la convention d'assurance qui le liait à l'assureur que par les dispositions de l'article 2485 C.C.

[3] [1927] R.C.S. 8, [1927] 1 D.L.R. 17.

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L'article 8 qui apparaît en gros caractères et à l'encre rouge, en anglais dans la proposition et en français dans la police d'assurance, toutes deux signées par Fortin, est en ces termes:

If the Applicant falsely describes the property to be Insured to the prejudice of the Insurer or *knowingly* misrepresents or conceals or omits to communicate any circumstances required by this application to be made known to the Insurer, the Policy shall be void as to the property insured or risk undertaken in respect of which the misrepresentation or omission is made; or where the Insured violates a term or condition of the Policy or commits a fraud or makes a wilfully false statement with respect to a claim under the Policy, such claim by the Insured shall be invalid and the right of the Insured to recover indemnity shall be forfeited.

Si le proposant décrit faussement l'objet de l'assurance, au préjudice de l'Assureur ou *sciemment* dénature, dissimule ou omet de communiquer quelque fait que la présente proposition exige qu'on fasse connaître à l'Assureur, la police sera nulle quant à l'objet assuré ou aux risques garantis auxquels se rapporte la fausse déclaration ou omission. De même, lorsque l'Assuré viole une disposition ou condition de la police ou commet une fraude ou fait délibérément une fausse déclaration à l'occasion d'une réclamation soumise en vertu de la police, la réclamation de l'Assuré sera sans valeur et l'Assuré perdra tout droit à une indemnité.

Les italiques sont de moi.

Les dispositions de cet article reçoivent ici leur application. En tout respect pour l'opinion contraire, je dois dire qu'à mon avis, le mot *sciemment* dans le texte français et le mot *knowingly* dans le texte anglais, ont, dans le contexte de la proposition et de la police, le même sens qui fut attribué au mot *knowingly* apparaissant dans une disposition statutaire substantiellement et presque mot à mot identique, par la Cour d'appel d'Ontario, alors composée du Juge en chef Robertson et de MM. les Juges Fisher et Kellock, dans *Sleigh v. Stevenson*[4] et par la Cour suprême de la Nouvelle-Écosse, alors composée du Juge en chef Ilsley et de MM. les Juges Doull, Parker et Currie, dans *General Accident Co. of Canada v. Button*[5]. Dans ces deux causes, on a jugé que le mot *knowingly* était utilisé

. . . in the sense that the applicant has in his possession information that what is in fact stated in the application is untrue or does not disclose the truth.

Pour excuser l'omission de Fortin, on a soumis qu'il était de bonne foi, qu'il n'avait pas lu la police d'assurance et le certificat de renouvellement et que, lors du renouvellement, on ne lui avait posé aucune question et on ne lui

[4] [1943] 4 D.L.R. 433, [1943] O.W.N. 465, 10 I.L.R. 287.
[5] [1954] 3 D.L.R. 552, (1954), 34 M.P.R. 25.

avait pas conséquemment demandé si son permis de conduire était ou avait été suspendu. Comme le déclare M. le juge Salvas, avec l'accord de ses collègues formant la majorité, la compagnie intimée ne doit pas subir les conséquences de la négligence de Fortin de lire la police qu'il a signée et les certificats de renouvellement qu'il a acceptés, et sa bonne ou mauvaise foi est sans importance, la loi décrétant en termes formels que les réticences *par erreur ou de propos délibéré* sur un fait de nature à diminuer l'appréciation du risque sont des causes de nullité (2487 C.C.) et, dans ce cas, ont le même effet que les réticences frauduleuses (2488 C.C.): elles entraînent la nullité du contrat. La compagnie intimée était justifiée d'aviser Fortin qu'elle considérait comme nuls et non avenus le certificat de renouvellement et le renouvellement du 7 août 1961 et de lui transmettre en même temps un chèque visé à son ordre en remboursement de la prime.

D'accord avec le jugement de la Cour d'appel, je dirais que Fortin a induit en erreur sa compagnie d'assurance en acceptant sans rien dire le renouvellement du 7 août 1961, que ce renouvellement émis en sa faveur est nul et que partant, il n'a pas eu pour effet de lier la compagnie intimée.

Il va de soi que sont réservés les recours des appelants, découlant de l'obligation que la tierce-saisie intimée a reconnu avoir, au paragraphe 13 de sa déclaration, en vertu de la *Loi de l'indemnisation des victimes d'accidents d'automobile,* S.R.Q. 1964, c. 232.

Je rejetterais les deux appels avec dépens.

Le jugement des Juges Hall et Pigeon fut rendu par

LE JUGE PIGEON (*dissident*):—A la suite d'un grave accident de la route survenu le 14 octobre 1961 le défendeur, Marc Fortin, a été, le 2 avril 1964, condamné solidairement avec les héritiers de Fernand Cloutier à payer au demandeur appelant Lorenzo Turgeon $26,992.19 et à son épouse Lucille Bolduc qu'il représentait alors comme curateur, $36,000, le tout avec intérêts et dépens dans chaque cas.

L'intimée avait délivré à Fortin le 7 août 1959 une police d'assurance automobile comportant une assurance-responsabilité jusqu'à concurrence de $25,000 pour dommages résultant de blessures à une seule personne et, *sous réserve de cette limite,* de $50,000 pour de tels dommages

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à plus d'une personne dans un même accident en outre de $5,000 pour dommages aux biens d'autrui. Cette police valable pour un an avait été renouvelée pour deux périodes semblables, le dernier certificat de renouvellement portant la date du 7 août 1961.

Le 29 mai 1962, les procureurs de l'intimée adressaient à Fortin une lettre se lisant comme suit:

Nous sommes les procureurs de Atlas Assurance Company Limited. Le ou vers le 7 août 1959, notre cliente a émis en votre faveur une police d'assurances-automobile portant le nº 1065257.

Le 7 août 1961, vous avez accepté de notre cliente un certificat de renouvellement de cette police pour la période du 7 août 1961 au 7 août 1962. Il est écrit dans ce certificat de renouvellement que par son acceptation l'assuré renouvelle et réaffirme les déclarations contenues dans la proposition qu'il a signée pour obtenir la police renouvelée. Or dans la proposition que vous avez signée pour obtenir votre police au mois d'août 1959, vous aviez répondu à l'article 4 que votre permis ou licence n'avait été annulé ni suspendu au cours des trois années antérieures à votre proposition.

Vos assureurs ont appris que lorsque vous avez accepté leur certificat de renouvellement nº MQF-200475 au mois d'août 1961, votre permis de conduire ou licence était suspendu à la suite d'une plainte portée contre vous. Ce fait était inconnu par vos assureurs lorsqu'ils ont émis leur certificat de renouvellement et vous n'avez pas jugé à propos de le porter à leur attention.

Dans les circonstances Atlas Assurance Company Limited considère son certificat de renouvellement du 7 août 1961 renouvelant la police nº 1065257 nul et non avenu. Vous trouverez ci-attaché un chèque certifié à votre ordre de Atlas Assurance Company Limited portant le nº 72411, au montant de $230 en remboursement de votre prime.

Vous voudrez bien nous retourner la police et le certificat de renouvellement par prochain courrier.

A la suite de cette lettre une action en garantie fut instituée contre l'intimée dans chaque cause et cette action fut rencontrée par un plaidoyer alléguant en substance les moyens invoqués dans la lettre du 29 mai 1962 et demandant qu'il soit donné acte de l'offre du remboursement de la prime par le chèque transmis à Fortin et que le contrat d'assurance et le renouvellement soient déclarés nuls et non avenus à partir du 7 août 1961 et résiliés à toutes fins que de droit. Alors que ces dernières procédures étaient toujours en instance, les appelants se sont pourvus par saisie-arrêt entre les mains de l'intimée. Celle-ci a produit dans chaque cause une déclaration où, après avoir relaté sa lettre du 29 mai 1962 et les moyens qui y sont invoqués, elle termine comme suit:

12. Dans les circonstances, la tierce-saisie est bien fondée à demander que le certificat de renouvellement numéro MQF-200475 et le contrat

d'assurance renouvelé par ledit certificat soient déclarés nuls et annulés à toutes fins que de droit, ce qu'elle a fait par son plaidoyer sur l'action en garantie intentée contre elle par le défendeur Marc Fortin dans le présent dossier;

13. Cependant la tierce-saisie reconnaît son obligation en vertu de l'article 6 de la Loi de l'indemnisation des victimes d'accidents d'automobile jusqu'à concurrence du montant prescrit à l'article 14 de cette Loi lors de l'accident dont le demandeur fut victime, le ou vers le 14 octobre 1961, sujet à la disposition de l'article 82 de ladite Loi;

14. La tierce-saisie n'a aucun revenu, effets mobiliers, rente ou somme d'argent appartenant au défendeur Marc Fortin et elle ne doit rien audit défendeur;

Dans chaque cause une contestation fut produite en conclusion de laquelle le demandeur prie le tribunal de déclarer que la police et le certificat de renouvellement étaient en vigueur lors de l'accident, de valider la saisie-arrêt et d'ordonner à la tierce-saisie de déposer au greffe:

le plein montant prévu par ladite police en cas d'accident où il y a plus d'une victime soit la somme de $50,000 plus les intérêts depuis l'assignation sur l'action principale et les frais sur icelle; pour les dites sommes être remises au demandeur en application sur le jugement intervenu en sa faveur.

Il est évident qu'en rédigeant ces conclusions on a omis de tenir compte que puisqu'il y avait en l'occurrence deux personnes ayant subi des blessures et obtenu des condamnations distinctes pour les dommages en découlant, ce n'est pas le maximum de $50,000 qu'il fallait appliquer à chacune mais bien celui de $25,000. D'un autre côté, on paraît aussi avoir oublié complètement que la police prévoit en outre du maximum de $50,000 pour la responsibilité découlant des dommages à la personne, un maximum de $5,000 pour la responsabilité découlant des dommages aux biens d'autrui. Quoi qu'il en soit, la Cour Supérieure fit droit aux conclusions telles que formulées par deux jugements en date du 23 mars 1965. La Cour d'appel[6], avec une dissidence, a cassé ces jugements. Dans chaque cas les conclusions de l'arrêt sont les suivantes:

ACCUEILLE l'appel avec dépens, CASSE le jugement de la Cour Supérieure, MAINTIENT la déclaration de la tierce-saisie-appelante et REJETTE la contestation du demandeur-intimé avec dépens.

On semble avoir complètement oublié de considérer que d'après une jurisprudence bien établie, lorqu'un contrat n'est pas d'une nullité absolue d'ordre public, il demeure

[6] [1967] B.R. 631.

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en vigueur tant qu'il n'est pas annulé. Le juge en chef Rinfret dit dans *Consumers Cordage Co. Ltd. v. St. Gabriel Land*[7].

> If, however, the agreement, although not being against public order, was simply illegal on account of being made in perpetuity, then it might have been looked upon as merely voidable, remaining in existence until annulled by a judgment of a court of justice, and the appellant would have found itself in difficulty in view of the absence in its plea of any conclusions for annulment . . .

Ce principe a été appliqué par la Cour d'Appel dans un cas semblable à celui-ci: *Wawanesa Mutual Insurance Company v. Lyonnais et Desjardins*[8]. Le juge Pratte dit:

> Quant à la première question, la Cour supérieure y a répondu négativement par plusieurs motifs, dont le principal est que l'appelante n'a pas demandé l'annulation du contrat en question. Ce motif est péremptoire. Chacun sait, en effet, que les vices du consentement n'ont pas pour effet d'empêcher la formation du contrat, mais seulement de donner ouverture à la demande en nullité, par voie d'action ou d'exception. Or, l'appelante n'ayant pas conclu à la nullité du contrat, la Cour supérieure n'eût pas pu la prononcer, même si elle fut venue à la conclusion que le consentement de l'appelante avait été vicié.
>
> Cela étant, il n'y a pas lieu d'examiner le point de savoir si la déclaration que l'appelante reproche à son assurée eût pu entraîner la nullité du contrat.

Un arrêt analogue a été rendu par le même tribunal dans *Léger et al. c. La Sécurité*[9]. On y relève le considérant suivant:

> Considérant que la cause de nullité fondée sur de fausses représentations résultant des faits requis lors de la proposition d'assurance n'est pas absolue, mais seulement relative, de sorte que celui qui entend se prévaloir de l'annulabilité de la police doit expressément conclure à cet effet; que s'il y a manquement à cette règle impérative, le contrat continue à lier les parties et subsiste dans ses effets;

Dans la présente cause, comme on l'a vu, une demande de nullité a été formulée par la défense à l'action en garantie laquelle défense a été mise en preuve à l'enquête sur la contestation de la saisie-arrêt, mais l'intimée n'a pas à cette instance-là soumis de conclusions à cette fin. La Cour d'appel pouvait-elle considérer que la façon dont le litige a été engagé et poursuivi suffisait à disposer de cet obstacle sans que la nullité soit prononcée? Cette question n'ayant pas été soulevée par les parties ni débattue à l'audition, je m'abstiendrai de l'approfondir vu la conclusion à laquelle j'en viens sur le fond.

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[7] [1945] R.C.S. 158 à 165, [1945] 2 D.L.R. 481.
[8] [1952] B.R. 534.
[9] [1954] B.R. 570.

Le premier moyen retenu par la Cour d'appel découle essentiellement de la phrase suivante insérée dans le certificat de renouvellement:

> Par l'acceptation du certificat de renouvellement, l'Assuré renouvelle et réaffirme au jour dudit renouvellement les déclarations que contient la proposition qu'il a signée pour obtenir la police renouvelée par les présentes, sous réserve de toute modification apportée par voie d'avenant.

En regard de ce texte on fait valoir que le déclaration renferme une réponse négative à la question suivante:

> Est-ce que, au su du proposant, un permis, une licence, un certificat d'enregistrement ou une autorisation analogue émis à son nom ou au nom d'un membre de sa famille ou de sa maison, conformément à la législation de quelque province, état ou pays sur les automobiles, a été annulé ou suspendu ou l'est demeuré au cours des trois années antérieures à la présente proposition? Si oui, expliquer.

On dit que dans le contexte du certificat de renouvellement la stipulation ne peut avoir de sens et de portée que si elle opère non pas en fonction d'un contrat ou d'une police d'assurance dont le terme est expiré mais en fonction d'un contrat ou d'une police d'assurance dont le terme est renouvelé. Je ne puis admettre ce raisonnement.

Ce qu'il faut d'abord se demander c'est quel est le sens du texte comme il est écrit et comme peut le comprendre un homme d'affaires ou un autre citoyen. En principe, il faut lire ce texte comme il est écrit. Or comme l'intimée l'a rédigé, il stipule que l'assuré «renouvelle et réaffirme au jour dudit renouvellement les déclarations que contient la proposition». Il s'agit donc des déclarations que renferme la proposition, non pas de déclarations analogues se rapportant à une autre période de temps. A mon avis, textuellement, «les déclarations que contient la proposition» signifie ces déclarations-là et pas autre chose. Il faut s'écarter du texte pour ne pas y voir identiquement la même affirmation. D'ailleurs l'emploi du mot «réaffirme» en outre du mot «renouvelle» empêche de donner à celui-ci un sens autre que celui de réitérer.

Avec toute la déférence que je dois à ceux qui pensent le contraire, il ne me paraît pas exact de dire que sans cela le texte n'a pas de sens ni de portée. Tout d'abord, ce n'est sûrement pas un non-sens que de réaffirmer la déclaration antérieure; cela peut être d'une utilité contestable mais ce n'est certainement pas illogique: une répétition inutile n'est pas une absurdité. Or, pour s'écarter de ce qui est à mon avis le sens littéral, c'est une absurdité qu'il faudrait

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trouver. On ne peut pas davantage démontrer que cela n'a pas de portée car si la déclaration antérieure n'était pas exacte, il ne serait sûrement pas sans intérêt de pouvoir s'en prévaloir pour démontrer la nullité du renouvellement comme celle de la police originale. Évidemment, cet intérêt n'est pas celui que présente une déclaration relative non pas aux trois ans qui précèdent la police mais aux trois ans qui précèdent le renouvellement. A mon avis, cela ne signifie pas qu'il est inexistant.

De toute façon, cela ne saurait constituer une raison de s'écarter de ce qui me paraît clairement être le sens littéral. Dans l'interprétation d'une police d'assurance de la responsabilité d'un manufacturier de colle, cette Cour a refusé de s'écarter du sens littéral de l'exclusion de toute responsabilité découlant d'un contrat par le motif qu'autrement on ne pouvait imaginer dans quelle circonstance la protection de l'assurance pouvait jouer: *The Canadian Indemnity Co. v. Andrews & George Co. Ltd.*[10]. A plus forte raison, doit-il en être ainsi quand c'est l'assureur qui invoque le texte du contrat qu'il a rédigé puisque tout doute doit être tranché contre lui du fait qu'il est l'auteur du document.

Il faut d'ailleurs considérer que la stipulation dont il s'agit ne se rapporte pas qu'à la seule déclaration ci-haut relatée. Il y a entre autres la réponse à la question suivante:

Indiquer à quels usages l'automobile doit servir principalement.

Il est clair que la stipulation telle que formulée dans le certificat de renouvellement s'applique parfaitement à cette déclaration-là et a un plein sens et une pleine portée à cet égard. Si l'on a omis de la rédiger de façon telle qu'elle ait autant d'effet à l'égard d'autres déclarations, c'est l'intimée qui doit en subir les conséquences.

L'appelante soutient ensuite que la stipulation comme elle veut qu'on l'interprète ne fait qu'exprimer ce qu'on a généralement reconnu comme implicite. Elle invoque l'arrêt de notre Cour dans *Sun Insurance Office c. Roy* [11]. Dans cette affaire-là, il s'agissait d'une assurance incendie et l'on a dit que le renouvellement impliquait qu'il n'y avait pas de changement dans l'usage de la chose assurée. Cependant le motif essentiel par lequel on a rejeté l'action c'est que

[10] [1953] 1 S.C.R. 19 à 27, [1952] 4 D.L.R. 690.
[11] [1927] R.C.S. 8, [1927] 1 D.L.R. 17.

l'on a jugé que l'assuré avait manqué de se conformer à la clause du contrat invalidant la police au cas d'un changement sans avis à l'assureur. A mon avis, lorsqu'un assureur, suivant l'usage suivi en assurance-automobile mais non en assurance-incendie, consigne dans un formulaire les questions auxquelles il exige une réponse avant de délivrer une police, il limite par le fait même l'obligation qu'a l'assuré de lui déclarer les faits pertinents Le même principe doit être appliqué au cas de renouvellement. L'assureur ayant choisi d'insérer une stipulation à cet égard, on doit s'en tenir à ce qu'elle comporte. C'est lui qui choisit d'expédier le renouvellement par la poste sans demande, sans enquête en sollicitant seulement la remise de la prime.

Il faut maintenant examiner le second moyen de l'intimée qui consiste essentiellement à soutenir que l'assurance est invalidée du fait que l'assuré n'a pas informé son assureur de la suspension de son permis de conduire. A ce sujet, il est indispensable de considérer en entier l'article 3 des conditions de la police lequel, y compris les notes marginales, se lit comme suit:

MODIFICATION ESSENTIELLE DU RISQUE

3. (1) L'Assuré nommément désigné dans la police doit avertir promptement l'Assureur ou son représentant local, par écrit, de toute modification du risque essentielle au contrat qui vient à sa connaissance;

(2) Sans restreindre la généralité de ce qui précède, les mots «modification du risque essentielle au contrat» comprennent:

Vente

(*a*) tout changement de l'intérêt assurable que l'Assuré nommé dans la police possède dans l'automobile par vente, cession ou autrement, sauf si ce changement se produit par voie de succession, de décès ou de procédures prises en vertu de la loi de faillite;

et dans les cas autres que les polices d'assurance automobile de responsabilité civile et de frais médicaux:

Hypothèque, créance ou charge

(*b*) toute hypothèque, créance ou charge dont l'automobile devient grevée après la proposition d'assurance;

Autre assurance

(*c*) toute autre assurance du même intérêt, qu'elle soit valide ou non, couvrant, en totalité ou en partie, la perte ou le dommage assurés par la police.

Il faut bien noter que le texte ne vise pas toute modification du risque mais seulement une modification «essentielle au contrat». Quelles modifications sont «essentielles»,

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on ne le dit pas. Cependant, la seule modification que le texte mentionne explicitement comme devant faire l'objet d'une déclaration immédiate dans un cas semblable c'est l'aliénation de l'automobile. Même si cette définition n'est pas limitative, elle n'a pas moins le résultat d'attirer uniquement l'attention sur une seule catégorie de modifications, savoir celles qui ont trait au véhicule lui-même et non pas au conducteur. N'est-ce pas suffisant pour que l'on doive en déduire que celles-là seules sont «essentielles»? N'oublions pas que si la police n'assure que l'automobile qui y est décrite, par contre elle assure tout conducteur quel qu'il soit.

Ce n'est pas tout. Si l'on regarde, comme un lecteur ordinaire non pas tant le texte en caractères minuscules que ce qui attire l'attention, les notes marginales en caractères gras, on constate que sous le titre «Modification essentielle du risque» tout ce que l'on signale c'est «Vente», «Hypothèque, créance ou charge», et «Autre assurance». Comment veut-on que celui qui n'est ni homme de loi, ni spécialiste en assurance soit en mesure de déduire d'un tel texte qu'il a l'obligation de déclarer toute suspension de permis de conduire? Si l'assureur entendait que l'assuré soit obligé de déclarer tout fait de la nature de ceux qui font l'objet de questions dans la proposition d'assurance, il lui était loisible de le dire en termes non équivoques. La condition comme elle est rédigée ne comporte rien de tel.

Il faut aussi considérer que, sur la première page de la police au-dessus de la proposition signée par l'assuré, il y a un papillon imprimé en rouge en gros caractères comme suit:

> IMPORTANT
>
> La prime qui a été chargée pour cette assurance est basée sur l'entente que:
>
> (1) l'automobile est principalement employée aux fins de plaisance; et
>
> (2) qu'il n'y a dans la maison, aucun conducteur masculin de l'automobile ni aucune personne engagée comme chauffeur, qui ait moins de 25 ans.
>
> Si ces conditions ne s'appliquent pas maintenant, ou cessent de s'appliquer plus tard, veuillez en avertir votre agent immédiatement.

C'est à bon droit que le juge de la Cour supérieure et le juge dissident de la Cour du banc de la reine ont vu là quelque chose de nature à mettre l'assuré sous l'impression qu'il n'avait pas à déclarer la suspension de son permis.

On fait valoir qu'au bas de la proposition signée par l'assuré on a imprimé en rouge et en gros caractères le texte suivant:

Si le proposant décrit faussement l'objet de l'assurance, au préjudice de l'Assureur ou sciemment dénature, dissimule ou omet de communiquer quelque fait que la présente proposition exige qu'on fasse connaître à l'Assureur, la police sera nulle quant à l'objet assuré ou aux risques garantis auxquels se rapporte la fausse déclaration ou omission. De même, lorsque l'Assuré viole une disposition ou condition de la police ou commet une fraude ou fait délibérément une fausse déclaration à l'occasion d'une réclamation soumise en vertu de la police, la réclamation de l'Assuré sera sans valeur et l'Assuré perdra tout droit à une indemnité.

Il n'y a rien là-dedans qui soit de nature à faire connaître à l'assuré qu'il doit déclarer une suspension de permis survenant ultérieurement. Il n'y a rien non plus qui tende de quelque manière à détruire l'impression qui se dégage du papillon et des notes marginales.

C'est une infraction pour un commerçant que de publier une annonce trompeuse ou d'offrir de la marchandise dans un emballage de nature à induire le consommateur en erreur sur la qualité du contenu. Comment peut-on logiquement en regard de ces principes, reconnaître en faveur d'une société d'assurance l'existence d'une obligation dont sa police ne permet pas à l'homme moyen de soupçonner l'existence: personne ne nie que c'est de bonne foi que Fortin a juré qu'il ne se croyait pas obligé d'informer son assureur de la suspension de son permis.

En statuant sur l'étendue de l'obligation imposée aux assurés de donner avis à l'assureur de toute modification du risque, il importe de tenir compte de la gravité des conséquences qui en découlent. L'assureur est affranchi de ses obligations même si, comme dans le cas présent, la perte n'y est pas reliée. Le moins qu'on puisse exiger c'est que l'obligation de donner l'avis soit clairement stipulée dans le contrat d'assurance et que l'assuré ne soit pas mis par l'assureur sous l'impression qu'elle n'existe pas.

Le jugement de la Cour d'appel implique que, sans que les conditions ordinaires de la police d'assurance-automobile en vigueur au Québec le disent de façon évidente pour le public, tous les assurés qui ont subi une suspension de permis de conduire cessent *ipso facto* d'être protégés s'ils n'en ont pas prévenu par écrit leur assureur, et il en est sans doute de même pour tous ceux dont un membre de leur famille ou de leur maison a subi cette déchéance. Je

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ne puis admettre une pareille conséquence en l'absence d'une disposition suffisamment explicite pour être généralement comprise et connue du public. Il me paraît inadmissible que des conséquences draconiennes découlent d'un texte ambigu qui est l'œuvre des assureurs et que les assurés doivent prendre comme il leur est offert.

Au sujet de l'arrêt de la Cour d'Appel d'Ontario *Sleigh c. Stevenson*[12], il faut dire tout d'abord qu'il s'agit d'une situation bien différente. On était en présence de réponses inexactes inscrites dans la proposition. On a statué que l'assuré devait en subir les conséquences quoique ce fût l'agent auquel la situation exacte avait été déclarée qui avait inscrit les réponses incorrectes. Cela ne saurait faire jurisprudence dans une cause du Québec: nous avons tout récemment confirmé à l'unanimité un arrêt en sens contraire de la Cour d'Appel du Québec dans *Compagnie Équitable d'Assurance contre le feu c. Gagné*[13].

Quant à l'arrêt de la Cour Suprême de la Nouvelle-Écosse, *General Accident Assurance Co. c. Button*[14], là encore on se trouve en présence de réponses inexactes à des questions formulées dans la proposition. L'assuré, pour s'en disculper, cherchait à prendre prétexte du fait qu'il n'avait pas lu le document que l'agent avait rédigé d'après une autre proposition. Cela n'est nullement notre cas.

A mon avis, le jugement de la Cour d'appel dans chaque cause doit être infirmé avec dépens. Cependant, pour le motif indiqué au début, il me paraît impossible de rétablir le jugement de la cour supérieure. Au cas où les parties ne pourraient s'entendre sur des conclusions conformes à leurs droits, je permettrais aux appelants de demander une réaudition aux fins de les formuler.

Appels rejetés avec dépens, les Juges HALL *et* PIGEON *étant dissidents.*

Procureur des demandeurs, appelants: R. Bélanger, Québec.

Procureurs de la tierce-saisie, intimée: Turgeon, Amyot, Choquette & Lesage, Québec.

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[12] [1943] 4 D.L.R. 433, [1943] O.W.N. 465, 10 I.L.R. 287.
[13] [1966] B.R. 109.
[14] [1954] 3 D.L.R. 552, (1954), 34 M.P.R. 25.

CITY OF PRINCE ALBERT (*Plaintiff*) ....APPELLANT;

AND

UNDERWOOD McLELLAN & ASSOCIATES LIMITED (*Defendant*) ....} RESPONDENT.

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*May 8, 9, 10
Dec. 20

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Guarantee and suretyship—Subrogation—Respondent employed by appellant to prepare plans for and supervise construction of reservoir—Performance bond by surety company provided by contractors—Collapse of reservoir because of faulty method of backfilling—Failure of respondent to properly supervise operation—Payment made by contractors to surety and from surety to appellant—Whether action brought in name of appellant against respondent champertous—Whether appellant's right to recover from respondent extinguished.

Under a contract in writing the appellant city employed the respondent, a firm of engineers, to prepare plans for and to supervise the construction of a reservoir. A contract of construction prepared by the respondent was entered into between the city and a firm of contractors. Pursuant to a term of the construction contract requiring them to furnish a performance bond covering the faithful performance of the contract, the contractors provided such a bond by a surety company. Several months after work on the erection of the reservoir was begun the structure collapsed during the process of backfilling.

Following the collapse the contractors took the position that they would not rebuild or complete the contract except without prejudice to the rights of all concerned. The respondent was unwilling to let the matter proceed on this "without prejudice" basis. Later, upon receipt of a certificate from the respondent that sufficient cause existed to justify such action, the city sent a notice to the contractors terminating their employment and advising them that the city intended "to take immediate possession of the premises and finish the work by whatever method the City may deem expedient all in accordance with the provisions of the said contract". Following this the appellant employed another contractor to rebuild and finish the reservoir which was done in accordance with the original design and specifications at a cost of $149,191.88.

Subsequently, under written agreements between the appellant and the surety and between the contractors and the surety, the contractors paid to the surety the sum of $101,039.28, *i.e.,* the cost of rebuilding the reservoir less the amount owing by the appellant to the contractors under the original contract of construction, which amount the appellant held back. The sum of $101,039.28 was in turn paid by the surety to the city. It was provided, *inter alia,* that subrogated rights of the surety to sue in the name of the city should be exercised under the control of the contractors.

An action against the respondent brought in the name of the city was successful at trial, where it was held that the failure of the respondent to properly supervise the backfilling operation "was the prime factor

*PRESENT: Cartwright C.J. and Martland, Ritchie, Hall and Spence JJ.

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in the collapse of the reservoir". On appeal, the Court of Appeal by a majority allowed the appeal and dismissed the action. An appeal from the judgment of the Court of Appeal was then brought to this Court.

Held (Cartwright C.J. and Spence J. dissenting): The appeal should be allowed and the judgment at trial restored subject to a variation as to quantum.

Per Martland, Ritchie and Hall JJ.: The surety company became an assignee by way of subrogation and by virtue of its agreement with the appellant, to which the appellant had to give effect by allowing the action to be taken in its name. No element of champerty or maintenance arose here.

The contention that the action was champertous having failed, nothing stood in the way of the appellant being entitled to judgment against the respondent for breach of their contract as found by the trial judge unless the payment made by the surety under its agreement with the appellant extinguished the appellant's right to recover from the respondent.

The payment in question was not a "realization" out of the contractors as stated by Riddell J.A. in *Campbell Flour Mills Co. Ltd. v. Bowes; Campbell Flour Mills Co. Ltd. v. Ellis* (1914), 32 O.L.R. 270 at 280, or a recovery within *Imperial Bank of Canada v. Begley*, [1936] 2 All E.R. 367. Here the payment was conditional. If the appellant had not permitted the action to be brought in its name it would have had to refund the money it got under the agreement. In that agreement the appellant did not purport to release the respondent nor the contractors, but specifically provided that the surety company should be subrogated to all the rights and remedies of the appellant against the contractors as well as against the respondent or any other persons arising out of the failure of the reservoir structure.

Further defences, *viz.*, that the appellant was estopped and that the agreement between the appellant and the surety was *ultra vires*, were also rejected.

Per Cartwright C.J. and Spence J., *dissenting*: As held by the Court of Appeal no question of subrogation arose in this case and the appeal was to be decided on the basis of the rights of the appellant against the respondent. The bonding company was not paying pursuant to its bond; it paid an amount larger than the penalty in the bond and did so with money furnished by the contractor and as its agent. A principal debtor who pays his debt has no right of subrogation.

The action failed because the appellant was not able to prove that it suffered any loss; indeed it was proved that before the action was commenced the appellant's loss had been paid in full.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], allowing an appeal from a judgment of Bence C.J.Q.B. Appeal allowed and trial judgment restored subject to a variation as to quantum, Cartwright C.J. and Spence J. dissenting.

[1] (1967), 61 W.W.R. 577, 65 D.L.R. (2d) 12.

Alan W. Embury, Q.C., and *John M. Embury*, for the plaintiff, appellant.

J. L. Robertson, Q.C., and *K. Barton*, for the defendant, respondent.

The judgment of Cartwright C.J. and Spence J. was delivered by

THE CHIEF JUSTICE (*dissenting*):—The relevant facts and material documents are set out in the reasons of my brother Hall. A brief summary will be sufficient to make plain the reasons for the conclusion at which I have arrived.

On the findings in the Courts below, which are fully supported by the evidence, the cause of the collapse of the reservoir was the faulty manner in which the backfill was applied by the contractor, Smith Bros. & Wilson Ltd., hereinafter referred to as "the contractor". I think it clear that there was a breach of contract by the contractor but this need not be decided as it has actually paid the whole of the loss suffered by the appellant.

There is no doubt that there was a breach of contract on the part of the engineer, the present respondent, in failing to supervise the application of the backfill by the contractor and that this breach was a cause of the collapse.

The contractor was not a party to the contract between the appellant and the respondent and the respondent was not a party to the contract between the appellant and the contractor. In my view when the reservoir collapsed the appellant had causes of action against both the contractor and the respondent but these were independent and distinct causes of action.

We are concerned only with the action between the appellant and the respondent. In my view this action fails on the ground that the loss which was undoubtedly sustained by the appellant has been fully paid to it by the contractor partly in cash and partly by the appellant retaining the sum of $48,152.60 held back by it which, but for its breach, would have been payable to the contractor. The matter is, in my view, covered by the following sentence

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in the judgment of Riddell J.A. in *Campbell Flour Mills Co. Ltd. v. Bowes; Campbell Flour Mills Co. Ltd. v. Ellis*[2]:

> It is true that, if the full amount of the damages were realised out of the contractors, no action (except perhaps for nominal damages) would lie against the architects, but that is on an entirely different principle, namely, that the plaintiffs have suffered no damage from the default of the architects.

The reasons given in the case just cited and in the passage from Mayne on Damages quoted in *Truth & Sportsman Ltd. v. Kethel*[3] for refusing to enquire into the existence of liability of a stranger to the contract for the loss caused by the breach by the defendant of its contract with the plaintiff have no application where that stranger is not merely said to be liable for but has actually paid the whole loss suffered by the plaintiff.

I agree with the unanimous conclusion of the Court of Appeal that no question of subrogation arises in this case and that the appeal is to be decided on the basis of the rights of the appellant against the respondent. If the bonding company had in fact paid the appellant under its bond questions might have arisen as to whether it could claim to be subrogated to the appellant's right of action against the respondent but the contracts recited in the reasons of my brother Hall make it plain that the bonding company was not paying pursuant to its bond; it paid an amount larger than the penalty in the bond and did so with money furnished by the contractor and as its agent. A principal debtor who pays his debt has no right of subrogation.

In my view the action fails because the appellant is not able to prove that it suffered any loss; indeed it is proved that before the action was commenced the appellant's loss had been paid in full.

The proposition that a person who has suffered a loss and who has separate causes of action against more than one person to recover the amount of that loss cannot recover more than the total amount thereof is treated as too plain for argument in *Imperial Bank of Canada v. Begley*[4], a judgment of the Privy Council affirming the

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[2] (1914), 32 O.L.R. 270 at 280.

[3] (1932), 32 N.S.W.S.R. 421 at 427.

[4] [1936] 2 All E.R. 367.

judgment of this Court in *Begley v. Imperial Bank of Canada*[5]. Lord Maugham giving the judgment of the Board says at p. 375:

> It is clear that in the circumstances the respondent was not put to her election to sue either McElroy or the appellants: she could sue both or either, subject of course to this that she could not recover more than the total sum due to her.

While it is clear that there was a breach of contract by the respondent and consequently the appellant may well have been entitled to a judgment against it for nominal damages, no claim for any such judgment was put forward either in the Courts below or before us and under the circumstances I think that the judgment of the Court of Appeal providing that the action be dismissed with costs ought not to be disturbed.

I would dismiss the appeal with costs.

The judgment of Martland, Ritchie and Hall JJ. was delivered by

HALL J.:—This is an appeal from a judgment of the Court of Appeal for Saskatchewan[6] (Woods J.A. dissenting) which allowed an appeal by the respondent from a judgment by Bence C.J.Q.B. in favour of the appellant for $160,784.53.

The litigation arises out of the collapse of a water reservoir being built for the appellant city. The city employed the respondent, a firm of engineers, to prepare detailed plans and specifications for the proposed reservoir under a contract in writing dated July 28, 1961. This contract contained the following clauses:

> Article 1 Branches of the Project:
>
> The Engineer will perform engineering services as outlined in Article II, for the following branches of the project:
>
> 1. New storage reservoir and pumphouse.
> 2. Other items directly related to the provision of the above as agreed.
>
> Article II Engineering Services:
>
> The Engineer will perform the following services under this contract:
>
> 1. Preliminary sketch plans and cost estimates. Attendances at any necessary meetings to discuss the project.
> 2. Design of structures and ancillary items, selection of equipment and materials. Preparation of detail plans and specifications, call, receive and tabulate tenders and make recommendations to council for tender award.

[5] [1935] S.C.R. 89.

[6] (1967), 61 W.W.R. 577, 65 D.L.R. (2d) 12.

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3. *Supervise construction of the project* including all office functions such as checking of shop drawings and changes in methods and materials, prepare and submit monthly progress estimates and *including resident supervision for continuous daily inspection and guidance of the contractor.* Final "as built" plans and operating manuals will be submitted for record purposes.

4. Arrange for soils investigation and materials testing as required.

(Emphasis added.)

The respondent recommended a cylindrical type of reservoir having a diameter of 131 feet and a height of 30 feet to be constructed in an excavation, the whole of which when completed and capped would be surrounded by and covered with earth. The reservoir was to be constructed of concrete and was designed to utilize a particular pre-load or pre-stressed process owned by a firm known as Canadian Gunite. This process permits the use of a thinner wall than that type of construction which is confined to reinforced steel. It includes reinforced steel but in addition involves the installation of a series of wires under tension around the outside of the cement wall and a special composition added to the outside surface. This method provided a lighter overall structure and strengthened the walls against the internal pressure exerted when filled with water. The filling in of the excavated area surrounding the concrete structure by the process known as backfilling was something which had to be done with great care. Earth had to be placed in layers all around the structure so that no undue pressure would be exerted at any particular area on the wall of the reservoir. This was of special importance because of the comparative lightness of the pre-stressed concrete and its susceptibility to being moved by uneven external pressure.

Tenders were called for in accordance with the terms of the contract between the parties. The tender of a firm known as Smith Bros. & Wilson Ltd. was accepted and a contract of construction prepared by the respondent was entered into between the appellant city and said contractors. That contract, including the specifications as a part thereof, contained *inter alia* the following:

10. Engineer and Contractor

The Engineer shall have general supervision and direction of the work, but the Contractor shall have complete control, subject to Clause 12, of his organization.

The Engineer is, in the first instance, the interpreter of the contract and the judge of its performance; he shall use his powers under the contract to enforce its faithful performance by both the parties hereto.

20. *Emergencies*

The Engineer has authority to stop the progress of the work whenever in his opinion such stoppage may be necessary to ensure its proper execution. In an emergency affecting or threatening the safety of life, or the structure, or of adjoining property, he has authority to make such changes and to order, assess and award the cost of such work extra to the contract or otherwise as may in his opinion be necessary.

In the specifications A under General Instructions:

(11)(e) All materials to be incorporated in the work shall be stored under suitable conditions to prevent damage, deterioration, contamination, etc. No materials to be incorporated in the work shall be temporarily used or installed as a facility for construction purposes except with the express approval of the Engineer.

B under General Trades:

(8) *Backfilling*:

(a) *All free water surrounding concrete structures in excavation prior to backfilling must be completely removed* and only dry unfrozen material may be used for backfill. Backfilling generally, unless otherwise particularly specified or noted, shall consist of gravel or of clean earth, particularly against concrete walls.

(b) *All backfill and embankment required around the structure shall be deposited in layers* and carefully consolidated to the lines and grades indicated on the drawings, *as indicated by the Engineer,* but not previous to 21 days after completion of placing the concrete for the walls. Where additional fill is required to comply with the drawings, it shall be furnished by the Contractor without additional remuneration.

(c) . . . . . .

(d) Backfilling shall not be done against walls that have been waterproofed, until the waterproofing has been inspected and approved by the Engineer; *then it shall be placed in layers,* and consolidated in such a manner as to not damage the waterproofing.

(e) Local pockets of materials which in the opinion of the Engineer are unsuitable for slab support shall be removed to such depth as the Engineer may require and replaced with compacted pit-run gravel.

(f) Backfill over the reservoir shall consist of 3″ of gravel and clean earth to the elevations noted. Consolidation of fill over the reservoir shall be done with light machinery to minimize the possibility of damage.

25. *Leakage Test*: After the covercoating has been applied but before waterproofing and backfilling the reservoir and pumpwell shall be water-tested.

The pumpwell shall be left empty while the reservoir is tested. This will indicate any leaks in walls of the pumpwell.

The chamber shall be filled to operating level with clear water and shall remain standing for 24 hours. *If no leaks develop and on approval of the Engineer, the Contractor may proceed with waterproofing and backfilling as further specified herein.*

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If leaks do develop, they shall be repaired to the satisfaction of the Engineer. After leaks have been repaired, the chambers shall be re-tested to ensure that the repairs are satisfactory. All visual leaks shall be repaired.

. . .

26. *Waterproofing*: The perimeter walls (interior and exterior) and reservoir roof shall receive two coats of asphalt waterproofing, Flintkote Static Asphalt Protective Coating Type I, or approved equal. The inside of the perimeter wall may be waterproofed prior to testing but the exterior surface shall not be waterproofed until after testing.

. . .

The Contractor shall obtain the approval of the Engineer on the first coat before proceeding with the second coat. *After approval has been received on the second coat, the Contractor shall proceed with backfilling as specified elsewhere herein.*

(Emphasis added.)

Clause 27 of the construction contract required the contractors to furnish a performance bond covering the faithful performance of the contract. Pursuant to this clause the contractors provided a bond by Western Surety Company in the sum of $93,500. That bond reads in part as follows:

KNOW ALL MEN BY THESE PRESENTS, that SMITH BROS. & WILSON LIMITED, a corporation organized under the laws of the Province of Saskatchewan, (hereinafter called the Principal) and WESTERN SURETY COMPANY, a corporation created and existing under the laws of the Dominion of Canada and whose principal office is located in Regina, Saskatchewan (hereinafter called the Surety), are held and firmly bound unto CITY OF PRINCE ALBERT (hereinafter called the Obligee), in the full and just sum of NINETY-THREE THOUSAND FIVE HUNDRED.....xx/100 Dollars, lawful money of the Dominion of Canada, to the payment of which sum, well and truly to be made, the said Principal binds itself, its successors and assigns, and the said Surety binds itself, its successors and assigns, jointly and severally, firmly by these presents. Signed, sealed and delivered this 15th day of June, A.D. 1962. WHEREAS, said Principal has entered into a certain written contract with the Obligee, dated April 25, 1962 for the construction of water storage reservoir, which by reference hereto is made part hereof as fully to all intents and purposes as though recited in full herein. *NOW*, therefore, the condition of the foregoing obligation is such that if the said Principal shall well and truly indemnify and save harmless the said Obligee from any pecuniary loss resulting from the breach of any terms, covenants and conditions of the said contract on the part of the said Principal to be performed, then this obligation shall be void; otherwise to remain in full force and effect in law;

Smith Bros. & Wilson Ltd. will hereinafter be referred to as the contractors.

The work on the erection of the reservoir was begun in the month of April 1962, with one Jenkins as superintendent in charge on behalf of the contractors and an engineer

representing the respondent by the name of Farley. Farley was replaced in mid-September 1962 by one Palichuk also employed by the respondent who had graduated in electrical engineering in the spring of 1962 and had worked for the respondent for one year prior to that time. He became a professional engineer in 1964. Both Jenkins and Palichuk continued in their respective positions until the reservoir collapsed. The collapse occurred on November 29, 1962, during the process of the backfilling operation.

The events preceding the collapse are set out in the judgment of Bence C.J.Q.B. as follows:

> When the reservoir was filled with water to test it for leaks prior to proceeding with the water-proofing of the exterior it was found that a portion consisting of approximately thirty per cent of the perimeter in the south-east section showed wet spots.
>
> According to Jenkins, Palichuk was on the job at the time the testing was done and instructed him to proceed to repeat the water-proofing on the inside of the thirty per cent. It was necessary for this purpose to drain the water out, which was done. While this was going on the construction company proceeded with the exterior water-proofing on the seventy per cent area which was free of leaks. Jenkins stated that he asked permission from Palichuk to proceed with the backfilling on the seventy per cent and that Palichuk gave him such permission subject to any water in the trench being removed. Palichuk confirmed this in his evidence.
>
> Backfilling operations commenced on Friday, November 23rd, which was the day after the said permission was given by Palichuk. It continued on Saturday and also on the Monday, Tuesday, Wednesday and Thursday of the following week. The collapse occurred at about five o'clock on the Thursday. At no time was there ever any backfilling on the said thirty per cent. Apparently the exterior water-proofing on the seventy per cent was going on at the same time as the backfilling. The exterior water-proofing was finished on Tuesday, November 26th.
>
> According to Palichuk, he left the job site Monday morning for Shellbrook to examine another construction job being undertaken at that point. He stated that before doing so he told Jenkins not to go beyond the limits of six to eight feet around the reservoir. This is denied by Jenkins, who said that the only warning that was ever given by Palichuk to him was not to use too large lumps in the backfill.
>
> Palichuk remained in Shellbrook that night and returned to Prince Albert around three o'clock the following afternoon and arrived on the job site at approximately 4:00 p.m. He stated that he found the backfill was up to the grade level, which is 20 to 24 feet from the bottom of the excavation. He said that when he observed this he talked to Jenkins and asked him why he had gone beyond the six to ten feet. Again, according to him, Jenkins replied that the reason he did so was that there would be enough counter action around the seventy per cent to prevent damage to the walls. Palichuk testified that his reply was merely: "I told him it is up to you Bill, you are doing the work." Nothing further was done and no warnings were given.

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Jenkins said that any instruction given to him by Palichuk were carried out. He insisted he received no advice or warnings from any one that the method of backfilling that he was doing was dangerous. He did state that the backfill which he did do was deposited in layers as these were the instructions in the specifications and also the instructions of the resident engineer Palichuk.

Bence C.J.Q.B. found and the finding is fully supported by the evidence that the reservoir collapsed because of the faulty method of backfilling in which about seventy per cent of the circumference was covered leaving the remaining thirty per cent without support. This was described as unsymmetrical loading and contrary to the specifications in the construction contract.

The care which had to be exercised in the back-filling operation was well known to Palichuk. One Davidson representing the Canadian Gunite Company visited the construction project on October 12, 1962, and testified that he had a discussion on the site with both Palichuk and Jenkins and that he described to them the proper procedure to be followed which was to go around the entire structure with the fill material in layers of about one foot in depth. Davidson followed up his concern about the backfilling operation by calling upon the respondent's officials in Saskatoon and discussing the procedure with them. He then returned to his company's office in Calgary where, being still apprehensive concerning the backfilling, he wrote a letter to the respondent dated October 16, 1962, as follows:

> Underwood McLellan & Associates Ltd.,
> Box 539,
> Saskatoon, Saskatchewan.
> Attention: Mr. K. Mountain, P. Eng.
> Reference: Prince Albert Reservoir
>
> Gentlemen:
>
> At this time we take the liberty of writing to you regarding the pending backfill work at the Prince Albert Reservoir. As is the case with any concrete reservoir the backfill must be properly placed to avoid damaging the walls and we mention the following points here in case you would wish to pass any or all of them along to the contractor or persons responsible for this work.
>
> —Care must be taken to avoid uneven loading to structure.
>
> —Backfill material must be soft earth, free from rock and stones.
>
> —No machines should be allowed close enough to increase side pressure on the wall.
>
> —Backfill material must be placed successively about the structure so as to avoid uneven loading.
>
> —If compaction is required this too should be done in a manner avoiding uneven loading and impact.

Mr. Warder has enquired regarding the possibility of using a 'cutback' type asphalt as an exterior wall treatment material and we are now waiting for a reply from the suppliers of the rubber jointing materials in this regard. You will hear from us soon.

Yours very truly,
THE CANADA GUNITE COMPANY LIMITED,
Sgd. "R. G. DAVIDSON"
R. G. Davidson,
Branch Manager.

This letter was entered as ex. P. 10. The contractors were not sent a copy nor any similar communication.

Palichuk testified that he received a copy of Davidson's letter (P.10) from his principals and that he showed the copy to Jenkins. Jenkins denied having been shown a copy prior to the collapse. Regarding this conflict in the evidence, the learned trial judge said: "I prefer to accept Jenkins' testimony in this regard."

The appellant city brought action against the respondent claiming:

(1) that the design was faulty.

(2) in the alternative that the defendant failed to use reasonable and proper skill in supervising the construction of the reservoir particularly during the backfilling operation and permitted and indicated through its resident engineer a backfill operation around part of the circumference of the reservoir leaving a gap in the backfill and causing the wall to collapse where it was unsupported by backfill in the area of such gap.

The claim based on faulty design was dismissed by Bence C.J.Q.B. and was not urged in this Court.

The learned trial judge made the following findings of fact:

(*a*) It was generally agreed by the witnesses, and I have no hesitation in finding, that the cause of the collapse was the faulty method used in backfilling by the completion of about seventy per cent of the circumference while leaving the balance of thirty per cent without any support. This is described as unsymmetrical loading.

(*b*) In the light of the knowledge which Palichuk says he had about the necessity of proper backfilling, his awareness of the information contained in the said letter, Exhibit P.10, and his familiarity with the specifications, I have come to the conclusion that he was negligent in not insisting at the time of his return from Shellbrook that no further work should be done on the backfilling. His attitude that it was up to Jenkins as he was doing the work is inexplicable. It is my view that it was his duty under the contract to have insisted that Jenkins stop and if there had been a refusal the matter should have been immediately reported both to the management of the contracting company and to the officials of the defendant.

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(c) Palichuk was further negligent by giving Jenkins permission in the first place to proceed with the backfilling when he knew that it could not be done around the thirty per cent. He did state that the thirty per cent could have been water-proofed up to the places where the water leak marks showed, these marks being above the grade level, but there is no evidence that he suggested that this be done.

(d) It seems to me also that Palichuk should not have left the job at this rather critical juncture for a period of over a day. He failed to give "continuous daily inspection and guidance".

(e) For the reasons I have indicated I find the defendant through its agent Palichuk was negligent in the discharge of his duties and responsibilities and that such negligence resulted in the collapse of the reservoir. If he had acted as he should have done and provided proper supervision the damage which incurred could have been avoided.

(f) I have found that the defendant's failure to discharge its responsibility under the contract was the reason for the collapse of the reservoir. Smith Bros. & Wilson Ltd. believed that this was so and in my opinion were justified in adopting the stand they did.

(g) I find that the defendant did have a responsibility with respect to supervising the proper carrying out of the operation, that it failed in its discharge thereof and that such failure was the prime factor in the collapse of the reservoir.

The Court of Appeal summarized the learned trial judge's findings of negligence under three headings:

(1) In his failure to stop continuance of backfilling operations on his return to the site after absence from a Monday morning to late Tuesday afternoon, when backfilling had then reached grade level;

(2) In granting permission to commence backfilling operations when it could not be done on the thirty per cent area;

(3) In absenting himself from the work for a period in excess of twenty-four hours, and this during what the trial judge termed a "critical juncture".

Maguire J.A. concurred in finding that there had been a breach of contract by the respondent. He said:

I think there is evidence upon which the learned trial judge could make his first finding of breach of contract by the engineer. The engineer company employee, Palichuk, when he returned to the site on the Tuesday late afternoon and observed that backfill on the seventy per cent of the circumference had proceeded almost to grade level and thus most substantially in excess of what he states he had authorized or approved, knew, or should have known, that this constituted a serious menace to the safety of the structure. Even though this situation may have arisen through default of the contractor, the engineer, in performing his duties to the City, failed to act and take what appears to be a rather obvious precaution for the safety of the structure, namely by ordering cessation of further backfill, until such fill could be brought up to level in the remaining thirty per cent circumference.

He did not deal with 2 and 3 holding it was not necessary to do so. In my view all the findings of negligence made

by the learned trial judge and so summarized by Maguire J.A. were fully supported by the evidence. The contractors were not parties to the action nor was any application made to join them as might have been done under the Saskatchewan Queen's Bench Rules of Court. The learned trial judge did not make any finding of negligence against the contractors. Regarding the cause of the collapse, he found specifically:

> That the defendant's failure to discharge its responsibility under the contract was the reason for the collapse of the reservoir. Smith Bros. & Wilson Limited believed that this was so and in my opinion were justified in adopting the stand they did.

and that the failure of the respondent to properly supervise the backfilling operation "was the prime factor in the collapse of the reservoir".

Maguire J.A., in dealing with this last finding, said:

> I do not interpret the trial judgment as absolving the contractor from negligence in the performance of its duties during construction. The learned trial judge directed his consideration to whether, as between the city and the engineer, and under the terms of the engineer's contract, it had committed a breach or breaches in the performance of its contractual duties. The findings that the negligence of the engineer was the "prime cause" of the failure of the structure goes no further than this.

While, as Maguire J.A. says, this does not absolve the contractors, it does not in any way constitute a finding of negligence against them but even if it did, the collateral liability, if any, of the contractors to the appellant under a separate and distinct contract cannot be used to defeat the appellant's right to judgment against the respondent, *Campbell Flour Mills Co. Ltd. v. Bowes; Campbell Flour Mills Co. Ltd. v. Ellis*[7]; *Truth & Sportsman Ltd. v. Kethel*[8], and *Mayne & McGregor on Damages,* 12th ed., p. 162, nor could the liability of the contractors be determined in the present action as constituted, they not being parties. *Mayne on Damages,* 10th ed. at p. 127.

The appellant was, therefore, entitled to succeed against the respondent unless under another aspect of the case which must now be examined, it has suffered no damage.

This second aspect has its foundation in certain agreements made between the appellant and Western Surety Co. on the one hand and between the contractors and Western

[7] (1914), 32 O.L.R. 270.
[8] (1932), 32 N.S.W.S.R. 421 at 427.

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Surety Co. on the other after the collapse of the structure. Following the collapse the appellant made a demand on the surety company but that company denied liability under the bond by letter dated March 14, 1963, as follows:

The City Clerk,
City Hall,
PRINCE ALBERT, Saskatchewan.

Dear Sir:

Re: New Water Storage Reservoir
and Pump House

We have your registered letter of March 8th, 1963, with enclosures.

We understand from Smith Bros. & Wilson Ltd. that they take the position the City has wrongfully and without sufficient cause terminated their contract and that there has been no breach of contract or other default on their part.

This being the case, our Company contemplates taking no action at this time.

Yours very truly,
WESTERN SURETY COMPANY.
(sgd) "L. N. RAY"

Lionel N. Ray,
General Manager.

Following the collapse of the structure, the contractors took the position that they would not rebuild or complete the contract except without prejudice to the rights of all concerned. In a letter to the respondent dated January 3, 1963, they said in part:

Underwood, McLellan & Associates Ltd.,
Consulting Professional Engineers,
1721—8th Street East,
Saskatoon, Saskatchewan.

Dear Sirs:

Re: Prince Albert Reservoir

You have indicated to us that you do not intend to reply to our letter of December 11th, nor to acknowledge that any work of repair carried out by us is to be without prejudice to the rights of all concerned, and is not to be construed as an admission of liability on our part.

Without such an agreement and acknowledgment from you and the City of Prince Albert, we find it impossible to undertake the responsibility of making repairs.

We do not ask that you or the City abandon any rights that you may have in the matter, but we ask simply that the question of liability be kept open and unaffected, and that our undertaking to make repairs is without prejudice to our right to claim payment for the same in addition to the contract price.

However, if you and the City are unwilling to facilitate matters as requested we must decline to proceed with the repairs.

A copy of this letter was sent to the appellant. The appellant replied on January 21, 1963, through its solicitor as follows:

> I have been retained by the City of Prince Albert in connection with the difficulties which have arisen in the matter of the completion of the New Storage Reservoir and Pumphouse.
>
> I have before me and have perused your tender of April 19, 1962, for the construction of this work; the agreement made on the 25th day of April, 1962, between your Company as Contractor and the City of Prince Albert as Owner; General Conditions of the contract; instructions to bidders and specifications.
>
> In our opinion it is clear that your Company undertook and agreed to do and fulfill everything which is indicated by the above documents and the drawings and to complete the work within the time specified.
>
> The work has not been completed in terms of the agreement and is at present in a state requiring major repairs to the work which was done.
>
> In the above circumstances the City hereby gives you the Notice and makes the demands following:
>
> PLEASE TAKE NOTICE THAT THE CITY HEREBY requires you to complete the construction of the Water Storage Reservoir and Pump House referred to in the Agreement of April 25, 1962, in accordance to the terms of the said agreement, general conditions of the contract, the instructions to bidders, the specifications, the tender and the drawing above referred to:
>
> AND FURTHER TAKE NOTICE THAT UNLESS you agree to proceed with the completion of the work the City will have no alternative but to terminate the agreement and/or call upon the Bonding Company to complete the work.
>
> In giving this notice and in making this demand the City agrees that, while denying any liability or responsibility, you may proceed on the understanding that it is without prejudice to any legal right or claim you may have against it for payment for the repair work in addition to the Contract price and by the same token without prejudice to any legal right or claim the City may have against your Company to claim payment for expenses or damages incurred or suffered by it or to enforce any other right which it may have.

The respondent was, however, unwilling to let the matter proceed on this "without prejudice" basis. It stated its position in a letter to the solicitors for the contractors dated February 14, 1963, reading:

> Yesterday in our meeting with Mr. Cuelenaere, you asked Underwood McLellan & Associates Limited to agree that if your client Smith Brothers and Wilson completed the reservoir at Prince Albert according to its contract with the City, its so doing would be "without prejudice" to any right it might have against Underwood McLellan & Associates Limited.
>
> While we do not know of any right your client may have in this regard, we have discussed your request at some length with our principals and are instructed to say that they do not agree to it.

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On February 25, 1963, the respondent, purporting to act under the provisions of the construction contract, certified to the appellant as follows:

> IN THE MATTER OF A CONTRACT DATED THE 25TH DAY OF APRIL, 1962, BETWEEN THE CITY OF PRINCE ALBERT AND SMITH BROTHERS & WILSON LTD. FOR THE ERECTION OF A RESERVOIR:
>
> CERTIFICATE
>
> WHEREAS Smith Brothers & Wilson Ltd. is the Contractor named in a certain contract dated the 25th day of April, 1962, between it and the City of Prince Albert;
>
> AND WHEREAS Underwood McLellan & Associates Limited is the Engineer of the City named in said contract;
>
> AND WHEREAS the said Smith Brothers & Wilson Ltd., under the provisions of said contract contracted and agreed with the City of Prince Albert to perform and complete the work, including the erection of the reservoir, described and specified in said contract by not later than the 21st day of August, 1962;
>
> AND WHEREAS said Smith Brothers & Wilson Ltd. has not performed and completed the work, including the erection of said reservoir, which it was required to do under said contract, and the said Underwood McLellan & Associates Limited estimates that the said work cannot now be completed until about July 1st, 1963, at the earliest;
>
> AND WHEREAS the said Smith Brothers & Wilson Ltd. has done no work under said contract since about the 29th day of November, 1962, notwithstanding requests both verbal and in writing to proceed with and complete said work, including the erection of said reservoir;
>
> *NOW THEREFORE the said Underwood McLellan & Associates Limited does hereby certify that in its opinion, and because of the foregoing, the Contractor is in substantial violation of the provisions of said contract* and that, without prejudice to any other right or remedy, sufficient cause exists to justify the City of Prince Albert, by written notice to the said Smith Brothers and Wilson Ltd., terminating the employment, under said contract, of the said Smith Brothers & Wilson Ltd., taking possession of the premises on which said work was to have been executed and all materials, tools, structures and appliances thereon and finishing the work, without undue expense or delay by whatever method may be deemed expedient, all in accordance with the provisions of the said contract.

It will be noted that this certificate makes no reference to the collapse of the structure or to any allegation of negligence in respect thereto on the part of the contractors. The substantial violation asserted against the contractors was that:

> Smith Bros. & Wilson Ltd. has done no work under said contract since about the 29th day of November, 1962, notwithstanding requests both verbal and in writing to proceed with and complete said work, including the erection of said reservoir.

The appellant thereupon gave the contractors the following notice on March 5, 1963:

> IN THE MATTER OF A CONTRACT DATED THE 25TH DAY OF APRIL, 1962, BETWEEN SMITH BROTHERS & WILSON LTD., AS CONTRACTOR AND THE CITY OF PRINCE ALBERT, AS OWNER, FOR THE CONSTRUCTION OF A WATER STORAGE RESERVOIR AND PUMPHOUSE:
>
> NOTICE
>
> TAKE NOTICE that the City of Prince Albert having received the Certificate of the Engineer, Underwood McLellan & Associates Limited that sufficient cause exists to justify such action, a copy of which said certificate is attached hereto, does hereby give you Notice terminating your employment as Contractor and does hereby notify you that the City intends to take immediate possession of the premises and finish the work by whatever method the City may deem expedient all in accordance with the provisions of the said contract.

Following this the appellant employed another contractor to rebuild and finish the reservoir which was done in accordance with the original design and specifications at a cost of $149,191.88.

When the reservoir had been rebuilt and the cost of so doing ascertained the surety company on June 2, 1964, entered into an agreement with the appellant under which the appellant received $101,039.28. No doubt negotiations between the appellant and the surety company and the contractors must have taken place in the months preceding June 1964 although the record is silent in this respect. This agreement reads:

> WHEREAS by a contract in writing between Smith Bros. & Wilson Limited, a body corporate carrying on business in the Province of Saskatchewan, and the above named City of Prince Albert, the said Smith Bros. & Wilson Limited contracted to erect a certain reservoir for the said City of Prince Albert in the said City to certain designs and specifications outlined in the said contract.
>
> AND WHEREAS the said City of Prince Albert entered into a contract in writing with Underwood McLellan and Associates Limited, a body corporate carrying on business in the Province of Saskatchewan, to provide engineering services and supervision for the erection of the said reservoir.
>
> AND WHEREAS Western Surety Company entered into its Bond Number 01-1-4461 for the due performance of the said contractor, Smith Bros. & Wilson Limited, in the construction of the said reservoir.
>
> AND WHEREAS on the 29th day of November, A.D. 1962, the structure of the said reservoir failed before construction had been completed and expenses were incurred in reconstruction and completion resulting from the said failure.
>
> AND WHEREAS the City of Prince Albert has completed the said repairs and construction of the said reservoir at a cost of

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$149,191.88 and claims the said sum less $48,152.60 owing by it to Smith Bros. & Wilson under the original contract of construction, namely, $101,039.28 from the said Western Surety Company pursuant to the terms of the said bond.

NOW THEREFORE THIS AGREEMENT WITNESSETH:

1. That in consideration of the premises and the payment of the sum of $101,039.28 now paid by the said Western Surety Company unto the City of Prince Albert (the receipt whereof is hereby acknowledged), the City of Prince Albert does hereby release, remise and forever discharge the said Western Surety Company from all claims, demands, actions or causes of actions whatsoever which the said City of Prince Albert may have against Western Surety Company under and by virtue of the said bond.

2. By virtue of such payment, the said City of Prince Albert acknowledges and agrees that Western Surety Company is subrogated to all of the rights and remedies for recovery of the City, both in contract and in tort, in law and in equity, enjoyed at any time by the City of Prince Albert arising out of either its contract with Smith Bros. & Wilson Limited or Underwood McLellan and Associates Limited or any other persons whatsoever arising out of the failure of the said reservoir structure, with the right in Western Surety Company to sue in the name of the City of Prince Albert against any person or corporation as it may be advised for the full enforcement of such rights, remedies and recoveries, and the City of Prince Albert agrees it will deliver to Western Surety Company all original contract documents, correspondence or any other relevant documents, vouchers or accounts in its possession and will co-operate fully with the said Western Surety Company in the prosecution of any action for such recovery, subject always to the condition that such co-operation and subrogation shall be at the expense of the said Western Surety Company; provided further that the said Western Surety Company will save the City harmless from any legal costs incurred in any action taken in the name of the City of Prince Albert from any judgment on any claim or counterclaim for engineering services incurred in demolition and rebuilding; and the City of Prince Albert agrees that if in any such action the costs of demolition and rebuilding of the said reservoir shall be found by the court to be less than the sum paid by the City of Prince Albert for this purpose, then the City of Prince Albert will refund to Western Surety Company the sum in excess of such court finding, if any, now paid to the City of Prince Albert under and by virtue of the terms of this release and subrogation agreement; and further Western Surety Company agrees to clear the title of the works of claims for lien arising prior to the 29th day of November, A.D. 1962.

3. The City of Prince Albert agrees that it will not rescind or revoke this agreement to the prejudice of the Western Surety Company at any time hereafter.

On the same day the contractors and the surety company entered into the following agreement:

WHEREAS Smith Bros. & Wilson Limited are indemnitors to the bond of Western Surety Company numbered 01-1-4461 for the due performance by Smith Bros & Wilson Limited of a certain contract for the construction of a reservoir for the City of Prince Albert by the said Smith Bros. & Wilson Limited dated the 25th day of April,

A.D. 1962, and have requested Western Surety Company to secure the rights in subrogation of the City of Prince Albert as indicated in a certain release and subrogation agreement hereunto annexed and marked as Schedule "A" hereto.

AND WHEREAS Smith Bros. & Wilson Limited have paid unto Western Surety Company the sum of $101,039.28, who in turn are paying the same to the City of Prince Albert for the acquisition of the said rights in subrogation pursuant to the said release and subrogation agreement.

AND WHEREAS Smith Bros. & Wilson Limited desires that the said rights in subrogation of the City of Prince Albert be exercised under its control in the name of the City of Prince Albert and at its expense by the issue of a writ against the engineers referred to, namely, Underwood McLellan and Associates Limited, a body corporate carrying on business in the Province of Saskatchewan.

NOW THEREFORE THIS AGREEMENT WITNESSETH:

(1) Smith Bros. & Wilson Limited hereby agrees to save Western Surety Company harmless and fully indemnifies it from all claims, counterclaims, demands, costs or expenses whatsoever which may be incurred and arising out of the prosecution of the said action in the name of the City of Prince Albert under and by virtue of the said release and subrogation agreement hereunto annexed and marked as Schedule "A" hereto.

(2) Western Surety Company hereby agrees that Smith Bros. & Wilson Limited shall have control of the said action in subrogation to prosecute the same against the said Underwood McLellan and Associates Limited as it may be advised.

(3) Nothing in this agreement contained nor anything done in pursuance thereof shall, in any way, prejudice the rights of Western Surety Company under the agreement of indemnity given by Smith Bros. & Wilson Limited in respect to the bond given by Western Surety Company in this connection, or in any way operate as a waiver, release or postponement of the rights of Western Surety Company under the said agreement of indemnity by Smith Bros. & Wilson Limited and the said agreement of indemnity is hereby ratified and confirmed and Smith Bros. & Wilson Limited hereby authorizes and confirms the entering into of the agreement marked as Schedule hereto.

In the statement of defence as originally delivered the respondent's main defence was that the collapse of the structure had been caused by the default and negligence of the contractors and it specifically denied any negligence on its part or on the part of its employee, Palichuk. However, at the trial of the action the statement of defence was amended by order of the learned trial judge permitting the respondent to plead in the alternative that all damage alleged to have been suffered by the appellant had been paid to it in the following manner:

(a) By Western Surety Company, for and on behalf of Smith Bros. & Wilson Limited, paying the sum of $101,039.28 to the Plaintiff, the said Western Surety Company being the Surety named in a certain

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bond (numbered 01-1-4461 by Western Surety Company for the purposes of its own records) dated June 15, 1962, wherein the Plaintiff was named as Obligee and Smith Bros. & Wilson Limited as Principal, the condition of which was that if the said Smith Bros. & Wilson Limited should well and truly indemnify and save harmless the City of Prince Albert from any pecuniary loss resulting from the breach by it (that is by Smith Bros. & Wilson Limited) of any of the terms, covenants, and conditions of the said contract the obligation under the said Bond should be void otherwise to remain in full force and effect; and

(*b*) By holding back from payment to Smith Bros. & Wilson Limited under the provisions of said contract dated the 25th day of April, 1962, the sum of $48,152.60 or thereabouts and applying said sum plus said sum of $101,039.28 to the cost of completing the construction work required to be done by Smith Bros. & Wilson Limited under its said contract with the Plaintiff.

and there was filed in evidence an admission of facts by the appellant as follows:

1. That Smith Bros. & Wilson Limited, on or shortly before June 2nd, 1964, paid the sum of $101,039.28 to Western Surety Company.
2. That Western Surety Company paid said sum of $101,039.28 to the Plaintiff on June 2nd, 1964.
3. That on June 2nd, 1964 Western Surety Company entered into an Agreement with the Plaintiff, a true copy whereof is hereunto annexed and marked "A".
4. That on June 2nd, 1964 Western Surety Company entered into an Agreement with Smith Bros. & Wilson Limited a true copy whereof is hereunto annexed and marked "B".
5. That Western Surety Company has no interest in this action excepting only as may be evidenced by said Agreements marked "A" and "B".
6. That Smith Bros. & Wilson Limited procured and paid for the bond described in the Statement of Defence wherein the Plaintiff is named as "Obligee", Western Surety Company as "Surety" and Smith Bros. & Wilson Limited as "Principal".

The agreements referred to as "A" and "B" in the foregoing admission of facts are the agreements of June 2, 1964, previously referred to. In substance the defence thus put forward by the respondent on this branch of the case is that the surety company did not become subrogated to the rights of the appellant and the appellant having received the reservoir it contracted for at no extra cost to it, had no right of action.

The respondent contended also that the action was a champertous one and that the agreement between the appellant and the surety company of June 2, 1964, was *ultra vires* the powers of the appellant and it also contended that the appellant was estopped from asserting a

claim against the respondent because of having acted upon the respondent's certificate of February 25, 1963, previously referred to.

The contention based on the subrogation issue was fully gone into by the learned trial judge and I am in agreement with him that the surety company became an assignee by way of subrogation and by virtue of the agreement of June 2, 1964, to which the appellant had to give effect by allowing the action to be taken in its name. I agree with the learned trial judge and with Maguire J.A. that no element of champerty or maintenance arises here.

In any event it is significant to point out as was done by Woods J.A. in his dissenting judgment that the action is in the name of the appellant only; that neither the surety company nor the contractor claims any status in the action.

The contention that the action is champertous having failed, nothing stands in the way of the appellant being entitled to judgment against the respondent for the breach of their contract as found by the learned trial judge unless the payment made by the surety under the agreement of June 2, 1964, extinguished the appellant's right to recover from the respondent. The case of *Campbell* previously cited arose out of somewhat similar circumstances. The facts in *Campbell's* case were: the plaintiffs employed a firm of architects to draw plans and specifications for a building and to superintend the construction thereof; and entered into a contract with a firm of builders to erect the building. The plaintiffs brought an action against the builders for breach of the building contract by placing defective materials in the building, and another action against the architects for negligence in supervising the construction by reason of which the defective material was not condemned. The actions were begun on the same day. The trial judge, Latchford J., consolidated the two actions and found that both the architects and the builders were in breach of their separate and distinct contracts and gave judgment against both for the damages sustained by the owners. Both the architects and the builders appealed, the former as to liability and the latter on quantum only.

The architects argued that the owners were bound to elect which set of defendants they would sue and that the judgment against the builders was a bar against the owners

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being given judgment against the architects. The Court of Appeal held that as the Rules then read, the actions should not have been consolidated, but regardless of the error in procedure held that the judgment against the architects was proper. In the result the owners had judgment against both the architects and the builders.

It is in this context that Riddell J.A. said at p. 280:

> It is true that, if the full amount of the damages were realised out of the contractors, no action (except perhaps for nominal damages) would lie against the architects, but that is on an entirely different principle, namely, that the plaintiffs have suffered no damage from the default of the architects.

That sentence came after he had said:

> "Where there are joint and several contracts, or joint and several debts, or where the several parties are independently and collaterally bound by the same obligation, the recovery of judgment against one of such separate contractors or separate debtors is no bar to an action against the others, until the judgment has been satisfied:" Addison on Contracts, 11th ed., p. 193. This is as old as Queen Elizabeth's time (*Blumfield's Case* (38 & 39 Eliz.), 5 Co. R. 86 B), and cannot be doubted. See *per* Montague Smith J., giving the judgment of the Court in *Vestry of Bermondsey v. Ramsey* (1871), L.R. 6 C.P. 247, at p. 251; *per* Stirling J. in *Blyth v. Fladgate,* [1891] 1 Ch. 337, at p. 353. And it makes not the slightest difference that the amount secured by the independent contracts is the same and for the same debt.
>
> * * *
>
> In the present case, the plaintiffs had two separate and distinct contracts, the one with the contractors, which was in writing, the other with the architects, which was, as in *Jameson v. Simon,* (not in writing but) implied from the employment. The contractors broke their contract when they put bad material into the building; at the same moment the architects broke theirs because they allowed this to be done. Under the circumstances, the damages are the same under either contract; but that is wholly immaterial. The contracts are not the same; and, if judgment were to be obtained in the action against the contractors, it would destroy their contract *quoad hoc,* but it could not affect the contract of the architects—that *non transit in rem judicatum,* but remains a simple contract.

and following the sentence above quoted, he continued:

> The result is, that the plaintiffs are entitled to judgment against both the contractors and the architects, and that is what the judgment in appeal gives them.
>
> * * *
>
> The plaintiffs might have insisted on a judgment in both cases with costs, either set of defendants to be at liberty to move, in the nature of an *audita querela,* to stay their action on payment of costs if and when the amount was made out of the other set, and either set of defendants to be at liberty to bring an action to recover from the other any sum paid by them, etc. (I do not suggest that any such action will lie on the facts, but the defendants should not be precluded from litigating the question if so advised.)

The case of *Imperial Bank of Canada v. Begley*[9] is authority for the proposition that a person who has suffered a loss and who has separate causes of action against two or more persons to recover the amount of that loss, cannot recover more than the total amount of the loss. That situation does not arise here. The city will not recover more than its actual loss. Under the agreement of June 2, 1964, it must account to the surety for all moneys it may recover in this action.

The payment made by the surety to the appellant was not, in my opinion, a "realization" out of the contractors as stated by Riddell J.A., or a recovery within *Imperial Bank of Canada v. Begley*. Here the payment was conditional, the condition being as set out in para. 2 of the agreement of June 2, 1964, previously quoted. If the appellant had not permitted the action to be brought in its name it would have had to refund the money it got under that agreement. The surety was potentially liable to the appellant under the performance bond because, whatever the reason may have been, the reservoir was not constructed within the time provided, and if liable under the bond the surety had the right to be reimbursed by the contractors. The fact that it received reimbursement prior to or simultaneously with payment to the appellant is immaterial. That does not alter the conditional character of the payment, and it is important to note that in the agreement between the appellant and the surety the appellant did not purport to release the respondent nor the contractors, but specifically provided that the surety company should be subrogated to all the right and remedies of the appellant against the contractors as well as against the respondent or any other persons arising out of the failure of the reservoir structure. In this way litigation between the appellant and the surety was no doubt avoided and the rights of the surety preserved.

Under Saskatchewan Rule of Court 48, the contractors could have been brought into the action by the respondent as parties "...whose presence before the Court may be necessary, in order to enable the Court effectually and completely to adjudicate and settle all the questions involved in the cause or matter..." and the rights of these

[9] [1936] 2 All E.R. 367.

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parties *inter se* dealt with, but for reasons best known to the respondent this was not done. The action, accordingly, falls to be disposed of in the form in which it was dealt with at the trial, in the Court of Appeal and in this Court.

On the record before this Court the appellant is entitled to succeed. There has been no judicial determination of negligence against the contractors. The respondent sought to overcome this fact by contending that the payment by the contractors through the surety to the appellant was the equivalent of such a determination, or, alternatively, was an admission of the contractors' liability. However, in view of the position taken by the contractors and by the surety in their respective letters of January 3, 1963, and March 14, 1963, and the findings of the learned trial judge previously quoted, that contention is not tenable. There has not been a "realization" of the appellant's damages from the contractors nor a payment of those damages by the contractors in the procedure which was adopted in this instance. The contractors were not relieved of their liability by the payment but that liability, if any, was specifically continued by the agreement of June 2, 1964.

There remain the defences of estoppel and *ultra vires* to deal with. First, as regards estoppel, this contention cannot succeed. There were no representations of fact made by the appellant to the respondent which the respondent acted upon to its prejudice nor was any prejudice alleged.

As to the defence that the agreement of June 2, 1964, between the appellant and the surety company was *ultra vires* the appellant, it should first be noted that this defence was not raised in the pleadings nor was it referred to in the judgments below. In any event it cannot be said that the appellant had not the power to stipulate for the indemnity bond from the contractors. Having received the indemnity bond, the appellant had the right to assert a claim under it and it must follow that it necessarily had the right to receive payment, and having received payment it became by the process of subrogation answerable to the surety for any damages it might recover. Nor can it be contended that the appellant had not the right to sue for a breach of the contract. The mere existence of the in-

demnity bond could not extinguish the appellant's right to recover damages from the respondent if the contract with it was breached as found by the learned trial judge.

The learned trial judge allowed as part of the appellant's damages an item of $17,573.57 being the fee paid the respondent for services in respect of the construction in question including the plans and specifications used both before and after the collapse. Counsel for the appellant admitted here and in the Court of Appeal that not all such fees had been thrown away by reason of the collapse. This clearly follows from the dismissal of the claim for faulty design. The structure was actually completed according to the original plans and specifications. I am in agreement with Maguire J.A. that the onus was on the appellant to establish what portion, if any, of the $17,573.57 was so thrown away and in the absence of such evidence the Court cannot speculate on the amount. The award of this item cannot stand and the judgment should be varied accordingly.

The appeal will, therefore, be allowed subject to this variation with costs here and in the Court of Appeal.

Appeal allowed and judgment at trial restored subject to a variation as to quantum, with costs, CARTWRIGHT C.J. *and* SPENCE J. *dissenting.*

Solicitors for the plaintiff, appellant: Embury, Molisky, Gritzfeld & Embury, Regina.

Solicitors for the defendant, respondent: Schmitt, Robertson, Muzyka, Beaumont & Barton, Saskatoon.

1968
*Oct. 16
1969
Jan. 28

J. HAROLD WOOD ..... APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Income or capital gain—Mortgage acquired at a discount—Whether amount of discount collected at maturity income —Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 139(1)(e).

Between 1956 and 1963, the appellant, a solicitor, acquired eight first mortgages and five second mortgages, all but two of them at a discount. The appellant's investments were made entirely from savings not from borrowings, and his income from this source was a relatively modest part of his gross income. In 1962, he was assessed for income tax on $700, being the amount of a discount he collected on a mortgage acquired in 1957 and paid off in full at maturity. The Tax Appeal Board upheld the assessment. The Exchequer Court found that it "was income from a source within the meaning of the opening words of s. 3 of the *Income Tax Act*". The appellant was granted leave to appeal to this Court, where the issue was as to whether the discount was a profit from a business or adventure in the nature of trade by virtue of s. 139(1)(*e*) of the Act or whether it was a capital gain.

Held: The appeal should be allowed.

The amount received in 1962 represented a capital gain and not taxable income. The appellant's purchases were made entirely from savings, were not speculative and were made after inspection of each property. This pattern of activities was consistent with the making of personal investments out of savings and not with the carrying on of a business.

Revenu—Impôt sur le revenu—Revenu ou gain en capital—Hypothèque acquise à escompte—Le montant de l'escompte perçu à l'échéance est-il un revenu—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 3, 139(1)(e).

Durant les années 1956 à 1963, l'appelant, un avocat, a acquis huit premières hypothèques et cinq secondes hypothèques. Elles ont été acquises à escompte à l'exception de deux. Les placements de l'appelant provenaient de ses économies et non pas d'emprunts, et son revenu de cette source formait une faible partie de son revenu total. En 1962, le Ministre a cotisé l'appelant pour impôt sur le revenu sur $700, montant d'un escompte perçu d'une hypothèque acquise en 1957 et entièrement payée à l'échéance. La Commission d'appel de l'impôt a confirmé la cotisation. La Cour de l'Échiquier a statué que ce montant était un revenu d'une provenance dans le sens de ces mots au début de l'art. 3 de la *Loi de l'impôt sur le revenu*. L'appelant a obtenu la permission d'en appeler à cette Cour, où la question à

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*PRESENT: Abbott, Judson, Ritchie, Hall and Pigeon JJ.

déterminer était de savoir si l'escompte était un profit d'une entreprise ou d'une initiative d'un caractère commercial en vertu de l'art. 139(1)(*e*) de la Loi ou s'il s'agissait d'un gain en capital.

Arrêt: L'appel doit être accueilli.

Le montant reçu en 1962 représentait un gain en capital et non pas un revenu imposable. Les achats de l'appelant ont été faits entièrement à même ses économies, n'étaient pas spéculatifs et ont été faits après que l'appelant eut visité les lieux. Cette manière de procéder était compatible avec le placement personnel d'argents provenant d'économies et non compatible avec l'exploitation d'une entreprise.

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada[1], en matière d'impôt sur le revenu. Appel accueilli.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada[1], in an income tax matter. Appeal allowed.

F. Stewart Fisher, for the appellant.

G. W. Ainslie and *J. R. London,* for the respondent.

The judgment of the Court was delivered by

ABBOTT J.:—The appellant, a solicitor who has practised law in the City of Toronto since 1928, was at all material times a member of the firm Mackenzie, Wood & Goodchild. That firm had a general practice which included a "fairly substantial mortgage practice".

The firm, on behalf of clients, managed or supervised the collection of moneys lent on the security of mortgages and, between 1956 and 1963, the appellant had acquired personally an interest in thirteen mortgages. Eleven of these mortgages were acquired at a bonus or discount.

In July 1957, appellant, in association with a client, bought a first mortgage on which the amount then owing was $8,500 for principal, with interest at the rate of 6½ per cent per annum. The term of the mortgage was five years. Appellant and his client paid the sum of $7,100 each of them putting up one-half of the purchase price. The mortgage was paid off in full at maturity in July 1962.

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[1] [1967] 1 Ex. C.R. 199, [1967] C.T.C. 66, 67 D.T.C. 5045.

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Appellant was assessed for income tax in 1962 on $700 being his share of the discount on the said mortgage that he had collected in that year.

Before the Tax Appeal Board, the assessment was upheld on the finding, not that it was a profit from a business but that "it was a *quasi-bonus*", and therefore "interest *per se*".

In the Exchequer Court[2], Gibson J. did not wish to pass on the soundness of that conclusion and did not choose (those are his words) to make a finding that this was profit from a business. He expressly founded his decision on the basis that this "was income from a source within the meaning of the opening words of Section 3 of the *Income Tax Act*" adding:

> as far as I know there is no decision of this Court or of the Supreme Court of Canada in which a question of this kind has been resolved by deciding that such a discount was income from a "source" within the meaning of the opening words of s. 3 of the Act, without deciding whether it was income from any of the particular sources detailed in s. 3 or elsewhere in the Act.

From this judgment, appellant gave notice of appeal to this Court as of right, without apparently realizing that, due to the rate of tax payable, the actual amount in controversy was less than $500. Respondent also appears to have overlooked this point and did not move to quash but, on the contrary, signed an agreement as to the contents of the case and did not object to the appeal being inscribed for hearing. Before it came on for hearing, however, appellant applied for special leave to appeal and, in view of the importance of the question of law involved in the decision sought to be appealed from, leave to appeal was granted[3] by my brother Pigeon.

At the hearing before this Court, counsel for the Crown abandoned the contention that the payment of $700 received by appellant in 1962 was interest and conceded that the issue of the appeal turns upon a finding as to whether or not the said sum was profit from a business or adventure in the nature of trade by virtue of para. (*e*) of subs. 1 of s. 139 of the *Income Tax Act*.

Although certain specified receipts are declared to be income for the purposes of the Act, the *Income Tax Act*

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[2] [1967] 1 Ex. C.R. 199, [1967] C.T.C. 66, 67 D.T.C. 5045.

[3] [1968] S.C.R. 957, [1968] C.T.C. 446, 68 D.T.C. 5291.

does not purport to define income, it simply describes it. Section 3 mentions the three main sources of income (1) business (2) property and (3) offices and employment, but without restricting the general meaning of income as being income from all sources.

The task of determining the meaning of income for income tax purposes has been left to the courts. The English courts, whose decisions on this point the Canadian courts tend to follow, have determined the meaning of income for tax purposes without reliance upon economic theory. Income is to be understoood in its plain ordinary sense and given its natural meaning.

Since income tax is levied on an annual basis and capital gains are not included in income for tax purposes, it is necessary to determine whether a particular receipt, in a particular taxation year, is an income receipt or a capital receipt. In the case of a mortgage discount, such as the one in issue in this appeal, it is now well settled that the answer to that question depends upon whether the amount received should be classified as income from a business or as an accretion to capital.

In *Scott v. Minister of National Revenue*[4], Judson J., after reviewing a line of cases in the Exchequer Court dealing with this problem, in some of which it was held that the taxpayer was engaged in investment, and in others in a scheme for profit-making, said at p. 225:

> This diversity of opinion is understandable when the decision must depend upon a full review of the facts in each case for the purpose of determining whether the discounts can be classified as income from a business. Even on the same facts, there is room for disagreement among judges on the conclusions that should be drawn from these activities of a taxpayer, for the Act nowhere specifically deals with these discounts, as it does, for example, in s. 105 (*a*) with shares redeemed or acquired by a corporation at a premium. It is possible to deal expressly with the problem and the Act had not done so.

The appellant's investments, including investments in mortgages, were made entirely from savings not from borrowings, and his income from this source, including income from stocks and bonds, was a relatively modest part of his gross income. During the period from 1956 to 1963 inclusive, the appellant acquired eight first mortgages and

[4] [1963] S.C.R. 223, [1963] C.T.C. 176, 63 D.T.C. 1121, 38 D.L.R. (2d) 346.

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five second mortgages all but two of them at a discount or bonus. This represents an average of one and one-half mortgages per year. The particulars of these mortgages are as follows:

1956 — 1 mortgage — $7,000
1957 — 1 mortgage — $7,100 (½ interest)
1958 — No mortgages
1959 — 1 mortgage — $2,500
1960 — 2 mortgages — $6,600
1961 — 4 mortgages — $22,412.20
1962 — 1 mortgage — $4,000.00 (no bonus or discount)
1963 — 3 mortgages — $17,000.00 (no bonus or discount)

As stated, appellant acquired his one-half interest in the mortgage in issue here in 1957, and it was the only acquisition in that year. Appellant's purchases were not speculative and, according to his evidence, they were made after he had inspected each property and reached a decision that each mortgage was a safe investment for him.

In my opinion, this pattern of appellant's activities was consistent with the making of personal investments out of his savings and not with the carrying on of a business. It follows that the amount of $700, received in 1962, represented a capital gain and not taxable income.

I would allow the appeal and direct that the assessement be referred back for reconsideration in accordance with these reasons. The appellant is entitled to his costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: MacKenzie, Wood & Goodchild, Toronto.

Solicitor for the respondent: D. S. Maxwell, Ottawa.

DELBERT R. WRIGHT .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1968
*Nov. 13, 14, 15
1969
Jan. 28

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Criminal law—Non-capital murder—Drunkenness—Provocation—Whether jury properly instructed on provocation—Criminal Code, 1953-54 (Can.), c. 51, s. 203.

After an absence of some five years, the appellant returned to visit his parents. A few days after his arrival he purchased a revolver. This act infuriated his father who was still in an angry mood when he arrived home from work that night. The appellant, who had spent most of the day drinking beer with friends, telephoned home to say that he would spend the night with his grandfather. The father then went to the grandfather's home, walked in without knocking, went straight to his son and demanded the gun. The appellant replied that he was 21 and fired three shots at his father killing him. The appellant was charged with non-capital murder and was convicted of manslaughter. The Crown appealed on the ground particularly that the trial judge erred in his directions on the question of provocation. The Court of Appeal ordered a new trial on the charge of non-capital murder. The accused appealed to this Court.

Held: The appeal should be dismissed.

Assuming that there was any evidence of provocation, within the meaning of s. 203 of the Code, to go to the jury, the instructions given to the jury, with respect to the test governing provocation, were inadequate and the verdict might have been different had they been rightly directed in the matter. The determination of the question whether there had been any provocation sufficient to reduce the charge to manslaughter was subject to the dual test stated in s. 203(2) of the Code. The first is an objective test in which one must consider the effect, on an ordinary person, of the particular wrongful act or insult relied on. The character, background, temperament, idiosyncracies or drunkenness of the accused are excluded from the consideration on this first test. If that first test is satisfied, then the second, a subjective test, is to determine whether the accused acted actually upon the provocation, on the sudden and before there was time for his passion to cool. In the present case, one can hardly escape the conclusion that the jury must or may have been left with the impression that the test was whether the conduct of the appellant's father was of such a nature as to deprive—not the ordinary man but—the accused himself of the power of self control.

Droit criminel—Meurtre non qualifié—Ivresse—Provocation—Directives au jury sur la question de provocation non adéquates—Code criminel, 1953-54 (Can.), c. 51, art. 203.

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*PRESENT: Fauteux, Judson, Ritchie, Hall and Pigeon JJ.

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WRIGHT
v.
THE QUEEN

Après une absence de quelque cinq années, l'appelant est revenu visiter ses parents. Quelques jours après son arrivée, il a acheté un pistolet. Ceci a considérablement irrité son père qui était encore en colère lorsqu'il est arrivé chez lui ce soir-là après son travail. L'appelant, qui avait passé presque toute la journée à boire de la bière avec des amis, a téléphoné à la maison pour dire qu'il passerait la nuit chez son grand-père. Le père est alors allé chez le grand-père, est entré dans la maison sans frapper, s'est dirigé directement vers son fils et a demandé le pistolet. L'appelant a répondu qu'il avait 21 ans et a tué son père en lui tirant trois balles. L'appelant a été accusé de meurtre non qualifié et a été trouvé coupable d'homicide involontaire coupable. La Couronne s'est pourvue en appel pour le motif principalement que le juge au procès avait donné des directives erronées sur la question de provocation. La Cour d'appel a ordonné un nouveau procès sur l'acte d'accusation de meurtre non qualifié. L'accusé en appela à cette Cour.

Arrêt: L'appel doit être rejeté.

Prenant pour acquis qu'il y avait une preuve de provocation, dans le sens de l'art. 203 du Code, pouvant aller au jury, les directives données au jury sur le critère relatif à la provocation, n'étaient pas adéquates et le verdict aurait pu être différent si le jury avait reçu des directives appropriées. La détermination de la question de savoir s'il y a eu provocation suffisante pour réduire l'acte d'accusation à un d'homicide involontaire coupable dépend du double critère énoncé à l'art. 203(2) du Code. Le premier est un critère objectif dans lequel on doit considérer l'effet, sur une personne ordinaire, de l'action injuste ou de l'insulte en question. Le caractère de l'accusé, ainsi que ses antécédents, son tempérament, ses manies ou son ivresse sont exclus de la considération dans ce premier critère. Si ce premier critère est satisfait, alors par le second, un critère subjectif, on doit déterminer si l'accusé a agi actuellement en vertu de la provocation, sous l'impulsion du moment et avant d'avoir eu le temps de reprendre son sang-froid. Dans le cas présent, on peut difficilement éviter la conclusion que le jury doit ou peut avoir été laissé sous l'impression que le critère était de savoir si la conduite du père de l'appelant était de nature à priver—non pas l'homme ordinaire mais—l'accusé lui-même du pouvoir de se maîtriser.

APPEL d'un jugement de la Cour d'appel de la Saskatchewan[1], ordonnant un nouveau procès. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], ordering a new trial. Appeal dismissed.

Brian A. Crane, for the appellant.

Serge Kujawa, for the respondent.

The judgment of the Court was delivered by

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[1] (1968), 3 C.R.N.S. 136, [1968] 3 C.C.C. 168.

1969

WRIGHT v. THE QUEEN

FAUTEUX J.:—The appellant has been charged that he did, on the 20th day of December 1966, at Moosomin, Saskatchewan, unlawfully kill his father, Frank Albert Wright, thereby committing the offence of non-capital murder. Tried at Moosomin, in April 1967, before Davis J. and a jury, he was acquitted of this offence and found guilty of the lesser offence of manslaughter.

Pursuant to s. 584(1)(*a*) Cr. C., the Crown appealed from this verdict to the Court of Appeal for Saskatchewan. By a unanimous judgment, the Court of Appeal[2], allowed the appeal, set aside the verdict of manslaughter and ordered a new trial on the charge of non-capital murder.

Appellant now appeals from this Order pursuant to s. 597(2)(*a*) of the *Criminal Code*.

It is convenient to say immediately that we all agree that, for the reasons hereafter stated, there should be a new trial. In these circumstances, only what is essential to our decision should be said.

The evidence shows, beyond per adventure, that the father died as the result of being shot three times by his son, in the early hours of the 20th of December 1966. The circumstances leading to this tragedy are set out in detail in the reasons for judgment of the learned Chief Justice of Saskatchewan who delivered the judgment of the Court of Appeal. For the purpose of our decision, the following summary will, I think, be sufficient. Appellant was then 25 years old, married with one child. A few days before the fatal occurrence, namely on the 11th of December, he had returned from British Columbia to Moosomin, to visit his parents whom he had not seen since he had left for British Columbia in 1961. Prior to 1961, he was living with them in Moosomin and there is some evidence that, during that period, there were difficulties between him and his father who is said to have been a bad tempered and violent man and to have, on many occasions, abused and slapped his son. However, during this visit, the relationship was and remained happy and cordial until some time after 9.30 p.m. on December the 19th when, at

[2] (1968), 3 C.R.N.S. 136, [1968] 3 C.C.C. 168.

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Fauteux J.

the beverage room of the Queen's Hotel where he was employed as a tapman, the father was informed by one Bernie Myers, a friend of the appellant, that his son had just bought a revolver from him. The father then became infuriated and was still in an angry mood when he arrived home shortly after midnight accompanied by one Norman Hoey. He and his wife were worried that their son might commit suicide. Concerned with the whereabouts of his son, the father had enquiries made at the residence of the latter's maternal grandfather, Henry Hnatyczyn, and also at the residence of Myers. The appellant who had spent most of the day drinking beer with friends at the Queen's Hotel beer parlour and other places, arrived at his grandfather's home at about 2.15 in the morning of December 20th, after having had a late meal. He telephoned to his parents' place and informed his mother, who answered the call, that he would spend the night at his grandfather's. The mother testified that before she could hang up the telephone, the father shoved her, grabbed the telephone, said a few words and became furious as the son hung up on him. And the mother added that her husband then said *I am going down there to get that goddam gun and I'll beat some brains into him that should have been done when he was a kid.* Thereupon, appellant's father left, drove Hoey home and went to Hnatyczyn's residence. He entered the house through the porch door, without knocking, went straight to his son and with a voice showing authority and anger, said *give me the gun.* To this, appellant replied *I am twenty-one* and he then fired the three shots at his father. A few minutes later, appellant called the police and said *I shot my father, come and get me.*

In defence, the accused pleaded that he was affected by alcohol to a point of losing the capacity to form the intent requisite in a case of non-capital murder and he also pleaded that he killed his father in the heat of passion caused by sudden provocation. On either grounds, the jury were invited by defence counsel to return—as they subsequently did—a verdict of manslaughter and not of non-capital murder. Hence the appeal of the Crown against this verdict.

In the Court of Appeal, the Crown's complaints were directed particularly to the matter of provocation as to which it was submitted (i) that the trial Judge had erred in law in holding that there was some evidence of a wrongful act or insult, within the meaning of s. 203 of the *Criminal Code,* upon which the defence of provocation could be founded, and (ii) alternatively, that the trial Judge had erred in law in failing to instruct the jury adequately as to the test to be applied in the consideration of a plea of provocation. On the first submission, the Court of Appeal held that the evidence upon which the trial Judge relied, and upon which he instructed the jury, was not evidence of provocation within s. 203 Cr. C., but declared that it was not saying that there may not have been, in evidence, evidence of provocation to go to the jury. On the second and alternative submission, the Court of Appeal found that there was a serious error in law in the trial Judge's charge, in that, in dealing with the question whether the provocative conduct of the victim was of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, he failed to instruct the jury that no consideration should be given to the quality of the relationship between the son and his father, or to the mentality of the son or to the fact that his mind may have been affected by alcohol. And the Court of Appeal, being satisfied that had there been no such error the verdict of the jury would not necessarily have been the same, directed the verdict of manslaughter to be set aside and ordered a new trial on the charge of non-capital murder.

We find it unnecessary to say anything and we are saying nothing on the question whether, as contended for by counsel for the appellant, there was, in evidence, any evidence of provocation—*within the meaning of section 203* —to go to the jury for, assuming that there was any, we are, for the reasons hereafter stated, in respectful agreement with the Court of Appeal that the instructions given to the jury, with respect to the test governing provocation, were inadequate and that the verdict might have been different had they been rightly directed in the matter.

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WRIGHT v. THE QUEEN

Fauteux J.

The determination of the question whether there had been any provocation sufficient to reduce a culpable homicide from non-capital murder to manslaughter is subject to the dual test stated in s. 203(2):

203.(1) . . .

(2) A wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted upon it on the sudden and before there was time for his passion to cool.

One must then first consider the effect, on an *ordinary person,* of the particular wrongful act or insult relied on. In the words of Lord Simonds, L.C., the purpose of this objective test is . . . *to invite the jury to consider the act of the accused by reference to a certain standard or norm of conduct and with this object the "reasonable" or the "average" or the "normal" man is invoked. Bedder v. Director of Public Prosecutions*[3]. It is not enough, therefore, that an accused acted in a blind rage, if this first requirement of s. 203(2) is not satisfied. If it is satisfied, then the second branch of the enquiry, or the subjective test, is to determine whether the accused acted actually upon the provocation, on the sudden and before there was time for his passion to cool. While the character, background, temperament, idiosyncracies, or the drunkenness of the accused are matters to be considered in the second branch of the enquiry, they are excluded from the consideration in the first branch. A contrary view would denude of any sense the objective test. On this aspect of the matter, one may refer to what was said by Lord Simonds, L.C., at page 804, in the *Bedder* case, *supra:*

It was urged on your Lordships that the hypothetical reasonable man must be confronted with all the same circumstances as the accused, and that this could not be fairly done unless he was also invested with the peculiar characteristics of the accused. But this makes nonsense of the test. Its purpose is to invite the jury to consider the act of the accused by reference to a certain standard or norm of conduct and with this object the "reasonable" or the "average" or the "normal" man is invoked. If the reasonable man is then deprived in whole or in part of his reason, or the normal man endowed with abnormal characteristics, the test ceases to have any value. This is precisely the consideration which led this House in Mancini's case (1) to say that an unusually excitable or pugnacious person is not entitled to rely on provocation which would not have led an ordinary person to act as he did.

[3] [1954] 2 All E.R. 801 at 804, 38 Cr. App. R. 133.

In *Salamon v. The Queen*[4], this Court, with a similar view of the law as to this aspect of the matter, indicated that, on the first branch of the enquiry, the jury should be directed that no consideration should be given to the peculiar or abnormal characteristics with which the accused may personally be invested. In the present case, nowhere either in the charge or the re-charge, can such a direction be found. On the contrary and notwithstanding that the provisions of s. 203(2) were read to the jury, on a consideration of all that was said to them by the trial Judge, one can hardly escape the conclusion that they must or may have been left with the impression that the test was whether the conduct of appellant's father was of such a nature as to deprive—not the ordinary man but—the accused himself of the power of self-control.

For these reasons, we cannot accede to appellant's submissions that the jury were adequately directed with respect to the test governing provocation.

The appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitor for the respondent: The Attorney General of Saskatchewan, Regina.

[4] [1959] S.C.R. 404, 30 C.R. 1, 123 C.C.C. 1, 17 D.L.R. (2d) 685.

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*Mai 23, 24
Déc. 20

RENATE KUNGL (*Demanderesse*) .....APPELANTE;

ET

THE GREAT LAKES REINSURANCE COMPANY et MALCOLM HERBERT BLAKELY (*Tiers-saisis*) .....INTIMÉS;

ET

JEAN MARIEN (*Intervenant*) .....INTIMÉ;

ET

LAURIER CYR et LAURENT LANGEVIN (*Défendeurs*).

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Assurance—Automobile—Compagnie d'assurance en faillite—Saisie-arrêt pratiquée entre les mains du réassureur—Le réassureur est-il un coassureur—S'agit-il d'une stipulation pour autrui—Le traité de réassurance est-il un contrat de société—Code civil, art. 1029, 1031, 1830, 1831, 2468.

A la suite d'un accident d'automobile, la demanderesse a obtenu un jugement contre C, propriétaire de l'automobile, qui subséquemment se mit en faillite, et dont la compagnie d'assurance P N a été mise en liquidation. La compagnie P N avait un traité de réassurance avec la compagnie G L, visant 75 pour cent de la responsabilité totale, et un autre traité avec la compagnie L pour toute perte excédant $12,500. La demanderesse a pris une saisie-arrêt en exécution de son jugement entre les mains de la compagnie G L et du représentant de L. Les tiers-saisis firent une déclaration négative qui fut contestée. La Cour supérieure et la Cour d'appel ont rejeté la contestation de la déclaration des tiers-saisis. La demanderesse en appela à cette Cour.

Arrêt: L'appel doit être rejeté.

La compagnie G L n'était pas un coassureur. La police d'assurance délivrée à C ne mentionne que la compagnie P N. Il est impossible de trouver dans les traités de réassurance un texte pouvant être interprété comme une stipulation pour autrui, à savoir en faveur des assurés de la compagnie P.N. Comme créancière de C, la demanderesse ne peut pas se prévaloir des dispositions de l'art. 1031 du *Code civil*. Le dossier fait voir que le tribunal chargé de surveiller la liquidation de la compagnie P N a spécifiquement autorisé le liquidateur à intervenir pour soutenir qu'il lui appartenait de toucher tous les montants dus par les tiers-saisis.

On ne peut pas voir dans les traités de réassurance un contrat de société. Le traité avec la compagnie L ne prévoit pas de partage de profits. Quant à la compagnie G L, le seul fait de participer dans les profits

CORAM: Les Juges Fauteux, Judson, Ritchie, Spence et Pigeon.

d'une compagnie n'entraîne pas une présomption de société. Dans le cas présent, l'intention était de faire une convention de réassurance. La compagnie G L n'entendait pas se rendre responsable de la totalité des obligations de la compagnie P N. De plus elle entendait se lier uniquement envers la compagnie avec laquelle elle traitait et non pas envers les assurés de cette dernière. La jurisprudence de la common law, dont les règles sur la formation du contrat de société semblent identiques à celles du droit québecois, paraît fixée dans le sens qu'un traité de réassurance avec participation aux profits ne constitue pas un contrat de société. Enfin, le traité de réassurance avec la compagnie G L n'a pas donné naissance à une société non déclarée.

Insurance—Automobile—Insurer bankrupt—Seizure by garnishment against reinsurer—Whether reinsurer a coinsurer—Whether contract of reinsurance a stipulation for the benefit of third persons—Whether contract of reinsurance a contract of partnership—Civil Code, art. 1029, 1031, 1830, 1831, 2468.

Following an automobile accident, the plaintiff obtained a judgment against C, the owner of the automobile who later declared bankruptcy, and whose insurer, the company P N, was ordered to be wound-up. The insurer P N had signed a contract of reinsurance with the company G L, covering 75 per cent of the total liability, and another contract with the company L for all losses in excess of $12,500. The plaintiff took a seizure by garnishment against G L and the agent of L. Both garnishees made a negative declaration which was contested. The Superior Court and the Court of Appeal dismissed the contestation of the garnishees' declaration. The plaintiff appealed to this Court.

Held: The appeal should be dismissed.

The company G L was not a co-insurer. The insurance policy in favour of C mentions only the name of the company P N. It is not possible to find in the reinsurance contracts anything capable of being interpreted as a stipulation for the benefit of third persons, in this instance the insured of company P N. As a creditor of C, the plaintiff could not exercise the rights conferred by art. 1031 of the *Civil Code*. The record discloses that the liquidator of the company P N was specifically authorized by the Court having jurisdiction over the winding-up to put in a claim for any moneys owed by the garnishees.

The contracts of reinsurance in this case are not contracts of partnership. The contract with the company L does not provide for participation in the profits. As to the company G L, the mere fact of the participation in the profits of a company does not create a presumption of partnership. In the present case, the intention was to make a contract of reinsurance. The company G L had no intention of assuming all of the obligations of the company P N. Moreover, it intended to oblige itself only towards the company with which it was contracting and not towards the insured of the latter. It is settled by the jurisprudence of the Common Law, the rules of which respecting the formation of a contract of partnership appear to be identical with the rules in Quebec, that a contract of reinsurance with participation in the profits does not constitute a contract of partnership. Finally, the contract of reinsurance with the company G L did not create an undeclared partnership.

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APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], dismissing an appeal from the judgment of Collins J. Appeal dismissed.

APPEL d'un jugement de la Cour du Banc de la reine, province de Québec[1], rejetant un appel d'un jugement du Juge Collins. Appel rejeté.

Roger Lacoste, c.r., et *Melville W. Smith,* pour la demanderesse, appelante.

Alastair M. Watt, c.r., pour les tiers-saisis, intimés.

Jean-Bernard Carisse, pour l'intervenant Marien, intimé.

Le jugement de la Cour fut rendu par

LE JUGE PIGEON:—Le 21 décembre 1956, Renate Kungl, l'appelante, alors mineure, a été victime d'un accident d'automobile causé par Laurier Cyr. Le 8 novembre 1963, un jugement a été rendu contre ce dernier à la poursuite de son tuteur pour la somme de $14,652.67 avec intérêts et dépens. Cyr se mit en faillite et Jean Marien fut nommé syndic. Il était assuré de la compagnie d'assurance La Protection Nationale mais celle-ci était devenue insolvable en 1958. Une ordonnance de mise en liquidation avait été rendue contre elle le 8 avril 1958 et le 22 juillet, Jean Marien avait été nommé liquidateur définitif.

La Protection Nationale avait trois traités de réassurance. Le premier avec la Great Lakes Reinsurance Company (Great Lakes), les deux autres avec les Lloyd's de Londres qui sont ici représentés par l'intimé Blakely. Le premier traité visait 75 pour cent de la responsabilité totale mais il était convenu que toutes pertes excédant $12,500 dans un même accident seraient réassurées jusqu'à concurrence de $287,500 et c'est ce qui faisait l'objet du premier traité avec les Lloyd's. L'autre ne nous intéresse pas.

Nonobstant la faillite de Cyr et la mise en liquidation de la Protection Nationale, une saisie-arrêt fut requise en exécution du jugement entre les mains de Great Lakes et du représentant autorisé des Lloyd's.

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[1] [1967] B.R. 717.

Les tiers-saisis firent une déclaration négative. Celle-ci ayant été contestée, le liquidateur intervint pour soutenir qu'il lui appartenait de toucher, pour le bénéfice de la masse des créanciers, tous montants dont les tiers-saisis pouvaient être redevables en vertu des traités de réassurance.

La Cour supérieure a rejeté la contestation de la déclaration des tiers-saisis et ce jugement a été confirmé par un arrêt unanime de la Cour d'Appel[2].

Le premier moyen de l'appelante consiste à soutenir que Great Lakes est en réalité un coassureur et non pas un réassureur. Dans son factum elle cite le passage suivant d'un ouvrage américain intitulé «Reinsurance» par Kenneth R. Thompson (3e éd., p. 9):

Coinsurance, as between insurers, approaches the practice of reinsurance. Several companies may issue a policy under a single name and each company under the policy is liable for a proportion of the loss. An agency may write the policy and the risk is then distributed automatically in several companies. The several insurers therefore take part by agreement in carrying the same risk.

When one insurer obligates itself to a single insured, and then splits the risk among several insurers who are obligated only to the first insurer, we have a case of internal coinsurance.

Where several insurers, through a single contract, are obligated directly to one insured, but the contract does not obligate the insurers to each other, then there exists a case of external coinsurance.

Ce texte est purement descriptif. Il ne dit rien des conséquences juridiques du cas qui nous intéresse et qui y est décrit comme «internal coinsurance».

Beaucoup plus intéressant est un arrêt de la Cour de Cassation du 9 juilet 1943: *Le Loyd's de Londres et Société Toplis and Harding c. Ruffié, Ragot et Piot* (Revue générale des Assurances terrestres, T. 14, pp. 234-236). Pour en apprécier la portée, il faut savoir qu'en France la Loi du 13 juillet 1930 décrète à l'article 4 ce qui suit:

Dans tous les cas où l'assureur se réassure contre les risques qu'il a assurés, il reste seul responsable vis-à-vis de l'assuré.

Le pourvoi invoquant ce texte a été rejeté par le raisonnement suivant:

Attendu que le pourvoi fait encore grief à l'arrêt attaqué de décider que la police litigieuse ne pouvait pas, malgré sa qualification expresse, être considérée comme un contrat de réassurance, mais qu'elle devait l'être comme un contrat comportant une stipulation pour autrui, conférant une action

[2] [1967] B.R. 717.

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directe au bénéficiaire de cette stipulation prétendue et de condamner en conséquence les Lloyd's de Londres à payer directement à Ruffié, assuré de la Compagnie La Bourgogne, le montant des condamnations prononcées contre ce dernier au profit de la veuve Barthier en raison de responsabilité civile; alors qu'il résulte des dispositions des articles 2 et 5 de la police litigieuse formellement invoquées dans les conclusions des demandeurs au pourvoi, auxquelles aucune réponse n'a été donnée, que des sommes, dues en vertu de la dite police, devaient être payées entre les mains de la Compagnie La Bourgogne et non pas entre celles de Ruffié, ce qui exclut juridiquement une stipulation pour autrui au profit de ce dernier;

Mais attendu que l'arrêt attaqué relève que la police Lloyd's fait siennes les clauses de la police qui lie La Bourgogne à Ruffié; qu'elle précise que la couverture des réassurances sera engagée en même temps que celle de La Bourgogne; que les conditions générales et spéciales de la police de La Bourgogne seront prises comme base en ce qui concerne le réassuré ou les personnes blessées; qu'elle donne compétence au Tribunal de la Seine et désigne des mandataires pour suivre la procédure en France;

Attendu que l'arrêt constate en fait que les Lloyd's se sont occupés directement des règlements relatifs à l'accident du 23 septembre 1934, en assurant même la défense de Ruffié et de son chauffeur devant la juridiction correctionnelle; que dès lors la Cour d'Appel a pu, par une interprétation de la police litigieuse qui n'en dénature pas les termes, lui reconnaître le caractère d'une coassurance et décider qu'une stipulation en faveur de Ruffié y était incluse sans qu'on puisse lui reprocher de n'avoir pas répondu aux arguments tirés par les Lloyd's des articles 2 et 5 de la police dont, d'ailleurs, l'un implique en opposition à la thèse du moyen une condamnation directement obtenue par la victime et l'autre est ambigu;

Ajoutons maintenant que le jugement de la Cour d'Appel d'Alger (Revue générale des Assurances terrestres, T. 10, 1939, pp. 253-8) fait voir qu'alors que la police avait été souscrite pour 2,000,000 de francs, la réassurance en couvrait 1,900,000. Que doit-on dire de ce précédent?

Notons tout d'abord que l'article 4 de la Loi de 1930 ne semble pas avoir été destiné à modifier l'état antérieur du droit. Les travaux préparatoires, dont on tient compte en France, le démontrent clairement. Le rapport de la Commission chargée de préparer l'avant-projet et celui de la Commission chargée de l'examiner disent tous deux au sujet de cet article:

La doctrine et la jurisprudence s'accordent à considérer que la réassurance ne crée aucun lien de droit entre l'assuré et le réassureur: l'article 36 du décret du 8 mars 1922 énonce d'ailleurs formellement ce principe, que notre article se borne à reproduire.

On lit dans Émérigon (Traité des Assurances et des Contrats à la grosse, T. 1, pp. 247-8, publié en 1782):

La Réassurance est absolument étrangère à l'Assuré primitif, avec lequel le Réassureur ne contracte aucune sorte d'obligation.

La chose ne concerne en rien l'Assuré primitif, lequel n'est point intervenu dans ce nouveau contrat.
Il suit de ce principe, que l'Assuré primitif ne peut exercer ni action directe, ni privilège sur la Réassurance.

La Cour de Cassation a cependant considéré que, bien qu'en principe le contrat de réassurance soit à l'égard de l'assuré un acte entre des tiers qui ne le concerne pas, cela ne signifie pas qu'il ne peut pas en être différemment dans des circonstances spéciales. Autrement dit, le contrat de réassurance est en principe l'affaire de l'assureur et du réassureur exclusivement, cependant, il n'est pas exclu qu'un lien de droit puisse être établi envers l'assuré. Comment cela peut-il se produire? Comment celui que l'on appelle réassureur peut-il être placé dans la situation de coassureur? C'est ce qu'il faut rechercher.

Il est bien évident que la première façon de constituer quelqu'un coassureur c'est de le rendre partie au contrat. Si la police d'assurance délivrée à Laurier Cyr au lieu de mentionner la Protection Nationale seule comme assureur avait également mentionné la Great Lakes, il y aurait clairement coassurance. Ce n'est évidemment pas notre cas. Il est clair que Laurier Cyr a contracté avec la Protection Nationale seule. Rien ne révèle qu'il ait entendu contracter avec la Great Lakes et on ne peut pas le présumer.

En droit français une relation contractuelle avec un tiers peut également se former par l'effet d'une stipulation pour autrui: Code Napoléon, article 1121, texte identique à l'article 1029 du Code civil du Québec:

1121. On peut pareillement stipuler au profit d'un tiers, lorsque telle est la condition d'une stipulation que l'on fait pour soi-même ou d'une donation que l'on fait à un autre. Celui qui a fait cette stipulation, ne peut plus la révoquer, si le tiers a déclaré vouloir en profiter.

C'est en croyant pouvoir trouver une stipulation pour autrui dans le contrat de réassurance intervenu avec les Lloyd's que la Cour d'Appel d'Alger a conclu à l'existence d'un lien de droit. Quant à la Cour de Cassation, il lui a suffi de dire que ce n'était pas dénaturer les termes du contrat que de l'interpréter ainsi.

Pour donner raison à l'appelante par application de la théorie de la stipulation pour autrui, il nous faudrait

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trouver dans les traités de réassurance un texte que nous puissions interpréter comme une stipulation en faveur des assurés. Cela nous est clairement impossible. On ne nous a rien signalé qui puisse révéler l'intention de stipuler un avantage envers les assurés de la Protection Nationale. Il faut donc dire qu'il est impossible d'appliquer dans la présente cause les principes de droit énoncés par la Cour de Cassation dans l'arrêt ci-dessus mentionné.

Les avocats de l'appelante nous ont également signalé deux décisions de la Cour d'Appel du Missouri. La plus récente est *O'Hare v. Purcell*[4]. Il s'agissait d'un contrat de réassurance par lequel la totalité des obligations d'un assureur était cédée à une autre compagnie désignée comme réassureur. Celle-ci ne s'engageait pas, comme les tiers-saisis dans la présente cause, à faire des paiements à l'assureur primitif mais bien à remplir toutes ses obligations envers ses assurés. Il y avait donc clairement stipulation pour autrui et on a jugé que la loi de cet État en faisait découler un lien de droit.

The law supplies the privity necessary for the insureds to maintain a direct action upon the contract of reinsurance. The bringing of suit is sufficient evidence of assent by the insureds to the Treaty.

On ne conclurait pas autrement dans le droit du Québec suivant l'article 1029 C.C. ainsi que cette Cour l'a fait dans *Hallé c. Canadian Indemnity Co.*[4], mais ce n'est pas notre cas.

On nous a également signalé un autre arrêt de la même Cour d'Appel dans une affaire qui présente beaucoup plus d'analogie. Il s'agit de *Homan v. Employers Reinsurance Corporation*[5]. Dans cette cause-là, les victimes d'un accident d'autobus ont été admises à recouvrer du réassureur de l'assureur de la compagnie propriétaire de l'autobus une partie de leur indemnité. Ce réassureur s'était obligé par traité à indemniser l'assureur de toutes pertes excédant $5,000 à l'égard d'une seule personne et de toutes pertes excédant $10,000 dans un même accident. Tout en admettant qu'en principe le contrat de réassurance ne fait pas

[3] (1960), 329 S. W. 2d 614.
[4] [1937] R.C.S. 368, 4 I.L.R. 259, [1937] 3 D.L.R. 320.
[5] (1940), 136 S. W. 2d 289.

naître de lien de droit entre l'assuré et le réassureur, on a conclu que la législation particulière de l'État avait pour effet non seulement de donner un recours direct à la victime d'accident contre l'assureur de l'auteur du dommage, mais aussi contre le réassureur de ce dernier. La décision repose donc uniquement sur l'interprétation d'un texte de loi dont on ne trouvait pas l'équivalent dans la législation du Québec à l'époque où l'accident qui a donné lieu au présent litige est survenu. Il est inutile de rechercher si ce texte avait bien la portée qu'on lui a donnée.

Pour les raisons ci-dessus indiquées il faut donc dire que l'appelante ne peut pas fonder un recours sur l'article 1029 C.C.

Pourrait-elle, toutefois, se prévaloir de l'article 1031 C.C.:

> **1031.** Les créanciers peuvent exercer les droits et actions de leur débiteur, à l'exception de ceux qui sont exclusivement attachés à sa personne, lorsque, à leur préjudice, il refuse ou néglige de le faire.

Il semble évident que l'ordonnance de liquidation fait obstacle à l'application de ce texte dans le cas présent. C'est au liquidateur qu'il appartient d'exercer les recours de la Protection Nationale contre les réassureurs. Rien ne démontre qu'il néglige de le faire. Même s'il en était ainsi, un créancier individuellement ne saurait se substituer à lui de sa propre initiative. Il faudrait indubitablement qu'il soit préalablement autorisé par le tribunal à le faire. Inutile de rechercher si cela est possible sous la Loi de liquidation comme sous la Loi de faillite car le dossier fait voir que le tribunal chargé de surveiller la liquidation, loin d'autoriser un créancier à exercer les recours du liquidateur envers les tiers-saisis, a autorisé ce dernier à intervenir pour s'y opposer.

Il ne reste donc, en dernière analyse, qu'un seul fondement possible du recours de l'appelante contre les tiers-saisis ou l'un d'entre eux. Il consisterait à voir dans les traités de réassurance un contrat de société. Cela paraît clairement impossible à l'égard des traités avec les Lloyd's. En effet, il n'y est pas prévu de partage de profits. Bien différente est la situation de la Great Lakes. Le traité qu'elle a conclu fait d'elle en réalité le principal assureur.

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Elle supporte les trois-quarts des risques et reçoit les trois-quarts des primes sauf le pourcentage alloué à la Protection Nationale pour couvrir les frais d'acquisition et d'administration qui sont à sa charge. De plus un partage de profits est stipulé. Enfin, les deux compagnies sont à ce point associées dans les affaires traitées au nom de la Protection Nationale que la réassurance des pertes excédant $12,500 a été obtenue pour elles conjointement. Les deux traités décrivent de la façon suivante la partie de première part:

> NATIONAL PROTECTION ASSURANCE COMPANY, Magog, Quebec, Canada, together with its Quota Share Reinsurer (hereinafter collectively called the "Company")

La Protection Nationale a donc signé ces deux contrats de la même façon que le ferait un associé, savoir pour le compte des deux intéressés. Cela cependant ne suffit point à démontrer l'existence d'un contrat de société car si un mandat découle du contrat de société, rien n'empêche qu'il existe en son absence. Les copropriétaires d'un immeuble peuvent, par exemple, confier un mandat d'administration à l'un d'eux sans que pour autant il en résulte nécessairement une société entre eux et non une simple indivision.

Contrairement au Code Napoléon, le Code civil du Québec ne définit pas le contrat de société. Les deux premiers articles de son titre de la Société se lisent comme suit:

> 1830. Il est de l'essence du contrat de société qu'elle soit pour le bénéfice commun des associés et que chacun d'eux y contribue en y apportant des biens, son crédit, son habileté ou son industrie.
>
> 1831. La participation dans les profits d'une société entraîne avec elle l'obligation de partager dans les pertes.
>
> Toute convention par laquelle l'un des associés est exclu de la participation dans les profits est nulle.
>
> La convention qui exempte quelqu'un des associés de participer dans les pertes est nulle quant aux tiers seulement.

Ces textes obligent à se demander si l'on doit conclure à l'existence d'une société dès que quelqu'un apporte une contribution à une entreprise en vue de participer dans les bénéfices. Mignault, Droit civil canadien, t. 8 (pp. 184-5), dit à ce sujet:

> L'article 1831 suppose nécessairement une société existante, car il parle de la participation dans les profits d'une société. Il faut donc qu'il y ait convention expresse ou implicite de société. Et alors celui qui participe aux profits de telle société ne peut s'exempter de contribuer au paiement des pertes qu'elle a encourues.

En dehors de convention de société, la règle de l'article 1831 ne s'applique pas. Ainsi le commis qui engage ses services ou le bailleur de fonds qui prête ses deniers moyennant une part dans les bénéfices d'une entreprise commerciale, ne devient pas associé, car ni l'un ni l'autre n'a entendu contracter une société. Naturellement, les tribunaux scruteront attentivement des conventions de ce genre afin de déterminer si les parties n'ont pas voulu cacher une société sous le couvert d'un prêt ou d'un louage de services. Mais s'il n'y a pas eu d'intention de former une société, on ne saurait en présumer l'existence.

Il y a eu quelques hésitations dans notre jurisprudence sur ces questions. Après avoir énoncé, du moins implicitement, la véritable doctrine dans quelques arrêts (*Pratt v. Berger,* 28 L.C.J., p. 192; *Préfontaine v. Barrie,* 13 Q.L.R., 312), la cour d'appel, croyant à tort que le conseil privé avait admis la doctrine contraire dans la cause de *Singleton v. Knight* (13 App. Cas., p. 788), a, dans deux causes (*Davie v. Sylvestre,* M.L.R., 6 Q.B., p. 143; *McFarlane v. Fatt,* M.L.R., 6 Q.B., p. 251), jugé que le seul fait de participer dans les profits d'une société ou d'une opération commerciale entraîne présomption de société. Elle est cependant revenue sur cette erreur dans la cause de *Reid v. McFarlane* (R.J.Q., 2 B.R., p. 130), qui fixe définitivement la jurisprudence dans le sens que j'ai indiqué.

Il convient d'ajouter que la jurisprudence du Québec ne paraît pas s'être modifiée depuis l'époque où ce texte a été écrit. Au contraire, on a expressément réaffirmé cette interprétation du Code civil du Québec dans *Bourboin c. Savard*[6].

Si l'on applique ces principes au cas qui nous concerne il est impossible de trouver dans le traité de réassurance souscrit par la Great Lakes une convention de société. En effet, tout démontre que l'intention était de faire une convention de réassurance et non pas une convention de société car il est évident que la Great Lakes n'entendait pas se rendre responsable de la totalité des obligations de la Protection Nationale, mais uniquement de sa quote-part. Il est également évident qu'elle entendait se lier uniquement envers la compagnie avec laquelle elle traitait et non envers les assurés de cette dernière. En principe, il ne faut pas l'oublier, le traité prévoit la compensation entre la part de primes et la part de pertes. C'est le solde seul qui fait l'objet d'une remise. (Article IV):

The Company shall furnish to the Reinsurer monthly accounts as soon as practicable after the close of each month in which the business

[6] (1926), 40 B.R. 68.

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was written. Such accounts shall be examined by the Reinsurer as early as possible and the balance due by either party shall be paid within 90 days after the close of the month for which the accounts have been rendered.

Il est vrai qu'ensuite on trouve la disposition suivante pour le cas d'une perte excédant $1,000. (Article V, para. 3):

The amounts due from the Reinsurer shall be charged in the monthly account, unless the loss or aggregate of losses in one casualty is in excess of $1,000 in which event the Reinsurer will, upon demand, forthwith remit its proportion thereof.

Cette modalité particulière de règlement ne signifie pas que la nature du contrat est différente lorsque la perte dépasse $1,000 et il faut rejeter l'argument que l'appelante prétend en tirer.

On trouve dans le rapport des codificateurs sur le titre de la Société la phrase suivante:

Ce chapitre se compose de neuf articles dont les quatre premiers contiennent des règles communes à tous les systèmes de droit commercial.

Et sous les articles 1830 et 1831 sont cités, outre Pothier, Domat, Vinnius et les Institutes, les ouvrages suivants fondés sur la Common Law: Partnership de Collyer, Partnership de Gow et Commentaries de Kent.

Il ne semble donc pas hors de propos d'examiner la jurisprudence fondée sur les principes de la Common Law dont les règles sur la formation du contrat de société semblent identiques à celles du droit québecois. Cette jurisprudence paraît fixée par un arrêt unanime de la Chambre des Lords dans le sens qu'un traité de réassurance avec participation aux profits ne constitue pas un contrat de société: *English Insurance Co. v. National Benefit Assurance Co. Official Receiver*[7]. Dans cette cause-là l'appelante avait conclu avec la National Benefit Assurance Co. un traité de réassurance par lequel celle-ci acceptait une participation d'un huitième dans tous risques d'assurance maritime («a quota participation equal to a one-eighth share»). Les conditions du traité étaient essentiellement de même nature que celles du contrat conclu par la Great Lakes, y compris une stipulation de partage de profits.

[7] [1929] A.C. 114, [1928] All E.R. 441.

La National Benefit Assurance Co. étant en liquidation, on a jugé que la English Insurance Co. ne pouvait être admise à produire une réclamation pour ce qui lui était dû en vertu du traité parce que la réassurance de chaque risque n'avait pas été constatée par une police timbrée, la loi du Royaume-Uni exigeant le timbre à peine de nullité. On a rejeté la prétention que le contrat était en réalité un acte de société et non pas une convention donnant naissance à autant de contrats de réassurance qu'il y avait de risques distincts faisant l'objet de la couverture, et cela quoique le traité eût décrit l'opération comme une participation et non comme une réassurance et le réassureur comme un «participant» («participator»). On a signalé que, comme dans notre cas, toutes les polices étaient au nom de l'assureur seul sans aucune allusion au réassureur et que ce dernier n'avait pas eu l'intention de s'en rendre responsable envers les assurés.

A l'encontre de ce raisonnement on peut invoquer un bon nombre d'arrêts où une personne qui n'avait pas eu l'intention de contracter d'obligations envers les tiers a cependant été déclarée associée parce que ses actes l'avaient placée dans cette situation. Il y a, en particulier, une décision récente de notre Cour: *Ministre du Revenu National c. Sedgwick*[8], où l'on a confirmé un jugement de la Cour de l'Échiquier[9] par lequel il a été statué que des personnes désignées comme «prêteurs» qui avaient avancé à un agent de change la somme requise pour acheter un «siège» à la Bourse et financer ses opérations étaient en réalité des associés bien que l'on eût expressément stipulé que l'on n'avait pas l'intention d'établir une société. Il est évident que ces soi-disant prêteurs n'avaient aucunement l'intention de se rendre responsables envers les tiers des dettes contractées par l'agent de change en son nom et non au leur. Cependant, l'arrêt qui les déclare imposables comme associés implique qu'ils se trouvaient obligés à ce titre envers les tiers comme envers le fisc malgré leur intention déclarée d'éviter de telles obligations.

[8] [1964] R.C.S. 177, [1963] C.T.C. 571, 63 D.T.C. 1378, 42 D.L.R. (2d) 492.

[9] [1962] R.C. de l'É. 337, 62 D.T.C. 1253, 36 D.L.R. (2d) 97.

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A la réflexion, je suis cependant venu à la conclusion qu'il y a une distinction à faire entre les deux situations. Dans l'affaire *Sedgwick*, le contrat avait comme conséquence que les soi-disant prêteurs étaient en réalité propriétaires du commerce. Au contraire, dans la cause de la *English Insurance* comme dans celle-ci, le réassureur n'avait aucun droit au portefeuille réassuré. Le commerce restait le sien. Tout comme la Protection Nationale, elle faisait affaires pour son compte et non pour le compte du réassureur. Il me paraît qu'il faut décider que le traité de réassurance avec la Great Lakes n'a pas donné naissance à une société non déclarée.

Appel rejeté avec dépens.

Procureurs de la demanderesse, appelante: Lacoste, Savoie, Laniel & Joncas, Montréal.

Procureurs des tiers-saisis, intimés: Foster, Watt, Leggat, Colby, Rioux & Malcolm, Montréal.

Procureurs de l'intervenant Marien, intimé: Gagnon, Beaulieu, Jurisic, Carisse, Szemenyei & Di Clementi, Montréal.

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*Oct. 8, 9
Dec. 20

F. W. ARGUE, LIMITED and CLIFFORD HEMPHILL (*Defendants*) ..... APPELLANTS;

AND

ROBERT BINGHAM HOWE (*Plaintiff*) ... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Delivery of fuel oil to customer's premises from tank truck—Excess quantity of oil escaping through faulty connection of overflow pipe and covering basement floor—Oil ignited—Sole negligence causing or contributing to damage that of delivery man and distributing company.

*PRESENT: Cartwright C.J. and Abbott, Judson, Spence and Pigeon JJ.

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Limitation of actions—Motor of tank truck used to operate pump in delivery of fuel oil—Damage not caused by use or operation of motor vehicle—The Highway Traffic Act, R.S.O. 1960, c. 172, s. 147(1).

A fire which originated in the basement of a building owned by the respondent caused extensive damage to the said building and the property of the occupants as well as to an adjoining building and the property of the tenants therein. Ten different writs were issued by various plaintiffs against the defendants A Co. and H. A Co. was a fuel distributing firm and H was a fuel delivery man acting at all material times in the course of his employment with A Co. All of the actions were tried together and were dismissed by the trial judge. On appeal, the Court of Appeal held: (1) that the provisions of s. 147(1) of *The Highway Traffic Act,* R.S.O. 1960, c. 172, did not apply to bar the action despite the fact that the writs were issued considerably longer than a year after the occurrence; (2) that the negligence of the plaintiff (the present respondent) contributed to the damage which had arisen from the negligence of H, therefore, the provisions of *The Negligence Act,* R.S.O. 1960, c. 261, applied, and that the fault should be apportioned 40 per cent to the plaintiff and 60 per cent to the defendants. The defendants appealed to this Court from the judgment of the Court of Appeal in so far as that judgment held that the limitation provision of *The Highway Traffic Act* did not apply to bar the plaintiff's action. The plaintiff cross-appealed asking that the judgment of the Court of Appeal should be varied to permit him to recover the full amount of his loss.

On the day of the fire H pumped 471 gallons of fuel oil into the respondent's premises, although the storage tank had a capacity of only 300 gallons. The excess oil escaped through a faulty connection of the overflow pipe, spread across the basement floor and shortly thereafter ignited. H made the delivery of oil from a tank truck by the operation of a pump which discharged oil from the tank of the truck into the fill pipe leading to the storage tank in the basement. The motor of the truck was used to operate the pump, being connected to the pump by a special transmission and lever which the operator of the truck manipulated to put the pump in operation.

There was a vent alarm system to warn the delivery man when the tank was full. By standing near the outside end of the vent pipe the employee would hear a whistle which sounded as long as air was being expelled from the tank. Following a short interval after the sound of the whistle ceased, a sound of the gurgle of oil would be heard in the pipe and finally, if the pumping continued, the oil would be driven up the pipe to fall outside on the ground with a plop.

The end of this pipe which had been inserted into a rubber compression collar at the top of the respondent's storage tank had become disengaged from the collar. Although the respondent knew that his equipment was old and that there was some slack in the vent pipe connection with the storage tank, and that the smell of oil was found after the periodic deliveries, he failed to make any repairs.

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H's evidence was that the whistle was faint and that at times he failed to hear it. He heard no gurgle or plop, nor did any oil escape outside. After the pump had been operating for some eleven minutes, H checked the number of gallons that had been pumped into the fill pipe and realizing that the amount was far in excess of the ordinary receipt at the respondent's premises, he shut off the pump and entered the building, where he found that the basement floor was completely covered with oil. He left the premises immediately to obtain assistance in the removal of the spilled oil without cutting off the emergency power switch or without warning anyone of the excessive danger of fire. A short time thereafter the fire commenced.

Held: The appeal should be dismissed and the cross-appeal allowed.

The provisions of s. 147(1) of the *Highway Traffic Act* did not apply to bar the action of the plaintiff. The damage was not caused by the use or operation of a motor vehicle but was caused by the use or operation of the pump mounted on the motor vehicle when the motor vehicle itself was stationary.

The sole negligence which caused or contributed to the damage was that of the defendant H, who failed to stop the pump on the tank truck as soon as the sound of the whistle ceased, and of the defendant A Co., for that defendant had notice of both the faintness of the whistle and of the smell of oil which had been present for the last fill of the tank. The negligence, if any, of the plaintiff, being not negligence which caused or contributed to the damage, the plaintiff was entitled to recover his damages in full.

Dufferin Paving & Crushed Stone Ltd. v. Anger and Derbyshire, [1940] S.C.R. 174; *Heppel v. Stewart and Domingos,* [1968] S.C.R. 707, distinguished; *Peters et al. v. North Star Oil Ltd. et al.; Derksen et al. v. North Star Oil Ltd. et al.* (1965), 53 W.W.R. 321; *Harvey v. Shade Brothers Distributors Ltd.* (1967), 61 W.W.R. 187, referred to.

APPEAL and CROSS-APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing appeals from a judgment of Landreville J. Appeal dismissed and cross-appeal allowed.

Rowell K. Laishley, Q.C., for the defendants, appellants.

Adrian T. Hewitt, Q.C., and *John L. Nesbitt,* for the plaintiff, respondent.

The judgment of the Court was delivered by

SPENCE J.:—In this matter, ten different writs were issued by various plaintiffs against the defendants F. W.

[1] [1966] 2 O.R. 615, 57 D.L.R. (2d) 691, *sub nom. R.A. Beamish Stores Co. Ltd. et al. v. F. W. Argue Ltd. et al.*

Argue Limited and Clifford Hemphill. All of the actions were tried together and were dismissed by Landreville J. in his judgment of June 16, 1966.

In the Court of Appeal[1], the appeal of certain of the plaintiffs was allowed in full and it was adjudged that they should recover the full amount of their losses to be ascertained upon a reference to the Local Master. Three of the plaintiffs had abandoned their appeal from the judgment of Landreville J. It was further adjuged that Robert Bingham Howe recover from the defendants 60 per cent of his loss to be ascertained upon such reference. The defendants appealed to this Court from the judgment of the Court of Appeal for Ontario in so far as the said judgment held that the limitation provision of the Ontario *Highway Traffic Act*, R.S.O. 1960, c. 172, s. 147(1) did not apply to bar the plaintiff's action. The plaintiff Robert Bingham Howe cross-appealed asking that the judgment of the Court of Appeal should be varied to permit him to recover the full amount of his loss as assessed upon the reference.

Robert B. Howe was the owner of a building on the north-east corner of Bank Street and Second Avenue in the City of Ottawa, and had, for many years, operated therein a pharmacy business known as Howe's Drug Store. Later, Howe sold the drug store business to one Alan Francis Forhan, and leased to him the building in which the business was carried on. In the basement of this building there were two furnaces both of which had been converted to the use of fuel oil. To store the fuel oil, there was a 300-gallon tank along the south wall of the basement. In the top of that tank, there were two openings, one of which was connected by a solid joint to a two-inch inlet pipe which led through the wall to the outside of the building and into which the oil was poured when the tank was filled. In the second opening, there was inserted by a threaded connection a device known as a vent alarm or whistle. This device consisted of a pipe running through the upper wall

[1] [1966] 2 O.R. 615, 57 D.L.R. (2d) 691, *sub nom. R. A. Beamish Stores Co. Ltd. et al. v. F. W. Argue Ltd. et al.*

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of the tank down some inches inside it. As the fuel oil flowed into the tank through the inlet pipe, it displaced the air which had occupied the empty portion of the tank, and that air rushing through this vent alarm caused a clearly audible whistle until the level of the oil in the tank reached the lower end of the vent alarm pipe when, of course, the whistle ceased. The sound of this whistle was transferred to the area of the outside from which the tank was being filled, by a three-quarter-inch pipe. That pipe had been connected to the vent alarm or whistle by a compression rubber collar and it ran from such collar through the outer wall and then perpendicularly up the wall for about seven feet, so that the operator supervising the pouring of the fuel oil into the outside end of the inlet pipe could hear this whistle sounding as the tank filled.

The defendant F. W. Argue Limited had, for some years, supplied the fuel oil to the plaintiff, here respondent, Robert B. Howe. Prior to the year 1959, the device on the outer end of the inlet pipe had been known as the "fast fill system" and that device seems to have consisted of a rubber diaphragm into which was inserted the nozzle of the hose from the tank truck. The purpose of the rubber diaphragm was simply to prevent splashing back of the oil. In the year 1959, the defendant F. W. Argue Limited installed in these and other premises to which they supplied oil in the City of Ottawa a different device known as the "Unifil system". This system was said by the witness John Argue to have two advantages over its predecessor: firstly, it was more efficient, permitting the operator to make a more rapid connection between the hose from the tank truck and the inlet pipe, and, secondly, it permitted the oil to flow into the customer's tank at a more rapid rate. The previous rate of flow was 32 gallons per minute and the rate with Unifil was 40 gallons per minute. It would seem, on all of the evidence, that the Unifil system had another very distinguishing feature. It provided, if not a solid, at least a very tight connection between the hose from the tank truck and the inlet pipe, while its predecessor had provided a connection which was

much less tight. The result was that the full pressure of the pump on the tank truck was transmitted through the hose and the nozzle at the end thereof into the inlet pipe and down into the tank. The previous system had permitted a break in that line of pressure. Although there has been no finding, it may be that the displacement of the end of the vent pipe which had been inserted in the rubber compression collar on the top of the plaintiff's storage tank could have been caused by this additional pressure in the fuel oil tank after the installation of the Unifil system. It should be noted that the plaintiff-respondent Howe was never informed of this alteration in the method of connecting the tank truck hose with the inlet pipe.

The witness Bullis, who was an inspector in the service of the Energy Board of the Province of Ontario, agreed with the learned trial judge that this rubber collar would be the weakest point and under pressure "it would be the one that would go".

In mid-January 1961, the defendant Argue delivered fuel oil to the plaintiff Howe's premises from a tank truck. This outfit, I avoid the use of the word "vehicle" as that word is given a definition in the Ontario *Highway Traffic Act*, consisted of an ordinary truck driven, of course, by the usual gasoline motor and, mounted on that truck, a large tank for carrying fuel oil and also a pump with a long hose to connect the pump with the customer's inlet pipe. The motor of the truck was used to operate the pump, being connected to the pump by a special transmission and lever which the operator of the truck manipulated to put the pump in operation. The speed at which the pump was operated was controlled by the speed of the only motor on the outfit, that which propelled the truck when it was in motion. There was a nozzle at the end of the pipe which was connected to the Unifil device on the outer end of the inlet pipe in the fashion which I have described and which the operator could control by a hand valve. There was, in addition, a meter on the pump so that the operator could determine the exact gallonage which had been pumped from the truck into the consumer's tank. On the occasion of

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the filling of the tank in mid-January 1961, and on a considerable number of occasions before, the operator of the truck had noted that the sound of the whistle coming from the vent alarm system was faint and the operator Hemphill had reported this fact to his employer the defendant Argue. It was said that that circumstance did not cause any particular concern as some other vent alarm whistles were faint.

On January 28, 1961, the defendant Argue delivered another supply of oil to the plaintiff's (Howe's) premises. On that occasion, and on the two previous deliveries, the operator of the defendant Argue's tank truck was the defendant Hemphill. The trial judge found that the defendant Hemphill, although he had a certain degree of instruction in carrying out the operation, was comparatively untrained. He connected the hose from the tank truck to the inlet pipe and started the pump. Hemphill's evidence was that the whistle was faint and that at times he failed to hear it. He purported not to have been concerned at his failure to hear the whistle which, of course, ordinarily would have indicated that the oil in the plaintiff's tank had not reached the level of the lower end of the whistle pipe because he blamed it on traffic noise in the neighbourhood. The inlet was only some few feet away from Bank Street, a main business street. He gave as a further reason for his unconcern the fact that he heard no gurgle. Now if a vent alarm whistle and the sound-carrying pipe are connected in the fashion I have already described when the whistle stops because the level of the oil has reached the bottom of the whistle pipe after an interval the sound of the whistle is replaced by the sound of the gurgle of the oil in the whistle pipe and the connecting pipe to the outside, and finally if the pumping is continued the oil is driven up that connecting pipe and falls outside on the ground with a plop. The three forms of warning were referred to during the trial as "whistle, gurgle, and plop". Hemphill heard no gurgle or plop, nor did any oil escape outside. At long last he became somewhat concerned at the length of time that the oil had been pumped, checked his gauge and was astounded to find that he had pumped in

471 gallons. He realized immediately that the amount was far in excess of the ordinary receipt at the plaintiff's premises. He shut off the pump, entered the premises, spoke to Forhan, the tenant, and asked to see the storage tank in the basement. As Hemphill and Forhan descended the steps into the basement, they saw that the floor of the basement was completely covered with oil. The depth of that covering was not determined. Although there was an emergency switch which could have cut off the power to the oil burner, Hemphill left the premises immediately to obtain assistance in the removal of the spilled oil without cutting off that switch or without warning anyone of the excessive danger of fire. Some short time after he left—no more than from fifteen minutes to half an hour—a fire commenced. Forhan attempted to extinguish that fire but was unsuccessful. A very serious conflagration ensued damaging extensively not only the plaintiff's building and Forhan's drug stock and equipment but also the neighbouring premises.

Other circumstances should be recounted. After the defendant Argue's employee Hemphill had filled the plaintiff's tank in mid-January of 1961, the plaintiff's tenant Forhan reported to the plaintiff that there was a smell of oil permeating the building. The plaintiff went to the premises, descended into the basement, opened a panel in the end of a plywood shell surrounding the storage tank, and aided by a flashlight sought evidence of oil spillage. He found no oil on or under the tank and it seemed to him that the vent alarm pipe was sitting in its rubber compression collar. The learned trial judge pointed out that that observation could not have been dependable when made under the circumstances I have outlined, and in fact found that:

> Furthermore, in light of all the evidence, I have arrived at the conclusion that the vent pipe had worked its way out of its proper connection for many months past. How it came into that position is problematic. The defence wishes me to assume that the cause is the pressure exercised by the cement step on the horizontal portion of the pipe outside the wall. Alternatively the moving by hand of the outside upright piece of pipe which was not bracketed to the wall by some unknown person may have given the torque necessary to unseat it at the tank connection. In my opinion, it is pointless to make such a finding.

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At any rate, the fact that the plaintiff found no evidence of oil about the outside of the tank or underneath it in mid-January, in my view, shows that the delivery which had been made at that time had not resulted in any overflow and that therefore the faint whistle carried to the outside by the vent pipe despite the fact that its end was displaced from the collar was sufficient to warn the driver on that occasion when he had filled the tank up to the bottom of the whistle pipe. So, on that occasion, immediately previous to the one when the damage occurred, the operator Hemphill acting on the cessation of the vent alarm whistle did not need either the gurgle or the plop warnings.

The plaintiff testified that immediately after this inspection, he attended the office of the defendant Argue and there spoke to Mr. Murphy, whom he knew, and who was then the sales manager of the defendant Argue, paid the oil account to that date, and informed Mr. Murphy of this smell of oil. Mr. Murphy, in examination for discovery, testified that no such attendance had been made by the plaintiff. At trial, in examination-in-chief, he indicated that he had searched the corporate records and found a receipt had been issued which convinced him that the plaintiff had attended the premises about January 18, 1961, but stated flatly that the plaintiff had not then complained about any smell of oil. However, this statement, although repeated during the cross-examination with much less force, was really a conclusion based on the fact that he had not passed on such complaint to the mechanical side of the defendant Argue's business, as he said was his invariable practice on such occasions.

The trial judge found and I accepted his finding:

> The faintness only begged greater attention and diligence by Hemphill. In my opinion, it does not excuse him. This condition of the whistle, as well as the smell of oil in the basement whenever the tank was being filled, had been reported to the office, not only on the one occasion by Cleary, but also by Howe in the other case. I find that the defendant company had notice and was negligent in not investigating these two abnormalities.

The delivery of the oil and the consequent fire occurred on January 28, 1961. The actions were instituted by the

various writs of summons issued on June 5, 1962. On the basis of these facts, the Court of Appeal for Ontario held, firstly, the provisions of s. 147(1) of *The Highway Traffic Act*, R.S.O. 1960, c. 172, did not apply to bar the action despite the fact that the writs were issued considerably longer than a year after the occurrence; secondly, that the respondent and cross-appellant Howe's negligence contributed to the damage which had arisen from the negligence of Hemphill, therefore, the provisions of *The Negligence Act*, R.S.O. 1960, c. 261, applied, and that the fault should be apportioned 40 per cent to the plaintiff Howe and 60 per cent to the defendants.

Little need be said as to the negligence of the defendant Hemphill, for whose negligence, of course, the defendant Argue is responsible, as the negligent acts were committed during the course of his employment. The trial judge made specific findings as to such negligence as follows:

> 1. that Hemphill, the delivery man, was negligent in the performance of his duty and that negligence was a direct cause of the spillage of oil of some two or three hundred gallons on the basement floor;
>
> 2. the oil coming in contact and flowing into the firebox of the furnace was ignited later, when, by thermostat, the oil burner went on, spread and set fire to the building;
>
> 3. that the negligence of Hemphill was a *direct cause* of the fire which consumed the building.

Laskin J.A., in his reasons for judgment in the Court of Appeal, said:

> Hemphill's negligence in this case consisted in his failure to shut off the flow of oil when he no longer heard the whistle, and particularly when he could hear no gurgle. He had made two previous deliveries of oil to the premises, on January 10 and January 19, discharging 241 and 151 gallons respectively on those occasions. Knowing the rate of flow, he should have realized, if he was at all alert to time, that he was overtaxing the capacity of the tank. Beyond this he showed poor judgment in leaving the premises, after seeing the basement flooded with oil, without turning off the oil furnace or ensuring that this would be done.

There are, therefore, concurrent findings as to Hemphill's negligence and such findings are amply supported by the evidence. Counsel for the appellant in this Court made no attempt to contest such findings.

The first important question to be decided must be whether the Court of Appeal for Ontario was correct in

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holding that s. 147(1) of *The Highway Traffic Act*, R.S.O. 1960, c. 172, did not apply under the circumstances which occurred to bar this action. The subsection provides:

> 147. (1) Subject to subsections (2) and (3) no action shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of twelve months from the time when the damages were sustained.

Subsections (2) and (3) are irrelevant for the purposes of this consideration.

Many cases were cited and analyzed in the careful argument of counsel, some of which, however, I do not deem to be relevant. Those are cases such as *Stevenson v. Reliance Petroleum Limited; Reliance Petroleum Limited v. Canadian General Insurance Company*[2]; *Irving Oil Company Limited v. Canadian General Insurance Company*[3], and *Law, Union & Rock Insurance Company Limited v. Moore's Taxi Limited*[4]. All of those cases dealt with the liability of an insurance company under a policy and depended for their decision upon the words of the policy. In my view, it mattered not that the words of the policy were also the words of the statute because if there was a statute involved that statute was not a limitation provision of the *Highway Traffic Act* but was a provision of the *Insurance Act* of Ontario. As an example, in the *Stevenson* and *Reliance Petroleum* cases, the clause in one policy covered claims "... against the liability imposed by law upon the insured ... for loss or damage arising from the ownership, use or operation of the automobile". Those words form part of the standard owner's form of automobile insurance approved by the Superintendent of Insurance of Ontario. The present statutory provisions as to the contents of a standard owner's policy appears in *The Insurance Act*, R.S.O. 1960, c. 190, as s. 213, and the coverage as outlined in subs. (1)(*a*) thereof is "arising from the ownership, use or operation of any such automobile in Canada ...". In so far as the cases may be considered cases dealing with the interpretation of the statute as well as the actual words

[2] [1956] S.C.R. 936.
[3] [1958] S.C.R. 590.
[4] [1960] S.C.R. 80.

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of insurance contract, they are words which interpret the provision of the *Insurance Act* and not the provisions of the *Highway Traffic Act*.

The relevant section of the *Highway Traffic Act*, as Laskin J.A. pointed out in his reasons for judgment in the Court of Appeal for Ontario, has appeared in the statute in substantially the same words since it was first enacted in 1923. The important words of the section are, of course, "occasioned by a motor vehicle", and, as Laskin J.A. notes, counsel for the plaintiff seeking to avoid a bar created by the section stresses the words "by a motor vehicle" and counsel for the defendant seeking to establish a bar to the action stresses the word "occasioned". The section has been considered in at least two cases in this Court and like sections have been considered in several cases in other Courts throughout Canada. I think one may commence with *Dufferin Paving & Crushed Stone Ltd. v. Anger and Derbyshire*[5]. There, the plaintiffs sued for damages which had been caused to their residence on Beech Avenue in the City of Toronto by heavy vibrations. The vibrations were caused by the passage along Beech Avenue of large cement ready-mix trucks. These trucks, although beyond the weight permitted by the *Highway Traffic Act*, had been permitted to use the street by a special authority granted by the City of Toronto, such special authority being permitted under the provisions of the *Highway Traffic Act*. The action was laid in "nuisance" and not "negligence" and there was no evidence that the driving of the heavy trucks had been negligent or that they were driven in a manner contrary to the provisions of the said permission. The writ was issued more than a year after anything but a negligible portion of the damage had been caused. It was the unanimous judgment of this Court that the action was barred by the provisions of the said statute. All the members of the Court adopted the rule of construction that if the words were in themselves precise and unambiguous then no more can be necessary than to expound those words in their natural and

[5] [1940] S.C.R. 174.

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ordinary sense. The words themselves in such case best declare the intention of the lawgiver. Crocket J., said at p. 183:

> There can be no doubt, I think, that the concrete mixing trucks were motor vehicles within the meaning of s. 1(*h*) of the *Highway Traffic Act*, nor that Beech Avenue was a highway within the terms of that statute. The learned trial judge having clearly found that the damage to the plaintiffs' property, for which compensation was sought in this action, was caused by the operation of these cement mixing trucks upon the highway and that the provisions of the *Highway Traffic Act* and the municipal by-laws and regulations were lived up to in connection with their movement along that highway, I am at a loss to perceive how it can well be said that this action was not an action "for the recovery of damages occasioned by a motor vehicle," within the meaning of s. 53 of the *Highway Traffic Act* or that the plaintiffs' right to recover for such damages was a common law right entirely beyond the scope and purview of that statute.

And at p. 184, he said:

> The section itself says nothing about the damages sued for being occasioned by the negligent operation of a motor vehicle upon a highway. It is directed wholly to the bringing of actions "for the recovery of damages occasioned by a motor vehicle"—a motor vehicle, which can only be lawfully operated on a highway under a permit granted in accordance with the provisions of the *Highway Traffic Act*.

As to the contention of the appellants that the section was limited to bar negligent operation upon the highway, Crocket J. said at p. 185:

> It seems to me, with the highest respect, that we could not give effect to the distinction now relied upon in support of the judgment *a quo* without reading into the language of a perfectly clear, precise and unambiguous enactment, words which it does not contain, and, moreover, without holding that the section was enacted as a protection only for those who violated the provisions of the statute, and not for those who observed them.

Kerwin J., as he then was, carefully considered the evidence to determine whether there was any evidence that the vibrations which caused the damage were the result of rotation of the cement mixer on the truck as distinguished from the vibration caused by the moving vehicle with its rotary mixer. It is of some significance that in this, the *Dufferin Paving* case, the mixer was rotated by a different motor than that which propelled the vehicle and that the mixer rotated whether it was filled or empty. Kerwin J. was

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unable to find that there was any evidence of damage which arose from vibrations caused by the rotation of the mixer as distinguished from the overall vibration occurring. At p. 188, he said:

> While, no doubt, throughout the trial emphasis was placed upon the fact that the cement mixers operated while trucks were in motion upon the highway both when carrying cement and when empty, and while it may be a fair inference that the mixers and auxiliary motors did set up vibrations, I am unable to find any evidence to warrant a finding that these vibrations caused damage to the respondents' house. *I therefore conclude that in this case the damages were caused by motor vehicles.*

The italicizing is my own.

I am of the opinion that the *Dufferin Paving* case is an authority only for the proposition that when damage is occasioned by a motor vehicle *used as such* whether that damage sounds in negligence or in nuisance or in breach of statutory regulations, the section is a bar to actions instituted by the issuance of a writ more than twelve months after the damage occurred. I find a distinct inference in the words of Kerwin J. which I have quoted above that if the damage was occasioned by some operation of the apparatus other than its operation as a motor vehicle, the section would not apply to bar the action. With respect, I agree with the comment of Laskin J.A. in reference to this case, when he said:

> I find nothing in the *Dufferin Paving* case incompatible with the view I would take of section 147(1), namely, that it applies only where the damage is occasioned by a motor vehicle which is used in that character and not where it is used for another purpose to which it has been adapted, as, for example, a stationary pumping machine.

In *Heppel v. Stewart and Domingos*[6], this Court considered the following circumstances. On June 15, 1964, a motor vehicle owned by one defendant and operated by the defendant Domingos ran into the rear of a motor vehicle owned by the plaintiff Stewart when it was stopped, causing personal injuries and property damage. The writ of summons was issued on April 21, 1965, *i.e.*, still within the twelve-month period. The statement of defence was delivered on June 17, 1965, *i.e.*, two days after the twelve-

[6] [1968] S.C.R. 707.

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month period had expired. In the statement of defence, the defendants alleged that the brakes on the automobile had been repaired by one Heppel, a short time prior to the accident, and that the brakes had operated satisfactorily until the time of the accident. The plaintiff Stewart only then made application to add the appellant as a party defendant, and this application was resisted on the allegation that any action against Heppel was barred by the said section 147(1) of the *Highway Traffic Act*. This Court held, reversing the Court of Appeal for Ontario, that the section was a bar. Martland J., giving the judgment for the Court, said:

> The learned judge of first instance was of the opinion that the subsection applied if the damages claimed were physically caused by the motor vehicle. The Court of Appeal held that the provision applied only if the legal basis of the claim is the use or operation of the motor vehicle.
>
> With respect, I do not agree with this interpretation of the subsection. It does not purport to apply only to causes of action of a particular nature. It does not refer to the use or operation of a motor vehicle. It states specifically that *no action* shall be brought to recover damages occasioned by a motor vehicle. If a motor vehicle is the occasion for the damage, *i.e.*, if it is the vehicle which brings it about, then the limitation period applies.

The *Dufferin Paving* case was cited as the authority.

Again, I stress that in the *Heppel* case, the damage was occasioned by a motor vehicle acting as a motor vehicle and not when stationary acting as a fuel pumping device.

Martland J. in *Heppel v. Stewart* cited and adopted Kerwin J., as he then was, in the *Dufferin Paving* case, at p. 189:

> Taken by themselves the words used in this subsection are clear and unambiguous. In terms they are not limited to circumstances where damages are occasioned by a motor vehicle on a highway; they are not restricted to cases where damages are caused by a motor vehicle coming in contact with a person or thing; they do not state that the damages must have been occasioned by negligence in the operation of a motor vehicle or by reason of the violation of any of the provisions of the Act. It is contended on behalf of the respondent that the subsection must be construed in a narrower sense and that such a claim as the present, based as it is on an alleged nuisance at common law, is not within its purview.

and continued:

> I agree with this interpretation of the subsection and, in my opinion, in terms, it covers the circumstances in the present case. In fact, in the

present case, the plaintiff's claim against the appellant clearly is founded upon the use and operation of a motor vehicle; *i.e.*, one with defective brakes.

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I am of the opinion that the *Heppel* case should not be applied to find that the statutory bar applies in the present case. In the present case, the damage was not caused by the use or operation of a motor vehicle but was caused by the use or operation of the pump mounted on the motor vehicle when the motor vehicle itself was stationary. I agree, with respect, with Laskin J.A., that the fact that the engine which propelled the tank truck along the highway was also the motor which drove the pump does not mean that the damage which ensued by such pumping when carried out negligently was "damage occasioned by a motor vehicle". I, further, with respect, agree with the learned justice in appeal when, citing the definitions appearing in s. 1(1) of the *Highway Traffic Act,* in para. 15 thereof "motor vehicle" includes "an automobile, motorcycle, and other vehicle propelled or driven otherwise than by muscular power...", and in para. 29 thereof "vehicle" "includes a motor vehicle, trailer, traction engine, farm tractor, road-building machine and any vehicle drawn, propelled, or driven by any kind of power, including muscular power ...", he concludes that the definitions convey a suggestion of something propelled or driven along a surface and not a stationary pump.

Dickson J. in *Peters et al. v. North Star Oil Limited et al.; Derksen et al. v. North Star Oil Limited et al.*[7] considered circumstances somewhat similar to those here. In that case, the fluid which was negligently allowed to overflow and caused a fire was gasoline being delivered to a service station. The action was commenced more than twelve months after the time when damages were sustained. Section 98(1) of *The Highway Traffic Act,* R.S.M. 1954, c. 112, provided:

> No action shall be brought against a person for the recovery of damages occasioned by a motor vehicle
>
> ...

[7] (1965), 53 W.W.R. 321.

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At p. 334, Dickson J. said:

> In my view, the words "damages occasioned by a motor vehicle or by the operator thereof" do not embrace situations where damage is occasioned—the vehicle being stationary—by the use of auxiliary equipment attached to, but not forming an integral part of, a vehicle, and used for a purpose unrelated to the operation of the vehicle *qua* vehicle.

Dickson J., as I have, concluded that cases dealing with the provisions of insurance policies have no application to this issue.

Counsel for the respondent in this Court also cited *Harvey v. Shade Brothers Distributors Ltd.*[8] That case may hardly be considered as a persuasive authority because Tyrwhitt-Drake, L.J.S.C., adopted as his authority the Court of Appeal decision in the case presently under appeal to this Court. I wish, however, to cite and, with respect, to adopt the words of Tyrwhitt-Drake, L.J.S.C., at p. 189:

> Shortly put, the test to be applied when considering the character of a multi-purpose article at any given time is the purpose for which, at that time, it was being used. To take an extreme example: to hold that in all circumstances a self-propelled gun is a vehicle, and never a piece of artillery, would be an obvious absurdity. Similarly, to say that a self-propelled supply tank is invariably a vehicle and never a supply tank—these uses being exclusive in essence—does not make sense;...

For these reasons, I have come to the conclusion that the provisions of s. 147(1) of the *Highway Traffic Act* do not, in the circumstances of this case, apply to bar the action of the plaintiff despite the fact that the writ was issued more than twelve months after the damage occurred. I, therefore, would dismiss the appeal.

I now turn to consider the respondent's cross-appeal. By that cross-appeal, the respondent asks that he be allowed to recover his damages against the defendants in full rather than merely the 60 per cent thereof allowed to him by the judgment of the Court of Appeal for Ontario. This reduction in the damages allowed to the plaintiff, here cross-appellant, is based upon the finding of negligence made in the Court of Appeal for Ontario in the words I have already quoted. By those words, Laskin J.A. outlined Howe's negligence as consisting of his failure to put and

[8] (1967), 61 W.W.R. 187.

keep his heating equipment in repair when he knew that it was old and that there was some slack in the vent pipe connection with the storage tank, and that the smell of oil was found after a delivery, such deliveries having been made periodically. For the purpose of the disposition of this case, I am content to accept that finding of negligence as against the plaintiff Howe. I am, however, with respect, not in agreement with Laskin J.A.'s sentence immediately following such finding, "This negligence contributed to the damage arising from the negligence of Hemphill." As I have already demonstrated, the negligence of Hemphill was his negligence in failing to stop the pump on the tank truck as soon as the sound of the whistle ceased. That sound of a whistle may have been faint. The evidence showed that other whistles on vent alarm systems were faint. The evidence showed that on previous occasions, despite the faintness of the whistle which had persisted for some considerable time over several deliveries, there had not been any overflow.

In my view, Hemphill, by failing to heed, if he had ever listened for the cessation of the sound of the whistle, and by relying on possible subsequent alarms such as a gurgle in the pipe or finally the plop of oil on the outside of the building, simply continued his negligence. This was not a case where a whistle had stopped and then some short time thereafter the oil gurgled up the vent pipe and plopped onto the ground causing some little damage by way of stain on ground or building. This was a case in which Hemphill poured 471 gallons of oil into the plaintiff's basement. Since the oil was pumped at the rate of 40 gallons a minute, pumping this amount took over eleven minutes. Although Hemphill was not under any duty to know the capacity of the plaintiff's storage tank, he had to realize, had he paid any attention whatsoever, that pumping for eleven minutes at the rate of 40 gallons a minute was delivering an amount of oil far in excess of that similarly delivered during similar climatic conditions.

The plaintiff and cross-appellant, by failure to have the looseness of the rubber compression collar's grip on the vent pipe repaired some time before might have resulted

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in his suffering a larger amount of damage than he would have had such repair been made; but on the other hand there has been no evidence to prove that the vent pipe became disengaged from the collar due to the looseness and not due to the pumping of the oil into the storage tank under the increased pressure which resulted from the Unifil system or perhaps even on the occasion of this very incident by the over-filling of the tank. Upon the whole of the evidence, I have come to the conclusion that the sole negligence which caused or contributed to the damage was that of the defendant Hemphill and of the defendant Argue, for that defendant company had notice of both the faintness of the whistle and of the smell of oil which had been present for the last fill of the tank.

Under these circumstances, the negligence, if any, of the plaintiff, cross-appellant, being not negligence which caused or contributed to the damage, the plaintiff should be entitled to recover his damages in full. I would, therefore, allow the cross-appeal and direct that the judgment at trial be varied to the effect that Robert Bingham Howe recover against the defendants the full amount of his loss, to be ascertained upon a reference to the Local Master of the Supreme Court of Ontario at Ottawa, together with his costs throughout.

Appeal dismissed and cross-appeal allowed with costs.

Solicitors for the defendants, appellants: Hughes, Laishley, Mullen & Touhey, Ottawa.

Solicitors for the plaintiff, respondent: Hewitt, Hewitt and Nesbitt, Ottawa.

REGINALD STUART LAMPARD .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1968
*Dec. 11
1969
Jan. 28

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Appeal—Fraudulent manipulations of stock exchange transactions—Acquittal at trial on finding that criminal intent not proved—Inference as to intent a question of fact—Criminal Code, 1953-54 (Can.), c. 51, ss. 325(a), 584.

The appellant, who had been in the brokerage business for many years, was acquitted on an indictment containing 29 counts charging that he, with intent to create a false or misleading appearance of active public trading in securities, effected transactions through the Canadian Stock Exchange in certain securities which involved no change in the beneficial ownership of those securities, contrary to s. 325(*a*) of the *Criminal Code*. The trial judge, having concluded that the appellant had intentionally effected the transactions in question, held that the Crown had not proven beyond a reasonable doubt that the appellant intended to create a false and misleading appearance of active public trading. The Court of Appeal set aside the verdicts of acquittal, held that the facts were not in dispute and that the only inference that could be drawn from them was that the appellant intended to create the false and misleading appearance. This, in the view of the Court of Appeal, raised a question of law so as to give the Crown a right of appeal under s. 584 of the *Criminal Code*. The accused appealed to this Court.

Held: The appeal should be allowed and the verdicts of acquittal restored.

Per Cartwright C.J. and Martland and Ritchie JJ.: There was dispute as to the vital question of fact whether the appellant did the acts which he is proved to have done with the guilty intention specified in the section. To determine whether an act, admittedly done, was done with a certain intention, it is necessary to inquire into the state of mind of the doer. Such an inquiry is as to a matter of fact. Unless the intention is expressed, it will be founded on an inference drawn from all the relevant circumstances. In drawing that inference, the Court is making a finding of fact. If the trial judge erred in finding that the onus, which was on the Crown to prove that the appellant did the acts complained of with the specified guilty intention, had not been satisfied, his error was one of fact. *Sunbeam Corporation of Canada Ltd. v. The Queen* [1969] S.C.R. 221, applied.

Per Judson and Spence JJ.: The Court of Appeal has rightly concluded that the inference that there was an intent to create a false or misleading appearance of active public trading in a security, was irresistible. However, following the judgment in *Sunbeam Corporation of Canada Ltd. v. The Queen, supra,* the trial judge's error was one of fact and the Crown had no right of appeal under s. 584 of the Code.

Droit criminel—Appel—Manipulations frauduleuses d'opérations boursières —Conclusion que l'intention criminelle n'avait pas été prouvée—Verdict

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*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Spence JJ.

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d'acquittement—Inférence quant à l'intention est une question de fait —Code criminel, 1953-54 (Can.), c. 51, art. 325(a), 584.

L'appelant, courtier depuis plusieurs années, a été déclaré non coupable sur un acte d'accusation contenant 29 chefs l'accusant d'avoir, avec l'intention de créer une apparence fausse ou trompeuse de négociation publique active d'une valeur mobilière, fait des opérations par l'entremise des facilités de la bourse canadienne sur cette valeur qui n'entraînèrent aucun changement dans la propriété bénéficiaire de cette valeur, contrairement à l'art. 325(*a*) du *Code criminel*. Le juge au procès a conclu que l'appelant avait fait les opérations en question intentionnellement mais statua que la Couronne n'avait pas prouvé hors d'un doute raisonnable que l'appelant avait eu l'intention de créer une apparence fausse et trompeuse de négociation publique active. La Cour d'appel a mis de côté les déclarations de non culpabilité, a jugé que les faits n'étaient pas contestés et que la seule inférence que l'on pouvait tirer des faits était que l'appelant avait eu l'intention de créer l'apparence fausse et trompeuse. Ceci, d'après la Cour d'appel, soulevait une question de droit donnant à la Couronne un droit d'appel en vertu de l'art. 584 du *Code criminel*. Le prévenu en appela à cette Cour.

Arrêt: L'appel doit être accueilli et les déclarations de culpabilité rétablies.

Le Juge en Chef Cartwright et les Juges Martland et Ritchie: La question vitale de fait à savoir si l'appelant a commis les actes que l'on a prouvé qu'il a commis avec l'intention coupable spécifiée à l'article, était contestée. Pour juger si un acte, reconnu comme ayant été commis, l'a été avec une certaine intention, il est nécessaire d'enquêter sur l'état d'esprit de celui qui l'a commis. Une telle enquête porte sur une question de fait. A moins que l'intention soit exprimée, elle sera basée sur une inférence tirée de toutes les circonstances pertinentes. En tirant cette inférence, la Cour en vient à une conclusion de fait. Si le juge au procès a fait erreur en jugeant qu'on n'avait pas rencontré le fardeau, qui était sur les épaules de la Couronne, de prouver que l'appelant a commis les actes dont on se plaint avec l'intention coupable spécifiée, son erreur en était une de fait. *Sunbeam Corporation of Canada Ltd. v. The Queen* [1969] R.C.S. 221.

Les Juges Judson et Spence: La Cour d'appel a jugé avec raison que l'inférence était irrésistible que l'appelant avait eu l'intention de créer une apparence fausse ou trompeuse de négociation publique active d'une valeur mobilière. Cependant, vu le jugement de *Sunbeam Corporation of Canada Ltd. v. The Queen, supra,* l'erreur du juge au procès était une erreur de fait et la Couronne n'avait pas droit d'appel en vertu de l'art. 584 du Code.

APPEL d'un jugement de la Cour d'appel de l'Ontario[1], faisant droit à l'appel de la Couronne à l'encontre d'un verdict d'acquittement. Appel accueilli.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal by the Crown against a verdict of acquittal. Appeal allowed.

[1] [1968] 2 O.R. 470, [1968] 4 C.C.C. 201.

George D. Finlayson, Q.C., and *Burton Tait,* for the appellant.

C. M. Powell, for the respondent.

The judgment of Cartwright C.J. and of Martland and Ritchie JJ. was delivered by

THE CHIEF JUSTICE:—This appeal is brought, pursuant to s. 597(2)(*a*) of the *Criminal Code,* from a judgment of the Court of Appeal[1] pronounced on April 8, 1968, setting aside verdicts of acquittal entered on February 9, 1966, by His Honour Judge Waisberg on twenty-nine counts in an indictment and ordering verdicts of guilty on each of the twenty-nine counts to be entered.

The respondent was tried before His Honour Judge Waisberg in the County Court Judges Criminal Court for the County of York. The trial occupied seven days. The indictment contained thirty-one counts. Except for differences in dates and in the number of shares all the counts were in the same words. Count 1 read as follows:

> 1. REGINALD STUART LAMPARD stands charged that he, on the 7th day of January, in the year 1963, at the Municipality of Metropolitan Toronto, in the County of York, with intent to create a false or misleading appearance of active public trading in the securities of Dominion Leaseholds Limited, effected a transaction through the facilities of the Canadian Stock Exchange in the securities of Dominion Leaseholds Limited, to wit, 14,000 shares that involved no change in the beneficial ownership of the said securities, contrary to The Criminal Code.

The offence charged is that defined in s. 325(*a*) of the Code which reads:

> 325. Every one who, through the facility of a stock exchange, curb market or other market, with intent to create a false or misleading appearance of active public trading in a security or with intent to create a false or misleading appearance with respect to the market price of a security,
>
> (*a*) effects a transaction in the security that involves no change in the beneficial ownership thereof,
>
> * * *
>
> is guilty of an indictable offence and is liable to imprisonment for five years.

The Crown offered no evidence on count 27 and consented to the dismissal of count 3. The charges contained in these two counts were accordingly dismissed. His Honour found the appellant not guilty on the remaining twenty-nine counts.

[1] [1968] 2 O.R. 470, [1968] 4 C.C.C. 201.

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Cartwright C.J.

The learned trial Judge found as a fact that the appellant intended to effect each of the twenty-nine transactions in the shares of Dominion Leaseholds Limited through the facilities of the Canadian Stock Exchange and intended that there be no change in beneficial ownership in the shares involved in the transactions. He acquitted the appellant because he was not satisfied beyond a reasonable doubt that the appellant intended to create a false and misleading appearance of active public trading in the shares.

There is no dispute as to the carrying out of the transactions. The appellant who had been in the brokerage business for many years was at the material times president of Lampard and Company Limited, a broker-dealer. The appellant had employed another person to run a publicity campaign in connection with the shares of Dominion Leaseholds Limited.

The trading by the appellant which resulted in the wash sales occurred on six different days in the months of January and February 1963, namely January 7th, January 22nd, January 23rd, January 24th, February 11th and February 18th.

On January 7th (counts 1, 2 and 4), the appellant placed orders to buy 41,000 shares at 50¢, 1,000 shares at 49½¢ and 3,000 shares at 51¢. On the same day he placed an order to sell 46,000 shares at 50¢. These orders resulted in three wash trades totalling 32,000 shares. On that day the total trading in the shares of Dominion Leaseholds on the Canadian Stock Exchange was 152,000 shares.

On January 22nd, 1963 (counts 5 to 15) the appellant placed seven orders to buy a total of 38,000 shares at 48½¢ through six different brokers. On the same day he placed four orders to sell a total of 35,000 shares at 48½¢. These orders resulted in eleven wash trades of 34,500 shares. The total volume of shares of Dominion Leaseholds traded on the Canadian Stock Exchange on that day was 38,500.

On January 23rd (counts 16 to 26) the appellant placed nine orders to buy a total of 173,500 shares through three different brokers at prices ranging from 50¢ to 65¢. He also placed two orders to sell a total of 147,500 shares at prices ranging from 50¢ to 56¢. These orders resulted in eleven

wash trades of 143,000 shares. The total volume of trading in the shares of Dominion Leaseholds on the Canadian Stock Exchange on that day was 199,000 shares.

On January 24th (count 28), the appellant placed one order to buy 20,000 shares at 52¢. On the same day he placed one order to sell 20,000 shares resulting in one wash trade of 20,000 shares. The total volume of shares traded on the Canadian Stock Exchange on that day was 25,000 shares.

On February 11th (counts 29 and 30) the appellant placed two orders to buy a total of 70,000 shares at 62¢. On the same day he placed two orders to sell a total of 90,000 shares at 62¢. These orders resulted in wash trades of 69,500 shares. The total volume of shares of Dominion Leaseholds traded on that day was 72,000 shares.

On February 18th (count 31) the appellant placed two orders to buy a total of 50,000 shares at 74¢. On the same day he placed two orders to sell a total of 50,000 shares at 74¢. These orders resulted in one wash trade of 25,000 shares. The total volume of shares of Dominion Leaseholds traded on that day was 60,150 shares.

On the buy side of the impeached transactions, the appellant employed seven different brokers and the orders were placed in the name of Lampard and Company as buyer. On the sell side most of the orders were placed through one broker, J. T. Frame and Company, but neither the appellant's name nor the name of his company appeared on such sell orders placed with that firm. Some of the sell orders with respect to transactions referred to in counts 20 to 26 inclusive and counts 29 to 31 were placed by the appellant with J. T. Leslie and Company showing Lampard and Company as seller. All the sales referred to above were carried out at the direction of the appellant.

On this evidence the learned trial Judge, having concluded that the appellant effected the transactions without change in beneficial ownership and that he did so intentionally, that is to say that it was not due to accident, mistake or inadvertence that there was no change in beneficial ownership, addressed himself to the remaining question as to whether the appellant did so with intent to create a false or misleading appearance of active public trading.

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The final conclusion at which the learned trial Judge arrived is expressed in his reasons in the following two sentences:

> I fail to see that the Crown has proven beyond a reasonable doubt that the accused intended to create a false appearance.
>
> * * *
>
> So that I find that I am not satisfied beyond a reasonable doubt that the accused intended to create a false or misleading appearance of active public trading and I cannot register a conviction. I have some doubt and the accused is entitled to the benefit of the doubt and I dismiss the charges.

The reasons for judgment of the Court of Appeal were delivered by McLennan J.A. After setting out the details of the transactions he said in part:

> . . . To take for example the simple case proved with respect to count 28 where the respondent (i.e., the appellant in this Court) placed one order to buy 20,000 shares and one to sell 20,000 shares resulting in one wash trade of 20,000 shares. The total volume of shares traded on the Exchange on that day was 25,000 shares and the only real public trading that day was 5,000 shares.
>
> It is, I think, irrefutable that a false and misleading impression of active public trading was created with respect to that count and so with all the other counts. The ticker tape records of the transactions impeached with respect to the total volume each day carried to a greater or lesser degree, depending upon the relationship between the wash trades and the total volume of shares traded, a false and misleading appearance of active public trading in the shares.
>
> The respondent did not give evidence himself nor did he call any witnesses on his own behalf. He had been in the brokerage business for many years and must be taken in the absence of evidence from which some other reasonable explanation may be inferred, not only to have foreseen that each wash trade would create a false appearance of active public trading, but to have intended that result. In *Regina v. Jay* (1965) 2 O.R. 471 referred to by the learned trial judge there was evidence in the record that the accused had an intent other than the intent described in section 325. No such evidence of another intent is in the record in this case or can be inferred.
>
> The record also discloses other matters relevant to the issue of intent. All the transactions set out in the 29 counts related to the shares of one company. They were carried out in substantially the same manner and on the sell side the name of the real seller was concealed altogether in most of the transactions and in part with respect to the others. In these circumstances when considering any intent with respect to any one count, it is proper to consider the conduct of the respondent with respect to the others in order to determine whether there was an intent to create a false and misleading appearance of public activity in the shares. *Regina v Stephens,* 16 Cox. 387, C.C.R. referred to in Phipson on Evidence, 10th ed. p. 464, and such other authorities as *Makin v. Attorney General of New South Wales* (1894) A.C. 57; *Harris v. Director of Public Prosecution* (1952) A.C. 694; *Regina v. Doughty* (1921) 50 O.L.R. 360; *Regina v. Mortimer* (1936) 25 Cr. App. R. 150.

Considering the transactions proved in the 29 counts, their proximity in time, the manner in which they were executed, including the subterfuge with respect to most of the sales, the employment of Roberts to run a publicity campaign with respect to the shares of Dominion Leaseholds, I can come to only one conclusion—and in my opinion it is an irresistible one—that the respondent was engaged in a scheme or plan to create a false and misleading appearance of active public trading in the shares of Dominion Leaseholds.

Counsel for the respondent submitted that the finding of reasonable doubt of the learned trial judge was a finding of fact from which the Crown has no right of appeal by virtue of the provisions of section 584 of the Criminal Code. As already stated the facts are not in dispute and in such circumstances where there is only one reasonable inference to be drawn from the facts, if that inference is not drawn a question of law is raised. *Edwards (Inspector of Income Tax) v. Bearstow* (1956) A.C. 14; *Bracegirdle v. Oxley* (1947) 1 All E.R. 126 discussed and approved by this Court in *Regina v. Sunbeam Corporation of Canada Limited* (1967) 1 O.R. 661. Here the facts are not in dispute and as I have said the only inference that can be drawn from the facts in the record is that the respondent intended to create a false and misleading appearance of active public trading which raises a question of law and the Crown has a right of appeal.

For the reasons given, I would allow the appeal, set aside the verdicts of acquittal and direct the entry of verdicts of guilty on each of the 29 counts.

The judgment of the Court of Appeal in *Regina v. Sunbeam Corporation of Canada Ltd.* referred to and relied upon by McLennan J.A. was reversed by this Court[2] in a judgment delivered on November 1, 1968. I venture to think that if the Court of Appeal had had the advantage of reading the reasons of the majority of the Court in that case delivered by my brother Ritchie they would have come to a different conclusion.

The basis of the decision of the Court of Appeal is found in the sentence already quoted above:

> . . . . Here the facts are not in dispute and as I have said the only inference that can be drawn from the facts in the record is that the respondent intended to create a false and misleading appearance of active public trading which raises a question of law and the Crown has a right of appeal.

With the greatest respect I am unable to agree that a question of law was raised. It is not correct to say that the facts are not in dispute. There is dispute as to the vital question of fact whether the appellant did the acts which he is proved to have done with the guilty intention specified in the section.

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[2] [1969] S.C.R. 221, (1969), 1 D.L.R. (3d) 161.

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To determine whether an act, admittedly done, was done with a certain intention it is necessary to inquire into the state of mind of the doer. That such an inquiry is as to a matter of fact has often been held.

In *Clayton v. Ramsden*[3], Lord Wright said:

> States of mind are capable of proof like other matters of fact.

In *Edgington v. Fitzmaurice*[4], Bowen L.J. said:

> But the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else.

Nothing that was said in regard to Bowen L.J.'s celebrated dictum either in *R. v. Dent*[5] or in *Cox and Paton v. The Queen*[6] throws any doubt on the pronouncement that the state of a man's mind is a fact.

Unless the doer of the act has expressed his intention, the finding as to what that intention was will necessarily be founded on an inference drawn from all the relevant circumstances proved in evidence. It has often been pointed out that where a trial judge makes findings of primary facts and draws an inference therefrom an appellate tribunal is in as good a position as was the trial judge to decide what inference should be drawn, but in drawing the inference the Court is making a finding of fact. In the case of an appeal at large the Court of Appeal has, of course, power to substitute its view, as to what inference should be drawn, for that of the trial judge, but where, as in the case at bar, the jurisdiction of the Court of Appeal is limited to questions of law in the strict sense it has no such power.

When the onus of establishing a certain fact lies upon a party it may be a question of law whether there is any evidence (as distinguished from sufficient evidence) to prove that fact. In the case at bar the onus was, of course, upon the Crown to prove that the appellant did the acts complained of with the guilty intention specified in the section. If the learned trial Judge erred in finding that that onus had not been satisfied, his error was one of fact,

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[3] [1943] A.C. 320 at 331, [1943] 1 All E.R. 16.

[4] (1884), 29 Ch. D. 459 at 483.

[5] [1955] 2 Q.B. 590 at 595, [1955] 2 All E.R. 806.

[6] [1963] S.C.R. 500 at 519, 40 C.R. 52, [1963] 2 C.C.C. 148.

certainly not one of law in the strict sense. The applicable principles are clearly set out in the reasons of my brother Ritchie giving the judgment of the majority of this Court in the *Sunbeam* case, *supra,* and it is not necessary to repeat them.

In a criminal case (except in the rare cases in which a statutory provision places an onus upon the accused) it can sometimes be said as a matter of law that there is no evidence on which the Court can convict but never that there is no evidence on which it can acquit; there is always the rebuttable presumption of innocence.

Nothing would be gained by my expressing an opinion as to what inference as to the intention of the appellant the learned trial Judge should have drawn from the primary facts which he found to have been proved. The Court of Appeal has said in the passage quoted above that "there is only one reasonable inference", that the conclusion that the guilty intention existed in the mind of the appellant is "an irresistible one", that it is "the only inference that can be drawn from the facts in the record". If I shared fully the view so expressed by the Court of Appeal, I would none the less be satisfied that the error (if such it were) made by the learned trial Judge in failing to draw the suggested inference was an error of fact.

In my opinion the Court of Appeal has fallen into the error of saying that the question of what inference should be drawn from certain undisputed facts is a question of law. Whether or not it is so must depend on the nature of the question as to which the inference is to be drawn. Here, as I have endeavoured to show above, the inference is as to the intention with which the appellant effected the transactions, that is as to the state of the appellant's mind, which is a question of fact.

Before parting with the matter I should point out that the Crown's appeal from the acquittal was based on and limited to a single ground stated in the notice of appeal as follows:

> The learned Trial Judge, having found that the accused had effected the transactions alleged in the indictment, erred in law in holding that there was any evidence from which it could be inferred that the accused had any intent other than the intent alleged in the indictment.

This wording seems to me to suggest a misapprehension as to one of the cardinal principles of the criminal law.

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In order for the appellant to be convicted it was essential for the Crown to prove beyond a reasonable doubt that the accused did the acts complained of with the specified guilty intent. That is an onus which never shifts. It was not incumbent upon the appellant to show that he did the acts with some intent other than that charged in the indictment.

I would allow the appeal, set aside the judgment of the Court of Appeal and restore the verdicts of acquittal entered by the learned trial Judge.

The judgment of Judson and Spence JJ. was delivered by

JUDSON J.:—The facts relating to the trading activities of R. S. Lampard, the appellant here, are fully set out in the reasons delivered in the Court of Appeal[7] and the reasons of the Chief Justice in this Court. Under s. 584(1) (*a*) of the *Criminal Code*, the Attorney General's appeal is confined to "any ground of appeal that involves a question of law alone". The appellant here submits that if there was error in the judgment at trial, which he does not admit, it is error in fact.

The basis of the judgment of the learned trial judge, who was sitting without a jury, was that the trading activities of the appellant did not indicate to him beyond a reasonable doubt that they were carried out "with intent to create a false or misleading appearance of active public trading in a security". On the other hand, a unanimous Court of Appeal thought that the inference that there was such intent was irresistible.

I agree with this conclusion of the Court of Appeal but we are still left with the question whether the error was one of fact or law. I am compelled by the majority judgment of this Court delivered in *Sunbeam Corporation of Canada Ltd. v. The Queen*[8] to hold that the error—and I am sure that it was error—was one of fact. The appeal therefore succeeds.

Appeal allowed and verdicts of acquittal restored.

Solicitors for the Appellant: McCarthy & McCarthy, Toronto.

Solicitor for the respondent: C. M. Powell, Toronto.

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[7] [1968] 2 O.R. 470, [1968] 4 C.C.C. 201.

[8] [1969] S.C.R. 221, (1969), 1 D.L.R. (3d) 161.

PAUL WALTER AND OTHERS (*Plaintiffs*) ..... APPELLANTS;

AND

THE ATTORNEY GENERAL OF THE PROVINCE OF ALBERTA (*Defendant*) ..... RESPONDENT.

1968 *Oct. 31, *Nov. 1 1969 Jan. 28

FRANK T. FLETCHER AND OTHERS (*Plaintiffs*) ..... APPELLANTS;

AND

THE ATTORNEY GENERAL OF THE PROVINCE OF ALBERTA (*Defendant*) ..... RESPONDENT.

AND

THE ATTORNEY GENERAL OF CANADA ..... INTERVENANT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Constitutional law—Validity of provincial legislation restricting acquisition of property by colonies such as the Hutterites—Whether legislation in respect of religion or in respect of property—Whether intra vires of the Province—Communal Property Act, R.S.A. 1955, c. 52.

The plaintiffs, other than the Fletchers, are Hutterians and form part of a religious community which bases its community life and its holding of property on religious principles. They challenged the validity of The *Communal Property Act,* R.S.A. 1955, c. 52, on the ground that the Act, the operation of which, it is alleged, prevents them from acquiring land, is legislation in respect of religion and therefore beyond the powers of a provincial legislature. The Hutterite colonies hold large tracts of land in Alberta and the effect of the legislation would restrict the colonies from acquiring additional lands. The actions were dismissed in the lower Courts. The plaintiffs appealed to this Court.

Held: The appeals should be dismissed.

The *Communal Property Act* was enacted in relation to the ownership of land in Alberta and the legislature had jurisdiction, under s. 92(13) of the *B.N.A. Act,* because it deals with property in the Province. The purpose of the legislation is to control the use of Alberta lands

*PRESENT: Cartwright C.J. and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

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as communal property. While it is apparent that the legislation was prompted by the fact that the Hutterites had acquired and were acquiring large areas of land in Alberta, held as communal property, it did not forbid the existence of Hutterite colonies. The Act was not directed at the Hutterite religious belief or at the profession of such belief, but at the practice of holding large areas of Alberta land as communal property, whether such practice stems from religious belief or not. It was a function of a provincial legislature to enact those laws which govern the holding of land within the boundaries of that province. The fact that a religious group upholds tenets which lead to economic views in relation to land holding does not mean that a provincial legislature, enacting land legislation which may run counter to such views, can be said, in consequence, to be legislating in respect of religion and not in respect of property. Freedom of religion does not mean freedom from compliance with provincial laws relative to the matter of property holding.

Droit constitutionnel—Validité d'une législation provinciale limitant les achats de terres par des colonies telles que les Hutterites—S'agit-il d'une législation concernant la religion ou la propriété—Est-elle intra vires de la province—Communal Property Act, R.S.A. 1955, c. 152.

Les demandeurs, autres que les Fletchers, sont des Hutterites et font partie d'une communauté religieuse dont la vie de communauté et la possession de propriétés sont fondées sur des principes religieux. Ils ont attaqué la validité du *Communal Property Act*, R.S.A. 1955, c. 52, pour le motif que le statut, dont l'application les empêche, prétendent-ils, d'acquérir des terres, est une législation concernant la religion et par conséquent au-delà des pouvoirs de la législature provinciale. Les colonies d'Hutterites possèdent de grandes étendues de terre en Alberta et la législation aurait pour effet de restreindre les colonies dans leurs acquisitions de terres additionnelles. Les Cours inférieures ont rejeté les actions. Les demandeurs en appelèrent à cette Cour.

Arrêt: Les appels doivent être rejetés.

Le *Communal Property Act* a été décrété par rapport au droit de propriété sur les terres en Alberta et la législature avait juridiction, en vertu de l'art. 92(13) de l'*Acte de de l'Amérique du Nord britannique*, parce que le statut traite de la propriété dans la province. La législation a pour but de contrôler l'usage des terres de l'Alberta comme propriétés de communauté. Bien qu'il soit évident que la législation a été suggérée par le fait que les Hutterites ont acquis et acquéraient de grandes étendues de terre en Alberta, pour les posséder comme propriétés de communauté, la législation ne défend pas l'existence des colonies d'Hutterites. Le statut ne s'attaque pas aux croyances religieuses des Hutterites ou à la profession de telles croyances, mais à la pratique de posséder comme propriétés de communauté de grandes étendues de terre en Alberta, que cette pratique provienne d'une croyance religieuse ou non. La législature provinciale a pour fonction de décréter des lois pour réglementer la possession des terres dans les limites de cette province. Le fait qu'un groupe religieux observe une doctrine qui mène à des vues économiques par rapport à la possession de terres ne veut pas dire qu'une législature provinciale, lorsqu'elle décrète une législation agraire qui peut aller à l'encontre de telles vues, peut être en conséquence considérée comme décrétant une légis-

lation concernant la religion et non la propriété. La liberté de religion ne veut pas dire liberté de ne pas se conformer aux lois provinciales se rapportant à la possession de terres.

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APPELS de jugements de la Cour d'appel de l'Alberta[1], confirmant un jugement du Juge Milvain. Appels rejetés.

APPEALS from judgments of the Supreme Court of Alberta, Appellate Division[1], affirming a judgment of Milvain J. Appeals dismissed.

Max Moscovich, Q.C., William B. Gill, Q.C., and *I. Michael Robison,* for the plaintiffs, appellants.

S. Friedman, Q.C., and *W. Henkel, Q.C.,* for the defendant, respondent.

C. R. O. Munro, Q.C., and *David Kilgour,* for the intervenant.

The judgment of the Court was delivered by

MARTLAND J.:—The question in issue in both these appeals is as to the constitutional validity of *The Communal Property Act,* R.S.A. 1955, c. 52, as amended, hereinafter referred to as "the Act". In each of the two actions the real purpose was to obtain a declaration that this statute was ultra vires of the Legislature of the Province of Alberta and they were consolidated for trial.

The facts are not in issue. The appellants, other than the Fletchers, are Hutterians. The Fletchers are owners of land in Alberta which their fellow plaintiffs sought to purchase. The plaintiffs in the other action also sought to purchase Alberta lands. It is conceded that the lands in each case sought to be acquired would be held in common as defined in s. 2(*b*)(i) of the Act and that the operation of the Act prevents the acquisition of the lands. The appellants, other than the Fletchers, in each case formed part of a religious community which based its community life and its holding of property on religious principles.

As of December 31, 1963, Hutterite colonies held approximately 480,000 acres of land in Alberta and over 10,000

[1] (1967), 58 W.W.R. 385, 60 D.L.R. (2d) 253.

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acres had been added in 1964. The approximate population of Hutterites in Alberta as of December 31, 1963, was 6,000.

The Act is described as "An Act respecting Lands in the Province Held as Communal Property." "Communal Property" is defined in s. 2 of the Act, which states:

> 2. In this Act,
>
> (*a*) "colony"
>
> ((i) means a number of persons who hold land or any interest therein as communal property, whether as owners, lessees or otherwise, and whether in the name of trustees or as a corporation or otherwise,
>
> (ii) includes a number of persons who propose to acquire land to be held in such manner, and
>
> (iii) includes Hutterites or Hutterian Brethren and Doukhobors;
>
> (*b*) "communal property" means
>
> (i) land held by a colony in such a manner that no member of the colony has any individual or personal ownership or right of ownership in the land, and each member shares in the distribution of profits or benefits according to his needs or in equal measure with his fellow members, and
>
> (ii) land held by a member of the colony by personal ownership or right of ownership or under a lease, if the land is used in conjunction with and as part of other land held in the manner described in subclause (i);
>
> (*c*) "Board" means the Communal Property Control Board established pursuant to this Act.

The general scheme of the Act for controlling the holding of land as communal property is as follows:

Unless otherwise authorized by the Lieutenant Governor in Council in the public interest (s. 5(2)) no colony existing on the 1st day of May, 1947, may increase the holdings of its land beyond its holdings on the 1st day of March, 1944 (s. 4(1)), or, if on that date the holdings were less than 6,400 acres, they may be extended thereto (s. 4(5)). The significance of the dates May 1, 1947, and March 1, 1944, referred to in the statute is as follows: The first Alberta legislation in relation to acquisition of land by Hutterites to come into force was *The Land Sales Prohibition Act,* 1944 (Alta.), c. 15, which came into force on March 1, 1944. In general that statute prohibited the selling of land to and the purchase of land by Hutterites. That Act, as amended, remained the law until it expired on May 1, 1947, and on that date *The Communal Property Act,* 1947 (Alta.), c. 16, came into force. So that between March 1, 1944, and May 1, 1947, no Hutterite could acquire

any land in Alberta, but by virtue of the provisions of *The Communal Property Act* which came into force on the latter date the restrictions on the acquisition of land were lessened somewhat in relation to Hutterites and the new provisions were made applicable to all "colonies", whether Hutterite or otherwise.

The general scheme of the Act goes on to provide as follows:

No "colony" which exists or existed outside the province may acquire land without the consent of the Lieutenant Governor in Council (s. 6).

No land may be acquired for the purpose of establishing a new "colony" without the consent of the Lieutenant Governor in Council (s. 7).

By an amendment to the statute which came into force on May 1, 1951, the Lieutenant Governor in Council was authorized to divide the province into zones and to designate the number of acres a "colony" established after that date may acquire in any zone or class of zones (s. 5(1)). By virtue of an amendment made in 1960, "colonies" established after May 1, 1947, were also limited to the number of acres designated by the Lieutenant Governor in Council for each zone (s. 9).

The Lieutenant Governor in Council is authorized to establish a Communal Property Control Board (s. 3a(1)), which is to hear applications by "colonies" for leave to acquire land. Where the application is for leave to acquire additional lands for a "colony" already holding lands, the Board may grant or refuse the application, subject to an appeal to a judge of a district court by "a person or colony not satisfied with the decision of the Board..." (s. 13, subss. (1) to (6)).

Where the granting of the application would result in the establishment of a new "colony", the Board is to give public notice of the application, and hold such hearings and make such inquiries as it deems necessary to determine whether the granting of the application would be in the public interest, giving consideration to the location of the lands applied for, the location of existing "colonies", the geographical location of the lands intended for communal use in relation to the lands not so used, and any other factors which the Board may deem relevant.

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Following its investigation the Board is to submit a report to the Minister of Municipal Affairs as to its recommendations in the matter. After consideration of the report the Lieutenant Governor in Council may consent or withhold consent as he deems proper in the public interest, irrespective of the Board's recommendation (s. 14).

Dispositions of land to "colonies" which would result in contravention of the provisions of the statute are prohibited (s. 11).

The submission of the appellants is that the Act is legislation in respect of religion and, in consequence, is beyond the legislative powers of a provincial legislature. The respondent contends that the Act is legislation in respect of property in Alberta, controlling the way in which land is to be held, by regulating the acquisition and disposition of land to be acquired by colonies to be held as communal land.

The learned trial judge, Milvain J. (as he then was), held that, in pith and substance, the Act relates to land tenure in the province and is, therefore, intra vires of the Legislature of the Province of Alberta under s. 92(13) of the *British North America Act.*

This judgment was sustained on appeal[2]. Johnson J.A., with whom Kane J.A. concurred, while holding that the Act was aimed at controlling the expansion of Hutterite colonies in Alberta, and that living in colonies and holding land communally were tenets of the Hutterite faith, decided that, even though the Act, therefore, related to religion, it was valid because the province, under s. 92(13), had legislative jurisdiction in relation to religion.

McDermid J.A., with whom the Chief Justice concurred, decided that the Act related to land tenure, and that the fact that it might restrict the religious practices of the Hutterites did not render it invalid, even if provincial legislatures cannot legislate in relation to religion.

Porter J.A. said that he agreed with Johnson J.A. and McDermid J.A. that the legislation was valid, but expressed doubts as to the adequacy of the material submitted.

In my opinion, the Act was enacted in relation to the ownership of land in Alberta and the Legislature had jurisdiction, under s. 92(13) of the *British North America Act,*

[2] (1967), 58 W.W.R. 385, 60 D.L.R. (2d) 253.

because it deals with property in the province. The scheme of the legislation indicates that the Legislature considered the use of large areas of land in Alberta for the purposes of communal living was something which, in the public interest, required to be regulated and controlled. The Act restricts, but does not prohibit, the use of land for such purposes.

It would seem to me to be clear that a provincial legislature can enact laws governing the ownership of land within the province and that legislation enacted in relation to that subject must fall within s. 92(13), and must be valid unless it can be said to be in relation to a class of subject specifically enumerated in s. 91 of the *British North America Act* or otherwise within exclusive Federal jurisdiction.

There is no suggestion in the present case that the Act relates to any class of subject specifically enumerated in s. 91.

It was on the basis that the legislation in question in the cases of *Henry Birks & Sons (Montreal) Limited v. The City of Montreal*[3] and *Switzman v. Elbling*[4] related to the subject of criminal law, assigned specifically to the Parliament of Canada by s. 91(27) of the *British North America Act*, that the statutes were held to be ultra vires of the Legislature of the Province of Quebec.

The *Birks* case involved the validity of a statute which empowered municipal councils of cities and towns to pass by-laws to compel the closing of stores on New Year's Day, the festival of Epiphany, Ascension Day, All Saints' Day, Conception Day and Christmas Day. The legislation was supported in argument on the basis that it related to the control of merchandising and the well-being of employees. It was held to be ultra vires of the Legislature of Quebec because it authorized the compulsion of Feast Day observance, and such legislation in England, as in the case of Sunday observance legislation, had been assigned to the domain of criminal law. Legislation in this field was held to relate to the subject of criminal law, assigned specifically to the Parliament of Canada by s. 91(27).

[3] [1955] S.C.R. 799, [1955] 5 D.L.R. 321, 113 C.C.C. 135.
[4] [1957] S.C.R. 285, 117 C.C.C. 129, 7 D.L.R. (2d) 337.

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Martland J.

Rand J. went on to add that the legislation was in relation to religion, and beyond provincial competence, and he referred to the *Saumur* case. Kellock and Locke JJ. said that, even if it were not properly "criminal law", it was beyond the competence of the Legislature as being legislation with respect to freedom of religion, a matter dealt with in the statute of the Province of Canada of 1852, 14-15 Vict., c. 175, the relevant portion of which is quoted later in these reasons.

Switzman v. Elbling involved the validity of *The Act Respecting Communistic Propaganda,* R.S.Q. 1941, c. 52, which, inter alia, made it illegal for any person who possessed or occupied a house in the province to use it or to allow any person to make use of it to propagate communism or bolshevism by any means whatsoever. It was attempted to support the legislation on the ground that it dealt with property in the province.

The majority of the Court was of the opinion that the legislation was in respect of criminal law which, under s. 91(27), was within the exclusive competence of the Parliament of Canada.

It was submitted by the appellants that the Act is aimed at preventing the spread of Hutterite colonies in Alberta, that, because the maintenance of such colonies is a cardinal tenet of the Hutterite religion, the Act seeks to deal with religion, and that the subject of religion is within the exclusive jurisdiction of the Parliament of Canada. Their position is stated in the reasons of Johnson J.A., in the Court below, as follows:

> This Act then in its pith and substance is legislation restricting the acquisition by Hutterites of more land in the province. If a by-law which prevents the distribution of religious tracts (the *Saumur* case) was an interference with religion, I find it difficult to say that legislation which is aimed at the restriction of new and existing colonies and the holding of land in common as practised by these colonies when living in such colonies and holding lands in that manner are the principal tenets of Hutterian faith, does not also deal with religion.

With respect, I do not share this view. I do not think that the case of *Saumur v. The City of Quebec*[5] is analogous to the present one. The law, the validity of which was in issue there, was a by-law which forbade the distribution in the streets of the City of Quebec of any book, pamphlet,

[5] [1953] 2 S.C.R. 299, 106 C.C.C. 289.

circular or tract unless the written permission of the Chief of Police to do so had been obtained. The granting of permission depended upon the content of the document proposed to be distributed. The by-law restricted, at the will of the Chief of Police, the dissemination, on the streets, of tracts dealing with religious, political or other views.

Of the nine judges who heard the appeal, four (Rand, Kellock, Estey and Locke JJ.) held that the by-law was invalid, because it was legislation in relation to religion and free speech and not in relation to the administration of the streets, and was, therefore, not within s. 92(13). Two judges (Rinfret C.J. and Taschereau J. (as he then was)) held that in pith and substance the by-law was to control and regulate the usage of streets. They also held that freedom of worship is a civil right within the provinces. Two judges (Cartwright J. (as he then was) and Fauteux J.) held that it was within provincial competence to authorize the enactment of this by-law, and that provincial legislation in relation to matters assigned to the provinces is not rendered invalid because, to a limited extent, it interferes with freedom of the press or freedom of religion. Kerwin J. (as he then was), while holding that freedom of religion was a civil right within the province, held that to the extent that the by-law interfered with the profession of religion it was not applicable because of its conflict, to that extent, with the provisions of a pre-Confederation statute of 1852, of the old Province of Canada, 14-15 Vict., c. 175, which provided:

> 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.

This provision continued to operate in the Province of Quebec by virtue of s. 129 of the *British North America Act*, which provides:

> 129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the

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Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

The four judges who were of the opinion that the by-law was invalid reached that conclusion because they felt that it was not enacted in relation to the administration of streets but rather to provide a means of censorship of published material distributed on the streets. It restricted, inter alia, the dissemination of religious views.

The purpose of the legislation in question here is to control the use of Alberta lands as communal property. While it is apparent that the legislation was prompted by the fact that Hutterites had acquired and were acquiring large areas of land in Alberta, held as communal property, it does not forbid the existence of Hutterite colonies. What it does is to limit the territorial area of communal land to be held by existing colonies and to control the acquisition of land to be acquired by new colonies which would be held as communal property. The Act is not directed at Hutterite religious belief or worship, or at the profession of such belief. It is directed at the practice of holding large areas of Alberta land as communal property, whether such practice stems from religious belief or not. The fact that Hutterites engage in that practice was the circumstance which gave rise to the necessity for the Legislature's dealing generally with the holding of land as communal property, but that does not mean that legislation controlling the holding of land in that way is not in relation to property in the Province of Alberta.

It is a function of a provincial legislature to enact those laws which govern the holding of land within the boundaries of that province. It determines the manner in which land is held. It regulates the acquisition and disposition of such land, and, if it is considered desirable in the interests of the residents in that province, it controls the extent of the land holdings of a person or group of persons. The fact that a religious group upholds tenets which lead to economic views in relation to land holding does not mean that a provincial legislature, enacting land legislation which may run counter to such views, can be said, in consequence, to be legislating in respect of religion and not in respect to property.

Religion, as the subject-matter of legislation, wherever the jurisdiction may lie, must mean religion in the sense that it is generally understood in Canada. It involves matters of faith and worship, and freedom of religion involves freedom in connection with the profession and dissemination of religious faith and the exercise of religious worship. But it does not mean freedom from compliance with provincial laws relative to the matter of property holding. There has been no suggestion that mortmain legislation by a provincial legislature is incompetent as interfering with freedom of religion.

In *Carnation Company Limited v. The Quebec Agricultural Marketing Board*[6], reference was made, at p. 252, to the distinction between legislation "affecting" the appellant's interprovincial trade and legislation "in relation to" the regulation of trade and commerce. In my opinion, the legislation in question here undoubtedly affects the future expansion and creation of Hutterite colonies in Alberta, but that does not mean it was enacted in relation to the matter of religion. The Act is in relation to the right to acquire land in Alberta, if it is to be used as communal property, and, in consequence, it is within provincial jurisdiction under s. 92(13).

Having reached this conclusion, it is unnecessary for me to express any opinion in respect of the submission of the respondent that legislation in relation to religious freedom falls within the exclusive jurisdiction of provincial legislatures, a view which was supported by three of the judges in the *Saumur* case.

The appellants also contended that the Act was in conflict with the statute of the Province of Canada of 1852, to which reference has already been made, it being contended that this statute was in force in Alberta by virtue of s. 129 of the *British North America Act* and ss. 3 and 16 of *The Alberta Act*, 4-5 Edward VII, c. 3. The Appellate Division of the Supreme Court of Alberta had held that this Act was in force in Alberta, in *R. v. Gingrich*[7]. I agree with the view expressed by Johnson J.A. and by McDermid J.A. that the effect of s. 129 of the *British North America Act*, which continued laws in force in Canada, Nova Scotia and

[6] [1968] S.C.R. 238, 67 D.L.R. (2d) 1.
[7] (1958), 29 W.W.R. 471 at 474, 31 C.R. 306, 122 C.C.C. 279.

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New Brunswick in Ontario, Quebec, Nova Scotia and New Brunswick *respectively*, was only to continue that Act in effect in the Provinces of Ontario and Quebec, and not to make it a part of the law of any other province.

In any event, it may be noted that that statute protected the free exercise and enjoyment of "Religious Profession and Worship". The Act does not interfere with the profession of the Hutterite faith or with religious worship in that faith. It controls the land holdings of colonies of people of that faith.

I would dismiss the appeals with costs. No costs should be paid by or to the intervenant.

Appeals dismissed with costs.

Solicitors for the plaintiffs, appellants Walter et al: Moscovich, Moscovich, Stanos & Matisz, Lethbridge.

Solicitors for the plaintiffs, appellants Fletcher et al: Gill, Conrad & Cronin, Calgary.

Solicitor for the defendant, respondent: S. A. Friedman, Edmonton.

Solicitor for the intervenant: D. S. Maxwell, Ottawa.

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*Nov. 1

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Jan. 28

SINCLAIR CANADA OIL COMPANY (*Plaintiff*) ..... APPELLANT;

AND

PACIFIC PETROLEUMS LIMITED (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Contracts—Interpretation—Agreements entered into by oil development companies—Whether appellant had contractual right to share in payment made by third company to respondent.

Under an agreement dated December 31, 1951, an oil company (Act) assigned its interests in certain petroleum and natural gas permits, which included four permits hereinafter referred to as "the Act Permits", to the respondent. Act's right to convert a 25 per cent carried interest into a 25 per cent participating interest not having been exercised within the time provided for in the agreement, *i.e.* on

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PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

or before August 1, 1953, the position of the parties, under the agreement, was that the respondent was assignee of all of Act's interest in the permits described in the agreement, including the Act Permits, and that Act was entitled to a 25 per cent interest in the gross proceeds of sale of production of all leased substances produced and marketed from all wells drilled on lands covered by the assigned permits after deduction of the payments and costs made by the respondent, as described in the agreement.

Under an agreement, dated January 22, 1954, between A Co. (the respondent's predecessor in title) and S Co. (the appellant's predecessor in title), S Co. acquired from A Co. the latter's right to enter upon certain projects (as defined in the agreement) to carry on exploratory and development work thereon for oil and gas substances. Included in these projects were lands covered by the Act Permits, as well as other lands.

A further agreement (*i.e.* "the Amendatory Agreement") was made between A Co. and S Co. on December 11, 1954. Instead of agreeing to expend the sum of $5,000,000 in an 18-month period, as provided in the agreement of January 22, 1954 (*i.e.* "the Basic Agreement"), S Co. agreed to spend $10,000,000 during a period of 4½ years. Instead of having to wait for the obtaining of commercial production from a project, to earn a 50 per cent interest in the project, S Co. acquired immediately a 25 per cent interest in all the projects, with the right to obtain an additional 25 per cent interest in any project from which commercial production was obtained. S Co. agreed to waive its right of recoupment of acquisition costs.

After the making of the Basic Agreement and the Amendatory Agreement, Act approached the respondent with a view to obtaining a renewal of the right which it had had, under the 1951 agreement, and which had expired before the Basic Agreement was made, to convert its carried interest under the 1951 agreement into a working interest. On July 31, 1956, an agreement was made between Act and the respondent which permitted this right to be exercised by Act, and it was, in fact, exercised by Act by notice dated June 1, 1962. Upon being notified by the respondent of the proposed revival of Act's conversion right, S Co. not only consented to the revival of this right, but expressed its willingness to forgo any claim for exploration costs recovered from Act if the conversion were effected by Act.

Following the conversion of its carried interest into a working interest, Act paid to the respondent the amounts stipulated in the 1951 agreement, which related to all of the permits referred to in that agreement, including the Act Permits. The appellant, successor in title to S Co., had incurred total expenditures of $1,868,620.15 in relation to the Act Permits. It claimed from the respondent the whole of the payment of $467,155.04 made to the respondent by Act, which represented 25 per cent of the expenditures made in relation to the Act Permits, this being the amount which Act was required to pay to the respondent for the privilege of exercising the right of conversion.

An action brought by the appellant to enforce its claim was dismissed at trial and an appeal from the trial judgment was dismissed by the Appellate Division of the Supreme Court of Alberta. On appealing to this Court the appellant abandoned its claim for the full amount of $467,155.04, which had been based on a claim for unjust enrichment. It contended that it was entitled to recover either: (1) $132,855.13,

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representing 25 per cent of the moneys paid by Act to the respondent, on the basis that it had acquired a 25 per cent interest in these moneys, pursuant to the provisions of the Amendatory Agreement; or (2) $205,194.45, representing the amount referred to in (1), plus an additional 25 per cent of the payment by Act in respect of a permit on which the appellant had completed a commercial well on April 24, 1958, as a result of which it claimed to have acquired an additional 25 per cent interest in that payment.

Held: The appeal should be dismissed.

There was nothing in the contractual arrangements existing between the appellant and the respondent (reference being made to the appellant and the respondent as though they were the actual parties to the Basic and the Amendatory Agreements, rather than the successors in title) upon which a claim to share in the payment made by Act to the respondent could be founded. That payment was made by virtue of contractual arrangements between Act and the respondent to which the appellant was not a party. Each of the alternative claims submitted by the appellant in this Court was dependent upon the appellant's establishing a contractual right to participate in the payment made by Act to the respondent, and, in the Court's opinion, no such contractual right existed.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], dismissing an appeal from a judgment of Kirby J. Appeal dismissed.

D. P. McLaws, Q.C., and *R. S. Dinkel*, for the plaintiff, appellant.

R. A. MacKimmie, Q.C., and *G. W. Lade*, for the defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—By an agreement in writing (hereinafter referred to as "the Act Agreement") dated December 31, 1951, made between Act Oils Limited (hereinafter referred to as "Act") and the respondent, Act agreed to assign to the respondent all of its estate, right, title and interest in certain British Columbia Crown Petroleum and Natural Gas Permits held by Act, which included permits numbered 38, 86, 90 and 98 (hereinafter referred to as "the Act Permits").

Clause 6 of the Act Agreement provided as follows:

6. CARRIED INTEREST OF ACT

The Permits assigned to Pacific under the provisions of this Agreement shall be held by Pacific in trust for Act as to an undivided Twenty-

[1] (1968), 67 D.L.R. (2d) 519.

five per cent (25%) net carried interest, being a Twenty-five per cent (25%) share or interest in the gross proceeds from the sale of production of all leased substances hereafter produced, saved, recovered and marketed from all wells drilled on any of the lands from time to time hereafter covered by the Permits assigned to Pacific under the terms of this Agreement after there shall have been deducted therefrom firstly the cash consideration paid by Pacific to Act as hereinbefore provided, secondly, all costs and expenses incurred by Pacific in the acquisition and maintenance by it of its interest in Permits Nos. 38 and 98 under the said Agreement dated the 8th day of November, A.D. 1950, determined in accordance with the provisions thereof, thirdly all costs and expenses, including Royalty, determined in accordance with the Scheduled Accounting Procedure hereto annexed as Schedule "B" and the further provisions hereof, incurred by Pacific in the exploration, drilling, development and operation of all the lands from time to time comprised within the Permits and the maintenance of the Permits in good standing.

Clause 8 of that agreement provided that the respondent should be the Operator of all lands comprised within the assigned permits.

Clause 12 of the agreement gave to Act the right, upon giving to the respondent 30 days' notice, at any time prior to August 1, 1953, to convert its 25 per cent net carried interest, as provided for in cl. 6, into a 25 per cent participating interest. It went on to provide as follows:

> Upon converting its interest aforesaid, Act shall pay to Pacific twenty-five per cent (25%) of all those costs and expenses which Pacific shall be entitled to recover out of the entire gross proceeds of sale of production prior to disbursing any moneys to Act in clause 6 hereof, calculated as of the expiration of such thirty (30) day period. From and after such date Act shall furnish its proportionate share of all costs and expenses for the maintenance, development and operation of the lands covered by the Permits assigned to Pacific under this Agreement and the provisions of the next succeeding clause hereof shall thereupon be and become operative in lieu of and in substitution for clauses 6 and 7 hereof, and Pacific shall stand possessed of the Permits in trust for itself and Act as to all its rights and interests thereunder and all production of leased substances from the lands covered thereby and all wells and equipment thereon in the following proportions, namely:—
>
> Pacific 75%
> Act 25%

This right was not exercised by Act within the time limited by cl. 12. After that time had expired, the position of the parties, under the Act Agreement, was that the respondent was assignee of all of Act's interest in the permits described in the Act Agreement, including the Act Permits, and that Act was entitled to a 25 per cent interest in the gross proceeds of sale of production of all leased substances produced, saved, recovered and marketed from

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all wells drilled on lands covered by the assigned permits after deduction of the payments and costs made by the respondent, as described in cl. 6.

This was the situation when an agreement in writing, hereinafter referred to as "the Basic Agreement", dated January 22, 1954, was made between Canadian Atlantic Oil Company, Ltd., hereinafter referred to as "Atlantic", and Southern Production Company, Inc., hereinafter referred to as "Southern". The appellant is the successor in title to Southern, and the respondent is the successor in title to Atlantic.

Article I of the Basic Agreement defined various words and terms used in the agreement. Paragraph 1 of this Article provided:

> 1. Where the word "Project" is used it shall mean, subject to the selection provided for in Schedule C hereof with respect to Projects B-4 and B-7 those tracts of land identified by Schedules A and B, and designated on one of the two maps by the corresponding number, and shall include the oil and gas substances within, upon, or under such lands and all rights, titles, and interests granted under or resulting from the reservations, permits, licenses, leases, deeds and grants pertaining thereto or concerning any part thereof, including renewals or extensions thereof;

Article II set out the covenants of Atlantic as follows:

> ARTICLE II
> COVENANTS OF ATLANTIC
>
> 1. Atlantic undertakes and warrants that it is entitled to enter in or upon the Projects and to carry on Exploratory Work and development work thereon for oil and gas substances.
>
> 2. Atlantic undertakes and warrants that Southern shall have the right, subject to the provisions of and, for any term of, this Agreement, to enter upon the Projects as listed in Schedules A and B and to carry on Exploratory Work and development work in the same manner and with the same rights as if such work was carried on by it. With respect to the Projects, Atlantic will endeavor to make such right of Southern exclusive.
>
> 3. Except as otherwise specifically provided with respect to Projects A-2, A-7 and B-7 in Schedule C annexed hereto and made a part hereof, upon Southern completing the first Commercial Well on any Project, Atlantic will assign and convey to Southern an undivided one-half of its right, title and interest in such Project and will enter into an Operating Agreement substantially in the form hereto attached as Schedule D, providing for the joint operation and development of the Project. One or more separate Operating Agreements will be entered into for each Project.

Southern agreed to spend, during the period from January 1, 1954, to June 30, 1955, the sum of $5,000,000 in performing the obligations required to be performed by Atlantic under the terms of the various reservations,

licences, permits, leases, deeds and grants to maintain Atlantic's rights in the projects and in performing such exploratory works as Southern might determine on such of the projects as Southern might select. Included in the projects described in the agreement were the lands covered by the Act Permits, as well as other lands.

It was agreed that Southern would be the operator of the defined projects, and provision was made for the recovery by Southern, from production, of its costs and expenses. This provision was contained in art. VI of the Operating Agreement which was annexed to the Basic Agreement.

A further agreement, hereinafter referred to as "the Amendatory Agreement", was made between Atlantic and Southern on December 11, 1954. The major changes effected in the Basic Agreement by the Amendatory Agreement were as follows:

1. Instead of agreeing to expend the sum of $5,000,000 in an 18-month period, as provided in the Basic Agreement, Southern agreed to spend $10,000,000 during a period of 4½ years, from January 1, 1954, to June 30, 1958.

2. Instead of having to wait for the obtaining of commercial production from a project, to earn a 50 per cent interest in the project, Southern acquired immediately a 25 per cent interest in all the projects, with the right to obtain an additional 25 per cent interest in any project from which commercial production was obtained.

3. Southern agreed to waive its right of recoupment of acquisition costs, retroactive to the date of the Basic Agreement. "Acquisition Costs" were defined in the Amendatory Agreement as including "all exploratory work and any and all rentals payable under the terms of the Basic Agreement, as amended, plus direct and overhead costs to Southern as provided in the Basic Agreement".

The Amendatory Agreement also provided that art. VI of the Operating Agreement, previously mentioned, which provided for Southern's recovery of costs and expenses from production, should be deleted. All of the amending provisions in the Amendatory Agreement were made retroactive to and effective as from January 1, 1954.

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It was subsequent to the making of the Basic Agreement and the Amendatory Agreement that Act approached the respondent with a view to obtaining a renewal of the right which it had had, under the Act Agreement, and which had expired before the Basic Agreement was made, to convert its carried interest under the Act Agreement into a working interest. On July 31, 1956, an agreement was made between Act and the respondent which permitted this right to be exercised by Act, and it was, in fact, exercised by Act by notice dated June 1, 1962.

Before this amending agreement was made, Southern had been notified by the respondent of the proposed revival of Act's conversion right. No objection was taken by Southern, and, in fact, by its letters to the respondent, dated March 6, 1956, and May 11, 1956, Southern not only consented to the revival of this right, but expressed its willingness to forgo any claim for exploration costs recovered from Act if the conversion were effected by Act.

Following the conversion of its carried interest into a working interest, Act paid to the respondent the amounts stipulated in the Act Agreement, which related to all of the permits referred to in the Act Agreement, including the Act Permits. The appellant, successor in title to Southern, had incurred total expenditures of $1,868,620.15 in relation to the Act Permits. It claimed from the respondent the whole amount of the payment of $467,155.04 made to the respondent by Act, which represented 25 per cent of the expenditures made in relation to the Act Permits, this being the amount which Act was required to pay to the respondent for the privilege of exercising the right of conversion.

Before this Court the appellant abandoned its claim for the full amount of $467,155.04, which had been based on a claim for unjust enrichment. It did contend that it was entitled to recover either:

(1) $132,855.13, representing 25 per cent of the moneys paid by Act to the respondent, on the basis that it had acquired a 25 per cent interest in these moneys, pursuant to the provisions of the Amendatory Agreement; or

(2) $205,194.45, representing the amount referred to in para. (1) above, plus an additional 25 per cent of the payment by Act in respect of permit 38, on which the

appellant had completed a commercial well on April 24, 1958, as a result of which it claimed to have acquired an additional 25 per cent interest in that payment.

In respect of the submissions made by the appellant in this Court, the primary issue to be determined is whether, under the terms of the Basic Agreement and the Amendatory Agreement, the appellant has any contractual right to recover from the respondent either of the amounts which it now claims. For the purpose of greater clarity I will be referring to the appellant and the respondent as though they were the actual parties to these agreements, rather than successors in title.

The appellant's contention is that, by the terms of those agreements, the respondent assigned to the appellant a 25 per cent interest, not only in the oil and gas substances underlying the lands described in the agreements, but also an undivided 25 per cent interest in any benefits to be derived by the respondent pursuant to the various instruments by which the respondent held its interest in such oil and gas substances, and that, by accepting such assignment, the appellant assumed, in addition to its obligations under the Basic Agreement, an undivided 25 per cent of the obligation of the respondent contained in such instruments.

The granting clause, contained in the Amendatory Agreement (amending cl. 3 of art. II of the Basic Agreement), provides that:

> Immediately and upon the execution and delivery of this Agreement, Southern will be entitled to receive from Atlantic and Adherents, and Atlantic and Adherents will assign and convey to Southern an undivided one-fourth of their respective interests in the Projects, as defined in the Basic Agreement and in the Schedules attached thereto.

The definition of the word "Project" is contained in para. 1 of art. I of the Basic Agreement, which has already been quoted.

In my opinion, this definition covers certain tracts of land, described in the schedules A and B, and, specifically, oil and gas substances within, upon or under those lands. When the clause goes on to refer to "rights, titles, and interests granted under or resulting from the reservations, permits, licences, leases, deeds and grants *pertaining thereto*" it is referring to rights, titles and interests in oil and gas substances derived from such instruments. The

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words "pertaining thereto", which I have italicized, relate back to the words "oil and gas substances". The granting clause, therefore, refers to an assignment of a one-fourth interest in the assignor's interest in oil and gas substances in certain tracts of land, as derived from various instruments.

The schedule to the Basic Agreement, when referring to those projects with which we are here concerned, refers to a permit "Subject to Act's 25 per cent net carried interest", or "Act 25 per cent carried". What was assigned in respect of those projects was, therefore, one-fourth of the respondent's interest in the oil and gas substances underlying the lands described in the Act Permits, which interest was subject to the 25 per cent net carried interest of Act, as defined in cl. 6 of the Act Agreement.

That clause, previously quoted, defined the carried interest as a 25 per cent share in *"the gross proceeds from the sale of production* of all leased substances" produced and marketed from wells drilled on the lands described in the permits. Before Act became entitled to share in such proceeds, certain deductions were to be made, as defined in this clause.

The appellant's submission is that the assignment of the 25 per cent interest contained in the Amendatory Agreement assigned to it an undivided 25 per cent of the respondent's right to recover moneys from Act under that clause and that, consequently, when the right to convert was revived and Act made a money payment to the respondent to effect such conversion, its right continued and applied to those moneys. I do not agree with this contention. Clause 6 of the Act Agreement did not create a right to recover money from Act. It created, in favour of Act, a carried interest in the proceeds of sale of oil and gas substances. It is true that in computing the amount of money which Act would be entitled to receive, provision was made for the prior deduction from gross proceeds of sale of certain expenditures. It is also true that, to the extent of such deductions, the balance remaining, initially to the respondent, and, after the making of the Basic Agreement and the Amendatory Agreement, to the respondent and to the appellant, would have been that much the greater. But any benefit accruing to the appellant, if cl. 6 had remained operative, and no conversion had been

effected by Act, was not by virtue of any assignment to the appellant of a right to recover money from Act. Such benefit would have accrued indirectly and only because it had an interest in the oil and gas substances and the proceeds of their sale determined after deducting therefrom the amount of Act's carried interest. What the appellant got as a result of the assignment was a 25 per cent interest in the respondent's interest in the oil and gas substances underlying the tracts described in the projects. In the case of the Act Permits, what it got was 25 per cent of the whole interest in those permits, less Act's carried interest, as defined in cl. 6.

It is my opinion, therefore, that at the time the Basic Agreement and the Amendatory Agreement were made, the appellant had not acquired by assignment any right to receive moneys payable by Act. Furthermore, since prior to the making of the Basic Agreement the right to convert by Act had ceased to exist, the appellant did not acquire, by virtue of the Basic Agreement and the Amendatory Agreement, any right to share in moneys which might be paid by Act in order to exercise its right of conversion.

The renewal of Act's conversion right was effected after the Amendatory Agreement had been made, with both the knowledge and the consent of Southern, the appellant's predecessor in title. The appellant did not stipulate for any share in the payment to be made by Act in order to exercise that right. On the contrary, Southern stated its willingness to forgo any claim thereto.

In the result, I can find nothing in the contractual arrangements existing between the appellant and the respondent upon which a claim to share in the payment made by Act to the respondent could be founded. That payment was made by virtue of contractual arrangements between Act and the respondent to which the appellant was not a party.

The foregoing reasoning applies equally to each of the alternative claims submitted by the appellant in this Court, for $132,855.13 and for $205,194.45 respectively. Each claim is dependent upon the appellant's establishing a contractual right to participate in the payment made by Act to the respondent, and, in my opinion, no such contractual right exists.

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In view of the conclusion reached in respect of the submissions made on this point, in this Court, it is unnecessary to determine whether, in any event, the appellant's claim would be defeated by virtue of the appellant's waiver of its right to recoupment of acquisition costs, as provided in the Amendatory Agreement, or on the basis of contract or estoppel arising from the exchange of correspondence between the respondent and Southern.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: McLaws & Company, Calgary.

Solicitors for the defendant, respondent: MacKimmie, Matthews, Wood, Phillips & Smith, Calgary.

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*June 18, 19

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Jan. 28

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

AND

IAN G. WAHN ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Business loss—Whether to be deducted first from other income in same year—Whether taxpayer has right to carry back as deduction in preceding year—Income Tax Act, R.S.C. 1952, c. 148, ss. 2, 3, 4, 5, 27(1)(e), 139(1)(x).

Taxation—Income tax—Partnership—Payment on withdrawal from partnership—Whether income or capital—If income, year in which taxable—Income Tax Act, R.S.C. 1952, c. 148, ss. 6(1)(c), 15(1).

At the end of the year 1961, the respondent resigned from a law firm of which he had been a partner and established his own firm. In the four months ending April 30, 1962, its first fiscal period, the respondent's new firm suffered a loss, of which the respondent's share was $6,902.89. He contended that he had the right under s. 27(1)(*e*) of the *Income Tax Act* to carry back this 1962 business loss as a deduction from his 1961 income. The Minister contended that the loss should be deducted first from the respondent's other income in 1962, which in fact exceeded the amount of the loss, and issued a revised assessment for the year 1961 in which he refused the deduction of the 1962 business loss. The respondent objected to his assessment for the year 1961. The Tax Appeal Board affirmed the assessment. The Exchequer Court reversed this decision and held that the respondent was entitled

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*PRESENT: Cartwright C.J. and Judson, Hall, Spence and Pigeon JJ.

to carry back his loss to the year 1961. It was held by the Court that the respondent had the option of deducting the loss from his other income in the same year or of carrying it back to the preceding taxation year.

A second issue related to a payment received in 1963 by the respondent in respect of his interest in the former law firm. Pursuant to a clause in the partnership agreement, it was decided to pay the respondent, as a withdrawing partner, the sum of $39,589.20 over a four-year period in respect of his share of the 1962 profits in the old firm, and $9,897.30 of this amount was received by him in 1963. The Minister taxed the $9,897.30 as income received in 1963. The respondent contended that the amount should be treated as a capital receipt, and alternatively, if it was income, that it was taxable in 1962 rather than in 1963. The Tax Appeal Board upheld the Minister's assessment, but the Exchequer Court held that the payment of $9,897.30 was not income to the respondent. The Minister appealed to this Court on both issues.

Held: The Minister's appeal should be allowed on both issues.

Per Cartwright C.J. and Judson, Hall and Spence JJ.: It appears to be implicit in the wording of s. 139(1)(*x*) of the *Income Tax Act* that a business loss shall operate to reduce the taxpayer's income from other sources for the purpose of income tax for the year in which it was sustained. If the income from other sources in the current taxation year is less than the business loss, the amount by which the loss exceeds the income from other sources will be deductible in other years as provided by s. 27(1)(*e*) of the Act. It was extremely difficult if not impossible to make a perfectly logical and satisfactory reconciliation of all the provisions of the *Income Tax Act* which bear upon this question. However, the result arrived at by the Tax Appeal Board correctly expressed the intention of Parliament in enacting these provisions.

The sum of $39,589.20 allocated to the respondent pursuant to the partnership agreement was received by the respondent as income and not as capital. The respondent had at all relevant times computed his income on a cash receipt basis. When the decision was made in 1963 to pay him, he acquired a contractual right to receive payment in equal annual instalments in the years 1963 and following. Each instalment formed part of the respondent's income in the year in which it was received by him. This result was not altered by the terms of s. 6(1)(*c*) of the Act.

Per Pigeon J.: The construction placed on s. 139(1)(*x*) of the Act by the Exchequer Court that the appellant had an option of either deducting the business loss from his other income in the same year or of carrying it back to the preceding taxation year, is not supported by any argument and cannot be reconciled with the text. However, it was not necessary in this case to ascertain the extent to which a business loss operates to reduce income from other sources in the same year because there was no appeal from the respondent's assessment for the year 1962 in which the Minister had applied the business loss suffered in the year against other income in that same year. The appeal was from the 1961 revised assessment. The Courts could not revise the 1962 assessment. Under s. 46(7) of the Act, it was only by an objection made in proper time and an appeal, if necessary, that the respondent could prevent his 1962 business loss from operating to reduce his other income in that year by virtue of the assessment.

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Construing the partnership agreement as written, the intention of the parties was that the payment to a withdrawing partner should be an allocation of profits, in this case, the profits of the partnership in the year 1962. There is nothing to show that the true nature of the payment was of a capital nature. The wording of the provision for the allowance to a withdrawing partner showed that it was not intended to be a capital payment for goodwill but an allocation of profits, and this is conclusive evidence that it was income of the recipient. Furthermore, under s. 6(1)(c) of the Act and under the method followed by the respondent of reporting his income as received, he was properly assessed for the payment made by his former firm in the year in which he actually received it. Section 15(1) of the Act was not applicable since he was not a partner of his former firm in the year 1962.

Revenu—Impôt sur le revenu—Perte commerciale—Doit-elle être déduite en premier lieu des autres revenus de la même année—Le contribuable a-t-il droit de reporter la perte comme une déduction dans l'année qui précède—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 2, 3, 4, 5, 27(1)(e), 139(1)(x).

Revenu—Impôt sur le revenu—Société—Paiement fait à un associé démissionnaire—S'agit-il d'un revenu ou d'un capital—S'il s'agit d'un revenu, en quelle année est-il imposable—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 6(1)(c), 15(1).

À la fin de l'année 1961, l'intimé a démissionné d'une étude d'avocats dont il était un des associés et a établi sa propre étude. Durant sa première période fiscale, c'est-à-dire les quatre mois finissant le 30 avril 1962, la nouvelle étude de l'intimé a subi une perte dont la part de l'intimé revenait à $6,902.89. Ce dernier a prétendu qu'il avait droit en vertu de l'art. 27(1(*e*) de la *Loi de l'impôt sur le revenu* de reporter cette perte commerciale de 1962 comme déduction de son revenu de 1961. Le Ministre a soutenu que la perte devait être déduite en premier lieu des autres revenus de l'intimé pour l'année 1962, qui en fait excédaient le montant de la perte, et il a émis une cotisation amendée pour l'année 1961 dans laquelle il refusa la déduction de la perte de 1962. L'intimé a produit une opposition à sa cotisation pour l'année 1961. La Commission d'appel de l'impôt a confirmé la cotisation. La Cour de l'Échiquier a infirmé cette décision et a jugé que l'intimé avait droit de reporter la perte à l'année 1961. La Cour statua que l'intimé avait le choix de déduire la perte de ses autres revenus de la même année ou de la reporter à l'année d'imposition qui précédait.

Un second point concernait un paiement reçu en 1963 par l'intimé en considération de son intérêt dans l'ancienne étude d'avocats. Selon une clause du contrat de société, il a été décidé de payer à l'intimé, comme associé démissionnaire, la somme de $39,589.20 à être versée sur une période de quatre années en considération de sa part des profits de l'année 1962 de son ancienne étude. En 1963, l'intimé a reçu $9,897.30 de ce montant. Le Ministre a cotisé cette somme comme un revenu reçu en 1963. L'intimé a soutenu que ce montant devait être traité comme un capital, et alternativement, s'il était un revenu, qu'il devait être cotisé en 1962 plutôt qu'en 1963. La Commission d'appel de l'impôt a maintenu la cotisation du Ministre, mais la Cour

de l'Échiquier a statué que le paiement de $9,897.30 n'était pas un revenu pour l'intimé. Le Ministre en appela à cette Cour sur les deux points.

Arrêt: L'appel du Ministre doit être accueilli sur les deux points.

Le Juge en Chef Cartwright et les Juges Judson, Hall et Spence: Il semble clair du texte de l'art. 139(1)(*x*) de la *Loi de l'impôt sur le revenu* qu'une perte commerciale a pour effet de réduire le revenu du contribuable retiré d'autres sources aux fins de l'impôt sur le revenu pour l'année dans laquelle elle a été subie. Si le revenu retiré des autres sources dans l'année d'imposition courante est moins que la perte commerciale, l'excédent de la perte sur le revenu provenant des autres sources pourra être déduit dans les autres années tel que prévu à l'art. 27(1(*e*) de la Loi. Il est extrêmement difficile sinon impossible de réconcilier d'une façon logique et satisfaisante toutes les dispositions de la *Loi de l'impôt sur le revenu* qui traitent de cette question. Cependant, le résultat atteint par la Commission d'appel de l'impôt exprime correctement l'intention que le Parlement avait en décrétant ces dispositions.

La somme de $39,589.20 attribuée à l'intimé en vertu du contrat de société a été reçue par lui comme revenu et non pas comme capital. Durant toute la période critique l'intimé a calculé son revenu d'après l'encaissement. Lorsqu'il fut décidé en 1963 de lui payer ce montant, il a acquis le droit contractuel de recevoir paiement en quatre versements annuels égaux dans les années 1963 et suivantes. Chaque versement a fait partie du revenu de l'intimé dans l'année dans laquelle il a été reçu par lui. Les termes de l'art. 6(1)(*c*) de la Loi ne changent pas ce résultat.

Le Juge Pigeon: La Cour de l'Échiquier a interprété l'art. 139(1)(*x*) de la Loi comme donnant à l'appelant le choix soit de déduire la perte commerciale de ses autres revenus de la même année ou de la reporter à l'année d'imposition précédente. Cette interprétation n'est supportée par aucun argument et ne peut pas être conciliée avec le texte. Cependant, dans le cas présent, il n'est pas nécessaire de décider jusqu'à quel point une perte commerciale a pour effet de réduire le revenu retiré d'autres sources dans la même année parce qu'il n'y a pas eu appel de la cotisation de l'intimé pour l'année 1962 dans laquelle le Ministre a déduit la perte commerciale subie durant l'année des autres revenus de la même année. L'appel est de la cotisation amendée de 1961. Les tribunaux ne peuvent pas amender la cotisation de 1962. En vertu de l'art. 46(7) de la Loi, c'est seulement en produisant une opposition dans les délais et un appel, si nécessaire, que l'intimé pouvait empêcher sa perte commerciale de 1962 d'avoir pour effet de réduire ses autres revenus de cette année en vertu de la cotisation.

Interprétant le contrat de société tel que rédigé, c'était l'intention des parties que le paiement à un associé démissionnaire soit une répartition des profits, dans le cas présent, ceux de la société pour l'année 1962. Il n'y a rien qui démontre que de sa vraie nature le paiement était un capital. Le texte de la disposition concernant l'allocation à un associé démissionnaire montre qu'elle n'était pas censée être un paiement en capital pour l'achalandage mais une répartition des profits. Cela est une preuve concluante qu'il s'agit d'un revenu pour le bénéficiaire. De plus, en vertu de l'art. 6(1)(*c*) de la Loi et en vertu de la méthode adoptée par l'intimé de déclarer son revenu d'après l'encaisse-

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ment, il a été correctement cotisé pour le paiement versé par son ancienne étude dans l'année durant laquelle il l'a effectivement reçu. L'article 15(1) de la Loi n'a pas d'application puisque l'intimé n'était pas un associé de son ancienne étude durant l'année 1962.

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada[1], en matière d'impôt sur le revenu. Appel accueilli.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada[1], in an income tax matter. Appeal allowed.

G. W. Ainslie and *F. P. Dioguardi,* for the appellant.

W. Z. Estey, Q.C., and *A. Englander,* for the respondent.

The judgment of Cartwright C.J. and of Judson, Hall and Spence JJ. was delivered by

THE CHIEF JUSTICE:—The relevant facts are set out in the reasons of my brother Pigeon which I have had the advantage of reading.

On the first question, that is whether the respondent was entitled to carry back the business loss of $6,902.29 which he sustained in his 1962 taxation year as a deduction to be made in computing his taxable income for his 1961 taxation year, I agree with the conclusion of the learned member of the Tax Appeal Board, Mr. J. O. Weldon, Q.C.

It is true, as my brother Pigeon points out, that the decision of Mr. Weldon is based mainly upon the wording of s. 139(1)(*x*) of the *Income Tax Act* which is an interpretation section. Just over a hundred years ago Cockburn C.J. in *Wakefield Board of Health v. West Riding and Grimsby Railway Company*[2] said at p. 801:

> I hope the time will come when we shall see no more of interpretation clauses, for they generally lead to confusion.

That hope has not been fulfilled and how profoundly the substantive law can be affected by the wording of an interpretation clause is shown by such cases as *Klippert v. The Queen*[3].

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[1] [1968] C.T.C. 5, 68 D.T.C. 5023.

[2] (1865), 6 B. & S. 794 at 801, 122 E.R. 1386.

[3] [1967] S.C.R. 822, 61 W.W.R. 727, [1968] 2 C.C.C. 129, 2 C.R.N.S. 319.

It appears to me to be implicit in the wording of s. 139(1)(*x*) that a business loss shall operate to reduce the taxpayer's income from other sources for the purpose of income tax for the year in which it was sustained and that the reason that the provisions of s. 27(1)(*e*) do not refer to business losses sustained in the current taxation year is that if the income from other sources during that year exceeded the business losses the whole of those losses will have been deducted by virtue of s. 139(1)(*x*). If, on the other hand, the income from other sources in the current taxation year was less than the business loss, the amount by which the loss exceeded the income from other sources would be deductible in other years as provided by s. 27(1)(*e*). I agree with my brother Pigeon that it is extremely difficult if not impossible to make a perfectly logical and satisfactory reconciliation of all the provisions of the *Income Tax Act* which bear upon this question, but it appears to me to be our duty to endeavour to ascertain the intention of Parliament in enacting these provisions and, in my opinion, the result arrived at by Mr. Weldon correctly expresses that intention. Should we be wrong in so deciding Parliament can deal with the matter by amendment. Having reached this conclusion, it becomes unnecessary for me to consider the effect of the business loss of $6,902.29 having in fact been deducted from the respondent's income from other sources for purpose of income tax for his 1962 taxation year which is dealt with in the reasons of my brother Pigeon and I express no opinion upon it.

It is next necessary to consider (a) whether the sum of $39,589.20 allocated to the respondent pursuant to clause 14(*b*) of the partnership agreement, quoted in the reasons of my brother Pigeon, was a capital payment or forms part of the income of the respondent and (b) if it is held to be income, in what taxation year or years it should be included in the calculation of the respondent's income.

As to (a) I agree with the conclusion of my brother Pigeon and that of Mr. Weldon that the sum in question is received by the respondent as income and not as capital. I do not find it necessary to add anything to the reasons which they have given for reaching this conclusion.

As to (b), the respondent had at all relevant times computed his income on a cash received basis. He was not

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entitled to receive any part of the sum of $39,589.20 until the decision of the Management Committee to allot that amount to him was made early in 1963. He did not, upon that decision being made, become the owner of that sum or entitled to withdraw it but had a contractual right to receive payment of it in equal annual instalments of $9,897.30 in the years 1963, 1964, 1965 and 1966. Each instalment forms part of the respondent's income in the year in which it was received by him. For the reasons given by my brother Pigeon I agree with his conclusion that this result is not altered by the terms of s. 6(1)(*c*) of the *Income Tax Act*. It was therefore correct for the appellant to include the sum of $9,897.30 received by the respondent in 1963 in the computation of his income for that year.

For these reasons, I would allow the appeal with costs in this Court and in the Exchequer Court, set aside the judgment of the Exchequer Court and restore the decision of the Income Tax Appeal Board.

PIGEON J.:—The respondent is a barrister practising in Toronto. At the end of the year 1961 he resigned his partnership in the law firm Borden, Elliott, Kelley & Palmer and established a new firm under the name of Wahn, McAlpine, Mayer, Smith, Creber, Lyons, Torrance & Stevenson. This new firm elected to end its fiscal year on April 30 and consequently its 1962 fiscal year was a four-month period. The audited financial statement for that period showed a deficit of which respondent's share was $6,516.39. After adding to this loss $386.50 for expenses incurred during the year 1962 in connection with the practice of his profession, he sought to have the total of $6,902.89 carried back to the year 1961 against his substantial professional income for that year.

The Minister took the view that the 1962 loss had to be deducted first from other income in the same year and, as there was in that year other income (mostly from an office or employment) to an amount exceeding the aforementioned loss and all other allowable deductions, he assessed respondent for 1962 on that basis. For the year 1961 he issued a revised assessment in which it is expressly stated that the deduction of the 1962 business loss is refused for the reason that it "has previously been allowed as a deduction from other income in 1962".

Seeing that respondent had a substantial professional income in 1961 while his other income in 1962 exceeded his allowable deductions and the aforementioned loss by a very small sum only, the progressive character of our income tax results in the respondent obtaining for the 1962 loss by such assessment an income tax credit that is only a small fraction of that which he would obtain if allowed to carry it back to the year 1961.

Respondent objected to his assessment for the year 1961 and the Minister refused to modify it.

On appeal to the Tax Appeal Board, the assessment was affirmed (J. O. Weldon, February 15, 1967). This decision was based essentially on the statutory definition of loss in para. (*x*) of s. 139(1) of the *Income Tax Act* (hereinafter referred to as the Act):

> (*x*) "loss" means a loss computed by applying the provisions of this Act respecting computation of income from a business *mutatis mutandis* (but not including in the computation a dividend or part of a dividend the amount whereof would be deductible under section 28 in computing taxable income) minus any amount by which a loss operated to reduce the taxpayer's income from other sources for purpose of income tax for the year in which it was sustained.

This was apparently taken to mean that a business loss *always* so operates to reduce the income from *all* other sources in the same year.

On a further appeal to the Exchequer Court[4] Gibson J. took a different view. He held that the taxpayer was entitled to carry back his loss to the year 1961, saying:

> By reason of section 139(1)(*x*) of the *Income Tax Act* the appellant had the option to deduct this 1962 business loss from his 1962 non-business other income but it was not mandatory for him to do so and he did not do so.

I must say at the outset that I cannot agree with this construction of the Act. It is not supported by any argument and I cannot reconcile it with the text. A reading of the whole Act shows that where it is intended that a taxpayer shall have an option, this is clearly indicated. In my view, the last part of the definition of loss is not intended to define the extent to which a loss operates to reduce income from other sources in the year in which it is sustained. That part of the definition clearly means one thing only and that is that the word "loss" applies only to what

[4] [1968] C.T.C. 5, 68 D.T.C. 5023.

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remains of the loss after deducting therefrom whatever part has operated to reduce the income from other sources in the year in which it was sustained. It is equally clear that one must look to the substantive provisions of the Act in order to ascertain the extent to which a loss so operates: the definition does not purport to indicate such extent. Of course it does imply that it may so operate but it does not specify in which circumstances or to what extent. One cannot read into this definition any intention to enact a substantive rule such as that a business loss does not operate to reduce the income from other sources in the current year except at the option of the taxpayer or that it always does so operate. It may happen that substantive provisions creep into statutory definitions but this is not to be presumed.

It is therefore necessary to examine the whole Act in order to ascertain the extent to which a business loss operates to reduce income from other sources in the same year. This is by no means an easy task.

In the first place, it is apparent that the definition was drawn up essentially for the purposes of para. (*e*) of s. 27(1) respecting the deduction of business losses. This provision deals with such deduction only in the immediately preceding and the five immediately following taxation years and not in the year in which they are sustained. It is in Division C dealing with deductions in the "Computation of Taxable Income", not in Division B: "Computation of Income".

When the Act was originally adopted in 1948 with the definition in its present form, there was in Division B a provision (repealed in 1952) that might be considered as defining the extent to which a loss could be deducted in the year in which it was sustained. This was s. 13 of which subs. 1 read:

> (1) The income of a person for a taxation year shall be deemed to be not less than his income for the year from his chief source of income.

The effect of that provision was that whenever a loss was incurred in a business that was not the taxpayer's chief source of income, it could not be deducted from income from that source. This might be said to imply that it

could be deducted from other income, because, if as a general rule, a loss from one source could not be deducted from income from any other source in the same year, there would never have been any reason for enacting any rule to limit such deductions in respect of the taxpayer's chief source of income.

Section 13(1) as enacted in 1948, was substantially to the same effect as s. 10 of the *Income War Tax Act* when replaced by the new Act. This may be of some importance when comparing the wording of the "general rules" of the present Act in Division B "Computation of Income" with the corresponding provisions of the former Act. In the latter, "income" was defined as meaning "the annual net profit or gain or gratuity, . . .". The word "net" was there from the outset and was obviously considered as implying the right to deduct any expenses or losses incurred in the year because Parliament in 1919, besides making other changes, added to the definition of "income" the following paragraphs (9-10 George V, c. 55, s. 2):

> (*e*) in determining the income no deduction shall be allowed in respect of personal and living expenses, and in cases in which personal and living expenses form part of the profit, gain or remuneration of the taxpayer, the same shall be assessed as income for the purposes of this Act;
>
> (*f*) deficits or losses sustained in transactions entered into for profit but not connected with the chief business, trade, profession or occupation of the taxpayer shall not be deducted from income derived from the chief business, trade, profession or occupation of the taxpayer in determining his taxable income.

The above para. (*f*) was amended the following year to provide for conclusive determination by the Minister and, in 1923, was replaced by a new provision stating that "the income of a taxpayer shall be deemed to be not less than the income derived from his chief position, occupation, trade, business or calling". In the 1927 revision this became s. 10. Despite the change of wording no doubt effected for the purpose of plugging loopholes, the purpose of the provision clearly remained to prohibit the deduction of business losses from income derived from the taxpayer's chief occupation while leaving intact the right to deduct them from income from any other sources by virtue of the general rule that net income only was taxed.

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However, and this might be said to be the main basis of respondent's argument, the present Act no longer defines "income" as "net income". The basic provisions are now the following:

2. (3) The taxable income of a taxpayer for a taxation year is his income for the year minus the deductions permitted by Division C.

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

5. (1) Income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by the taxpayer in the year plus . . .

* * *

minus the deductions permitted by paragraphs (*i*), (*ib*), (*q*) and (*qa*) of subsection (1) of section 11 and by subsections (5) to (11), inclusive, of section 11 but without any other deductions whatsoever.

Concerning business losses the difficulty is that, as we have seen, the only provision for their deduction is para. (*e*) of s. 27(1) in Division C. This, as already noted, does not provide for such deduction in the year in which they are suffered. Section 4 defining income from a business or property as "the profit therefrom" would appear to negate the consideration of losses. Also the definition of "loss" requiring the application of the provisions "respecting computation of income from a business *mutatis mutandis*" implies that "income" in the "general rules" does not include a loss.

On the other hand, the result of such literal reading of ss. 2, 3, 4 and 5 would be that what is contemplated in the last part of the definition of "loss" would never arise. A loss would never operate to reduce the taxpayer's income from other sources for purposes of income tax for the year in which it is sustained if s. 3 contemplates only the addition of income from every source this being taken in the case of a "business" as meaning a profit not a loss. The difficulty is that such a construction deprives the last part of the definition of "loss" of any meaning.

It must also be considered that when ss. 2, 3 and 4 were enacted in 1948, the Act included besides the definition of

"loss" a s. 13 which would have had no effect unless, as a general rule, business losses were deductible from other income in the same year. This provision was repealed in 1952 (1 Eliz. II, c. 29, s. 4). However, according to Maxwell (On Interpretation of Statutes, 11th ed., p. 37):

> Where a part of an Act has been repealed, it may, although not of operative force, still be taken into consideration in construing the rest, for it is part of the history of the new Act.

But, how do we know that the provision was not repealed because it was considered useless?

One must also consider that under s. 27(1)(*e*) as amended in 1958 (c. 32, s. 12), business losses sustained in the five preceding years or in the immediately following year are now deductible not only from the income from the same business but from the income from any other business as well. It would be an extreme anomaly if they were not deductible from the income from another business in the same year, but such is the result if ss. 3 and 4 are read literally as requiring an addition of income from every source without deducting any loss.

On this literal construction, another equally anomalous result would follow from the definition of "earned income" (s. 32(5)) as it now stands. Despite its length, I find it necessary to quote it in full.

> (5) For the purpose of this section, "earned income" means the aggregate of
>
> (*a*) salary or wages, superannuation or pension benefits, retiring allowances, death benefits, royalties in respect of a work or invention of which the taxpayer was the author or inventor, amounts included in computing the income of the taxpayer by virtue of paragraph (*d*), (*da*) or (*db*) of subsection (1) of section 6, amounts allocated to the taxpayer by a trustee under an employees profit sharing plan, amounts received by the taxpayer from a trustee under a supplementary unemployment benefit plan, amounts included in computing the income of the taxpayer by virtue of section 79B and amounts included in computing the income of the taxpayer by virtue of subsections (9) and (14) of section 79C,
>
> (*b*) income from the carrying on of a business either alone or as a partner actively engaged in the business, and
>
> (*c*) rental income from real property,
>
> minus
>
> (*d*) business losses sustained in the taxation year in the course of the carrying on of a business either alone or as a partner actively engaged in the business,

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(*da*) losses sustained in the taxation year from the rental of real property, and

(*e*) amounts deductible under paragraph (*u*) or (*v*) of subsection (1) of section 11 or under section 79B in computing income for the taxation year.

The above provision clearly indicates that for the purpose of the definition of "earned income" business losses are deductible from what might be described as all income other than investment income in the year in which they are suffered, but not in subsequent or preceding years although they may be deductible from business income in such years. While it is very hard to see how Parliament can possibly have intended that business losses should be deducted in the same year for ascertaining what is "earned income" and not for ascertaining what is "income", one must bear in mind that the paramount duty of the Courts is to construe the legislation as written and not to depart from the clear wording because the result of the literal construction appears illogical or unfair. Here, if we compare, as we must, the provisions of s. 32(5) with those of ss. 3, 4 and 5, we find not only an explicit provision for an algebraic addition, plusses and minusses being specified, but also a reference not to income only but to losses as well. A comparison of the language thus appears to indicate a deliberate different intention. It must be noted that this difference arises essentially from an amendment enacted in 1957 (5-6 Eliz. II, c. 29, s. 9). In the Act as adopted in 1948, subs. (5) of s. 31 read:

(5) For the purpose of this section, "earned income" means

(*a*) salary or wages, superannuation or pension benefits, retiring allowances and royalties in respect of a work or invention of which the taxpayer was the author or inventor, and

(*b*) income from the carrying on of a business either alone or as a partner actively engaged in the business.

One must now turn to the last part of subs. (1) of s. 5, being the definition of "income from an office or employment". While s. 4 does not specify the deductions that may be made in ascertaining the income from a business or property, s. 5, after enumerating all the items to be included in income from an office or employment, expressly limits the allowable deductions to those contemplated in a few specifically enumerated provisions of the Act. Can this mean that the other deductions, although they are thus disallowed from income from an office or employment, are

nevertheless allowable from total income even if there is no other income, or if all other income amounts to less than those deductions? Would this not deprive the restriction of any practical effect due to the repeal of s. 13(1)? It does not seem that this repeal was intended to have that result because not only was the limitation of the deductions allowable against employment income left intact at that time, but it was reenacted in amended form in 1957 (5-6 Eliz. II, c. 29, s. 1). Parliament having decreed that income from an office or employment shall include all the items specified minus the permitted deductions "but without any other deductions whatsoever", it is not easy to see on what basis some other deductions, namely business losses incurred in the same year, should be allowed to reduce the income of a taxpayer below the amount of his income from an office or employment.

On the other hand, the limitation of deductions from "income from an office or employment" is only in the definition of such income (s. 5) and does not affect the definition of "income" (s. 3). Can it be held to exclude the deduction of business losses incurred in the same year unless it is also held that the latter definition does not implicitly provide for that particular deduction being made? If it is so, then there is no basis anywhere in the Act as it now reads for allowing the deduction of a business loss from income from any other source in the same year as is expressly contemplated in the definition of "loss" (s. 139(1)(*x*)). Should it be said that this merely means that this part of the definition was made useless by the repeal of the former s. 13(1) in 1952? Nothing indicates that this amendment was intended to prohibit the deduction of any business loss in the same year.

Both parties seek to avoid the difficulty by calling this a "netting out" instead of a deduction.

Respondent contends that the plural "businesses" in s. 3 implies a "netting out" of the income from all businesses in the same year. This argument is self-defeating because, if the plural does of itself carry such an implication, then this must be applied to "sources" as well, resulting in an overall "netting out" that is the very basis of the Minister's contention.

On the other hand, some very serious objections to any "netting out" theory are not only that the word "net" was

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eliminated from the Act in the 1948 revision but also that, in the Act generally, "deduction" appears to cover anything that may be subtracted. Moreover, the word "loss" is found in s. 12 dealing with deductions that are not to be made.

> 12.(1) In computing income, no deduction shall be made in respect of
>
> * * *
>
> (*b*) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part,

This might be said to imply that a loss that is not a loss of capital is, as a rule, deductible. But, if this is a "deduction", how can it escape the effect of the limitation of deductions against "income from an office or employment"?

Having thus stated at length the problem presented in argument by the parties, I find however that it does not require to be solved in the instant case because there is no appeal from respondent's assessment for the year 1962. It is for that year that the question really arose whether, for income tax purposes, the business loss suffered in that year was to be applied first against other income in that same year. Although the assessment notice for the year 1962 is not in the record, the transcript shows that while respondent was testifying in the Exchequer Court, his counsel said:

> MR. ESTEY:
>
> Then, I believe, My Lord, part of the record already before Your Lordship includes the three assessment notices which followed that sequence of correspondence. There are three in all which perhaps would be helpful to the Court to mention for a moment now. The first one is 1961 on which is endorsed, after the arithmetic is sorted out—and there is no contest on the arithmetic—"As per amended return filed with the exception of 1962 business loss, 1962 business loan has previously been allowed as a deduction from other income in 1962". So the issue for 1961 is narrowed down to whether or not the loss which the taxpayer seeks to apply against that year has already been used up in 1962. And then on the '62 assessment, notice of assessment, is endorsed: "Your loss from business in 1962 must first be applied against any other income of the year in which the loss occurs, and accordingly it has been deducted in 1962 and your amended 1961 return will have no effect." And the third one is for 1963 which again, after dealing with the other matters of arithmetic, it adds in the $9,897.30 with this note: "Taxable income as previously assessed as payments received from Borden, Elliott deemed income $9,897.30." I take it it is not necessary to file those as exhibits, My Lord?

to which His Lordship replied: "No."

Thus it appears that in making up respondent's assessment for the year 1962, the Minister applied the business loss suffered in that year against other income in that same year. Respondent's return, which is in the record, shows how this was done and also reveals that there was other income in that year in an amount exceeding the business loss and all other allowable deductions. As there is no appeal from that assessment, the courts cannot revise it. It follows that they cannot consider whether the Minister was correct in applying the business loss, as he did, against other income in that year. That is a question that arose on respondent's assessment for the year 1962 and was properly determined on that assessment. That determination is binding on the parties. Section 46(7) reads:

> (7) An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a re-assessment, be deemed to be valid and binding notwithstanding any error, defect or omission therein or in any proceeding under this Act relating thereto.

It is only by an objection made in proper time and an appeal, if necessary, that the respondent could prevent his 1962 business loss from operating to reduce his other income in that year by virtue of the assessment. As this was not done, the result is that, having to consider only the assessment for the year 1961, the statutory definition of loss is to be applied to the facts as they are. These are that the whole amount of the 1962 business loss has operated to reduce the taxpayer's income from other sources for purposes of income tax for the year in which it was sustained and, therefore, it is not available as a deduction in the previous year.

I must add that s. 46(7) was not referred to in argument written or oral and I would consider a rehearing necessary on that point before such could properly be the basis of the majority decision on this branch of the case.

For the year 1963 the facts are the following. The partnership known as Borden, Elliott, Kelley & Palmer was, at the material time, governed by an agreement made as of January 1, 1961. Clause 1 of this contract states that the partnership is a continuation of the partnership heretofore carried under the same firm name and shall continue until determined by the affirmative vote of 75 per cent of the total votes exercisable. There are elaborate provisions for establishing yearly the percentage of the profits to which

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each partner is to be entitled. It must be noted that two of them are entitled to fix their own share without any restriction and also to exercise this right upon a dissolution with respect to all assets remaining after discharging any liabilities. In respect of withdrawals from partnership, clause 14 provides:

14. In the event of the withdrawal from partnership or death of any partner, the withdrawing partner or the estate of a deceased partner, as the case may be, shall be entitled to receive, not later than six (6) months following the date of such withdrawal or death, the amount of undrawn profits from years preceding the year of withdrawal or death then standing to the credit of such partner.

The withdrawing partner or the estate of a deceased partner shall also be paid the following additional amounts,—

(*a*) In respect of the financial year (hereinafter in this sub-paragraph (*a*) called the "current financial year") in which death or withdrawal occurred, such portion of the profits for that year as shall be voted to the withdrawing partner or to the estate of the deceased partner at the ballot conducted pursuant to sub-paragraph (*c*) of paragraph 12 by the partners then entitled to vote. The withdrawing partner or the personal representatives of the deceased partner shall not be entitled to vote on such ballot but the name of the withdrawing or deceased partner shall appear on the ballot; provided that the withdrawing partner or the estate of the deceased partner shall be entitled to receive from the profits for the current financial year not less than an amount which shall be the average of his percentage rates of profit participation for the three (3) preceding financial years applied to the profits in which the withdrawing or deceased partner would have been entitled to share but for his withdrawal or death of the current financial year and prorated to the period from the commencement of such current financial year to the date of withdrawal or death. The amount so voted to such partner or the aforesaid minimum whichever may be the greater, after deduction of sums paid on account as monthly drawings to the withdrawing partner, or to the deceased partner and his estate, as the case may be, shall be paid in full at once; and pending the determination of the actual amount so payable there shall be paid on account thereof each month during the balance of the current year an amount equal to his last effective monthly drawing rate, and any necessary adjustment shall be made when the actual amount so payable is determined; and

(*b*) The Management Committee shall examine into and, in the exercise of its best judgment, evaluate the profits accruing or to accrue or likely to accrue to the partnership from work in process or in contemplation on which the withdrawing or deceased partner was engaged or in respect of which he had general supervision or which he had introduced to the partnership and shall allocate to the withdrawing or deceased partner such portion of those profits as they, in their sole and unrestricted discretion shall consider to be just and equitable; provided, however, that unless the Management Committee shall, by the affirmative vote of 90% of the total votes exercisable in accordance with clauses (*d*) and (*f*) of paragraph 11 of this agreement (excluding for the purpose of such

vote the votes of the withdrawing partner), have determined that the withdrawing partner or the deceased partner has by his misconduct or dishonesty caused actual loss or damage to the partnership or prejudiced its reputation with the public or clients or the profession, the amount so allocated shall not be less than an amount calculated as follows:—

The average of the percentage rates of profit-participation awarded to the withdrawing or deceased partner during the three (3) financial years of the partnership last completed on or before the date of his withdrawal or death shall be calculated. The average percentage rate so obtained shall be applied to the amount of the profits of the partnership, in which the withdrawing or deceased partner would have been entitled to share but for his withdrawal or death, for the financial year of the partnership next following that in which the withdrawal or death occurred and the amount so obtained shall be the minimum entitlement of such partner under this sub-paragraph (*b*).

Such allocation shall be final and binding on all persons in interest and shall not be subject to review in any court. The profits so allocated under this sub-paragraph (*b*) to a withdrawing or deceased partner shall be paid in full at once or in equal annual instalments over such period of time not exceeding five years from the date on which such withdrawal or death occurred as the Management Committee shall, in its discretion, consider appropriate. There shall, however, be paid to the estate of a deceased partner, on account of the profits to be so allocated, a sum equal to the income tax payable by the estate in respect of the said profits, and such sum shall be paid forthwith upon the ascertainment of the amount of such tax. In no event shall interest be payable on any deferred balance.

Some time after respondent's withdrawal from the firm, the Management Committee made a decision under para. (*b*) of the above clause. The decision allocated to the respondent an amount calculated on the minimum basis specified and decided that this would be payable in four yearly equal instalments starting in 1963. On April 23, 1963, the auditors of the firm certified in writing "that the sum of $39,589.20 was credited to the account of Mr. I. G. Wahn as his share of the net profit of the firm for the year ended December 31, 1962", and on April 26 this was mailed to the respondent with a cheque for $9,897.30 being one quarter of the total credit.

In his income tax return for the year 1962, respondent, after setting forth the details of his business loss of $6,902.89 previously referred to and claiming the right to carry it back against his 1961 professional income, added the following note:

I also received from Borden, Elliott, Kelley & Palmer a cheque for $9,897.30 being one quarter of the amount (which is subject to dispute and adjustment) payable to me under my old partnership agreement with that

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firm. The proper amount payable is determined by reference to 1962 profits of Borden, Elliott, Kelley & Palmer. I left that firm effective December 31, 1961. Accordingly all such payments are capital not income.

Although, as previously mentioned, the notice of assessment for the year 1962 is not in the record, it is clear that the respondent was not assessed for income tax on his income for the year 1962 in respect of either the whole amount allocated to him by his former firm or the part of this amount that was paid to him in April 1963. What happened was that on August 16, 1965, a notice of reassessment was issued for the taxation year 1963 bearing the following mention:

> ADD: payments received from Borden, Elliott, Kelley & Palmer—deemed income.....$9,897.30

In his notice of objection, respondent again raised the contention that this was "a capital payment". He also urged in alternative that if the payment is considered as income, it should be treated as income for the taxation year 1962 rather than 1963. The objection was overruled by the Minister who said in a notification dated May 31, 1966:

> The amount of $9,897.30 received by the taxpayer in the 1963 taxation year from Messrs. Borden, Elliott, Kelley and Palmer pursuant to clause 14 of the Agreement dated 1st January, 1961 has been properly taken into account in computing the taxpayer's income for the 1963 taxation year in accordance with the provisions of sections 3 and 4 and paragraph (*c*) of subsection (1) of section 6 of the Act.

The parties took substantially the same position in the notice of appeal to the Income Tax Appeal Board and the reply thereto.

On February 15, 1967, the Tax Appeal Board upheld the assessment. Weldon said, after quoting from clause 14(*b*) of the partnership agreement:

> My interpretation of sub-paragraph (*b*) is that it was included in the Partnership Agreement to provide a convenient formula for compensating a withdrawing partner in respect of legal fees which he had earned, in whole or in part, but which were destined to be received by his former firm after his withdrawal therefrom. In that light, the amount of $39,589.20, allocated to the Appellant as aforesaid, was clearly income.

Concerning respondent's alternative contention, all that was said is the following:

> Since the above payment of $9,897.30 was properly made to the Appellant by his former partners strictly in accordance with the relevant provision contained in the Partnership Agreement, there is no question,

in my view, that the payment does not fall directly within the taxpayer's 1963 taxation year. That point has been clarified because Mr. Wahn has submitted, in the alternative, that, if the payment of $9,897.30 was found to be income instead of capital, as maintained by him, it should be taxed in his 1962 rather than in his 1963 taxation year.

This is found in the reasons for judgment of the Board before the other quoted passage in which reference is made not to the amount paid in 1963 but to the whole amount allocated out of the 1962 profits. This makes it rather difficult to understand the precise basis on which respondent's alternative contention was rejected by the conclusion confirming the assessment for the year 1963.

In the Exchequer Court, Gibson J. said:

> The payment in 1963 of $9,897.30 (together with the payments of a similar amount in the four years following) was for the release, transfer or surrender of the interest of the appellant in goodwill in the law practice of Borden, Elliott, Kelley and Palmer to the remaining partners, the corollary of purchased goodwill, a capital asset, and also to a small degree for the surrender of all the right, title and interest of the appellant in the other capital assets less his responsibility for the liabilities of this firm, and therefore the receipt of this sum for such by the appellant was not income to him within the meaning of the *Income Tax Act*.

Here again I find myself unable to agree with the view taken in the Court below. In order to ascertain the nature of the amount allocated to the respondent out of the profits of the firm from which he had withdrawn, the partnership agreement must be construed as written. It was obviously drawn up with great care and special consideration was given to the fiscal consequences of the provisions for payments to a withdrawing partner or to the estate of a deceased partner. In the latter case it is provided that payment will be made by the firm of "a sum equal to the income tax payable by the estate in respect of the said profits" (viz. the profits so allocated). This shows clearly that it was not the intention that the remaining partners should bear the income tax on the part of the 1962 profits allocated to the respondent. However, such would be the result of treating the amount as a capital payment. Respondent would be getting it free from income tax but the amount allocated to him out of the 1962 profits would be added to the share of the remaining partners because, on the assumption that the sum allocated is a capital payment, the whole amount of the 1962 profits would have to be apportioned among the partners instead

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of the portion remaining after deducting the amount allocated to the respondent. This is clearly what was never intended and I fail to see on what basis the agreement should be given an effect other than that which was undoubtedly intended.

It is contended that what is said in the agreement respecting income tax cannot override the provisions of the Act. This is quite true but does not mean that what is said is not to be taken as expressing the intention of the parties. I find it obvious that the intention was that the payment to a withdrawing partner should be an allocation of profits. It is true that the fact that a payment is measured by reference to profits may not prevent it from being of a capital nature but there must be something to show that such is the true nature of a payment. In the present case, I can find nothing tending to indicate that it is so. On the contrary, clause 18 provides clearly that a withdrawing partner has no interest in the capital assets of the firm.

> 18. The amounts hereinbefore provided to be paid to a withdrawing, retiring or expelled partner or to the estate of a deceased partner shall be accepted by the withdrawing, retiring or expelled partner or by the estate of the deceased partner in full satisfaction of all claims or demands which he or it may have against the partnership.

It must also be noted that when respondent was admitted to the partnership, he was not required to make and did not make, at that time or at any other time, any contribution to capital account. Under such circumstances it is only natural that the agreement was not intended to compel the other partners to pay a substantial capital sum for the privilege of retaining assets to which respondent had not contributed. Concerning goodwill, it is significant that the agreement contains no provision intended to secure it to the remaining partners as against a withdrawing partner although such provision is made for the case when a partner retires because of age or ill health. In such case, clause 17 of the agreement provides for a retiring allowance subject to the condition that he shall not "in any way compete with the continuing partnership". It is thus clear that the matter of goodwill was considered in the drafting of the partnership agreement. The wording of the provision for the allowance to a withdrawing partner shows that it was not intended to be a capital payment for goodwill but an

allocation of profits and this is conclusive evidence that it is income of the recipient as was held by this Court in *Minister of National Revenue v. Sedgwick*[5].

Much was said of the *Partnerships Act*, R.S.O. 1960, c. 288, but I can find nothing in it which would compel us to hold that the amount allocated to the respondent is anything else than what the agreement intends it to be, namely a share of the 1962 profits. Sections 32 and 33 clearly show that it may be lawfully stipulated that a partnership will continue after the withdrawal of a partner and s. 43 implies that payments to a withdrawing partner may be governed by the stipulations of the partnership agreement.

Having come to the conclusion that the amount allocated to the respondent by his former firm is not a capital payment but a part of the profits of that partnership in the year 1962, being the year following his withdrawal, it is necessary to consider s. 6 of the Act and especially para. (*c*). This section down to that paragraph reads as follows:

6. (1) Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year

(*a*) amounts received in the year as, on account or in lieu of payment of, or in satisfaction of
  (i) dividends,
  (ii) director's or other fees,
  (iii) Repealed. 1963, c. 21, s. 2(1).
  (iv) superannuation or pension benefits,
  (v) retiring allowances, or
  (vi) death benefit;

(*aa*) amounts received in the year as annuity payments;

(*b*) amounts received in the year or receivable in the year (depending upon the method regularly followed by the taxpayer in computing his profit) as interest or on account or in lieu of payment of, or in satisfaction of interest;

(*c*) the taxpayer's income from a partnership or syndicate for the year whether or not he has withdrawn it during the year;

These provisions must be considered in the light of s. 15 of which subs. (1) reads as follows:

15. (1) Where a person is a partner or an individual is a proprietor of a business, his income from the partnership or business for a taxation year shall be deemed to be his income from the partnership or business for the fiscal period or periods that ended in the year.

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[5] [1964] S.C.R. 177, [1963] C.T.C. 571, 63 D.T.C. 1378, 42 D.L.R. (2d) 492.

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It is clear that the last quoted provision cannot be applied to the respondent. He was not a partner of his former firm in the year 1962. In my view, this provision should also be taken as defining what is meant as the taxpayer's income from a partnership in para. (*c*) of s. 6(1). The Shorter Oxford Dictionary gives the following as the first two meanings of the word "partnership":

> 1. The fact or condition of being a partner.
>
> 2. *Comm.* An association of two or more persons for the carrying on of a business, of which they share the expenses, profit, and loss.

In the first and stricter sense the payment made to the respondent in 1963 was not income from a partnership because he was not a partner, although in the second and wider sense it might be said to be income from the partnership because it came from the association of which he had formerly been a member. Bearing in mind 1° that fiscal statutes must be construed strictly, 2° that the respondent having regularly followed the method of reporting his income as received, para. (*c*) is an exception to the more general rule, 3° that the narrow sense is the only one consistent with s. 15(1), I have reached the conclusion that the respondent was properly assessed for the payment made by his former firm in the year in which he actually received it.

For the above reasons I am of the opinion that the appeal should be allowed with costs, that the judgment of the Exchequer Court should be reversed, that respondent's appeal to that Court from the decision of the Income Tax Appeal Board should be dismissed with costs and that the said decision should be re-established and confirmed.

Appeal allowed with costs.

Solicitor for the appellant: D. S. Maxwell, Ottawa.

Solicitors for the respondent: Robertson, Lane, Perrett, Frankish & Estey, Toronto.

PROVOST & PROVOST (1961) LIMITÉE (*Petitioner*) ..... APPELLANT;

AND

SPOT SUPERMARKETS CORPORATION (*Intervenant*) ..... RESPONDENT;

AND

CONSERVERIE ST-DENIS LIMITÉE (*Debtor*);

AND

ARMAND GAGNON and LLOYD H. PAUL (*Mis-en-Cause*).

1968
*Dec. 9
1969
Jan. 28

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

Sale—Purchase of canned vegetables—Goods paid for in advance but not delivered—Goods not weighted, counted or measured before winding-up of seller—Whether ownership has passed to buyer—Sale of stock in trade by liquidators—Buyer has only pecuniary claim against assets—Civil Code, art. 1474.

In 1963, the petitioner contracted to purchase a large quantity of canned vegetables from C Co., against which a winding-up order was subsequently made. Under the contract, the goods were paid for in advance but not delivered. Some of them were not in existence at the time of the contract. In subsequent weeks some of the goods were delivered but when the winding-up order was made against C Co., a substantial quantity remained to be shipped. The liquidators invited tenders for the purchase of all the stock in trade of C Co. and accepted the tender of the respondent S Co. The petitioner filed a petition asking that it be declared owner of the goods of which it had not received delivery. The liquidators did not contest the petition. S Co. intervened and claimed ownership of the disputed goods. The trial judge granted the petition, but his decision was reversed by the Court of Appeal. The petitioner appealed to this Court.

Held: The appeal should be dismissed.

Since the goods had not been identified before the liquidation pursuant to art. 1474 of the *Civil Code*, the petitioner had only a pecuniary claim against the assets of C Co. and not a right in rem to the goods over which it claimed ownership.

Vente—Achat de conserves alimentaires—Marchandises payées d'avance mais non livrées—Marchandises non pesées, ni comptées ni mesurées avant la mise en liquidation du vendeur—Propriété non transférée à l'acheteur—Vente du fonds de commerce par les liquidateurs—Acheteur a seulement un droit de créance contre la masse—Code Civil, art. 1474.

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*PRESENT: Fauteux, Abbott, Martland, Hall and Pigeon JJ.

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PROVOST & PROVOST (1961) LTÉE
v.
SPOT SUPER-MARKETS CORPORATION *et al.*

En 1963, la requérante a acheté de la compagnie C, qui fut subséquemment mise en liquidation, une grande quantité de conserves alimentaires. En vertu du contrat, les marchandises étaient payées d'avance mais non livrées. Certaines de ces marchandises n'existaient pas au moment du contrat. Une certaine quantité a été livrée durant les semaines subséquentes, mais lorsque la compagnie C a été mise en liquidation une grande quantité n'avait pas encore été expédiée. Des soumissions furent demandées par les liquidateurs pour l'achat du fonds de commerce de la compagnie C, et celle de la compagnie S fut acceptée. La requérante a produit une requête demandant d'être déclarée propriétaire des marchandises dont elle n'avait pas encore reçu livraison. Les liquidateurs n'ont pas contesté la requête. La compagnie S a produit une intervention et a revendiqué la propriété des marchandises en question. Le juge au procès a accueilli la requête, mais sa décision fut renversée par la Cour d'appel. La requérante en appela à cette Cour.

Arrêt: L'appel doit être rejeté.

Puisque les marchandises n'avaient pas été identifiées avant la liquidation conformément à l'art. 1474 du *Code Civil,* la requérante avait seulement un droit de créance contre la masse et non pas un droit réel sur les marchandises dont elle revendiquait la propriété.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], renversant un jugement du Juge Montpetit. Appel rejeté.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Montpetit J. Appeal dismissed.

Jules Dupré, Q.C., for the petitioner, appellant.

R. S. Litvack, for the intervenant, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—In August 1963, appellant contracted to purchase a substantial quantity of canned vegetables from Conserverie St-Denis Ltée, (against which a Winding-Up Order was subsequently made and which is hereinafter referred to as the Insolvent). The contract was of a nature known in the trade, apparently, as G.I.N.D., "goods invoiced and not delivered". The merchandise was paid for in advance, but not delivered. Some of it was not in existence at the time the contract was made.

In subsequent weeks, some of the merchandise was delivered but, as at October 26, 1963, some 9,541 cases of assorted vegetables remained to be shipped.

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[1] [1968] Que. Q.B. 404.

Shortly thereafter a fire occurred at the premises of the insolvent and, on November 8, 1963, the latter wrote appellant, confirming the undelivered quantities and informing appellant that its merchandise had been destroyed.

On December 23, 1963, solicitors for appellant wrote the insolvent stating that, in view of the nature of the sale, title had not passed to appellant and, accordingly, any loss suffered as a result of the fire was to be borne by the insolvent. This letter contained the following statement:

. . . Ces marchandises ne sont donc pas, jusqu'au moment de leur livraison, spécifiquement désignées comme étant la propriété de nos clients et celles que vous prétendez avoir été détruites dans l'incendie—car il apparaît qu'une quantité considérable de ces marchandises a échappé au sinistre—ne sont pas nécessairement les marchandises de nos clients. Dans un genre de vente comme celle-ci, la marchandise ne devient individualisée qu'au moment de la livraison et la garde et les soins de détention de ces marchandises sont entièrement l'objet de votre responsabilité. Nos clients, en effet, ne sont pas appelés à payer de frais d'entreposage pour ces marchandises, parce que, précisément, la marchandise n'est pas déposée ou remisée en leur nom dans un endroit spécifique, comme la chose se rencontre dans les entrepôts publics.

In February 1964, appellant instituted an action against the insolvent before the Superior Court, asking for judgment ordering the latter to deliver the balance of the merchandise purchased, or, in the event of the insolvent's failure so to do, condemning it in the sum of $28,707.98. The action was accompanied by a conservatory attachment in virtue of which, assorted merchandise found by the bailiff at the premises of the insolvent, was placed under seizure, but the goods in issue here were not at that time identified by the bailiff.

The insolvent pleaded to the action, but subsequently confessed judgment and, on June 1, 1964, judgment was rendered declaring the conservatory attachment good and valid, ordering the insolvent to deliver the merchandise «jusqu'à concurrence des quantités et qualités décrites dans le bref», in default of which, the insolvent was condemned to pay to appellant the sum of $28,707.98, with interest and costs.

However, no further deliveries were made to appellant, and on August 20, 1964, a winding-up order was issued against the insolvent. By judgment of the Superior Court, the mis-en-cause were subsequently appointed joint liquidators.

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PROVOST & PROVOST (1961) LTÉE v. SPOT SUPER-MARKETS CORPORATION et al

Abbott J.

On or about September 14, 1964, appellant filed with the liquidators proof of claim, as an unsecured creditor, in the amount of $28,707.98 plus interest, in accordance with the terms of the judgment of June 1, 1964 above referred to.

Subsequently, the liquidators invited tenders for the purchase of all the stock in trade of the insolvent, and the tender of the respondent, for a total price of $226,000, was accepted, subject to the following condition:

> . . . In the event that it is subsequently established that any other party or parties have a right in the said merchandise, or in any part thereof, then, and to such extent, the purchase price hereinabove mentioned shall be proportionally reduced.

Delivery of this stock in trade was made from time to time to respondent by the liquidators following an inventory completed on December 8, 1964.

On February 5, 1965, appellant filed a petition, which initiated the present litigation, asking that it be declared owner of the specified quantity of canned vegetables above referred to. The liquidators did not contest the petition, but submitted to justice. The respondent intervened and claimed ownership of the merchandise in question under its contract with the liquidators. Appellant's petition was granted by the learned trial judge, but that judgment was unanimously reversed by the Court of Queen's Bench[1].

The facts which I have recited are set out somewhat more fully, in the reasons of Taschereau J., who delivered the unanimous judgment in the Court below. They are not now really in dispute.

The issue here, as in the Court of Queen's Bench, was stated concisely by Taschereau J. as follows:

> Il s'agit donc pour cette Cour de décider si, par l'application de l'article 1474 c.c., les marchandises réclamées par la requérante ont été comptées, pesées ou mesurées et ainsi identifiées avant la mise en liquidation de la débitrice, ce qui lui donnerait sur icelles un droit réel opposable à tout le monde, dès lors à l'intervenante. Dans le cas contraire, la requérante n'aurait qu'un droit personnel qui n'existerait qu'à l'encontre de la débitrice et ne pourrait être opposé aux tiers.

After discussing the authorities, and referring to certain evidence as to identification of the goods, he said:

> J'en conclus que les diverses quantités de conserves alimentaires qui font l'objet du présent litige n'ont pas été identifiées avant la faillite, conformément à l'article 1474 c.c., et que, dès lors, l'intimée n'a qu'un droit

[1] [1968] Que. Q.B. 404.

de créance contre la masse et non un droit réel sur les marchandises dont elle revendique la propriété. C'est d'ailleurs ainsi qu'elle a compris la chose, car autrement elle n'aurait jamais écrit la lettre du 23 décembre 1963 et son action du 7 février 1964 aurait été accompagnée d'une saisie revendication et non pas d'une saisie conservatoire.

I am in agreement with those findings, I am content to adopt them, and I do not find it necessary to add anything to what the learned judge has said.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Attorneys for the petitioner, appellant: Duranleau, Dupré & Gagnon, Montreal.

Attorneys for the intervenant, respondent: Chait, Aronovitch, Salomon, Gelber & Bronstein, Montreal.

MARCEL TREMBLAY .....APPELANT;

ET

SA MAJESTÉ LA REINE .....INTIMÉE.

1968
*Dec. 2
1969
Janv. 28

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Droit criminel—Recel—Obligations volées—Explication de l'accusé—Le juge a-t-il déplacé le fardeau de la preuve—Rappel par la Couronne de l'accusé comme témoin, la preuve de la défense étant close et la contre-preuve de la Couronne ayant commencé—Code criminel, 1953-54 (Can.), c. 51, art. 296, 597(1)(b).

L'appelant, homme d'affaires de la cité de Québec, a été déclaré coupable du recel de dix obligations qui avaient été volées à Montréal. L'appelant raconte avoir reçu les obligations le lendemain du jour du vol et en avoir disposé dès le jour suivant. Son explication consiste à avouer qu'il a aidé, moyennant finance, un inconnu de Montréal à frauder le fisc mais à nier qu'il savait qu'il s'agissait d'obligations volées. La déclaration de culpabilité fut confirmée par la Cour d'appel. L'appelant a obtenu la permission d'en appeler à cette Cour sur les deux questions de droit suivantes: (1) les directives concernant le caractère de l'explication de l'appelant étaient-elles conformes à la loi, et (2), le juge a-t-il erré en droit en permettant à la Couronne de rappeler l'accusé comme témoin alors que la preuve de la défense était close et que la Couronne avait commencé sa contre-preuve.

Arrêt: L'appel doit être rejeté.

On doit rejeter le grief que le juge au procès, en parlant d'explications raisonnablement vraies au lieu de parler d'explications qui peuvent

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*CORAM: Les Juges Fauteux, Abbott, Judson, Hall et Pigeon.

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être raisonnablement vraies, aurait placé l'accusé dans l'obligation de prouver hors de tout doute raisonnable que son explication était raisonnablement vraie. Ce qui importe, c'est que dans leur substance, sinon dans leur forme, les directives correspondent adéquatement aux exigences de la loi. Dans l'espèce, le juge a expliqué ce qu'il fallait entendre par une explication qui est raisonnablement vraie et a exposé qu'il s'agit d'une explication qui, au regard des circonstances, peut avoir du bon sens, est vraisemblable ou qui engendre un doute; il a dit que, pour repousser la présomption résultant de la possession récente, l'accusé n'était pas obligé de convaincre le jury hors de tout doute que son explication était vraie, et, plusieurs fois, il a déclaré que l'accusé était présumé innocent et que dans tous les cas, la Couronne gardait toujours le fardeau absolu de prouver la culpabilité hors de tout doute raisonnable. L'appelant n'est pas justifié de reprocher au juge d'avoir déplacé le fardeau de la preuve.

Quant à la deuxième question, il n'est pas nécessaire de la considérer parce que ce nouvel interrogatoire de l'accusé n'a rien ajouté qui puisse empêcher la Cour de conclure que le verdict aurait nécessairement été le même si cet incident n'avait pas eu lieu.

Criminal law—Possession of stolen bonds—Explanation by accused—Whether onus of proof displaced by trial judge—Recall by the Crown of accused as a witness after the defence had closed its case and the Crown had started its rebuttal—Criminal Code, 1953-54 (Can.), c. 51, ss. 296, 597(1)(b).

The appellant, a business man of Quebec City, was convicted of the possession of ten bonds which had been stolen in Montreal. The appellant said that he received the bonds the day after the theft and that he disposed of them the following day. His explanation consisted in admitting that he had helped, for a financial consideration, an unknown man from Montreal to defraud the taxing authorities and in denying knowledge that the bonds had been stolen. The conviction was affirmed by the Court of Appeal. The appellant was granted leave to appeal to this Court on the following questions of law: (1) whether the instructions to the jury concerning the appellant's explanation complied with the law, and (2), whether the trial judge erred in law in giving leave to the Crown to recall the accused as a witness after the defence had closed its case and the Crown had started its rebuttal.

Held: The appeal should be dismissed.

The objection that the trial judge, when speaking of explanations reasonably true instead of explanations which may reasonably be true, had placed on the accused the burden of proving beyond a reasonable doubt that his explanation was reasonably true, could not be entertained. What is important is that the instructions, in their substance if not in their form, should adequately meet the requirements of the law. In the present case, the judge explained what was to be understood by an explanation which is reasonably true and stated that it is an explanation which, having regard to the circumstances, makes sense, is plausible or raises a doubt; he said that the accused did not have, in order to rebut the presumption raised by the recent possession, to convince the jury beyond a reasonable doubt that his explanation was true, and stated several times that the accused was presumed

innocent and that at all events the Crown had at all times the absolute onus of proving the guilt beyond a reasonable doubt. It could not be said that the trial judge had displaced the onus of proof.

It was not necessary to consider the second question because this new examination of the accused did not add anything which could prevent the Court from concluding that the verdict would have necessarily been the same if that incident had not taken place.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming the appellant's conviction for possession of stolen bonds. Appeal dismissed.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], confirmant une déclaration de culpabilité pour recel d'obligations volées. Appel rejeté.

Lawrence Corriveau, c.r., pour l'appelant.

Roch Lefrançois, pour l'intimée.

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:—L'appelant a été déclaré coupable, à Québec, par un jury présidé par M. le Juge Lacroix, du recel de dix obligations de la St. Lawrence Corporation Limited, dont huit de $1,000 et deux de $500, le tout d'une valeur de $8,714.19, en contravention de l'article 296 du *Code criminel.*

Il appela de cette déclaration de culpabilité et son appel fut rejeté par une décision unanime de la Cour du banc de la reine (division d'appel)[1], alors composée de MM. les juges Hyde, Rinfret et Choquette.

Il obtint par la suite, en vertu de l'article 597(1)(*b*) du *Code criminel*, la permission d'appeler de ce jugement sur les deux questions de droit suivantes:

1. Les directives données au jury, en ce qui concerne le caractère de l'explication susceptible en droit de repousser la présomption résultat de la possession récente d'objets volés, sont-elles conformes à la loi?

2. Le juge au procès a-t-il erré en droit alors que, la défense ayant déclaré sa preuve close et la couronne ayant commencé sa contre-preuve, il a permis à la couronne, nonobstant l'objection de la défense, d'appeler l'accusé à la barre des témoins et de procéder à le contre-interroger?

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[1] [1967] B.R. 784.

1969

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Le juge Fauteux

Il convient d'exposer brièvement les faits. Les obligations mentionnées dans l'acte d'accusation ont été volées, à Montréal, dans la nuit du 10 au 11 novembre 1964, à l'occasion d'une effraction commise à la résidence de M. et M^me^ Charles A. Davison. Dès le lendemain du vol, soit dans la matinée du 12 novembre 1964, ces obligations sont, dans la cité de Québec, en la possession de l'appelant, homme d'affaires y exerçant différents commerces. Les circonstances dans lesquelles l'appelant raconte avoir reçu ces débentures le 12 novembre et en avoir disposé dès le jour suivant, sont relatées en détail aux raisons de jugement de M. le juge Choquette, auxquelles ses collègues ont donné leur accord. Il suffit de résumer. Au cours de la matinée du 12 novembre, l'un des employés de l'appelant, R. C. Handy, présente à celui-ci, comme étant un représentant d'une maison de courtage de Montréal, un soi-disant courtier du nom de Jimmy Bundy. Cette présentation faite, celui-ci expose qu'un de ses clients, détenteur des obligations en question, a des problèmes avec l'impôt et pour cette raison, est prêt à vendre ces valeurs à 10 pour cent de moins que le prix parce que *s'il était déclaré,* il perdrait 50 pour cent, soit plus de $4,000; et Bundy d'ajouter que son client insiste pour que la vente soit faite immédiatement, loin de Montréal, au nom d'une autre personne et dans des circonstances ne laissant aucune trace susceptible d'alerter le ministère du Revenu national. L'appelant ne veut pas acheter directement parce que *il n'a pas le temps de s'occuper de cette affaire* mais songeant qu'un nommé Michel Camirand, ancien vendeur d'obligations, a tout le temps voulu, il s'informe de ce dernier pour savoir si la proposition de Bundy l'intéresse. Camirand lui conseille alors de ne pas acheter ces obligations avant que leur valeur et le fait qu'il ne s'agit pas d'obligations volées, ne soient vérifiés. Il suggère à l'appelant de se les faire remettre par Bundy et de les lui transmettre ensuite aux fins de cette vérification. Bundy consent à remettre les titres à l'appelant en échange d'un récépissé. L'appelant porte alors les obligations à Camirand. Dès le lendemain, soit le 13 novembre, Camirand vend les obligations à une maison de courtage, au nom d'un client fictif, nommément Marcel Larue, 333, rue Notre-Dame, Thetford Mines, P.Q.—Notons incidemment que Camirand a témoigné qu'il avait fait la vérification précitée, alors que, d'après la preuve, plusieurs jours sont requis pour vérifier si des

obligations ont été rapportées comme volées.—La vente étant faite, la maison de courtage émet un chèque au montant de $8,714.19 au nom de la personne fictive; un employé endosse le chèque, l'encaisse à la banque, en remet le produit à Camirand qui le remet ensuite à l'appelant, moins une commission de 5 pour cent, soit environ $435, qu'il garde pour lui-même. L'appelant, à son tour, remet le solde à Bundy, moins une commission de 5 pour cent. Ainsi donc et dans toute cette affaire, il ressort que le nom de l'appelant, celui de Handy, celui de Bundy, celui du véritable propriétaire des débentures n'apparaissent aucunement dans la transaction; le reçu que l'appelant dit avoir donné à Bundy, lorsque celui-ci lui a remis les débentures, n'est pas produit; Camirand ne donne aucun reçu à l'appelant lorsque ces débentures lui sont remises pour être vendues ou pour la commission de $435 qu'il a gardée; Bundy ne donne aucun reçu à l'appelant pour les $7,842.78 que celui-ci lui a remis; l'appelant ne donne aucun reçu à Bundy pour sa commission ou celle de Camirand; et une commision totale de 10 pour cent, soit environ $871, est payée alors que la commission régulière, suivant la preuve, est de 2½ à 3 pour cent. Enfin, ni Bundy, ni Handy sont entendus comme témoins et les seuls exhibits produits dans la cause consistent dans les obligations en question, trois états de compte émanant des courtiers où elles furent vendues et un certificat attestant le décès de Charles A. Davison. En somme, déclare M. le juge Choquette, avec l'accord de ses collègues, l'explication de l'appelant consiste à avouer qu'il a aidé, moyennant finance, un inconnu de Montréal à frauder le fisc d'une somme d'au moins $4,000 et à nier que Bundy lui ait déclaré ou que lui-même ait *pensé* qu'il s'agissait d'obligations volées. Et M. le juge Choquette de conclure:

> Sur le tout, les circonstances sont tellement suspectes que l'on peut dire qu'elles auraient convaincu tout homme raisonnable qu'il s'agissait d'obligations volées; que si l'appelant ne l'a pas réalisé, c'est qu'il s'est délibérément refusé à le savoir, qu'il a volontairement fermé les yeux à une évidence que tout homme ordinaire eut clairement perçue. Il y a dans sa conduite plus que de l'insouciance ou de la simple négligence; on y trouve tous les éléments permettant au jury de conclure à sa culpabilité. *Armstrong v. La Reine* (1966) B.R. 695; *Kenny's Outlines of Criminal Law*, 18e édition, 1962, nº 360, note 2, p. 357.

Il va sans dire que les seules questions de droit que nous sommes appelés à considérer et déterminer en cet appel sont celles sur lesquelles la permission d'appeler fut accordée.

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Le juge Fauteux

Le premier grief de l'appelant est que, au cours de ses instructions aux jurés, relativement au caractère de l'explication susceptible de repousser la présomption résultant du fait de la possession récente, le juge a parlé d'explications *raisonnablement vraies* au lieu de parler d'explications qui *peuvent être raisonnablement vraies* et il a de la sorte, dit-on,—et c'est là l'essence même du grief—placé l'accusé dans l'obligation de prouver hors de tout doute raisonnable que son explication était raisonnablement vraie. La Cour d'appel a rejeté ce grief et avec cette décision, nous sommes tous, pour les raisons ci-après, respectueusement d'accord.

La possession récente des obligations par l'appelant était l'un des faits qui, à la lumière des circonstances incriminantes concernant leur réception et leur disposition, devait, avec le reste de la preuve, être pris en considération, comme élément de preuve, dans l'examen de la question de savoir si l'appelant savait qu'il s'agissait d'obligations volées. La loi sur la possession récente est exposée de façon complète, concise et fidèle dans la 10e édition de *Phipson on Evidence*, à la page 53, au nº 106:

> On charges of stealing or receiving, proof of *recent possession* of the stolen property by the accused, if unexplained or not reasonably explained, or if, though reasonably explained, the explanation is disbelieved, raises a presumption of fact, though not of law, that he is the thief or receiver according to the circumstances; and upon such unexplained, or not reasonably explained, possession, or disbelieved explanation, the jury may (though not must) find him guilty. It is not, however, for the accused to prove honest dealing with the property, but for the prosecution to prove the reverse; and if an explanation be given which the jury think may be true, though they are not convinced that it is, they must acquit, for the main burden of proof (i.e. that of establishing guilt beyond reasonable doubt) rests throughout upon the prosecution, and in this case will not have been discharged.

D'où l'on voit qu'un des dangers contre lequel le juge doit se garer, en formulant ses directives de droit sur la question et particulièrement sur le caractère de l'explication donnée par l'accusé, est que son adresse aux jurés, considérée comme un tout, laisse ou puisse raisonnablement laisser aux jurés l'impression que dès que la possession récente est établie, le fardeau de la preuve passe de la poursuite à la défense et que c'est alors à l'accusé de satisfaire les jurés qu'il a une explication raisonnable à offrir, que cette explication est vraie ou que ses agissements en ce qui concerne les objets volés étaient honnêtes. Le juge doit inviter les jurés à considérer, à la lumière de toutes les circonstances de la cause,

si l'explication donnée par l'accusé peut être vraie et les directives qu'il doit alors leur donner doivent traduire (i) l'obligation qu'ils ont d'acquitter l'accusé s'ils sont d'avis que l'explication donnée peut être vraie bien qu'ils ne soient pas convaincus qu'elle le soit et (ii) le droit, mais non l'obligation, qu'ils ont, en se fondant sur la présomption découlant de la possession récente, de trouver l'accusé coupable s'ils ne croient pas ou trouvent déraisonnable de croire en l'explication donnée. Dans le cas qui nous occupe, l'appelant a raison de dire que le juge au procès a parlé d'explications *raisonnablement vraies* au lieu de parler, à l'instar de cette Cour dans *Richler v. Le Roi*[2] et dans *Ungaro v. Le Roi*[3], d'explications qui *peuvent être raisonnablement vraies.* Cependant, et ainsi qu'on s'en est exprimé aux raisons de jugement en Cour d'appel, ces mots n'ont pas de valeur sacramentelle. En fait, ni cette Cour dans ces causes, ni la Cour d'appel d'Angleterre dans *Rex. v. Schama,*[4] sur laquelle se fondent ces décisions, n'ont alors prétendu innover en ce qui a trait à la substance du droit et, à la vérité, la Cour d'appel dans *Rex v. Schama, supra,* s'est servie tantôt de l'expression *which may reasonably be true* et tantôt de l'expression *which might be true.* Ce qui importe, c'est que dans leur substance, sinon dans leur forme, les directives correspondent adéquatement aux exigences de la loi. Dans l'espèce, le savant juge de première instance a expliqué aux jurés ce qu'il fallait entendre par une explication qui est *raisonnablement vraie* et leur a exposé qu'il s'agit d'une explication qui, au regard des circonstances révélées par la preuve, *peut avoir du bon sens, est vraisemblable* ou *qui engendre un doute*; il leur a dit que, pour repousser la présomption résultant de la possession récente, l'accusé n'était pas obligé de les convaincre hors de tout doute que son explication était vraie et, plusieurs fois, il leur a déclaré que l'accusé était présumé innocent et que dans tous les cas, la Couronne gardait toujours le fardeau absolu de prouver sa culpabilité hors de tout doute raisonnable. Après avoir considéré l'adresse dans son entier, nous sommes tous d'avis que l'appelant n'est pas justifié de reprocher au juge d'avoir déplacé le fardeau de la preuve.

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[2] [1939] R.C.S. 101, 72 C.C.C. 399, [1939] 4 D.L.R. 281.
[3] [1950] R.C.S. 430, 9 C.R. 328, 96 C.C.C. 245, [1950] 2 D.L.R. 593.
[4] (1914), 84 L.J.K.B. 396, 11 Cr. App. R. 45, 24 Cox C.C. 591.

1969

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Le juge Fauteux

Le second grief de l'appelant est né du fait qu'après que l'accusé eut été entendu comme témoin en défense, que la défense eut déclaré sa preuve close et que la Couronne eut commencé sa contre-preuve, la Couronne a demandé et obtenu du juge, nonobstant l'objection de la défense, la permission de rappeler l'accusé pour lui poser quelques questions additionnelles. En ce faisant, dit l'appelant, le juge a commis une erreur de droit. La Cour d'appel a rejeté cette prétention en considérant que tant que l'instruction n'est pas terminée, le juge a discrétion pour permettre que de nouvelles questions soient posées à un témoin déjà entendu. L'appelant nous a soumis que si tel peut être le cas quand il s'agit d'un témoin ordinaire, la situation est différente quand il s'agit de l'accusé. Il n'est pas nécessaire que nous nous arrêtions à considérer la question car nous sommes tous d'opinion que ce nouvel interrogatoire de l'accusé n'a rien ajouté qui puisse nous empêcher de conclure que le verdict aurait nécessairement été le même si cet incident n'eût pas eu lieu.

Pour ces raisons, nous sommes tous d'avis que cet appel doit être rejeté.

Appel rejeté.

Procureurs de l'appelant: Corriveau, Bertrand, Gauvin & Bouchard, Québec.

Procureur de l'intimée: R. Lefrançois, Québec.

1968

*Dec. 10

1969

Feb. 17

HER MAJESTY THE QUEEN .....APPELLANT;

AND

JILLIAN WELSFORD .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Information—Breach of driving regulations—Signature of Justice of the Peace in jurat affixed with rubber stamp—Whether information valid—Criminal Code, 1953-54 (Can.), c. 51, s. 696.

Criminal law—Jurisdiction—Order prohibiting magistrate from proceeding with information—Court of Appeal affirming order of prohibition—Whether Supreme Court of Canada has jurisdiction to grant leave to appeal from order of Court of Appeal—Supreme Court Act, R.S.C. 1952, c. 259, s. 41.

PRESENT: Cartwright C.J. and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

1969

THE QUEEN v. WELSFORD

The appellant was charged under s. 64(*b*) of the *Highway Traffic Act*, R.S.O. 1960, c. 172, with failing to yield the right of way. The signature of the Justice of the Peace, acting as a Commissioner for taking oaths, had been affixed on the information with a rubber stamp. The appellant obtained an order prohibiting the magistrate or any other magistrate from proceeding with that information. An appeal to the Court of Appeal was dismissed. The Crown was granted leave to appeal to this Court, but the issue of this Court's jurisdiction to grant leave was left to be decided by the Court which would hear the appeal (see p. 441).

Held: The appeal should be dismissed.

It was necessary to decide only whether this Court had jurisdiction to grant leave to appeal from the judgment of the Court of Appeal affirming the order of prohibition and to entertain that appeal on the merits. This Court had that jurisdiction under s. 41 of the *Supreme Court Act*.

As to the merits, the Court of Appeal had rightly held that the information was a nullity.

Droit criminel—Dénonciation—Infraction au code de la route—Signature du juge de paix assermentant la dénonciation apposée au moyen d'une étampe en caoutchouc—La dénonciation est-elle valide—Code criminel, 1953-54 (Can.), c. 51, art. 696.

Droit criminel—Juridiction—Ordonnance interdisant au magistrat de donner suite à une dénonciation—Cour d'appel confirmant l'ordonnance de prohibition—La Cour suprême du Canada a-t-elle juridiction pour accorder la permission d'appeler de la décision de la Cour d'appel—Loi sur la Cour suprême, S.R.C. 1952, c. 259, art. 41.

L'appelant a été accusé sous l'art. 64(*b*) du *Highway Traffic Act*, R.S.O. 1960, c. 172, de n'avoir pas cédé le droit de passage. La signature du juge de paix qui avait assermenté la dénonciation a été apposée sur la dénonciation au moyen d'une étampe en caoutchouc. L'appelant a obtenu une ordonnance interdisant au magistrat ou à tout autre magistrat de donner suite à cette dénonciation. Un appel à la Cour d'appel a été rejeté. La Couronne a obtenu la permission d'en appeler à cette Cour, mais la question de la juridiction de la Cour d'accorder la permission d'appeler a été laissée en suspens pour être décidée par la Cour devant entendre l'appel (Voir page 441).

Arrêt: L'appel doit être rejeté.

Il est nécessaire de décider seulement la question de savoir si la Cour a juridiction pour accorder la permission d'appeler du jugement de la Cour d'appel confirmant l'ordonnance de prohibition et d'entendre l'appel sur le mérite. La Cour a cette juridiction en vertu de l'art. 41 de la *Loi sur la Cour suprême*.

Quant au mérite, la Cour d'appel a eu raison de conclure que la dénonciation était nulle.

APPEL d'un jugement de la Cour d'appel de l'Ontario[1], confirmant une ordonnance de prohibition. Appel rejeté.

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[1] [1967] 2 O.R. 496, 2 C.R.N.S. 5, [1968] 1 C.C.C. 1.

1969

THE QUEEN v. WELSFORD

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming an order of prohibition. Appeal dismissed.

E. G. Hachborn, for the appellant.

M. Robb, Q.C., for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is an appeal from an order of the Court of Appeal for Ontario[1], dated June 12, 1967, affirming an order of Stewart J., dated November 1, 1966, prohibiting Raymond G. Gill, Esq., Justice of the Peace, or any other Justice of the Peace from proceeding further with an Information sworn on the 17th day of December, 1965, charging the respondent

that she did while driving a vehicle license No. 103020, at 10:40 A.M., upon entering the intersection of Lawrence Ave. W., and Kimbark Blvd., from Kimbark Blvd., the first named being a highway with a stop sign at the entrance thereto, fail to yield the right of way to traffic approaching the said intersection on Lawrence Ave., W., so closely as to constitute an immediate hazard, as required by Sec. 64(*b*) of the *Highway Traffic Act.*

The appeal is brought pursuant to an order of this Court[2] made on October 26, 1967, granting the appellant leave to appeal on the following question of law:

Whether the Court of Appeal for Ontario erred in law in holding that a rubber-stamped signature on an Information of a Justice of the Peace acting as a Commissioner for taking Oaths on an Information rendered such Information a nullity.

At the hearing of the application for leave counsel for the respondent had submitted that the Court did not have jurisdiction to grant leave and, in giving leave, the Court stated that it should be left to the Court hearing the appeal to determine the question whether we have jurisdiction to grant leave and, if this should be decided in the affirmative, to deal with the merits.

So far as the question of our jurisdiction is concerned, for the purposes of the present appeal it is necessary to decide only whether this Court has jurisdiction to grant leave to appeal from the judgment of the Court of Appeal affirming the Order of Prohibition made by Stewart J. and

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[1] [1967] 2 O.R. 496, 2 C.R.N.S. 5, [1968] 1 C.C.C. 1.

[2] Page 441.

to entertain that appeal on the merits, and all members of the Court are in agreement that we have this jurisdiction under s. 41 of the *Supreme Court Act*.

On the merits of the appeal I find myself so fully in agreement with the reasons of McGillivray J. A. who delivered the unanimous judgment of the Court of Appeal that I am content to adopt them and do not find it necessary to add anything to what he has said. This does not imply any expression of opinion respecting the case to which he refers in which a typed or stamped signature was held to be valid.

I would dismiss the appeal. Pursuant to the terms of the order granting leave to appeal the appellant will pay the costs of the respondent in this Court.

Appeal dismissed, costs to the respondent.

Solicitor for the appellant: W. C. Bowman, Toronto.

Solicitor for the respondent: M. Robb, Toronto.

MOTION FOR LEAVE TO APPEAL*

On October 26, 1967, the following judgment on the application of the Crown for leave to appeal, was delivered by

THE CHIEF JUSTICE:—This is an application, made pursuant to s. 41(1) of the *Supreme Court Act,* for leave to appeal from an order of the Court of Appeal for Ontario[3], dated June 12, 1967, dismissing an appeal from an order of Stewart J., dated November 1, 1966, prohibiting Raymond G. Gill, Esq., J.P., from further proceeding with an Information charging the respondent with driving a motor vehicle contrary to s. 64(*b*) of the *Highway Traffic Act* of Ontario. The Order of Prohibition was granted on the ground that the signature of the deponent on the Information and also the signature of the Justice of the Peace before whom the Information was sworn, were both affixed with a rubber stamp instead of in the handwriting of those persons.

Counsel for the applicant informs us that a large number of other cases depend on the result of this case and argues

*CORAM: Cartwright C.J. and Judson and Spence JJ.

[3] [1967] 2 O.R. 496, 2 C.R.N.S. 5, [1968] 1 C.C.C. ².

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that the judgments below are contrary to the principles of law laid down in *Regina v. Fox*[4] and *Goodman v. J. Eban Ltd.*[5] and other authorities. On these grounds we were disposed to grant leave to appeal on terms but counsel for the respondent argued that it has been decided by this Court in *Rex v. Paul,*[6] which was followed in *Fong Sing v. The Queen,*[7] that we have no jurisdiction to grant leave as the proceedings below arise out of a charge of an offence other than an indictable offence and the order sought to be appealed is not a judgment acquitting or convicting or setting aside or affirming a conviction or acquittal of such an offence.

In reply counsel for the applicant refers to *Canadian Broadcasting Corporation v. Attorney General for Ontario*[8], *Smith v. The Queen*[9], particularly at page 642, neither of which appear to have been referred to in the judgments in *Paul v. The Queen* or *Fong Sing v. The Queen,* referred to above, and also to the case of *Minister of National Revenue et al v. Lafleur*[10]. It appears difficult to reconcile these judgments and under all the circumstances it seems to us that the proper course is to grant leave to appeal, leaving it to the Court which hears the appeal to determine the question whether we have jurisdiction to grant leave and, if this is decided in the affirmative, to deal with the merits.

As the matter is in the nature of a test case, we think it proper to grant leave subject to the terms that the applicant will pay the costs of the respondent in this Court in any event of the appeal.

Leave is granted accordingly.

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[4] (1958), 120 C.C.C. 289, 27 C.R. 132, [1958] O.W.N. 141.
[5] [1954] 1 Q.B. 550, [1954] 1 All E.R. 763.
[6] [1960] S.C.R. 452, 34 C.R. 110, 127 C.C.C. 129.
[7] [1963] S.C.R. 60, 40 C.R. 195, [1963] 1 C.C.C. 113.
[8] [1959] S.C.R. 188, 122 C.C.C. 305, 16 D.L.R. 609.
[9] [1959] S.C.R. 638, 30 C.R. 230, 124 C.C.C. 71, 22 D.L.R. (2d) 129.
[10] [1964] S.C.R. 412, 46 D.L.R. (2d) 439, [1965] 1 C.C.C. 133.

UNIVERSITY OF TORONTO (*Respondent*) ..... APPELLANT;

AND

ZETA PSI ELDERS ASSOCIATION OF TORONTO (*Claimant*) ..... RESPONDENT.

1968
*Oct. 16, 17, 18
1969
Jan. 28

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Expropriation—Valuation—Expropriation of fraternity house by university—Jurisdiction of appellate Court to review arbitrator's award—Greater of replacement and redevelopment values awarded—Reinstatement standard not applicable—The Expropriation Procedures Act, 1962-63 (Ont.), c. 43.

Property of the respondent consisting of land having an area of 15,730 square feet and a fraternity house was expropriated by the appellant university. The subject land was a corner site, immediately contiguous to the university, and it was agreed that its highest and best use, apart from the building thereon, was for the erection of an apartment building. Following a hearing the Ontario Municipal Board fixed the compensation at $160,000. On appeal from the Board's decision, the Court of Appeal increased the compensation to $202,260. The university appealed and the fraternity cross-appealed from the judgment of the Court of Appeal.

Held (Judson and Pigeon JJ. dissenting): The appeal should be dismissed and the cross-appeal allowed.

Per Cartwright C.J. and Spence J.: The task of this Court was to determine whether the arbitrator had proceeded on some incorrect principle or overlooked or misapprehended some material evidence of fact and in turn whether the Court of Appeal had done so in its disposition of the issue.

The fraternity's contention that compensation for the subject property should be fixed upon reinstatement value was properly rejected by the Municipal Board and by the Court of Appeal. Generally, the reinstatement standard was applicable only in respect of property for which there was no market or general demand. This could not be said of the property in question.

The Municipal Board in its decision considered the evidence of value on two different bases, *i.e.*, replacement and redevelopment. In making his appraisal for redevelopment purposes the university's valuator had considered properties as comparable which were not comparable and it did not seem that he gave consideration to corner influence and prime location. Therefore, to accept his valuation, as the Municipal Board did, was to arrive at a valuation based on a misapprehension of the effect of the evidence and so was to fail to act in accordance with principle.

The Court of Appeal again adopting the value for redevelopment as the highest and best use of the subject property fixed the per square foot

*PRESENT: Cartwright C.J. and Judson, Ritchie, Spence and Pigeon JJ.

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valuation at a higher figure than that given by the university's valuator, but reduced the total appraisal for that purpose by an amount of 1,500 square feet on the basis that the fraternity did not require lands of such area, and then added to the amount of the land value, so adjusted because of what was viewed as oversize, the sum of $30,000 for renovation and reconstruction, and the sum of $1,500 for moving and incidental expenses. The reduction could not be supported, as a developer intending to build an apartment house on the site would have to pay the same amount per square foot for all the lands and would have to buy it all. The addition of an amount for renovation and reconstruction was also an error in principle. A developer would pay only the cost of acquiring the lands and would not pay anything for a building which he intended to remove.

On a consideration of the evidence, the value for redevelopment purposes was placed at $194,490, and that for replacement at $210,500. The greater of these two values was the value to which the fraternity was entitled, and with the addition thereto of $1,500 for moving and incidental expenses, the fraternity was entitled to compensation of $212,000.

Per Ritchie J.: Errors in principle found by Spence J. to have been made by the Board, *i.e.* (i) failing to appreciate that in this case the overriding consideration in determining "value to the owner" was the value which the respondent attached to the maintenance of its fraternity domicile and that the fact that it was deprived of its "home" was an essential and substantial ingredient to be taken into account in determining the loss for which the respondent was entitled to compensation by way of replacement and (ii) accepting a value of $3 per square foot for that part of the respondent's land that was used as a parking area, afforded a justification for the review made by him. Agreement was expressed with his analysis of the circumstances and with his proposed disposition of the case.

Per Judson and Pigeon JJ., *dissenting:* The appeal should be allowed and the valuation of the Municipal Board restored; the cross-appeal should be dismissed. The Court of Appeal had erred in principle in awarding an increase in the square foot valuation, in giving the sum of $30,000 for renovation and reconstruction of any property which the fraternity might purchase as a substitute, and in awarding $1,500 for moving and incidental expenses.

The fraternity's cross-appeal asking for the value of the land for redevelopment purposes between the brackets of $160,000 and $236,000, plus the depreciated reconstruction cost of the building at $103,754.80, would involve the assessment of compensation on the basis of reinstatement. This basis was to be applied only when there was no possible market for the property as used. Evidence before the Board fully justified the finding that there was such a market.

On a review of pronouncements of great authority prior to *Winnipeg Supply & Fuel Co. Ltd. v. Metropolitan Corporation of Greater Winnipeg,* [1966] S.C.R. 336, the principle upon which the reasons in the deciding opinion in this appeal rested was questioned.

[*Saint John Harbour Bridge Authority v. J. M. Driscoll Ltd.,* [1968] S.C.R. 633; *Diggon-Hibben Ltd. v. The King,* [1949] S.C.R. 712, applied.]

APPEAL and CROSS-APPEAL from a decision of the Court of Appeal for Ontario[1], allowing an appeal from a decision of the Ontario Municipal Board. Appeal dismissed and cross-appeal allowed, Judson and Pigeon JJ. dissenting.

W. D. Griffiths, Q.C., and *J. T. DesBrisay, Q.C.*, for the appellant.

W. L. N. Somerville, Q.C., and *G. Cihra*, for the respondent.

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

SPENCE J.:—This was an appeal by the University of Toronto from the decision of the Court of Appeal for Ontario[1] pronounced on May 1, 1967, by which judgment the Court of Appeal allowed an appeal from the decision of the Municipal Board pronounced on August 4, 1966. The Board had fixed the compensation allowed to the Zeta Psi Elders Association of Toronto at $160,000. By its decision the Court of Appeal for Ontario had increased that compensation to $202,260.

The Elders have cross-appealed from the said judgment of the Court of Appeal.

The University of Toronto enacted a by-law on August 6, 1964, which was registered on the next day expropriating the entire holding of the Zeta Psi Elders situated in the City of Toronto and known municipally as 118 St. George Street. Under the provisions of *The University Expropriation Powers Act*, 1965 (Ont.), c. 135, and *The Expropriation Procedures Act*, 1962-63 (Ont.), c. 43, the compensation was to be fixed by the Ontario Municipal Board. That Board held a hearing over seven days receiving the evidence of many witnesses, particularly three experts on the question of appraisal: James I. Stewart, for the claimant Elders, and Kevin W. Hicks and Robert A. Davis for the respondent the University of Toronto, and after reserving its judgment gave the decision recited aforesaid which was later varied by the Court of Appeal as I have set out.

Before proceeding with these reasons, I think it proper to again indicate the function of this Court upon the consider-

[1] [1967] 2 O.R. 185.

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ation of such an appeal. I had the occasion to point out in *Winnipeg Supply & Fuel Co. Ltd. v. Metropolitan Corporation of Greater Winnipeg*[2]:

> Sufficient to say that the Court of Appeal has jurisdiction to act when the arbitrator has proceeded on some incorrect principle or has overlooked or misapprehended some material evidence of fact.

and I referred to that passage in the reasons given for the Court in *Saint John Harbour Bridge Authority v. J. M. Driscoll Ltd.*[3] It would seem, therefore, that the task of this Court is to determine whether the arbitrator had proceeded on some incorrect principle or overlooked or misapprehended some material evidence of fact and in turn whether the Court of Appeal had done so in its disposition of the issue.

The Zeta Psi Fraternity had a chapter in Toronto from the year 1879 on. In the year 1911, they had purchased the subject property, an imposing residence built in 1885 on the west side of St. George Street one house north of the intersection of St. George and Harbord Streets. The fraternity occupied those premises for use as a fraternity house from that date until the expropriation in 1964. There had been small renovations or additions through the years but in 1950 the fraternity had considered the demolition of the building on the premises and its replacement with another building or, as an alternative, a move to other premises. The fraternity decided to make a complete renovation and structural alteration of the building on the site at a cost of about $47,000. In the year 1955, the one house to the south and separating the house from Harbord Street had been expropriated by the City of Toronto and demolished and Harbord Street at its easterly end bent north-east so that it ended at St. George Street immediately opposite Hoskin Avenue, the street which runs from St. George Street to Queen's Park. At this time, the City of Toronto also expropriated a small portion of the lands owned by the fraternity at its south-east corner and conveyed to the fraternity, in return, a small block at the south-west corner of the fraternity's lands so that thereafter the fraternity had its whole southerly frontage from east to west adjoining Harbord Street. This left the fraternity with a corner property immediately across Harbord Street from the new,

[2] [1966] S.C.R. 336 at 338.

[3] [1968] S.C.R. 633.

very large and imposing university buildings, and diagonally across the intersection of St. George Street and Harbord Street from fairly new and imposing university residences. Looking further east from the subject premises there was an unobstructed view of the entire back campus of the University of Toronto, and in the distance Wycliffe College, a part of Hart House, and at the end of Hoskin Avenue, Queen's Park. The subject property had been, from the time of its first establishment as a fraternity house, one of the two finest sites in Toronto for a fraternity house. Many years before, its only rival for that distinction, the Kappa Alpha Fraternity house at the north-west corner of Hoskin Avenue and Devonshire Place, had been expropriated by the university, so that from then until the time of the expropriation of the subject premises the Zeta Psi Fraternity house at 118 St. George Street was by far the most advantageous site for a fraternity house in Toronto. Moreover, there is no doubt that the fraternity was an eminent one in that group. The Zeta Psi Fraternity had no intention whatsoever of giving up the subject property, and after the expropriation its only intention was to find other premises as close as possible to the subject premises both in location and standard of amenities and to continue to carry on therein the operation of the fraternity. Since the arbitration, the Elders for the Zeta Psi Fraternity have purchased other premises at 180 St. George Street, one block north of Bloor Street, *i.e.*, exactly three blocks north of the subject property. The transaction not having been closed until after the expropriation hearing before the Municipal Board, the final details thereof could not be presented to the Board. The Court of Appeal for Ontario declined to receive evidence thereon. It is regrettable that the property in the City of Toronto which was most comparable to the subject property could not have been the subject of any detailed study by either the Municipal Board or the Court of Appeal for Ontario. This Court, under the circumstances, could receive no evidence thereon.

The Municipal Board, in the lengthy and carefully detailed reasons for its decision, considered the expert evidence given by the many witnesses including those to whom I have referred. It had been the Elders' contention before the Board, before the Court of Appeal, and in this Court, that the compensation for the subject property

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should be fixed upon the standard which has been referred to as "reinstatement", and which standard was applied by Thorson P. in *The Queen v. Community of the Sisters of Charity of Providence*[4]. Cripps on Compulsory Acquisition of Land, 11th ed., at p. 907 ff., discusses the question of reinstatement value pointing out that it is a method of arriving at the value to the owner which, of course, it has been said in a very large number of cases, is the compensation to which the claimant is entitled. At pp. 907-8, the learned author states:

> Generally it was only given in respect of property which was of such a nature (for example, a school, church, hospital, house of exceptional character, business premises in which the business could only be carried on under special conditions or by means of a special licence) *that there was no market or general demand for such property*; and a market value deducted from the income derived would not constitute a fair basis in assessing the value to the owner.

(The italicizing is my own.)

This statement, I think, is one which does reflect the jurisprudence upon the subject. Despite the evidence adduced by the University of Toronto as to the statement of the Caput of the University on February 1, 1960, in which it emphasizes the non-official character of the fraternities at the University of Toronto, I would be of the opinion that a fraternity house was within the type of use which would bring its property within the class of those to which reinstatement might apply. I am, however, of the opinion that it cannot apply in the particular case for it cannot be said that as to the subject property there was no market or general demand. In Toronto, a very large number of fraternities maintain chapters and occupy fraternity houses. As I have said, the site of the subject property was, at the time of the expropriation, the pre-eminent site in Toronto for a fraternity house. There was, in my view, a strong demand for that property for use as a fraternity house had the Zeta Psi Fraternity ever determined to move elsewhere or, a most unlikely event, determined to cease the maintenance of a fraternity house in Toronto. I, therefore, as did the Municipal Board and the Court of Appeal for Ontario, need not consider reinstatement value. Moreover, it would appear that a valuation considered on replacement basis in

[4] [1952] Ex. C.R. 113, [1952] 3 D.L.R. 358.

the circumstances of the present case would arrive at the same result as a valuation considered upon reinstatement basis.

The Municipal Board in its decision considered the evidence of value given upon two different bases: Firstly, the basis of replacement to which I have already referred and, secondly, the basis of the value of the site for sale for redevelopment purposes. The Municipal Board accepted the evidence of Mr. Hicks, one of the two expert witnesses called by the university whose evidence had been confirmed by Mr. Davis, the other expert called by the university. In such evidence, to which more detailed reference will be made hereafter, Mr. Hicks appraised the value of the subject site for redevelopment purposes at $10.25 a square foot. Since the said premises contain 15,730 square feet, Mr. Hicks rounded out that figure at $160,000. Mr. Hicks, turning to the replacement value, found that the replacement value was only $140,000. He, therefore, concluded and the Board accepted that conclusion and based judgment on it, that the highest and best use of the land was for redevelopment purposes and that the claimant was entitled to the sum of $160,000.

Mr. Stewart, giving evidence on behalf of the claimant, had submitted values far beyond that found by Mr. Hicks. He had appraised the value of the site for redevelopment purposes at $15 a square foot which he rounded out at $236,000. Mr. Stewart's opinion on the replacement basis was the sum of $284,000.

In the Court of Appeal for Ontario, Evans J.A., in his reasons, said:

> Mr. Stewart's evidence suffered from a lack of comparables since in his opinion there was only one suitable comparable while Mr. Hicks used many properties both north and south of Bloor Street and west to Spadina. He does not appear to have given any consideration to the additional value which attaches because of corner influence nor has he, in my opinion, adequately considered the undoubtedly prime location of the subject property. These two factors add a premium to the value of the expropriated land which in my opinion of the evidence should result in a value of $12.00 per square foot as redevelopment land.

Therefore, the Court of Appeal for Ontario again adopting the value for redevelopment as the highest and best use of the subject property fixed the valuation at $12 per square foot and not $10.25 as had been done by the Municipal Board, but reduced the total appraisal for that purpose

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by an amount of 1,500 square feet on the basis that the fraternity did not require lands of such an area, and then added to the amount of the land value, so adjusted because of what was viewed as oversize, the sum of $30,000 for renovation and reconstruction, and the sum of $1,500 for moving and incidental expenses. The Court of Appeal for Ontario, therefore, varied the award increasing the sum to the amount of $202,260. The reasons advanced by both tribunals must be considered.

Mr. Hicks recited in his evidence and there was produced as ex. 30 forty sales which he found to be in some degree comparable. These sales were in an area extending north of Bloor Street, well-nigh to Dupont Street, westerly to Walmer Road and Kendal Avenue and easterly almost to Avenue Road. Mr. Stewart had confined his search for comparables to a much narrower area as the fraternity officers had insisted that they could only relocate in an area bounded on the east by Bedford Road, on the north by Lowther Avenue, and on the west by Spadina Road. The University of Toronto had expropriated the subject property in the course of a large expropriation which took in all the property, except some owned by the province, north of Harbord Street to within a few hundred feet of Bloor Street, and westerly toward Spadina Avenue. However, when that extended area is occupied by university buildings, none of the alleged comparable properties will be as close to such extended campus as the subject property is to the present campus nor will any of them occupy a site of such eminence in reference to the university campus. Certainly, it would appear from the evidence and particularly the cross-examination of Mr. Hicks that sites on Walmer Road, on Kendal Avenue, on Bedford Road, and on such streets as Prince Arthur, cannot be considered as in any way comparable to the subject site for either replacement or redevelopment purposes.

Having cited these various forty comparables, Mr. Hicks seems to have given a figure based on his opinion but not calculated by an analysis of the comparables of $10.25 a square foot. Evans J.A., in the Court of Appeal for Ontario, noted and, with respect, I think rightly, that such figure had not been one giving sufficient weight to corner influence or to prime location, and increased the valuation to $12 per square foot.

Since all agree that the highest and best use of the subject lands, apart from the buildings thereon, would be for the erection of an apartment building, I find an interesting comparison to be the sale of lands for such redevelopment purposes in the immediate neighbourhood. Mr. Hicks had admitted that the subject property not only had the finest location for a fraternity house but that St. George Street was the preferred site for apartment development and, therefore, of course, lands on St. George Street would have the highest value for redevelopment as apartment sites. He also testified that from 1957 to 1964 the price paid for lands for redevelopment in the St. George Street area had increased at the rate of about 6 per cent per year. Therefore, from the comparables cited in ex. 30 by Mr. Hicks, I took the lands on St. George Street as close as possible thereto which were sold for redevelopment purposes. It is necessary to adjust the sales value up or down at the rate of 6 per cent per year in order to arrive at a comparable valuation as of the date of the expropriation herein. There were seven such sales cited in the evidence as follows:

189-197 St. George Street
Large site on St. George Street, midway between Lowther Avenue and Bernard, *i.e.*, 2½ blocks north of Bloor Street.

157 St. George Street
North-east corner of St. George Street and Lowther Avenue, *i.e.*, 2 blocks north of Bloor Street.

153 St. George Street
Just south of 157 St. George Street.

149 St. George Street
Two doors south of 153.

64 Prince Arthur Avenue
North side of Prince Arthur, east of St. George Street.

South side of Prince Arthur Avenue
West of St. George and east of Huron Street.

North side of Prince Arthur Avenue
Midway between Avenue Road to Bedford.

I accept the submission made by counsel for the university that 149 St. George Street and 153 St. George Street should be eliminated from this comparison. At an earlier date, the zoning regulations had permitted the construction on a site on St. George Street and in that area of a building three-and-a-half times the square foot area of the site. An amendment of those building regulations by by-law

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reduced the size of a building which could be constructed on a site to one having a floor space of twice the size of the site. This caught those two other houses on 149 and 153 St. George Street with apartment houses on either side of them. An amendment was enacted permitting the increase in the floor area of these two premises alone to three and one-half times the site area. As a result, they were sold in October 1960 for $14 a square foot and $13.86 a square foot, respectively.

Taking the other five sales and making the 6 per cent annual allowance of increase or decrease in price in order to arrive at the value for development purposes in August 1964, we find a valuation of $11.45 a square foot. As I have already pointed out, they are all a considerable distance north of the subject site, that is, in August 1964, they were that much further away from the university. The subject property was, at the date of the expropriation, a site immediately contiguous to the university, and it had a very considerable advantage for apartment house development purposes. Had it been possible to erect an apartment house thereon at that date in August 1964, the premises would have been very valuable as prospective housing for faculty. It is the situation in that August 1964 and not the situation after the expropriation which must be considered, but even if we consider the latter situation then the sites which I have indicated above will all be further from the extended campus than the subject site is from the present campus and only one of them was a corner site. I am of the opinion, therefore, that that $11.45 average indicates a value for redevelopment purposes of the subject site in August 1964 of $13 per square foot. This valuation is, in my view, to be preferred to that given by Mr. Hicks because he considered as comparable properties which, in my opinion, are not comparable and because he does not seem to have given consideration to corner influence or prime location although he admitted in cross-examination that the subject site possessed them both. Therefore, to accept Mr. Hicks' valuation of $10.25 per square foot, as the Municipal Board did, was to arrive at a valuation based on a misapprehension of the effect of the evidence and so was to fail to act in accordance with principle. This $13 per square foot for 15,730 square feet gives a valuation for redevelopment purposes of $194,490. As has been pointed out already, Evans

J.A. in the Court of Appeal reduced the amount allowed for redevelopment purposes by deducting from the area of the site for which compensation was being allowed an area of 1,500 square feet, being of the opinion that the subject site was that much larger than the area required for its use as a fraternity house site. With respect, I think this deduction cannot be supported. The valuation for redevelopment purposes is the valuation of all the lands whatever had been their use prior to the expropriation. A redeveloper intending to build an apartment house on the site would have to pay the same amount per square foot for all the lands and would have to buy it all. In fact, the land at the south-west corner would be as valuable as any other portion of the lands because it would permit him to design an apartment building with a garage entrance from Harbord Street to the rear of his building, leaving unmarred by driveways and available for his apartment building the whole of the St. George Street frontage. I would, therefore, have fixed the valuation for redevelopment purposes at the said $194,490. It should be noted that in arriving at the value of $13 per square foot, I have used only the comparables cited by Mr. Hicks in his evidence for the respondent, although not all of them, and have adjusted the values to the date of the expropriation using his evidence alone.

It must be noted that that figure does not make any allowance for an amount referred to by Evans J.A. in the Court of Appeal for Ontario as being for renovation and reconstruction.

In *Saint John Harbour Bridge Authority v. Driscoll, supra,* it was said, at pp. 641-2:

> The value of the buildings at $62,000 had been part of the award made by the Land Compensation Board but it must be remembered that in that award the value of the land was being assessed at the rate of 35¢ per square foot while as I have said the Appeal Division were unanimously of the opinion that it should be fixed at $1 per square foot. It must also be remembered that this latter figure of $1 per square foot represented the opinion of Mr. Corbett as to the value of the land when put to its highest and best use, that is, for a large warehousing or manufacturing enterprise and did not represent the value of the land when used by a small business supplying lumber items to ships. Before any purchaser could utilize the land for that highest and best use, the purchaser would have to remove from the site the considerable number of frame buildings which existed at the time of the expropriation and which had been valuable and efficient for the use for which the owner was putting them at the time of the expropriation.
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> * * *

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Therefore, I am of the view that having adopted the rate of $1 per square foot as the value of the lands, it was an error of principle to add to that amount any valuation of the buildings and that the award of the Appeal Division should be reduced by the sum of $62,000 representing the value of the buildings included in the amount awarded.

Similarly, if one is considering the value of the subject site for redevelopment purposes, then the redeveloper must before he can proceed to accomplish his purpose, *i.e.*, the erection of a large apartment house, demolish the building constructed in 1885 which at the time of the expropriation occupied the lands. Salvage from that demolished building would certainly be slight and not cover the cost of demolition. The developer would pay only the cost of acquiring the lands and he would not pay one cent for a building which he intended to remove.

As I have said, what must be awarded upon an expropriation is the value to the owner. In Canada the classic statement thereon was given in this Court by Rand J. in *Diggon-Hibben Ltd. v. The King*[5], at p. 715 as follows:

> . . . the owner at the moment of expropriation is to be deemed as without title, but all else remaining the same, and the question is what would he, as a prudent man, at the moment, pay for the property rather than be ejected from it.

The owner must consider whether he would sell the site for its highest and best use, that is, undoubtedly, development as an apartment site, or whether it is more valuable to him to hold it and continue to use it for its present purposes. As I have said, the Zeta Psi Fraternity had only the intention to continue in the use of the subject site for a fraternity house, and its only intention for the future is to carry on a fraternity house in the best site it could obtain for such purpose. As I have said, this purpose has now been accomplished but unfortunately too late to provide us with the necessary evidence for consideration upon the present appeal.

When the fraternity could not carry on in the subject site, it is entitled to the value of that site to it and that value is, in my opinion, the greater of either the value of that site for redevelopment purposes or the cost of replacing that site with another for the purpose of carrying on a

[5] [1949] S.C.R. 712.

fraternity house. It was with this consideration in view that evidence was given before the Municipal Board with respect to replacement costs. As I have said, the evidence given by the expert for the claimant and that by the experts for the respondent varied startlingly, Mr. Stewart arriving at a valuation of $284,000 when giving evidence for the claimant and Mr. Hicks arriving at a valuation of only $140,000 when giving evidence for the respondent. The Municipal Board rejected the evidence of Mr. Stewart, I think, from a perusal of the reasons given on behalf of the Board, chiefly because he arrived at his result by the use of one comparable only, that was the property at 182 St. George Street. That property had been purchased in the year 1958 by the Delta Upsilon Fraternity when that fraternity had, at that time, been dispossessed of its former premises across Harbord Street, a short distance south of the subject property, by expropriation by the university. With respect, I agree with the view of the Municipal Board that it is not proper to assess the replacement value of 118 St. George Street by the consideration of one comparable only, *i.e.*, 182 St. George Street. I am, however, of the opinion that if one were to consider the evidence given by Mr. Hicks on behalf of the respondent, one may avail oneself of much more evidence as to comparables and arrive at a result differing considerably from the result at which he arrived. Mr. Hicks approached the replacement value in two different fashions. He, firstly, took his figure of $10.25 per square foot as the value for replacement and then by some calculation which I have not been able to fathom arrived at a valuation for use as a fraternity house of one-half of that amount per square foot rounding it out at $5.25, and then added to the amount so found a depreciated amount for buildings. Mr. Hicks then proceeded to check the result arrived at by this somewhat mysterious procedure, with the sale of about eight buildings in the area for use for other than redevelopment. The purchasers of those buildings did not intend to demolish the buildings but rather to use them after renovation for their purposes. The schedule of those buildings was produced as ex. 29 and it contains nine examples. Two of them lettered in the schedule as "D" and "E" should be disregarded as they would appear to have been truly apartment house sites.

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One of them, the premises at 651 Spadina Avenue, I would disregard as being far from a comparable. It was a very large building on a large site which had been used as a young ladies' private school for many decades, thereafter for some other purpose, and is now being used as a Ukrainian students' residence. The premises, I think, from the point of view of their site on Spadina Avenue below Bloor and from the point of view of building, would be quite impossible to consider as a fraternity house. In the comparables, however, set out as ex. 29, were five properties actually purchased from 1958 on by various fraternities for use as fraternity houses. Those properties were as follows:

182 St. George Street
Purchased as I have said by the Delta Upsilon.

94 Prince Arthur Avenue
North side of Prince Arthur Avenue one block west of St. George Street. Purchased by the Alpha Delta Fraternity.

407 Huron Street—Purchased by Zeta Delta Association.

409 Huron Street—Purchased by Phi Gamma Delta Fraternity. East side of Huron Street immediately south of Bloor Street.

157 St. George Street
Purchased by Deke Alumni Association. North-east corner of St. George Street and Lowther Avenue.

Mr. Hicks in his evidence gave a careful analysis of all of those properties and gave values per square foot of the buildings on the premises as compared to the building on the subject premises. He concluded his analysis of the site at 182 St. George Street by testifying:

> This would give an indicated value for 118 St. George, which is seven thousand six hundred and ninety-one square feet [that is the square foot area above the ground floor of the subject premises] . . . of $18.22 per square foot.

If one takes the rounded square foot area of the buildings in the said property as 7,700 square feet and applies thereto the average of Mr. Hicks' values of the five comparables, *i.e.*, $18.11 per square foot, one arrives at the average valuation of the building and the lands occupied by the fraternity of $139,447. As I have said, this figure is arrived at by considering the sale of other premises for fraternity house occupation as close as possible to the claimant's present advantageous site, although, as I have pointed out, all such sites to a considerable degree lack the pre-eminence of the subject site. There is, in addition another factor which

must be considered. Those five sites had an average square foot area of land either occupied by the building or used for other purposes or unused of 9,519 square feet. The subject site had an area of 15,730 square feet. There was much evidence and much cross-examination in reference to Mr. Hicks' evidence that the "extra land" should only be valued at $3 per square foot as this was an alleged valuation of lands used for parking. I am of the opinion that that evidence and any reliance placed upon it in arriving at a result is ill-conceived. What the claimant is entitled to on replacement is replacement of the present premises as close as one may arrive at it. If the claimant has a large property of 15,730 square feet whether or not it did occupy the whole of the old site for its building or whether or not it will occupy in the new premises only 7,700 square feet, it matters not whether that "extra land" is used for parking or for landscaping or for any other purpose. The claimant had it before the expropriation, and if the claimant is entitled to replacement the claimant is entitled to have it again and, failing that, a fair value for it.

As I have said, the comparable accommodations used to value the fraternity house and the necessary lands about it would justify a valuation of $139,447. Since those comparable accommodations averaged 9,519 square feet, the claimant is entitled to compensation for what it will not obtain in any of those comparable accommodations, *i.e.*, an additional 6,211 square feet of land. At what amount per square foot should those 6,211 square feet be valued? Again, turning to the properties which had been purchased for use as a fraternity house, I find that four of them had been purchased at an average square foot price for the whole land of $11.44 per square foot. As will be seen, I have eliminated one of the five purchases for the purpose of occupying as a fraternity house; that was a purchase made in 1966, almost two years after the expropriation. It was a purchase of a building at 409 Huron Street which had already undergone an extensive renovation with a large addition at the rear, and I am of the opinion that the purchase of the land site including land and buildings, when the buildings cover such a large percentage of the site and when the buildings included this large new addition, would throw out the value of the land itself. Therefore, eliminating that sale, I find

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that the average valuation of the lands sold for occupation of the buildings thereon as fraternity houses is the said figure of $11.44 a square foot, and the value therefore of 6,211 square feet of such lands, which is the extent of the "extra land" of the subject site, is $71,053. Adding that amount to the amount of the value for use of the fraternity house and its adjacent lands previously fixed at the amount of $139,447, I arrive at a valuation of the subject site at 118 St. George Street for use as a fraternity house of $210,500.

There was allowed in the Court of Appeal for Ontario the sum of $1,500 for moving and incidental expenses. No objection was made to that allowance in argument before this Court. It would seem to be a proper item when the replacement basis of valuation is that accepted and it would seem to be a modest allowance. Adding that sum, therefore, I find that the claimant is entitled to compensation of $212,000. The claimant is entitled to interest on that amount from the date of the expropriation until payment.

Therefore, I would dismiss the appeal herein and allow the cross-appeal increasing the award to the claimant cross-appellant as I have outlined. The claimant should have its costs in this Court and the amount of $625.80 as allowed in the judgment of the Court of Appeal for the reporting and transcribing of the proceedings as required by the Municipal Board.

RITCHIE J.:—I have had the benefit of reading the reasons for judgment of my brothers Spence and Pigeon and I would dispose of this case in the manner proposed by my brother Spence.

I find it necessary, however, to express my views as to the function of this Court on the consideration of such an appeal.

As has been pointed out by my brother Spence, the majority of this Court in *Winnipeg Supply & Fuel Co. Ltd. v. Metropolitan Corporation of Greater Winnipeg*[6], endorsed the statement that it was "Sufficient to say that the Court of Appeal has jurisdiction to act when the arbitrator has

[6] [1966] S.C.R. 336 at 338.

proceeded on some incorrect principle or has overlooked or misapprehended some material evidence of fact". I think it desirable to say that the word "misapprehended" as used in this context should, in my view, be taken as meaning that the arbitrator has made a mistake of fact and that it should not be construed as justifying this Court in reviewing the evidence and substituting its views for that of the arbitrator on the theory that if he was of a different opinion, he must have "misapprehended some material evidence of fact".

As I read the reasons for judgment of my brother Spence, he appears to me to have found that the Board erred in principle in failing to appreciate that in this case the overriding consideration in determining "value to the owner" was the value which the respondent attached to the maintenance of its fraternity domicile and that the fact that it was deprived of its "home" was an essential and substantial ingredient to be taken into account in determining the loss for which the respondent was entitled to compensation by way of replacement.

I think also that Mr. Justice Spence rightly considered that the Board had erred in principle in accepting a value of $3 per square foot for that part of the respondent's land that was used as a parking area. I agree that this "extra land" should be valued on the same basis as the land occupied by the building.

As I have indicated, I agree with the careful analysis of the circumstances which is contained in the judgment of my brother Spence, and I think that the errors in principle to which I have referred afford a justification for the review which he has made.

The judgment of Judson and Pigeon JJ. was delivered by

PIGEON J. (*dissenting*):—The property with which we are concerned in this expropriation was a fraternity house at the north-west corner of St. George and Harbord Streets, Toronto. It was a large old house, having been built in 1885. The land area was 15,730 sq. ft. It had been extensively renovated in 1950 at a cost of $47,700, and in 1964, when it was expropriated, it was in need of repairs which would

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have cost approximately $9,000. In 1955, a portion of the property on the south side had been expropriated by the City of Toronto for a street-widening. At that time the city took 727.1 sq. ft. at $6 per sq. ft., and the fraternity acquired in exchange from the city a parcel containing 2,260 sq. ft., now comprising the south-west corner of the expropriated property, at $4 per sq. ft.

The property was expropriated by the university on August 6, 1964. The Ontario Municipal Board, on August 4, 1966, awarded the fraternity $160,000. The Court of Appeal, on May 1, 1967, increased the award to $202,260. Before the Board, the fraternity submitted that the proper basis for compensation was to be determined on the principle of reinstatement. It claimed the market value of the land at $236,000, plus the depreciated replacement cost of its building at $103,750, for a total of $339,750. In the alternative, it claimed an award based on the cost of acquiring and renovating a comparable property together with an allowance for the relative inadequacies of that property as compared with the existing property.

The university, on the other hand, urged that the principle of reinstatement did not apply and that the fraternity was entitled only to the market value of the expropriated property when devoted to its highest and best use, which was for redevelopment as an apartment site, and that such market value was $160,000. The university also submitted that this value exceeded (a) the value of the expropriated property when used as a fraternity house (existing use value), and (b) the cost of acquiring and renovating a comparable property for use as a fraternity house.

The Ontario Municipal Board accepted the valuation of the experts called on behalf of the university. They arrived at a valuation of $10.25 per square foot for redevelopment as a site for apartments and found this to be more than existing use value. Their evidence was based upon an appraisal of at least twenty-three fraternity houses on St. George Street south of Bloor and elsewhere and, in addition, they considered all the sales since 1957 (over 200 in number) in an area to the north, west and south of the university campus.

Hicks first appraised the property on a basis of its redevelopment value as if vacant, and in this connection he selected and listed forty of the sales which he considered most significant.

Stewart (for the fraternity) first valued the expropriated property as if there were no buildings on the property and he worked from eight comparable sales, all of which were within a ten-minute walk of St. George Street. Three of these were on Huron Street, two on Prince Arthur, and two on St. George Street.

Stewart's second method of appraisal was to compare the expropriated property with the premises at 182 St. George Street, which had been purchased by another fraternity in 1958 for $115,000. He called this the market data approach and by this method he arrived at a valuation of $284,000.

Hicks' second method of appraisal was to establish the existing-use value as a fraternity house by using the same approach as Stewart except that he considered nine comparable properties which had been sold for fraternity, student residences or office use. He then estimated the price at which the expropriated property would have sold in August 1964 in the light of the established sale price for each of those comparables with certain adjustments. He came up with a figure of $140,000 if sold for fraternity house use in 1964.

The Board heard all this evidence and chose to accept the valuations, the procedures and the opinions of Messrs. Hicks and Davis in contrast with those of Mr. Stewart. I can find no error in their choice.

The Court of Appeal thought that the value as redevelopment land was too low at $10.25 and should be $12 per square foot. They awarded $170,760 for the land. This was arrived at as follows:

> Land value (15,730 square feet less 1500 square feet at $12.00 per square foot) $170,760.00

They also awarded $30,000 for renovation and reconstruction of any building to be purchased, and $1,500 for moving and incidental expenses, making a total of $202,260.

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I do not understand why the Court of Appeal valued 14,230 square feet at $12 per square foot and gave no value to the remaining 1,500 square feet. I could understand an increase in the square foot value but for the whole parcel. In any event, I do not think that a case was made out for any increase above the $10.25 per square foot awarded by the Municipal Board. When the Board accepted this figure they were giving effect to the evidence of Hicks based on an exhaustive study of land values for redevelopment purposes based on numerous sales to developers in that area. Of the 40 sales that he considered *in toto,* only one was at a price as high as $12 a square foot.

The second error in the judgment of the Court of Appeal was in giving the sum of $30,000 for renovation and reconstruction of any property which the fraternity might purchase as a substitute. Hicks' evidence as to existing-use value indicated that in August of 1964, the fraternity should have been able to purchase and, if necessary, renovate at a total cost of $140,000 a property which would have been the equivalent of the expropriated property for use as a fraternity although not in a location with as high a value for redevelopment.

In addition, the Court of Appeal awarded $1,500 for moving and incidental expenses, making the total of $202,260. In my opinion, there was error also in awarding this item when compensation was assessed not on the basis of existing-use value, but on the basis of value of the land for its highest and best use. This is a value that the owner cannot realize without moving.

I would allow the appeal and restore the valuation of the Municipal Board with costs here and below.

There was a cross-appeal by the fraternity asking for the value of the land for redevelopment purposes between the brackets of $160,000 and $236,000, plus the depreciated reconstruction cost of the building at $103,754.80. This would involve the assessment of compensation on the basis of reinstatement. It is settled law that this basis is to be applied only when there is no possible market for the property as used. Evidence before the Board fully justified the finding that there was such a market. In fact, there were several sales of such properties in the vicinity at the material time.

I would dismiss the cross-appeal with costs.

Having read the reasons written by my brother Spence I must with great respect question the principle on which they rest. When formulated by him in *Winnipeg Supply & Fuel Co. Ltd. v. Metropolitan Corporation of Greater Winnipeg*[7], it was prefaced by the following sentence:

> It would seem that no purpose can be served by a review of the jurisprudence in reference to the variation by the Court of Appeal of an award made by an arbitrator.

I cannot think this is to be taken as a complete rejection by this Court of the authority of precedents. Therefore, I take it that the principle enunciated was accepted as implying no departure from established practice concerning the proper scope of the duty of an appellate tribunal on questions of fact and in particular in the assessment of compensation. However, a review of previous pronouncements of great authority on the subject has driven me to a different conclusion.

In *The King v. Elgin Realty Co. Ltd.*[8], Taschereau J. (as he then was), delivering the unanimous judgment of the Court, said (at p. 51):

> In expropriation cases it is settled, I think, that when determining the amount, a court of first instance has acted upon proper principles, has not misdirected itself on any matter of law, and that when the amount arrived at is supported by the evidence, a Court of Appeal ought not to disturb its finding. This rule has for many years been the guiding principle in this Court, and a reference may be made to *Vézina v. The Queen* (1889), 17 S.C.R. 1. At page 16, Mr. Justice Patterson, with whom concurred Strong J., Fournier J., and Taschereau J., said:
>
> > "Where the tribunal of first instance has proceeded on correct principles and does not appear to have overlooked or misapprehended any material fact, an appeal against the amount awarded will in most cases resemble an appeal against an assessment of damages in an action, which would be a hopeless proceeding unless some very special reason for the interference of the appellate court can be shown."

I have found no case previous to the *Winnipeg Supply & Fuel Co. Ltd.* judgment in which a decision contrary to that pronouncement was rendered. However, I think I should note that similar views were expressed by the Privy Council in *Ruddy v. Toronto Eastern R.W. Co.*[9], where they affirmed

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[7] [1966] S.C.R. 336 at 338.
[8] [1943] S.C.R. 49.
[9] (1917), 38 O.L.R. 556 at 557.

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the unreported judgment of this Court reversing the Appellate Division of the Supreme Court of Ontario increasing an arbitration award, saying:

> Before considering the facts and the merits of the case, it is well to examine what is the real nature of the appeal covered by sec. 209. In their Lordships' opinion, it places the awards of arbitrators under the statute in a position similar to that of the judgment of a trial Judge. From such a judgment an appeal is always open, both upon fact and law. But upon questions of fact an appeal Court will not interfere with the decision of the judge who has seen the witnesses, and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence—unless there is some good and special reason to throw doubt upon the soundness of his conclusions.

I should also mention that in *Atlantic and North-West Railway Co. v. Wood*[10] the Privy Council rejected the contention that on an appeal under the same statute, the Court of Appeal was bound "to decide the case upon and in accordance with their own appreciation of that evidence and not the appreciation of the arbitrators" and held that "they should review the judgment of the arbitrators as they would that of a Subordinate Court, in a case of original jurisdiction, where review is provided for".

On the authority of those decisions and on principle it appears to me that the duty of an appellate tribunal in expropriation cases does not differ from its duty in reviewing compensation in other cases. On this I do not know of a better statement than that made by the Privy Council in *Nance v. British Columbia Electric Railway Company Ltd.*[11]:

> Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint v. Lovell*, [1935] 1 K.B. 354, approved by the House of Lords in *Davies v. Powell Duffryn Associated Collieries, Ld.*, [1942] A.C. 601).

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10 [1895] A.C. 257.

11 [1951] A.C. 601 at 613.

The last named case further shows that when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone. The figure must be wholly "out of all proportion" (*per* Lord Wright, *Davies v. Powell Duffryn Associated Collieries, Ld.*, [1942] A.C. 601, 616).

This was relied upon and applied in *Widrig v. Strazer et al.*[12] and *Gorman v. Hertz Drive Yourself Stations of Ontario Ltd. et al.*[13]

I do not overlook the fact that the principle stated in the *Winnipeg Supply* case was also accepted in *Saint John Harbour Bridge Authority v. J.M. Driscoll Ltd.*[14] This cannot make it binding if at variance with previous decisions of this Court. It must be so under any view of the authority of precedents. If they are held binding, an exception for such case must be made as was noted in *Stuart v. Bank of Montreal*[15] by a reference to *Bozson v. Altrincham Urban District Council*[16]. On the other hand, if one rejects the doctrine then the principle is undoubtedly open to reconsideration. On that basis I would say that the rule adopted in respect of the assessment of damages that was also followed in the past in reviewing the assessment of compensation in expropriation cases appears to me preferable.

Appeal dismissed and cross-appeal allowed with costs, Judson and Pigeon JJ. dissenting.

Solicitors for the appellant: Cassels, Brock, DesBrisay, Guthrie, Griffiths & Genest, Toronto.

Solicitors for the respondent: Borden, Elliot, Kelly & Palmer, Toronto.

12 [1964] S.C.R. 376.
13 [1966] S.C.R. 13.
14 [1968] S.C.R. 633.
15 (1909), 41 S.C.R. 516.
16 [1903] 1 K.B. 547.

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COMMISSION DES RELATIONS DE TRAVAIL DU QUÉBEC ..... APPELANTE;

ET

L'ASSOCIATION UNIE DES COMPAGNONS ET APPRENTIS DE L'INDUSTRIE DE LA PLOMBERIE ET TUYAUTERIE DES ÉTATS-UNIS ET DU CANADA *et al.* ..... INTIMÉES;

ET

LA CORPORATION DES ENTREPRENEURS EN PLOMBERIE ET CHAUFFAGE DE LA PROVINCE DE QUÉBEC (SECTION QUÉBEC ET DISTRICT) *et al.* ..... MISES-EN-CAUSE.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Travail—Juridiction de la Commission des relations de travail du Québec—Convention collective—Demande d'accréditation par autre union et demande de suspension des négociations de renouvellement de la convention—Mandamus pour forcer la Commission d'entendre les requérants—Code du travail, S.R.Q. 1964, c. 141, art. 33—Loi des décrets de la convention collective, S.R.Q. 1964, c. 143—Code de procédure civile, art. 844, 845.

Pendant qu'un groupe de syndicats, affiliés à la Confédération des syndicats nationaux, négociaient le renouvellement de la convention collective à laquelle ils étaient parties, les unions intimées, affiliées au Congrès du travail du Canada, déposèrent auprès de la Commission des relations de travail 41 requêtes en accréditation, dans le but de représenter les mêmes salariés. Quelques jours plus tard, les mêmes intimées présentèrent à la Commission une requête, basée sur l'art. 33 du *Code du travail*, S.R.Q. 1964, c. 141, pour faire suspendre les négociations de renouvellement de la convention collective. La Commission déclara non recevable la requête pour suspension des négociations pour le motif qu'elle n'avait pas juridiction pour l'accorder. La Cour supérieure a alors rejeté une demande pour obtenir l'émission d'un bref de mandamus dirigé contre la Commission pour la forcer d'entendre les intimées sur le mérite de leur demande de suspension. Ce jugement a été renversé par la Cour d'appel qui a accordé le bref de mandamus. La Commission en appela à cette

*CORAM: Les Juges Fauteux, Abbott, Martland, Ritchie et Hall.

Cour, où la question en litige était de savoir si la Commission avait refusé d'exercer une compétence que l'art. 33 du *Code du travail* lui confère.

Arrêt: L'appel de la Commission doit être rejeté.

La Commission a erré en droit en établissant une distinction que l'art. 33 du *Code du Travail* n'autorise pas, et a ainsi refusé d'exercer une compétence que la loi lui faisait un devoir d'exercer. L'art. 33 confère à la Commission un pouvoir discrétionnaire et, règle générale, les tribunaux ne doivent pas intervenir dans l'exercice d'un tel pouvoir. Cependant si un tribunal comme la Commission erre en droit dans l'interprétation du texte qui lui confère compétence, les tribunaux ordinaires doivent intervenir et le mandamus est le recours approprié pour forcer un tribunal inférieur à exercer une compétence que la loi lui confère.

Labour—Jurisdiction of Labour Relations Board of Quebec—Collective agreement—Petition by rival union for certification and for suspension of negotiations for renewal of agreement—Mandamus to oblige Board to hear petitioners—Labour Code, R.S.Q. 1964, c. 141, s. 33—Collective Agreement Decrees Act, R.S.Q. 1964, c. 143—Code of Civil Procedure, art. 844, 845.

While a group of unions, affiliated to the Confederation of National Trade Unions, were negotiating the renewal of a collective agreement to which they were parties, the respondent unions, affiliated to the Canadian Labour Congress, presented to the Labour Relations Board 41 petitions in certification to represent the same employees. A few days later, the same respondents presented to the Board a petition, based on s. 33 of the *Labour Code,* R.S.Q. 1964, c. 141, to suspend the negotiations for renewal of the collective agreement. The Board refused to grant the suspension of the negotiations on the ground that it did not have jurisdiction to do so. The Superior Court rejected a petition for the issue of a writ of mandamus against the Board to force it to hear the respondents on the merits of their petition for suspension. That judgment was reversed by the Court of Appeal which granted the writ of mandamus. The Board appealed to this Court, where the question in issue was whether the Board had refused to exercise a jurisdiction it had under s. 33 of the *Labour Code.*

Held: The appeal of the Board should be dismissed.

The Board had erred in law in making a distinction which s. 33 of the *Labour Code* did not authorize, and had thereby refused to exercise a jurisdiction it was bound by law to exercise. Section 33 gives to the Board a discretionary power and as a general rule, the Courts will not interfere in the exercise of such a power. However, if a tribunal such as the Board has erred in law in the interpretation of the text giving it jurisdiction, mandamus is the proper recourse to force an inferior tribunal to exercise its jurisdiction.

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COMMISSION DES RELATIONS DE TRAVAIL DU QUÉBEC *v.* L'ASSOCIATION UNIE DES COMPAGNONS ET APPRENTIS DE L'INDUSTRIE DE LA PLOMBERIE ET TUYAUTERIE DES ETATS-UNIS ET DU CANADA *et al.*

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Larouche J. Appeal dismissed.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], infirmant un jugement du Juge Larouche. Appel rejeté.

Jean Turgeon, c.r., pour l'appelante.

Phil Cutler, Ross Goodwin et *Pierre Langlois,* pour les intimées.

Le jugement de la Cour fut rendu par

LE JUGE ABBOTT:—Le 20 janvier 1966, la Cour supérieure du District de Québec rejetait une demande en *mandamus* dirigée contre la Commission des Relations de Travail du Québec (ci-après désignée «la Commission»), à la suite d'une décision de cette dernière déclarant non recevable une requête pour suspension des négociations faite par les intimées devant cette Cour en vertu de l'art. 33 du *Code du Travail* du Québec, S.R.Q. 1964, c. 141. La Cour d'appel du Québec[1], dans un jugement unanime rendu le 22 janvier 1968, a cassé ce jugement et ordonné que la requête soit retournée à la Commission pour que celle-ci la décide à son mérite. D'où le pourvoi de la Commission devant cette Cour.

Il n'est pas nécessaire, pour disposer de cet appel, de relater tous les faits à l'origine du conflit. Il suffit de rappeler qu'un groupe de syndicats affiliés à la Confédération des Syndicats nationaux était partie à une convention collective à laquelle le «Décret relatif à l'industrie et aux métiers de la construction pour la région de Québec» avait conféré l'extension juridique en vertu de la *Loi de la convention collective,* S.R.Q. 1941, c. 103, devenue, lors de la refonte de 1964, la *Loi des décrets de convention collective,* S.R.Q. 1964, c. 143.

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[1] [1968] B.R. 199.

Le 25 mai 1965, soit 60 jours avant la date prévue pour l'expiration du décret, les intimées, affiliées au Congrès du Travail du Canada, déposèrent auprès de la Commission 41 requêtes en accréditation, dans le but de représenter les mêmes salariés. Quelques jours plus tard, soit le 12 juillet 1965, elles présentèrent à la Commission une requête pour faire suspendre les négociations qui avaient alors cours entre les syndicats mis-en-cause et l'Association des Constructeurs de Québec en vue du renouvellement de leur convention collective.

Le texte qui confère compétence à la Commission pour accorder une telle requête est l'art. 33 du *Code du Travail* que l'on retrouve d'ailleurs dans la décision de la Commission ci-après citée.

La seule question en litige est la suivante: La Commission a-t-elle refusé d'exercer une compétence que l'art. 33 du *Code du Travail* lui confère? L'interprétation du texte de la décision en cause est d'une importance capitale et c'est pourquoi je la cite au long:

> L'article 33 du Code du Travail dont on demande l'application se lit comme suit:
>
> «Lorsqu'elle est saisie d'une requête en accréditation, revision ou révocation d'accréditation, la Commission peut ordonner la suspension des négociations et des délais de négociations collectives et empêcher le renouvellement d'une convention collective.
>
> En ce cas, les conditions de travail prévues dans telle convention demeurent en vigueur jusqu'à la décision de la Commission et les dispositions de l'article 48 s'appliquent.»
>
> Les négociations visées par l'article 33 sont celles qui se rapportent à une convention collective susceptible d'avoir effet sous l'empire du Code du Travail, selon les dispositions du chapitre III du Code.
>
> Il semble évident que la requête telle que formulée vise les négociations se rapportant à un accord entre une collectivité d'employeurs et une collectivité de groupements de salariés, en vue de réaliser sous l'empire de la Loi de la Convention Collective (S.R.Q. 1941, chap. 163), une réglementation par arrêté en conseil, dans le cadre de ladite loi, des conditions de travail devant régir les salariés d'une occupation et d'un territoire donnés.
>
> Un tel accord vise l'industrie en général et non pas tel ou tel employeur en particulier, D'ailleurs, aucun employeur particulier visé par l'une quelconque des requêtes en accréditation alléguées n'est mise en cause sur la requête présentement soumise.

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v.
L'ASSOCIATION UNIE DES COMPAGNONS ET APPRENTIS DE L'INDUSTRIE DE LA PLOMBERIE ET TUYAUTERIE DES ETATS-UNIS ET DU CANADA
et al.

Le juge Abbott

La juridiction conférée à la Commission par l'article 33 du Code du Travail ne peut avoir pour objet un accord de cette nature et de cette portée.

Les dispositions d'un décret, sauf le cas exceptionnel de l'article 10a de la Loi de la Convention Collective lequel par le fait même confirme la règle, ne peuvent faire obstacle aux demandes d'accréditation sous le Code du Travail par des groupements de salariés même régis par tel décret. Voir à ce sujet la décision de la Commission des Relations Ouvrières en date du 9 mars 1964 dans l'affaire du Conseil des Métiers du Bâtiment et de la Construction de Montréal et Banlieue vs Canadian Vickers Limited.

Corrélativement, des demandes d'accréditation ne peuvent pas faire échec aux discussions d'un accord du genre de celui poursuivi par les négociations alléguées.

La structure des relations patronales-ouvrières visée par le Code du Travail et celle prévue par la Loi de la Convention Collective sont d'un ordre différent et ne peuvent être confondues ou paralysées dans leur fonctionnement l'une par l'autre.

La demande de suspension des négociations doit donc, dans l'espèce, être considérée comme non recevable.

La demande exprimée par la deuxième conclusion de la requête à l'effet d'ordonner aux intimées de «suspendre toute négociation et de surseoir à la signature de toute convention collective» dépasse la portée des allégations qui la précèdent et n'apparaît pas supportée par celles-ci, dans l'hypothèse ou une telle conclusion viserait une convention collective particulière (et destinée à valoir comme telle) entre un employeur déterminé et le groupe de ses salariés.

Quant à la conclusion à l'effet d'ordonner de cesser de percevoir ou de retenir les prestations syndicales, elle ne peut être accordée, la Commission n'ayant pas en toute hypothèse autorité pour modifier un contrat déjà passé si tel contrat existe.

POUR CES MOTIFS la Commission *déclare non recevable* la requête produite par les requérants le 12 juillet 1965.

(Les italiques sont de moi.)

Il me paraît évident, à la lecture de cette décision, en particulier les passages que j'ai soulignés, que la Commission a décliné une juridiction qu'elle avait en refusant de se prononcer sur le mérite de la demande de suspension.

L'article 33 confère à la Commission un pouvoir discrétionnaire et, règle générale, les tribunaux ne doivent pas intervenir dans l'exercice d'un pouvoir comme celui-là. Cependant, il est bien établi que, si un tribunal comme la Commission erre en droit dans l'interprétation du texte qui lui confère compétence, les tribunaux ordinaires doivent intervenir, et le *mandamus* est le recours approprié pour

forcer un tribunal inférieur à exercer une compétence que la loi lui confère. Ce recours est maintenant consigné aux art. 844 et 845 du nouveau *Code de procédure civile* sous le titre «Moyen de se pourvoir en cas de refus d'accomplir un devoir qui n'est pas de nature purement privée.»

Je suis entièrement d'accord avec la Cour d'appel du Québec que la Commission a erré en droit, en établissant une distinction que l'art. 33 du *Code du Travail* n'autorise pas, et qu'ainsi elle a refusé d'exercer une compétence que la loi lui faisait un devoir d'exercer. En conséquence, je rejetterais l'appel avec dépens.

Appel rejeté avec dépens.

Procureurs de l'appelante: Turgeon, Amyot, Choquette & Lesage, Québec.

Procureurs des intimées: Ross Goodwin et Cutler, Larner, Bellemare, Desaulniers & Langlois, Montréal.

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Le juge Abbott

CHARLES-ÉDOUARD SAINT-GERMAIN APPELLANT;

AND

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

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*Oct. 22, 23

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Feb. 17

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Benefit to shareholder—Additions and improvements to property owned by shareholder and leased to corporation—Additions and improvements paid for by corporation—Whether benefit to shareholder—Whether additions and improvements the property of the shareholder—Civil Code, art. 413, 1640—Income Tax Act, R.S.C. 1952, c. 148, s. 8(1).

The appellant was the principal shareholder of, and controlled, a company carrying on the business of manufacturing insulated windows. He was also the owner of a building which he leased, by verbal lease, to the company and in which the company carried on its business. In 1959, 1960 and 1961, funds of the company totalling $71,668.43 were used to effect additions and improvements to the appellant's property. These were for the use by the company in its business and appear to have been carried in the company's books as an asset. In 1962, the appellant sold to a third party all the shares of the company as well as the property in question. In assessing the appellant for the years 1959, 1960 and 1961, the Minister, relying on s. 8(1) of the *Income Tax Act,*

*PRESENT: Fauteux, Abbott, Ritchie, Hall and Pigeon JJ.

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R.S.C. 1952, c. 148, contended that the costs of the additions and improvements to the leased property constituted a benefit or advantage conferred by the company on the appellant as a shareholder. The appellant contended that by virtue of art. 1640 of the *Civil Code* the additions and improvements were the property of the company and that consequently a benefit had not been conferred on him. The Tax Appeal Board upheld the Minister's assessment and its decision was affirmed by the Exchequer Court. The taxpayer appealed to this Court. At the hearing, counsel were informed that, if the additions and improvements to the property belonged to the appellant as owner, from the time they were effected, the Court was satisfied that s. 8(1) of the Act applied.

Held (Pigeon J. dissenting): The appeal should be dismissed.

Per Fauteux, Abbott, Ritchie and Hall JJ.: The costs of the additions and improvements to the leased property constituted a taxable benefit to the appellant during the years in question. It was clear that, from the very outset, it was never contemplated that these additions and improvements would be removed on the termination of the lease. They were of a permanent character, were integrated with the existing buildings and could not be removed with any conceivable economic advantage to the company. Under articles 413 and following of the *Civil Code,* additions and improvements of this kind are presumed to have become the property of the owner of the immovable by accession. There was nothing in the circumstances of this case which could justify holding that such legal presumption had been rebutted. The mere fact that the cost of the additions and improvements had been paid for by the company and appear to have been carried as an asset in its books was not sufficient to rebut the presumption. Under these circumstances, art. 1640 of the *Civil Code* could have no application.

Per Pigeon J., *dissenting:* In the absence of evidence of a contrary stipulation, the rights of the company as to the improvements were defined by art. 1640 of the *Civil Code.* By virtue of that article, the improvements made by the company with its own money became its property since it had the right to remove them and the appellant, as owner of the immovable, could only retain them on paying the value. The improvements not having become his property from the time they were effected, no benefit was therefore conferred on the appellant by the company so as to make s. 8(1) of the Act applicable.

Revenu—Impôt sur le revenu—Bénéfice attribué à un actionnaire—Additions et améliorations faites à une propriété appartenant à un actionnaire d'une compagnie et louée à cette compagnie—Additions et améliorations payées par la compagnie—Un bénéfice a-t-il été attribué à l'actionnaire—Les additions et améliorations sont-elles devenues la propriété de l'actionnaire—Code civil, art. 413, 1640—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 8(1).

L'appelant détenait toutes les actions, ainsi que le contrôle, d'une compagnie qui fabriquait des fenêtres isolantes. Il était aussi le propriétaire d'un bâtiment qu'il avait loué à la compagnie en vertu d'un bail verbal et que la compagnie occupait pour les fins de son entreprise. En 1959, 1960 et 1961, la compagnie, en se servant de ses propres argents, a effectué sur le terrain et le bâtiment appartenant à l'appelant

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des additions et améliorations pour un montant de $71,668.43. Ces additions et améliorations étaient pour l'usage de la compagnie et semblent avoir été inscrites à l'actif de la compagnie dans ses livres. En 1962, l'appelant a vendu à un tiers toutes les actions de la compagnie ainsi que la propriété en question. Dans la cotisation de l'appelant pour les trois années en question, le Ministre a prétendu, en se basant sur l'art. 8(1) de la *Loi de l'impôt sur le revenu,* S.R.C. 1952, c. 148, que le coût des additions et améliorations faites à la propriété louée constituait un bénéfice ou un avantage attribué par la compagnie à l'appelant comme actionnaire. L'appelant a soutenu qu'en vertu de l'art. 1640 du *Code Civil* les additions et améliorations étaient la propriété de la compagnie et que par conséquent aucun bénéfice ne lui avait été attribué. La Commission d'appel de l'impôt a maintenu la cotisation du Ministre et cette décision a été confirmée par la Cour de l'Échiquier. Le contribuable en appela à cette Cour. Lors de l'audition, la Cour a déclaré aux procureurs que si les additions et améliorations étaient devenues la propriété de l'appelant à compter du jour où elles avaient été effectuées, elle était satisfaite qu'il y avait lieu d'appliquer l'art. 8(1) de la Loi.

Arrêt: L'appel doit être rejeté, le Juge Pigeon étant dissident.

Les Juges Fauteux, Abbott, Ritchie et Hall: Le coût des additions et améliorations faites à la propriété louée constituait pour l'appelant un bénéfice imposable durant les années en question. Il est clair que, dès le début, on n'a jamais envisagé que ces additions et améliorations seraient enlevées à l'expiration du bail. Elles avaient un caractère permanent, étaient devenues parties des édifices et ne pouvaient pas être enlevées avec un avantage économique pour la compagnie. En vertu des articles 413 et suivants du *Code Civil,* les additions et améliorations de ce genre sont présumées être devenues la propriété du propriétaire de l'immeuble par droit d'accession. Il n'y a rien dans les circonstances de cette cause pouvant justifier la conclusion que cette présomption légale avait été repoussée. Le seul fait que le coût des additions et améliorations avait été payé par la compagnie et qu'il apparaissait qu'elles avaient été inscrites à l'actif de la compagnie dans ses livres n'était pas suffisant pour repousser la présomption. Dans les circonstances, l'art. 1640 du *Code Civil* n'avait pas d'application.

Le Juge Pigeon, *dissident:* En l'absence de preuve d'une stipulation contraire, les droits de la compagnie à l'égard des améliorations se trouvaient définis par l'art. 1640 du *Code Civil.* En vertu de cet article les améliorations faites par la compagnie à ses frais lui appartenaient puisqu'elle avait le droit de les enlever et que l'appelant, propriétaire de l'immeuble, ne pouvait les retenir qu'en en payant la valeur. Les améliorations n'étant pas devenues sa propriété à compter du jour où elles ont été effectuées, il n'en est donc pas résulté pour l'appelant un bénéfice conféré par la compagnie et donnant lieu à l'application de l'art. 8(1) de la Loi.

APPEL d'un jugement du Juge Dumoulin de la Cour de l'Échiquier du Canada[1], en matière d'impôt sur le revenu. Appel rejeté, le Juge Pigeon étant dissident.

[1] [1968] 2 Ex. C.R. 430, [1968] C.T.C. 148, 68 D.T.C. 5105.

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APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], in an income tax matter. Appeal dismissed, Pigeon J. dissenting.

Maurice Régnier and *A. Peter F. Cumyn,* for the appellant.

Paul Ollivier, Q.C., Alban Garon and *Jean Claude Sarrazin,* for the respondent.

The judgment of Fauteux, Abbott, Ritchie and Hall JJ. was delivered by

ABBOTT J.:—The appellant is a manufacturer and, during the period 1953 to 1962, was the president and principal shareholder of a Company known as Superior Window Co., Ltd.—hereinafter called "the company".

At the beginning of that period and again in August 1962, he was the beneficial owner of all the issued shares of the company. At all times he controlled the said company. He was also the owner of an immovable property with a building erected thereon in which the company carried on its business of manufacturing insulated windows.

By verbal lease, appellant leased the said building to the company on a month to month basis, the rental payable being $435. a month up to and including 1958, and $550. a month from 1959. The property had been purchased in 1953 at a cost of approximately $50,000. In the early years of the lease, all expenses of heating, insurance and taxes were paid by appellant but, in the later years, some of these expenses were paid by the company. The building in question included two dwellings in the upper storeys, the rent of which appears to have been received by the appellant. In 1959, a shed was constructed by the company on the leased premises at a cost of $2,596.55; in 1960, the company made substantial additions to the main building on the property at a cost of $20,963.28, and in 1961 further substantial additions at a cost of $48,108.60.

These improvements and additions were for the use by the company in its business. The additions and improvements were carried out and paid for by the company and appear to have been carried in the company's books as an asset.

[1] [1968] 2 Ex. C.R. 430, [1968] C.T.C. 148, 68 D.T.C. 5105.

In August 1962, the appellant sold 313 shares in the capital stock of the company—being all the issued capital stock—for a price of $318,131, and the immovable property above referred to, for a price of $275,000. The description of the property, as contained in the notarial deed of sale, included the statement: "AVEC bâtisses dessus érigées, portant les numéros civiques 4474 et 4477 du dit Boulevard Sir Wilfrid Laurier, et toutes dépendances y attachées." Formal conveyance of the immovable property and the shares was made pursuant to an option contained in a letter dated August 3, 1962 which reads:

Montréal, le 3 août 1962

Monsieur Marc Masson Bienvenu,
210 ouest rue St-Jacques,
Montréal, P.Q.

Cher Monsieur,

Je vous donne par la présente, l'option valable jusqu'au 31 août 1962 d'acquérir ce qui suit:

313 actions ordinaires de Superior Window Co. Ltd. ..	$318,131
Les terrains et immeubles dans lesquels cette compagnie opère	275,000
	$593,131
Concouramment avec votre exercice de la présente option en regard des actifs ci-haut, les avances qui me sont dues par Superior Window Co. Ltd. me seront remboursées:	$ 56,869
somme totale que je devrai recevoir par chèque visé	$650,000

Lors de la clôture de cette transaction, je conviens d'acheter de La Maison Bienvenu Limitée et de payer par chèque visé, 12,500 actions de Corporation d'Expansion Financière un prix de $20.00 chacune, soit $250,000.

Je conviens de garder mon poste à la tête de Superior Window Co. Ltd. et en qualité de Président de cette société pour une période d'au moins cinq ans à des conditions de rémunération à déterminer.

Il est entendu que toutes les opérations ci-haut décrites se feront sur une base comptant, simultanément et indivisiblement.

Votre tout dévoué,
(S) C. E. St-Germain

The question in issue is whether the amounts of $2,596.55, $20,963.28 and $48,108.60, totalling $71,668.43, the cost of the improvements and additions to the leased property,

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constituted a benefit to the appellant during the years in question within the provisions of s. 8(1) of the *Income Tax Act*. That section reads

> 8(1) Where, in a taxation year,
>
> (*a*) a payment has been made by a corporation to a shareholder otherwise than pursuant to a *bona fide* business transaction,
>
> (*b*) funds or property of a corporation have been appropriated in any manner whatsoever to, or for the benefit of, a shareholder, or
>
> (*c*) a benefit or advantage has been conferred on a shareholder by a corporation,
>
> otherwise than
>
> (i) on the reduction of capital, the redemption of shares or the winding-up, discontinuance or reorganization of its business,
>
> (ii) by payment of a stock dividend, or
>
> (iii) by conferring on all holders of common shares in the capital of the corporation a right to buy additional common shares therein,
>
> the amount or value thereof shall be included in computing the income of the shareholder for the year.

The Tax Appeal Board held that the cost of the improvements and additions to the leased property did constitute a benefit to the appellant under the said section, and that finding was confirmed by the Exchequer Court[2].

At the hearing before us, counsel for respondent was informed that, if the improvements and additions to the property belonged to the appellant as owner, from the time they were effected, the Court was satisfied that s. 8(1) does apply and that we did not need to hear him on that point.

It is clear to me that, from the very outset, it was never contemplated that these improvements and additions would be removed on the termination of the lease; with the exception of the shed, they were an integral part of, and permanent improvements and additions to, the existing buildings.

Under art. 413 and following of the *Civil Code*, additions and improvements of this kind are presumed to have become the property of the owner of the immovable by accession. While this presumption can be rebutted either expressly or tacitly, I can find nothing in the circumstances of this case which would justify holding that such legal presumption had been rebutted. On the contrary, the letter

[2] [1968] 2 Ex. C.R. 430, [1968] C.T.C. 148, 68 D.T.C. 5105.

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of August 3, 1962 and the terms of the deed of sale of the immovable property indicate clearly that appellant intended to convey and did convey the whole of the immovable, including the buildings in question. The mere fact that the cost of the improvements and additions had been paid for by a company controlled by appellant, and appear to have been carried as an asset in its books, is not sufficient to rebut the presumption to which I have referred.

Appellant contended that the improvements and additions in issue here belonged to him in virtue of art. 1640 of the *Civil Code* which reads

> The lessee has a right to remove, before the expiration of the lease, the improvements and additions which he has made to the thing leased, provided he leaves it in the state in which he has received it; nevertheless if the improvements or additions be incorporated with the thing leased, with nails, lime, or cement, the lessor may retain them on paying the value.

I am unable to agree with that submission.

As I have stated, the lease, given by appellant to the company controlled by him, was a verbal one and on a month to month basis. The extensive additions and improvements made to the leased premises were of a permanent character, were integrated with the existing buildings and could not be removed with any conceivable economic advantage to the tenant. It was never contemplated that they would be removed. In these circumstances, in my opinion, art. 1640 C.C. can have no application.

I would dismiss the appeal with costs.

LE JUGE PIGEON (*dissident*):—Les faits sont relatés par mon collègue le juge Abbott. Comme lui, je ne doute pas que si les améliorations faites par la compagnie Superior Window Co. Ltd. sont devenues la propriété de l'appelant à compter du jour où elles ont été effectuées, il en est résulté pour lui un bénéfice donnant lieu à l'application du para. 1 de l'art. 8 de la *Loi de l'impôt sur le revenu.*

Dans le cas présent, il est admis que la compagnie était locataire de l'immeuble de l'appelant en vertu d'un bail verbal. En l'absence de preuve d'une stipulation contraire les droits de la locataire à l'égard des améliorations se trouvaient donc définis par l'article 1640 C.C.

> 1640. Le locataire a droit d'enlever, avant l'expiration du bail, les améliorations et additions qu'il a faites à la chose louée, pourvu

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qu'il la laisse dans l'état dans lequel il l'a reçue; néanmoins si ces améliorations et additions sont attachées à la chose louée, par clous, mortier ou ciment, le locateur peut les retenir en en payant la valeur.

Il importe de souligner que cet article du code québecois est une règle spéciale que l'on ne trouve pas dans le Code Napoléon. Cette règle spéciale est indubitablement du droit supplétif c'est-à-dire qu'elle constitue une condition de tout bail en l'absence de stipulation particulière. Je ne vois pas comment on peut douter qu'elle ait exactement le même effet que si elle était transcrite textuellement dans un bail écrit entre le propriétaire et la locataire. Si cela avait été fait, comment pourrait-on croire que l'on ait voulu que les améliorations faites par la compagnie à ses frais ne lui appartiennent pas alors qu'elle avait le droit de les enlever et que le propriétaire ne pouvait les retenir qu'en en payant la valeur?

Ce n'est pas tout. Ces améliorations ont été inscrites à l'actif de la compagnie dans ses livres et dans son bilan et c'est elle, et non pas l'appelant, qui a réclamé l'allocation du coût capital. Je ne vois pas au nom de quel principe on pourrait soutenir que ces faits sont sans importance et qu'il n'y a pas lieu d'en tenir compte. Ce n'est sûrement pas parce que l'appelant était pour ainsi dire l'unique actionnaire et le principal administrateur que l'on doit en venir à une telle conclusion. En effet, supposons qu'il eût vendu ses actions de la compagnie sans aliéner l'immeuble, les nouveaux actionnaires n'auraient-ils pas été en droit de lui dire: «Vous avez vous-même reconnu que la compagnie avait les droits prévus à l'article 1640 puisque comme son administrateur vous avez approuvé des registres et un bilan où les améliorations sont inscrites comme lui appartenant. Comment pouvez-vous prétendre qu'elles sont votre propriété?» En l'absence d'une disposition spéciale de la loi ou d'une fraude, la constitution en corporation d'une compagnie donne naissance à une personne morale dont les droits sont entièrement distincts de ceux du principal actionnaire et cela est vrai aussi bien envers le fisc qu'envers les individus.

On nous a cité à l'audition ce que dit Mignault au volume 7, page 324:

> Quant aux améliorations et additions qui ne peuvent être enlevées sans dégrader le fonds, telles que les peintures sur les bois, murs ou plafonds, elles doivent rester, sans indemnité, au propriétaire. Il en

est de même des améliorations qui ne peuvent être enlevées par le locataire avec avantage pour lui-même, telles que les papiers de tenture et autres embellissements de ce genre (arg. de l'art. 417, dernier alinéa).

Il est clair que l'exception ne vise que des améliorations du genre de celles que l'auteur énumère: peinture, papier peint. On ne saurait l'appliquer à des constructions nouvelles à charpente d'acier. Par ailleurs, il importe de souligner que dans une note au bas de la page 501 du volume 2, le même auteur exprime l'avis que l'art. 1640 est la seule règle à suivre dans le cas des améliorations faites par un locataire et il le considère comme dérogeant à la règle générale de l'accession et ayant pour effet de reconnaître au locataire le droit de propriété sur les améliorations faites par lui. En effet, il qualifie «d'achat par le propriétaire», l'exercice du droit de les retenir en en payant la valeur.

> Citons, à titre de comparaison, l'article 1640 qui règle la question des améliorations faites par le locataire et de l'indemnité qui peut en être due par le bailleur. Cette disposition n'existe pas au code Napoléon.
>
> (Texte de l'article)
>
> Remarquons que le locataire n'est pas traité comme le possesseur de mauvaise foi ni encore comme le possesseur de bonne foi, en vertu de l'art. 417. Ainsi, il a le droit absolu d'enlever, sauf, lorsque les améliorations sont attachées à la chose louée par clous, mortier ou ciment, le droit du propriétaire de garder les améliorations en en payant, non le coût, ni la plus-value procurée au fond, mais la valeur laquelle, bien entendu, doit s'estimer au moment de l'achat de ces améliorations. Il est permis de croire que cet achat des améliorations par le propriétaire les immobiliserait, bien qu'elles n'aient pas été placées par lui, car cet achat renferme certainement une destination.

La jurisprudence des tribunaux du Québec est conforme à l'opinion de Mignault.

Je crois devoir ajouter que lorsque l'appelant a négocié simultanément la vente de l'immeuble et de ses actions dans la compagnie sa convention avec l'acquéreur de l'entreprise comportait la stipulation suivante:

> 2. Le vendeur représente et garantit:
>
> * * *
>
> *e*) que la situation financière de la compagnie, au 30 juin 1962, est telle que montrée sur le bilan de cette date qui est annexé aux présentes et dans les livres de la compagnie . . .

Comme on l'a vu, les améliorations dont il s'agit figuraient au bilan et dans les livres comme propriété de la compagnie. Vu cette stipulation, il ne me paraît pas qu'il y ait lieu

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Le juge Pigeon

d'attacher beaucoup d'importance au fait que l'acte de vente de l'immeuble signé en exécution de cette convention comporte suivant la formule habituelle la cession de l'immeuble «avec bâtisses dessus érigées ... et toutes dépendances y attachées». Rien n'indique qu'on ait entendu exécuter la convention d'achat de l'immeuble et des actions autrement qu'elle avait été originairement conclue. D'ailleurs, l'acte notarié de vente de l'immeuble a été signé entre l'appelant et la compagnie. Il me semble tout à fait impossible d'interpréter ce document comme comportant une vente à la compagnie d'améliorations qui lui appartenaient déjà selon un droit découlant de l'art. 1640 C.C. et reconnu par les écritures comptables et les bilans par lesquels les deux parties étaient liées.

De la part de l'intimé on a fait état à l'audition de l'écart important entre le prix d'acquisition de l'immeuble par l'appelant en 1953 et celui de revente à la compagnie en 1962. A ce sujet, il faut faire observer que la cotisation de l'appelant n'est pas fondée sur la prétention que la compagnie lui a conféré un bénéfice en faisant cette opération et par conséquent, il n'y a pas de preuve démontrant que le prix payé en 1962 excède ce qu'était alors la valeur marchande de l'immeuble qui a pu être acheté à prix d'aubaine environ dix ans auparavant. D'un autre côté, les états financiers démontrent que le prix payé pour les actions de la compagnie correspond à un bilan où les améliorations à l'immeuble figurent dans l'actif de la compagnie. Les cotisations contestées reposent uniquement sur la prétention que l'appelant est devenu propriétaire des améliorations au moment où elles ont été effectuées. C'est pourquoi la seule question à juger est celle que formule mon collègue le juge Abbott.

Pour ces raisons, j'infirmerais le jugement de la Cour de l'Échiquier et celui de la Commission d'Appel d'Impôt sur le Revenu avec dépens des deux Cours contre l'intimé et j'ordonnerais que les cotisations faisant l'objet de l'appel soient revisées suivant les conclusions ci-dessus formulées.

Appeal dismissed with costs, PIGEON J. *dissenting.*

Solicitors for the appellant: Stikeman, Elliott, Tamaki, Mercier & Robb, Montreal.

Solicitor for the respondent: D. S. Maxwell, Ottawa.

NATIONAL TRUST COMPANY LIMITED, Executors under the Last Will and Testament of Douglas James Taylor, Deceased (*Defendant*) .....APPELLANT;

1968
*Oct. 11, 15
1969
Jan. 28

AND

WONG AVIATION LIMITED and ANTHONY M. WONG (*Plaintiffs*) RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Bailment—Aircraft rented for solo flight—Pilot and aircraft never seen again—Action in contract and tort against pilot's executors—No direct evidence of negligence on pilot's part—Factors equally consistent with negligence and no negligence—Res ipsa loquitur not applicable—Burden of proof.

An aircraft owned by the second respondent and leased by him to the respondent company was rented by the company to one T for the purpose of flying, solo, "in a tight flight circuit around Toronto Island Airport". T, a licensed but inexperienced pilot, took off from the airport and neither he nor the aircraft was ever seen again. In an action brought by the respondents against the executor of T's estate for damages for the loss of the aircraft, the claim of the respondent company was framed in both contract and tort and that of the second respondent in tort only. The action was dismissed at trial. On appeal, the Court of Appeal allowed the appeal and awarded the respondents $10,500. The executor then appealed to this Court.

Held: The appeal should be allowed.

Adopting the views of the trial judge that it had been satisfactorily demonstrated the loss of the aircraft could have been caused by many other factors as equally consistent with no negligence as with negligence on the part of T and that, accordingly, the maxim *res ipsa loquitur* did not apply, the claims in negligence, based as they were solely on the application of that maxim, should be dismissed.

Both the bailee and the bailed chattel having disappeared and there being no evidence of negligence on the part of the bailee, the rule of evidence whereby the onus is placed on the bailee to disprove negligence was not applicable and the general rules governing proof where performance of a contract has become impossible due to the destruction of the subject-matter should be applied. As the respondents had not adduced any evidence to "establish a fault or default in the defendant", the bailment action depended upon the application of the rule embodied in the maxim *res ipsa loquitur*. As there were factors which might well have caused the loss of the aircraft without any negligence on T's part, that maxim was not applicable.

The appellant had produced an explanation from which it would be just as reasonable for a Court to conclude that the happening occurred without the negligence of the bailee as to conclude that he was negligent. Where there was no direct evidence of negligence, no more could be required of the executor of a deceased bailee who perished with the chattel.

*PRESENT: Cartwright C.J. and Judson, Ritchie, Hall and Spence JJ.

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Pratt v. Waddington (1911), 23 O.L.R. 178; *Macdonell v. Woods* (1914), 32 O.L.R. 283; *Stables v. Bois* (1956), 3 D.L.R. (2d) 701; *McCreary v. Therrien Construction Co. Ltd. and Therrien*, [1951] O.R. 735; *The "Ruapehu"* (1925), 21 Ll.L.Rep. 310; *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corporation, Ltd.*, [1941] 2 All E.R. 165, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Moorhouse J. Appeal allowed.

Hugh Rowan, Q.C., and *J. G. Pink*, for the defendant, appellant.

B. F. Kennerly, for the plaintiffs, respondents.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] allowing an appeal from a judgment rendered at trial by Mr. Justice Moorhouse and directing that the respondents recover the sum of $10,500 from the appellant in respect of the loss of a Cessna 172A aircraft (hereinafter sometimes referred to as CF-LWE) which had been rented by Wong Aviation Limited to the late Douglas Taylor on October 28, 1962, for the purpose of flying, solo, "in a tight flight circuit around Toronto Island Airport", and which was lost, together with its pilot. No trace of the aircraft or Taylor has ever been found.

The aircraft was owned by the respondent, Anthony M. Wong, and was leased by him to the respondent company which carried on the business of providing flying instruction and of leasing aircraft to licensed pilots at the Toronto Island Airport. Douglas Taylor, although far from being an experienced pilot, was the holder of a valid pilot's licence and in this sense qualified to fly the aircraft in question under visual flight conditions, although there is no evidence that he had ever flown a Cessna 172A aircraft before. The learned trial judge found that the aircraft was in satisfactory flying condition and had sufficient fuel for the purpose of the projected flight.

[1] [1966] 2 O.R. 182, 56 D.L.R. (2d) 228.

In opening the argument before us, counsel for the appellant stressed the fact that the claim of the respondent company was framed in both contract and tort, being founded primarily on the appellant's alleged breach of the contract of bailment in that he failed to return the plane which he had hired, and in the alternative, on the ground that the plane was lost due to Taylor's negligence. Counsel pointed out that this created a somewhat anomalous situation in that the claim in bailment involved the contention that the onus lay on the appellant to prove that the loss was not caused by Taylor's negligence, whereas it was acknowledged that in the tort claim the onus of proving negligence rested upon the respondents who relied exclusively on the application of the maxim *res ipsa loquitur* to discharge it.

If the company were the only plaintiff in this action, I do not think that the mere fact of its having pleaded negligence in the alternative would have any great significance. The company's action is one in bailment. In the present case, however, there are in fact two separate and distinct actions pleaded because the second plaintiff, Anthony M. Wong, who was the owner of the aircraft, was not a party to the contract of bailment and his action depends entirely upon proof that the plane was lost through Taylor's negligence. This phase of the matter does not appear to have concerned the Courts below, but as I think that Anthony M. Wong's claim should be dealt with, I find it necessary to make a brief review of the essential allegations in the pleadings.

It is alleged in the statement of claim that on October 28 the company, by its servant George Morewood, "orally agreed to let on hire to Taylor CF-LWE at a rental at the rate of $17.00 per hour" on the express condition that Taylor was to fly, in accordance with visual flight rules, "in a tight flight circuit around Toronto Island Airport" going no further west than High Park in the City of Toronto and that after completing two such circuits, he was to fly the aircraft back to the airport and land there. It is further alleged that it was an implied condition of hire that Taylor would take due and proper care of the aircraft and would restore it to the company at the airport at the conclusion of the flight in the same condition as

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that in which he had received it. The breach of this contract is alleged in para. 8 of the statement of claim in the following terms:

> In breach of the conditions of hire, Taylor has never returned the CF-LWE to the Company at the Toronto Island Airport or elsewhere. The Company and Wong have no knowledge of the whereabouts of CF-LWE or of Taylor after Taylor took . . . off from the Toronto Island Airport on the 28th of October, 1962.

The claims of Wong and the company in tort are made by reason of *The Trustee Act*, R.S.O. 1960, c. 408, s. 38(2) "for the loss of CF-LWE due to the negligence of Taylor". These claims are pleaded in para. 11 of the statement of claim as follows:

> Wong as owner of the CF-LWE claims and the Company by way of alternate plea further claims that the loss of CF-LWE was due to the negligence of Taylor and as such loss occurred while CF-LWE was in the sole control and possession of Taylor, the Plaintiffs will rely on the doctrine of *res ipsa loquitur*.

During the course of the examination for discovery of Anthony M. Wong, this paragraph was read into the record and the following exchange then took place between Mr. Rowan, acting on behalf of the present appellant, and Mr. Church, acting for the respondents:

> Q. In Paragraph 11 of the Statement of Claim the company claims that the loss of CF-LWE was due to the negligence of Taylor. Can you tell me on what acts of negligence you rely in paragraph 11?
>
> MR. CHURCH: We rely on the doctrine of *res ipsa loquitur*.
>
> MR. ROWAN: I understand that. Apart from the doctrine of *res ipsa loquitur*, are there any more acts of negligence on the part of Taylor that you rely on?
>
> MR. CHURCH: No, we have no knowledge of any particular acts. His conduct was beyond reproach at the time the aircraft was rented. Our allegations of negligence are by way of our reliance on the doctrine of *res ipsa loquitur*.
>
> MR. ROWAN: Exclusively?
>
> MR. CHURCH: Yes.

I think it convenient to deal first with the claims in negligence and to say at the outset that I agree with the finding of the learned trial judge which is expressed in his reasons for judgment in the following language:

> It was agreed there was no evidence of negligence by Taylor. The plaintiffs rely upon the maxim *res ipsa loquitur*.
>
> The management of the aircraft was under the sole control of Taylor but it has been demonstrated to my satisfaction the loss of the aircraft could have been caused by many other factors as equally consistent with

no negligence as with negligence on the part of Taylor. For these reasons I believe that maxim is not here applicable. Many of the explanations of loss are indeed probable without negligence by Taylor. Air turbulence, carburetor icing, loss of vision with reference to ground or horizon to name but three.

The learned trial judge then quotes from the decision of this Court in *United Motors Service, Inc. v. Hutson*[2], where Sir Lyman Duff said:

> Broadly speaking, in such cases, where the defendant produces an explanation equally consistent with negligence and with no negligence, the burden of establishing negligence still remains with the plaintiff.

Adopting, as I do, these views expressed by the learned trial judge, it follows that I would dismiss the claims in negligence based, as they are, solely on the application of the maxim *res ipsa loquitur*, and this means that the appeal against Anthony M. Wong should be allowed as he has made no claim in contract.

Mr. Justice Laskin, in the reasons for judgment which he delivered on behalf of the Court of Appeal, was content to limit himself to a consideration of the facts in terms of an action for damages for breach of the contract of bailment and he felt free to leave the maxim *res ipsa loquitur* out of his consideration altogether saying:

> Since I do not agree that *res ipsa loquitur* has any place in our law of bailment I need not deal with the contention that it is inapplicable to the facts.

It is, I think, significant to note that the Court of Appeal did not disagree with the finding of the learned trial judge that many of the explanations of the loss of the aircraft were "indeed probable without negligence by Taylor".

It appears to me to be obvious that the contract of bailment was dependent for its performance upon the continuing existence of the bailed chattel and the disappearance of the chattel made that performance impossible. Under these circumstances, the bailee's position at law is well summarized in 2 Hals., 3rd ed., p. 126, para. 242, as follows:

> He must also return the chattel hired at the expiration of the agreed term. But if the performance of his contract to return the chattel becomes impossible because it has perished, this impossibility (if not arising from the fault of the hirer or from some risk which he has taken upon himself) excuses him.

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[2] [1937] S.C.R. 294 at 297.

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The basic question in this case is whether the onus is upon the bailee's executor to show that the disappearance did not occur through his fault or on the bailor to prove that it did, and it appears to me that the Court of Appeal has rested its decision on the ground that in the bailment action the burden of proving that Taylor's negligence was not the cause of the loss lay on the appellant and that this involved the onus of disproving negligence by affirmative proof of reasonable care by Taylor which was not discharged by producing an explanation equally consistent with negligence or no negligence. In reaching this conclusion, Laskin J.A. expressed himself as follows:

> The jurisprudence of this Court has been clear, at least since *Pratt v. Waddington* (1911), 23 O.L.R. 178, that on a plea and proof of bailment and non-return of the bailed goods, the bailee must disprove negligence: see also *McCreary v. Therrien Construction Co. Ltd. and Therrien,* [1951] O.R. 735. I do not think that the type of bailment, whether gratuitous or for reward makes any difference in the application of this proposition. Nor do I think that the proposition is affected by the circumstance that the cause of loss of the bailed chattel is unknown. I readily agree, however, that the evidence offered in exoneration may be different in its thrust according to whether the cause of loss is known or unknown. Where known, the bailee must negative negligence in respect of the occurrence. Where the bailed chattel disappears and the disappearance is unaccountable, the bailee must still disprove negligence by affirmative proof of reasonable care, but he is not to be put to the obligation to show how the loss occurred and then saddled with the duty to disprove negligence in respect thereto: see *Macdonnell v. Woods* (1914), 32 O.L.R. 283; *Brooks Wharf & Bull Wharf, Ltd. v. Goodman Bros.*, [1936] 3 All E.R. 696; *Stables v. Bois,* [1956] O.W.N. 164, 3 D.L.R. (2d) 701. Indeed, proof of the cause of loss does not inevitably carry disproof of negligence, although in particular circumstances it may do so . . .

In the last two sentences of the next paragraph of his reasons for judgment, the learned judge says:

> I note that counsel for the plaintiffs was content to rest his appeal on the proposition that the bailee, or the defendant in this case, had the burden of bringing forth a reasonable explanation of how the aeroplane may or could have been lost without the bailee's negligence. In putting his case on this footing he was apparently accepting the burden of persuasion if the evidence on the whole case was in balance, but, as already pointed out, this is not the law of Ontario.

Earlier in his reasons for judgment, Mr. Justice Laskin expressed the opinion that "the principles of proof do not vary merely because the bailee and the chattel bailed disappeared together", but we were not referred to any reported cases in which this had happened and it appears to me to be desirable to examine the cases cited by

Laskin J.A. in order to determine whether they afford any authority for imposing on the executor of a dead bailee the same onus of disproving negligence that rests upon one who knows all about the circumstances of the chattel's disappearance and is alive to give evidence.

The case of *Pratt v. Waddington, supra,* was one in which the plaintiff had loaned a horse to the defendant who in turn, without obtaining any permission from the plaintiff, had loaned it to a third party by the name of Spain who used it for heavy work as a result of which it died within three weeks. In the course of his reasons for judgment, Middleton J. said:

> Here the defendant was entirely in the wrong; the loan of the horse was to him, and he had no right to pass it on to Spain. . . . It [the horse] was subject to conditions and risks not contemplated by the bailment; the defendant, and Spain holding the horse under him, have the means of shewing what was done, and in fairness and in law the onus is upon them to excuse the default in making due return.

That was a case of gratuitous bailment in which it was clear that the death of the horse was a consequence of the bailee's breach of contract in loaning it to a third party without the bailor's authority, and it is significant to note that the third party, who knew more than anyone else about the cause of the horse's death, was alive and was not called to give evidence at the trial. In the present case there is no suggestion that the loss was in any way related to a breach of contract by Taylor, there is no evidence of negligence, and there was nobody available who knew the circumstances under which the loss occurred.

The case of *Macdonnell v. Woods, supra,* was one in which a trunk had been left at a rooming house for safe-keeping pending the plaintiff's arrival and the defendant's servant undertook to send it to the room which the plaintiff had booked, but in breach of this contract, the trunk was left in the passageway unprotected from whence it was stolen. This was clearly another case in which the goods were lost through a breach of the contract by the bailee, and, like the *Pratt* case, the principles upon which it was decided do not, in my view, apply to a case where the bailee and the chattel bailed have disappeared together and there is no evidence of negligence or breach of contract by the bailee.

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Stables v. Bois[3], was a case in which the plaintiff had left his car in a garage for repairs when one of the servants of the garage owner bailee was using an acetylene torch to remove the muffler from another car in the garage. A fire broke out and the garage, together with the plaintiff's car, was destroyed. There was no evidence that the operator of the acetylene torch had made any inspection of the gasoline tank in the car that he was working on and it was shown to be a common occurrence that would be known and anticipated by an experienced operator for such an acetylene torch to flash back.

The Court of Appeal for Ontario, in an oral judgment rendered by Laidlaw J.A., held that the burden lay on the garage owner to show that his servant had not been negligent and concluded by saying:

> In those circumstances, and in the light of that evidence, how could it be found that the defendant had explained this happening in such a manner that the Court could reasonably consider that there was no negligence on the part of the defendant? We think the onus was not satisfied and that on the evidence that conclusion is the reasonable one to reach.

That was a case where the garage mechanic who knew all about the cause of the fire was available to give evidence and where the circumstances themselves were such as to require an explanation.

It is interesting to note, however, that even under these circumstances Mr. Justice Laidlaw's decision appears to have turned on the fact that the defendant had given no explanation from which the Court could reasonably conclude that there was no negligence on the part of the defendant. With all respect, this does not appear to me to afford any authority for the broad statement made by Mr. Justice Laskin to the effect that under the law of Ontario it is not enough for a bailee to bring forth a reasonable explanation of how the bailed chattel could have been lost without his negligence.

The case cited by Mr. Justice Laskin which is closest to the present case is that of *McCreary v. Therrien Construction Co. Ltd. and Therrien*[4], where the defendant had rented a "cabin trailer" from the plaintiff for use as living quarters for himself and others and the trailer was

[3] 3 D.L.R. (2d) 701, [1956] O.W.N. 164.

[4] [1951] O.R. 735, [1952] 1 D.L.R. 153.

destroyed by fire while in the defendant's possession. It was held that in these circumstances the onus rested on the bailee to show that the loss of the property had not resulted from negligence or improper conduct on his part, and Mr. Justice Laidlaw, who wrote the reasons for judgment of the Court of Appeal for Ontario, made a careful review of the authorities and concluded by explaining the principle governing the burden of proof in bailment cases in the language which was used by Atkin L.J. in *The "Ruapehu"*[5]. Mr. Justice Laidlaw said:

> Lord Justice Atkin explains the grounds upon which the principle is founded, and I quote his language as follows: "The bailee knows all about it; he must explain. He and his servants are the persons in charge; the bailor has no opportunity of knowing what happened. These considerations, coupled with the duty to take care, result in the obligation on the bailee to show that that duty has been discharged."

Although Mr. Justice Laidlaw and Lord Atkin referred to this as "a principle" it might, in my view, be more accurately described as a rule of evidence and as it is one which has the practical effect of placing on the bailee the heavy onus of proving a negative (*i.e.* that he was not negligent) it should, in my opinion, only be invoked in cases where *all* the considerations stipulated by Lord Atkin can be found to be present.

In the present case, even if Taylor had survived, it is by no means certain that a pilot of his meagre experience would have been able to explain the reason for the loss of the plane; but in any event, he is not available to explain the accident. In a case such as this where the bailee is dead, it seems to me to be quite unrealistic to apply a rule, one of the basic considerations for which is that "the bailee knows all about it; he must explain". In this case nobody "knows all about it", indeed, nobody knows anything about it. Both the bailee and the bailed chattel have disappeared and there is no evidence of negligence on the part of the bailee. I am accordingly of opinion that the rule explained by Lord Atkin respecting burden of proof in bailment cases does not apply to the peculiar circumstances of this case and that the general rules governing proof where performance of a contract has become impossible due to the destruction of the subject-matter, should be applied. Those rules are best stated by

[5] (1925), 21 Ll. L. Rep. 310 at 315.

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Ritchie J.

Lord Russell of Killowen in *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corporation, Ltd.*[6], where he said:

> The defendant will prove the destruction of the *corpus*, and, where possible, the event which brought it about. It may be that the event is of such a nature as of itself to raise a *prima facie* case of fault or default in the defendant. Unless he displaces that *prima facie* case, he will be unable to rely on the doctrine. The frustration will stand as self-induced. On the other hand, it may be that nothing is known as to what event brought about the destruction, or the known event may be of such a nature as of itself to raise no *prima facie* case of fault or default in the defendant. If the matter rests there, he will be excused from liability under the contract. The plaintiff, however, may by cross-examination, or independent evidence, or both, establish a cause of fault or default in the defendant. If the matter rests there, the defendant will be unable to rely on the frustration, which will stand as self-induced. In every case, the contractor will succeed or fail in his defence on frustration according as it is or is not found as the result of the whole evidence that the frustration was self-induced.

This statement of law was applied by Coady J. in *McDonald Aviation Co. Ltd. v. Queen Charlotte Airlines Ltd.*[7], where a leased aeroplane was destroyed by fire and its pilot and his passenger were killed. Mr. Justice Coady's decision was affirmed by the Court of Appeal for British Columbia[8].

As the respondents in the present case have not adduced any evidence to "establish a fault or default in the defendant", the outcome of the bailment action must depend upon whether "the event is of such a nature as of itself to raise a *prima facie* case of fault or default ...". In other words, the bailor's action depends upon the application of the rule embodied in the maxim *res ipsa loquitur*.

I do not find it necessary to review the facts which were so fully considered in the Courts below as I think it sufficient to say that I agree with the learned trial judge that the weather conditions which prevailed while Taylor was in the air were such as to support an inference that air turbulence, carburetor icing or loss of vision with reference to the ground might well have caused the loss of the aircraft without any negligence on Taylor's part, and that the maxim last referred to is therefore not applicable.

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[6] [1941] 2 All E.R. 165 at 181.

[7] [1951] 1 D.L.R. 195, [1950] 2 W.W.R. 552.

[8] [1952] 1 D.L.R. 291, 3 W.W.R. (N.S.) 385.

With the greatest respect, I am unable to agree with Mr. Justice Laskin that "the principles of proof do not vary merely because the bailee and the chattel bailed disappear together". As I have indicated, I think that the rule explained by Lord Atkin in *The "Ruapehu", supra,* is based on the fact that the bailee, who knew all about the circumstances of the loss and who was under a duty to take care of the chattel, is required to explain its disappearance, and it seems to me that this proposition loses its force when the bailee has disappeared with the chattel and that it is unrealistic to apply such a rule to his executor who obviously knows nothing about the circumstances.

I do not think it desirable, except in the clearest of cases, for a question of liability to be determined on the sole ground that the strict rules of evidence regarding the shifting of the onus of proof have not been complied with. In my view, in cases such as this, what is to be looked to is the evidence as a whole, and in the present case when the evidence is so viewed, it appears to me that the appellant has produced an explanation from which it would be just as reasonable for a Court to conclude that the happening occurred without the negligence of the bailee as to conclude that he was negligent. I do not think that, where there is no direct evidence of negligence, any more can be required of the executor of a deceased bailee who perished with the chattel.

I do not find it necessary to deal with the argument that the respondents voluntarily accepted the risk of the loss of the aircraft, nor do I base my decision in any way on the student-instructor relationship which the learned trial judge found to have existed between the appellant and the respondents.

For all these reasons I would allow this appeal and set aside the judgment of the Court of Appeal, with costs both here and in the Court of Appeal for Ontario.

Appeal allowed with costs.

Solicitors for the defendant, appellant: Tory, Tory, DesLauriers & Binnington, Toronto.

Solicitors for the plaintiffs, respondents: Manning, Bruce, Toronto.

1968
Déc. 9
1969
Fév. 17

LEONARD C. RANGE (*Défendeur*) .....APPELANT;

ET

CORPORATION DE FINANCE BELVÉDÈRE (*Demanderesse*) .. } INTIMÉE.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Lettre de change et billet—Billet attaché à un contrat de vente conditionnelle—Le tout cédé à un tiers—Poursuite par le cessionnaire fondée exclusivement sur le billet—Objet de la vente non livré—Le cessionnaire est-il un détenteur régulier—Loi sur les lettres de change, S.R.C. 1952, c. 15, art. 57, 58(2), 176(1).

Le 7 avril 1960, l'appelant a acheté un manteau de fourrure et a signé un contrat de vente conditionnelle selon une formule imprimée d'une compagnie de finance, United Loan Corporation, stipulant que le vendeur resterait propriétaire du manteau jusqu'au paiement final. Le premier versement devait avoir lieu le 10 mai 1960. Au contrat, il était stipulé qu'un billet négociable avait été donné par l'acheteur au vendeur. Ce billet était partie de la feuille de papier contenant le contrat et il était endossé à l'ordre de United Loan par le vendeur. Ce dernier n'a jamais livré le manteau et a fait faillite quelques mois plus tard. Le 13 avril, le contrat, billet compris, était entre les mains de United Loan et le 26 avril, celle-ci le remettait à la Banque Impériale en garantie collatérale. Lors de la signature du contrat, l'appelant avait aussi signé une série de chèques dont chacun représentait un des versements. Ces chèques ou traites étaient entre les mains de United Loan qui a encaissé les deux premiers, l'appelant ayant contremandé les autres. Il est en preuve qu'avant la première échéance, United Loan connaissait le défaut de livraison. L'année suivante, cette compagnie devenait insolvable et le fiduciaire vendait à l'intimée, avec le concours de la Banque Impériale, le contrat de vente conditionnelle avec le billet qui n'en avait jamais été détaché. Une carte comptable indiquant que seuls les deux premiers versements avaient été reçus et portant la mention «non livré» fut aussi remise à l'intimée. Cette dernière détacha le billet et intenta une poursuite fondée exclusivement sur cet effet en prétendant avoir les droits d'un détenteur régulier. La Cour supérieure a rejeté l'action pour le motif que le billet était nul faute de considération. Ce jugement fut infirmé par une décision majoritaire de la Cour d'appel. D'où le pourvoi devant cette Cour.

Arrêt: L'appel doit être accueilli.

Lorsqu'il y a eu fraude à l'origine d'un effet de commerce il incombe à celui qui l'a pris de prouver sa bonne foi: *Benjamin c. Weinberg*, [1956] R.C.S. 553. La preuve non contredite démontre que le vendeur devait livrer le manteau avant l'échéance du premier versement. Si dans ces conditions il se servait, pour obtenir de l'argent, d'un document reconnaissant la livraison sans révéler le fait de la

*CORAM: Les Juges Fauteux, Abbott, Martland, Hall et Pigeon.

non livraison, il commettait une fraude. Ce fait ayant été révélé à United Loan, celle-ci connaissait le vice du titre et il fallait alors que l'on prouve sa bonne foi, ce qui n'a pas été tenté.

La prétention que la banque n'était pas détentrice régulière parce qu'elle avait pris l'effet en garantie collatérale vient à l'encontre de la décision de cette Cour dans *Bonenfant c. La Banque Canadienne de Commerce*, [1930] R.C.S. 386. La banque était détentrice régulière au moins jusqu'à concurrence de la dette garantie collatérallement. Il faut donc admettre que l'intimée doit être considérée comme aux droits de la banque et comme cette dernière a pris l'effet avant l'échéance, il importe peu, si on le tient pour un billet au sens de la *Loi sur les lettres de change*, que la cession subséquente à l'intimée ait eu lieu alors qu'il était en souffrance, l'art. 57 ne faisant pas de distinction à cet égard.

Dans le cas présent, l'effet n'était pas un billet au sens de l'art. 176(1) de la *Loi sur les lettres de change*. Ce qui a été transporté c'est le tout, le billet non détaché du contrat. En examinant ce tout il est impossible d'en venir à la conclusion que la promesse de l'acheteur était inconditionnelle. Le cas présent diffère de *Killoran c. Monticello State Bank* (1921), 61 R.C.S. 528.

Bills and notes—Promissory note attached to a conditional sale contract—Both assigned as a whole to a holder—Action by assignee exclusively on the note—Object of sale not delivered—Is the assignee a holder in due course—Bills of Exchange Act, R.S.C. 1952, c. 15, ss. 57, 58(2), 176(1).

On April 7, 1960, the appellant purchased a fur coat and signed a conditional sale contract on a printed form of a finance company, United Loan Corporation, which stated that the seller would remain owner until payment of all the instalments. The first of these instalments was to be made on May 10, 1960. The contract stipulated that a negotiable promissory note had been given by the purchaser to the seller. This note was on the same sheet as the contract and was endorsed by the seller to United Loan. The coat was never delivered and the seller went bankrupt a few months later. On April 13, 1960, the contract, with the note still attached to it, was in the hands of United Loan which, on April 26, 1960, transferred it as collateral to the Imperial Bank. At the time of the signature of the contract, the appellant had also signed a series of cheques, each covering one instalment. These cheques were in the hands of United Loan which cashed only the first two, payment of the others having been stopped by the appellant. The evidence showed that before the due date of the first instalment, United Loan knew that the coat had not been delivered. The following year, United Loan went bankrupt and the trustee, with the bank's consent, sold to the respondent the appellant's contract to which the note was still attached. The respondent was also given an accounting card indicating that two payments had been made and a mention "not delivered". The respondent detached the note and sued exclusively on that instrument alleging that it had the rights of a holder in due course. The Superior Court dismissed the action on the ground

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that the note was null for lack of consideration. This judgment was reversed by a majority decision in the Court of Appeal. An appeal was launched to this Court.

Held: The appeal should be allowed.

When there has been fraud at the origin of a negotiable instrument, the burden of proving good faith is on the holder: *Benjamin v. Weinberg,* [1956] S.C.R. 553. The uncontradicted evidence showed that the seller had to deliver the coat before the date of the first instalment. If, in order to obtain a loan, he was using a document acknowledging delivery without revealing the fact of the non delivery, he was committing a fraud. The fact of the non delivery having been revealed to United Loan, the latter knew the defect of the title and it was up to it to prove its good faith, which was not attempted to be done.

The contention that the bank was not a holder in due course because it had received the note as collateral goes against the judgment of this Court in *Bonenfant v. The Canadian Bank of Commerce,* [1930] S.C.R. 386. The bank was a holder in due course at least up to the amount of the debt guaranteed collaterally. It must therefore be admitted that the respondent must be considered in the rights of the bank and, as the latter had taken possession of the note before its maturity it matters not under s. 57 of the *Bills of Exchange Act* that its subsequent delivery to the respondent took place when it was overdue, so long as the instrument is considered a note within the meaning of the Act.

However, the instrument was not a note according to s. 176(1) of the *Bills of Exchange Act.* What was delivered was the note attached to the contract, forming a whole. A scrutiny of the whole reveals that the promise made by the buyer was not unconditional. The present case differs from the judgment in *Killoran v. Monticello State Bank* (1921), 61 S.C.R. 528.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reversing a judgment of Morin J. Appeal allowed.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], infirmant un jugement du Juge Morin. Appel accueilli.

Guy Dorion, c.r., pour le défendeur, appelant.

Vincent Masson, c.r., pour la demanderesse, intimée.

Le jugement de la Cour fut rendu par

LE JUGE PIGEON:—Le 7 avril 1960, l'appelant a signé une commande d'un manteau de fourrure pour son épouse.

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[1] [1967] B.R. 932.

Le prix total, taxe comprise, était de $792 payable en 24 versements de $33 chacun à partir du 10 mai. En même temps que la commande adressée à Durand Fourrures Inc., il a signé un «Contrat de vente conditionnelle» selon une formule imprimée de United Loan Corporation, une «compagnie de finance». Dans ce document, le vendeur est décrit comme Durand & Coutu Enrg. La première condition inscrite au verso se lit comme suit:

1. Le vendeur restera propriétaire des choses présentement vendues jusqu'à parfait paiement final du prix de la vente à tempérament: si l'acheteur fait défaut d'en acquitter le prix conformément aux conditions arrêtées aux présentes, le vendeur aura le droit, à son choix, soit d'exiger le paiement immédiat des versements échus, soit de reprendre possession dudit appareil sans indemnité ni sans être tenu de rembourser l'argent déjà reçu par le vendeur en acompte du prix de vente à tempérament, et dans ce cas, l'acheteur se trouvera libéré quant au solde du prix de la vente à tempérament.

Le montant inscrit comme total des paiements différés est $792 payable au bureau de United Loan en 24 versements mensuels de $33 à partir du 10 mai 1960, avec la stipulation suivante:

Un billet promissoire négociable a été donné par l'Acheteur au Vendeur comme pièce constatant ledit Total des Paiements Différés mais non pas en paiement d'icelui.

En fait, il n'y a qu'un seul document le «billet» est la partie inférieure de la feuille de papier dont la partie supérieure est intitulée «Contrat de vente conditionnelle». Entre les deux, il n'y a qu'une ligne pointillée. Le «billet» porte à gauche en travers, la mention «Instrument négociable», au verso, il s'y trouve un endossement imprimé à l'ordre de United Loan Corporation. La signature du vendeur y figure à l'endroit approprié. On constate également plus bas un endossement au nom de United Loan Corporation. Ce n'est qu'au moment d'instituer l'action que l'intimée a détaché le «billet» du contrat.

Lors de la signature de la commande et du contrat de vente conditionnelle, le vendeur avait verbalement promis de livrer le manteau de fourrure dans deux ou trois semaines. En fait, il ne l'a jamais livré et il a fait faillite quelques mois plus tard. Cependant, dès le 13 avril, le contrat de vente conditionnelle, billet compris, était entre les mains de United Loan à son siège social à Montréal. Le 26 avril, celle-ci le remettait à la Banque Impériale

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avec un grand nombre d'autres effets semblables, en garantie collatérale d'avances dépassant le million de dollars.

En même temps que la commande et le contrat de vente conditionnelle, l'appelant avait signé une série de chèques au montant de $33 chacun, faits à l'ordre de Durand & Coutu Enrg. et payables à chacune des échéances. Ces chèques, (ou plutôt ces traites: *Leduc c. La Banque d'Hochelaga*)[2], avaient été endossés et United Loan les avait en sa possession, ce qui lui permit d'encaisser les deux premiers. Après cela, l'appelant les ayant contremandés, le paiement fut refusé et les menaces de poursuite n'obtinrent aucun résultat. Il faut ajouter qu'avant la première échéance, United Loan connaissait le défaut de livraison; un de ses employés ayant, par téléphone, demandé à l'épouse de l'appelant si son manteau lui avait été livré; elle avait répondu négativement.

L'année suivante, United Loan devenait insolvable à son tour et, le 19 octobre 1961, le fiduciaire de ses détenteurs de billets garantis vendait à l'intimée, avec le concours de la Banque, un certain nombre de créances parmi lesquelles se trouvait la réclamation contre l'appelant. C'est en exécution de cette convention que le contrat de vente conditionnelle, avec le «billet» qui n'en avait jamais été détaché, fut remis à l'intimée. On lui remit également une carte comptable indiquant que seuls les deux premiers versements mensuels avaient été reçus et portant la mention «Non livré». L'intimée ayant détaché le «billet» intenta une poursuite fondée exclusivement sur cet effet, et elle prétend avoir les droits d'un détenteur régulier.

La Cour supérieure a rejeté l'action et déclaré le billet nul faute de considération, considérant que l'intimée n'avait pas les droits d'un détenteur régulier.

En appel[3], ce jugement a été infirmé par le motif suivant auquel une majorité s'est ralliée:

> La U.L.C. ayant remis le billet contre valeur et avant qu'il ne fût en souffrance, elle doit être réputée avoir été détenteur régulier, à

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[2] [1926] R.C.S. 76, [1926] 1 D.L.R. 433.
[3] [1967] B.R. 932.

moins qu'il ne soit prouvé qu'elle était de mauvaise foi lorsqu'elle a pris le billet, ou qu'elle avait reçu avis d'un vice affectant le titre de Durand & Coutu Enrg.

Or, cette preuve n'a pas été faite. Il est vrai que l'épouse du défendeur a déposé qu'elle avait averti la U.L.C. par téléphone que l'objet de la vente ne lui avait jamais été livré; mais cela se passait quelque dix jours après la signature du billet et sa négociation à la U.L.C. Il est vrai aussi que la U.L.C. savait que le billet avait été donné en paiement d'un manteau vendu à tempérament, puisque le contrat de vente lui avait été cédé. Mais ce contrat ne contenait rien qui pût lui faire soupçonner que le manteau n'avait pas été livré; au contraire, l'acheteur y reconnaissait avoir reçu l'objet de la vente.

Avec déférence, ce motif me paraît erroné. On y considère que c'est au défendeur qu'il incombait de faire la preuve de la mauvaise foi de United Loan. Or, notre Cour, confirmant un arrêt de la Cour d'appel du Québec, a statué que lorsqu'il y a eu fraude à l'origine d'un effet de commerce il incombe à celui qui l'a pris de prouver sa bonne foi (*Benjamin c. Weinberg*)[4]. Ici, la preuve non contredite démontre que le vendeur devait livrer le manteau de fourrure avant l'échéance du premier versement. Si dans ces conditions il se servait, pour obtenir de l'argent, d'un document reconnaissant la livraison sans révéler le fait de la non livraison, il me semble évident qu'il commettait une fraude. D'un autre côté, s'il révélait le fait à United Loan, il est clair que celle-ci connaissait le vice de titre. A mon avis, c'est ce qu'il faut déduire de la seule preuve au dossier: l'appel téléphonique destiné à vérifier la livraison. Si l'on voulait prétendre que United Loan était de bonne foi, il fallait que l'on prouve cette bonne foi et cette preuve on n'a pas tenté de la faire.

Cela cependant est loin de disposer du litige car le «billet» a été transporté à la Banque avant l'échéance du premier versement et une preuve complète a été faite des circonstances de ce transport et de la bonne foi de la Banque. A l'audition, le procureur de l'appelant a admis que celle-ci était détentrice contre valeur, mais il a soutenu que parce qu'elle avait pris l'effet en garantie collatérale elle n'était pas détentrice régulière. Cette prétention vient à l'encontre d'un arrêt unanime de notre Cour confirmant un jugement de la Cour d'appel du Québec (*Bonenfant c.*

[4] [1956] R.C.S. 553; [1954] B.R. 582.

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La Banque Canadienne de Commerce)[5]. On a jugé que dans de telles conditions cette banque était détentrice régulière, au moins jusqu'à concurrence du montant de la dette en garantie collatérale de laquelle l'effet lui a été transporté. Ici, l'acte de vente fait voir que le montant dû à la Banque dépassait celui des créances cédées et dont elle touchait en totalité le prix versé par l'intimée, étant d'ailleurs obligée de subir une déduction au cas de défaut de livraison. Il faut donc admettre que l'intimée doit être considérée comme aux droits de la Banque et comme cette dernière a pris l'effet avant l'échéance, il importe peu, si on le tient pour un billet au sens de la *Loi sur les lettres de change,* que la cession subséquente à l'intimée ait eu lieu alors qu'il était en souffrance, l'article 57 ne faisant pas de distinction à cet égard.

Il faut donc rechercher si le document, base de l'action, est vraiment un «billet» au sens de la *Loi sur les lettres de change.* Pour cela il faut qu'il soit sans condition (art. 176.1). Il est évident que l'effet dont il s'agit n'est sans condition que si on le considère indépendamment du contrat de vente conditionnelle. Dès que l'on considère le tout, la première condition démontre que la promesse de payer est conditionnelle: advenant la reprise de l'effet vendu, l'acheteur est libéré. On ne saurait douter que le même résultat doit se produire advenant défaut de livraison. Ici, la preuve démontre que l'intimée a acquis les droits découlant du contrat de vente conditionnelle et du «billet» comme un tout. On voit qu'elle a fait publier des avis comme s'il s'agissait d'une vente de créance. Il est clair qu'elle voulait être en mesure d'exercer les droits découlant du contrat de vente aussi bien que ceux découlant du «billet». Ce n'est qu'en vue de l'institution de la poursuite qu'elle a détaché le «billet» pour prétendre le considérer comme un contrat distinct et inconditionnel. Nous n'avons pas à nous demander ce que serait la situation si l'intimée, et avant elle la Banque, avaient pris le «billet» détaché du contrat. Ce qui a été transporté, dans le cas présent, c'est le tout. En examinant le tout, il est impossible d'en venir à la conclusion que la promesse de l'acheteur est inconditionnelle. Ce n'est donc pas un billet.

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[5] [1930] R.C.S. 386; (1929), 46 B.R. 219.

Il faut signaler que le contrat produit en la présente cause diffère de celui qui figurait sur le billet qui a fait l'objet de la décision de cette Cour dans *Killoran c. Monticello State Bank*[6]. Dans ce contrat-là on trouvait la stipulation suivante:

> These notes ... may be discounted, pledged or hypothecated by the Promisee and in every such case payment thereof is to be made to the holder of the note instead of to the Promisee, and *no holder* of the said notes ... shall be affected by ... any equities existing between the Subscriber and the Promisee, but shall be and shall be deemed to be a holder in due course and for value of the notes held by him.

On avait donc expressément stipulé que l'obligation découlant du billet serait inconditionnelle et subsisterait en faveur de tout détenteur de cet effet, nonobstant tout ce qui pourrait se produire entre l'acheteur et le vendeur comme conséquence de la vente conditionnelle. Ici on ne trouve rien de tel, j'irais même jusqu'à dire que la clause du contrat relative au «billet» implique le contraire.

Pour ces raisons, je suis d'avis d'accueillir l'appel, d'infirmer le jugement de la Cour d'appel et de rétablir le jugement de la Cour supérieure rejetant l'action, le tout avec dépens contre l'intimée dans toutes les cours.

Appel accueilli avec dépens.

Procureurs du défendeur, appelant: Dorion, Bernier, Gagnon & Cantin, Québec.

Procureurs de la demanderesse, intimée: Bhérer, Masson, Juneau, Bernier, Côté & Ouellet, Québec.

[6] (1921), 61 R.C.S. 528, [1921] 1 W.W.R. 988, 57 D.L.R. 359.

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*April 29
April 29

FREDERICK JAMES BAKER (*Plaintiff*) ..APPELLANT;

AND

TERRY AUSTIN (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Collision of automobile and motorcycle at intersection—Right of way—Apportionment of degrees of blame by jury—Damages—Motor-vehicle Act, R.S.B.C. 1960, c. 253, s. 164.

An action arising out of a collision between the defendant's automobile and the plaintiff's motorcycle in an area constituting an intersection within the meaning of the *Motor-vehicle Act*, R.S.B.C. 1960, c. 253, was tried by a judge and jury. The principal issue was which party had the right of way under s. 164 of the Act. The defendant was travelling in a southerly direction when, after signalling a left turn with his turn signal, he turned left across the centre line into the path of the plaintiff, who was half a block from the intersection, proceeding towards the north. When the plaintiff realized that the defendant was not going to stop he swerved to his right in an attempt to avoid the defendant's car. However, the two vehicles collided in the curb lane northbound and as a result of the collision the plaintiff was injured.

In answer to questions the jury found both parties negligent, the defendant in the degree of 75 per cent and the plaintiff in the degree of 25 per cent. The defendant was found to have been negligent in that he did not exercise due care and attention and the plaintiff in that he assumed he had the right of way and in so doing failed to take the proper action at an early stage. The plaintiff's general damages were assessed at $35,000 and the special damages were agreed in the amount of $1,209.

As a result of the jury's verdict judgment was entered for 75 per cent of the general damages awarded and the agreed special damages. On appeal, the Court of Appeal allowed the defendant's appeal and dismissed the action. An appeal by the plaintiff was then brought to this Court.

Held: The appeal should be allowed and the judgment at trial restored.

APPEAL from a judgment of the Court of Appeal for British Columbia, allowing an appeal from a judgment of Verchere J. sitting with a jury. Appeal allowed and judgment at trial restored.

James L. Barrett, for the plaintiff, appellant.

A. W. Mercer and *J. L. Woodley,* for the defendant, respondent.

* PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Hall JJ.

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At the conclusion of the argument of counsel for the respondent, the Court retired and on returning the following judgment was delivered:

THE CHIEF JUSTICE (*orally for the Court*):—Mr. Barrett we do not find it necessary to hear you in reply.

We are all of opinion that there was ample evidence to support the findings of the jury including their apportionment of the degrees of blame. The answers of the jury must be read as a whole and in the light of the charge of the learned trial judge. We are unable to agree with the view of the Court of Appeal that it was implicit in the answers of the jury that they found that the defendant had the right of way. We find no error in the charge to the jury either on the question of liability or as to the assessment of damages. We cannot say that the amount at which the jury assessed the damages was inordinately high.

The appeal is allowed with costs in this Court and in the Court of Appeal, the judgment of the Court of Appeal is set aside and that at the trial is restored.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: Mussallem, Lakes & Co., Vancouver.

Solicitors for the defendant, respondent: Paine, Edmonds, Mercer & Co., Vancouver.

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*Feb. 19
March 4

TIME MOTORS LIMITED .....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Deductions—Car dealer issuing credit notes—Notes redeemable on later purchase of car before specified date—Whether unredeemed notes current liabilities or contingent account—Accounting principles—Income Tax Act, R.S.C. 1952, c. 148, s. 12(1)(a), (e).

The appellant company was a used car dealer and sometimes gave credit notes in partial payment of used cars acquired by it. These notes were not transferable and could be applied by the holder within a stated

*PRESENT: Fauteux, Abbott, Judson, Spence and Pigeon JJ.

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time to the purchase of a car of not less than a specified value. In the appellant's accounts, credit notes outstanding were treated as current liabilities. If they were not redeemed, the amount at expiration was removed from accounts payable and treated as a profit. The Minister took the view that the outstanding credit notes were not existing liabilities and should be disallowed under s. 12(1)(*e*) of the *Income Tax Act* as being contingent. The Tax Appeal Board set aside the Minister's assessment, but this judgment was reversed by the Exchequer Court. The taxpayer appealed to this Court.

Held: The appeal should be allowed.

It was not possible to uphold the Minister's contention that the issuance of a credit note did not create any contract or agreement giving rise to any liability or obligation because, in particular, there was no agreement as to the price or the model of the car which could be purchased by the customer on presenting the credit note. The note could not be considered apart from the transaction out of which it arose. It was part of the consideration for an executed contract, the purchase of a used car. It could not be considered otherwise than as evidence of the conditions of the appellant's obligation to pay the balance of the purchase price. The customer had an enforceable obligation for that balance. Even if the notes were to be considered by themselves they could not be considered as unenforceable for indefiniteness.

The wording of s. 12(1)(*e*) of the Act clearly refers to accounting practice. This provision is to be construed by reference to proper accounting practice in a business of the kind with which one is concerned. The evidence showed that in the appellant's accounts credit notes were treated according to standard practice as current liabilities until they were redeemed or expired.

Revenu—Impôt sur le revenu—Déductions—Commerçant d'automobiles délivrant des notes de crédit—Notes rachetables sur achat subséquent d'une automobile avant une certaine date—Les notes non rachetées sont-elles des exigibilités ou des comptes de prévoyance—Principes de comptabilité—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 12(1)(a), (e).

La compagnie appelante faisait le commerce d'automobiles usagées et, en paiement partiel d'automobiles usagées qu'elle acquérait, donnait parfois des notes de crédit. Ces notes n'étaient pas cessibles et pouvaient être affectées par le détenteur à l'achat d'une automobile d'une valeur non moindre qu'un montant spécifié. Dans ses livres, l'appelante a inscrit les notes dues comme étant des exigibilités. Si elles n'étaient pas rachetées, le montant, à leur expiration, était retranché des comptes payables et traité comme un profit. D'après le Ministre, les notes de crédit dues n'étaient pas des dettes existantes et leur déduction n'était pas permise en vertu de l'art. 12(1)(*e*) de la *Loi de l'impôt sur le revenu* comme comptes de prévoyance. La Commission d'appel de l'impôt a mis de côté la cotisation du Ministre, mais ce jugement a été infirmé par la Cour de l'Échiquier. Le contribuable en appela à cette Cour.

Arrêt: L'appel doit être accueilli.

Il n'est pas possible de faire droit à la prétention du Ministre que la délivrance d'une note de crédit ne créait pas un contrat ou une convention engendrant une dette ou une obligation parce que, entre autres, il n'y avait aucune entente concernant le prix ou le modèle de l'automobile qui pouvait être achetée par le client sur présentation de la note de crédit. On ne peut pas considérer la note indépendamment de la transaction dont elle émane. Elle fait partie de la considération d'un contrat exécuté, l'achat d'une automobile usagée. On ne peut pas la considérer autrement que comme une preuve des conditions de l'obligation de l'appelante de payer le solde du prix d'achat. Le client avait une créance valable pour ce solde. Même si l'on considère les notes en elles-mêmes, on ne peut pas les déclarer invalides pour cause d'indétermination.

Le texte de l'art. 12(1)(*e*) de la Loi réfère clairement aux principes de comptabilité. Cette disposition doit être interprétée en se rapportant à la pratique de comptabilité appropriée au genre d'affaire en question. La preuve établit que l'appelante a inscrit les notes de crédit dans ses livres selon la pratique normale comme des exigibilités jusqu'à ce qu'elles soient rachetées ou expirées.

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada[1], en matière d'impôt sur le revenu. Appel accueilli.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada[1], in an income tax matter. Appeal allowed.

John Hopwood, for the appellant.

G. W. Ainslie, Q.C., for the respondent.

The judgment of the Court was delivered by

PIGEON J.:—Appellant is a used car dealer also selling new cars to a limited extent. Credit notes are sometimes given in partial payment of used cars acquired for resale. In such case, the cash payment and the amount of the credit note are stated in the bill of sale. The note is signed by both parties and the conditions are set forth on its face. These are that:

1. It is not transferable;
2. It is valid only within a stated delay, usually between one and two years;
3. It is good only for the purchase of a car of not less than a stated value.

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[1] [1968] C.T.C. 131, 68 D.T.C. 5081.

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Pigeon J.

Sometimes the credit note would be good for the purchase of a new car but generally it was good for the purchase of any used car owned by the appellant of not less than a specified value. The price of the cars offered for sale was posted but, of course, bargaining was not excluded. In appellant's accounts credit notes outstanding were treated as current liabilities. If they were not redeemed, the amount at expiration was removed from accounts payable and treated as a profit.

In 1965, the Minister took the view that the outstanding credit notes were not existing liabilities and should be disallowed for tax purposes as being contingent. On that basis, reassessments were issued whereby additional tax was levied for appellant's 1961, 1962 and 1963 taxation years disallowing $4,415, $9,870 and $1,615 in those years respectively. By judgment dated December 23, 1966, signed by Maurice Boisvert, the Tax Appeal Board allowed the taxpayer's appeal. This judgment was reversed by Gibson J. on further appeal to the Exchequer Court[1] (March 13, 1968).

On the appeal to this Court, counsel for the Minister contended that when appellant issued each credit note there was not, in fact, created any contract or agreement which would give rise to any liability or obligation because, in particular, there was no agreement as to the price or the model of car which could be purchased by the customer upon presentment of the credit note. This contention cannot be upheld. The credit note should not be considered apart from the transaction out of which it arises. It is part of the consideration for an executed contract, the purchase of a used car. Under that contract, appellant became obliged to pay a stated sum of money, a part only of that sum was paid in cash, the balance remaining due was stipulated payable in merchandise of a stated kind. While the contract is spelled out in two separate documents, the bill of sale and the credit note, the latter cannot be considered otherwise than as evidence of the conditions of the obligation to pay the balance of the purchase price. That obligation must be considered as subsisting until satisfied or expired. No special reason was advanced, no authority was cited to support the contention that the credit note should be considered otherwise.

[1] [1968] C.T.C. 131, 68 D.T.C. 5081.

The fact that the merchandise to be obtained by virtue of a credit note was not specified does not mean that appellant's customer had no enforceable obligation for the balance due. He could select any of the cars offered for sale coming within the general description in his credit note and require delivery by tendering the note and cash to make up the posted price. Appellant could not have evaded this obligation by posting inflated prices. This would have been a fraud against which the credit note holder would have been entitled to a remedy.

Even if the credit notes were to be considered by themselves they could not be considered as unenforceable for indefiniteness. It should be noted that Viscount Dunedin's dictum in *May & Butcher v. The King*[2] (Feb. 22, 1929):

> To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties.

was explained in a *later* decision of the House of Lords, *Hillas & Co. v. Arcos Ltd.*[3]. Reversing a judgment of the Court of Appeal based on it Lord Wright said (at pp. 507-508):

> When the learned lord justice speaks of essential terms not being precisely determined, i.e. by express terms of the contract, he is, I venture with respect to think, wrong in deducing as a matter of law that they must, therefore, be determined by a subsequent contract; he is ignoring, as it seems to me, the legal implication in contracts of what is reasonable, which runs throughout the whole of modern English law in relation to business contracts. To take only one instance, in *Hoadly v. McLaine,* Tindal C.J. (after quoting older authority), said (10 Bing. at p. 487):
>
> 'What is implied by law is as strong to bind the parties as if it were under their hand. This is a contract in which the parties are silent as to price, and therefore leave it to the law to ascertain what the commodity contracted for is reasonably worth.'

That decision was relied on by Estey J. in *Dawson v. Helicopter Exploration Co. Ltd*[4].

Respondent's second contention is that because appellant's obligation was conditional it should not, until the condition was realized, be treated for purposes of income tax as a current liability but as an amount properly to be

[2] [1934] 2 K.B. 17, 103 L.J.K.B. 556.
[3] [1932] All E.R. 494.
[4] [1955] S.C.R. 868 at 878, [1955] 5 D.L.R. 404.

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entered in a contingent account. As a result, the deduction would be prohibited by s. 12(1)(*e*) of the *Income Tax Act*:

> 12(1) In computing income, no deduction shall be made in respect of
>
> * * *
>
> (*e*) an amount transferred or credited to a reserve, contingent account or sinking fund except as expressly permitted by this Part,

The wording of that provision clearly refers to accounting practice. The only expression applicable to the present case is not "contingent liability" but "contingent account". This means that the provision is to be construed by reference to proper accounting practice in a business of the kind with which one is concerned. In the present case, the only evidence of accounting practice is that of appellant's auditor, a chartered accountant. His testimony shows that in appellant's accounts credit notes are treated according to standard practice as current liabilities until they are redeemed or expired. They are not classed as contingent liabilities. When asked why he considered the obligation under a credit note as current liability and the obligation under a warranty as contingent, he said:

> . . . the credit note, while it is a liability, is also an existing obligation today. A warranty may be a liability in the future. It may be determinable in the future but isn't an existing obligation until the future. At least, this is my interpretation of the difference.

With respect, Gibson J. was in error in holding that whether or not appellant's financial statements were drawn up according to generally accepted accounting principles could be disregarded. On the contrary, the wording of the relevant provision of the *Income Tax Act* implies that this is the essential question.

The appeal should be allowed and the judgment of the Exchequer Court set aside, with costs both in this Court and in the Court below; and it should be ordered that the reassessments of the taxation years 1961, 1962 and 1963 be referred back to the Minister of National Revenue for reassessments and adjustments in accordance with these reasons.

Appeal allowed with costs.

Solicitors for the appellant: Hopwood & Molyneux, Calgary.

Solicitor for the respondent: D. S. Maxwell, Ottawa.

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

1969
*Feb. 4, 5
Mar. 4

AND

JAMES N. SISSONS ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Profit on purchase and redemption of debentures of insolvent company in a loss position—Whether profit realized in an "adventure in the nature of trade" and therefore taxable—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 8(1), 137(2), 139(1)(e).

The respondent, a stamp dealer, carried on his business through a private company controlled by him. In 1961, he acquired the debentures and shares of Sonograph and Semco, two related companies in a loss position and on the verge of bankruptcy. For a sum of $15,000, he acquired $100,000 debentures of Sonograph in default as to interest and approaching maturity; 2,100 shares of Sonograph at a par value of $100; $102,000 debentures of Semco in default as to interest and approaching maturity; and 3,000 common shares of no par value of Semco. It was agreed that the two companies would first make an arrangement with their creditors—but not in respect of a $112,000 debt owed by Sonograph to Semco. The respondent's private company sold its inventory of stamps to Sonograph and was authorized to buy and sell stamps for the benefit of that company. In 1962 and 1963, Sonograph profits from the stamp business (which profits were exempt from tax by reason of the application of past losses) allowed that company to pay off its indebtedness to Semco of $112,000. Semco was thus able to redeem its debentures held by the respondent in the amount of $102,000. The Minister assessed the respondent's profit, $102,000 less $15,000, as income. The Exchequer Court allowed an appeal from that assessment. The Court ruled that the profit was not income from a business or adventure in the nature of trade, nor income from a source within the meaning of s. 3, nor a benefit under s. 8(1) or s. 137(2). The Minister appealed to this Court.

Held: The Minister's appeal should be allowed.

The profit was realized in an adventure in the nature of trade and was therefore taxable as income from a business. The acquisition of the debentures was a part of a profit-making scheme. The purpose of the operation was not to earn income from the debentures but to make a profit on prompt realization. The operation had therefore none of the essential characteristics of an investment, it was essentially a speculation.

Revenu—Impôt sur le revenu—Profit sur achat et remboursement d'obligations d'une compagnie insolvable et dont les pertes durant les années précédentes excédaient les revenus—Le profit a été réalisé dans une «affaire d'un caractère commercial» et est imposable—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 3, 4, 8(1), 137(2), 139(1)(e).

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*PRESENT: Cartwright C.J. and Abbott, Martland, Spence and Pigeon JJ.

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L'intimé, un commerçant de timbres, exploitait son entreprise par l'intermédiaire d'une compagnie privée dont il avait le contrôle. En 1961, il a acquis les obligations et actions de Sonograph et Semco, deux compagnies liées dont les pertes durant les années précédentes avaient excédé les revenus et qui étaient sur le point de faire faillite. Pour une somme de $15,000, il a acquis des obligations au montant de $100,000 de Sonograph en défaut quant à l'intérêt et dont l'échéance approchait; 2,100 actions de Sonograph d'une valeur au pair de $100; des obligations au montant de $102,000 de Semco en défaut quant à l'intérêt et dont l'échéance approchait; et 3,000 actions communes de Semco sans valeur nominale. Il fut convenu que les deux compagnies feraient au préalable un arrangement avec leurs créanciers—une dette de $112,000 due à Semco par Sonograph n'étant pas comprise dans cet arrangement. La compagnie privée de l'intimé a vendu à Sonograph son inventaire de timbres et fut autorisée à acheter et à vendre des timbres pour le bénéfice de cette dernière. En 1962 et 1963, les profits que Sonograph a tirés de l'entreprise (lesquels profits étaient exempts d'impôt en raison de l'application des pertes antérieures) lui ont permis d'acquitter sa dette de $112,000 envers Semco. Cette dernière a alors pu racheter ses obligations au montant de $102,000 détenues par l'intimé. Le Ministre a cotisé le profit réalisé par l'intimé, $102,000 moins $15,000, comme étant un revenu. La Cour de l'Échiquier a accueilli un appel de cette cotisation et elle a statué que le profit n'était pas un revenu provenant d'une entreprise ou d'une affaire d'un caractère commercial, ni un revenu d'une provenance quelconque dans le sens de l'art. 3, ni un bénéfice en vertu de l'art. 8(1) ou de l'art. 137(2). Le Ministre en appela à cette Cour.

Arrêt: L'appel du Ministre doit être accueilli.

Le profit a été réalisé dans une affaire d'un caractère commercial et était en conséquence imposable comme revenu provenant d'une entreprise. L'acquisition des obligations faisait partie d'un projet dont le but était de réaliser un profit. Le but de l'opération n'était pas de tirer un un revenu des obligations mais de faire un profit sur prompte réalisation. L'opération n'avait en conséquence aucune des caractéristiques essentielles d'un placement, elle était essentiellement une spéculation.

APPEL d'un jugement du Juge Gibson de la Cour de l'Échiquier du Canada[1], en matière d'impôt sur le revenu. Appel accueilli.

APPEAL from a judgment of Gibson J. of the Exchequer Court of Canada[1], in an income tax matter. Appeal allowed.

G. W. Ainslie, Q.C., and *D. G. H. Bowman*, for the appellant.

Terence Sheard, Q. C., and *C. R. Archibald, Q.C.*, for the respondent.

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[1] [1968] C.T.C. 363, 68 D.T.C. 5236.

The judgment of the Court was delivered by

PIGEON J.:—The respondent is a successful stamp dealer. He caused to be incorporated J. N. Sissons Limited, a private company controlled by him and to which he transferred, after the incorporation, his inventory of stamps. In 1961, he sought to obtain financial advantages through the acquisition of securities of two companies in a loss position: Sonograph Limited ("Sonograph") and Sonograph Engineering & Manufacturing Company Limited ("Semco"). In that view, he successfully negotiated a transaction whereby for a total sum of $15,000 he acquired:

(i) $100,000 6% first debentures of Sonograph, due October 31st, 1961 in default as to interest, but in respect of which all interest had been waived until maturity,

(ii) 2,100 5% non-cumulative preference shares of $100 par value of Sonograph,

(iii) $102,000 6% first debentures of Semco issued in two series, $72,000 due October 15, 1962 and $30,000 due November 1, 1963, both series being in default as to interest, but in respect of which all interest had been waived until maturity, and

(iv) 3,000 common shares of no par value of Semco.

Sonograph and Semco were related companies on the verge of bankruptcy. It was a condition of respondent's bargain that an arrangement with the creditors would be completed under the *Bankruptcy Act* before the acquisition of the securities would be completed. Respondent undertook to place the companies in a position to make the necessary cash payments for such purpose in the amount of $20,000 and he postponed his rights as debenture holder of Sonograph to those of the Royal Bank as holder of new debentures in the amount of $50,000 in order that needed funds could be obtained from that Bank.

To enable Sonograph to earn profits respondent, as part of the operation, caused Sissons Limited to sell to Sonograph its inventory of stamps for $150,000, this being apparently a fair market price for such a bulk sale. Sissons Limited retained physical possession of the inventory and was authorized to sell it for the account of Sonograph. It was also authorized to make new acquisitions of stamps so

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as to keep the stamp business active for the benefit of Sonograph. The latter's past losses being applicable against its profits from the stamp business, these became exempt from corporate income tax and were available to pay off an indebtedness to Semco in the amount of $112,000 which had been thoughtfully excluded from the arrangement with the creditors. The scheme was so successful that after only one year, in October 1962, Semco was able to redeem $72,000 of its debentures and the balance, namely $30,000, a year later shortly before they matured.

Respondent was assessed for income tax on the amounts thus received by him less his cost of $15,000 that was deducted in full from the first payment. The issue is whether his profit of $57,000 in 1962 and of $30,000 in 1963 is income or a capital gain.

In the Exchequer Court[1] Gibson J., after reciting the facts, made the following finding that was not challenged before us:

> . . . it is apparent, and the appellant admits it, that the said second transaction out of which the redemption of these debentures arose, the subject matter of this appeal, would not have been entered into unless the said first transaction was also entered into, and vice-versa. As a consequence, this was not a simple purchase of debentures which were realized upon at maturity; it was something more than that, namely, the purchase was a part of a whole transaction involving several parts, and the cause of the redemption was due to many factors, as the above brief summary of the facts shows.

However, he held that respondent's profit was not income from a "business" within the meaning of 139(1)(*e*) of the *Income Tax Act* nor income from a source within the meaning of s. 3. He also said that the sums received by the respondent were not benefits conferred on him within the meaning of either s. 8(1) or s. 137(2). Accordingly the appeal from the assessment was allowed.

The first question to be considered is obviously whether respondent's profit is income from a "business" bearing in mind that by virtue of the statutory definition this includes "an adventure in the nature of trade". The reasons and conclusions of the trial judge on this point are as follows:

> . . . upon a full review and consideration of the facts in this case, since these debentures (*a*) came into existence for a full consideration in a

[1] [1968] C.T.C. 363, 68 D.T.C. 5236.

market over which the appellant had no control, (*b*) the discounts arose unfortuitously by a capital loss to the original owners thereof, and (*c*) were purchased by the appellant in an arm's length transaction, the purchase price thereby representing the then market value; and since the gain, being the amount of these said discounts, to the appellant, from the redemption of these debentures arose, in part, from the indirect efforts of the appellant through J. N. Sissons Limited, which company in turn earned income working for Sonograph in selling its inventory of stamps and merchandising new inventory and, in part, fortuitously, both in a substantial way, I am of opinion that the purchasing of these debentures and the holding of them to maturity by the appellant was not a 'business' . . .

With respect, I am unable to agree for the following reasons.

(a) That the debentures came into existence for a full consideration in a market over which the appellant (respondent in this Court) had no control is irrelevant to the issue which is the character of the operation whereby he subsequently acquired them. It is also inconclusive, when an investment dealer underwrites a bond issue such is usually the situation, it is nonetheless a business operation.

(b) The loss to the original owners is equally immaterial and inconclusive. If a man in difficult financial circumstances sells a prized possession, say an old painting, to an art dealer for a fraction of what it is worth, the dealer's profit on the resale is clearly income although the former owner has suffered a capital loss when disposing of it.

(c) That the acquisition was in an arm's length transaction at market value is also irrelevant and inconclusive. Even if a stock promoter obtains shares in a new mining company at full market price, a profit he makes on the resale, if the promotion is successful, is undoubtedly from a "business".

(d) As to the fact that the gain arose at least in part from respondent's efforts, this clearly tends to show not that it is a capital gain but profit from a "business". One of the characteristics of income from such a source is that it is essentially the result of the businessman's efforts.

(e) Finally, respondent's gain cannot properly be considered as having arisen fortuitously. On the contrary, uncontradicted evidence shows that it is

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the result of a carefully considered plan executed as conceived. It is true that there is some evidence that the profits from the stamp business carried on for the benefit of Sonograph were greater and quicker than anticipated. This does not make them fortuitous in the legal sense.

For the respondent to escape taxation on his gain from the operation he has to show that it is to be characterized as an investment. Otherwise, the conclusion is inescapable that it is an adventure in the nature of trade. In support of the judgment in the Court below, counsel for the respondent relied essentially on the decision of this Court in *Irrigation Industries Ltd. v. Minister of National Revenue*[2]. In that case, an otherwise inactive company had purchased from a mining company 4,000 treasury shares of an initial issue of 500,000 shares. The majority held that this was an investment and that the gain obtained by selling the shares at a profit a few weeks later was not income. Martland J. said (at p. 351):

> In my opinion, a person who puts money into a business enterprise by the purchase of the shares of a company on an isolated occasion, and not as a part of his regular business, cannot be said to have engaged in an adventure in the nature of trade merely because the purchase was speculative in that, at that time, he did not intend to hold the shares indefinitely, but intended, if possible, to sell them at a profit as soon as he reasonably could. I think that there must be clearer indications of "trade" than this before it can be said that there has been an adventure in the nature of trade.

Here the clear indication of "trade" is found in the fact that the acquisition of the securities was a part of a profit-making scheme. The purpose of the operation was not to earn income from the securities but to make a profit on prompt realization. The operation has therefore none of the essential characteristics of an investment, it is essentially a speculation.

In *Irrigation Industries* the tests that were applied to decide if the operation was an adventure in the nature of trade were (at p. 352):

> (1) Whether the person dealt with the property purchased by him in the same way as a dealer would ordinarily do and (2) whether the nature and quantity of the subject-matter of the transaction may exclude

[2] [1962] S.C.R. 346, [1962] C.T.C. 215, 62 D.T.C. 1131, 33 D.L.R. (2d) 194.

the possibility that its sale was the realization of an investment, or otherwise of a capital nature, or that it could have been disposed of otherwise than as a trade transaction.

The following was quoted from Viscount Simonds' judgment in *Edwards v. Bairstow*[3]:

> I find 'activities which led to the maturing of the asset to be sold' and the search for opportunities for its sale, and, conspicuously, I find that the nature of the asset lent itself to commercial transactions. And by that I mean, what I think Rowlatt J. meant in *Leeming v. Jones*, (1930) 1 K.B. 279, that a complete spinning plant is an asset which, unlike stocks or shares, by itself produces no income and, unlike a picture, does not serve to adorn the drawing room of its owner. It is a commercial asset and nothing else.

Those observations apply with peculiar force in the instant case where the asset is a lot of debentures at or close to maturity. They could not be considered as acquired for income.

Applying the second test it was observed that the acquisition of corporate shares "is a well recognized method of investing capital in a business enterprise". Such is certainly not the case for debentures coming to maturity. Respecting the quantity, it was said (at p. 353):

> Furthermore, the quantity of shares purchased by the appellant in the present case would not, in my opinion, be indicative of an adventure in the nature of trade, as it constituted only 4,000 out of a total issue of 500,000 shares.

Here it is the whole issue of debentures that was acquired. Also, while the acquisition was not made in the way in which an investment dealer would, it was in no way done as an investment is normally made. It was part of a scheme for quickly making a very substantial profit out of the prompt realization of debentures payable immediately or in the near future.

There can be no doubt that the acquisition of mortgages by an individual is of its nature just as much an investment as the acquisition of corporate debentures or of company shares: *Wood v. Minister of National Revenue*[4]. However, it is established by two decisions of this Court that when such acquisition by its frequency and other cir-

[3] [1956] A.C. 14 at 29, [1955] 3 All E.R. 48, 36 T.C. 207.
[4] [1969] S.C.R. 330, [1969] C.T.C. 57, 69 D.T.C. 5073.

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cumstances takes on the character of a business, it is no longer an investment although all the mortgages are held to maturity: *Scott v. Minister of National Revenue*[5], *Minister of National Revenue v. MacInnes*[6]. It is equally well established that even a single operation entered into for gain takes a business character when it cannot properly be considered as an investment but is to be characterized as a speculation. In such circumstances, it is an adventure in the nature of trade: *Fraser v. Minister of National Revenue*[7], *Minister of National Revenue v. Freud*[8].

Having come to the conclusion that respondent's gain is a profit from an adventure in the nature of trade, it follows that it is income from a "business" and it becomes unnecessary to consider the Minister's alternative submissions. Consequently, no opinion is expressed as to the correctness of the conclusions in the Court below on those points.

The appeal must be allowed with costs and respondent's appeal to the Exchequer Court from his revised assessments for income tax must be dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellant: D. S. Maxwell, Ottawa.

Solicitors for the respondent: Strathy, Archibald, Seagram & Cole, Toronto.

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[5] [1963] S.C.R. 223, [1963] C.T.C. 176, 63 D.T.C. 1121, 38 D.L.R. (2d) 346.

[6] [1963] S.C.R. 299, [1963] C.T.C. 311, 63 D.T.C. 1203.

[7] [1964] S.C.R. 657, [1964] C.T.C. 372, 64 D.T.C. 5224, 47 D.L.R. (2d) 98.

[8] [1969] S.C.R. 75, [1968] C.T.C. 438, 68 D.T.C. 5279.

ANDREW HAWRISH (*Defendant*) .....APPELLANT;

AND

BANK OF MONTREAL (*Plaintiff*) .....RESPONDENT.

1968
*Nov. 6
1969
Jan. 28

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Contracts—Guarantee in writing—Alleged collateral oral agreement—Terms of two contracts in conflict—Whether parol evidence of collateral agreement admissible.

The appellant, a solicitor, signed, without having previously read, a guarantee to the respondent bank for the indebtedness and liability of a company which was formed for the purpose of buying the assets of a second company in which the appellant had an interest. The guarantee was on the bank's usual form and stated that it was to be a continuing guarantee and to cover existing as well as future indebtedness of the company to the amount of $6,000.

The company having become insolvent, and being indebted to the bank in an amount in excess of $6,000, the bank brought an action against the guarantor for the full amount of his guarantee. The defence was that when he signed the guarantee, the guarantor had an oral assurance from the assistant manager of the branch that the guarantee was to cover only existing indebtedness and that he would be released from his guarantee when the bank obtained a joint guarantee from the directors of the company. Two such guarantees were received by the bank.

The trial judge dismissed the action. On appeal, the Court of Appeal reversed this decision and gave judgment for the bank. On appeal to this Court, the argument was confined to two submissions of error contained in the reasons of the Court of Appeal: (*a*) that the contemporaneous oral agreement found by the trial judge neither varied nor contradicted the terms of the written guarantee but simply provided by an independent agreement a manner in which the liability of the appellant would be terminated; and (*b*) that oral evidence proving the making of such agreement, the consideration for which was the signing of the guarantee, was admissible.

Held: The appeal should be dismissed.

The appellant's argument failed on the ground that the collateral agreement allowing for the discharge of the appellant could not stand as it clearly contradicted the terms of the guarantee bond which stated that it was a continuing guarantee.

Lindley v. Lacey (1864), 17 C.B.N.S. 578; *Morgan v. Griffith* (1871), L.R. 6 Exch. 70; *Erskine v. Adeane* (1873), 8 Ch. App. 756, distinguished; *Pym v. Campbell* (1856), 6 E. & B. 370; *Byers v. McMillan* (1887), 15 S.C.R. 194, considered; *Heilbut, Symons & Co. v. Buckleton*, [1913] A.C. 30; *Hoyt's Proprietary Ltd. v. Spencer* (1919), 27 C.L.R. 133, applied.

*PRESENT: Abbott, Judson, Ritchie, Hall and Spence JJ.

1969

HAWRISH v. BANK OF MONTREAL

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], allowing an appeal from a judgment of Davis J. Appeal dismissed.

The Honourable C. H. Locke, Q.C., for the defendant, appellant.

S. J. Walker, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

JUDSON J.:—This action was brought by the Bank of Montreal against Andrew Hawrish, a solicitor in Saskatoon, on a guarantee which the solicitor had signed for the indebtedness and liability of a newly formed company, Crescent Dairies Limited. This company had been formed for the purpose of buying the assets of Waldheim Dairies Limited, a cheese factory in which Hawrish had an interest.

By January 1959, the line of credit granted by the bank to the new company was almost exhausted. The bank then asked Hawrish for a guarantee, which he signed on January 30, 1959. The guarantee was on the bank's usual form and stated that it was to be a continuing guarantee and to cover existing as well as future indebtedness of the company up to the amount of $6,000.

The defence was that when he signed the guarantee, Hawrish had an oral assurance from the assistant manager of the branch that the guarantee was to cover only existing indebtedness and that he would be released from his guarantee when the bank obtained a joint guarantee from the directors of the company. The bank did obtain a joint guarantee from the directors on July 22, 1959, for the sum of $10,000. Another joint guarantee for the same amount was signed by the directors on March 22, 1960. Between the dates of these two last-mentioned guarantees there had been some changes in the directorate.

Hawrish was never a director or officer of the new company but at the time when the action was commenced, he was a shareholder and he was interested in the vendor company. At all times the new company was indebted to the vendor company in an amount between $10,000 and $15,000. Hawrish says that he did not read the guarantee before signing. On February 20, 1961, Crescent Dairies Ltd., whose

[1] (1967), 61 W.W.R. 16, 63 D.L.R. (2d) 369.

overdraft was at that time $8,000, became insolvent. The bank then brought its action against Hawrish for the full amount of his guarantee—$6,000.

The trial judge dismissed the bank's action. He accepted the guarantor's evidence of what was said before the guarantee was signed and held that parol evidence was admissible on the ground that it was a condition of signing the guarantee that the appellant would be released as soon as a joint guarantee was obtained from the directors. He relied upon *Standard Bank v. McCrossan*[2]. The Court of Appeal[3] reversed this decision and gave judgment for the bank. In their view the parol evidence was not admissible and the problem was not the same as that in *Standard Bank v. McCrossan*. Hall J.A. correctly stated the *ratio* of the Standard Bank case in the following paragraph of his reasons:

> In my opinion the learned trial Judge erred in holding that the respondent was able to establish such condition by parol evidence. The condition found, if indeed it is one, was not similar to that which existed in *Standard Bank v. McCrossan, supra,* in that it did not operate merely as a suspension or delay of the written agreement. It may be permissible to prove by extraneous evidence an oral agreement which operates as a suspension only.

The relevant provisions of this guarantee may be summarized as follows:

(a) It guarantees the present and future debts and liabilities of the customer (Crescent Dairies Ltd.) up to the sum of $6,000.

(b) It is a continuing guarantee and secures the ultimate balance owing by the customer.

(c) The guarantor may determine at any time his further liability under the guarantee by notice in writing to the bank. The liability of the guarantor continues until determined by such notice.

(d) The guarantor acknowledges that no representations have been made to him on behalf of the bank; that the liability of the guarantor is embraced in the guarantee; that the guarantee has nothing to do with any other guarantee; and that the guarantor intends the guarantee to be binding whether any other guarantee or security is given to the bank or not.

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[2] (1920), 60 S.C.R. 655.

[3] (1967) 61 W.W.R. 16, 63 D.L.R. (2d) 369.

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Judson J.

The argument before us was confined to two submissions of error contained in the reasons of the Court of Appeal:

(a) that the contemporaneous oral agreement found by the trial judge neither varied nor contradicted the terms of the written guarantee but simply provided by an independent agreement a manner in which the liability of the appellant would be terminated; and

(b) that oral evidence proving the making of such agreement, the consideration for which was the signing of the guarantee, was admissible.

I cannot accept these submissions. In my opinion, there was no error in the reasons of the Court of Appeal. This guarantee was to be immediately effective. According to the oral evidence it was to terminate as to all liability, present or future, when the new guarantees were obtained from the directors. But the document itself states that it was to be a continuing guarantee for all present and future liabilities and could only be terminated by notice in writing, and then only as to future liabilities incurred by the customer after the giving of the notice. The oral evidence is also in plain contradiction of the terms of para. (d) of my summary above made. There is nothing in this case to permit the introduction of the principle in *Pym v. Campbell*[4], which holds that the parol evidence rule does not prevent a defendant from showing that a document formally complete and signed as a contract, was in fact only an escrow.

The appellant further submitted that the parol evidence was admissible on the ground that it established an oral agreement which was independent of and collateral to the main contract.

In the last half of the 19th century a group of English decisions, of which *Lindley v. Lacey*[5], *Morgan v. Griffith*[6] and *Erskine v. Adeane*[7] are representative, established that where there was parol evidence of a distinct collateral agreement which did not contradict nor was inconsistent with the written instrument, it was admissible. These were

[4] (1856), 6 E. & B. 370, 119 E.R. 903.
[5] (1864), 17 C.B.N.S. 578, 144 E.R. 232.
[6] (1871), L.R. 6 Exch. 70.
[7] (1873), 8 Ch. App. 756.

cases between landlord and tenant in which parol evidence of stipulations as to repairs and other incidental matters and as to keeping down game and dealing with game was held to be admissible although the written leases were silent on these points. These were held to be independent agreements which were not required to be in writing and which were not in any way inconsistent with or contradictory of the written agreement.

The principle formulated in these cases was applied in *Byers v. McMillan*[8]. In this case Byers, a woodcutter, agreed in writing with one Andrew to cut and deliver 500 cords of wood from certain lands. The agreement contained no provision for security in the event that Byers was not paid upon making delivery. However, before he signed, it was orally agreed that Byers was to have a lien on the wood for the amount to which he would be entitled for his work and labour. Byers was not paid and eventually sold the wood. The respondents, the McMillans, in whom the contract was vested as a result of various assignments, brought an action of replevin. It was held by a majority of this Court that they could not succeed on the ground that the parol evidence of the oral agreement in respect of the lien was admissible. Strong J., with whom the other members of the majority agreed, said at p. 202:

> . . . *Erskine v. Adeane* [*supra*]; *Morgan v. Griffith* [*supra*]; *Lindley v. Lacey* [*supra*], afford illustrations of the rule in question by the terms of which any agreement collateral or supplementary to the written agreement may be established by parol evidence, provided it is one which as an independent agreement could be made without writing, and that it is not in any way inconsistent with or contradictory of the written agreement.
>
> * * *
>
> These cases (particularly *Erskine v. Adeane* which was a judgment of the Court of Appeal) appear to be all stronger decisions than that which the appellant calls upon us to make in the present case, for it is difficult to see how an agreement, that one who in writing had undertaken by his labor to produce a chattel which is to become the property of another shall have a lien on such product for the money to be paid as the reward of his labor, in any way derogates from the contemporaneous or prior writing. By such a stipulation no term or provision of the writing is varied or in the slightest degree infringed upon; both agreements can well stand together; the writing provides for the performance of the contract, and the consideration to be paid for it, and the parol agreement merely adds something respecting security for the payment of the price to these terms.

[8] (1887), 15 S.C.R. 194.

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In *Heilbut, Symons & Co. v. Buckleton*[9], a case having to do with the existence of a warranty in a contract for the sale of shares, there is comment on the existence of the doctrine and a note of caution as to its application:

> It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. "If you will make such and such a contract I will give you one hundred pounds," is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract. But such collateral contracts must from their very nature be rare. The effect of a collateral contract such as that which I have instanced would be to increase the consideration of the main contract by 100 £., and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be clearly shewn. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter.

Bearing in mind these remarks to the effect that there must be a clear intention to create a binding agreement, I am not convinced that the evidence in this case indicates clearly the existence of such intention. Indeed, I am disposed to agree with what the Court of Appeal said on this point. However, this is not in issue in this appeal. My opinion is that the appellant's argument fails on the ground that the collateral agreement allowing for the discharge of the appellant cannot stand as it clearly contradicts the terms of the guarantee bond which state that it is a continuing guarantee.

The appellant has relied upon *Byers v. McMillan*. But upon my interpretation that the terms of the two contracts conflict, this case is really against him as it is there stated by Strong J. that a collateral agreement cannot be established where it is inconsistent with or contradicts the written agreement. To the same effect is the unanimous judgment of the High Court of Australia in *Hoyt's Proprietary Ltd. v. Spencer*[10], which rejected the argument

[9] [1913] A.C. 30 at 47.

[10] (1919), 27 C.L.R. 133.

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that a collateral contract which contradicted the written agreement could stand with it. Knox C.J., said at p. 139:

> A distinct collateral agreement, whether oral or in writing, and whether prior to or contemporaneous with the main agreement, is valid and enforceable even though the main agreement be in writing, provided the two may consistently stand together so that the provisions of the main agreement remain in full force and effect notwithstanding the collateral agreement. This proposition is illustrated by the decisions in *Lindley v. Lacey* [*supra*], *Erskine v. Adeane* [*supra*], *De Lassalle v. Guildford*, [1901] 2 K.B. 215, and other cases.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendants, appellant: Schmitt, Robertson, Muzyka, Beaumont & Barton, Saskatoon.

Solicitors for the plaintiff, respondent: Walker, Agnew, MacKay & Hercus, Saskatoon.

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*Fév. 11
Mars 4

LIONEL MASSICOTTE (*Demandeur*) .....APPELANT;

ET

LES COMMISSAIRES D'ÉCOLES POUR LA MUNICIPALITÉ DE LA CITÉ D'OUTREMONT (*Défendeurs*) ..... INTIMÉS.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Faute—Responsabilité—Commissaires d'écoles—Écolier blessé lors d'une chute en glissant dans l'entrée de la cour de l'école—Surface glacée et utilisée par les écoliers comme glissoire—Manque d'entretien et de surveillance—Code Civil, art. 1054.

Le fils du demandeur, un écolier âgé de huit ans, a été blessé lorsqu'il fit une chute alors qu'il utilisait comme glissoire le passage servant d'entrée de la rue à l'école des défendeurs et dont la surface, qui accusait une pente de 20 à 30 degrés, était glacée. Avant d'avoir pu se relever, il fut frappé accidentellement à la tête par la botte d'un autre écolier qui glissait derrière lui. Il n'y avait pas de surveillant à cet endroit. L'action est basée sur les motifs que cette pente durant la saison d'hiver représentait un danger inhérent, qu'on avait fait défaut d'y parer par des moyens raisonnables et qu'il y avait eu manque de surveillance. Le juge au procès partagea la responsabilité et en attribua 75 pour-cent aux défendeurs et 25 pour-cent à la victime. Seuls les défendeurs en appelèrent de ce jugement. La Cour d'appel l'a infirmé et a rejeté l'action. Le demandeur en appela à cette Cour.

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* CORAM: Les Juges Fauteux, Abbott, Martland, Judson et Pigeon

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Arrêt: L'appel doit être accueilli.

Le juge au procès était justifié d'attribuer aux défendeurs une responsabilité d'au moins 75 pour-cent. En principe, il n'y a pas de faute à permettre à des enfants normaux de s'amuser à glisser sur une glissade. Un tel amusement peut parfois, cependant, suivant les circonstances ou en l'absence de certaines précautions, offrir certains dangers prévisibles. Dans l'espèce, l'accident s'est produit dans un endroit exclusivement destiné en tout temps de l'année à servir aux écoliers comme passage du trottoir de la municipalité à la cour de l'école. Les autorités n'ignoraient pas le danger et avaient donné des instructions au concierge de sabler au besoin et interdisait aux enfants d'y glisser. Dans le cas où un dommage est causé à un élève par un de ses condisciples, pendant qu'ils sont sous la surveillance des instituteurs, il appartient à ces derniers de repousser la présomption de responsabilité de l'art. 1054 du *Code Civil*. Dans la présente cause, il n'est pas nécessaire d'invoquer cette présomption. Les défendeurs étaient clairement en faute. La preuve établit le défaut des préposés des défendeurs de voir à l'entretien de cette pente et de satisfaire au devoir de surveillance des enfants confiés à leurs soins.

Negligence—Liability—School Commissioners—Schoolboy injured after falling while sliding in entrance to school yard—Grounds in icy condition and used as a slide by the boys—Lack of maintenance and supervision—Civil Code, art. 1054.

The plaintiff's son, an 8-year old schoolboy, was injured when he fell while using as a slide the passage-way used as an entrance from the street to the defendants' school, the surface of which, having a slope of 20 to 30 degrees, was in an icy condition. Before he could get up, another boy who was sliding behind struck him accidentally on the head with his boot. There was no supervisor at that location. The action alleged that this slope represented during the winter months an inherent danger, that there had been default in using reasonable means to correct it and that there had been lack of supervision. The trial judge assessed the fault at 75 per cent against the defendants and 25 per cent against the victim. The defendants only appealed from that judgment. The Court of Appeal reversed it and dismissed the action. The plaintiff appealed to this Court.

Held: The appeal should be allowed.

The trial judge was justified in assessing the defendants with at least 75 per cent of the liability. In principle, there is no fault in permitting normal children to have fun by sliding on a slide. However, such play can sometimes, depending on the circumstances or the lack of certain precautions, present certain foreseeable dangers. In the present case, the accident occurred on a location used exclusively all year round by the schoolboys as a passage-way from the sidewalk of the municipality to the school yard. The authorities knew of the danger and had given instructions to the janitor to spread sand if necessary and had forbidden the boys from using it as a slide. When a schoolboy is injured by another, while under the supervision of a schoolmaster, the onus of rebutting the presumption of liability under art. 1054 of the *Civil Code* is on the schoolmaster. In the present case, it was not

necessary to invoke that presumption. The defendants were clearly at fault. The evidence established the lack of maintenance on the part of the defendants' employees and the lack of supervision.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Robinson J. Appeal allowed.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], infirmant un jugement du Juge Robinson. Appel accueilli.

Gilles Godin, c.r., pour le demandeur, appelant.

Michel Rioux, pour les défendeurs, intimés.

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:—Il s'agit d'un pourvoi contre un arrêt de la Cour d'appel[1], infirmant un jugement de la Cour supérieure qui condamnait les intimés à payer à l'appelant, en sa qualité de tuteur de Gilles Chartier, une somme de $15,255.48, à titre de dommages-intérêts.

Les faits donnant lieu à cette cause se passent le 8 janvier 1958, sur la propriété de la Commission scolaire administrée par les intimés, soit à l'Académie St-Germain d'Outremont. A ce temps, les écoliers devaient, pour entrer dans le bâtiment de l'Académie, utiliser une entrée donnant sur la cour de l'école et, pour accéder à cette cour, devaient nécessairement, en quittant le trottoir de la rue Bellingham, s'engager et descendre dans un passage longeant, à ciel ouvert, le bâtiment et accusant sur une faible distance une pente abrupte d'environ 20 à 30 degrés. A cause de cette pente et de la circulation des enfants, ce passage devenait souvent glacé durant la saison d'hiver et, à moins d'être alors couvert de sable ou autres substances, offrait, à la connaissance des maîtres, une véritable glissoire que ces écoliers de 6 à 14 ans ne manquaient guère d'utiliser comme telle, nonobstant l'interdiction qui leur en avait été faite. Telle était la situation et telle était, depuis deux ou trois jours, la condition dangereuse de ce passage,—suivant la preuve retenue par le juge au procès,—lorsque le 8 janvier, comme d'ailleurs tous les autres jours de classe, une trentaine ou quarantaine

[1] [1967] B.R. 966.

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d'écoliers devaient s'y engager après être allés prendre le repas du midi à la maison. En l'absence du surveillant à cet endroit, les enfants se lancèrent sur cette glissoire et ce d'une manière décrite comme suit au témoignage d'Alain Chartier, frère aîné de Gilles: *ils se garochaient sur la glissade, alors, il y avait des bousculades, ça tombait* . . . Certains d'entre eux, après avoir ainsi descendu la pente, la remontaient pour glisser à nouveau au lieu de se rendre à la cour. A la suite d'une deuxième glissade, Gilles Chartier, alors âgé de 8 ans, fit une chute au bas de la pente. Saisi d'un étourdissement, il ne s'était pas encore relevé lorsqu'un écolier plus âgé, qui glissait derrière lui, trébucha lui-même au même endroit et le heurta, avec sa botte, à la tempe gauche. Le surveillant qui se trouvait dans la cour fut alerté, l'enfant fut conduit à la clinique de l'école et, par la suite, à l'hôpital d'où il ne sortit qu'après plusieurs semaines, affecté d'un trouble visuel lui infligeant pour la vie une incapacité admise de 13 pour-cent. D'où la présente action en dommages, basée, en somme, sur la conjugaison du danger inhérent au caractère abrupt de cette pente durant la saison d'hiver, du défaut d'y parer par des moyens raisonnables et du manque de surveillance des enfants dont les agissements contribuaient à la conversion de ce passage en glissoire.

La Cour supérieure jugea, en substance, que les préposés des intimés, chargés de l'entretien de ce passage, du soin et de la discipline des enfants, avaient manqué à leurs devoirs et que si, comme ils l'avaient affirmé, ils avaient interdit aux enfants de glisser à cet endroit, ils ne s'étaient guère souciés d'assurer, par une surveillance raisonnable, que cette directive fut suivie mais qu'ils avaient plutôt toléré leur conduite. La Cour nota, d'autre part, que nonobstant son âge, Gilles Chartier, qui était un écolier brillant, aurait dû réaliser qu'il s'exposait au danger en participant à ces glissades désordonnées. Jugeant que la responsabilité devait être partagée, la Cour en attribua une proportion de 75 pour-cent aux intimés et 25 pour-cent à la victime et condamna les intimés à payer à l'appelant ès-qualité une somme de $15,255.48, représentant les trois-quarts des dommages prouvés.

Seuls les intimés appelèrent de ce jugement; de sorte que il y a chose jugée en ce qui concerne la part de responsabilité attribuée au jeune Chartier par la Cour supérieure.

En Cour d'appel, on a considéré que la question à résoudre, en l'espèce, était de savoir s'il est fautif de permettre à des jeunes garçons normaux de s'amuser en glissant sur une glissade; et on déclara que cette question avait été résolue de façon négative dans la cause de *L'œuvre des terrains de jeux de Québec v. Cannon*[2], et qu'au même effet se trouvaient les arrêts dans *Cité de Montréal v. Lamoureux*[3], *O'Brien v. Les Commissaires d'écoles de la Municipalité de Ste-Ursule*[4] et *Lavallée v. Les Commissaires d'écoles pour la Municipalité de St-Germain de Grantham*[5]. D'autre part, on précisa que la condamnation de la cité dans *Cité de Sherbrooke v. Ferland*[6] était due à une circonstance spéciale, soit à un défaut de surveillance qui avait permis à un enfant de chausser des patins et de s'aventurer sur la glissoire aménagée par la ville. On nota enfin que le jeune Chartier avait glissé volontairement. L'appel fut donc maintenu, le jugement de la Cour supérieure infirmé et l'action de l'appelant ès-qualité fut rejetée. De là l'appel à cette Cour.

Avec le plus grand respect pour l'opinion exprimée en Cour d'appel, il faut dire immédiatement que nous sommes tous d'avis que le juge au procès, qui a vu et entendu les témoins, était, en raison des faits qu'il a retenus comme prouvés, justifié en droit d'attribuer aux intimés une responsabilité d'au moins 75 pour-cent. Certes et en principe, il n'y a pas de faute à permettre à des enfants normaux de s'amuser à glisser sur une glissade. Inoffensif en soi, un tel amusement peut parfois, cependant, suivant les circonstances ou en l'absence de certaines précautions, offrir certains dangers prévisibles. Il va de soi que ces circonstances sont éminemment variables ainsi qu'en témoignent les causes citées aux motifs du jugement de la Cour d'appel. Toutefois, ce qui distingue fondamentalement le cas qui nous occupe de ceux qu'on a dû considérer dans ces causes, c'est que dans celles-là il s'agissait d'accidents survenus au cours de jeux pratiqués dans un terrain de jeux, de récréation ou un parc, alors que dans l'espèce, l'accident s'est produit dans un endroit exclusivement destiné en tout temps de l'année à servir aux écoliers comme passage du trottoir de la municipalité à la cour de l'école. Les glissades auxquelles ce groupe d'enfants

[2] (1940), 69 B.R. 112.
[3] [1960] B.R. 284.
[4] [1964] B.R. 433.
[5] [1965] B.R. 463.
[6] [1964] B.R. 395.

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de 6 à 14 ans se livrait sur cette pente abrupte, sans aucune surveillance, dans le désordre, la bousculade et la cohue, offraient sûrement pour les plus jeunes sinon pour leurs aînés un danger que les autorités n'ignoraient pas et qu'elles entendaient conjurer en donnant des instructions au concierge de sabler au besoin ce passage et en interdisant aux enfants d'y glisser. Ces directives n'ont pas été respectées et on ne paraît pas s'être soucié de voir à ce qu'elles le fussent. Les préposés des intimés à qui étaient confiées la garde et la surveillance de ces enfants, étaient tenus de les protéger, par une vigilance raisonnable, contre un danger qu'ils avaient ainsi jugé prévisible et que, en fait, ils avaient prévu. Dans le cas où un dommage est causé à un élève par un de ses condisciples, pendant qu'ils sont sous la surveillance des instituteurs, il appartient à ces derniers de repousser la présomption de responsabilité qu'édictent à leur endroit les dispositions de l'article 1054 C. C. Dans la présente cause, il n'est pas nécessaire d'invoquer cette présomption. La preuve établit le défaut des préposés des intimés de voir, comme ils y étaient tenus et pouvaient facilement le faire, à l'entretien de cette pente abrupte et glissante, et de satisfaire au devoir de surveillance des enfants confiés à leurs soins. L'accident résulte de la conjugaison de ces fautes qui entraîne la responsabilité des intimés.

Pour ces raisons, nous sommes tous d'accord que l'appel doit être maintenu, la décision de la Cour d'appel infirmée et le dispositif du jugement de la Cour supérieure rétabli; le tout avec dépens en cette Cour et en Cour d'appel.

Appel accueilli avec dépens.

Procureur du demandeur, appelant: G. Archambault, Montréal.

Procureurs des défendeurs, intimés: Foster, Watt, Leggat, Colby, Rioux & Malcolm, Montréal.

CURTISS-WRIGHT CORPORATION (*Suppliant*) ..... APPELLANT;

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*Feb. 7, 10
Mar. 10

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Licensing agreement—Acknowledgement by licensee of validity of patent and undertaking not to contest—Whether licensee estopped from denying validity after expiration of agreement—Defence Production Act, R.S.C. 1952, c. 62, s. 20—Patent Act, R.S.C. 1952, c. 203.

The suppliant and company CAE entered into an agreement whereby CAE obtained the right to use certain patents of the suppliant. In the agreement, the licensee acknowledged the validity of the patents and agreed not to be an adverse party to any action disputing their validity. After the expiration of the agreement, the Minister of Defence Production, pursuant to s. 20(1) of the *Defence Production Act*, R.S.C. 1952, c. 62, agreed to indemnify CAE for its continued use of the patents. The Crown having refused to entertain its claim for compensation on the ground that the patents were invalid, the suppliant filed a petition of right in the Exchequer Court to determine whether it had a right to compensation. A preliminary question, set down for hearing before trial, was whether after the expiration of the agreement CAE and the Crown were precluded from denying the validity of the patents. The Exchequer Court ruled that neither CAE nor the Crown were estopped. The suppliant appealed to this Court.

Held: The appeal should be dismissed.

The words in the acknowledgement clause did not constitute a representation of fact. An acknowledgement of a fact is not a representation of a fact. There was no representation of fact intended to induce the suppliant to change its position to its detriment. It was simply a contractual obligation inserted to protect the patentee and binding upon the licensee for the life of the licensing agreement.

Brevets—Contrat concédant une licence—Reconnaissance de la validité du brevet par le porteur de licence et engagement de ne pas la contester —Le porteur de licence n'est pas empêché de nier la validité après l'expiration du contrat—Loi sur la production de défense, S.R.C. 1952, c. 62, art. 20—Loi sur les brevets, S.R.C. 1952, c. 203.

La demanderesse et la compagnie CAE ont convenu par contrat que la compagnie CAE aurait le droit d'utiliser certains brevets appartenant à la demanderesse. Dans le contrat, le porteur de licence a reconnu la validité des brevets et a convenu qu'il ne serait pas une partie adverse dans toute action mettant en doute leur validité. Après l'expiration du contrat, le Ministre de la Production de défense a convenu, en vertu de l'art. 20(1) de la *Loi sur la production de défense*, S.R.C.

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* PRESENT: Cartwright C.J. and Fauteux, Judson, Hall and Pigeon JJ.

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1952, c. 62, d'indemniser la compagnie CAE pour tout usage subséquent des brevets. Lorsque la Couronne a refusé d'accueillir une réclamation pour indemnité pour le motif que les brevets étaient invalides, la demanderesse a produit une pétition de droit devant la Cour de l'Échiquier pour faire déterminer la question de savoir si elle avait droit à une indemnité. Avant l'enquête, la Cour a entendu la question préliminaire de savoir si après l'expiration du contrat la compagnie CAE et la Couronne étaient empêchées de nier la validité des brevets. La Cour de l'Échiquier a statué que ni CAE ni la Couronne étaient empêchées. La demanderesse en appela à cette Cour.

Arrêt: L'appel doit être rejeté.

Le texte de la clause de reconnaissance ne constitue pas une représentation d'un fait. Une reconnaissance d'un fait n'est pas une représentation d'un fait. Il n'y a eu aucune représentation d'un fait destinée à induire la demanderesse à changer sa situation à son préjudice. Il s'agit simplement d'une obligation contractuelle insérée pour protéger le titulaire du brevet et ne liant le porteur de la licence que pour la vie du contrat de licence.

APPEL d'un jugement du Président Jackett de la Cour de l'Échiquier du Canada[1], concernant l'audition avant l'enquête de certaines questions de droits. Appel rejeté.

APPEAL from a judgment of Jackett P. of the Exchequer Court of Canada[1], concerning the hearing before trial of certain questions of law. Appeal dismissed.

I. Goldsmith, for the suppliant, appellant.

K. E. Eaton and *G. A. Macklin*, for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—Curtiss-Wright Corporation is the owner of a number of Canadian patents relating to the manufacture of flight training apparatus. On December 3, 1952, with the knowledge and approval of the Crown, it entered into a licensing agreement with Canadian Aviation Electronics (referred to as CAE) under which this company obtained the right to use these patented inventions in the manufacture of flight training apparatus in Canada for defence purposes. CAE agreed to pay to Curtiss-Wright royalties of 7½ per cent of the selling price on the apparatus made under the agreement and, in addition, the cost of certain

[1] [1968] 1 Ex. C.R. 519, 53 C.P.R. 144, 37 Fox Pat. C. 153.

technical assistance. Curtiss-Wright also made an agreement with the Crown under which it agreed to provide engineering and technical assistance to CAE for a stated sum.

Both agreements expired in December 1957, except that the licensing agreement was extended in a limited respect which does not affect the issue which has to be decided in this appeal. CAE continued to manufacture flight training apparatus under contract from the Department of Defence Production. By a letter dated July 8, 1958, and pursuant to s. 20(1) of the *Defence Production Act*, R.S.C. 1952, c. 62, the Minister of Defence Production directed CAE not to pay any royalties to Curtiss-Wright and agreed to indemnify the company against any claims for royalties arising out of the manufacture, sale, maintenance, repair and overhaul of any flight training apparatus.

Curtiss-Wright then sought compensation from the Crown under s. 20(3) of the *Defence Production Act*. The Crown refused to entertain the claim on the ground that the appellant's patents were invalid.

Curtiss-Wright then filed a petition of right in the Exchequer Court to determine whether it had a right to compensation. This was done as a preliminary to proceeding before the Commissioner of Patents to have the amount of compensation ascertained. Before embarking on the trial, the Exchequer Court decided to dispose of two preliminary questions of law. The first of these was:

> 1. Whether on the true construction of the licensing agreement, CAE could be precluded in any proceedings by the suppliant for patent infringement after the expiration of the agreement from denying the validity of any patents to which it applies.

The answer of the Exchequer Court[1] was that CAE was not estopped from contesting the validity of the patents after the expiration of the licensing agreement and that consequently, the Crown was not estopped from contesting their validity in proceedings for compensation under s. 20, subs. (3) of the *Defence Production Act*. With this opinion I agree.

Counsel for the appellant founded his argument on clause XVI of the agreement. This reads:

> Licensee hereby acknowledges the validity of the patents made the subject of this Agreement, and under which Licensee is now or hereafter

[1] [1968] 1 Ex. C.R. 519, 53 C.P.R. 144, 37 Fox Pat. C. 153.

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CURTISS-WRIGHT CORPORATION v. THE QUEEN

Judson J.

licensed and agrees not voluntarily to become an adverse party, directly or indirectly, to any suit or action disputing the validity of said patents or any of them.

His contention was that the principle of common law estoppel applied as the words "licensee hereby acknowledges the validity of the patents" were a representation not that the patents were valid but that the licensee accepted the fact that they were valid. To me this argument is without substance. The words do not constitute a representation of fact. Counsel for the appellant is claiming far too much for the word "acknowledges". As the President of the Exchequer Court pointed out, an acknowledgment of a fact is not a representation of a fact.

To me, the meaning and effect of clause XVI are both clear. The licensee "acknowledged", "admitted" or "agreed" (and it does not matter which word is used) that the patents were valid. The licensee also agreed not to become an adverse party "directly or indirectly, to any suit or action disputing the validity of the said patents or any of them". Clause XVI contains no representation of fact which was intended to induce Curtiss-Wright to change its position to its detriment. It was simply a contractual obligation inserted to protect the patentee and binding upon the licensee for the life of the licensing agreement.

The President of the Exchequer Court came to this conclusion on a consideration of clause XVI in the context of the agreement, and particularly clause XI dealing with the rights of the parties upon the expiration, termination or cancellation of the agreement. It is unnecessary for me to go into the matter in further detail. On this branch of the case I am in complete agreement with the Exchequer Court.

The Exchequer Court also went on to consider a further question, which was:

> 2. Assuming an affirmative answer to the first question, whether on a true construction of s. 20 of the *Defence Production Act* the respondent (the Crown) is precluded from raising an issue as to the validity of any of the patents by way of defence to the suppliant's claim for compensation under that section for the alleged use by CAE of such patents regardless of whether such alleged use constitutes a breach of the licensing agreement.

Although the President recognized that the question did not require an answer in view of the answer given to question 1, nevertheless he did express the opinion that the Crown was not precluded from contesting the validity of

the patents. It is not necessary in this Court to express an opinion on this question.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the suppliant, appellant: Goldsmith & Caswell, Toronto.

Solicitors for the respondent: Gowling, MacTavish, Osborne & Henderson, Ottawa.

AURÈLE BRISSON .....REQUÉRANT;

ET

LA BANQUE PROVINCIALE DU CANADA ..INTIMÉE.

1968
*Déc. 20
1969
*Janv. 16
Mars 10

REQUÊTE POUR APPELER IN FORMA PAUPERIS

Procédure—Cour suprême du Canada—Requête pour appeler in forma pauperis—Il appartient au tribunal et non pas à un juge en chambre de rejeter sommairement un appel futile—Règle 142 des Règles de la Cour suprême du Canada—Code Civil, art. 1032.

Le requérant demande l'autorisation d'introduire devant cette Cour un pourvoi *in forma pauperis* à l'encontre d'un jugement unanime de la Cour d'appel confirmant une condamnation prononcée contre lui par la Cour supérieure au montant de $21,998.14 pour avances en compte courant. L'intimée oppose, entre autres moyens, que l'appel à cette Cour est futile. Le requérant soutient que le juge qui est saisi de la requête n'a pas à considérer s'il existe réellement des motifs raisonnables d'appel parce que c'est au tribunal et non pas à un juge qu'il appartient de rejeter sommairement un appel futile.

Arrêt: La requête doit être accordée.

Il vaut mieux laisser au tribunal le soin de juger si un appel doit être rejeté sommairement parce qu'il est futile.

On ne peut tenir compte de l'autre moyen invoqué par l'intimée que le requérant, quelques jours après le jugement de première instance, aurait hypothéqué certains de ses immeubles en faveur de son procureur en l'instance et les aurait vendus à un tiers avec cette charge. Le délai pour l'institution d'une action paulienne est expiré.

Practice and Procedure—Supreme Court of Canada—Motion to appeal in forma pauperis—Jurisdiction to dismiss futile appeal summarily belongs to the Court and not to a judge in chambers—Rule 142 of the Rules of the Supreme Court of Canada—Civil Code, art. 1032.

The applicant presented a motion to be authorized to appeal to this Court *in forma pauperis* against a unanimous judgment of the Court of Appeal affirming a judgment of the Superior Court rendered against

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*CORAM: Le Juge Pigeon en chambre.

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him for an amount of $21,998.14 for advances made through a current account. The respondent pleaded, *inter alia*, that the appeal to this Court was futile. The applicant argued that the judge before whom such a motion is presented does not have to consider whether there are reasonable grounds of appeal because it was up to the Court and not to a judge in chambers to dismiss a futile appeal summarily.

Held: The application should be granted.

It should be left to the tribunal to decide whether an appeal should be dismissed summarily because of its futility.

The second ground invoked by the respondent that the applicant had, a few days after the first judgment, hypothecated some of his immovables in favour of his attorney in the case and sold them to a third party subject to that hypothec, could not be entertained. The delay to institute an *action paulienne* had expired.

APPLICATION before Pigeon J. in chambers to be authorized to appeal *in forma pauperis*. Application granted.

REQUÊTE devant le Juge Pigeon en chambre pour obtenir l'autorisation d'appeler *in forma pauperis*. Requête accordée.

Cyrille Goulet, pour le requérant.

Jacques Bonneau, pour l'intimée.

Le jugement suivant a été rendu par

LE JUGE PIGEON:—L'appelant demande par requête l'autorisation d'introduire un pourvoi *in forma pauperis*, à l'encontre d'un jugement unanime de la Cour d'appel qui a confirmé une condamnation prononcée contre lui par la Cour supérieure le 30 décembre 1965, au montant de $21,998.14 pour avances en compte courant.

L'intimée oppose à cette demande deux moyens.

Premièrement, quelques jours après le jugement de la Cour supérieure, soit le 7 janvier 1966, l'appelant a hypothéqué pour la somme de $10,000 en faveur de son procureur en l'instance, des immeubles qu'il possédait à Ste-Agathe-des-Monts et les a vendus à un tiers à charge de cette hypothèque.

Deuxièmement, l'appel à cette Cour est futile, les notes des juges de la Cour d'appel tout comme le jugement de la Cour supérieure constatant que l'appelant n'a fait aucune preuve au procès à l'encontre de celle qui a été produite par l'intimée.

Dans ces circonstances, j'ai ordonné au procureur de l'appelant de déclarer par écrit quels sont les motifs raisonnables d'appel visés par son certificat à l'appui de la requête. Cela a été fait.

Il faut maintenant ajouter que l'appelant a soutenu à l'appui de sa requête que, de toute façon, le juge qui en est saisi n'a pas à considérer s'il existe réellement des motifs raisonnables d'appel parce que c'est au tribunal et non à un juge qu'il appartient de rejeter sommairement un appel futile. D'un autre côté, l'intimée a invoqué un jugement rendu par mon collègue, le juge Spence, le 5 décembre 1967, par lequel il a refusé une requête semblable par le motif suivant:

> I am of the opinion therefore that the appeal is so hopeless that I could not justify requiring the defendant to expend the moneys necessary to defend the appeal with no hope of recovering the costs after success and that would be the effect of granting leave to appeal in forma pauperis.

(*Bridge c. Herzog,* non publié.)

Après avoir conféré avec mon collègue, je suis venu à la conclusion avec laquelle il est d'accord qu'il vaut mieux laisser au tribunal le soin de juger si un appel doit être rejeté sommairement parce qu'il est futile.

Quant à l'autre moyen invoqué par l'intimée, je ne vois pas comment je pourrais en tenir compte alors que le délai pour l'institution d'une action paulienne est expiré.

Pour ces motifs, la requête de l'appelant est accordée avec dépens à suivre le sort de l'appel, l'appelant est dispensé de fournir cautionnement et de verser des honoraires au régistraire et son appel est admis sans autre formalité sous réserve du droit de l'intimée d'en demander le rejet.

Requête accordée.

1969
*Feb. 7
Mar. 31

RADIO CORPORATION OF AMERICA....APPELLANT;

AND

HAZELTINE CORPORATION and PHILCO-FORD CORPORATION (DELAWARE) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Conflict proceedings—Action in Exchequer Court—Statement of claim—Motion to strike out paragraph of statement of claim—What may properly be pleaded—Patent Act, R.S.C. 1952, c. 203, s. 45(8).

* PRESENT: Martland, Ritchie, Hall, Spence and Pigeon JJ.

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Applications for patents were made by the appellant and the respondents. The Commissioner of Patents found that a conflict existed between their claims and awarded the claims in conflict to the respondent H. The appellant brought an action in the Exchequer Court, pursuant to s. 45(8) of the *Patent Act*, R.S.C. 1952, c. 203, for a determination of its rights. By paragraph 7 of its statement of claim, the appellant alleged that claim C1 in the applications of both parties covered more than was invented in respect to which any party was entitled to a patent and that the appellant was entitled, as between the parties, to a patent including a substitute claim for claim C1. The respondent H applied for an order striking out this paragraph of the statement of claim or, in the alternative, for particulars. The order to strike out was made by the Exchequer Court. An appeal was launched to this Court, where the issue raised was as to what may properly be pleaded in a statement of claim filed in pursuance of s. 45(8) of the Act.

Held: The appeal should be allowed.

The pleadings under s. 45(8) of the *Patent Act* are not limited to a determination of the sort of issue defined in paragraph (*d*) of the subsection, *i.e.*, which of the applicants is entitled, as against the others, to the issue of a patent including the claim in conflict as applied for by him. Subsection (8) does not give a right of appeal from the determination made by the Commissioner under subsection (7), but enables one of the applicants to commence an action in the Exchequer Court "for the determination of their respective rights". Each paragraph of subsection (8) is given equal status and the Court is empowered to make a determination under any of the four paragraphs. An action could be brought to obtain any one or more of the kinds of determination provided for by paragraphs (*a*) to (*d*) inclusive.

Brevets—Conflit de demandes—Action devant la Cour de l'Échiquier—Déclaration—Requête pour faire rayer un paragraphe de la déclaration—Que peut-on alléguer dans la déclaration—Loi sur les brevets, S.R.C. 1952, c. 203, art. 45(8).

Des demandes de brevets ont été présentées par l'appelante et les intimées. Le Commissaire des brevets a conclu qu'il existait un conflit entre leurs revendications et il a attribué à l'intimée H les revendications concurrentes. L'appelante a institué une action devant la Cour de l'Échiquier, en vertu de l'art. 45(8) de la *Loi sur les brevets*, S.R.C. 1952, c. 203, en vue de faire déterminer ses droits. Au paragraphe 7 de sa déclaration, l'appelante a allégué que la revendication C1 dans les demandes de brevets des deux parties couvrait plus que ce qui faisait le sujet d'une invention au sujet de laquelle l'une ou l'autre partie avait droit à la délivrance d'un brevet, et que l'appelante avait droit, quant aux parties, à la délivrance d'un brevet comprenant une revendication substituée à la revendication C1. L'intimée H a demandé que ce paragraphe de la déclaration soit rayé ou, alternativement, que des détails soient fournis. La Cour de l'Échiquier a ordonné que le paragraphe soit rayé. De là l'appel devant cette Cour, où la question soulevée était de savoir ce qu'on peut alléguer dans une déclaration produite en vertu de l'art. 45(8) de la Loi.

Arrêt: L'appel doit être accueilli.

Les plaidoiries sous l'art. 45(8) de la *Loi sur les brevets* ne sont pas limitées à décider la sorte de question visée par le paragraphe (*d*) de de l'alinéa (8), *i.e.*, lequel des demandeurs a droit à l'encontre des autres à la délivrance d'un brevet comprenant la revendication concurrente, selon la demande qu'il en a faite. L'alinéa (8) ne donne pas un droit d'appel de la décision du Commissaire rendue en vertu de l'alinéa (7), mais permet à un des demandeurs de commencer une action devant la Cour de l'Échiquier «en vue de déterminer leurs droits respectifs». On doit donner à chaque paragraphe de l'alinéa (8) un statut égal et la Cour a le pouvoir d'en venir à une décision sous n'importe lequel des quatre paragraphes. Une action peut être instituée pour obtenir une ou plus des décisions prévues sous les paragraphes (*a*) à (*d*) inclusivement.

APPEL d'un jugement du Juge Noël de la Cour de l'Échiquier du Canada, rayant un paragraphe de la déclaration. Appel accueilli.

APPEAL from a judgment of Noël J. of the Exchequer Court of Canada, striking out a paragraph of the statement of claim. Appeal allowed.

Russell S. Smart, Q. C., and *Robert H. Barrigar*, for the appellant.

Douglas S. Johnson, Q. C., and *William M. Thom*, for the respondents.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from an order of the Exchequer Court striking out paragraph 7 of the appellant's Statement of Claim in an action brought by the appellant against the respondents in that Court.

The circumstances giving rise to these proceedings are as follows: Applications for patents were made by the appellant and by the respondents. The applications are in conflict by reason of the appearance in each of them of claims designated by the Commissioner of Patents as C1 to C14 inclusive. By his decision, made pursuant to s. 45(7) of the *Patent Act*, R.S.C. 1952, c. 203, he awarded these claims to the respondent Hazeltine Corporation.

Subsection (7) of s. 45 provides as follows:

(7) The Commissioner, after examining the facts stated in the affidavits, shall determine which of the applicants is the prior inventor to whom he will allow the claims in conflict and shall forward to each applicant a copy of his decision, a copy of each affidavit shall be transmitted to the several applicants.

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The action in the Exchequer Court was brought by the appellant, pursuant to subs. (8) of that section, which states:

(8) The claims in conflict shall be rejected or allowed accordingly unless within a time to be fixed by the Commissioner and notified to the several applicants one of them commences proceedings in the Exchequer Court for the determination of their respective rights, in which event the Commissioner shall suspend further action on the applications in conflict until in such action it has been determined either

(*a*) that there is in fact no conflict between the claims in question,

(*b*) that none of the applicants is entitled to the issue of a patent containing the claims in conflict as applied for by him,

(*c*) that a patent or patents, including substitute claims approved by the Court, may issue to one or more of the applicants, or

(*d*) that one of the applicants is entitled as against the others to the issue of a patent including the claims in conflict as applied for by him.

In paragraph 7 of the Statement of Claim, the appellant made the following allegation:

7. The plaintiff says that claim C1 covers more than was invented in respect to which any party hereto is entitled to a patent, and the plaintiff is entitled, as between the parties, to a patent including a substitute claim for claim C1 approved by the Court.

The prayer for relief contained the following paragraphs, seeking the Court's determination:

(*b*) That none of the applicants is entitled to the issue of a patent containing claim C1 as applied for by them.

(*c*) That the plaintiff is entitled to the issue of a patent including a substitute claim for claim C1 approved by the Court.

The respondent Hazeltine Corporation applied for an order striking out paragraph 7 of the Statement of Claim, or, in the alternative, for particulars as to what claim C1 covers that is more than was invented in respect to which any party is entitled to a patent and particulars as to the substitute claim to which the appellant alleges it is entitled. An order was granted striking out paragraph 7 of the Statement of Claim.

The issue which is thus raised is as to what may properly be pleaded in a statement of claim filed in pursuance of s. 45(8) of the *Patent Act*.

This Court decided in *Radio Corporation of America v. Philco Corporation (Delaware)*[1], that it was not open to a plaintiff, in proceedings taken pursuant to s. 45(8), to

[1] [1966] S.C.R. 296, 32 Fox Pat. C. 99, 56 D.L.R. (2d) 407.

attack claims contained in an application in relation to which no conflict had been found by the Commissioner, and that proceedings under that subsection were restricted to a determination of the respective rights of the parties in relation to the subject-matter of the claims put in conflict by the Commissioner. That case, however, is not decisive in respect of the present appeal, where the issue relates to claim C1, which is in conflict.

The basis for striking out paragraph 7 of the Statement of Claim is to be found in the reasoning contained in some recent decisions of the Exchequer Court, of which *Texaco Development Corporation v. Schlumberger Limited*[2], *The Carborundum Company v. Norton Company*[3], and *E. I. DuPont de Nemours and Company v. Allied Chemical Corporation*[4] are examples. The effect of these decisions is stated in the last mentioned case, at p. 152, as follows:

> In my view, what this Court is authorized to deal with under section 45(8) of the *Patent Act* is a claim by a party who has failed to obtain a favourable decision from the Commissioner that he is entitled, as against the person who obtained the favourable decision, to the issue of a patent including the conflict claims, *"as applied for by him"* (paragraph (*d*) of section 45(8)). This requires that evidence be placed before the Court by the plaintiff designed to show that the plaintiff's inventor did invent the invention, and when he invented it, and either that the defendant's inventor did not invent it or that he did but at a time subsequent to the making of the invention by the plaintiff's inventor. The defendant, of course, is entitled to adduce evidence in relation to the same matters. The upshot of all the evidence may be that the Court is convinced that it cannot adjudicate in favour of either of the parties under section 45(8)(*d*), but
>
> (*a*) that there is in fact no conflict, in which case it adjudicates under section 45(8)(*a*), or
>
> (*b*) that none of the parties is entitled to the issue of a patent containing the claims in conflict as applied for by him, in which case it adjudicates under section 45(8)(*b*).
>
> I reiterate that I do not regard either of such latter possible classes of judgment as being the purpose of section 45(8) proceedings. I regard them as judgments arising incidentally in the course of proceedings designed to obtain a judgment under section 45(8)(*d*).

The effect of this interpretation of s. 45(8) of the *Patent Act* is that the task of the Exchequer Court, in proceedings brought pursuant to that subsection, is restricted to a determination of the sort of issue defined in paragraph (*d*) of the subsection, i.e., which of the applicants is entitled,

[2] [1967] 1 Ex. C.R. 459, 33 Fox Pat. C. 194, 49 C.P.R. 225.
[3] [1967] 1 Ex. C.R. 466, 33 Fox Pat. C. 148, 51 C.P.R. 97.
[4] [1967] 2 Ex. C.R. 151, 35 Fox Pat. C. 112, 52 C.P.R. 36.

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Martland J.

as against the others, to the issue of a patent including the claims in conflict as applied for by him. The evidence to be led is to show that the plaintiff's inventor did invent the invention, when he did it, and that the defendant's inventor did not invent it, or did so at a later time. Consequently the pleadings are to be limited to that issue.

On this interpretation of the subsection, paragraph (*a*), (*b*) and (*c*) do not have application except incidentally, in the course of proceedings designed to obtain a judgment under paragraph (*d*). It is not the purpose of proceedings under s. 45(8) to obtain the kind of judgment contemplated in the paragraphs other than (*d*), and consequently the pleadings should relate only to the issue under that paragraph. The Court may make a determination under one of the other paragraphs but should do so only incidentally to proceedings under paragraph (*d*).

With great respect, I am unable to interpret s. 45(8) in that way, whether or not the consequences of such an interpretation are desirable. Subsection (7) limits the jurisdiction of the Commissioner to a determination as to which of the applicants is the prior inventor to whom he will allow the claims in conflict. If the task of the Exchequer Court had been intented also to be limited to that issue, the statute could have provided merely for an appeal from the Commissioner to the Court. But subs. (8) does not give a right of appeal. Instead, it enables one of the applicants involved in conflict proceedings to commence an action in the Exchequer Court "for the determination of their respective rights".

If an action is commenced, the Commissioner must suspend further action on the applications in conflict until, "*in such action*", it has been determined *either*

(a) that there is no conflict;

(b) that none of the applicants is entitled to the issue of a patent containing the claims in conflict;

(c) that a patent or patents, including substitute claims, approved by the Court, may issue to one or more of the applicants; *or*

(d) that one of the applicants is entitled as against the others to the issue of a patent including the claims in conflict.

Subsection (8) does not require that the Court must first seek to make a determination under paragraph (*d*) and only make a secondary determination under paragraph (*a*), (*b*), or (*c*) in the alternative. Each paragraph is given equal status, and the Court is empowered to make a determination under any of the four paragraphs.

In my view s. 45(8) enables any applicant involved in conflict proceedings, where a determination has been made by the Commissioner, to commence an action in the Exchequer Court to seek to obtain, in relation to the claims in conflict, any one or more of the kinds of determination by the Court for which paragraphs (*a*) to (*d*) inclusive provide. As in any other proceeding seeking relief, it is essential that the pleadings should allege the facts on the basis of which the relief is sought, and should specify that relief.

This interpretation of subs. (8) is supported by the decision of this Court in *Kellogg Company v. Kellogg*[5]. That case involved two conflicting applications for a patent. The respondent was an assignee by mesne assignments in respect of an invention by John L. Kellogg Jr., who, the Commissioner decided, was the prior inventor. The appellant commenced proceedings in the Exchequer Court pursuant to s. 44(8) of *The Patent Act*, 1935, c. 32, Statutes of Canada, 1935, the predecessor of the present s. 45(8). The appellant claimed, inter alia, that if John L. Kellogg Jr. was the first inventor, he had been, at the time of the invention, an employee of the appellant, and that the invention was made in the course of his employment while carrying out work, which he had been instructed to do, on the appellant's behalf, and that he was a trustee of the invention for the benefit of the appellant. The pleadings alleging this trust and the prayer based upon it were struck out in the Exchequer Court on the ground that this issue could not be raised in proceedings under s. 44(8).

The appeal to this Court was allowed. Rinfret J., as he then was, said, at p. 248:

> Although the occasion for the appellant's action was the decision of the Commissioner that the respective applications of the appellant and of the respondent were in conflict and that he would allow the claims to the respondent, the appellant, in bringing suit against the respondent, was not limited to an action for the purpose of having it determined either

[5] [1941] S.C.R. 242, 1 Fox Pat. C. 101, 1 C.P.R. 30, [1941] 2 D.L.R. 545.

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that there was no conflict between the claims in question, or that none of the applicants was entitled to the issue of a patent containing the claims in conflict, or that a patent or patents (including substitute claims approved by the Court) may issue to one or more of the applicants; but the Exchequer Court could also decide that one of the applicants was entitled, as against the other, to the issue of a patent including the claims in conflict, as applied for by him. We have already seen that such was the express enactment of subs. 8 of s. 44 of the *Patent Act, 1935*.

And, for the determination of the latter point, we see nothing in the Act or in the law which could prevent the appellant from urging any fact or contention necessary or useful for the purpose of enabling the Court to decide between the parties.

This passage makes it clear that the Court was of the opinion that the appellant could bring a suit to seek any of the kinds of determination contemplated in s. 44(8), which are the same as those defined in the present s. 45(8).

Paragraph 7 of the Statement of Claim in this action is drawn with a view to obtaining the kind of determination contemplated in paragraphs (*b*) and (*c*). It is undoubtedly drawn in very broad and general terms, but the respondent has, in its notice of motion, applied for an order for particulars, in the alternative to an order to strike out the paragraph, and that phase of the application has not yet been decided.

In my opinion the appeal should be allowed, with costs, and the order under appeal should be set aside.

Appeal allowed with costs.

Solicitors for the appellant: Smart & Biggar, Ottawa.

Solicitors for the respondent, Hazeltine Corporation: MacBeth & Johnson, Toronto.

Solicitors for the respondent, Philco-Ford Corporation (Delaware): Gowling, MacTavish, Osborne & Henderson, Ottawa.

GUARANTY TRUST COMPANY OF CANADA (by suggestion) Formerly KATHLEEN RAE PEARCE (*Plaintiff*) ..... APPELLANT;

1968 *Nov. 7 1969 Jan. 28

AND

MALL MEDICAL GROUP, DOCTOR DAVID M. BRUSER, and JAMES VERNON BOYCE (*Defendants*) .... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Negligence—Patient's knee-cap refractured during exercise treatment administered in medical clinic by clinic's employee—Employee acting contrary to written instructions from surgeon not to apply force or pressure—Whether employee negligent in administering treatment.

The plaintiff (P) fractured her right knee-cap when she struck her right knee against a bedpost. Following an operation the knee was healing well and the surgeon (the second defendant) decided that it would be wise to begin active exercises in order to mobilize the knee. He felt that because the patient had an unusual reaction to pain she would be most reluctant to flex her knee against a sensation of pain and, accordingly, he decided she would benefit from assistance by the third defendant in performing the exercises. The third defendant was a remedial gymnast and an employee of the surgeon and of the defendant medical clinic. The surgeon issued written instructions to the said employee that no force was to be used and no pressure applied. While P was undergoing the recommended treatment, her right knee-cap was refractured.

The plaintiff's action was maintained by the trial judge in the amount of $20,000 general and $7,085 special damages. On appeal, the Court of Appeal allowed the appeal and dismissed the action. An appeal from the judgment of the Court of Appeal was then brought to this Court.

Held (Judson J. dissenting): The appeal should be allowed and the trial judgment restored.

Per Martland, Ritchie, Hall and Spence JJ.: As it was established that the employee was acting contrary to his instructions in applying passive pressure to the patient's knee and that the injury could reasonably have resulted from that fact, the onus was on the employee to establish that the fracture did, in fact, occur not because he was acting contrary to instructions and applying pressure, but because the plaintiff jerked backwards on the plinth, inducing the muscle contraction that caused the break.

The employee's evidence failed to support the proposition that the plaintiff suddenly pulled her leg back and that the fracture occurred at that moment. This being so, the only reliable theory explaining the injury was that it was caused in accordance with the trial judge's finding that the employee "was negligent on this occasion in applying some

PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

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pressure, contrary to his instructions, to assist movement, and in not exercising as much care as was reasonably necessary under the circumstances, and that his negligence was responsible for the fracture which occurred".

Per Judson J., *dissenting*: The reason why the Court of Appeal reversed the judgment at trial was that the inferences drawn by the trial judge were not supported by the evidence and the findings of fact as made by him, and that on these findings of fact there was no believable evidence to support an inference of negligence against the physiotherapist. The reasons of the Court of Appeal should be affirmed.

APPEAL from a judgment of the Court of Appeal for Manitoba, allowing an appeal from a judgment of Smith J. Appeal allowed and judgment at trial restored, Judson J. dissenting.

W. C. Newman, Q.C., for the plaintiff, appellant.

Gordon F. Henderson, Q.C., and E. Peter Newcombe, Q.C., for the defendants, respondents.

The judgment of Martland, Ritchie, Hall and Spence JJ. was delivered by

HALL J.:—This is an appeal from a decision of the Court of Appeal for Manitoba which allowed an appeal by the respondents from the judgment of Smith J. who had maintained the appellant's action against the respondents in the amount of $20,000 general and $7,085 special damages and costs.

The action arose out of the refracture of Kathleen Rae Pearce's right knee-cap on January 11, 1961, when she was undergoing treatment in the Mall Medical Clinic being administered by the respondent Boyce, a remedial gymnast. Boyce was an employee of the respondents Bruser and Mall Medical Group. No negligence is or was asserted against the respondent Bruser who is a well-known orthopaedic surgeon practising in Winnipeg. The liability, if any, of the respondents Mall Medical Group and Bruser depends entirely on whether their employee Boyce was negligent.

Mrs. Pearce fractured her right knee-cap in an unusual accident in her home in the early morning of December 1, 1960, when she struck her right knee against the bedpost in her bedroom. She consulted her physician, Dr. McKenty, and was referred by him to the respondent Dr. Bruser. Dr. Bruser operated on the knee on December 2, removing fragments of bone which had broken off at the lower end of the patella. He found that higher on the patella there was an

incomplete transverse fracture which did not extend to the articular cartilage. There was no displacement of the bone in the area of the fracture. Being of the opinion that the fracture would become solid and that reconstituting the extensor apparatus in and around the knee would produce an excellent result, he repaired the knee accordingly and the leg was then immobilized in a cast.

Some two weeks later the cast was changed to a lighter one. On December 28 the cast was bivalved so that it could be taken off and replaced readily. X-rays were taken at this time, and Dr. Bruser found that in the X-ray plates the transverse fracture appeared "fuzzy", indicating it was healing very well. He was of opinion that clinical soundness was not yet complete. He prescribed that Mrs. Pearce should continue to wear the cast, but to remove it once a day and sit in a warm bath, and with the water supporting the injured leg she was to try and bend and straighten it for fifteen or twenty minutes each day. Mrs. Pearce returned to the Mall Clinic on January 2, 1961, and her knee was again examined by Dr. Bruser. She was able at this time to raise the leg out of the back half of the cast without pain. She could flex the knee about 20 degrees and straighten it again without pain. In Dr. Bruser's view, the knee looked very well, and he decided that it would be wise to begin active exercises by which term is meant exercises in which the patient's own muscles are used to cause movement in the joint, sometimes directed, guided and encouraged by another person who does not apply any force himself to cause the patient's leg to flex or straighten, but merely supports the leg. He came to this decision, based on his experience with her in hospital. He recognized her as a very nervous patient who complained a great deal, and he was aware that her reaction to drugs for the relief of pain, *e. g.*, morphine, had been most unusual as she seemed to require doses at more frequent intervals than were normal, and he was left with the impression that she had an unusual reaction to pain. For this reason he felt she would be most reluctant to flex her knee against a sensation of pain, but unless exercises were begun she might have a permanently stiff knee. Accordingly, he decided that she would benefit from assistance which the respondent Boyce could give, and he instructed Boyce to start active exercises to mobilize the knee.

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The respondent Boyce was not a qualified physiotherapist, and was required to follow the instructions given him by Dr. Bruser. Those instructions were given by Dr. Bruser to Boyce in writing, and Dr. Bruser was particular in specifying that no physical force was to be used and no pressure applied. Dr. Bruser testified that he instructed Boyce to be careful, and because of Mrs. Pearce's apparent low pain tolerance he had to avoid pressure. Boyce stated that his instructions with regard to Mrs. Pearce were that the exercises to get the knee moving were to be done by Mrs. Pearce "on her own" and that his function was to support the knee and let her work it actively with her own muscle control.

On January 2 Boyce gave Mrs. Pearce some instruction in static contraction of the thigh muscles with no movement of the knee joint, the whole leg resting on a table or plinth. Mrs. Pearce returned for a treatment on January 4 and another treament on January 6. The third treatment was on January 11 and it was on this occasion that the knee-cap was refractured. On this date Mrs. Pearce was placed on a table in such a position that the injured leg from the knee down projected out from the table. Boyce supported the leg by placing his left hand on the thigh a little above the knee with his right hand gripping behind the heel with his thumb coming around in front of the ankle. This was intended as a new exercise in which the knee was to be flexed and straightened. As of this date Mrs. Pearce had been able to obtain a flexion of 30 degrees in the knee.

Shortly put, the established facts are that when Mrs. Pearce presented herself to Boyce for treatment on January 11 her injured knee-cap was intact. A few minutes later, while being treated by Boyce in the manner just described, the knee-cap fractured with a crack resembling the breaking of a bamboo stick. There was a great deal of medical testimony dealing with fractures of the knee-cap of this kind, but none to the effect that such a fracture would happen spontaneously with the leg at rest. Something had to occur to cause the break.

The appellant's contention is that Boyce was applying pressure contrary to Dr. Bruser's written instructions that no pressure was to be applied, and it was admitted by Boyce that on January 11, while guiding the movement he was applying two pounds' pressure. This was contrary to the instructions he had received from Dr. Bruser. The medical

testimony established that pressure could cause pain and pain could induce an involuntary contraction of the quadriceps muscles and this involuntary contraction of the quadriceps muscles could cause the knee-cap to fracture.

The respondents' contention is that Mrs. Pearce was on the plinth receiving a treatment from Boyce, and being apprehensive of pain pulled her leg back, and in so doing induced a contraction of the quadriceps muscles which fractured the knee-cap.

It is clear that the injury occurred either by the passive pressure applied by Boyce causing pain with the result as stated or by reason of Mrs. Pearce pulling herself back on the plinth with the result as stated.

In view of the fact that it was established that Boyce was acting contrary to his instructions in applying passive pressure and that the injury could reasonably have resulted from that fact, it seems to me that an onus devolved upon Boyce to establish that the fracture did, in fact, occur not because he was acting contrary to instructions and applying pressure, but because Mrs. Pearce jerked backwards on the plinth, inducing the muscle contraction that caused the break.

The evidence fails to establish that Mrs. Pearce suddenly pulled her leg back at the instant of the break. Three persons were then present, Mrs. Pearce, her son Ralph James and Boyce. They testified on this most material point as follows:

RALPH JAMES PEARCE:

Q It doesn't matter, tell it in your own way.

A Well, at first she didn't say too much, but as the exercise progressed she complained about being in pain, and through this she was a little reluctant to go on with the exercise and she tried to pull herself back up, or her leg was back on the bench, and with this Mr. Boyce—I won't quote exactly what he said because I can't remember, it's quite a little while ago now—but with this he was more persistent on helping her with the exercise, and he made her stay where she was doing this exercise.

BY THE COURT:

Q You say she pulled herself back on the plinth, is that it?

A Yes. She was complaining that he was hurting her and she wanted to get back on, as you call it, the plinth.

Q And you say he stopped her?

A Yes—well, he proceeded with the exercise even though she was reluctant to do so, and finally it was just a case of a little bit too much pressure, I guess, and it snapped and all you heard was a loud crack.

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BY MR. NEWMAN:

Q Well, did you observe which way the leg was moving when the snap occurred?
A It was moving in the downward motion.
Q And where was Mr. Boyce's right hand at the time?
A Holding on to the heel of her foot.
Q And the left hand up?
A Up behind the knee.

and on cross-examination:

Q That is she put her hands to the side of her and pulled herself back?
A Yes.
Q How far would you say she moved back?
A Well, she got back to where her leg, except for about the bottom half of her leg itself, was on.
Q Well, that is, her knee would be—
A Her knee would have been on the bench then.
Q On the bench. That is over the edge of the plinth?
A Yes.
Q Which would mean that both legs would be probably straight out?
A That's correct, yes.

BY THE COURT:

Q Would you say only a few inches—
A Well, there was only about, I would say, about eight, maybe ten inches of her leg over the edge of it.

BY MR. MONK:

Q Well, I want to be quite clear about that. That is her leg was only projecting beyond the plinth, say, a little above the ankle?
A Oh, yes, just a little above, not much.
Q There would be, say, six inches of her leg beyond the plinth?
A Yes.
Q I see. And when she was in that position what was Mr. Boyce doing?
A He was talking to her.
Q Talking to her. Did he have his hands touching her at all?
A Well, he still had his hand on her heel.
Q But was he moving the leg at all at that point?
A No, not at that particular time. He was just trying to persuade her to come down to the end of the bench again.
Q I see. And how long did she stay in the position she was that you described?
A Oh, not more than a half a minute.
Q Half a minute, and it was during that half a minute that this occurrence, that crack—
A No, sir.
Q Well, tell us what happened.
A Then Mr. Boyce throughout some of the conversation told her that "you had to be cruel to be kind".
Q I see. That is exactly what he said?
A I'm not quoting, sir, now. It was pertaining to this.

Q But what you believe he said, yes.
A And he held her down to the edge of the plinth again. Even though she was reluctant I guess she was just naturally out to try to help herself as well.
Q I see. And he helped her into what position?
A The same position she was before she pulled herself back.
Q That is sitting with her knee over the edge of the plinth?
A That is correct, yes.
Q I see. And was she attempting to move her leg?
A I don't—I can't say as to whether she was attempting, but I know the leg was being moved.
Q In what motion, up and down?
A That's right, yes, sir.
Q And did Mr. Boyce have his hands as you described previously?
A Yes, sir.
Q And how long had this occurred when the sound which you referred to, or the cracking sound, occurred?
A Possibly a minute and a half to two minutes at the most.
Q At the most. And at the time that the occurrence, that the cracking sound occurred, was your mother attempting to move back onto the plinth?
A I wouldn't say so, but with the pain after the crack—well, I can recall looking at her face and I knew she was in pain.
Q But prior to the crack did she make any other movement to attempt to get back onto the plinth or further back on the plinth?
A No, just conversation, I would say.
Q I see. And what was the conversation, what occurred?
A That she wanted to stop this and go home, he was hurting her. That's all.
Q Did you say that you remembered whether this occurred on the upward or downward movement of the leg?
A It was the downward movement.
Q That is the leg was coming down?
A That's correct.

JAMES VERNON BOYCE:

Q You were giving this treatment to Mrs. Pearce, and how long did you give it to her on this last occasion?
A In the area of about five to ten minutes.
Q Would this be continuously or intermittently?
A It would be intermittently.
Q Tell us what happened.
A The one point I don't remember, in what direction the travel was.
Q When you say "in what direction the travel was" what do you mean?
A Whether on the downward motion or upward motion. I can't say for certain where it was. This is one thing I can't say, but I did hear a tearing sound.
Q What occurred at that moment; what happened?
A I believe that Mrs. Pearce did scream, which was normal reaction.

BY THE COURT:

Q After the tearing sound or before?
A After the tearing sound.

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BY THE COURT:

Q Before the tearing sound had she made any movement?
A *Not to my knowledge.* She was working along fairly well with me.
Q After the tearing sound what did you do and what did she do?
A After the tearing sound I can't say for certain, I am not sure, but she was sitting back on the bench. I think she moved back but I am not sure.
Q Do you know whether she moved back before or after the tearing sound?
A *It was after.* She pulled the leg back for the support of the plinth.

(Emphasis added.)

Mrs. Pearce's evidence was not as clear as that of her son or that of Boyce. That was to be expected in the circumstances. She was quite hysterical following the injury. However, she did testify as follows:

Q And then what happened?
A My knee snapped and it sounded like a bamboo stick.
Q And then what about pain?
A Well, it was worse than the first one I had, the first time I hit my knee on the bedpost.
Q And what was he doing at the time the snap occurred, do you recall? Do you actually recall what he was doing at the time the snap occurred?
A Well, as I say, he had his hand like on the ball of my heel and his other hand on the top of my knee.
Q Do you recall whether he was moving your foot down or up when the snap occurred?
A He was pushing it up or down.
Q But do you recall actually at the time it snapped whether he was pulling it down or pushing it up?
A No, I don't.

It is clear from the son's evidence that Mrs. Pearce moved backwards on the plinth at some time prior to the fracture and was persuaded by Boyce to permit him to resume the up and down movement. She agreed and came forward again and it was at this time, after Boyce had resumed the up and down movement under pressure that the fracture occurred.

Respondents' contention must, I think, stand or fall principally on Boyce's evidence and that evidence just does not support the proposition that Mrs. Pearce suddenly pulled her leg back and that the fracture occurred at that moment. This being so, the only reliable theory explaining the injury is that it was caused in accordance with the learned trial judge's finding as follows:

I find that Boyce was negligent on this occasion in applying some pressure, contrary to his instructions, to assist movement, and in not

exercising as much care as was reasonably necessary under the circumstances, and that his negligence was responsible for the fracture which occurred.

I would, accordingly, allow the appeal with costs here and in the Court of Appeal and restore the judgment of Smith J.

JUDSON J. (*dissenting*):—The reason why the Court of Appeal reversed the judgment at trial was that the inferences drawn by the learned trial judge were not supported by the evidence and the findings of fact as made by him, and that on these findings of fact there was no believable evidence to support an inference of negligence against the physiotherapist.

I will not attempt to paraphrase the comments of the learned trial judge on the evidence of the physiotherapist and the patient. The following are verbatim extracts from his reasons for judgment:

> Boyce's evidence that he did not pull the leg down or push it up, but that the movement was due entirely to use of Mrs. Pearce's own muscles with him imposing about two pounds of resistance to the movement; that she was in fairly good spirits that day; that at no time did she complain about being in pain, or that he was being too rough, or that he was hurting her, but worked along fairly well with him within the range of movement; that there was no problem at all until the tearing sound occurred, and that it was after the tearing sound occurred that she pushed herself backward on the plinth: all this gives no credible explanation of the fracture. Even his adoption of the answers to questions put to him when he was examined for discovery, to the effect that he could have moved Mrs. Pearce's leg up and down but did not recall doing so, does not explain the accident. Nor does his admission on cross-examination that though he did not recall any conversation with Mrs. Pearce on January 11 prior to the fracture, she might have asked him if he was an old sergeant-major, she might have told him she was not a Blue Bomber, or that he was being too rough. These admissions raise doubts about the strict accuracy of his evidence, but they do not explain the accident.
>
> Even if all of Mrs. Pearce's evidence is accepted, it does not indicate satisfactorily how the accident occurred. She said she objected to his treatment because of the pain in the knee, that she pushed Boyce back and told him she wasn't coming back for any more treatments and that he was far too rough. Asked twice by the Court if it was very painful, her first answer was that "It was very vigorous that night" and her second was "Yes, it was painful". She did not use the word "very" in this answer. She said she then went to push herself backwards on the plinth because she could see he was going to be too vigorous, and by this time the knee had snapped. On cross-examination she said she didn't push herself away from Boyce but kind of slid back slowly as best she could, and that it wasn't a second after she made this movement that the break occurred. Questioned further, she said the two things were not almost simultaneous, and then that she didn't know whether it was less than a second after her backward movement that the break occurred.

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Nowhere does Mrs. Pearce's evidence suggest a sudden movement on her part or a sharp pain such as would cause a violent or even quick muscular reaction in her quadriceps.

The conclusions of the learned trial judge are set out in the following extracts from his reasons:

> Though none of those present said anything to this effect, I have come to the conclusion, on all the evidence, that the immediate cause of the fracture on January 11 was and can only have been a sudden contraction of Mrs. Pearce's quadriceps muscle, which was probably occasioned either by actual pain in the knee or by nervous reaction anticipating such pain. I find that during the exercise she suffered some pain which, because of her nervous condition and low pain tolerance, led her to make some complaint. I do not accept her evidence that Boyce was too rough or too vigorous. Her son said he was persistent in getting her to continue with the exercise, but he said nothing to indicate roughness or excessive vigor.
>
> Boyce's knowledge of Mrs. Pearce's nervous condition and reaction to pain imposed a greater duty than usual upon him to be on guard against sudden movements or muscular contractions on her part. Though he denied it at the trial, his evidence on examination-for-discovery (questions 168 and 169) indicate that he could have been moving Mrs. Pearce's leg up and down. He then said at the trial that the answers to those questions were correct to the best of his knowledge. My conclusion on this point is that he was assisting to some slight extent the upward and downward movement of Mrs. Pearce's leg. The evidence is that during this exercise his right thumb was in front of or above the ankle. If, as Mrs. Pearce's son said, the fracture occurred during the downward movement of the leg, that would be the instant when a spasm or sudden contraction of the quadriceps occurred, the effect of which would be aggravated by any downward pressure then being exerted by the grip of Boyce's right hand or by his right thumb. I consider the balance of probabilities is in favour of this being the true explanation for the accident. The medical evidence indicates that it is possible for the patella to be fractured by sudden muscular contraction alone, but it is more likely to occur if the contraction works against resistance such as I have found was being exerted by Boyce's hand or thumb. Accordingly, I find that Boyce was negligent on this occasion in applying some pressure, contrary to his instructions, to assist movement, and in not exercising as much care as was reasonably necessary under the circumstances, and that his negligence was responsible for the fracture which occurred.

The evidence of the medical experts for the plaintiff indicates that neither of them would go beyond saying that it was possible that the fracture might have happened as a result of the small amount of pressure Boyce was exerting upon the leg. Indeed, Dr. Mills agreed on cross-examination that there were several ways in which the fracture could have happened during the period remedial exercises were being administered, and these were equally as probable as the theory that the injury occurred as a result of Boyce exerting too much pressure. Furthermore, both expert wit-

nesses for the defendants gave testimony which emphatically supported the contention that Boyce had not been negligent in his administration of treatment.

With the evidence left as it was and with the findings of fact made by the learned trial judge, the conclusion of the Court of Appeal is, in my opinion, sound. They said:

> The conclusion reached by the learned trial judge was, at most, an inference or theory which *he evolved* to explain the accident. It could only be warranted if, on the balance of probabilities, such inference or theory was justified. I think the plaintiff's case falls far short of presenting evidence adequate in clarity or strength to discharge the onus of proving negligence. The greater part of the judgment of the learned judge is to the same effect. The somewhat surprising conclusion that he reached is, with respect, not based on evidence which he clearly or unreservedly accepts; it is in almost direct contradiction of much of the medical testimony, and runs counter to the weight of the highly competent professional opinion on the record.

I would affirm the reasons of the Court of Appeal and dismiss the appeal.

Appeal allowed with costs, JUDSON J. *dissenting.*

Solicitors for the plaintiff, appellant: Newman, MacLean & Associates, Winnipeg.

Solicitors for the defendants, respondents: Aikins, MacAulay & Company, Winnipeg.

1969
*Mar. 10
Apr. 29

HER MAJESTY THE QUEEN .....APPELLANT;

AND

LEONARD OTTO BORG .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Capital murder—Deliberate shooting of police officer—Defence of insanity—Evidence dealing with that defence not reviewed by trial judge—Whether misdirection—Power of Supreme Court to consider other defences raised in notice of appeal or record—Criminal Code, 1953-54 (Can.), c. 51, ss. 16, 202A, 583A(3), 592(1)(b)(iii).

The respondent was convicted of capital murder. As a result of a telephone call, two uniformed police officers were sent to the respondent's home. As they approached the house, the respondent shot one of them from an upstairs window. The defence of insanity was raised. In a statement admitted in evidence, the respondent said that he had planned to kill a policeman and had purchased a rifle and ammunition for that purpose. The defence called two witnesses only, the respondent's sister

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* PRESENT: Cartwright C.J. and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

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who testified as to the mistreatment of her brother by their father when he was a child, and a psychiatrist who saw the respondent nine months after the crime and six days before the trial. The psychiatrist expressed the opinion that the respondent had an aggressive, anti-social, impulse-ridden type of personality and was unable to cope with his homicidal or sexual impulses. The trial judge did not review the evidence of the respondent's sister or that of the psychiatrist. By a majority judgment, the Court of Appeal ordered a new trial on the ground that there had been non-direction as to the defence of insanity amounting to misdirection. The Crown appealed to this Court.

Held (Hall and Spence JJ. dissenting): The appeal should be allowed and the verdict at the trial restored.

Per Cartwright C.J. and Fauteux, Abbott, Martland, Judson, Ritchie and Pigeon JJ.: After considering all the evidence that had any relevance to the defence of insanity and in the particular circumstances of this case, the charge on this branch of the matter, considered as it must be in the light of all the evidence in the record, was sufficient in law and more favourable to the respondent than it could have been if the trial judge had made a detailed analysis of the psychiatrist's evidence. The Court of Appeal should, therefore, have rejected the ground of appeal on which it based its judgment.

The Court of Appeal found it unnecessary to consider the other grounds of appeal alleged in the notice of appeal or disclosed by the record, as it had the jurisdiction to do under s. 583A(3) of the *Criminal Code*. In these circumstances, this Court has the power to make a final disposition of the appeal. A consideration of any other defence leads to the conclusion that the trial was conducted with scrupulous fairness to the respondent, that in its course there was no error in law, that no valid exception could be taken to the charge of the trial judge and that the verdict was fully supported by the evidence. There was no need to invoke the provisions of s. 592(1)(*b*)(iii) of the Code.

Per Hall and Spence JJ., *dissenting*: The trial judge misdirected the jury on the defence of insanity in that he failed to instruct them that there was evidence that the respondent was suffering from a disease of the mind, and while an irresistible impulse was not of itself a defence the evidence that the irresistible impulse was a manifestation of a disease of the mind was evidence to be considered by them in the light of the psychiatrist's testimony. Furthermore, the trial judge should have reviewed in part what the psychiatrist had said and how the law as to insanity as a defence should be applied to the facts as the jury found them. If there is medical evidence of disease of the mind as there was here and yet the only symptoms of that disease are irresistible impulses, the jury may conclude that the accused is insane. The evidence of irresistible impulse is also relevant to the issue of whether the accused is capable of appreciating the nature and quality of the act. A man operating under an irresistible impulse may have knowledge of the nature and quality of his act without appreciating its nature and quality. In failing to point out to the jury that the theory of the defence was that the respondent had a disease of the mind and that the irresistible impulse was the manifestation of that disease, the trial judge failed to put the theory of the defence adequately to the jury. The provisions of s. 592(1)(*b*)(iii) of the Code should not be invoked. This Court has the jurisdiction to do what the Court of Appeal was required to do by s. 583A(3) of the Code.

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Droit criminel—Meurtre qualifié—Coup de feu tiré de propos délibéré sur un officier de police—Défense d'aliénation mentale—La preuve se rapportant à cette défense non passée en revue par le juge au procès—S'agit-il de mauvaises directives—Pouvoir de la Cour suprême de considérer les autres défenses soulevées dans l'avis d'appel ou le dossier—Code criminel, 1953-54 (Can.), c. 51, art. 16, 202A, 583A(3), 592(1)(b)(iii).

L'intimé a été déclaré coupable d'un meurtre qualifié. A la suite d'un appel téléphonique, deux officiers de police, en uniforme, ont été envoyés à la résidence de l'intimé. Comme ils approchaient de la maison, l'intimé, d'une fenêtre située à un étage supérieur, a tiré un coup de feu sur l'un des officiers. La défense d'aliénation mentale a été soulevée. Dans une déclaration admise en preuve, l'intimé a dit qu'il avait projeté de tuer un agent de police et que pour ce faire il avait acheté un fusil et des balles. La défense a fait entendre deux témoins seulement, la sœur de l'intimé qui a témoigné des mauvais traitements infligés par leur père à son frère lorsqu'il était un enfant, et un psychiatre qui a vu l'intimé neuf mois après le crime et six jours avant le procès. Le phychiatre a exprimé l'opinion que l'intimé avait une personnalité agressive, antisocial, menée par ses impulsions et qu'il était incapable de repousser ses impulsions meurtrières ou sexuelles. Le juge au procès n'a pas passé en revue le témoignage de la sœur de l'intimé ou celui du psychiatre. La Cour d'appel, par un jugement majoritaire, a ordonné un nouveau procès pour le motif qu'il y avait eu, quant à la défense d'aliénation mentale, un manque de directives équivalent à une mauvaise directive. La Couronne en appela à cette Cour.

Arrêt: L'appel doit être accueilli et la déclaration de culpabilité rétablie, les Juges Hall et Spence étant dissidents.

Le Juge en Chef Cartwright et les Juges Fauteux, Abbott, Martland, Judson, Ritchie et Pigeon: Après avoir examiné toute la preuve se rapportant à la défense d'aliénation mentale et dans les circonstances particulières de cette cause, les directives sur cette branche du procès, considérées comme elles doivent l'être à la lumière de toute la preuve au dossier, étaient suffisantes en droit et plus favorables à l'intimé qu'elles l'auraient été si le juge avait fait une analyse détaillée du témoignage du psychiatre. En conséquence, la Cour d'appel aurait dû rejeter le motif d'appel sur lequel elle a appuyé sa décision.

La Cour d'appel n'a pas jugé qu'il était nécessaire de considérer les autres motifs d'appel allégués dans l'avis d'appel ou apparaissant au dossier, comme elle avait juridiction de le faire sous l'art. 583A(3) du *Code criminel*. Dans ces circonstances, cette Cour a le pouvoir de disposer finalement de l'appel. Un examen des autres défenses mène à la conclusion que le procès a été tenu avec une impartialité scrupuleuse, qu'il ne s'est produit aucune erreur en droit, qu'on ne peut s'objecter validement aux directives du juge et que la déclaration de culpabilité était amplement supportée par la preuve. Il n'y a aucune nécessité d'invoquer les dispositions de l'art. 592(1)(*b*)(iii) du Code.

Les Juges Hall et Spence, *dissidents:* Le juge au procès a donné des mauvaises directives quant à la défense d'aliénation mentale, à savoir qu'il ne leur a pas dit qu'il y avait une preuve que l'intimé était atteint d'une maladie mentale, et quoiqu'une impulsion irrésistible n'est pas en soi une défense la preuve que l'impulsion irrésistible est une manifestation d'une maladie mentale est une preuve que le jury devait considérer à la lumière du témoignage du psychiatre. De plus,

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le juge aurait dû examiner en partie ce que le psychiatre avait dit et expliquer comment la loi concernant l'aliénation mentale comme défense doit être appliquée aux faits tels que déterminés par le jury. S'il existe une preuve médicale d'une maladie mentale, comme c'était le cas, et cependant les seuls symptômes de cette maladie sont des impulsions irrésistibles, le jury peut en venir à la conclusion que l'accusé est un aliéné. La preuve d'impulsion irrésistible est de plus pertinente à la question de savoir si l'accusé est capable de juger la nature et la qualité de l'acte. Un homme agissant sous des impulsions irrésistibles peut bien connaître la nature et la qualité de son acte sans en apprécier la nature et la qualité. En omettant de faire observer au jury que la théorie de la défense était que l'intimé était atteint d'une maladie mentale et que l'impulsion irrésistible était la manifestation de cette maladie, le juge au procès a omis de placer adéquatement devant le jury la théorie de la défense. Les dispositions de l'art. 592(1)(*b*)(iii) du Code ne doivent pas être invoquées. Cette Cour a juridiction pour faire ce que la Cour d'appel devait faire sous l'art. 583A(3) du Code.

APPEL par la Couronne d'un jugement de la Cour d'appel de l'Alberta[1], ordonnant un nouveau procès. Appel accueilli.

APPEAL by the Crown from a judgment of the Supreme Court of Alberta, Appellate Division[1], which had ordered a new trial. Appeal allowed.

J. W. K. Shortreed, Q.C., for the appellant.

G. A. C. Steer, Q.C., and *G. A. Verville* for the respondent.

The judgment of Cartwright C.J. and of Fauteux, Abbott, Martland, Judson, Ritchie and Pigeon JJ. was delivered by

THE CHIEF JUSTICE:—This is an appeal, brought pursuant to s. 598(1)(*a*) of the *Criminal Code*, from a judgment of the Supreme Court of Alberta, Appellate Division[1], pronounced on October 31, 1968, setting aside a verdict of guilty of capital murder and directing a new trial. Allen J.A., dissenting, would have dismissed the appeal.

The respondent was tried before Milvain J., as he then was, and a jury. The verdict was rendered on April 11, 1968. The respondent was sentenced to death.

There is no dispute as to the facts surrounding the actual killing.

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[1] (1969), 66 W.W.R. 385, 5 C.R.N.S. 222.

On June 23, 1967, as a result of a telephone call made at about 2.40 p.m. to the detachment office of the Royal Canadian Mounted Police at Grande Prairie, Alberta, Corporal Harvey and Corporal Biggar drove from the detachment office to a residence known as 1006 103rd St., in an area of the City of Grande Prairie described as Bear Creek Flats. Both were dressed in the uniform of the Royal Canadian Mounted Police. They enquired at that address as to the location of the residence of Leonard Otto Borg and Harvey Lambert, an occupant of the house, came out to show them where Borg lived. Borg lived in an apartment above a double garage to the rear and slightly to one side of the residence mentioned. Lambert, Corporal Biggar and Corporal Harvey walked past the front of that residence and turned into a driveway leading to Borg's apartment. They had walked about twelve feet along the driveway towards Borg's residence when a head appeared at an open window near the southeast corner of the apartment and a shot was heard. Corporal Harvey clutched the upper part of his body and fell to the ground. Corporal Biggar drew his revolver, fired one shot into the ground, then obtained some assistance and moved Harvey out of the line of fire. Harvey was mortally wounded and died in a short time, undoubtedly as a result of the wound caused by the bullet fired through the open window.

When Corporal Biggar fired into the ground the head in the window disappeared. A very short time later Corporal Biggar saw what he believed to be the same head appear at the same open window and he fired his revolver towards the head. He saw "the head come up and appear to fall back". Corporal Biggar radioed to the detachment office for assistance. He could then see no movement in the house and he fired another shot into the ground immediately in front of him. He then heard a voice coming from inside the building "If I throw my gun out you won't shoot, will you?". Corporal Biggar said he wouldn't and told the man to stand up where he could see him. A hand with a rifle came over the windowsill and the rifle dropped to the ground. The man inside said there was no door on the front and that the Corporal would have to go to the back. The Corporal went to the back and told the man to come out

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with his hands up; the man, who was Borg, did so and was placed under arrest; he was found to have been shot and slightly wounded in one ear.

Following a voir dire, the learned trial judge admitted in evidence portions of a statement written and signed by the respondent and two questions out of several asked of him by Corporal Dillabaugh and his answers thereto.

These are as follows:

I then slept till 9 a.m. Went down town and bought a cil. 22 for $19.80 and one box of .22 long. I came back home and made a phone call to the RCMP. I didn't give them . . . .

(Here a sentence is omitted.)

. . . . I later went up town at 1 am and had one drink of Vodka strate and one ry and water I came home about 2 30 am and made a phone call to the RCMP telling them where I lived When the police arrived I shot one in the chest some ware around the heart, at least thats where I was aiming shortly after that the second police man shot at me hitting me in the left ear it knocked me to the floor I then thought whats the use. I caused enough grief in my life. I then gave myself up.

(It is obvious, and was agreed by counsel, that "1 am" and "2 30 am" should have read "1 p.m." and "2.30 p.m.")

The questions and answers were as follows:

Que. When you made the phone call to the R.C.M. Police & told them who you were & where they might find you, did you at that time plan to kill a policeman when he came to see you?

Ans. I planned to kill a policeman before that, before I ever went up town to buy the gun.

Que. Just when did you first plan to kill a policeman?

Ans. My plan to kill a policeman first came into my mind while I was doing 3 years in the B.C. pen for something I didn't do.

There is evidence confirming the purchase of the rifle and ammunition on the 23rd June 1967. Ammunition of the type purchased was found in the respondent's apartment in several places. Some blood was splattered upon the floor in the vicinity of the open window and there were quite substantial amounts of blood upon the respondent's shirt.

It should be explained why portions only of the written statement and the questions and answers were read to the jury.

On the voir dire there had been filed as Exhibit V.D. 5, three documents, (i) a lengthy statement in the handwriting of the respondent headed, "To whom it may concern", (ii)

a short letter commencing "Mom Dad and Kinfolk" and (iii) a short document intended to be the respondent's will. These documents had been found by Staff Sergeant Chalk, at about 3.10 p.m. on the day of the killing of Corporal Harvey, in a sealed envelope in the apartment occupied by the respondent from which the fatal shot was fired. At the time when these documents were found, the respondent was in a police car outside the building. In the apartment was the dead body of a woman. It seems obvious that the three documents were written by the respondent between the time when he killed the woman and the arrival of Corporal Harvey and Corporal Biggar.

Between 10.15 p.m. and 11.45 p.m. on June 23, 1967, the respondent made a lengthy statement to Corporal Dillabaugh and Constable Fischer. This statement was written and signed by the respondent. It was filed as Exhibit V.D. 3 on the voir dire. It described in considerable detail the killing of a woman by the respondent on December 21, 1966, and the burning by him of the shack in which her dead body lay with the result that her death was held to have been accidental. It went on to describe the killing of another woman by the respondent in the early morning hours of June 23, 1967, stating that she was dead about 3 a.m. Immediately following this point in the statement were the words:— "I wrote a letter detailing my part". This letter would appear to be item (i) in Exhibit V.D. 5 mentioned above. This sentence immediately preceded the portion of the statement which was read to the jury and which has been quoted above. The "sentence omitted" indicated in the quoted statement, read as follows:

I just told them that I had murdered my wife, I didn't give them any details of the place at the time for I was not sure of my plans.

Following the making of this written statement by the respondent, he was asked several questions by Corporal Dillabaugh. These questions and answers of the respondent were taken down in writing and were signed by the accused and this document was marked as Exhibit V. D. 4.

The two questions and answers read to the jury have been quoted above.

It would seem that both counsel at the trial were of the view that, although the learned trial judge had ruled that

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the statements made by the accused were voluntary, it would be unfair to the accused to show that he had killed two persons other than the one with whose murder he was charged and that after discussion, in the absence of the jury, some of which appears to have taken place in the judge's chambers, counsel agreed, with the approval of the learned trial judge, as to what should be read to the jury.

In taking this course I presume the learned trial judge and counsel had in mind the rule of conduct referred to in such cases as *Noor Mohamed v. The King*[2], that evidence, although legally admissible, should not be tendered if the prejudice to the accused would far outweigh its probative value relevant to the issue before the Court.

In my opinion, so far as the statement, V.D. 3, the questions and answers, V.D. 4 and the documents contained in Exhibit V.D. 5 were tendered to show that the accused had murdered Corporal Harvey it may well have been proper to exclude the portions which were withheld from the jury; but it appears to me that they were all clearly relevant to the issue of the defense of insanity and on that issue could properly have been put before the jury in their entirety. However, in view of the course taken at the trial, I propose in deciding how this appeal should be disposed of to consider only the evidence actually placed before the jury.

In the course of his reasons the learned Chief Justice of Alberta, who delivered the judment of the majority of the Appellate Division, after summarizing the facts surrounding the shooting of Corporal Harvey, said that it was established beyond any room for doubt (i) that the shooting was the act of the respondent and (ii) that his act amounted to capital murder and consequently that the only defence open to the respondent was that of insanity under s. 16 of the *Criminal Code*. I agree with this statement; it is supported by conclusive and uncontradicted evidence.

The only issue discussed before us and the only one of any substance in this case is that regarding the defence of insanity.

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[2] [1949] A.C. 182 at 192.

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The ground on which the majority of the Appellate Division allowed the appeal is summarized in the formal judgment as follows:

AND UPON this Honourable Court finding that the learned trial Judge failed to review the substantial parts of the evidence of Mrs. Hartman and Dr. Spaner and to instruct the jury as to how the law was to be applied to the facts as they found them and thereby misdirected the jury by such non-direction.

The only evidence at the trial called by the defence was that of Mrs. Hartman, a sister of the accused, and Dr. Spaner, a medical practitioner specializing in psychiatry whose qualifications were not questioned. Their evidence related entirely to the defence of insanity.

The Crown called no evidence in reply.

The evidence of Mrs. Hartman is sufficiently summarized by Bruce Smith C.J.A. as follows:

Mrs. Hartman gave a very detailed description of her and the appellant's life at home as children. She said he had been persecuted, beaten and abused by his father and unnecessarily mistreated in many ways; that he had been shown no affection by his father; that he would be given conflicting instructions by his father and then brutally punished because he did not properly carry out the instructions; that his father cheated him out of a trap line when he became older. She said that on one occasion, after he had left home, he returned and was very mixed up and acting strangely. She said that he was 'sitting there sharpening a knife and looking at me' and that she was afraid and got an iron and a knife with which to protect herself. On another occasion, at the time of Mrs. Hartman's wedding, the appellant didn't remember where he had been for five days. She said his only association was with Metis women, not white girls, and that he didn't feel good enough for white girls.

Dr. Spaner interviewed the accused at Fort Saskatchewan gaol on April 2, 1968, that is six days before the commencement of the trial and a little over nine months after the killing of Corporal Harvey. The interview lasted between $2\frac{1}{2}$ and 3 hours. Dr. Spaner heard the evidence of Mrs. Hartman and the portions of the accused's statement and answers that were read to the jury. It was from these materials that he formed his opinion.

As was pointed out by Bruce Smith C.J.A., Dr. Spaner nowhere in his evidence expressed the opinion, in so many words, that the accused at the time he shot Corporal Harvey did not know that what he was doing was contrary to law or that he was incapable of appreciating the nature

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and quality of his act. The learned Chief Justice was, however, of the view that either of these conclusions could be founded on Dr. Spaner's evidence if accepted. With the greatest respect I cannot agree with this.

It appears to me that if the view of Dr. Spaner's evidence most favourable to the accused were taken by the jury it could be said to show, (i) that Borg was suffering from a disease of the mind called a psychopathic state and that he fitted into the classification of the aggressive, anti-social, impulse-ridden type of personality, (ii) that he had very few healthy coping mechanisms or ways of defending himself against impulses such as homicidal or sexual ones, (iii) that this lack of impulse control is chronic, (iv) that a major characteristic of this impulse type of personality is being emotionally unbalanced by the illness, that the moral issues cannot be differentiated, that he does not have the moral ethical part of his mind functioning most of his life but "most important of all he can have normal cognitive functioning—that is the knowing part of his mind functioning", (v) that the impulse is so powerful his judgment is impaired but he can still have intellectual functioning, (vi) that the effect of alcohol is unpredictable; it can wipe away any controls or it might even calm him; it is impossible to say, (vii) that Borg hates authoritarian figures and under the influence of his anti-social impulse driven, aggressive impulses, he can kill, (viii) that if the force of the impulse cannot be resisted "at that moment", and this is a symptom of what he suffers from—an impulse —psychotic state—an irresistible impulse when he neither reasons nor deliberates, (ix) that the irresistible impulse is both a symptom of the disease of the mind and the disease itself, (x) that he operates sometimes with normal intellect, sometimes with a little better than normal intellect and sometimes like a little boy.

An important answer made by Dr. Spaner in the course of his cross-examination was as follows:

Que. You are unable to say with any degree of accuracy whether or not the drink of rye—the drink of vodka straight and the rye and water, aggravated any—what—first of all I would gather you are unable to say what particular emotional condition he was in at the time.

Ans. No, I just thought he—that the circumstances that were going on, that it was quite possible that he was anxiety ridden, panic stricken, under the influence or some catastrophic disorganization.

It appears to me that the effect of Dr. Spaner's evidence is that, in his opinion, at the time of the shooting Borg may have been acting under an irresistible impulse such as the Doctor had described. There is no evidence that Borg himself had that view and the portions of his statement and of his answers read to the jury far from suggesting anything in the nature of an impulsive action indicate a careful and deliberate plan which it took him some hours to carry out. The actions and statements of Borg after the shooting indicate that he was well aware of what he had done and that it was wrong. The evidence taken as a whole falls far short of being sufficient to satisfy the onus of proof on the balance of probabilities which rests on the defence when insanity is alleged.

The only evidence given on the last day of the trial was that of Mrs. Hartman followed by that of Dr. Spaner. It would be fresh in the minds of the jury when they heard the judge's charge. That charge in so far as it dealt with the law regarding insanity was clear and correct. The learned trial judge did not analyze or summarize the evidence of Mrs. Hartman or that of Dr. Spaner but he did say:

> Now in this case I suggest that you can bear in mind as you weigh the entire evidence in this regard, many things: you bear in mind, of course, the evidence that was given by the accused's sister of his background and life; you bear in mind what we have learned of the man through the statements, or, to the extent that the statement is before you, and we bear in mind the evidence that was given by Dr. Spaner. All of those things together form the evidence that you consider.
>
> * * *
>
> You weigh in your minds the whole of the evidence that you have heard because it is your province and your province alone to conclude whether or not, on a balance of probabilities, the accused has satisfied you that he was insane within the meaning of the Act that I read you, and if he has done so, of course, your verdict then would be not guilty but insane.
>
> It would seem to me, gentlemen, in viewing the whole of this case, when you retire to consider your verdict, there are three possible verdicts within the law. One verdict could, of course, be guilty as charged; he could be found not guilty at all, or he could be found not guilty because of insanity. Those appear to me to be the only three possible verdicts.

It is not surprising that the learned and experienced counsel for the defence did not request the judge to give a further charge involving a detailed examination of the Doctor's evidence. Such a request, if acceded to, would

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have resulted in the judge having to point out to the jury how far the evidence fell short of indicating that the accused was other than sane at the time of the shooting.

After considering all the evidence that had any relevance to the defence of insanity I am satisfied that, in the particular circumstances of this case, the charge on this branch of the matter, considered as it must be in the light of all the evidence in the record, was sufficient in law and more favourable to the accused than it could have been if the judge had made a detailed analysis of Dr. Spaner's evidence before the jury.

For these reasons I am, with respect, of opinion that the Appellate Division should have rejected the ground of appeal on which it based its judgment and, so far as that ground is concerned, should have dismissed Borg's appeal.

This, however, is not the end of the matter. When the appeal came before the Appellate Division the duty of that Court was prescribed by subs. 3 of s. 583A of the *Criminal Code* which reads as follows:

> (3) The court of appeal, on an appeal pursuant to this section, shall
>
> (*a*) consider any ground of appeal alleged in the notice of appeal, if any notice has been given, and
>
> (*b*) consider the record to ascertain whether there are present any other grounds upon which the conviction ought to be set aside or the sentence varied, as the case may be.

The Appellate Division having come to the conclusion that the supposed defects in the charge of the learned trial judge to the jury relating to the defence of insanity necessitated the quashing of the conviction and the ordering of a new trial, it became unnecessary for that Court to consider, and consequently it did not consider, any grounds of appeal alleged in the Notice of Appeal or which might have been ascertained by a consideration of the record as required by clause (*b*), quoted above, other than the ground on which it decided to allow the appeal.

In these circumstances I have reached the conclusion that the duty cast upon the Appellate Division by s. 583A(3) devolves upon this Court and, while I do not doubt our power to do so, it is my opinion that it would not be proper for us to refer the matter back to the

Appellate Division to consider all possible grounds of appeal other than the one upon which the judgment of that Court was based.

The question of our power to make a final disposition of the appeal appears to me to be settled by the decision of this Court in *The Queen v. McKay*[3]. In that case McKay had been convicted before LeBel J. and a jury on the charge that he and others being armed with offensive weapons did unlawfully assault one Robson with intent to rob. An appeal to the Court of Appeal was allowed by a judgment of the majority, Laidlaw and MacKay JJ.A., on the ground of law that there was no evidence to go to the jury, the conviction was accordingly quashed and a verdict of acquittal directed; Hogg J.A., dissenting, held that there was legal evidence against McKay upon which the jury were entitled to find him guilty. On appeal by the Crown to this Court the majority, Kerwin, Taschereau, Kellock and Fauteux JJ., held that Hogg J.A. was right in law and that the appeal should be allowed.

However, McKay in his Notice of Appeal to the Court of Appeal had asked leave to appeal on questions of fact. The Court of Appeal after deciding that there was no evidence to go to the jury had not proceeded to determine whether, even if there was such evidence, the verdict should be set aside as unreasonable. Kerwin J., as he then was, dissenting in this regard, was of opinion that the proper order to be made in these circumstances on an appeal by the Crown (which he differentiated from an appeal by the accused) was to remit the case to the Court of Appeal in order that it might, if leave had been given or should be given, pass upon the question as to whether the verdict was unreasonable in the light of all the evidence. This view was decisively rejected in the judgment of the other members of the Court who formed the majority, which was delivered by my brother Fauteux.

After quoting, in abbreviated form, s. 1024 of the *Criminal Code,* as then in force, and s. 46 of the *Supreme Court Act* as follows:

> 1024. The Supreme Court of Canada shall make such rule or order thereon, either in affirmance of a conviction or for granting a new trial, or otherwise . . . as the justice of the case requires.

[3] [1954] S.C.R. 3, 17 C.R. 412, 107 C.C.C. 304.

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46. The Court may . . . give the judgment . . . which the court whose decision is appealed against, should have given . . .

Fauteux J. examined a number of authorities and continued, at pp. 6 and 7:

It is true that in each of these cases, the appeal, contrary to what is the situation in the present instance, was entered by the accused and not by the Crown. But the suggestion that this difference as to the person appealing calls for a distinction in law as to the powers of this Court finds, in my respectful view, no support, either in the enactments defining them or in the above judicial pronouncements interpreting such enactments.

* * *

On an exhaustive review of the evidence, it does not appear that the verdict of the jury was unreasonable.

In this view, it would not, in my opinion, be consonant with the diligence required in the proper administration of justice in criminal matters to return this case to the Court of Appeal in order that it may pass on that question, i.e., whether the verdict is unreasonable, which this Court is in as good a position as the former to determine.

The power given to this Court by s. 600(1) of the *Criminal Code*, now in force, is at least as wide as that conferred by s. 1024 above referred to. It reads:

600. (1) The Supreme Court of Canada may, on an appeal under this Part, make any order that the court of appeal might have made and may make any rule or order that is necessary to give effect to its judgment.

Having formed the opinion that we have the necessary authority to make a final disposition of this case and that, to use the words quoted above, "it would not be consonant with the diligence required in the proper administration of justice in criminal matters" to do otherwise, I have not only considered every ground set out in the Notice of Appeal to the Appellate Division and those referred to in the reasons delivered in that Court but I have read with care the whole of the record to ascertain whether there are present any other grounds upon which the conviction ought to be set aside.

As a result, I have reached the conclusion that the trial was conducted throughout with scrupulous fairness to the accused, that in its course there was no error in law, that no valid exception could be taken to the charge of the learned trial judge to the jury and that the verdict was fully supported by the evidence. I am satisfied that there are no grounds upon which the conviction ought to be set aside.

Because there was some discussion in argument as to the possible application of the provisions of s. 592 (1)(*b*)(iii) of the *Criminal Code*, which enacts that even where there has been error in law at the trial the Court of Appeal may dismiss an appeal against a conviction if of opinion that no substantial wrong or miscarriage of justice has occurred, I wish to make it clear that I am not basing my conclusion in any way upon that clause; there is no need to invoke it.

I would allow the appeal, set aside the judgment of the Appellate Division and restore the verdict at the trial.

The judgment of Hall and Spence JJ. was delivered by

HALL J. (*dissenting*):—The facts are fully set out in the reasons of my brother the Chief Justice. The only real defence which was being put forward at the trial on behalf of Borg was that of insanity. The fact of the killing of the police officer was not in dispute. It was admitted in Borg's confession and proved conclusively by the verbal testimony and that fact was recognized in the reasons of the learned Chief Justice of Alberta.

With deference to contrary opinion, I would dismiss the appeal. As I see it, the learned trial judge misdirected the jury on the defence of insanity in that he failed to instruct them that there was evidence that Borg was suffering from a disease of the mind, and while an irresistible impulse was not of itself a defence the evidence that the irresistible impulse was a manifestation of a disease of the mind was evidence to be considered by them in the light of Dr. Spaner's testimony.

I think, too, that the learned trial judge should have reviewed in part what Dr. Spaner had said and how the law as to insanity as a defence should be applied to the facts as they found them. The law in this regard is clear. In *Azoulay v. The Queen*[4], Taschereau J. (as he then was) said:

> On the second point, I agree with the Chief Justice of the Court of King's Bench. *The rule which has been laid down, and consistently followed is that in a jury trial the presiding judge must, except in rare cases where it would be needless to do so, review the substantial parts of the evidence, and give the jury the theory of the defence, so that they may*

[4] [1952] 2 S.C.R. 495, 15 C.R. 181, 104 C.C.C. 97.

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appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them. (*Spencer v. Alaska Parkers,* (1905) 35 Can. S.C.R. 362.) As Kellock J.A. (as he then was) said in *Rex v. Stephen et al,* (1944) O.R. 339 at 352: "It is not sufficient that the whole evidence be left to the jury *in bulk for valuation.*" The pivotal questions upon which the defence stands must be clearly presented to the jury's mind. Of course, it is not necessary that the trial judge should review all the facts, and that his charge be a minute record of the evidence adduced, but as Rivard, J.A. said in *Vincent v. Regem,* Q.R. (1932) 52 K.B. 38 at 46: (Emphasis added)

> Il faut admettre que l'adresse du juge est plutôt brève et que, tant sur les faits que sur les questions de droit, il n'a dit que l'essentiel, sans développement. Mais la question n'est pas de savoir si le juge a été court; il faut rechercher plutôt *s'il a omis le nécessaire.*

Regarding the defence of insanity, the learned trial judge said to the jury:

> Now then, the defence say assuming that all of this is found to be so as to fact, or a set of facts, that it was in fact the accused who fired the shot that killed Harvey and that Harvey was a policeman within the meaning of the section I read you, in the course of his duty, assuming all those things were found, and that the shot killed him, that he is not guilty of the charge against him because he was at that time insane. It is a defence of insanity. Now, I must say to you in that regard that where the defence places before you a defence of insanity, I must instruct you, as best I can, of the law that lies behind such defence.
>
> I think I should say to you at the outset that it is not all forms of insanity which furnish a defence according to law. It is only that type of insanity which carries with it certain attributes that will furnish a defence at law, and I refer you immediately to Section 16 of the Criminal Code because it is from this section that the law we are about to consider, comes, and Section 16 says this:
>
> "No person shall be convicted of an offence in respect of an act or omission on his part while he was insane."
>
> Section 2:
>
> "For the purposes of this section a person is insane when he is in a state of natural imbecility or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong."
>
> Then I think I should tell you the provisions of subsection (3) because they may apply. It says:
>
> "A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused him to believe in the existence of a state of things that, if it existed, would have justified or excused his act or omission."
>
> And then subsection (4) of that section is of extreme importance because it says this:
>
> "Every one shall, until the contrary is proved, be presumed to be and to have been sane."
>
> In other words, when we come to a defence of insanity, the accused person starts off with a presumption at law that he is sane, and the obligation rests on him to prove that he is insane within the meaning of this section, before it will serve him as a defence.

Now, I told you at the outset that the Crown was under an obligation to prove all that it must prove, beyond a reasonable doubt. But when the accused is called upon to establish insanity the obligation of proof is not that of proof beyond a reasonable doubt, it is proof by a preponderance of evidence. In other words, it establishes a set of facts from which the reasonable probability or the preponderance of probabilities points towards insanity, and that is to say, insanity within the meaning of this section, and it is only proof to that extent that the accused is called upon to establish, not proof beyond a reasonable doubt.

Now, I must tell you that at law a so called irresistible or uncontrollable impulse of itself is not a defence within the meaning of this Act unless that uncontrollable or irresistible movement or impulse stems from the existence of insanity as defined here, and when one looks to the reasonable rationality of it, it becomes so obvious why it is that a mere irresistible and uncontrollable impulse is not a defence. Because everybody would get such impulses with respect to any offence. The man who breaks a jeweller's window to steal a diamond, has an irresistible impulse to do it, and, therefore, is acquitted on the ground of insanity if one is guided by this mere proposition of irresistible impulse. It must be as this section says and I repeat it to you:

> "For the purpose of this section a person is insane when he is in a state of natural imbecility"

now there is no suggestion of that here—

> "or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong."

Now in this case I suggest that you can bear in mind as you weigh the entire evidence in this regard many things: you bear in mind, of course, the evidence that was given by the accused's sister of his background and life; you bear in mind what we have learned of the man through the statements, or, to the extent that the statement is before you, and we bear in mind the evidence that was given by Dr. Spaner. All of those things together form the evidence that you consider.

I explain to you that the evidence of an expert is merely evidence. Just because an expert says that something is so, doesn't mean that it is. The evidence of experts is weighed along with all other evidence. An expert's evidence, by a jury or by a Judge, for that matter, can be accepted in whole or disregarded in whole or accepted in part and disregarded in part. There is no complete sanctity of evidence because it has been given by an expert.

But the thing that strikes me as being of importance to consider, you may not think so, but I think you should bear it in mind, is that in the statement which the accused gave to the police and to the extent that it's before you, he winds up by saying, he speaks of having been hit by the bullet which the police officer fired at him; he says "It knocked me to the floor. I then thought what's the use, I caused enough grief in my life and then gave myself up."

This is at least some indication gentlemen, as to whether or not the mind of the accused was such that he appreciated the nature and quality of his act and as to whether or not it was wrong, and these things never are conclusive one direction or another, but it is evidence of some weight to consider.

You weigh in your minds the whole of the evidence that you have heard because it is your province and your province alone to conclude

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whether or not, on a balance of probabilities, the accused has satisfied you that he was insane within the meaning of the Act that I read you, and if he has done so, of course, your verdict then would be not guilty but insane.

As will be seen, his only reference to the evidence of Dr. Spaner is in the paragraph:

Now in this case I suggest that you can bear in mind as you weigh the entire evidence in this regard, many things: you bear in mind, of course, the evidence that was given by the accused's sister of his background and life; you bear in mind what we have learned of the man through the statements, or, to the extent that the statement is before you, *and we bear in mind the evidence that was given by Dr. Spaner.* All of those things together form the evidence that you consider.

(*Emphasis added*)

There were parts of Dr. Spaner's evidence which should have been drawn to the jury's attention as they related specifically to whether, when Borg killed Constable Donald Archibald Harvey, he was incapable of appreciating the nature and quality of his act or of knowing that it was wrong. Dr. Spaner had testified in chief as follows:

I felt that Leonard Borg was suffering *from a mental illness, or a disease of the mind* which is called a psychopathic state. There are many types of psychopathic states, and he fits into the classification of the aggressive, anti-social, impulse ridden type of personality. Another name for *a psychopath is a personality disorder.* (Emphasis added)

* * *

Q. Now, he has there stated that when the officers came, he shot one of them. In your opinion how was Borg's mind operating at this time? A. Well, in view of what I said at the very beginning, the impulse to kill can be operating right side by side with the—with the knowing part of his mind.

Q. Yes, and in your opinion how strong is this impulse? A. I don't think that the knowing part played any part at the moment the impulse comes up. It is swept aside.

Q. Pardon? A. It's swept aside.

Q. What is swept aside? A. The knowing part.

Q. The knowing part—? A. Of his mind.

Q. And when you say that, would you clarify it for us, doctor? A. I mean the impulse is the force that is operating. I would say to the exclusion of everything else.

Q. In the situation in which he found himself—and as he has said, he shot one of these men—is he able—. A. I missed a word there. Is he what?

Q. Is he able—and I'm going to ask you not to answer until my friend has a chance to say something, if he so wishes—is he able to resist—I will put it—yes, all right, go ahead. A. Is it all right to answer?

MR. MCGURK: Is he able to resist the impulse?

MR. STEER: Yes.

MR. MCGURK: I have objection.

MR. STEER: Go ahead—with His Lordship's permission.

THE COURT: Very good. A. My opinion is that the force of that impulse cannot be resisted at that moment.

Q. MR. STEER: Now, this irresistible impulse which you have described, is this a symptom of a disease of the mind, or is it the disease of the mind itself. A. I would say both.

Q. Pardon? A. Would you mind repeating the question?

Q. What I am trying to find out is: is this a symptom, this impulse, is it a symptom of something in Borg's mind? A. The answer to that part is yes, it is a symptom of what he suffers from, an impulse—psychopathic state.

Q. How far had this disease of the mind that you have described, progressed in Borg at this time? A. Well, I don't think there was any—much of anything else operating except the impulse to kill.

Q. How would this impulse that you have described affect Borg's mind as to knowing whether he was doing anything wrong? A. I think I said before, the moral issues of right and wrong are not operating at—when the impulse is at a certain intensity. That part of the mind is not operating.

Q. Now, had the impulse at this time as far as Borg is concerned reached that degree of intensity in your opinion, or had it not? A. Oh, I think by this time it had reached that height.

Q. Intensity? A. Yes.

Q. What is your opinion as to whether Borg could reason about this act which has been described, or which has been read to the jury? A. He wasn't reasoning at all. He was under the influence of this powerful force, or this irresistible impulse—or if it was, it was so insignificant that as far as I am concerned, it didn't play any part.

Q. Now, one other question, doctor: what is your opinion as to whether the act he has described was a considered act? A. Does that mean deliberate? That he deliberated?

Q. Yes. A. At the height of the impulse there is no deliberation.

and on cross-examination:

Q. Doctor, your opinion is that this irresistible—this impulse which can at its height be absolutely over-powering, is a symptom of a disease, and not a disease itself? A. It is the most characteristic symptom of the disease, yes. It is a symptom of a disease.

The learned trial judge's statement:

Now, I must tell you that at law a so called irresistible or uncontrollable impulse of itself is not a defence within the meaning of this Act unless that uncontrollable or irresistible movement or impulse stems from the existence of insanity as defined here . . .

although an accurate statement of the law, was misleading in the context on the case. In order for the defence of

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insanity to be established, the defence must prove on the balance of probabilities two propositions: (1) that the accused was suffering from a disease of the mind; and (2) that the disease rendered the accused incapable of appreciating the nature and quality of the act or knowing that the act is wrong. When an accused pleads insanity there is a sense in which it is true to say that irresistible impulse of itself is not a defence. However, there are two senses in which it is not true to say that irresistible impulse of itself is not a defence.

There is no legal presumption of insanity merely from the existence of an irresistible impulse. If an accused presents no medical evidence of disease of the mind but merely pleads that he was acting under an irresistible impulse, a jury is not entitled to infer that the man was insane. In that sense irresistible impulse is not of itself a defence. However, if there is medical evidence of disease of the mind as there was here and yet the only symptoms of that disease of the mind are irresistible impulses, the jury may conclude that the accused is insane. This specific point was dealt with by Lord Tucker in *Attorney-General for South Australia v. Brown*,[5] when, speaking for their Lordships of the Privy Council, he said at pp. 449-450:

> Their Lordships must not, of course, be understood to suggest that in a case where evidence has been given (and it is difficult to imagine a case where such evidence would be other than medical evidence) that irresistible impulse is a symptom of the particular disease of the mind from which a prisoner is said to be suffering and as to its effect on his ability to know the nature and quality of his act or that his act is wrong it would not be the duty of the judge to deal with the matter in the same way as any other relevant evidence given at the trial.

In that sense irresistible impulse is of itself evidence of a disease of the mind.

The evidence of irresistible impulse is also relevant to the issue of whether the accused is capable of appreciating the nature and quality of the act. It is not so relevant in England. The reason for the difference is that there is a difference between the definition of the defence of insanity in s. 16 of the Canadian *Criminal Code* and the state-

[5] [1960] A.C. 432, [1960] 1 All E.R. 734.

ment of the defence according to *M'Naghten's* case[6]. In *M'Naghten's* case the judges said that a man could not be held to be insane unless he did not know the nature and quality of the act he was doing. Section 16 of the Canadian *Criminal Code* states that a man cannot be held to be insane unless he did not appreciate the nature and quality of the act he was doing. A man operating under an irresistible impulse may have knowledge of the nature and quality of his act without appreciating its nature and quality. A man may be aware of an act without foreseeing and measuring its consequences. That is what Dr. Spaner testified to here when he said: "I think I said before, the moral issues of right and wrong are not operating at—when the impulse is at a certain intensity. That part of the mind is not operating."

Although what the learned trial judge said as previously quoted was good law, it was irrelevant law in context. There was no question of the jury concluding that Borg was insane simply because there was evidence that he acted under an irresistible impulse because there was medical evidence that Borg was suffering from a disease of the mind, and in failing to point out to the jury that the theory of the defence was that Borg had a disease of the mind and that the irresistible impulse was the manifestation of that disease, he failed to put the theory of the defence adequately to the jury.

The Chief Justice, being of the view that there was no error in law and that no valid exception could be taken to the charge of the learned trial judge to the jury, saw no need to invoke s. 592(1)(*b*)(iii) of the *Criminal Code* which authorizes that even when there has been an error in law at the trial, the Court of Appeal (and this Court has the same power) to dismiss the appeal if, notwithstanding that a ground of appeal may be decided in favour of the appellant, it is of opinion that no substantial wrong or miscarriage of justice has occurred. Having come to the conclusion that there was in this case an error in law, I should consider the provision of that section. I am of opinion that

[6] (1843), 10 Cl. & F. 200, 8 E.R. 718.

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the section should not be invoked here. I agree with Spence J. in *Colpitts v. The Queen*[7], where he said at 756:

> I am of the opinion that this Court cannot place itself in the position of a jury and weigh these various pieces of evidence. If there is any possibility that twelve reasonable men, properly charged, would have a reasonable doubt as to the guilt of the accused, then this Court should not apply the provisions of s. 592(1)(*b*)(iii) to affirm a conviction.

There is a further and separate issue which arises in this appeal and it is as to the power of this Court to make a final disposition of the appeal notwithstanding that the Appellate Division did not consider any grounds other than those set out in the reasons of the learned Chief Justice of Alberta. On this aspect of the appeal, I am fully in agreement with the Chief Justice that this Court has the jurisdiction to do what the Appellate Division was required to do by subs. (3) of s. 583A of the *Criminal Code*. My consideration of the record brought me to the conclusion that there was error in the learned trial judge's charge to the jury, but I have no doubt as to this Court's power under s. 46 of the *Supreme Court Act* to render the judgment which the Appellate Division could or should have given.

I would, accordingly, dismiss the appeal and confirm the decision of the Appellate Division of the Supreme Court of Alberta granting the appellant a new trial.

Appeal allowed and conviction restored, Hall and Spence JJ. dissenting.

Solicitor for the appellant: The Attorney General for Alberta, Edmonton.

Solicitors for the respondent: Milner & Steer, Edmonton.

[7] [1965] S.C.R. 739, 47 C.R. 175, [1966] 1 C.C.C. 146, 52 D.L.R. (2d) 416.

STEPHEN BOLESLAV ROMAN (*Defendant*) ..... APPELLANT;

1969
*Feb. 6, 7
Feb. 21

AND

JOHN DAVID CRIGHTON (*Plaintiff*) ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Damages—Joint action brought by plaintiff and executors of estate for return of shares—Executors successful at trial—Plaintiff failing in two Courts before succeeding in Supreme Court—Separate actions for damages for wrongful detention between date of original judgment and date when shares received—Claim for difference between price received and highest price at which shares traded during period—Executors' action successful on appeal—Whether Plaintiff's position differentiated from that of executors—Whether defendant entitled to relief under s. 35 of The Trustee Act, R.S.O. 1960, c. 408.

The plaintiff C instituted an action, in which he had as his co-plaintiff a trust company in its capacity as executor of the estate of F, against the defendant R. In this joint action the plaintiffs claimed, *inter alia,* the return to each of them of certain shares of stock. At trial the executors' claim for delivery of the shares was allowed but the corresponding claim of C was dismissed. From the trial judgment R and C appealed to the Court of Appeal which dismissed both appeals. On appeal to this Court, R's appeal was dismissed and C's appeal was allowed.

Following the decision of this Court in the joint action, both plaintiffs in that action commenced separate actions claiming damages for the wrongful detention of their shares between the date of the original judgment at the trial and the date when the shares were actually delivered. As R had been held to be a trustee of the shares for the plaintiffs, the damages claimed were the difference between the price actually realized by them for their shares and the highest price at which the shares were traded during the period. The executors of F proceeded with their action but, by consent, C's action was stayed pending the outcome of the F action. The latter action was dismissed at trial but an appeal was allowed by the Court of Appeal and the damages as claimed were awarded to the executors. An appeal from the Court of Appeal's decision was dismissed by this Court.

C then proceeded with his action which was dismissed after a trial without a jury. The trial decision was reversed on appeal and R then appealed from the judgment of the Court of Appeal to this Court.

The points in issue were: (i) whether the fact that C did not obtain a judgment in his favour with respect to the shares he claimed until his case had reached this Court differentiated his position in this case from that of the executors of F's estate in their case, and (ii) whether, assuming C to be entitled to damages on the same basis as were the executors of F, the appellant should be relieved from paying them under the provisions of s. 35 of *The Trustee Act,* R.S.O. 1960, c. 408.

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* PRESENT: Cartwright C.J. and Martland, Ritchie, Hall and Spence JJ.

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Held: The appeal should be dismissed.

On both of the points in issue the Court agreed with and adopted the reasons of the Court below. C was entitled to damages on the same basis as were the executors of F, and R was not entitled to relief under s. 35 of *The Trustee Act*.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Stewart J. Appeal dismissed.

Joseph Sedgwick, Q.C., for the defendant, appellant.

Terence Sheard, Q.C., and *Rodney Hull*, for the plaintiff, respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is an appeal by the defendant, Roman, from a judgment of the Court of Appeal for Ontario[1] dated February 23, 1968. The judgment appealed from reversed the judgment of Stewart J. who had dismissed the action with costs after a trial without jury. The judgment appealed from awarded the respondent $31,105.90 damages, suffered as a result of the wrongful detention of 7,143 shares of Consolidated Denison Mines Limited.

The action was tried on an agreed statement of fact and for the purposes of this appeal a brief summary thereof will be sufficient.

On August 4, 1955, the plaintiff Crighton instituted an action, in which he had as his co-plaintiff The Toronto General Trusts Corporation in its capacity of executor of the Estate of the late William Ray Featherstone, deceased, against the defendant Roman. This action may for convenience be termed the joint action and in it the plaintiffs claimed, *inter alia*, the return to each of them of 25,000 shares of the capital stock of North Denison Mines Limited held by the defendant Roman and later represented by 7,143 shares of Consolidated Denison Mines Limited.

The joint action came on for trial before Judson J., then a member of the Supreme Court of Ontario. By his judgment, (delivered on February 5, 1958), the claim of the executors of Featherstone for delivery of the shares was allowed but the corresponding claim of the plaintiff Crighton was dismissed.

[1] [1968] 1 O.R. 769, 67 D.L.R. (2d) 669.

From this judgment Roman and Crighton appealed to the Court of Appeal for Ontario which dismissed both appeals. They then appealed to this Court which by a judgment dated October 4, 1960, dismissed Roman's appeal from the judgment in favour of the executors of Featherstone and allowed Crighton's appeal. The judgment was entered on November 23, 1960, after a motion before the Court to settle its terms. (This judgment is reported *sub. nom. Crighton v. Roman, Roman v. Toronto General Trusts Corp.*[2]). Paragraphs 2 and 3 of the formal judgment read as follows:

2. AND THIS COURT DID FURTHER ORDER AND DECLARE that the respondent (defendant) Stephen Boleslav Roman is a trustee accountable to the appellant (plaintiff) John D. Crighton for twenty-five thousand (25,000) fully paid shares in North Denison Mines Limited or the equivalent thereof, being seven thousand, one hundred and forty-three (7,143) fully paid shares of Consolidated Denison Mines Limited found to be in the hands of the respondent (defendant) Stephen Boleslav Roman at the time of trial of this action, AND DID FURTHER ORDER AND ADJUDGE that the respondent (defendant) Stephen Boleslav Roman do forthwith deliver to the appellant (plaintiff) John D. Crighton the said shares or the equivalent thereof, being seven thousand, one hundred and forty-three (7,143) fully paid shares of Denison Mines Limited;

3. AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the respondent (defendant) Roman do account for and pay to the appellant (plaintiff) Crighton all dividends upon the shares so ordered to be delivered, including the amount of Ten thousand, seven hundred and fourteen Dollars and fifty cents ($10,714.50) declared and paid prior to the date of this judgment;

During the period between the decision of the Court of Appeal in the joint action and the final judgment of this Court two dividends aggregating $1.50 per share were paid on the shares of Consolidated Denison Mines Limited and the judgment of this Court directed that Roman, who was found to have been a trustee and who had received these dividends, should account to Crighton for them. This he did on January 30, 1961. In compliance with the judgment of this Court, Roman delivered to Crighton, certificates for 7,100 shares on December 8, 1960, and for the balance of 43 shares on December 20, 1960.

Following the decision of this Court in the joint action, both plaintiffs in that action namely, The Toronto General Trusts Corporation as executors of Featherstone, and Crighton, commenced separate actions claiming damages for the wrongful detention of their shares between the date of the

[2] [1960] S.C.R. 858, 25 D.L.R. (2d) 609.

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original judgment at the trial namely, February 5, 1958, and the date when the shares were actually delivered. As Roman had been held to be a trustee of the shares for the plaintiffs, the damages claimed were the difference between the price actually realized by them for their shares and the highest price at which the shares were traded during the period namely, $16\frac{5}{8}$ on June 16, 1958. The executors of Featherstone proceeded with their action but, by consent, Crighton's action was stayed pending the outcome of the Featherstone action.

By a unanimous judgment of the Court of Appeal for Ontario delivered by Schroeder J.A. damages as claimed were awarded to the executors of Featherstone (the judgment is reported in [1963] 1 O.R. 312). This decision was appealed to this Court which, in a judgment delivered by my brother Martland, agreed with and adopted the reasons of Schroeder J.A. See [1963] S.C.R. vi, 41 D.L.R. (2d) 290. Following this decision, Crighton proceeded with his action which is now the subject of this appeal.

There are two points only in issue in this appeal. The first point is whether the fact that Crighton did not obtain a judgment in his favour with respect to the shares he claimed until his case had reached this Court differentiates his position in this case from that of the executors of the Featherstone Estate in their case. The appellant claims that it does and that Crighton is entitled to no damages. The respondent claims that it does not and that he is entitled to damages on the same basis as the executors of the Featherstone Estate were found to be. If the respondent's contention on this point is upheld, there is no dispute as to the amount of damages awarded by the Court of Appeal.

The second point is whether, assuming Crighton to be entitled to damages on the same basis as were the executors of Featherstone, the appellant should be relieved from paying them under the provisions of s. 35 of *The Trustee Act*, R.S.O. 1960, c. 408. The appellant claims he should be so relieved whereas the respondent says there is no ground for relieving him. This contention was not raised by the defendant in the action brought by the executors of Featherstone; it was not dealt with by Stewart J. as that learned Judge had held that the action failed; it was rejected by the Court of Appeal.

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It should be noted that there was no conflict of view between any of the judges who dealt with Crighton's claim against Roman in the joint action as to whether Roman originally held the shares as trustee for Crighton as well as for Featherstone. The difference of opinion between the majority in this Court on the one hand and Kerwin C.J. and the judges in the Courts below on the other hand was as to whether Roman had received a valid release or assignment of Crighton's beneficial interest in the shares.

On both of the points in issue in this appeal which are set out above I find myself so fully in agreement with the reasons of Laskin J.A. that I am content to adopt them and do not find it necessary to add anything to what he has said.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Smith, Rae, Greer, Toronto.

Solicitors for the plaintiff, respondent: Strathy, Archibald, Seagram & Cole, Toronto.

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*Mar. 7
Apr. 29

J. R. BALDWIN .....APPELLANT;

AND

YVES POULIOT .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Pilot—Cancellation of license for violation of by-law—Whether pilotage authority had jurisdiction to order cancellation—Exchequer Court Act, R.S.C. 1952, c. 98—Canada Shipping Act, R.S.C. 1952, c. 29.

The appellant, as the pilotage authority for the district of Quebec, issued an order under which the license of the respondent as a pilot for that district was withdrawn on the ground that he had been guilty of consuming intoxicating liquor while on duty, contrary to the provisions of art. 19(1) of the General By-Law of the Quebec pilotage authority. The order withdrawing the license had been made following an inquiry held under art. 21 of the General By-Law. In an action commenced by the respondent in the Exchequer Court, the trial judge held that art. 19(1) of the General By-Law was null and void on the ground that the pilotage authority had exceeded its power to make by-laws under s. 329 of the *Canada Shipping Act*, R.S.C. 1952, c. 29. The pilotage authority was granted leave to appeal to this Court.

*PRESENT: Fauteux, Abbott, Martland, Ritchie and Hall JJ.

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Held: The appeal should be allowed.

In enacting s. 329(*f*) of the *Canada Shipping Act,* Parliament intended to confer upon a pilotage authority wide powers to regulate by by-law the conduct of pilots under its jurisdiction. Article 19(1) of the General By-Law, which prohibits the consumption of alcoholic beverages by a pilot while on duty or about to go on duty, was validly enacted under the authority of the said section 329.

Article 21 of the General By-Law, which authorizes the holding of such an inquiry as was held in this case, was valid.

Couronne—Pilote—Annulation d'un brevet de pilote pour violation de règlement—L'autorité de pilotage avait-elle juridiction pour ordonner l'annulation— Loi sur la Cour de l'Échiquier, S.R.C. 1952, c. 98— Loi sur la marine marchande du Canada, S.R.C. 1952, c. 29.

L'appelant, en sa qualité d'autorité de pilotage du district de Québec, a émis une ordonnance en vertu de laquelle le brevet de pilote de l'intimé lui a été retiré pour le motif qu'il s'était rendu coupable d'avoir consommé de la boisson enivrante pendant qu'il était de service, contrairement aux dispositions de l'art. 19(1) du règlement général de la circonscription de pilotage de Québec. L'ordonnance en question a été émise à la suite d'une enquête tenue sous l'art. 21 du règlement général. Dans une action instituée par l'intimé devant la Cour de l'Échiquier, le juge au procès a statué que l'art. 19(1) du règlement général était nul pour le motif que l'autorité de pilotage avait excédé son pouvoir de faire des règlements sous l'art. 329 de la *Loi sur la marine marchande du Canada,* S.R.C. 1952, c. 29. L'autorité de pilotage a obtenu la permission d'en appeler à cette Cour.

Arrêt: L'appel doit être accueilli.

Le Parlement a eu l'intention, en édictant l'art. 329(*f*) de la *Loi sur la marine marchande du Canada,* de conférer à l'autorité de pilotage des pouvoirs très étendus d'établir des règlements concernant la conduite des pilotes sous sa juridiction. L'article 19(1) du règlement général, qui défend la consommation par un pilote de liqueurs enivrantes pendant qu'il est de service ou à la veille de l'être, a été validement passé sous l'autorité dudit article 329.

L'article 21 du règlement général qui autorise la tenue d'une enquête du genre de celle qui a été tenue dans cette cause est valide.

APPEL d'un jugement du Juge Dumoulin de la Cour de l'Échiquier du Canada. Appel accueilli.

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada. Appeal allowed.

Paul Coderre, Q.C., for the appellant.

Raymond Caron, for the respondent.

The judgment of the Court was delivered by

ABBOTT J.:—Appellant, in his capacity as the pilotage authority for the pilotage district of Quebec (hereinafter referred to as the "Authority"), has appealed from a judgment of the Exchequer Court of Canada, dated November 12, 1968, annulling an Order of the Authority dated May 19, 1967, under which the licence of respondent as a pilot for the said pilotage district was withdrawn on the ground that he had been guilty of having consumed intoxicating liquor while on duty, contrary to the provisions of art. 19(1) of the General By-Law of the Authority (SOR 57-51 as amended). The said Order was made by the Authority, following an inquiry held under art. 21 of the said General By-Law.

On December 10, 1968, I granted leave to appeal from the said judgment, under s. 83 of the *Exchequer Court Act*, subject to respondent's right to argue before the Court as to whether such leave to appeal could be granted. At the hearing before us, counsel for both parties agreed that leave could be granted and I share that view. It seems clear that future rights of appellant as pilotage authority are affected by the judgment *a quo*.

In his action before the Exchequer Court, respondent asked (1) that the Order withdrawing his licence as a pilot be cancelled and annulled by reason of numerous irregularities and illegalities alleged in the Statement of Claim, and (2) that art. 19(1) of the General By-Law of the Authority be declared irregular, illegal and beyond the powers of the Authority to enact under the provisions of s. 329 of the *Canada Shipping Act*, R.S.C. 1952, c. 29, as amended.

Under Rule 149 of the Rules of the Exchequer Court, on the application of respondent, the President of the Exchequer Court ordered that the following questions of law be determined prior to a hearing on the merits.

1. Has the Exchequer Court jurisdiction to hear and determine the present action?
2. Was the Order of the Authority withdrawing the licence of respondent illegal and without effect, because arts. 19(1) and 21 of the General By-Law above referred to are *ultra vires*, the powers of the Authority?

At the hearing in the Court below, it was conceded that the Exchequer Court had jurisdiction in view of the

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decision of this Court in *Jones & Maheux v. Gamache*,[1] judgment in which was rendered on October, 1, 1968. As to the second question, the learned trial judge held that art. 19(1) of the General By-Law of the Authority was null and void, on the ground that the Authority had exceeded its power to make by-laws under s. 329 of the *Canada Shipping Act*, when it adopted the said article. This being sufficient to dispose of the question before him, he did not find it necessary to consider the validity of art. 21 of the said by-law.

The relevant portions of s. 329 and the said art. 19(1) read as follows:

Section 329:

Subject to the provisions of this Part, or of any Act for the time being in force in its pilotage district, every pilotage authority shall, within its district, have power, from time to time, by by-law confirmed by the Governor in Council, to

* * *

(*f*) make regulations for the government of pilots, and of masters and mates holding certificates enabling them to act as pilots on their own ships, and for ensuring their good conduct on board ship and ashore and constant attendance to and effectual performance of their duty on board and on shore, and for the government of apprentices, and for regulating the number thereof and for the holding of enquiries either before the pilotage authority or any other person into any matters dealt with in this Part; and without restricting the generality of the foregoing make regulations with respect to every licensed pilot or apprentice pilot who, either within or without the district for which he is licensed,

* * *

(iii) acts as pilot or apprentice pilot while under the influence of intoxicating liquor or narcotic drugs, while on duty or about to go on duty,

* * *

Article 19(1):

No pilot shall, while on duty or about to go on duty, consume intoxicating liquor or consume or use a narcotic drug; and the licence of any pilot contravening these provisions shall be withdrawn by the Authority.

This Court held in *Jones & Maheux v. Gamache* that the word "government" (in the French version "gouverne") contemplates the conduct of pilots. It seems evident to me that the consumption of alcoholic beverages while on duty comes under that heading.

The learned trial judge was of opinion that sub-para. (iii) of para. (*f*) of s. 329 had the effect of limiting the

[1] [1969] S.C.R. 119.

general provisions of the text of the section to cases where a pilot was "under the influence" of alcoholic beverages. In other words, it would have to be shown that his behaviour was in fact affected by the alcohol he had consumed. He, therefore, held that the Authority, in enacting art. 19(1) which prohibits the consumption of alcoholic beverages by a pilot while on duty or about to go on duty, had exceeded the power conferred by the statute. With the greatest respect for the opinion of the learned trial judge, I am unable to agree with that interpretation.

It seems clear that, in enacting s. 329(*f*), Parliament intended to confer upon a pilotage authority wide powers to regulate by by-law the conduct of pilots under its jurisdiction. That intention is evidenced by the fact that the operative text of para. (*f*), just prior to an enumeration of certain specified matters, contains the words "and without restricting the generality of the foregoing make regulations with respect to every licensed pilot or apprentice pilot, who, either within or without the district for which he is licensed,...". There then follows an enumeration of seven specified subjects.

A similar question was considered by this Court in *Re George Edwin Gray*.[2] The issue there related to the power of the Governor-in-Council to make regulations under a provision of the *War Measures Act*, which read as follows:

> The Governor in Council shall have power to do and authorize such acts and things, and to make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:—...

There followed an enumeration of six specified subjects. At p. 158, Fitzpatrick C.J. said this:

> But it is said that the enumeration of several matters in section 6 of the *"War Measures Act"* limits the effect of the general power conferred. The answer to this objection, as urged by Mr. Newcombe, would appear to be 1st, that the statute itself expressly provides otherwise; and 2nd, that the reason for introducing specifications was that those specified subjects were more or less remote from those which were connected with the war, and it was therefore thought expedient to declare explicitly that

[2] (1918), 57 S.C.R. 150, [1918] 3 W.W.R. 111, 42 D.L.R. 1.

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the legislative power of the government could go even thus far. The decisions of the Judicial Committee of the Privy Council, under section 91 of the *"British North America Act,"* upon similar language exclude such limited interpretation.

And at p. 167, Duff J., as he then was, said:

> The authority conferred by the words quoted is a law-making authority, that is to say an authority (within the scope and subject to the conditions prescribed) to supersede the existing law whether resting on statute or otherwise; and since the enactment is always speaking, *"Interpretation Act,"* section 9, it is an authority to do so from time to time. It follows that unless the language of the first branch of section 6 is affected by a qualifying context or by subsequent statutory modification the order-in-council of the 20th April (the subject matter of which in the above expressed view is indisputably within the scope of the *"War Measures Act"*) is authorized by it.
>
> There is no qualifying context. There is in the second branch of the section an enumeration (an enumeration let it be said rather of groups of subjects which it appears to have been thought might possibly be regarded as "marginal instances" as to which there might conceivably arise some controversy whether or not they fell within the first branch of the section) of particular subjects and a declaration that the powers thereby given to the Governor-in-council extended to these subjects, so enumerated; but there is also a declaration that this enumeration shall not have the effect of limiting the "generality" of the language of the first branch of the section—the language quoted above. Thus the context, instead of qualifying the preceding language (the language quoted), emphasizes the comprehensive character of it and pointedly suggests the intention that the words are to be comprehensively interpreted and applied.

As was the case in *Gray,* the enumeration of specified subjects in s. 329(*f*) does not have the effect, in my opinion, of limiting the general power to make by-laws regulating the conduct of pilots which is conferred under the section. It follows that art. 19(1) of the General By-Law was validly enacted under the authority of the said s. 329.

Respondent also challenged the validity of art. 21 of the General By-Law of the Authority which reads

Article 21

(1) Where a pilot is charged with having violated a provision of this By-law,

(*a*) the Authority may appoint a person to hold an inquiry to determine the validity of the charge; or

(*b*) with the consent of the pilot charged, the Superintendent may determine the validity of the charge.

(2) Where a person appointed pursuant to paragraph (*a*) of subsection (1) determines that the pilot charged has violated any of the provisions of this By-law, the Authority may impose on that pilot a penalty not exceeding two hundred dollars or withdraw or suspend his licence or both impose a penalty and withdraw or suspend his licence.

(3) Where the Superintendent, pursuant to paragraph (*b*) of subsection (1), determines that the pilot charged has violated any of the provisions of this By-law, the Superintendent may impose on that pilot a penalty not exceeding one hundred dollars.

(4) Any penalty imposed on a pilot pursuant to subsection (2) or (3) may be recovered by deduction from moneys owing to that pilot by the Authority and the Authority may suspend the licence of a pilot until the penalty imposed on him has been paid.

The relevant portion of s. 329 of the *Canada Shipping Act* under which this by-law was enacted reads:

Subject to the provisions of this Part, or of any Act for the time being in force in its pilotage district, every pilotage authority shall . . . have power . . . by by-law confirmed by the Governor in Council to . . . make regulations . . . for the holding of enquiries either before the pilotage authority or any other person into any matters dealt with in this Part;

Respondent submitted that art. 21 of the General By-Law is beyond the power of the Authority to enact on the ground that s. 329 does not authorize the Authority to enact a by-law in such general terms, without specifying the procedure to be followed on an inquiry and designating some person or persons other than the Authority to make such enquiry.

I am unable to agree with that submission. In my opinion the enquiry contemplated, under s. 329 of the Act and art. 21 of the General By-Law, is a purely administrative matter to ascertain facts. The power of the person appointed to conduct such enquiry is to make an enquiry as to fact and to report to the Authority. Any decision must be made by the Authority itself which is not bound to accept the finding of the person named to conduct the enquiry. In my view, art. 21 of the General By-Law of the Authority, which authorizes the holding of such an enquiry, is valid.

The present appeal is limited to the question of the validity of arts. 19(1) and 21 of the General By-Law of the Authority. We do not have to consider whether, on the merits, the Authority was justified in adopting the Order which it did withdrawing the respondent's licence.

The appeal should be allowed with costs, the judgment of the Exchequer Court set aside, and the record returned to that Court.

Appeal allowed with costs.

Solicitor for the appellant: D. S. Maxwell, Ottawa.

Solicitor for the respondent: R. Caron, Québec.

1969
*Feb. 26, 27
Mar. 31

THE CORPORATION OF THE TOWN OF TRENTON (*Defendant*) ..... APPELLANT;

AND

B. W. POWERS & SON LIMITED (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real property—Subdivision plan showing certain lands as public highways—Whether properties dedicated to public use and titles vested in municipality—Whether maker of plan owned properties in question at time plan prepared—Whether ad medium filum rule applied—The Beds of Navigable Waters Act, R.S.O. 1960, c. 32, s. 1.

A judgment at trial granted a declaration that the respondent company was the owner of certain lands and ordered the appellant municipality to pay damages for trespass. An appeal from the said judgment was dismissed by the Court of Appeal and the municipality then appealed further to this Court. The appellant contended that the two pieces of property in question had been dedicated to the public use and were public highways, the titles of which were vested in it. The respondent's defence was that there was never any dedication of either piece of property by an individual or corporation who had title to do so.

A subdivision plan of the Village of Trenton (as the municipality was then) prepared for one H on March 15, 1864, and registered on August 9, 1865, showed an unnamed street as a public highway as well as all of Ontario Street even though at that time the disputed area of Ontario Street was completely under water. By virtue of the force of certain statutory enactments the unnamed street and the disputed area of Ontario Street would have become public streets unless H did not own either piece of property at the time the plan was prepared.

Held: The appeal should be dismissed.

The unnamed street had been conveyed to an individual by H in 1850, long before his plan was registered. In the case of Ontario Street, H's title depended upon whether the *ad medium filum* rule applied. The appellant's argument that the rule did apply was foreclosed by s. 1 of *The Beds of Navigable Waters Act*, R.S.O. 1960, c. 32, which provides that where land bordering on a navigable body of water "has been heretofore or is hereafter granted by the Crown", the bed does not pass in the absence of an express grant of it. The root of title to that portion of Ontario Street shown to be under water on H's plan was a Crown grant of a 70-acre water lot made in 1876. In 1901 both properties had come into the ownership of the respondent's predecessor in title.

*PRESENT: Cartwright C.J. and Judson, Ritchie, Hall and Spence JJ.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of Landreville J. Appeal dismissed.

John Sopinka, for the defendant, appellant.

S. G. M. Grange, Q.C., and *J. W. V. Stephens,* for the plaintiff, respondent.

The judgment of the Court was delivered by

JUDSON J.:—This is an appeal from a unanimous judgment of the Court of Appeal[1] affirming a judgment at trial which granted a declaration that the respondent was the owner of certain lands and ordered the appellants to pay damages for trespass.

Two pieces of property in the Town of Trenton are the subject of this appeal. One consists of a portion of Ontario Street, which runs in an easterly direction from Foundry Street (which is a north-south street) to a point where it meets the other piece known as the unnamed street (hereafter referred to as Street X), which runs north, at an angle to the west, until it meets Sidney Street. Both pieces are located on the respondent's premises, and coal sheds and oil storage tanks occupy a considerable part of the Ontario Street extension, while part of Street X is covered by a community centre, the land for the centre being conveyed to the appellant by the respondent in 1956.

The appellant contends that these two pieces of property have been dedicated to the public use and are public highways, the titles of which are vested in it. The respondent's defence is that there was never any dedication of either piece of property by an individual or corporation who had title so to do. The Court of Appeal, after a detailed consideration of the instruments, plans and related documents submitted in argument, came to the conclusion that this was so and I agree.

Laskin J.A. thought the appellant's claim initially depended upon the first subdivision plan of the Village of Trenton (as it was then) prepared for one Sheldon Hawley on March 15, 1864, and registered on August 9, 1865. This showed Street X as a public highway as well as all of

[1] [1967] 2 O.R. 432, 64 D.L.R. (2d) 1.

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Judson J.

Ontario Street even though at that time the disputed area of Ontario Street was completely under water. And by virtue of the force of certain statutory enactments, Street X and the disputed area of Ontario Street would have become public streets unless Hawley did not own either piece of property at the time the plan was prepared. In his view it was clear that Hawley did not own either at the crucial time. Some fourteen years earlier, in 1850, he had made a grant of land, which included Street X, to one Allan Gilmour. This property, as a result of a consolidation of various properties in 1901, ended up in the hands of Gilmour & Co. Ltd., which is the predecessor in title of the respondent. This was a complete answer to the appellant's arguments based upon estoppel and s. 86(5) of *The Registry Act* as enacted by 1964 (Ont.), c. 102, s. 22, and its forerunners. In respect of the third argument in connection with Street X, that as there was some indication in some of the instruments or documents that Lot 37A included Street X, then it passed to the appellants under the tax arrears certificate respecting Lot 37A, dated September 20, 1937, it failed as the earliest instruments as well as the more recent indicated that these were considered to be two separate pieces of property. A misdescription was not enough to found a claim of title and that is all that had occurred here.

In the case of Ontario Street, Hawley's title depended upon whether the *ad medium filum* rule applied. In the opinion of Laskin J.A., it did not. He was disposed to hold that the *ad medium filum* rule did not apply to navigable rivers (of which the Trent is one) in Ontario. I agree with him. However, he did not rely upon this ground as he held that the appellant's argument was foreclosed by s. 1 of *The Beds of Navigable Waters Act*, R.S.O. 1960, c. 32, which was clearly retroactive and applicable. Thus the respondent's title to the disputed area of Ontario Street which can be directly traced from a grant made by the Crown to one John Gilmour on April 1, 1876, and recorded April 18, 1876, of a 70-acre water lot which included the disputed area and which ended up in the hands of Gilmour & Co. Ltd., in the consolidation of 1901, stood unaffected by the claim of the appellant.

This was really sufficient to dispose of the appeal. To summarize: Hawley had conveyed Street X long before his

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plan was registered; the root of title to that portion of Ontario Street shown to be under water on Hawley's plan is the Crown grant of the 70-acre water lot made in 1876. In 1901 both properties came into the ownership of Gilmour & Co. Ltd., the predecessor in title of B. W. Powers & Son Limited, the respondent.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Fasken & Calvin, Toronto.

Solicitors for the plaintiff, respondent: McMillan, Binch, Berry, Dunn, Corrigan & Howland, Toronto.

1969

*Feb. 5, 6
Mar. 10

WILFRED JOSEPH LAWSON .....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Valuation of closing inventory—Stock promoter—Valuation of shares—Specific identification—Certificate numbers—Stock exchange quotation—Cost to taxpayer or fair market value—Income Tax Act, R.S.C. 1952, c. 148, ss. 12(1)(e), 14(2).

The appellant was a mining stock promoter. As a result of his extensive trading in the shares of a mining company, he held, at the end of his fiscal year 1955, an inventory of 568,900 shares. He was assessed for income tax on the basis that the proper valuation for his inventory was his average cost of all the shares bought by him. This was computed by dividing his total purchase of 1,609,860 shares into the total cost of $608,229.62. The Exchequer Court upheld the Minister's assessment with a variation based on a shorter averaging period. The taxpayer appealed to this Court.

Held: The appeal should be dismissed.

The appellant's closing inventory could not be valued on any basis lower than the average cost of the shares as determined by the trial judge. The latter was fully justified in holding that there was no evidence that a reasonable programme of disposition of the inventory would have brought the market price below cost. No basis could therefore be found in the evidence for establishing a market value lower than cost.

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*PRESENT: Fauteux, Judson, Ritchie, Hall and Pigeon JJ.

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None of the different bases of computation submitted by the appellant to establish a cost lower than the cost determined by the trial judge could be accepted.

The method of "specific identification" by which one identifies the shares remaining in the inventory by an examination of the serial numbers on the certificates is inapplicable to company shares. As long as a shareholder continues to hold a certain quantity of shares none of his shares is distinguishable from any other.

No convincing evidence was given that the method known as "first in, first out" (FIFO) was a proper method for valuing such an inventory and it was not shown to be in use to any extent by persons in a situation similar to the appellant's.

The "project" method which consists in applying total receipts from the sales of some of the shares against the cost of all the shares sold or unsold—no sale being considered as yielding any profit until the entire cost of the venture is recovered—must be rejected for income tax purposes on the authority of *M.N.R. v. Anaconda American Brass Ltd.*, [1956] A.C. 85. What the appellant was really trying to accomplish by this method of accounting was to set up against the contingency that his inventory might drop in value, a reserve equal to his profit so far on the operation. Such a reserve is prohibited by s. 12(1)(*e*) of the *Income Tax Act*.

Revenu—Impôt sur le revenu—Évaluation d'un inventaire de fin d'année—Promoteur d'émissions de valeurs mobilières—Évaluation d'actions d'une compagnie—Identification spécifique—Numéros des certificats—Cote de la Bourse—Prix coûtant pour le contribuable ou juste valeur marchande—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 12(1)(e), 14(2).

L'appelant est un promoteur d'émissions d'actions minières. Comme résultat de son commerce considérable des actions d'une compagnie minière, il en détenait, à la fin de son année fiscale 1955, un inventaire de 568,900 actions. Il a été cotisé pour fins d'impôt sur le revenu d'après le principe que l'évaluation appropriée de son inventaire était le coût moyen de toutes les actions qu'il avait achetées. Le calcul a été fait en divisant l'achat total de 1,609,860 actions par le coût total de $608,229.62. La Cour de l'Échiquier, avec une modification basée sur une période plus courte pour le calcul de la moyenne, a maintenu la cotisation du Ministre. Le contribuable en appela à cette Cour.

Arrêt: L'appel doit être rejeté.

L'inventaire de fin d'année de l'appelant ne peut pas être évalué sur une base moindre que le coût moyen des actions tel que fixé par le juge au procès. Ce dernier était amplement justifié de statuer qu'il n'existait aucune preuve qu'un programme raisonnable d'écoulement de l'inventaire aurait fait baisser le prix du marché au-dessous du prix coûtant. En conséquence on ne peut trouver aucune base dans la preuve pour établir une valeur marchande moindre que le prix coûtant.

Aucune des bases de calcul proposées par l'appelant en vue d'établir un prix coûtant moindre que le prix coûtant fixé par le juge au procès ne peut être acceptée.

La méthode du «coût spécifique de chaque article» en vertu de laquelle on identifie les actions qui sont encore dans l'inventaire par un examen des numéros de série des certificats ne s'applique pas à des actions de compagnie. Tant qu'un actionnaire détient une certaine quantité d'actions, aucune de ses actions n'est distinguable des autres.

On n'a présenté aucune preuve concluante que le procédé du «premier entré, premier sorti» (FIFO) soit un procédé approprié à l'évaluation d'un tel inventaire et il n'a pas été démontré que ce procédé soit utilisé en général par des personnes dans une situation semblable à celle de l'appelant.

La méthode de la «comptabilité du projet» qui consiste à imputer le total des argents provenant de la vente de quelques-unes des actions au prix coûtant de toutes les actions vendues ou non vendues—c'est-à-dire qu'aucune vente n'est considérée comme donnant un profit tant que le prix coûtant entier de l'opération n'a pas été recouvré—doit être rejetée pour fins d'impôt sur le revenu vu la décision *M.N.R. v. Anaconda American Brass Ltd.*, [1956] A.C. 85. Ce que l'appelant tente en réalité d'accomplir par cette méthode de comptabilité est d'établir, contre l'éventualité d'une perte de valeur de son inventaire, une réserve égale au profit qu'il a réalisé à date. Une telle réserve est prohibée par l'art. 12(1)(*e*) de la *Loi de l'impôt sur le revenu.*

APPEL d'un jugement du Juge Cattanach de la Cour de l'Échiquier du Canada[1], en matière d'impôt sur le revenu. Appel rejeté.

APPEAL from a judgment of Cattanach J. of the Exchequer Court of Canada[1], in an income tax matter. Appeal dismissed.

R. E. Shibley, Q.C., and *M. L. O'Brien*, for the appellant.

M. A. Mogan and *G. V. Anderson*, for the respondent.

The judgment of the Court was delivered by

PIGEON J.:—Appellant is a mining stock promoter. In 1954 he "took over", as he says, Maneast Uranium Corporation Limited ("Maneast"). The shares were then quoted around 3 cents. He became president having effective control, distributed promotional material and started selling shares on the Toronto Stock Exchange between 20 and 34 cents. In October, he took down 100,000 treasury shares. In December, he entered into an underwriting agreement for 200,000 shares at 20 cents with an option on an additional 800,000 shares at 20 cents for the first 200,000

[1] [1965] 1 Ex. C.R. 64, [1964] C.T.C. 245, 64 D.T.C. 5147.

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shares, 25 cents for the next 200,000 shares, 30 cents for the following 200,000 shares and 35 cents for the balance. All these were taken down, the last two lots on May 10, 1955.

While selling as many shares as he could, appellant was also buying substantial quantities on the stock exchange in order, as he says, "to maintain the market". As a result of his operations he held, at the end of his fiscal year, May 31, 1955, an inventory of 568,900 shares. He was assessed for income tax on the basis that the proper valuation for this inventory was his average cost of all Maneast shares bought by him. This was computed at 37½ cents by dividing his total purchases of 1,609,860 shares (being 1,100,000 treasury shares plus 509,860 market shares) into the total cost of $608,229.62 (being $310,000.00 plus $298,229.62). However, on the appeal before the Exchequer Court, it being shown that on April 18 appellant had been in a "short position", respondent determined that the correct average cost was 34.1 cents per share on the basis of a shorter averaging period, from April 19 to May 31, 1955, and Cattanach J. ordered the assessment to be varied accordingly. Otherwise he dismissed the appeal without costs to either party.

The only question on the appeal to this Court is whether appellant's 1955 closing inventory should be valued on any basis lower than the average cost as above determined. Section 14(2) of the *Income Tax Act* reads:

> 14(2). For the purpose of computing income, the property described in an inventory shall be valued at its cost to the taxpayer or its fair market value, whichever is lower, or in such other manner as may be permitted by regulation.

As there is no other manner permitted by regulation in such a case, the only bases to be considered are cost and fair market value.

On the Toronto Stock Exchange the closing bid on May 31, 1955 was 67 cents per share. There were in that month 535,440 shares traded at prices ranging between a low of 49 cents and a high of 73 cents. In the following month, there were 1,184,560 shares traded between a low of 63 cents and a high of $1.03. Cattanach J. said:

> ...there was a very substantial volume of sales at prices greatly in excess of what the shares cost the appellant and the Toronto Stock Exchange continued to list Maneast shares at prices in excess of cost to the appellant for almost a year after the end of the taxation year. On the other hand, there was no evidence that a reasonable programme of disposition in

respect of the appellant's inventory as of the end of May would have brought the market price below cost. It may well be inferred that, if the appellant's whole inventory had been thrown on the market at one time, the price would have dropped to nothing. There was no evidence, however, that by a carefully planned programme, he could not have disposed of all the shares at a price equal to or in excess of his cost. The onus was on the appellant to show that the actual fair market value of the inventory at the end of May 1955 was less than cost and in my opinion the appellant has failed to discharge that onus.

As against this finding appellant says that he was under obligation by virtue of the Stock Exchange rules "to run an orderly market" and that this prevented him from selling any more shares than he did. However, the fact is that by the end of December 1955, his inventory was down to 123,980 shares, the high and low within that month being 41 cents and 30 cents.

In my view, the trial judge was fully justified in holding that there was no evidence that a reasonable programme of disposition of the inventory would have brought the market price below cost. Therefore, even on the assumption that in appellant's special circumstances the Stock Exchange quotation at the material date was not to be taken as the market value, no basis can be found in the evidence for establishing a market value lower than cost. No attempt was made to show what another promoter would have been willing to pay for acquiring appellant's inventory.

There remain to be considered the different bases of computation submitted by appellant to establish a cost lower than 34.1 cents per share.

One of the methods suggested is described as "specific identification". It is sought to be applied by identifying the shares remaining in the inventory by an examination of the serial numbers on the certificates that were held for appellant by his broker. This method was properly rejected because it is inapplicable to company shares. As was pointed out by Kerwin J. (as he then was) in *Canada China Clay Ltd. v. Hepburn*[2], "the distinction between a share of capital stock of a company and the certificate of such share is (to be) borne in mind...". As long as a shareholder continues to hold a certain quantity none of his shares is distinguishable from any other. Appellant's witness

2 [1945] S.C.R. 87 at 93, [1945] C.T.C. 91, [1945] 1 D.L.R. 273.

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Lachance, an expert accountant, said: "All shares are interchangeable one with the other". To endeavour to ascertain the cost by reference to the serial numbers of the certificates held would mean that the cost would be determined according to a criterion that has no relevance to the actual situation. The shares were clearly fungible things and the specific identification method was impossible of application.

Furthermore, as Cattanach J. noted, there were at least some 40,000 shares for which the origin of the certificates could not be traced. Appellant contended that the difficulty could be solved by valuing these at average cost. This contention is to be rejected because if in some way a portion of the inventory is valued on another basis, that portion cannot be used in striking an average, specially when the average largely reflects the excluded portion, the treasury shares. If all but some 40,000 shares are valued on the assumption that they are treasury shares the others must be valued as market shares. If this is done the result is a cost higher than the average calculated by the Minister.

The result is much the same if one attempts to apply the method known as "First in, first out" (Fifo). In order to arrive at a cost lower than the average it is necessary to apply this method on the assumption that treasury shares only were in the inventory. To make such a distinction is really not to apply Fifo because the very principle of every method of valuation is uniform application. In any case no convincing evidence was given that Fifo was a proper method for valuing such an inventory and it was not shown to be in use to any extent by persons in a situation similar to appellant's.

Appellant contends that the trial judge was in error in rejecting Fifo for the following reason:

> the evidence as to which stock certificates were used for particular sales did not lead to the conclusion that there was a tendency to use the oldest certificates first.

Appellant points out that in *Minister of National Revenue v. Anaconda American Brass Ltd.*[3], the Privy council held in favour of Fifo as a convenient assumption not as

[3] [1956] A.C. 85, [1956] 1 All E.R. 20, [1955] C.T.C. 311, 55 D.T.C. 1220, [1956] 2 D.L.R. (2d) 1.

corresponding with an actual user test. This does not invalidate Cattanach's main basis for the rejection of Fifo which is as follows:

> No evidence was given, however, that would lead to the conclusion that this assumption was closer to reality than the averaging basis adopted by the Minister.

This leaves for consideration the only costing method that would in fact yield a figure very substantially inferior to the average, namely, the "project" method of accounting. Shortly stated, this system consists in applying total receipts from the sales of *some* Maneast shares against the cost of *all* Maneast shares sold or unsold. In other words, no sale is considered as yielding any profit until the entire cost of the venture is recovered. It appears from some reported cases that the method is in fact applied by the Minister in the assessment of isolated transactions that do not fall within the description of a business in the ordinary sense but are assessable as such by virtue of the statutory definition (section 139(1)(*e*)): *Sissons v. Minister of National Revenue*[4]; *Weinstein v. Minister of National Revenue*[5]. However, the method is contended to be inapplicable to a regular business.

In my view, the decision in the *Anaconda* case is conclusive on that point. In that case, Lifo was rejected on the basis that it involved setting up as an element in valuing the inventory an "unabsorbed residue of cost" (at p. 101):

> It is in fact, so far as tax law is concerned, a novel and even revolutionary proposal that the physical facts should even where they can wholly or partly be ascertained be disregarded for the purpose of the opening and closing inventory and a theoretical assumption made which is based on a supposed "flow of cost" and an "unabsorbed residue of cost".

Seeing that the project method really consists in valuing the inventory by equating it with the unrecovered cost of the venture in Maneast shares, it must be rejected for income tax purposes on the authority of the *Anaconda* case.

Appellant laid great stress on the speculative character of the venture and endeavoured to liken it to a Christmas tree selling operation. He contended that as there was no proven value behind the Maneast shares they could, at any

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[4] [1968] C.T.C. 363, 68 D.T.C. 5236.
[5] [1968] C.T.C. 357, 68 D.T.C. 5232.

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Pigeon J.

time, become worthless like unsold Christmas trees after December 24. The comparison is inappropriate. There was no fixed time at which Maneast shares were sure to become worthless, on the contrary there was a possibility that they would become more valuable. As long as appellant's operation was going on the future was uncertain. What appellant is really trying to accomplish by the "project" method of accounting is to set up against the contingency that his inventory might drop in value, a reserve equal to his profit so far on the operation. This is contrary to a fundamental rule of the *Income Tax Act* that prohibits any "reserve, contingent account or sinking fund except as expressly permitted" (section 12(1)(*e*)). For this reason, no consideration can be given to what appellant testified concerning the extreme uncertainty of the operation:

> Most of those operations are really just glorified crap games. The purchasers of the shares buy them in the hope that if the market goes up they can make money out of the market. In the case of Maneast that was the situation. They were buying into an active market and that was the basis that we sold it on, that if we could get enough buyers into the market the price would go up and they would make a profit on the shares. Our customers were not interested as far as potentialities of the property were concerned; they were interested in what the stock was going to do.

Under our *Income Tax Act* if, for any reason foreseen or unforeseen, an inventory subsequently proves to be worth less than cost or fair market value at the closing date, the taxpayer is entitled to carry back one year and carry forward five years any resulting loss to the extent that it is not applied against income in the year in which it occurs. No alternative is given to set up a reserve against that contingency. This would amount to a deferment of income tax liability.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: J. G. McDonald, Toronto.

Solicitor for the respondent: D. S. Maxwell, Ottawa.

M.F.F. EQUITIES LIMITED .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1969
*Mar. 11
Apr. 22

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Sales tax—Margarine made in part from fish oil—Whether exempt from tax as a product of fish—Trade designation—Construction by reference to subsequent amendment rejected—Excise Tax Act, R.S.C. 1952, c. 100, ss. 30(1), 32(1), and Schedule III.

In the manufacturing of margarine, the appellant company used as the main component a fish oil in a proportion varying between 48 per cent and 90 per cent. The company claimed that its product was exempt from sales tax as being an edible product of fish within the meaning of Schedule III of the *Excise Tax Act*. The petition of right by which it sought to recover the sum of $355,412.48 it had paid under protest as sales tax during the period April 7, 1963 to February 8, 1964, was dismissed by the Exchequer Court. It was held that the fish oil, and the fish from which it was extracted, had become so obscured by the manufacturing processes and the addition of other ingredients that the resultant margarine could not be considered as a product of fish. The company appealed to this Court.

Held: The appeal should be dismissed.

The trade designation of "fish or marine oil margarine" was in such limited use that it could not be considered as of substantial weight in ascertaining the proper description of the goods for the purposes of the Act. The trial judge was fully justified in reaching the conclusion that according to the common understanding margarine was not a product of fish, even when in specialized trading circles a particular kind was known as fish oil margarine. The refined, bleached and deodorized oil was hydrogenated, a process altering its chemical nature to such extent that it was no longer a fish oil, but a derivative of fish oil.

The new Schedule III substituted in 1966 by s. 8 of 14-15 Eliz. II, c. 40, could not affect the construction of the schedule as it stood at the material time.

Revenu—Taxe de vente—Margarine fabriquée en partie avec de l'huile de poisson—Est-elle exempte de la taxe comme produit de poisson—Désignation commerciale—Loi subséquente sans effet sur interprétation—Loi sur la taxe d'accise, S.R.C. 1952, c. 100, art. 30(1), 32(1), et Annexe III.

La compagnie appelante utilisait comme ingrédient principal dans la fabrication de la margarine une huile de poisson dans une proportion variant de 48 pour cent à 90 pour cent. La compagnie prétend que son produit est exempt de la taxe de vente à titre de produit comestible de poisson au sens de l'Annexe III de la *Loi sur la taxe d'accise*. La pétition de droit en vertu de laquelle elle a cherché à recouvrer la somme de $355,412.48 qu'elle avait payée sous protêt

*PRESENT: Cartwright C.J. and Abbott, Ritchie, Hall and Pigeon JJ.

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comme taxe de vente durant la période du 7 avril 1963 au 8 février 1964, a été rejetée par la Cour de l'Échiquier. Il a été statué que l'huile de poisson, et le poisson dont elle est extraite, étaient devenus tellement modifiés par les procédés de manufacture et l'addition d'ingrédients supplémentaires que la margarine en résultant ne pouvait pas être considérée comme un produit de poisson. La compagnie en appela à cette Cour.

Arrêt: L'appel doit être rejeté.

L'usage de la désignation commerciale «margarine d'huile de poisson» ou «d'huile marine» est tellement limité qu'on ne peut pas le considérer pour vérifier la description appropriée de la marchandise pour les fins de la loi. Le juge au procès était amplement justifié de conclure que généralement on ne considère pas la margarine comme un produit de poisson, même lorsque dans les groupes commerciaux spécialisés une espèce particulière est connue comme margarine d'huile de poisson. L'huile raffinée, décolorée et déodorisée est hydrogénée, un procédé qui a pour effet de changer sa nature chimique à un tel point qu'elle n'est plus une huile de poisson, mais un dérivé d'huile de poisson.

La nouvelle Annexe III qui a été substituée en 1966 par l'art. 8 du Statut 14-15 Eliz. II, c. 40, ne peut influer sur l'interprétation de l'annexe telle qu'elle existait à l'époque en question.

APPEL d'un jugement du Juge Cattanach de la Cour de l'Échiquier du Canada[1], en matière de taxe de vente. Appel rejeté.

APPEAL from a judgment of Cattanach J. of the Exchequer Court of Canada[1], in a matter of sales tax. Appeal dismissed.

Gordon F. Henderson, Q.C., and *John D. Richard,* for the appellant.

D. H. Aylen and *John E. Smith,* for the respondent.

The judgment of the Court was delivered by

PIGEON J.:—In 1963 and 1964 appellant, then known as Monarch Fine Foods Limited, was manufacturing margarine. By its petition of right it seeks to recover the sum of $355,412.48 paid under protest for sales tax in respect of the sale of this product between April 7, 1963 and February 8, 1964. The claim for exemption is based on the contention that because a substantial proportion, varying between 48 per cent and 90 per cent, of the oil used as the

[1] [1969] C.T.C. 29, 69, D.T.C. 5039.

main component in the manufacture of this butter substitute was herring oil, it is to be considered as an edible product of fish within the meaning of the following item of Schedule III of the *Excise Tax Act* under the heading "Foodstuffs":

Fish and edible products thereof;

Cattanach J. dismissed the petition saying:

In my view, in order to determine whether a particular product falls within an expression such as "Fish and edible products thereof;" resort must be had to the common understanding of such words when used in relation to articles of commerce. The question here is, therefore, whether, in the ordinary use of words, margarine may be fairly regarded as falling within the words, "Fish and edible products thereof;" or more specifically, applying such a test: is margarine a product of fish?

I do not think that, in common parlance, the words "product of fish" can be considered as comprehending margarine, even though it contains fish oil as one of its principal ingredients. Margarine is itself a well known article of commerce and is neither marketed, purchased, nor thought of by the consumer as a product of fish.

It seems to me that the fish from which oil has been extracted and which is used in the manufacture of margarine, which is by no means the sole ingredient of the end product, has become so obscured by the processes to which it and the oil thereof has been subjected and by the oil being intermingled with substantial amounts of other ingredients from other sources, the whole of which is again the subject of an extensive manufacturing process, that the resultant margarine cannot be considered as a product of fish, even though the fish oil content may make the margarine a fish oil margarine and the labels thereon disclose the fish oil content.

Counsel for the appellant pointed out that before reaching the above stated conclusion, the trial judge had made a finding "that any margarine 40 per cent or over of the total oil content of which is fish oil is referred to in the trade as a fish or marine oil margarine". It must be noted however that this designation does not appear to be used in connection with retail sales. Fish or marine oil margarine is not sold to consumers as a fish product and is almost invariably sold with dairy products in the same way as vegetable oil margarine. A trade designation in such limited use cannot be considered as of substantial weight in ascertaining the proper description of the goods for the purposes with which we are concerned.

Reference was made to the decision of this Court in *Townsend v. Northern Crown Bank*[2]. In that case, the

[2] (1914), 49 S.C.R. 394, 20 D.L.R. 77.

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Pigeon J.

question was whether sawn lumber was a "product of the forest" within the meaning of s. 88 of the *Bank Act*. Duff J. (as he then was) said (at p. 398):

> This is only one example of the class of cases in which the court being loath and refusing to attempt to draw an abstract line, finds itself compelled to decide whether a particular concrete case falls on one side or on the other side of the line which theoretically must be found somewhere within given limits. In this particular case I prefer to say that according to the common understanding the articles in question would fairly be comprised within the description "products of the forest", and I think they are within the contemplation of the enactment we have to interpret.

In my view, the trial judge applying this test was fully justified in reaching the conclusion that according to the common understanding margarine was not a product of fish, even when in specialized trading circles a particular kind was known as fish oil margarine.

Furthermore, although in some cases fish oil was the main raw material, in other cases and for a very substantial quantity it was only approximately one half the main raw material, it being mixed with an equal or nearly equal quantity of vegetable oil. Also, it was shown that all the fish oil used was treated to remove any odour or colour identifying it with fish so that, for the consumer, the product would be undistinguishable from margarine made from vegetable oil only. Finally, the refined, bleached and deodorized oil was hydrogenated, a process altering its chemical nature to such extent that, as Dr. Sims said, it was "no longer a fish oil, but a derivative of fish oil".

In his argument in support of the judgment of the Exchequer Court, counsel for the respondent made reference to the new Schedule III of the *Excise Tax Act* substituted for the former one by s. 8 of 14-15 Eliz. II, c. 40 (assented to July 11, 1966). One of the new items is the following:

> 20. Oleomargarine and margarine for consumption in the Province of Newfoundland.

It was contended that this amendment of the statute could be considered in construing the former text on the same basis as this Court did consider an amendment of a zoning by-law in construing its original provisions in *Wilson v. Jones*[3]. I must point out that the two situations are

[3] [1968] S.C.R. 554, 68 D.L.R. (2d) 273.

entirely different. In the *Wilson* case, the amending by-law had been adopted long before the application for the building permit sought to be enjoined. Therefore, the amending by-law was to be considered as making one enactment together with the original by-law. In the present case, however, the tax sought to be recovered was paid in 1963 and 1964 and the petition of right filed in March 1964, long before the amending statute was enacted. In the absence of any declaratory provisions, the 1966 statute cannot have any retrospective operation and the construction of the schedule as it stood at the material time can, in no way, be affected by the later amendment.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitor for the respondent: D. S. Maxwell, Ottawa.

SA MAJESTÉ LA REINE .....APPELLANTE;

ET

LOUIS-PHILIPPE RIOUX .....INTIMÉ.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Droit criminel—Possession de films obscènes—Films montrés par l'accusé à des amis dans son appartement—S'agit-il de possession aux fins de les mettre en circulation—Code criminel, 1953-54 (Can.), c. 51, art. 150(1)(a).

L'intimé a été acquitté de l'accusation d'avoir eu en sa possession des films obscènes aux fins de les mettre en circulation, contrairement aux dispositions de l'art. 150(1)(*a*) du *Code criminel*. La possession des films et leur projection en trois occasions devant une dizaine de personnes ont été admises. L'intimé a aussi admis que les films étaient obscènes. La Cour d'appel a confirmé le jugement de première instance. La Couronne en appela à cette Cour.

Arrêt: L'appel doit être rejeté.

La Cour d'appel a statué avec raison que le fait de montrer des images obscènes à un ami ou de projeter un film obscène dans l'intimité de son foyer n'est pas en soi un crime, ni ne suffit pas pour établir l'intention de les mettre en circulation. La mise en circulation dont parle l'art. 150 du Code doit avoir un caractère public.

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*CORAM: Les Juges Fauteux, Abbott, Judson, Hall et Pigeon.

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LA REINE v. RIOUX

Criminal law—Possession of obscene films—Films showed by accused to friends in own residence—Whether possession for the purpose of circulation—Criminal Code, 1953-54 (Can.), c. 51, s. 150(1)(a).

The respondent was acquitted on a charge of having in his possession obscene films for the purpose of circulation, contrary to s. 150(1)(*a*) of the *Criminal Code*. The possession of the films and their showing on three occasions to some ten persons were admitted. The respondent admitted also that the films were obscene. The Court of Appeal affirmed the judgment at trial. The Crown appealed to this Court.

Held: The appeal should be dismissed.

The Court of Appeal has rightly concluded that the showing of obscene pictures to a friend or of showing an obscene film within an individual residence does not *per se* constitute a criminal offence and is not sufficient to establish the intention to circulate the films. The word "circulation" in s. 150 must involve some public element.

APPEAL by the Crown from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], affirming a judgment acquitting the respondent. Appeal dismissed.

APPEL par la Couronne d'un jugement de la Cour du banc de la reine, province de Québec[1], confirmant un jugement qui avait acquitté l'intimé. Appel rejeté.

Louis Carrier et *Jacques Gagné,* pour l'appelante.

A. P. Casgrain, c.r., pour l'intimé.

Le jugement de la Cour fut rendu par

LE JUGE HALL:—L'intimé, Louis-Philippe Rioux, a été accusé le 19 avril 1967 d'avoir:

Au cours des années 1964 et 1965 et spécialement en octobre 1964 et aux mois de mars, avril et décembre 1965 à Rimouski, dans le district de Rimouski, illégalement, malicieusement et criminellement eu en sa possession des films obscènes aux fins de les mettre en circulation, commettant ainsi l'offense prévue à l'article 150, paragraphe 1-*a* du Code Criminel avec référence à l'article 154 paragraphe *a*.

Le 29 mai 1967, le prévenu enregistra un plaidoyer de non-culpabilité et opta pour un procès devant un juge sans jury lequel eut lieu le 7 juillet 1967 devant le Juge Jean-Paul Bérubé de la Cour des Sessions de la Paix, district de Rimouski.

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[1] [1968] B.R. 942.

En date du 15 juin 1967, l'intimé ainsi que le procureur de la Couronne produisirent pour valoir comme preuve dans la présente cause une admission de faits dans laquelle certains éléments de l'infraction étaient admis, notamment:

1. Le prévenu admet que des films ont été trouvés en sa possession par la Police Provinciale à son appartement en mai 1965;
2. Le prévenu admet que lesdits films sont obscènes au sens prévu par le Code Criminel, à l'article 150, paragraphe 1-*a*;
3. Le prévenu admet que lesdits films obscènes ont été projetés sur écran à son appartement par lui-même et ont été vus par une dizaine de personnes en octobre 1964 et en mars-avril 1965;
4. Les parties admettent que les présentes admissions constituent la preuve complète de part et d'autre, se réservant, cependant, tout droit de plaider sur toutes questions de droit qui se soulèvent dans le présent procès et de donner chacun leur interprétation de la preuve ainsi soumise.

Il n'y eut aucune enquête dans cette cause et aucun témoin ne fut entendu.

Le Juge de première instance en date du 8 septembre 1967 acquittait le prévenu de l'accusation telle que portée contre lui. Le 13 juin 1968, la Cour du banc de la reine[1], formée des honorables Juges Pratte, Hyde et Rinfret, confirmait le jugement de première instance et rejetait l'appel de la Couronne avec dissidence du savant Juge Rinfret.

La possession des films et la projection de ces films en trois occasions devant une dizaine de personnes sont admises; les films ont été jugés obscènes et ceci est également admis par l'accusé lui-même.

La seule question qui se pose est de savoir si le prévenu les avait en sa possession «aux fins de les mettre en circulation».

Le savant Juge de première instance a dit dans ses motifs:

> Pour ma part, je crois que la mise en circulation dont parle l'article 150 du Code criminel doit avoir un caractère public, tout comme les autres actions défendues par le même article, soit la publication et la distribution de tels objets. Le fait que dans le même article la mise en circulation soit juxtaposée au mot «publication» qui contient le mot «public» et au mot «distribution», me convainc que la mise en circulation doit avoir un caractère public.

Dans la Cour d'appel, le Juge Pratte a dit:

> Selon le sens ordinaire des mots, mettre une chose en circulation c'est la faire passer de main en main, ce qui évoque l'idée de dessaisisse-

[1] [1968] B.R. 942.

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ment, temporaire ou définitif: ce que l'on garde pour soi n'est pas en circulation. Mais l'on invoque une décision de la Cour d'Appel de la Nouvelle-Écosse (Regina v. Berringer, 122 C.C.C., 350) pour prétendre que l'article 150 vise à prévenir toute communication d'images ou autres choses obscènes, et que par conséquent, les mots «mettre en circulation» doivent être entendus de manière à comprendre même le seul fait de montrer privément une image obscène. Or, dit-on, projeter un film, c'est en faire voir les images, donc les mettre en circulation.

Sauf tout le respect dû aux tenants de cette opinion, je ne suis pas d'accord; et cela pour les raisons que voici.

D'abord, s'agissant de matière pénale, les termes employés par le législateur doivent être pris dans leur sens ordinaire: c'est une règle fondamentale d'interprétation.

En second lieu, il se trouve que la communication, par la vue, d'une image obscène, est prévue au paragraphe (2)*a* de l'article 150 ci-après:

> «Commet une infraction, quiconque, sciemment et sans justification ni excuse légitime, vend, expose à la vue du public, ou a en sa possession à une telle fin, quelque écrit, image, modèle, disque de phonographe ou autre chose obscène;»

Les termes de cette disposition font voir clairement que le législateur a entendu faire une distinction entre la mise en circulation (art. 150(1)*a*), d'une part, et l'exposition à la vue d'autre part (art. 150(2)*a*). Si l'interprétation donnée dans l'arrêt précité devait être suivie, il faudrait conclure que le fait de montrer une image obscène, que ce soit privément ou en public, est toujours un acte criminel; et comme l'article 154 édicte la même peine pour la mise en circulation que pour l'exposition à la vue du public, il s'ensuivrait que la disposition du paragraphe 2*a* concernant l'exposition à la vue du public serait absolument superflue. Or, on sait que le législateur ne parle pas inutilement.

Si donc l'exposition «à la vue du public» est mentionnée dans le paragraphe 2*a*, c'est que le législateur a voulu que celle-là seule, et non pas l'exposition privée, constitue un crime.

Je dirais donc que le fait de montrer des images obscènes à un ami ou de projeter un film obscène dans l'intimité de son foyer n'est pas en soi un crime, ni ne suffit pour établir l'intention de les mettre en circulation, encore qu'il puisse aider à prouver cette intention. Si, par exemple, il était établi, en l'espèce, que Rioux avait projeté ces films en vue de trouver un acheteur ou un emprunteur, l'accusation serait prouvée. Mais tel n'est pas le cas. Le fait que Rioux ait eu ces films en sa possession pendant plusieurs mois porte plutôt à penser qu'il les a projetés pour sa propre satisfaction et celle de ses amis, plutôt qu'avec l'intention de les mettre en circulation.

et le Juge Hyde:

I see no intent by the use of the word "circulates" or "circulation" to broaden the offence. Dissemination by circulation must be of a public nature. I think of circulation as used in reference to a circulating library or a newspaper or periodical. The Shorter Oxford Dictionary, for example, gives "To pass from place to place, from hand to hand, or from mouth to mouth; to pass into the hands of readers, as a newspaper". The recently published Random House Dictionary equates it with distribution, thus: "To be distributed or sold, especially over a wide area".

Before I am prepared to hold that private use of written matter or pictures within an individual's residence may constitute a criminal offence,

I require a much more specific text of law than we are now dealing with. It would have been very simple for parliament to have included the word "exhibit" in this section if it had wished to cover this situation.

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Je souscris aux motifs de ces savants Juges et je ne crois pas nécessaire de rien y ajouter. En conséquence je rejetterais l'appel.

Appel rejeté.

Procureur de l'appelante: L. Carrier, Québec.

Procureurs de l'intimé: Casgrain, Casgrain & Crevier, Rimouski.

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

1969
*Mar. 20
May 16

AND

EDGELEY FARMS LIMITED ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Company incorporated to acquire land—No definite intention as to exploitation or disposition—Long-term lease granted with option to buy—Profits from exercise of option and from expropriation—Whether business profits or capital gains—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e).

The appellant company was incorporated in December 1958 for the purpose of acquiring 350 acres of farm land in a rapidly developing urban area. There was no fixed plan as to what the company would do with the property. The farming operations were gradually brought to an end. In 1960, the company leased the property for 25 years to a lessee who was given the option to purchase the land in its entirety or in parcels of not less than 10 acres. In 1962, the lessee exercised his option on part of the land, and in 1963 an additional part was expropriated. The profits realized by the company on the sale and on the expropriation were assessed by the Minister as profits from a business. The assessments were set aside by the Exchequer Court on the ground that the company had committed itself to holding the land as income producing land for 25 years and that the option clause in no way constituted a dedication of the land to a trading operation. The Minister appealed to this Court.

Held: The appeal should be allowed.

The earlier indecision of the company was resolved when the company gave the lease and option. The option was all important. It was the method adopted by the company that put through its real estate transactions. The company was selling its lands in the course of the operation of a business for profit. Consequently, the profits in question were income.

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*PRESENT: Cartwright C.J. and Abbott, Judson, Hall and Spence JJ.

1969

MINISTER OF NATIONAL REVENUE v. EDGELEY FARMS LTD.

Revenu—Impôt sur le revenu—Compagnie formée pour acquérir une propriété—Intention d'exploiter ou de disposer non arrêtée—Bail à long terme accordé avec faculté d'achat—Profits provenant de l'exercice de l'option et de l'expropriation—S'agit-il de profits provenant d'une entreprise ou de gains en capital—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 3, 4, 139(1)(e).

La compagnie appelante a été constituée en corporation en décembre 1958 aux fins d'acquérir une ferme de 350 acres dans un endroit où le développement urbain allait en accélérant. La compagnie n'avait pas décidé ce qu'elle ferait de la propriété. Elle a graduellement mis fin à l'exploitation agricole. En 1960, la compagnie a loué la propriété pour 25 ans à un locataire à qui elle a donné la faculté d'acheter le terrain en totalité ou en parcelles de pas moins de 10 acres. En 1962, le locataire a opté pour l'achat d'une partie de la propriété, et en 1963 une partie additionnelle a été expropriée. Les profits réalisés par la compagnie de la vente et de l'expropriation ont été cotisés par le Ministre comme étant des profits provenant d'une entreprise. Les cotisations ont été mises de côté par la Cour de l'Échiquier pour le motif que la compagnie s'était engagée pour 25 ans à garder la propriété comme propriété produisant un revenu et que la clause d'option ne constituait pas une dédicace de la propriété comme opération commerciale. Le Ministre en appela à cette Cour.

Arrêt: L'appel doit être accueilli.

L'indécision que la compagnie a montrée au début est disparue lorsqu'elle a accordé le bail et l'option. L'option est de toute importance. C'est la méthode que la compagnie a adoptée pour faire ses transactions immobilières. La compagnie a vendu sa propriété dans le cours de l'exploitation d'une entreprise ayant pour but de faire des profits. Les profits en question étaient donc un revenu.

APPEL d'un jugement du Président Jackett de la Cour de l'Échiquier du Canada[1], en matière d'impôt sur le revenu. Appel accueilli.

APPEAL from a judgment of Jackett P. of the Exchequer Court of Canada[1], in an income tax matter. Appeal allowed.

G. W. Ainslie, Q.C., and *J. Halley*, for the appellant.

W. D. Goodman, Q.C., for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—This is an appeal from a judgment of the Exchequer Court[1] which allowed an appeal from assessments made against Edgeley Farms Limited for its 1962 and 1963 taxation years. The 1962 assessment was on a

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[1] [1968] 2 Ex. C.R. 375, [1968] C.T.C. 240, 68 D.T.C. 5174.

profit of $23,375 made by the company by selling part of an area of land which it purchased in 1959. The 1963 assessment was on a profit of $3,100 that the company had made as a result of an expropriation of another part of the same area of land. The assessments were set aside on the ground that the profits in question were not profits from a business. On this appeal the Minister contends that the assessments for the 1962 and 1963 taxation years were on such profits.

The company was incorporated on December 31, 1958, to acquire the rights of a syndicate which had an agreement to buy lots 6, 7 and 8, Concession 5, Township of Vaughan, containing approximately 350 acres, for the sum of $497,000. The sale was closed on the payment of $150,000 cash and by giving back two mortgages, one for $150,000 and the other for $197,000. The mortgage given back provided for the repayment of principal at the rate of $5,000 per annum on each mortgage and also gave the company the privilege of obtaining a partial discharge on 5 acre lots upon paying the proportionate amount of principal.

At the time when the company bought the lands they were being operated as a farm by two estates. The company gradually brought the farming operations to an end and by 1960 had disposed of all the livestock and farm machinery. On May 18, 1960, the company leased the lands to one Samuel Z. Donnenfield. The lease provided for a term of 25 years at an annual rent of $52,800, and gave the lessee the following rights:

(a) to remove anything on the property and to change grades, remove trees, etc., in connection with the development of the property;

(b) to purchase the property at any time up until 31 December, 1967, for $875,000;

(c) to renew the option to purchase for a further eight years provided he arranged for the respondent a new first mortgage for at least $300,000 bearing interest at 7 per cent per annum;

(d) to exercise the option to purchase from time to time with regard to various parcels of not less than 10 acres, on the basis of paying $2,500 per acre and the rent under the lease being reduced by $150.00 for each acre purchase.

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Judson J.

The evidence was that in 1962, the company sold 21.25 acres; in 1963 had 2.3 acres expropriated; in 1965 had 2.1 acres expropriated; in 1968 sold 42 acres, and in 1969 had received notice of the exercise of the option to purchase a further 43 acres. Both completed sales were made pursuant to the exercise of the option.

The findings of fact of the learned President are contained in the following extracts from his reasons:

> No attempt was made before me to support the contention put forward at earlier stages of the matter, and suggested in the Notice of Appeal to this Court, that the property was acquired for the purpose of continuing the farming business carried on on the land by the previous owners.
>
> Clearly, as I have said, the land was acquired because it was a good "buy". Its potential value was obvious. What the appellant would do with it was not decided at the time of acquisition. The incorporators were well to do and could afford to bide their time. What the appellant would do with the land would depend on what opportunities presented themselves. I have no doubt that, if the guiding mind of the appellant were to have frankly answered questions at the time of acquisition, he would have agreed that the appellant might itself, at an appropriate time, erect on the land buildings suitable for the developing neighbourhood, with a view to renting them or selling them; he would also have agreed that, if the right opportunity or opportunities arose, the appellant might sell some or all of the property, and he would also have agreed that a really attractive bare land leasing proposal would receive careful consideration by the appellant. In other words, the land was not dedicated at the time of acquisition to any particular use. It might end up as stock-in-trade of a trading business or as the subject of a venture in the nature of trade. It might end up as the site for an income-producing building. It might end up as revenue-producing bare land.
>
> In those circumstances, had the acquisition merely been followed by the 1962 sale, I should have had no doubt that the resultant profit was a profit from a business within the extended meaning of that word as used in the *Income Tax Act*. In effect, the appellant would have dedicated the land, or at least that part of it that it sold, to the carrying on of a trading business or a venture in the nature of trade.

The ratio of the judgment under appeal is that the company had committed itself to holding the land as income producing land for 25 years and that the option clause in no way constituted a dedication of the land to a trading operation. Here, I think, there is error.

When the company gave this lease and option its earlier indecision was resolved. This is not the "bare land leasing proposal" referred to in the quoted reasons for judgment. The option, in my opinion, is all important. It was the method which the company adopted in putting through its real estate transactions. The property was in a rapidly developing area. The mortgages given back when the

property was purchased provided for partial discharges on 5 acre lots. The option was granted within 17 months from the date of acquisition of the property and provided for the purchase of 10 acre parcels. The issue in this appeal is whether the company was selling its lands in the course of the operation of a business for profit. It undoubtedly was and the gains in question are income.

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Judson J.

The appeal should be allowed with costs, and the assessments for the company's 1962 and 1963 taxation years restored.

Appeal allowed with costs.

Solicitor for the appellant: D. S. Maxwell, Ottawa.

Solicitors for the respondent: Goodman & Carr, Toronto.

THREE RIVERS BOATMAN LIMITED ... APPELANTE;

ET

CONSEIL CANADIEN DES RELATIONS OUVRIÈRES, ROGER L. FOURNIER, J. LORNE MacDOUGALL et SYNDICAT INTERNATIONAL DES MARINS CANADIENS ..... INTIMÉS.

1968

*Déc. 4

1969

Mai 13

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Relations ouvrières—Procédure—Requête en évocation—Conseil canadien des relations ouvrières—Pouvoir de surveillance et contrôle de la Cour supérieure sur les décisions du Conseil—Code de procédure civile, art. 33, 846—Loi sur les relations industrielles et sur les enquêtes visant les différends du travail, S.R.C. 1952, c. 152.

Le Conseil canadien des relations ouvrières accorda la demande du Syndicat intimé d'être accrédité comme agent négociateur d'un certain groupe de salariés de l'appelante préposés aux opérations maritimes qu'elle poursuit dans les limites du port de Trois-Rivières ou ses environs immédiats sur le fleuve St-Laurent, dans la province de Québec. Le Conseil fut d'opinion que les travailleurs de l'unité proposée étaient employés à une entreprise ou affaire à laquelle s'applique la première partie de la *Loi sur les relations industrielles et sur les enquêtes visant les différends du travail*, S.R.C. 1952, c. 152, et que, de plus, cette unité était une unité habile à négocier collectivement. La compagnie appelante s'est alors adressée à la Cour supérieure pour

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*CORAM: Les Juges Fauteux, Abbott, Martland, Hall et Spence.

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obtenir la délivrance d'un bref d'assignation pour faire surseoir à toute procédure subséquente et pour faire reviser la décision du Conseil. Le juge de première instance accorda la délivrance du bref. La Cour d'appel rejeta la requête de l'appelante pour le motif que la Cour supérieure n'avait, en vertu de l'art. 846 du nouveau *Code de procédure civile,* aucun pouvoir de surveillance ou de contrôle sur les procédures et décisions du Conseil. L'appelante a obtenu la permission d'en appeler à cette Cour.

Arrêt: L'appel doit être accueilli.

Tant en vertu de sa loi organique qu'en vertu des pouvoirs inhérents à sa fonction, la Cour supérieure possède depuis avant la Confédération l'autorité de surveillance et contrôle sur les organismes qui relèvent maintenant de la compétence du Parlement et qui exercent une action judiciaire ou quasi judiciaire dans les affaires de la province et rendent des décisions qui y sont exécutoires. De sorte que toute personne qui se prétend lésée dans ses droits, par suite d'un excès de juridiction de la part d'un organisme fédéral, peut, afin de les faire reconnaître et en assurer le respect, recourir à cette autorité. La Cour supérieure a donc juridiction pour contrôler l'exécution d'une décision quasi judiciaire rendue par le Conseil canadien, lorsque cette exécution doit affecter les droits des justiciables de la province de Québec et y être effectuée. En l'absence de moyens prescrits pour faire appel à ce pouvoir de la Cour supérieure, les justiciables peuvent, conformément à la disposition de l'art. 20 du *Code de procédure civile,* recourir à la procédure applicable dans le cas des tribunaux administratifs relevant de la compétence de la législature de Québec.

Le Conseil a, *prima facie,* excédé sa juridiction en exerçant le pouvoir d'accréditation que lui confère la première partie de la *Loi sur les relations industrielles et sur les enquêtes visant les différends du travail.* L'entreprise de l'appelante n'entre pas dans l'une des catégories d'entreprises mentionnées à l'art. 53 de cette Loi. Tenant compte des faits allégués dans la requête, et non pas des faits que le Conseil a jugé avoir été prouvés devant lui, et vu que les opérations de l'appelante sont conduites à Trois-Rivières ou dans ses environs immédiats mais que la requête ne fait pas voir que ses opérations se rattachent à du transport extra-provincial, le juge de première instance était justifié, à ce stade préliminaire de la procédure, d'accorder la délivrance du bref d'assignation.

Labour—Procedure—Motion to evoke—Canada Labour Relations Board—Board subject to the superintending and reforming power of the Superior Court—Code of Civil Procedure, art. 33, 846—Industrial Relations and Disputes Investigation Act, R.S.C. 1952, c. 152.

The Canada Labour Relations Board granted the petition of the respondent union to be certified as bargaining agent of a group of employees of the appellant company employed in its maritime operations within the harbour of Trois-Rivières or in its immediate vicinity on the St. Lawrence River, in the province of Quebec. The Board held that the employees of the proposed unit were employed in connection with an undertaking or business to which Part I of the *Industrial Relations and Disputes Investigation Act,* R.S.C. 1952, c. 152, applied and that, furthermore, this unit was a unit competent to bargain

collectively. The appellant company petitioned the Superior Court for the issuance of a writ of summons to suspend all subsequent proceedings and to have the decision of the Board revised. The trial judge granted the issuance of the writ. The Court of Appeal dismissed the appellant's petition on the ground that the Superior Court did not have, under art. 846 of the new *Code of Civil Procedure*, any superintending or reforming power over the proceedings and decisions of the Board. The appellant was granted leave to appeal to this Court.

Held: The appeal should be allowed.

The Superior Court has since before Confederation, as much by virtue of its constitutive statute as by virtue of the powers inherent in its functions, the authority of superintendence and reform over the bodies now under the jurisdiction of the Parliament exercizing a judicial or quasi-judicial action over provincial undertakings and which make decisions enforceable therein. Consequently, any person claiming that its rights have been encroached upon as a result of an excess of jurisdiction on the part of a federal body, can, in order to have these rights recognized and to ensure that they be respected, have recourse to that authority. The Superior Court has therefore jurisdiction to control the execution of a quasi-judicial decision rendered by the Board, when that execution affects the rights of the people of the province of Quebec and is to be carried out therein. In the absence of prescribed provisions to invoke this power of the Superior Court, one can have recourse to the procedure applicable in the case of administrative tribunals under the jurisdiction of the legislature of Quebec, as provided for by art. 20 of the *Code of Civil Procedure.*

The Board has, *prima facie,* exceeded its jurisdiction in exercising the power of certification given to it by Part I of the *Industrial Relations and Disputes Investigation Act.* The undertaking of the appellant does not fall under any of the categories of undertakings mentioned in s. 53 of the Act. Taking into account the facts alleged in the motion, and not the facts as found by the Board, and considering that the operations of the appellant are pursued at Trois-Rivières or in its immediate vicinity but that the petition did not disclose that its operations were in connection with extra-provincial transport, the trial judge was justified, at this preliminary stage of the procedure, to grant the issuance of the writ of summons.

APPEAL from two judgments of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reversing a judgment of Dorion C.J. Appeal allowed.

APPEL de deux jugements de la Cour du banc de la reine, province de Québec[1], infirmant un jugement du Juge en Chef Dorion. Appel accueilli.

Léopold Langlois, c.r., pour l'appelante.

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[1] [1968] B.R. 575.

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Rodrigue Bédard, c.r., et *Roger Thibodeau, c.r.*, pour les intimés, le Conseil et R. L. Fournier et J. L. MacDougall.

Phil Cutler, Ross Goodwin et *Pierre Langlois,* pour l'intimé, le Syndicat.

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:—Le Syndicat intimé a présenté une requête au Conseil canadien des relations ouvrières, ci-après appelé le Conseil canadien, pour être accrédité comme agent négociateur d'un certain groupe de salariés de l'appelante préposé aux opérations maritimes qu'elle poursuit dans les limites du port de Trois-Rivières ou ses environs immédiats sur le fleuve Saint-Laurent, dans la province de Québec. L'unité de négociation proposée par le Syndicat est ainsi décrite dans sa demande:

> All boats running D.O.T. Pilots to ships belonging to the Three River Boatmen.

L'appelante a contesté cette requête. Elle a soumis principalement et avec vigueur qu'il s'agit là d'une entreprise locale, intra-provinciale qui, en raison de sa nature, n'est pas comprise dans la catégorie des entreprises ou affaires auxquelles s'applique la première partie de la *Loi sur les relations industrielles et sur les enquêtes visant les différends du travail*, S.R.C. 1952, c. 152, ci-après désignée sous le nom de *Loi sur les différends du travail*. Et sans préjudice à cette objection fondamentale, l'appelante a plaidé que l'unité à l'égard de laquelle se rapporte la demande du Syndicat ne constitue pas une unité habile à négocier collectivement et que la majorité des employés de cette unité ne sont pas membres en règle du Syndicat. Après enquête et audition, le Conseil canadien rejeta l'objection principale de l'appelante en s'appuyant sur les considérations suivantes quant aux faits:

> Respondent operates five boats designated as service boats or ships' tenders at the harbour of Trois-Rivières to provide the transport of pilots from and to the Canada Department of Transport office at Trois-Rivières to be put aboard or brought ashore from ships proceeding up or down the St. Lawrence River including trans ocean, eastern coastal and domestic shipping in order to provide such ships with the pilotage services required for navigation purposes on the section of the St. Lawrence River serviced from the Trois-Rivières Canada Department of Transport station. The Respondent may be called upon also to transport on its boats customs officers and medical officers for other departments of the Government of Canada and shipping companies' agents on ships' business to ships pro-

ceeding up river and may transport also ships' officers and crewmen from shore to ship and ship to shore for ships anchored in the river in the vicinity of Trois-Rivières on request of the ship's captain; however, the requirements for these services are irregular.

It is clear from the evidence that the primary purpose of the Respondent's undertaking in which its service boats are engaged is the transport of pilots from shore to ship and ship to shore to ships requiring pilotage services in proceeding up and down the St. Lawrence River. For this purpose the Respondent provides a 24 hour per day service operating on a 3 shift per diem basis. These service boats operate within a radius of some 5 miles up and down stream from the harbour. The crew on each of these service boats consists of a captain and a seaman. The shore based personnel employed by the Respondent to service these boats consists of 2 marine engineers, a mechanic, a machinist, a maintenance man and a labourer. All of these employees together with a clerk who is in charge of a shop maintained by the Respondent at St. Antoine de Tilly where its boats are built and repaired comprise the proposed bargaining unit.

En droit, le Conseil canadien invoqua la décision du Conseil Privé dans *Paquet et al v. Corporation of Pilots for and below the Harbour of Quebec and Attorney General for Canada*[2] et la décision de cette Cour dans *Eastern Canada Stevedoring Company Limited*[3]. Et se résumant, le Conseil canadien disposa en ces termes de l'objection fondamentale de l'appelante:

The Board concludes on the evidence that the Respondent's primary business involves directly an aspect of pilotage. It has been held that the subject of pilotage falls exclusively within the jurisdiction of the Parliament of Canada—see Paquet v. Pilots' Corporation (1920) A.C. 1029. Furthermore to the limited extent that the Respondent provides services going beyond the subject of pilotage, it would appear that these services should be properly regarded as an essential part of navigation and shipping within the principles recognized by the Supreme Court of Canada in Eastern Canada Stevedoring Company Limited Reference (1955) S.C.R. 529.

Étant ainsi d'opinion que les travailleurs de l'unité de négociation proposée étaient employés à une entreprise ou affaire à laquelle s'applique la première partie de la *Loi sur les différends du travail* et que, de plus, cette unité était une unité habile à négocier collectivement, le Conseil canadien accorda la demande d'accréditation du Syndicat.

C'est alors que, afin de se pourvoir contre cette décision du Conseil canadien, l'appelante, en janvier 1967, s'adressa, par requête, à la Cour supérieure, district de Québec, pour obtenir la délivrance d'un bref d'assignation, adressé aux intimés, leur enjoignant de surseoir à toute procédure

[2] [1920] A.C. 1029, 54 D.L.R. 323.
[3] [1955] R.C.S. 529, [1955] 3 D.L.R. 721.

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découlant de cette décision, de transmettre le dossier à la Cour supérieure et d'y comparaître pour voir statuer sur la requête et la demande d'un jugement déclarant que le Conseil canadien n'a pas juridiction pour accréditer le Syndicat comme agent négociateur de ses employés et revisant, en conséquence, la décision du Conseil canadien. Cette requête fut signifiée au Conseil canadien, à son bureau à Ottawa, en en laissant une copie à J. Lorne MacDougall, son administrateur en chef, et à son bureau à Montréal, en en laissant une copie à Roger L. Fournier, agent des relations industrielles. Les intimés comparurent devant M. le juge en chef Dorion, objectèrent à la délivrance du bref d'assignation et demandèrent qu'il y eût une enquête préalablement à la plaidoirie en droit. Cette demande fut refusée. Le savant juge rappela, par ailleurs, en rendant subséquemment jugement sur la requête, le principe voulant que sur une requête de ce genre, le juge ne soit pas appelé à décider le fond du litige, qu'il peut fort bien arriver que, à la suite d'une enquête et lorsque tous les faits relativement à la cause auront été prouvés, le Tribunal en vienne à la conclusion que le remède demandé ne peut être accordé, mais que, pour ce qui est de la requête demandant la délivrance du bref, il faut s'en rapporter aux faits qui sont allégués dans la requête.

Il convient à ce point de référer aux allégations de faits contenues dans la requête. Il n'est pas nécessaire de les relater ici textuellement. Il suffit d'indiquer l'essence des faits qui sont pertinents et que le juge, au stade de la demande de la délivrance du bref, a le droit sinon l'obligation de tenir comme avérés. Voici ces faits: l'appelante a sa principale place d'affaires à St-Antoine de Tilly, comté de Lotbinière, où elle construit, répare et entretient des bateaux. Elle a aussi sur la rive nord du Saint-Laurent à Trois-Rivières une autre place d'affaires consistant dans un terrain riverain, bâtiments y érigés, et un quai, loués d'un particulier, d'où elle conduit les opérations de quatre vedettes à moteur, une remorque de rivière et un chaland, dont le port d'attache est à cet endroit. Ces divers bateaux sont utilisés pour assister les navires qui manœuvrent dans le port de Trois-Rivières ou au transbordement de *passagers* entre navires et rives du Saint-Laurent, dans les limites du port de Trois-Rivières ou ses environs immédiats. Le chaland est utilisé au transport de pièces lourdes entre

navires et les rives du Saint-Laurent, toujours dans le port de Trois-Rivières et ses environs immédiats. Ces services de l'appelante sont requis et rémunérés par les propriétaires des navires auxquels ils sont rendus ou par leurs agents. Les taux en vigueur pour ces services sont négociés et approuvés par la Shipping Federation of Canada ou la Dominion Marine Association, associations qui entre elles groupent la presque totalité des propriétaires de navires naviguant sur le fleuve Saint-Laurent. Les bateaux de l'appelante n'ont jamais navigué ailleurs que dans les limites de la province de Québec, soit toujours dans les environs immédiats de la ville de Trois-Rivières sauf lorsqu'ils ont à descendre, à l'occasion, à ses chantiers de St-Antoine de Tilly, comté de Lotbinière. Enfin, on allègue le fait que l'entreprise de l'appelante est d'un caractère exclusivement intra-provincial et que le Conseil canadien a mésinterprété la preuve faite devant lui pour rendre la décision attaquée.

Après avoir pris la requête en délibéré, le juge de première instance considéra que les faits dont il devait tenir compte étaient ceux qui étaient allégués dans la requête et non ceux qui étaient relatés dans la décision du Conseil canadien, que ces faits se rapportent exclusivement à des opérations de transport intra-provincial, que *prima facie* le Conseil canadien a excédé sa juridiction en appliquant les dispositions de la *Loi sur les différends du travail* aux activités de l'appelante et que ces allégations de faits, supportées par affidavit, justifient, en droit, les conclusions recherchées dans la demande. Il considéra de plus que la Cour supérieure a juridiction pour contrôler l'exécution d'une décision rendue par le Conseil canadien, lorsque cette exécution doit se faire dans la province de Québec. En conséquence, il accorda la requête enjoignant aux intimés de suspendre toute procédure et transmettre au greffe de la Cour supérieure le dossier complet de l'affaire afin qu'il soit déterminé si la décision du Conseil canadien est exécutoire quant aux employés de l'appelante et il ordonna la suspension de toute procédure relative à l'exécution de cette décision.

De là deux appels distincts à la Cour du banc de la reine[4], soit l'appel conjoint du Conseil canadien et ses officiers MacDougall et Fournier et l'appel du Syndicat.

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Ces appels furent entendus simultanément par un banc composé de MM. les juges Rinfret, Montgomery et Salvas. Le Syndicat, d'une part, persista à soutenir que le Conseil canadien avait juridiction en ce qui a trait aux relations entre l'appelante et ses travailleurs. Le Conseil canadien, d'autre part, adopta les arguments du Syndicat et ajouta que la Cour supérieure n'avait, en vertu de l'art. 846 du nouveau *Code de procédure civile,* aucun pouvoir de surveillance ou de contrôle sur ses procédures ou ses décisions. La Cour d'appel accepta cette prétention du Conseil canadien et pour cette raison jugea inopportun de se prononcer sur l'application de la *Loi sur les différends du travail* et la juridiction du Conseil canadien en ce qui concerne les activités précitées de l'appelante. Les appels furent maintenus et la requête de la compagnie Three Rivers Boatman Ltd. fut rejetée.

L'appelante demanda alors et obtint la permission d'appeler à cette Cour de ces jugements.

Ainsi qu'il appert des motifs donnés par M. le juge Montgomery, avec l'accord de ses collègues, la décision de la Cour d'appel se fonde sur les dispositions du premier paragraphe de l'art. 846 C.P.C., lues à la lumière de celles de l'art. 33 du nouveau Code qui était déjà en vigueur au temps de l'institution des procédures en l'espèce. Le premier paragraphe de l'art. 846 se lit comme suit:

> 846. La Cour supérieure peut, à la demande d'une partie, évoquer avant jugement une affaire pendante devant un tribunal *soumis à son pouvoir de surveillance ou de contrôle,* ou reviser le jugement déjà rendu par tel tribunal:

Ce qu'il faut entendre par tribunal *soumis à son pouvoir de surveillance ou de contrôle* apparaît, dit-on, aux dispositions suivantes de l'art. 33 C.P.C.

> 33. A l'exception de la Cour d'appel, les tribunaux *relevant de la compétence de la Législature de Québec,* ainsi que les corps politiques et les corporations dans la province, sont soumis au droit de surveillance et de réforme de la Cour supérieure, en la manière et dans la forme prescrites par la loi, sauf dans les matières que la loi déclare être du ressort exclusif de ces tribunaux, ou de l'un quelconque de ceux-ci, et sauf dans les cas où la juridiction découlant du présent article est exclue par quelque disposition d'une loi générale ou particulière.

D'où l'on conclut qu'il s'agit d'un tribunal *relevant de la compétence de la Législature de Québec* et que tel n'étant pas le cas du Conseil canadien—que le Parlement a créé

par la *Loi sur les différends du travail*,—les dispositions de l'art. 846 C.P.C. ne peuvent s'appliquer au Conseil canadien et offrir à l'appelante le moyen de se pourvoir contre l'absence ou les excès de juridiction de ce tribunal administratif fédéral. Il se peut, poursuit M. le juge Montgomery, que, en vertu d'une loi d'avant la Confédération ou en vertu du droit commun, la Cour supérieure ait retenu une certaine autorité pour restreindre un excès de juridiction de la part d'un tribunal administratif fédéral, que ce soit au moyen de *certiorari* ou prohibition, recours remplacés, précise-t-il, par celui qu'établit l'art. 846 du nouveau Code. Toutefois, à son avis, cette question ne saurait se présenter, vu que l'appelante a choisi d'exercer le recours établi au nouveau Code, recours inapplicable en l'espèce pour les raisons ci-dessus indiquées. Enfin, le savant juge a noté que, alors que le présent appel était en délibéré devant la Cour d'appel, un autre banc de cette Cour, composé de MM. les juges Taschereau, Owen et Choquette, avait jugé, dans une cause concernant le Conseil canadien, le même Syndicat et Agence Maritime Inc., que le Conseil canadien n'était pas soumis à la juridiction de la Cour supérieure en vertu des dispositions de l'art. 846 C.P.C. et suivants. Dissident, M. le juge Choquette aurait rejeté cet appel; il exprima l'opinion que s'il était vrai que l'art. 33 et partant l'art. 846 visent les tribunaux *relevant de la compétence de la Législature de Québec* et que le Conseil canadien tire son existence d'une loi fédérale, le texte de ces articles ne prive pas la Cour supérieure de l'autorité qu'elle détient en vertu de sa loi organique et des pouvoirs inhérents à sa fonction. Et M. le juge Choquette ajouta que le bref délivré en vertu de l'art. 846 et suivants vaut comme bref d'assignation ordinaire et que, par sa requête, Agence Maritime Inc. avait demandé à la Cour supérieure de déclarer que la décision du Conseil canadien était nulle et de nul effet. Cet arrêt de la Cour d'appel dans Agence Maritime Inc. est présentement l'objet d'un pourvoi devant notre Cour.

Avec le plus grand respect, je dois dire que je ne puis partager la conclusion à laquelle la Cour d'appel en est arrivée.

Au jour où elle fut créée en 1849, la Cour supérieure acquit en plénitude la juridiction civile de première instance et particulièrement la juridiction de surveillance jusqu'alors exercée par la Cour du Banc du Roi, *cf 12*

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Victoria, c. 38, art. VII. Au même temps, on décréta que les brefs de prérogatives, afférents à l'exercice de cette juridiction de surveillance, émaneraient désormais de la Cour supérieure, *cf 12 Victoria*, c. 41, art. XVI. La Cour supérieure devenait ainsi nantie du pouvoir de surveillance, basé sur la *common law*, qu'exerçait en Angleterre la *Court of King's Bench* sur laquelle la Cour du Banc du Roi fut modelée. Cette loi du contrôle judiciaire sur les tribunaux, corps politiques ou corporations exerçant des pouvoirs judiciaires ou quasi judiciaires, nous vient du droit public anglais introduit au Québec lors et par suite de la cession. On réfère à cette juridiction de surveillance, que possédait en Angleterre la *Court of B.R. (Banco Regis)*, dans la cause de *Groenvelt v. Burwell*[5]. Il s'agissait du pourvoi d'un médecin contre une décision des Censeurs du Collège des Médecins de Londres, le condamnant à une amende et à la prison. On objecta que le médecin était sans remède, le statut ne prévoyant pas de *writ of error* ou de *certiorari*. Le Juge en chef Holt déclara:

> That a certiorari lies, for no court can be intended exempt from the superintendency of the king in this court of B.R. (Banco Regis). It is a consequence of every inferior jurisdiction of record that their proceedings be removable into this court, to inspect the record and see whether they keep themselves within the limits of their jurisdiction...

Et on trouve au Québec, avant 1849, une application de cette loi sur le contrôle judiciaire dans *Hamilton v. Fraser*[6], où, dans une décision rendue en 1811, la Cour du Banc du Roi accueillit une demande de prohibition contre la Cour de Vice-Amirauté et dans *King v. Gingras*[7], où, dans une décision rendue en 1833, la Cour provinciale des appels fit droit à une demande de *certiorari* dirigée contre les Commissaires chargés de l'érection des églises. Écartant de la considération, pour l'instant, les dispositions de l'art. 33 du nouveau Code, dont il sera question ci-après, on doit retenir que depuis 1849, la Cour supérieure a toujours conservé et exercé cette juridiction, concurremment pour un temps seulement avec la Cour de Circuit. Quant à la conservation de ce droit, on peut référer aux arts. 1031 et 1220 du premier *code de procédure civile*, entré en vigueur

[5] (1699), 1 Ld. Raym. 454, 3 Salk. 354, 91 E.R. 1202.
[6] (1811), Stu. K.B. 21.
[7] (1833), Stu. K.B. 560.

avant la Confédération, soit le 28 juin 1867, aux arts. 1003 et ss. et 1292 et ss. du second *code de procédure civile* entré en vigueur le 1er septembre 1897 et à l'art. 846,—qui sera ci-après considéré,—du nouveau Code en vigueur depuis le 1er septembre 1966. Et quant à l'exercice de cette juridiction de surveillance à l'endroit de personnes ou organismes relevant de la compétence du Parlement et exerçant des pouvoirs quasi judiciaires, on peut référer aux décisions suivantes: *Hon. G. Ouimet, Atty. Gen. v. Hon. J. H. Gray*[8], cas d'un arbitre nommé par le Gouvernement du Canada en vertu de l'art. 142 de l'*Acte de l'Amérique du Nord Britannique; The United Shoe Machinery Company of Canada v. The Hon. Charles Laurendeau et al.*[9], cas d'une commission siégeant en vertu de la *Loi des enquêtes sur les coalitions* (1910) 9-10 Ed. VII, c 9; *The Montreal Street Railway Co. v. The Board of Conciliation & Investigation et al.*[10], cas d'un conseil de conciliation et d'enquête nommé en vertu de la *Loi des enquêtes en matière de différends industriels* (1907) 6-7 Ed. VII, c. 20; *Reid v. Charpentier et al.*[11], cas d'arbitres nommés en vertu de l'art. 196 de l'*Acte des chemins de fer du Canada,* 1906, S.R.C., c. 37 *The Lachine, Jacques-Cartier & Maisonneuve Railway Co.*[12], encore un cas d'arbitres nommés en vertu de la même loi des chemins de fer; *Goulet v. Winters et al.*[13], cas d'une cour martiale siégeant en vertu de la *Loi de la Milice,* 1906 S.R.C., c. 41; *Poulin v. Casgrain*[14], cas d'un juge de la Cour supérieure agissant, comme *persona designata,* en matière de contestation d'élection fédérale, 1927 S.R.C., c. 50; *Stanley and others v. The Canada Labour Relations Board et al.*[15], où référence est faite à la décision de la Cour d'appel de la Colombie-Britannique dans *Vantel Broadcasting Co. Ltd. v. Canada Labour Relations Board*[16]. C'est en 1957, par la loi *5-6 Elizabeth II,* c. 15, art. 1, que la Législature de Québec amenda l'art. 50 C.P.C.,—reproduit à l'art. 33 du nouveau Code,—pour statuer expressément que le droit de surveillance ou de réforme de la Cour supérieure sur les tribunaux inférieurs

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8 (1871), 15 L.C.J. 306.
9 (1911), 12 R.P. 319.
10 (1913), 44 C.S. 350.
11 (1913), 45 C.S. 56.
12 (1914), 23 B.R. 373.
13 (1919), 56 C.S. 521.
14 [1950] R.P. 91.
15 [1967] C.S. 104.
16 (1962), 35 D.L.R. (2d) 620, 40 W.W.R. 95.

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serait limité aux *tribunaux relevant de la compétence de la Législature de Québec.* Une législature est présumée légiférer dans les limites de sa compétence. La Législature de Québec n'a pas la compétence pour modifier et rien n'indique qu'elle ait entendu modifier, par cet amendement de 1957, l'autorité de surveillance et contrôle que la Cour supérieure possède depuis avant la Confédération, tant en vertu de sa loi organique qu'en vertu des pouvoirs inhérents à sa fonction, sur les organismes qui relèvent maintenant de la compétence du Parlement et qui exercent une action judiciaire ou quasi judiciaire dans les affaires de la province et rendent des décisions qui y sont exécutoires. Seul compétent pour ce faire, depuis 1867, cf. art. 129 de la *Loi impériale,* 30-31 Victoria, c. 3, (Acte de l'Amérique du Nord Britannique), le Parlement n'a pas, généralement du moins, attribué, à une autre cour, ce droit de contrôle et de surveillance. Il s'ensuit que la Cour supérieure possède toujours cette autorité dont elle hérita, par statut, de la Cour du Banc du Roi en 1849, de sorte que toute personne qui se prétend lésée dans ses droits, par suite d'un excès de juridiction de la part d'un organisme fédéral, peut, afin de les faire reconnaître et en assurer le respect, recourir à cette autorité. On reconnaît d'ailleurs aux dispositions de l'art. 31 du nouveau *Code de procédure civile* que la Cour supérieure est le tribunal de droit commun et qu'elle connaît en première instance de toute demande qu'une disposition formelle de la loi n'a pas attribuée exclusivement à un autre tribunal. C'est là un principe de droit public, basé sur la *common law,* qu'on trouve exprimé en ces termes par le Vicomte Haldane, à la page 962, dans *Board v. Board*[17]:

> If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Court of Justice. In order to oust this jurisdiction, it is necessary, in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other court.

Et plus loin, à la page 963, le savant juriste ajoute... *nothing shall be intended to be out of the jurisdiction of a superior court but that which especially appears to be so.* Dans les cas où le moyen d'exercer un droit n'a pas été prévu, on peut, prescrit l'art. 20 du nouveau Code, y sup-

[17] (1919) A.C. 956, [1919] 2 W.W.R. 940, 48 D.L.R. 13.

pléer par toute procédure non incompatible avec les règles contenues dans ce Code ou avec quelque autre disposition de la loi. En fait et ainsi que le notent les rédacteurs de ce nouveau Code, l'art. 846 réunit les dispositions des arts. 1003 et 1292 du Code précédent, concernant respectivement la prohibition et le *certiorari*. Et les rédacteurs précisent que ces recours, à cause de la connexité qui existe entre eux, au point que bien souvent la distinction était difficile à établir, ont été fusionnés pour n'en former qu'un seul. Ainsi donc, et nonobstant sa double fonction, le recours mentionné à l'art. 846 n'est pas nouveau. Différent dans sa forme et non dans son essence, ce recours ne diffère pas substantiellement des recours jusqu'alors utilisés pour se pourvoir, de façon sommaire et efficace, contre les excès de juridiction des tribunaux administratifs.

Je dirais donc, à l'instar de M. le juge en chef Dorion, que la Cour supérieure a juridiction pour contrôler l'exécution d'une décision quasi judiciaire rendue par le Conseil canadien, lorsque cette exécution doit affecter les droits des justiciables de la province de Québec et y être effectuée. En l'absence de moyens prescrits pour faire appel à ce pouvoir de la Cour supérieure, les justiciables peuvent, conformément à la disposition de l'art. 20 C.P.C., recourir à la procédure applicable dans le cas des tribunaux administratifs relevant de la compétence de la Législature de Québec.

Il reste maintenant à se demander si, *prima facie*, le Conseil canadien a excédé sa juridiction en exerçant, en l'espèce, le pouvoir d'accréditation que lui confère la première partie de la *Loi sur les différends du travail*. Il nous faut donc rechercher si la première partie de ce statut s'applique à l'entreprise de l'appelante ou, plus précisément, si cette entreprise entre dans l'une des catégories d'entreprises mentionnées à l'art. 53 de ce statut, dont il convient de citer les dispositions suivantes:

> 53. La Partie I s'applique à l'égard des travailleurs employés aux ouvrages, entreprises ou affaires qui relèvent de l'autorité législative du Parlement du Canada, ou relativement à l'exploitation de ces choses, y compris, mais non de manière à restreindre la généralité de ce qui précède:
>
> *a*) les ouvrages, entreprises ou affaires exécutés ou exercés pour ou concernant la navigation et la marine marchande, intérieures ou maritimes, y compris la mise en service de navires et le transport par navires partout au Canada;

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b) les chemins de fer, canaux, télégraphes et autres ouvrages et entreprises, reliant une province à une ou plusieurs autres provinces, ou s'étendant au delà des limites d'une province;

c) les lignes de vapeurs et autres navires reliant une province à une ou plusieurs autres provinces, ou s'étendant au delà des limites d'une province;

d) les bacs transbordeurs entre une province et une autre, ou entre une province et tout pays autre que le Canada;

e) . . .

f) . . .

g) . . .

h) . . .

et à l'égard des patrons de ces travailleurs dans leurs rapports avec ces derniers, ainsi qu'à l'égard des syndicats ouvriers et organisations patronales composés desdits travailleurs ou patrons.

Les faits dont il faut tenir compte pour décider du caractère juridique des opérations de l'appelante sont ceux qui sont allégués dans sa requête et non ceux que le Conseil canadien a jugé avoir été prouvés devant lui. Le Conseil ne saurait, en effet, s'attribuer une juridiction en mal interprétant la preuve qu'on lui a soumise et voilà bien précisément le fait qu'on lui reproche à la requête et que nous devons présumer, au moins pour l'instant, au stade préliminaire où en est cette requête, ainsi que le veut la disposition du second alinéa de l'art. 847 C.P.C. Ainsi donc et tenant compte des faits allégués, nous devons retenir que, *rationae loci,* les opérations maritimes de l'appelante sont poursuivies dans le port de Trois-Rivières ou ses environs immédiats sur le fleuve Saint-Laurent, dans la province de Québec. Quant à la nature de ces opérations, la requête ne fait pas voir dans quelle mesure elles peuvent se rattacher à du transport intra-provincial ou extra-provincial. Ce manque de précision a été noté par les juges de la Cour d'appel ainsi qu'il appert de l'extrait suivant des motifs de jugement donnés par M. le juge Montgomery, avec l'accord de ses collègues:

All parties recognize that the leading case on this question is the reference to the Supreme Court regarding the validity of the Industrial Relations and Disputes Investigation Act, commonly known as the *Eastern Canada Stevedoring* case, 1955, S.C.R. 529. In that case a majority of the Supreme Court held that the act applied to the relations between employees and a company that performed loading and unloading services entirely within the port of Toronto, because the employer's activities related to "navigation and shipping" within the meaning of Section 91(10) of the British

North America Act. On the face of it, this decision is favourable to the contentions of the Appellants, but Respondent maintains that it is distinguishable on the facts. When we turn to the facts of the present case, we find that they are not clearly set forth in the petition. Respondent does not admit that the findings of fact in the Board's judgment are correct but opposed Appellant's attempt to make evidence at the hearing of the petition. I am therefore of the opinion that we should not attempt to decide the merits of the question on the record as it stands.

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Vu que la requête fait voir que les opérations de l'appelante sont conduites à Trois-Rivières ou dans ses environs immédiats mais qu'elle ne fait pas voir que ses opérations se rattachent à du transport extra-provincial, le savant juge de première instance était justifié, à ce stade préliminaire de la procédure, d'accorder la délivrance du bref d'assignation.

Pour toutes ces raisons, j'accueillerais l'appel des jugements prononcés, le 15 mai 1968, par la Cour du banc de la reine, dans les dossiers portant les numéros 7076 et 7080 de ses dossiers, et je rétablirais le dispositif du jugement de première instance; le tout avec dépens.

Appel accueilli avec dépens.

Procureurs de l'appelante: Langlois & Langlois, Québec.

Procureurs des intimés, le Conseil, R. L. Fournier et J. L. MacDougall: Germain, Thibaudeau & Lesage, Québec.

Procureurs de l'intimé, le Syndicat: Culter, Lamer, Bellemare, Robert & Desaulniers, Montréal.

1968
*Oct. 2, 3, 4, 7
1969
Apr. 22

ONTARIO WOODSWORTH MEMORIAL FOUNDATION (*Plaintiff*) .. APPELLANT;

AND

A. Y. GROZBORD, MONT BLANC HOLDING COMPANY, THE ROYAL BANK OF CANADA, THE BANK OF NOVA SCOTIA and E. LAWRENCE STONE (*Defendants*) ..... RESPONDENTS;

AND

E. LAWRENCE STONE (*Third Party at the instance of the Defendants A. Y. Grozbord and Mont Blanc Holding Company*);

AND

THE ROYAL BANK OF CANADA and THE BANK OF NOVA SCOTIA (*Third parties at the instance of the Defendant E. Lawrence Stone*).

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Estoppel—Purchase and sale agreement—Solicitor for payee forging signature of fellow signing officer on endorsement of cheque—Delay by payee in giving notification of forgery to banks and drawer—Action against purchaser, drawer and banks dismissed.

One G, on behalf of MB Co., entered into an agreement of purchase and sale whereby G purchased certain property from the plaintiff foundation for $150,000, to be paid by a cash deposit, a stated amount on closing and the balance by means of a first mortgage. The president of the foundation, one R, was one of two officers who had authority to sign for the plaintiff and he acted as its solicitor throughout the transaction. A solicitor, S, acted for G and MB Co.

On the date for closing, *viz.* November 6, 1962, S delivered to R a cheque for $125,506.82 which represented the balance payable under an arrangement made between S and R to provide for payment of the whole consideration in cash and a reduction of the purchase price. This cheque was drawn by S on the Royal Bank in favour of the plaintiff. It was certified by the Royal Bank. A deed conveying the plaintiff's property to MB Co. was delivered and registered.

R on receipt of the cheque signed his own name and forged the signature of his fellow signing officer and then deposited the cheque in his trust account at the Bank of Nova Scotia. The Bank of Nova Scotia sent the cheque for presentation to the Royal Bank. The latter bank received the cheque on November 8, 1962, and paid it the same day.

*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Spence JJ.

On February 27, 1963, the plaintiff acquired knowledge that the signature of the second signing officer on the endorsement of the cheque had been forged by R, but no notice of the forgery was given to either bank or to S until some two and one-half months later. During the intervening time negotiations were carried on between the plaintiff and R in an effort to obtain restitution from him. However, R absconded before either bank was notified of the forgery.

On May 14, 1963, the cheque for $125,506.82 having been endorsed on behalf of the plaintiff by its proper signing officers was presented for payment to the Royal Bank but payment was refused. On the same day, the Royal Bank informed the Bank of Nova Scotia that it looked to it for reimbursement. The Bank of Nova Scotia denied liability to the Royal Bank.

The plaintiff brought action against five defendants, claiming against G and MB Co. specific performance of the agreement of purchase and sale, claiming against S as maker of the cheque and claiming against the two banks damages of $125,506.82 for conversion of the cheque. S commenced third party proceedings against both banks claiming indemnity against any liability he might be under to the plaintiff.

The trial judge dismissed the plaintiff's action as against the Bank of Nova Scotia on the ground of estoppel. He also dismissed the action as against G and MB Co. He gave judgment for the plaintiff against the Royal Bank and S on the ground that they had suffered no detriment, and so could not rely on the defence of estoppel. He gave judgment for S against both banks in the third party proceedings.

Both banks appealed to the Court of Appeal from the judgment against the Royal Bank and S in the main action and from the judgment against the banks in favour of S in the third party proceedings. The plaintiff cross-appealed from the judgment dismissing its action against the Bank of Nova Scotia and from the dismissal of its action against G and MB Co.

The Court of Appeal agreed with the trial judge that the Bank of Nova Scotia had established a defence of estoppel and dismissed the plaintiff's cross-appeal. Differing from the trial judge, it held that the Royal Bank and S had also suffered detriment and that the plaintiff was estopped as against them from denying that the cheque was properly endorsed. Accordingly, it allowed the appeals of the Royal Bank and S. The third party proceedings taken by S against the banks were necessarily dismissed as well.

The plaintiff then appealed to this Court, as against all the defendants, from the dismissal of its action and S served notice of appeal to this Court from the dismissal of the third party proceedings if this Court should find him liable to the plaintiff.

Held: The appeals should be dismissed.

The action as against G and MB Co. was rightly dismissed. The plaintiff, in view of the terms of the agreement, was estopped from asserting that the agreement had not been performed. The plaintiff had elected to adopt the transaction after it had full knowledge of all that R had done and as to the manner in which the transaction had been closed.

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As to the claim against the banks and S, the Court agreed with the concurrent findings in the Courts below that these parties were prejudiced by the delay in giving notice of the forgery to them. The defence of estoppel applied to all three parties.

By the doctrine of estoppel a person is precluded from denying the truth of the statement acted on for any purpose which results in a detriment to the representee. The plaintiff's deliberate silence in withholding notification of the forgery destroyed the Bank of Nova Scotia's opportunities of meeting the claims for indemnity made upon it by its co-defendants, in large part at least, by going against the forger. The plaintiff, therefore, was estopped from denying as against the Royal Bank and S the genuineness of the forged signature.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Grant J. and dismissing plaintiff's action against all defendants and dismissing third party proceedings. Appeals against all defendants and conditional appeal in third party proceedings dismissed.

Douglas K. Laidlaw, Q.C., for the plaintiff, appellant.

R. E. Holland, Q.C., and *W. R. McMurtry*, for the defendants, respondents, A. Y. Grozbord and Mont Blanc Holding Co.

C. F. H. Carson, Q.C., and *J. R. Houston*, for the defendants, respondents, The Royal Bank of Canada and The Bank of Nova Scotia.

I. W. Outerbridge, Q.C., for the defendant, respondent, E. Lawrence Stone.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is an appeal from the judgment of the Court of Appeal for Ontario[1] dated July 4, 1966, allowing an appeal from the judgment of Grant J. dated December 16, 1964, and dismissing the plaintiff's action against all defendants with costs and dismissing the third party proceedings.

The plaintiff is a non-profit corporation incorporated under the laws of the Province of Ontario and was the owner of certain lands and premises in the City of Toronto known as 565 Jarvis St.

Samuel Resnick (hereinafter called "Resnick"), a barrister and solicitor practising in the City of Toronto, was

[1] [1966] 2 O.R. 642, 58 D.L.R. (2d) 21.

president of the plaintiff and was one of the two officers having authority to sign for the plaintiff under its relevant by-laws and resolutions.

The defendant A. Y. Grozbord (hereinafter called "Grozbord") was the agent or nominee for the defendant Mont Blanc Holding Company (hereinafter called "Mont Blanc") a partnership consisting of two companies owned or controlled by Grozbord. He entered into the agreement hereinafter referred to on behalf of Mont Blanc.

The defendant E. Lawrence Stone (hereinafter called "Stone") was solicitor for the defendant Grozbord and Mont Blanc in connection with the transaction of purchase and sale hereinafter referred to and Resnick acted throughout as solicitor for the plaintiff in the said transaction.

The defendant Stone maintained an account at the defendant, the Royal Bank of Canada (hereinafter called "The Royal Bank"), and Resnick maintained a current, two savings and a trust account at the defendant, the Bank of Nova Scotia.

On July 19, 1962, the plaintiff entered into a written agreement of purchase and sale with the defendant Grozbord as trustee to sell 565 Jarvis St. for a price of $150,000 on terms that $2,000 was to be paid down as a deposit, a further $55,000 to be paid on closing subject to adjustments and the balance of the purchase price to be made up by a mortgage to be given back carrying interest at 6 per cent per annum for twelve months from the date of closing.

By the terms of the said agreement after adjustment the plaintiff was to receive including the deposit the sum of $56,976.82 in cash and a first mortgage of $93,000.

The plaintiff acknowledges having received or having had paid on its behalf or credited in the way of adjustments on the closing of the transaction the total sum of $17,000.

The transaction was originally to be closed on September 28, 1962, and the time for closing was extended three times by agreement between the solicitors to October 30, 1962, November 2, 1962, and finally to November 6, 1962.

Resnick received the $2,000 deposit payable to him on July 19, 1962, and deposited this in his trust account at the Bank of Nova Scotia. He received a further $15,000 cheque payable to the plaintiff which he deposited in his trust

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account on a forged endorsement on November 1, 1962, such monies being received as a condition of the extension of the time for closing.

Some time between November 2 and November 5, 1962, an arrangement which was not reduced to writing was made between Stone and Resnick to provide for payment of the whole consideration in cash and a reduction in the purchase price to $149,000 subject to adjustments. On the date for closing Stone delivered to Resnick a cheque for $125,506.82 which represented the balance payable in cash on this basis. This cheque was drawn by Stone on the Royal Bank and payable to the plaintiff. It was certified by the Royal Bank. A deed conveying the plaintiff's property to Mont Blanc Holding Company was delivered and registered.

The cheque was deposited by Resnick in his trust account at the Bank of Nova Scotia on November 7, 1962, at which time it bore the following endorsement:

> Ontario Woodsworth Memorial Foundation
> Per 'S. Resnick'
> Per 'Marion H. Bryden'
> For deposit only
> To the credit of
> Samuel Resnick
> Trust account

The signatures "S. Resnick" and "Marion H. Bryden" were handwritten. It is common ground that the signature of Marion H. Bryden, then the vice-president of the plaintiff, was forged by Resnick.

The Bank of Nova Scotia sent the cheque for presentation to the Royal Bank, on which it was drawn. The Royal Bank received the cheque on November 8, 1962, and paid it the same day.

Neither of the banks had at any time done business with the plaintiff or carried its account or had any knowledge of what persons had authority to endorse cheques on behalf of the plaintiff. The Bank of Nova Scotia deposited the cheque for its customer, Resnick, because it knew and trusted him.

At a meeting of the Board of the plaintiff on November 14, 1962, Resnick reported orally that the transaction had been closed, that he had received the $2,000 deposit and $55,016.41 on closing making a total of $57,016.41, that

after deducting various expenses there remained a balance of $48,322.31, that he had invested $40,000 of this in a mortgage at 8 per cent for one year and would turn over the balance to the treasurer of the plaintiff.

The treasurer, Mrs. Lazarus, gave evidence that Resnick had no previous express authority from the Board to negotiate the cheque received on closing or to invest any of the proceeds, but nevertheless Resnick's report was accepted by the Board.

By letter dated November 22, 1962, Resnick reported to Mrs. Lazarus that the transaction had been completed by the plaintiff receiving the $2,000 deposit, taking back a mortgage for $93,000 and receiving the balance of the purchase price of $150,000 in cash subject to adjustments on closing. He enclosed a cheque for $5,247 drawn on his trust account representing the balance of the cash received on closing after taking in account certain adjustments and the $40,000 invested by him.

Mrs. Lazarus stated that she understood that Resnick had received some $57,000 on behalf of the plaintiff and she assumed he had deposited it in a bank account in his name and that this assumption was confirmed when she received the cheque for $5,247.

On February 25, 1963, the plaintiff's auditor, Mr. Irwin, in the course of a routine accounting investigation, learned from Mont Blanc Holding Company that there was no principal or interest outstanding on any mortgage from it to the plaintiff and in telephone conversations with Grozbord and Stone on February 25 and 26, Irwin learned the manner in which the transaction had been closed and the wording of the endorsement on the cheque for $125,506.82.

Knowledge that the signature of Marion Bryden on the endorsement of the cheque had been forged by Resnick was acquired by the plaintiff on February 27, 1963.

On either March 5 or March 6, 1963, Stone attended on Resnick and obtained his signature as president of the plaintiff to a rectification deed, dated March 5, 1963, correcting an error of description in the deed from the plaintiff to Mont Blanc which had been registered on November 6, 1962. Stone then attended on Mrs. Bryden who, after speaking to Resnick on the telephone, signed the deed as vice-president and affixed the seal of the plaintiff. This rectification deed was registered on March 7, 1963.

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No notice of the forgery was given to either bank until on May 9, 1963, the Royal Bank was notified and on May 10, 1963, the Bank of Nova Scotia was notified. Neither bank had any prior knowledge of the forgery. These notifications were given to the banks by telephone by Mr. Holland, solicitor for Grozbord, who had been consulted by Mr. Stone. It appears that on May 3, 1963, Mr. Brewin, the solicitor for the plaintiff, told Stone that there was some question of forgery of a signature in the endorsement of the cheque and that on May 9 at a meeting with Holland and Stone Brewin made it clear that Mrs. Bryden's signature had been forged.

The plaintiff did not at any time notify the defendant Mont Blanc of the forgery.

I do not find it necessary to set out the details of the negotiations carried on between the plaintiff and Resnick between February 27 and May 9 in an effort to obtain restitution from him as I agree with the concurrent findings in the Courts below that the banks and Stone were prejudiced by the delay in giving notice of the forgery to them.

Early in May, before either bank was notified of the forgery, Resnick and his wife left Canada and took up residence in Israel.

On May 14, 1963, the cheque for $125,506.82 having been endorsed on behalf of the plaintiff by its proper signing officers was presented for payment to the Royal Bank but payment was refused. On the same day, the Royal Bank informed the Bank of Nova Scotia by letter that it looked to it for reimbursement. The Bank of Nova Scotia replied by letter dated May 17, 1963, denying liability to the Royal Bank.

The plaintiff brought action against the five defendants, claiming against Grozbord and Mont Blanc specific performance of the agreement of purchase and sale on the ground that the agreement had not been performed according to its terms and that it had received only part of the purchase price, claiming against Stone as maker of the cheque and claiming against the two banks damages of $125,506.82 for conversion of the cheque.

The defendants Grozbord and Mont Blanc commenced third party proceedings against Stone but these proceedings were dismissed at the trial and no appeal was taken from that dismissal.

Stone commenced third party proceedings against both banks claiming indemnity against any liability he might be under to the plaintiff.

The learned trial judge dismissed the plaintiff's action as against the Bank of Nova Scotia on the ground of estoppel. He also dismissed the action as against Grozbord and Mont Blanc. He gave judgment for the plaintiff against the Royal Bank and Stone on the ground that they had suffered no detriment, and so could not rely on the defence of estoppel. He gave judgment for Stone against both banks in the third party proceedings, but without costs.

Both banks appealed to the Court of Appeal for Ontario from the judgment against the Royal Bank and Stone in the main action and from the judgment against the banks in favour of Stone in the third party proceedings. The plaintiff cross-appealed from the judgment dismissing its action against the Bank of Nova Scotia and from the dismissal of its action against Grozbord and Mont Blanc.

The Court of Appeal, in a judgment delivered by Aylesworth J.A., agreed with the learned trial judge that the Bank of Nova Scotia had established a defence of estoppel and dismissed the plaintiff's cross-appeal. Differing from the learned trial judge, it held that the Royal Bank and Stone had also suffered detriment and that the plaintiff was estopped as against them from denying that the cheque was properly endorsed. Accordingly, it allowed the appeals of the Royal Bank and Stone. Since the plaintiff's action against Stone was dismissed by the Court of Appeal, the third party proceedings taken by him against the banks were necessarily dismissed as well.

The plaintiff now appeals to this Court, as against all the defendants, from the dismissal of its action and Stone has served notice of appeal to this Court from the dismissal of his third party proceedings if this Court should find him liable to the plaintiff.

I am satisfied that the Court of Appeal has reached the right conclusion.

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It is stated in the reasons of Aylesworth J.A. that during the course of the argument the Court of Appeal announced its agreement with the learned trial judge on the following points: (i) that Resnick had no authority express, implied or apparent to endorse the cheque for $125,506.82 and deposit it in his trust account and (ii) that such endorsement and deposit were not ratified by the plaintiff. I see no reason to disagree with the first of these propositions but if it were necessary for the decision of this appeal I would find it necessary to examine the second with care and I express no opinion upon it.

So far as the claim against the defendants Grozbord and Mont Blanc is concerned, the Court of Appeal, at the conclusion of the argument, dismissed the plaintiff's appeal from the dismissal of its action against these two defendants for the reasons given by the learned trial judge. The plaintiff's claim against these defendants was for specific performance of the agreement of purchase and sale or, in the alternative, damages in the amount of $136,823.50 "being the amount of the purchase price and value of the mortgage to be given back to the plaintiff under the said agreement". I agree with the conclusion of the Courts below that the plaintiff was estopped from asserting that the agreement had not been performed. I am also of opinion that the agreement was in substance performed by the purchaser. A term of the agreement read as follows:

> Any tender of documents or money hereunder may be made upon the Vendor or the Purchaser or any party acting for him and money may be tendered by negotiable cheque certified by a chartered bank or trust company.

I am unable to agree with the view of the learned trial judge that these words did not authorize the purchaser to pay the purchase price by delivering to the solicitor acting for the vendor at the closing of the transaction a certified cheque payable to the vendor.

It was argued for the plaintiff that Resnick had no authority to agree that the whole balance of the purchase price should be paid in cash instead of being satisfied in part by the giving back of a mortgage, but by the terms of the agreement that mortgage was to contain a clause giving the mortgagor the privilege of paying the whole or any part of the principal sum at any time without notice or bonus. If the purchaser wished to pay all cash, as it did, it

could have complied literally with the terms of the agreement by tendering a duly executed mortgage and at the same time tendering payment in full thereof. The maxim—*lex neminem cogit ad vana seu inutilia peragenda*—would seem to be applicable. There remains, however, the question of the effect of Resnick having agreed to a reduction of $1,000 in the purchase price. Whether or not he had ostensible authority to do this, as president as well as solicitor of the plaintiff and as its officer who alone had signed the agreement for sale, need not be decided as it is clear that after it had full knowledge of all that Resnick had done and as to the manner in which the transaction had been closed the plaintiff elected to adopt the transaction. This is shown, amongst other things, by the plaintiff executing and delivering the rectification deed of March 5, 1963, and by its treating the cheque for $125,506.82 as its own, presenting it for payment and proceeding to judgment upon it. For these reasons as well as those dealing with estoppel on which the Courts below proceeded I agree that the plaintiff's action as against Grozbord and Mont Blanc was rightly dismissed.

Turning to the claim against the banks and Stone, I agree with the view of both Courts below that the lengthy delay on the part of the plaintiff in notifying each of these parties of the fact that the endorsement on the cheque for $125,506.82 had been forged materially reduced the chances of each of them of recovering from the forger. The duty of the plaintiff to notify these parties of the forgery arose at the latest on March 4, 1963. The course that the plaintiff took is succinctly stated by the learned trial judge as follows:

> . . . March 4th was the date when all directors of the plaintiff association became aware of such offence on the part of Resnick. They then had direct positive knowledge of forgery and minutes of subsequent meetings of the association reveal that the failure to notify the banks was deliberate and calculated to conceal the forgery until such time as the plaintiff had completed its investigations and decided what it would do. It is significant that no official of the plaintiff ever did notify either bank of the improper endorsement until the cheque was again presented for payment at the Royal Bank on May 14th. The Royal Bank acquired such knowledge from the solicitors for Stone on May 9th and the Bank of Nova Scotia the following day.

The reason that moved the learned trial judge to give judgment against the Royal Bank and Stone was that although their chances of recovery from Resnick had been

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prejudiced they ran no real risk of financial loss as each was entitled to be indemnified by the Bank of Nova Scotia.

In the Court of Appeal, Aylesworth J.A., after quoting from the reasons of the learned trial judge, continued as follows:

> With respect, I take a different view as to the position of both the Royal Bank of Canada and Stone. I also think that the defence of estoppel raised by the Bank of Nova Scotia has a wider application to the plaintiff's action than accorded it by the learned trial Judge. Dealing first with the Bank of Nova Scotia, it seems to me that the Bank is entitled to say to the plaintiff:—'Your deliberate silence in withholding notification of the forgery has destroyed this Bank's opportunities of meeting the claims for indemnity made upon it by its co-defendants, in great part at least, by going against the forger; you are therefore estopped from denying as against the Royal Bank and Stone the genuineness of Mrs. Bryden's signature forged by Resnick; otherwise this Bank suffers as a result of your silence to precisely the same extent as would be the case if it had been unable to demonstrate any loss whatever of opportunity of recoupment from the forger.' By the doctrine of estoppel a person is precluded from denying for any purposes of the particular transaction in which the estoppel arises, the truth of the statement acted on. Putting it another way, the truth of the statement acted on surely cannot be denied to any degree or for any purpose which results in a detriment to the representee. It is a distinct detriment to the Bank of Nova Scotia to have been deprived of its opportunities to meet the claims of its co-defendants by recoupment from Resnick.

I agree with all that is said in this passage as applied to the circumstances of this particular case and find it sufficient to support the allowance of the appeals of the Royal Bank and of Stone. Consequently I do not find it necessary to consider the two other grounds upon which Aylesworth J.A. was prepared to allow these appeals, (i) that even if the Royal Bank and Stone were entitled to recover from the Bank of Nova Scotia they have been deprived of their chance of recovering from Resnick, each thus losing one of two strings to his bow, and (ii) that even if entitled to full indemnity from the Bank of Nova Scotia they might well suffer delay and be put to expense in making that recovery.

As I find the reasons given above sufficient to dispose of the appeals it becomes unnecessary to consider the arguments advanced by counsel for some of the respondents based on the decisions in *Uxbridge Permanent Benefit Building Society v. Pickard*[2], and *Lloyd V. Grace, Smith & Co.*[3]

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[2] [1939] 2 K.B. 248.

[3] [1912] A.C. 716.

Before parting with the matter I think it only fair to the defendant Stone to say that I have found no support in the record for the criticism of his conduct suggested in the reasons of the learned trial judge and in the joint factum filed in this Court by the respondents the Royal Bank and the Bank of Nova Scotia. He appears to have conducted himself throughout in the manner to be expected of a prudent and competent solicitor acting for the purchaser of a parcel of real estate of substantial value.

I would dismiss the appeals of the plaintiff against all the defendants with costs. As the plaintiff's action against Stone is dismissed it follows that his conditional appeal in his third party proceedings against the two banks becomes unnecessary and I would dismiss it but without costs. I would vary the judgment of the Court of Appeal to provide that there be no order as to costs in that Court of the appeal by the banks against Stone in the third party proceedings and in all other respects would affirm the judgment of the Court of Appeal.

Appeals dismissed with costs; conditional appeal in third party proceedings dismissed without costs.

Solicitors for the plaintiff, appellant: McCarthy & McCarthy, Toronto.

Solicitors for the defendants, respondents, A. Y. Grozbord and Mont Blanc Holding Co.: Bassel, Sullivan, Holland & Lawson, Toronto.

Solicitors for the defendants, respondents, The Royal Bank of Canada and The Bank of Nova Scotia: Tilley, Carson, Findlay & Wedd, Toronto.

Solicitors for the defendant, respondent, E. Lawrence Stone: Thomson, Rogers, Toronto.

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*Feb. 12
Apr. 22

GENERAL TRUCK DRIVERS UNION, LOCAL 938, PAUL C. WEILER, STANLEY T. BULLOCK and F. WILLIAM MURRAY ..... APPELLANTS;

AND

HOAR TRANSPORT COMPANY LIMITED ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Labour relations—Collective agreement—Union and company nominees failing to select chairman of arbitration board—Union nominee failing until after prescribed period to request appointment of chairman by Minister—Grievance deemed to have been withdrawn if "grievance has not been processed by the grievor, his representatives or agents" in accordance with time limit—Whether board had jurisdiction to consider merits of grievance.

The appellant union, dissatisfied with the respondent company's rejection of a discharge grievance, indicated that it wished to proceed to arbitration, as was provided for in their collective bargaining agreement. Appointments of a union nominee and a company nominee to the board of arbitration were made within the time limits stipulated by art. 6.7 of the collective agreement. However, this article also provided that the appointees were to select a chairman within fifteen days of their appointment and that if they failed to do so, then the "aggrieved party's appointee must request in writing within five (5) calendar days," the Minister of Labour to name a chairman. It was not until after the prescribed period that the union's nominee B wrote to the Minister requesting that a chairman be appointed. This was done, and later the question was raised as to whether the board of arbitration had jurisdiction to consider the merits of the discharge grievance where there was clearly a failure on the part of the aggrieved party's appointee to comply with the time limit stipulated in art. 6.7.

The board, by a majority, held that it had jurisdiction to hear and determine the grievance. An application by the respondent to quash the proceedings by way of *certiorari* and for an order to prohibit further proceedings was dismissed. On appeal the Court of Appeal, by a majority, reversed this decision. With leave, an appeal from the judgment of the Court of Appeal was then brought to this Court.

Held (Spence J. dissenting): The appeal should be dismissed.

Per Cartwright C.J. and Martland, Judson and Ritchie JJ.: Article 6.8 of the agreement provided that if at any time during the carrying out of the steps laid down in art. 6.7 "the grievance has not been processed by the grievor, his representatives or agents in accordance with the time limit as prescribed, the grievance shall be deemed to have been withdrawn". B was well out of time when he wrote to the Minister requesting the appointment of a chairman. He was the

*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Spence JJ.

"aggrieved party's appointee" for this purpose. He was the only person who could make the request on behalf of the grievor, and he made it as representative of, or as agent of, the grievor. There was no conflict between this position and the quasi-judicial function which he later assumed upon the board being fully constituted.

Articles 6.7 and 6.8 were integral provisions of the agreement. They created obligations of a basic nature and the parties to the agreement were obliged to adhere to them.

Per Spence J., *dissenting:* The scheme of the collective agreement was that although there could be an employee's grievance that grievance had to be espoused by the union and, therefore, the notice of intention to arbitrate referred to in art. 6.7 which was required to contain the name of the aggrieved party's appointee to the board of arbitration required that the union, if it were processing either a union grievance or an employee grievance, was the party who should appoint to the board of arbitration. Article 6.8, however, did not refer to the aggrieved party's appointee but to the grievor, *his* representatives, or agents. Upon this consideration alone, it was apparent that the default of the union's appointee under art. 6.7 could not be the default of the grievor or the grievor's representatives or agents under art. 6.8.

Furthermore, even if B were the grievor's appointee not an "aggrieved party's appointee" under art. 6.7, he was not the "grievor's representative or agent" within art. 6.8. The function and character of a member of a board of arbitration was exactly opposite to that of a representative or agent. It was of the essence of his duty that such a member must act impartially and under such duty he could not be a representative or agent of anyone whether that party appointed him or not.

[*Union Carbide Canada Ltd. v. Weiler et al.*, [1968] S.C.R. 966; *Port Arthur Shipbuilding Co. v. Arthurs et al.*, [1969] S.C.R. 85, applied.]

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from an order of Stark J. dismissing an application for an order of *certiorari* and prohibition. Appeal dismissed, Spence J. dissenting.

Aubrey E. Golden, for the appellants.

W. Z. Estey, Q.C., for the respondent.

The judgment of Cartwright C.J. and Martland, Judson and Ritchie JJ. was delivered by

JUDSON J.:—The appellant, General Truck Drivers Union, Local 938, hereinafter referred to as "the Union", and the respondent are parties to a collective agreement which contains provisions for the orderly settlement of

[1] [1968] 1 O.R. 705, 67 D.L.R. (2d) 484, *sub nom. Regina v. Weiler et al., Ex parte Hoar Transport Co. Ltd.*

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Judson J.

grievances finally terminating, if necessary, in binding arbitration. The Union, dissatisfied with the respondent's rejection of a discharge grievance, indicated that it wished to proceed to arbitration, and on November 10, 1966, it appointed appellant Bullock as its nominee to the board of arbitration. On November 16, 1966, the respondent appointed appellant Murray as its nominee.

These appointments were within the time limits stipulated by art. 6.7 of the collective agreement. However, this article also provided that the appointees were to select a chairman within fifteen days of their appointment and that if they failed to do so, then the "aggrieved party's appointee must request in writing within five (5) calendar days," the Minister of Labour for the Province of Ontario to name a chairman. The appellants failed to agree upon a chairman and Bullock did not write to the Minister within the prescribed period. Indeed, it was not until January 4, 1967, that Bullock discussed the matter with Murray and then wrote to the Minister requesting that a chairman be appointed. This was done, and the question in this appeal is whether the board of arbitration had jurisdiction to consider the merits of the discharge grievance where there was clearly a failure on the part of the aggrieved party's appointee to comply with the time limit stipulated in art. 6.7.

The board, by a majority, held that it had jurisdiction to hear and determine the grievance. The respondent's motion to quash the proceedings by way of *certiorari* and for an order to prohibit further proceedings was dismissed by Stark J. But on appeal the Court of Appeal[1], by a majority, reversed this decision. I fully agree with the majority reasons delivered in the Court of Appeal.

Article 6.8 provides that if at any time during the carrying out of the steps laid down in art. 6.7 "the grievance has not been processed by the grievor, his representatives, or agents in accordance with the time limit as prescribed, the grievance shall be deemed to have been withdrawn". Bullock was well out of time when he wrote to the Minister of Labour for the Province of Ontario requesting the appointment of a chairman. He was the "aggrieved party's appointee" for this purpose. He was the only person who could make the request on behalf of the grievor, and he made it as representative of, or as agent of,

the grievor. There is no conflict between this position and his quasi-judicial function. He assumes the latter only at a later stage in the proceedings; that is, upon the board being fully constituted.

The board of arbitration is bound by the terms of the collective agreement. Articles 6.7 and 6.8 are integral provisions of the agreement. They create obligations of a basic nature and the parties to the agreement are obliged to adhere to them. The board of arbitration cannot ignore or dilute the force of these obligations, nor change their purport by means of amendment or substitution. This was the view taken by this Court in the recent decisions of *Union Carbide Canada Ltd. v. Weiler et al.*[2], and *Port Arthur Shipbuilding Co. v. Arthurs et al.*[3], and these decisions determine the disposition of this appeal.

I would dismiss the appeal with costs.

SPENCE J. (*dissenting*):—I have had the opportunity of reading the reasons of my brother Judson and I need not repeat the circumstances which have been outlined with such detail in his reasons.

I am in agreement that the board of arbitration is bound by the terms of the collective agreement and that arts. 6.7 and 6.8 are integral provisions of the agreement creating an obligation of a basic nature and that the parties to the agreement are obliged to adhere to them.

I am also of the opinion that s. 86 of the Ontario *Labour Relations Act,* R.S.O. 1960, c. 202, does not permit the board of arbitration to ignore the exact provisions of the collective agreement and that the failure to comply with such provisions is no mere "technical irregularity". Indeed, counsel for the appellant declined to urge such a submission on this Court.

With respect, however, I cannot accept the view that, when Mr. Bullock, the aggrieved party's appointee, failed to request the Minister of Labour to name a chairman within five days after the expiry of the time for the two arbitrators to agree on the appointment, such an action resulted in the grievance being deemed to have been withdrawn. The majority of the Court of Appeal were of

[2] [1968] S.C.R. 966, 70 D.L.R. (2d) 333.
[3] [1969] S.C.R. 85, 70 D.L.R. (2d) 693.

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the opinion that such a result was wrought by the provisions of art. 6.8 of the collective agreement. That provision, so far as it is relevant, is as follows:

> If at any time during the above mentioned steps the grievance has not been processed by the grievor, his representatives, or agents in accordance with the time limit as prescribed, the grievance shall be deemed to have been withdrawn...

I note that the default which is to have this very serious result is the default of the "grievor, his representatives or agents". The default in the present case was that of Mr. Bullock. Mr. Bullock was the exact person upon whom the duty rested in that he was "the aggrieved party's appointee" under the provisions of art. 6.7 of the collective agreement. If it had been intended to have included the arbitrator who was appointed by the grievor amongst those whose default would result in the grievance being deemed to have been withdrawn, it would have been extremely easy to have repeated in art. 6.8 the same exact words "the aggrieved party's appointee" as had been set out in art. 6.7 rather than have left the question open as to whether such aggrieved party's appointee could be included in the general words "his representatives or agents".

In art. 6.7, three kinds of grievances are outlined:

1. an employee grievance,
2. a member company grievance,
3. a union grievance.

There would seem to be no doubt that the present case is concerned with an employee grievance. I am, however, doubtful that "the aggrieved party's appointee" is the employee's appointee. Although the collective agreement does bear a definition of member companies and of employees, it bears no definition of the word "party". The individual employees were not signators of the collective agreement. Throughout the whole of the various paragraphs of art. 6, there is consistent reference to the "aggrieved employee" and to the "grieving employee" but nowhere is the employee referred to as a "party". Moreover, art. 6.3 provides:

> During any such steps of the grievance procedure, after the grievance has been received in writing the grieving employee must be accompanied by one steward and/or business agent.

This all leads me to believe that the scheme of the collective agreement was that although there could be an employee's grievance that grievance had to be espoused by the union and that, therefore, the notice of intention to arbitrate referred to in art. 6.7 which was required to contain the name of the aggrieved party's appointee to the board of arbitration required that the union, if it were processing either a union grievance or an employee grievance, was the party who should appoint to the board of arbitration. Article 6.8, however, does not refer to the aggrieved party's appointee but to the grievor, *his* representatives, or agents. Upon this consideration alone, it is apparent that the default of the union's appointee under art. 6.7 cannot be the default of the grievor or the grievor's representatives or agents under art. 6.8.

I am, however, further of the opinion that art. 6.8 need not be interpreted as causing the grievance to be deemed to be withdrawn even if art. 6.7 did provide that the notice should contain the name of the grievor's appointee rather than "the aggrieved party's appointee" as it does. I do not think so because I am of the opinion that the function and character of a member of a board of arbitration is exactly opposite to that of a representative or agent. It is of the essence of his duty that such a member must act impartially and under such duty he could not be a representative or agent of anyone whether that party appointed him or not.

It was the view of Aylesworth J.A., giving the judgment of the majority of the Court of Appeal for Ontario, that such appointee's "quasi-judicial function of arbitration begins with the constitution of the board, not before, and the board, of course, cannot be constituted and cannot enter upon its functions until after the appointment of a chairman". With respect, I am unable to agree with the view that the character of an arbitrator changes from that of an agent to that of an impartial adjudicator after a chairman has been appointed in the ordinary course by the act of that very member of the board and the board commences its deliberations. Any such mystical translation of functions is unnecessary for the proper conception of the position and duty of an arbitrator.

In *Veritas Shipping Corporation v. Anglo-Canadian Cement, Ltd.*[4], Mr. Justice McNair considered an appli-

[4] [1966] 1 Lloyd's Rep. 76.

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cation to remove one Wallersteiner from a board of arbitration. The arbitration was one provided for by a clause in the charter-party which clause called on each party, *i.e.*, the owners and charterers, to nominate a member of the board. The charterer purported to nominate its own managing director as the arbitrator and, in fact, Dr. Wallersteiner, as such managing director of the charterer, actually executed the document appointing himself the arbitrator. The submission made by the shipowners was that Dr. Wallersteiner had misconducted himself in the arbitration in appointing himself, having been managing director of the charterer. McNair J. said at p. 77:

> I am quite satisfied that it would be quite wrong for him to be allowed to continue to act as arbitrator in a dispute of this nature. It is quite true that under the clause, if the two arbitrators disagree and the matter is referred to the umpire for his decision, the arbitrators, according to the customary way in which these matters are dealt with in the City of London, may if they so wish act as advocates. They need not do so but there is nothing wrong in them doing so. Until that moment arrives, the arbitrators must not only act judicially and show no bias at all but must also appear to be in a position to act judicially and without any bias.

Therefore, it was McNair J.'s view that so soon as the arbitrator was appointed his judicial and impartial function became operative. In the present case, for the same reasons, Mr. Bullock's judicial and impartial function became operative so soon as he was appointed as the aggrieved party's appointee to the board. In fact, the very act of choosing the chairman of the board was a duty he was required to perform judicially and without bias.

I am, therefore, of the opinion that, as I have said, even if Mr. Bullock were the grievor's appointee not an "aggrieved party's appointee" under art. 6.7, he was not the "grievor's representative or agent" within art. 6.8.

I am assisted in coming to this conclusion by the circumstance, referred to by Mr. Justice Laskin in his dissenting judgment in the Court of Appeal for Ontario, that the words "the grievor, his representatives or agents" in art. 6.8 have ample subject-matter in art. 6 to which the words might refer other than the aggrieved party's appointee. Throughout it and the preceding articles of the agreement, many examples of representative or agent character of

either the member company or the union are given. Any one of those representatives or agents could be "the grievor, his representatives or agents" in art. 6.8.

For these reasons, I would allow the appeal with costs in this Court and in the Court of Appeal and restore the judgment of Stark J., dismissing the motion for *certiorari* with costs.

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Appeal dismissed with costs, SPENCE J. *dissenting.*

Solicitor for the appellants: Aubrey E. Golden, Toronto.

Solicitors for the respondent: Robertson, Lane, Perrett, Frankish & Estey, Toronto.

SYLVIA ELAINE MUGFORD .....APPELLANT;

AND

THE CHILDREN'S AID SOCIETY OF OTTAWA .....RESPONDENT.

1968

*Dec. 11, 12

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Feb. 12

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Infants—Child of unmarried mother made ward of Crown under s. 25(c) of The Child Welfare Act, 1965 (Ont.), c. 14—Subsequent application by mother under s. 35 for custody of child—Whether judge had jurisdiction to consider such application.

The appellant gave birth to a child on October 5, 1967, and at that time was unmarried and between 19 and 20 years of age. Prior even to the birth of the child she consulted the Children's Aid Society of Ottawa as to the child about to be born being given into custody of that organization subsequent to its birth. On October 26, 1967, upon the application of the Society, a judge of the Family Court made an order whereby he found that the child was a child in need of protection. Exercising the jurisdiction conferred in s. 25(c) of *The Child Welfare Act,* 1965 (Ont.), c. 14, he made the infant a ward of the Crown and committed him to the care of the Society.

On January 24, 1968, the appellant wrote to the social worker of the Society and said as to her infant son, "but now I want him back", but on February 23, 1968, in reply to a letter from the social worker, she asked that the earlier request be disregarded. However, by a letter of April 10, 1968, the appellant again applied for the return of her son. In the interim, the appellant's mother for the first time had discovered the birth of the child and she and her husband were anxious to take the appellant back into their home and to care for the child. On April 18, the social worker replied stating that the infant had been placed with adopting parents and that "we cannot disturb this arrangement".

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*PRESENT: Cartwright C.J. and Martland, Judson, Hall and Spence JJ.

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Subsequently, the appellant applied to the Juvenile and Family Court under s. 35 of *The Child Welfare Act* for an order for the production of the infant and for a further order for the delivery of the said infant to the applicant. The application was dismissed. On an appeal under s. 36 of the Act, a County Court judge allowed the appeal, terminated the order of October 26, 1967, and directed that the child be produced and delivered to the appellant. An appeal from this decision to the Court of Appeal was allowed on the ground that s. 25(*c*) of the Act provided "that the child be made a ward of the Crown until the wardship is terminated under section 31 or 34", and that, therefore, no application could be made by a parent under the provisions of s. 35 of the Act when a child had been so made a ward of the Crown under the provisions of s. 25(*c*). With leave, an appeal from the judgment of the Court of Appeal was brought to this Court.

Held (Judson and Hall JJ. dissenting): The appeal should be allowed and the case returned to the Court of Appeal for consideration upon the merits.

Per Cartwright C.J. and Martland and Spence JJ.: Under s. 31 of *The Child Welfare Act* the Children's Aid Society having the care of the child could apply to terminate the wardship order, and under s. 34 the wardship would terminate when the child reached the age of 18. But a Court should not be forced to the conclusion that the whole determination of whether the mother should have the custody of her child returned to her is to be left for the Children's Aid Society so that that society by simply refusing to make an application provided for by s. 31 could bar the mother having a Court consider a change of circumstances and what might well be not only to her advantage but to the advantage of the welfare of the child.

While there was truth in the submission that such an interpretation of the section is necessary in order to permit the efficient operation of the procedure for the adoption of children who have been made wards of the Crown, and that proposed adopting parents will not take a child preparatory to adopting the said child if their custody of the child and their opportunity to secure the adoption of that child is imperilled by the possibility that the parent or parents of the child might at any time prior to the granting of an adoption order make an application to have the child returned thereby disrupting all the plans of the proposed adopting parents and causing them a considerable emotional upset, this should not persuade the Court to find that the most important right of a natural parent has been taken from such natural parent merely by implication. Consent of the natural parent to the original order which made the infant a ward of the Crown is often and perhaps usually given under conditions when such natural parent, almost inevitably the mother, is under a condition of almost intolerable stress.

Accordingly, s. 35 of the Act permitted the application of the natural mother for production of the child even when that child was a ward of the Crown and, therefore, the Family Court judge had jurisdiction to consider such application by the present appellant and the County Court judge had jurisdiction to consider an appeal from the Family Court judge's refusal of the application.

Per Judson and Hall JJ., *dissenting:* Under s. 32 of *The Child Welfare Act,* the Crown is made the legal guardian and has the care, custody

and control of a child designated as a Crown ward. It has the obligation to secure adoption of the child under s. 84(1). By s. 73(3) the natural parent's consent is dispensed with in the case of a Crown ward in adoption proceedings under Part IV of the Act.

It followed that the Legislature intended, by s. 25(*c*), that once a child was designated as a Crown ward, the natural parent was to be accorded no recourse other than the right to appeal, and the order designating the child as a Crown ward was not to be terminated except as provided in s. 31 or when the child attained the age of 18. The power of the Legislature to so enact could not be questioned: *Reference re Adoption Act, etc.*, [1938] S.C.R. 398.

The plain words of s. 25(*c*) "that the child be made a ward of the Crown until the wardship is terminated under section 31 or 34" could not be read as being nullified by the opening words of s. 35(1). The two subsections have a place in the scheme of things contemplated by the Act. Section 25(*c*) does not deprive s. 35(1) of effect. Section 35(1) still applies to wards of children's aid societies who are not Crown wards namely, those so designated under s. 25(*b*) and to whom s. 31(1) does not apply.

[*Fortowsky v. Roman Catholic Children's Aid Society for County of Essex*, [1960] O.W.N. 235, 23 D.L.R. (2d) 569; *Re Minister of Social Welfare and Rehabilitation and Dubé* (1963), 39 D.L.R. (2d) 302; *Hepton and Hepton v. Maat*, [1957] S.C.R. 606; *Martin v. Duffell*, [1950] S.C.R. 737, referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from an order of Honeywell Co.Ct.J. Appeal allowed and case remitted to Court of Appeal to be dealt with on the merits, Judson and Hall JJ. dissenting.

Joseph F. Foreman, for the appellant.

W. G. Burke-Robertson, Q.C., for the respondent.

P. J. Brunner and J. I. Tavel, for the intervenants, the adoptive parents.

The judgment of Cartwright C.J. and of Martland and Spence JJ. was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario[1] pronounced immediately following argument on October 1, 1968. Leave to appeal to this Court was granted by the Court on October 21, 1968.

The appellant Sylvia Elaine Mugford gave birth to a child, David John Mugford, on October 5, 1967. At that time, Sylvia Elaine Mugford was unmarried and between 19 and 20 years of age. She was living temporarily with a

[1] [1968] 2 O.R. 866.

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sister in Ottawa and her mother did not know of her pregnant condition. Prior even to the birth of the child, she had consulted the Children's Aid Society of Ottawa as to the child about to be born being given into custody of that organization subsequent to its birth. On October 26, 1967, upon the application of the Children's Aid Society of Ottawa, His Honour Judge Robert Good, a judge of the Family Court, made an order whereby he found that the infant David John Mugford was a child in need of protection. Exercising the jurisdiction conferred in s. 25(*c*) of *The Child Welfare Act,* 1965 (Ont.), c. 14, to which reference shall be made hereafter, he made the said David John Mugford a ward of the Crown and committed him to the care of the Children's Aid Society of Ottawa.

On January 24, 1968, Miss Mugford wrote to the social worker with the Children's Aid Society of Ottawa and said as to her infant son, "but now I want him back". The social worker replied thereto suggesting that Miss Mugford should come and discuss the matter with her but on February 23, 1968, Miss Mugford replied to that letter asking the social worker to disregard her earlier request. Part of that letter is of some relevance to these considerations. Miss Mugford said, in part:

> I'm sorry for causing so much inconvenience but I have been very upset lately and didn't know which way to turn. I didn't answer your letter immediately because I was in the process of really trying to straighten myself out and wanted to be sure. As it is now I don't see how I will be able to take the baby back because I don't feel worthy of him. I will always want him but I don't feel I have that extra something that it takes to devote my life to raising him.

Further in the letter, Miss Mugford said:

> Please let me know as soon as he is adopted; I am planning to move away soon and I would like to know exactly how everything is with him before I leave.

By her letter of April 10, 1968, Miss Mugford again renewed her application to have her son David John Mugford returned to her. The evidence reveals that in the interim Miss Mugford's mother had for the first time discovered the birth of the child and she and her husband were most anxious to take Miss Mugford back into her home and to care for the child. To that letter, the social worker replied on April 18 stating that the infant had been placed with adopting parents in mid-March and that "we cannot disturb this arrangement". On May 27, 1968, through her

solicitor, Miss Mugford applied to the Juvenile and Family Court of the City of Ottawa and County of Carleton under the provisions of s. 35 of *The Child Welfare Act* for an order for the production of the infant and for a further order for the delivery of the said infant to the applicant. That application was considered by His Honour Judge Good, the same judicial officer who had, as a judge of the Family Court, jurisdiction under s. 25(*c*) of *The Child Welfare Act,* and who had ordered on October 26, 1967, that the infant should be a ward of the Crown. His Honour Judge Good's formal order dismissing Miss Mugford's application appears under date of June 24, 1968, which would appear to have been the date of the hearing. His Honour Judge Good, however, delivered careful and detailed reasons dated July 5, 1968. An appeal therefrom in accordance with the provisions of s. 36 of *The Child Welfare Act* was taken to the presiding judge in chambers for the County Court of the County of Carleton. After a hearing and with detailed and carefully considered reasons, by an order made on August 13, 1968, His Honour Judge Honeywell allowed the appeal, terminated the order of October 26, 1967, and directed that the child be produced and delivered to Miss Mugford. From this order, the Children's Aid Society of Ottawa appealed to the Court of Appeal in accordance with s. 36(2) of *The Child Welfare Act,* and those persons with whom the infant had been placed and who hoped to become the adopting parents applied to the Court of Appeal for leave to appeal the said order of the County Court judge.

The appeal came on for hearing on October 1, 1968, and, for reasons given by Kelly J. A., the appeal was allowed upon the ground that s. 25(*c*) of *The Child Welfare Act* provided "that the child be made a ward of the Crown until the wardship is terminated under section 31 or 34 . . .", and that, therefore, no application could be made by a parent under the provisions of s. 35 of the said statute when a child had been so made a ward of the Crown under the provisions of s. 25(*c*) of the statute. Whether or not this is the effect of the statute was the subject of the argument in this Court. Although the present *Child Welfare Act* is a new statute first enacted in 1965, it contains many statutory provisions which had appeared in earlier statutes. Section 35 has appeared in various forms in the statutory provisions for about sixty years, and the present section

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is largely a repetition of that which appeared in *The Child Welfare Act,* R.S.O. 1960, c. 53, s. 30. The only revisions wrought in the new statute were to provide, firstly, that the application under s. 35 should be made "to a judge of the Supreme Court", and, secondly, that the words in the original section that the judge should refuse to enforce "his [the parent's] right to the custody of the child" have been replaced by the words "that the child is in need of protection".

In *Fortowsky v. Roman Catholic Children's Aid Society for County of Essex*[2], the Court of Appeal for Ontario considered an appeal arising under circumstances surprisingly similar to those of the present case. There the application had been made by the parent, under the provisions of *The Infants Act,* R.S.O. 1960, c. 187, to a judge of the Surrogate Court of the County of Essex. At that time, there was in effect *The Child Welfare Act,* 1954 (Ont.), c. 8. Section 27(1) of that statute provided:

> 27.—(1) Where a parent applies to a judge of the Supreme Court for an order for the production of a child committed under this Part and the judge is of the opinion that the parent has neglected or deserted the child or that he has otherwise so conducted himself that the judge should refuse to enforce his right to the custody of the child, the judge may in his discretion decline to make the order.

Aylesworth J. A. delivered the judgment of the Court in which he held that the Court was by the provisions of the said *Child Welfare Act* deprived of its jurisdiction under the general provisions of s. 1(1) of *The Infants Act* when the child had been made a permanent ward of the Children's Aid Society. At p. 236 of the note it is said:

> All the provisions of Part II expressed overwhelmingly the intention of the legislature to deal specifically by special provisions with all matters relevant to the protection, care and custody of neglected children and the legislature by these enactments, as it were, segregated all such questions with respect to this specific class of infants to be dealt with by those special provisions only and not to be dealt with at large under the provisions of the Infants Act. Under Part II a parent seeking to regain the custody of a neglected child must bring an application for that purpose, before a Judge of the Supreme Court: s. 27. Upon such an application the Judge was required to give specific consideration to all those matters with respect to which provision was made in the Part. It was true that the provisions of s. 27 having to do with the issue of custody of a neglected child, were phrased somewhat in the negative, rather than in the positive, in referring to the powers of a Judge of the Supreme Court. That, however, was immaterial. A Judge of the Supreme Court or a

[2] [1960] O.W.N. 235, 23 D.L.R. (2d) 569.

Judge of the Surrogate Court were given general jurisdiction over questions of custody by the provisions of the Infants Act. The Child Welfare Act, Part II simply carved out of that general jurisdiction the powers which a Judge of the Surrogate Court otherwise would have and set up provisions for the guidance of a Judge of the Supreme Court when application was made to him by a parent with respect to a neglected child.

It should be noted that the order which the Surrogate Court judge purported to vary was an order made under the provisions of s. 16(8)(*c*) of *The Child Welfare Act*, 1954, which provided:

> 16. (8) Where the judge finds the child to be a neglected child he shall make an order,
>
> * * * *
>
> (*c*) that the child be committed permanently to the care and custody of the children's aid society;

Subsection (14) of the said s. 16 provided:

> (14) Where a judge has made an order under clause *c* of subsection 8, the society may at any time during the period of permanent commitment and upon at least thirty days notice in writing to the Director, bring the case before a judge to determine if the welfare of the child might best be served by the termination of such permanent commitment and if the judge is satisfied that such action is in the interest of the welfare of the child, he shall terminate the commitment.

and subsection (16) of the said s. 16 provided:

> (16) Where a child has been permanently committed to the care and custody of a society, the society shall be the legal guardian of such ward until he has attained the age of eighteen years, or until he is adopted under Part IV,...or until the wardship is terminated by a judge under subsection 14, or until an extended guardianship under subsection 17 terminates.

It would, therefore, appear that with the exception that the application under the present s. 35 of *The Child Welfare Act* is made to a "judge", defined in s. 19(1)(*d*) as being a judge of a Juvenile and Family Court, while the application under s. 27 of *The Child Welfare Act*, R.S.O. 1960, c. 53, was made to a judge of the Supreme Court, all the other relevant provisions of the statute are similar. I cannot see that the fact that the earlier statutory provisions were that the child should be made a permanent ward of the society while the present provisions are that the child should be a ward of the Crown can affect the matter; nor can I see that the alteration of the words "to enforce the right to the custody of the child" to the words "that the child is in need of protection" require any different interpretation of the section. It was very plainly Aylesworth J.A.'s opinion that the parent could have made

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an application not to the Surrogate judge under the provisions of s. 1(1) of *The Infants Act,* as the parent in the *Fortowsky* case purported to apply, but rather to a Supreme Court judge under the provisions of the then s. 27 of *The Child Welfare Act,* for the learned justice in appeal said at p. 237:

> If the mother was sincere in her wish for the custody of her child—and the record gave every indication of such sincerity—the question of custody would remain to be decided, if necessary, upon an application to a Judge of the Supreme Court for custody of the child, on notice, of course, to the society.

I am, therefore, of the opinion that the *ratio decidendi* of the Court of Appeal in the present case and of the same Court in the *Fortowsky* case are in exact opposition. If an application could have been made by a parent under the provisions of s. 27 of *The Child Welfare Act,* 1954, c. 8, as to a child who had been made a permanent ward of the society under the provisions of s. 16 of that statute then, similarly, the application may be made by a parent under s. 35 of the present *Child Welfare Act* as to an infant who had been made a ward of the Crown under the provisions of s. 25(*c*) of the latter statute.

In support of the submission that the interpretation of s. 35 made by the Court of Appeal in the present case is the correct one, it has been said that the original order made by His Honour Judge Good on October 26, 1967, was subject to appeal under s. 36 of *The Child Welfare Act,* that there is no limitation on the time for such appeal and that, therefore, the present appellant instead of taking the procedure under s. 35 of *The Child Welfare Act* could have appealed that original order. This argument seems to me to exhibit a misconception of the purpose of appeal. It is not the appellant's contention that the order made by His Honour Judge Good on October 26, 1967, was in error. She had appeared to support that application, she was represented by counsel, and she was carefully warned of her rights but believed at that time and under the circumstances which then prevailed that the only way in which the interest of her infant child could be protected properly was by the making of such order. No matter what extension of time might be obtained to permit such an appeal and no matter what other evidence might be permitted upon such an appeal, it would be the duty of the

judicial officer hearing the appeal, *i.e.*, the judge of the County Court of the County of Carleton, to consider the appeal on the circumstances which prevailed at the time the order appealed from was made. Any attempt to bring in the subsequent most important circumstances as to the mother's present ability to care for her infant and the offer of her mother and step-father to assist her, as they are well able to do, could not affect the validity of the order as originally made.

Kelly J.A., in giving reasons for the Court of Appeal, said:

> The order under s. 25(*c*) had the effect of making the child a ward of the Crown until the wardship be terminated under s. 31 or s. 34 of *The Child Welfare Act*, 1965. No proceedings with respect to the termination of the wardship under either of those sections are before the Court or have been taken. It is the view of this Court that the application was misconceived and that no power lay in the Judge under s. 35 to make any order with respect to a wardship under s. 25(*c*) that had not been terminated.

As I have pointed out, to attribute that exclusive character to s. 25(*c*) is contrary to the view of Aylesworth J.A. as outlined in the *Fortowsky* case, *supra*. It would appear, moreover, not to be in accordance with the other provisions of *The Child Welfare Act*. As Kelly J.A. pointed out, an order under s. 25(*c*) is subject to an appeal. Part IV of *The Child Welfare Act* makes the provision for adoption and Part IV is not referred to as an exception under s. 25(*c*). The inevitable effect of s. 82, which appears in the said Part IV, is to terminate any wardship as by subs. (1) the adopted child becomes the child of the adopting parents. There is some indication that unless and until that adoption takes place the natural parent still maintains rights. Section 73(3) provided that the only consent required to the adoption of a child which is a Crown ward is the consent of the Director. Apart from that provision, the natural parent, by the provisions of s. 73(2), would have been required to consent.

In *Re Minister of Social Welfare and Rehabilitation and Dubé*[3], Culliton C.J.S., giving judgment for the Court of Appeal of Saskatchewan, considered an appeal from an order made granting the custody of a child to its father. The child had been found, by a Family Court judge, to

[3] (1963), 39 D.L.R. (2d) 302.

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have been abandoned and it had been committed to the Minister, that being the provision of the Saskatchewan statute rather than granting wardship to the Crown as in Ontario. An appeal had been taken to a judge in chambers and that appeal had been dismissed. The father then made an application to the Court of Queen's Bench under the provisions of *The Infants' Act,* R.S.S. 1953, c. 306, for custody of the child. This order was granted and an appeal was taken to the Court of Appeal. Culliton C.J.S. said at p. 304:

> The primary question raised by this appeal is whether when there is an existing committal order under Part I of the *Child Welfare Act,* the Court of Queen's Bench has jurisdiction to entertain an application for custody.

The *Fortowsky* case, *supra,* was cited as an authority for the depriving of the Court of Queen's Bench of such jurisdiction. The learned Chief Justice of Saskatchewan refused to follow such case pointing out that the Ontario statute, *i.e., The Child Welfare Act,* 1954, c. 8, contained the provision in s. 27 to which I have already referred and that such provision was not reproduced in the Saskatchewan statute. At pp. 307-8 he said:

> I would also point out that an order for custody made by the Court of Queen's Bench is not a final judgment. It is not a decision which terminates for all time the rights of the parents or either of them. The Court always has the right, under changed conditions, to make a new order, notwithstanding the existence of the previous order. To give effect to the contention of learned counsel for the appellant, would be to give to a committal order a finality not provided for in a custody order. This, in my view, would so drastically terminate the rights of the parents that such effect should not be given thereto *in the absence of express language.*

(The italicizing is my own.)

In Hepton and Hepton v. Matt[4], the present Chief Justice of this Court found reason to repeat his statement in *Martin v. Duffell*[5], and such statement received the expressed approval of Rand J. in the same case. There, the present Chief Justice said:

> ...I regard it as settled law that the natural parents of an infant have a right to its custody which, apart from statute, they can lose only by abandoning the child or so misconducting themselves that in the opinion of the Court it would be improper that the child should be allowed to remain with them, and that effect must be given to their wishes unless "very serious and important reasons" require that, having regard to the child's welfare, they must be disregarded.

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[4] [1957] S.C.R. 606.

[5] [1950] S.C.R. 737.

I think that view is sound basis for a disinclination to find that the statute has deprived the natural parent of any right to apply for a variation of the order making a child the ward of the Crown unless it so provides in express words. On the interpretation urged by the respondent in the present appeal, upon the order having been made originally on October 26, 1967, and properly made for what then existed as good and sufficient cause, no matter what change in circumstances took place, the mother was forever barred from making an application to the Court for the custody of her own child. It is true that under s. 31 of *The Child Welfare Act* the Children's Aid Society having the care of the child might then determine that the welfare of the child would justify termination of the wardship order and itself apply, and under s. 34 the wardship would terminate when the child reached eighteen years of age. Surely a Court should not be forced to the conclusion that the whole determination of whether the mother should have the custody of her child returned to her is to be left for the Children's Aid Society so that that society by simply refusing to make an application provided for by s. 31 could bar the mother having a Court consider a change of circumstances and what might well be not only to her advantage but to the advantage of the welfare of the child.

It is said such an interpretation of the section is necessary in order to permit the efficient operation of the procedure for the adoption of children who have been made wards of the Crown, and it is to be noted that s. 84(1) of *The Child Welfare Act* provides that every Children's Aid Society should endeavour to secure the adoption of Crown wards. It is argued that proposed adopting parents will not take a child preparatory to adopting the said child if their custody of the child and their opportunity to secure the adoption of that child is imperilled by the possibility that the parent or parents of the child might at any time prior to the granting of an adoption order make an application to have the child returned thereby disrupting all the plans of the proposed adopting parents and causing them a considerable emotional upset. There is truth in this submission but I cannot feel that even that should persuade this Court to find that the most important right of a natural parent has been taken from such natural parent merely by implication. It must be remembered that the consent of the natural parent to the

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original order which made the infant a ward of the Crown is often and perhaps usually given under conditions when such natural parent, almost inevitably the mother, is under a condition of almost intolerable stress, and to attribute the degree of finality argued for by the respondent to her consent under those circumstances is a course which I find most difficult to follow.

For these reasons, I am of the opinion that s. 35 of *The Child Welfare Act* permits the application of the natural mother for production of the child even when that child is a ward of the Crown and that, therefore, His Honour Judge Good had jurisdiction to consider such application by the present appellant and His Honour Judge Honeywell had jurisdiction to consider an appeal from His Honour Judge Good's refusal of the application.

The Court of Appeal for Ontario based its decision only on this question of jurisdiction and having expressed its view that no such jurisdiction existed did not deal with the merits of the appeal. His Honour Judge Good came to one conclusion in carefully detailed reasons and His Honour Judge Honeywell, on appeal from His Honour Judge Good, came to the opposite conclusion, again in carefully detailed reasons. It would seem that those merits should be dealt with by the Court of Appeal for Ontario and it is, therefore, my view that this appeal should be returned to the Court of Appeal for Ontario for consideration upon the merits.

Neither before His Honour Judge Good nor before His Honour Judge Honeywell, nor in the Court of Appeal for Ontario were any costs allowed. I would, therefore, not make any provision for costs in this appeal.

The judgment of Judson and Hall JJ. was delivered by

HALL J. (*dissenting*):—The facts are set out in the reasons of my brother Spence. The merits of the appellant's application for the production and delivery to her of the infant David John Mugford are not in issue in this appeal. The only question for determination is whether His Honour Judge Good had jurisdiction to entertain the application, having regard to s. 25(*c*) of *The Child Welfare Act*, 1965 (Ont.), c. 14. The Court of Appeal held that His Honour Judge Good was without jurisdiction.

There is no question as to the validity of the original order made by His Honour Judge Good on October 26,

1967, wherein he found the child David John Mugford to be a child in need of protection and under s. 25 of *The Child Welfare Act*, which reads:

25. Where the judge finds the child to be a child in need of protection, he shall make an order,

(*a*) that the case be adjourned *sine die* and that the child be placed with or returned to his parent or other person subject to supervision by the children's aid society; or

(*b*) that the child be made a ward of and committed to the care and custody of the children's aid society having jurisdiction in the area in which the child was taken into the protective care of the society for such period, not exceeding twelve months, as in the circumstances of the case he considers advisable; or

(*c*) that the child be made a ward of the Crown until the wardship is terminated under section 31 or 34 and that the child be committed to the care of the children's aid society having jurisdiction in the area in which the child was taken into the protective care of the society.

He elected to act under cl. (*c*) above and ordered:

(*a*) that the child be made a ward of the Crown and committed to the care of the Children's Aid Society of Ottawa commencing 26th October, 1967.

Although s. 36 of *The Child Welfare Act* gives a right of appeal, no appeal was taken from this order. In fact the order was made with the mother's consent three weeks after the birth of the child and after she had been counselled and advised by Mr. Brian Golding, who acted as guardian *ad litem*.

As will be seen, s. 25 above recognizes two types of wardship. The first, under cl. (*b*), provides for a child being made a ward of, and committed to, the care and custody of the Children's Aid Society having jurisdiction in the area in which the child was taken into protective custody; and the second, under cl. (*c*) that the child be made a ward of the Crown until the condition is terminated under s. 31 or 34.

It is only in respect of an order made under cl. (*c*) that the condition is to continue until terminated under s. 31 or 34.

Section 31 reads:

31. (1) Where a child has been committed as a ward of the Crown, the children's aid society having the care of the child may apply to a judge for an order terminating the Crown wardship, and, if the judge is satisfied that the termination is in the best interests of the child, he shall order that the Crown wardship be terminated.

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(2) Within twelve months after a Crown ward is admitted to an institution under *The Mental Hospitals Act*, other than an examination unit, the children's aid society responsible for the care of the child shall, upon notice to the superintendent of the mental institution, apply to a judge for an order terminating the Crown wardship, and, if the judge is satisfied that the termination of the wardship is in the best interests of the child, he shall order that the Crown wardship be terminated.

and provides for termination of a Crown wardship unilaterally on an application by the Children's Aid Society having the care of the child. No similar provision is provided for in this section in favour of anyone else.

Section 34 reads:

34. Every wardship terminates when the ward attains the age of eighteen years, but, upon the application of a children's aid society with the approval of the Director, a judge may order that the wardship of a Crown ward continue until the ward attains the age of twenty-one years where the ward is dependent for educational purposes or because of mental or physical incapacity.

and has no application here.

That leaves s. 35(1) which reads:

35. (1) Where a parent applies to a judge for an order for the production of a child committed under this Part and the judge is of the opinion that the parent has deserted the child or that he has otherwise so conducted himself that the child is in need of protection, the judge may in his discretion decline to make the order.

and it is under this section that the appellant applies to terminate the Crown wardship. Kelly J.A., speaking for himself, MacKay and MacGillivray JJ.A., said:

Under the scheme of *The Child Welfare Act* the Judge, as therein defined and within which definition came His Honour Judge Good who made the order of 26th October 1967, may make orders, under s. 25, in respect of a child whom he finds to be "in need of protection", which phrase is defined in s. 19(1)(*b*) of the Act. The order of Judge Good did find that this child was a child in need of protection. Having made such a finding, the Judge was authorized to make one of several orders. The order which he chose to make was made under s. 25(*c*) and must be taken to have been made judicially on the facts before him. No proceedings have been taken to set aside or appeal from that particular order. The order under s. 25(*c*) had the effect of making the child a ward of the Crown until the wardship be terminated under s. 31 or s. 34 of *The Child Welfare Act*. No proceedings with respect to the termination of the wardship under either of those sections are before the Court or have been taken. It is the view of this Court that the application was misconceived and that no power lay in the Judge under s. 35 to make any order with respect to a wardship under s. 25(*c*) that had not been terminated. It follows that neither of the Courts below had jurisdiction to deal with the application and the proper order would be that the order appealed from be varied and as varied provide that the proceedings before the Judge of the Juvenile Court be quashed for want of jurisdiction.

It was argued in this Court that this result was in conflict with the decision of the Court of Appeal in *Fortowsky v. Roman Catholic Children's Aid Society for County of Essex*[6], in which Aylesworth J.A., in dismissing an application for custody on the grounds quoted by my brother Spence in his reasons, continued as follows [pp. 573-74 (D.L.R.)]:

> For these reasons I conclude that the appeal must succeed. Having come to that conclusion it is unnecessary to deal with the merits of the respondent mother's application. If the mother is sincere in her wish for the custody of her child and the record gives very indication of such sincerity, the question of custody will remain to be decided, if necessary, upon an application to a Judge of the Supreme Court for production and for custody of the child, on notice, of course, to the appellant. I say "if necessary" because the appellant if convinced that it is in the best interests of the child's welfare to restore custody to the respondent (and upon the evidence before him the Surrogate Court Judge was so convinced) may decide to expedite the matter by itself upon notice to the mother making application under s. 16 (14) of the special Act; *otherwise the respondent must be left to the legal remedy which is hers under s. 27.*

(Emphasis added.)

It is on this reference to s. 27 that the appellant relies.

Section 27 referred to by Aylesworth J.A. then read:

> 27.(1) Where a parent applies to a judge of the Supreme Court for an order for the production of a child committed under this Part and the judge is of the opinion that the parent has neglected or deserted the child or that he has otherwise so conducted himself that the judge should refuse to enforce his right to the custody of the child, the judge may in his discretion decline to make the order.

Section 35(1) with some amendments replaced s. 27 of the 1954 Act which was the operative section when *Fortowsky* was decided.

By one amendment the judge in s. 35(1) is a judge of a Juvenile and Family Court (s. 19(1)(*d*) of the 1965 Act) in lieu of a judge of the Supreme Court. Other changes were made in the wording of the section which are not relevant to this appeal.

When the *Fortowsky* case was decided in March 1960, the application having been made May 7, 1959, the present s. 25 was then s. 16(8) of *The Child Welfare Act* 1954, c. 8, and read:

> (8) Where the judge finds the child to be a neglected child he shall make an order,

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[6] [1960] O.W.N. 235, 23 D.L.R. (2d) 569.

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(a) that the case be adjourned *sine die* and that the child be returned to his parent or guardian or other person in whose charge he is, subject to supervision by the children's aid society; or

(b) that the child be committed temporarily to the care and custody of the children's aid society for such period, not exceeding twelve months, as in the circumstances of the case he considers advisable; or

(c) that the child be committed permanently to the care and custody of the children's aid society; and

(d) that in cases under clause *b* or *c* the municipality to which the child belongs pay the rate in respect of the child from the day the child was apprehended, or if he was not apprehended, from the day he was brought before the judge as an apparently neglected child, and so long as the child remains in the care and custody of the society.

There were amendments to cl. (*a*) of subs. (8) in 1957 and cl. (*d*) in 1958, none of which are relevant to the present problem.

Accordingly, when *Fortowsky* was decided the Act did not contain s. 25(*c*) and the Court in *Fortowsky* was not required to give consideration to the condition "that the child be made a ward of the Crown until the wardship is terminated under section 31 or 34", as that stipulation did not exist in law until 1965. It must also be noted that s. 31(1) as it now reads, first appeared in the Act of 1965 as well as s. 84 which reads:

84. (1) Every children's aid society shall endeavour to secure the adoption of Crown wards, having regard to the individual needs of each ward.

(2) Every children's aid society shall, within one year after a Crown ward is committed to its care, report to the Director in the prescribed form the efforts made to secure the adoption of the ward and the facts relevant to his adoption.

(3) Every children's aid society shall submit to the Director a quarterly return in the prescribed form showing, as at the end of each quarter, the adoption status of each Crown ward in its care and of applicants as adoptive parents.

At the same time s. 66(3) of the 1960 Act, was replaced by 73(3) which reads:

73. (3) An order for the adoption of a child who is a Crown ward shall be made only with the written consent of the Director, in which case no other consent is required.

This amendment substituted the words "Crown ward" for "who is committed permanently to the care and custody of a children's aid society" and substituted "the Director" for "the society".

The expression "Crown ward" is not defined in the 1965 Act. However, by s. 32, the Legislature spelled out the

Crown's rights and duties to Crown wards saying, "The Crown has and shall assume all the rights and responsibilities of a legal guardian over its wards for the purpose of their care, custody and control . . ." Having so enacted, the question arises—what rights, if any, were left by the Legislature to a Crown ward's natural parent? The Crown is made the legal guardian and has the care, custody and control of a child designated as a Crown ward. It has the obligation to secure adoption of the child under s. 84(1). By s. 73(3) the natural parent's consent is dispensed with in the case of a Crown ward in adoption proceedings under Part IV of the Act.

The emphasis on the special provisions relating to Crown wards is illustrated by a comparison of the provisions of subss. 1 and 2 of s. 73 with those of subs. 3. Subsections 1 and 2 relate to children committed under s. 25(*b*) while subs. 3 relates to Crown wards under s. 25(*c*).

It follows from the foregoing that the Legislature intended, by s. 25(*c*), that once a child was designated as a Crown ward, the natural parent was to be accorded no recourse other than the right to appeal, and the order designating the child as a Crown ward was not to be terminated except as provided in s. 31 or when the child attained the age of 18. The power of the Legislature to so enact cannot be questioned: *Reference re Adoption Act, etc.*[7]

I cannot see how the plain words of s. 25(*c*) "that the child be made a ward of the Crown until the wardship is terminated under section 31 or 34" can be read as being nullified by the opening words of s. 35(1) because the two subsections have a place in the scheme of things contemplated by the Act. Section 25(*c*) does not deprive s. 35(1) of effect. Section 35(1) still applies to wards of children's aid societies who are not Crown wards namely, those so designated under s. 25(*b*) and to whom s. 31(1) does not apply.

The Legislature might have used more specific language, but the language it did use is plain and unambiguous and must be given its plain meaning, and it is obvious from the other changes which were made in the Act in 1965, when s. 25(*c*) first appeared, that once a child was designated

[7] [1938] S.C.R. 398, *per* Duff C.J. at p. 402 and pp. 418-19.

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Hall J.

as a Crown ward only a Children's Aid Society may under s. 31(1), apply for an order terminating the Crown wardship. Once an order under s. 25(*b*) becomes effective the natural parent has no further enforceable rights. This is the over-all scheme or programme for Crown wards which the Legislature has erected and its power to do so is beyond question: *Reference re Adoption Act, etc.* It is to be expected that a Children's Aid Society, having the care of a ward of the Crown, upon being satisfied that it is in the best interests of the child to restore it to the natural parent would accomplish that result by an application under s. 31(1). There are no limitations on a society's right to do so. The section empowers the judge to terminate the wardship ". . . if the judge is satisfied that the termination is in the best interests of the child . . ."

I would accordingly dismiss the appeal. I agree with my brother Spence that there should be no order as to costs.

Appeal allowed and case remitted, no order as to costs; JUDSON *and* HALL JJ. *dissenting.*

Solicitor for the appellant: John P. Nelligan, Ottawa.

Solicitors for the respondent: Burke-Robertson, Urie, Butler, Weller & Chadwick, Ottawa.

Solicitors for the intervenants: Gowling, MacTavish, Osborne & Henderson, Ottawa.

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*Feb. 19, 20, 21
May 16

MATTHEW H. BROWNSCOMBE (*Plaintiff*) ..... APPELLANT;

AND

THE PUBLIC TRUSTEE of the Province of Alberta, Administrator of the Estate of ROBERT MARCELL VERCAMERT (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Contracts—Part performance—Statute of Frauds—Plaintiff working on farmer's land without real wages—House built on farm by plaintiff at own expense—Alleged oral agreement that on farmer's demise farm would go to plaintiff by will—Whether acts of plaintiff "unequivocally referable" to said agreement.

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*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

Over a period of some twenty-six years the plaintiff worked with but little financial reward for a farmer who because of a heart ailment was unable to carry on his farming operations without assistance. Following the death of the farmer, who died intestate, the plaintiff brought an action against the defendant as administrator of the estate of the deceased for specific performance of an oral agreement by which the plaintiff alleged the deceased had agreed to leave him his farm in return for services rendered, and whereas the said farm had been sold by the administrator, the plaintiff claimed the proceeds thereof. In giving judgment for the plaintiff, the trial judge found that there were acts constituting part performance of the contract so as to afford relief from the operation of the *Statute of Frauds*. On appeal, the Appellate Division concurred with the finding of the trial judge that there was an oral contract as the plaintiff alleged, but on the question as to whether the acts done by the plaintiff referred "unequivocally" to an agreement that the land was to be left by will the Appellate Division concurred with the finding of the trial judge However, it was held that although there was no part performance and the plaintiff was not entitled to recover the farm he was entitled to be compensated for his services. The plaintiff appealed and the defendant cross-appealed from the judgment of the Appellate Division.

Held: The appeal should be allowed and the trial judgment restored.

Not all the acts relied on by the plaintiff could be regarded as "unequivocally referable in their own nature to some dealing with the land", but the building of a house on the lands in question at the suggestion of the deceased farmer almost, if not wholly, at the plaintiff's expense was, as the trial judge found "unequivocally referable" to the agreement which the plaintiff alleged had been made and inconsistent with the ordinary relationship of employee or tenant.

The Appellate Division was in error in holding that the act of building the house on the farm in the circumstances of the case was not part performance of the contract.

McNeil v. Corbett (1907), 39 S.C.R. 608; *Deglman v. Guaranty Trust Co. of Canada and Constantineau*, [1954] S.C.R. 725, referred to.

APPEAL and CROSS-APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], allowing in part an appeal from a judgment of Farthing J. Appeal allowed and trial judgment restored; cross-appeal dismissed.

W. H. Downton, for the plaintiff, appellant.

G. R. Forsyth, for the defendant, respondent.

The judgment of the Court was delivered by

HALL J.:—This is an appeal and cross-appeal from the judgment of the Appellate Division of the Supreme Court of Alberta[1] which allowed in part an appeal by the respondent from a judgment of the late Mr. Justice Farthing in

[1] (1968), 64 W.W.R. 559, 69 D.L.R. (2d) 107.

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which he had awarded the appellant damages in the sum of $38,000 in lieu of specific performance of an oral agreement between the appellant and the late Robert Marcell Vercamert, the said sum of $38,000 representing the proceeds from the sale of certain lands which the appellant claimed Vercamert had agreed to leave to him for services rendered. The judgment also awarded a certain Chevrolet vehicle to the appellant.

The Appellate Division allowed the respondent's appeal as to that portion of the judgment that there were sufficient unequivocal acts of part performance to grant specific performance or damages in lieu thereof, and substituted a finding that the appellant was entitled to compensation for services rendered to Vercamert in an amount to be fixed by the Appellate Division. The respondent's appeal as to the Chevrolet vehicle was dismissed. The appellant appeals to this Court to restore the judgment of the learned trial judge as to the $38,000 damages awarded in lieu of specific performance. The respondent gave notice of a cross-appeal to this Court as follows:

> TAKE NOTICE that the Respondent intends to cross-appeal to the Supreme Court of Canada from that part of the judgment of the Appellate Division of the Supreme Court of Alberta delivered on the 2nd day of May, 1968 wherein the Court confirmed the decision of the Trial Judge that there was an oral agreement between the Appellant and Robert Marcel Vercamert relating to the deceased's farm lands, that there was performance by the Appellant of such oral agreement, that the evidence of such agreement was corroborated sufficiently to satisfy the provisions of the Alberta Evidence Act and that the Appellant is entitled to compensation for services rendered to the deceased, Robert Marcel Vercamert.

The matter of the Chevrolet is not an issue in this appeal.

The respondent is the Public Trustee of the Province of Alberta and was sued as Administrator of the Estate of the said Robert Marcell Vercamert who died intestate on January 16, 1961, leaving an estate, including the lands in issue in this litigation, the net value of which was $124,133.54. The lands in issue here were sold by the respondent as Administrator on February 28, 1962, for $38,000.

The facts are summarized by the learned trial judge in the opening paragraph of his judgment as follows:

> In 1932 when Canada and the world in general were in a severe business depression, the plaintiff, whose home was in Prince George, B.C.,

and who was then sixteen years of age, applied to the late Robert Marcel Vercamert at the latter's home, not far from Rockyford in Alberta, for work. The said Vercamert, a bachelor, somewhat severely crippled by heart trouble and able to do but little work on the farm where he lived and which he conducted, took the plaintiff into his home. On the evidence I find that plaintiff worked faithfully for his employer with but little financial reward for a considerable number of years. I find that on a number of occasions when plaintiff thought of leaving Vercamert's employ he was dissuaded by the latter's promised assurance that on his demise the farm would go to plaintiff by Will. In January, 1961, Vercamert died intestate and this action is the result.

The appellant's evidence of his agreement with Vercamert was corroborated by the evidence of four independent witnesses, Leon Sherger, Joseph Smith MacBeth, Lawrence Stinn and Anthony E. Velker and by the appellant's wife, to each of whom Vercamert said in effect on separate occasions that the appellant was to get the farm for having worked for Vercamert since a boy and to Sherger he said in particular that he had a will and he was leaving the farm to the appellant.

After reviewing the evidence in detail, Farthing J. made the following finding:

After careful consideration of all of the evidence, I am impelled to find that the plaintiff and Vercamert entered into an oral agreement that the plaintiff would do so such work as Vercamert might reasonably request him to do in carrying on Vercamert's farm operations until his death, and that in consideration of the plaintiff staying on with him then and carrying out such requests, Vercamert would leave to the plaintiff as payment, the farm he was operating at the time of his death; that the farm at the time of Vercamert's death consisted of Lots 24 and 25, Parcel C, Plan Grasswald 5755 A.W., and Lots 22 and 35, Parcel C, Plan R.W. 80, aforesaid; and that the reason for the agreement was Vercamert's inability because of a heart ailment to carry on his farming operations without assistance and he was financially unable to pay any real wages at the time the agreement was made.

and then he said:

The contract relating to land is within s. 4 of the *Statute of Frauds*, and there is no memorandum in writing. Therefore, part performance is necessary for the plaintiff to succeed on his claim for specific performance. *Per* Cranworth, L.C. in *Caton v. Caton* (1866), 1 Ch. App. 137, at p. 147: Part performance will afford relief from the operation of the Statute '... in many cases...when to insist upon it would be to make it the means of effecting instead of preventing fraud.' However, not all acts done in pursuance of the unenforceable contract will constitute part performance in law. They may be found to relate only to a contract of service as in *Maddison v. Alderson* (1883), 8 App. Cas. 467, and *Deglman v. Guaranty Trust Co. of Canada and Constantineau*, [1954] S.C.R. 725, except where such acts are 'unequivocally referable in their own nature to some dealing with the land which is alleged to have been the subject

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of the agreement sued upon...': *Per* Duff, J. in *McNeil v. Corbett* (1907), 39 S.C.R. 608, approved by the Supreme Court of Canada in *Deglman, supra.*

He then canvassed the evidence to determine if the acts testified to in the evidence in pursuance of the verbal contract were "unequivocally referable in their own nature to some dealing with the land" and found:

In this case, there is no doubt in my mind that the work the plaintiff did on the farm and the services he performed for Vercamert, as well as suiting his working and living arrangements to Vercamert's needs and requests over a period of some twenty-six years, were 'unequivocally referable' to the agreement that existed between them. The plaintiff fully performed his part of the agreement, and he did so for a wholly inadequate compensation in money. Vercamert's books, which were introduced in evidence, showed a total of less than $2,200.00 paid to Vercamert [sic] over the whole period in question, and there were other exhibits filed indicating that part of that sum was paid to the plaintiff for goods purchased for Vercamert. However, as I have stated already, this evidence can only go to satisfy me that the agreement between these parties as alleged by the plaintiff, existed.

and concluded:

I therefore find that the plaintiff was entitled to specific performance of the oral agreement which has been so partly performed. Therefore, the plaintiff was the equitable owner of the farm lands and buildings, and as the equitable owner he is entitled to the proceeds of their sale.

I also find that the plaintiff is entitled to a declaration of title to the 1950 Chevrolet truck, Serial #1131403564, for the reason that it having been registered in his name in 1957 and he having performed acts of ownership in relation to it in that year and the following, by providing the license plates, and no further registration having been effected, is *prima facie* the owner, and I do not find that the evidence adduced by the defendant satisfied the onus which was on the defendant of proving otherwise.

In the Appellate Division, McDermid J.A., writing for the Court, concurred in the finding of the learned trial judge that there was an oral contract as the plaintiff alleged. In this regard he said:

The learned trial judge came to the conclusion that there was an express contract and, as there was evidence on which the learned trial judge could so find, I think we should not interfere with that finding. In *Maddison v. Alderson* [*supra*], where a housekeeper performed services for the deceased over a long period of time on the basis that he was to leave her certain property the Law Lords expressed doubts as to the existence of a contract. Lord Selborne L.C. at p. 472 said: 'If there was a contract on his part, it was conditional upon, and in consideration of, a series of acts to be done by her, which she was at liberty to do, or not to do, as she thought fit; and which if done, would extend over the whole remainder of his life. If he had dismissed her, I do not see how she could have brought any action at law, or obtained any relief in equity.' Such a contract made during the lifetime of the parties may well be a unilateral contract as distinguished from a bilateral or synallagmatic

contract as those terms are used by Diplock, L.J. in *United Dominions Trust (Commercial) Ltd. v. Eagle Aircraft Services Ltd.*, [1968] 1 All E.R. 104. However, whether the arrangement constitutes a binding contract during the lifetime of the parties, if the services are performed, then upon the death of the person receiving the same there is a valid contract. Such validity was clearly recognized by the Supreme Court of Canada in *Deglman v. Guaranty Trust Company of Canada and Constantineau* [*supra*].

As to the argument that the contract was too vague, in Williston on Contracts, 3rd ed., vol. 1, pp. 158-9, it is stated: 'If, however, the side of the agreement which was originally too vague for enforcement becomes definite by entire or partial performance, the other side of the agreement (or a divisible part thereof, corresponding to the performance received), though originally unenforceable, becomes binding.'

Counsel for the appellant further argued that if there was an agreement the respondent had not fulfilled his side of the agreement. I think there was substantial performance of the agreement by the respondent. If there was any lack of performance on the part of the respondent, such performance was prevented by the conduct of the deceased.

However, on the question as to whether the acts done by the appellant referred "unequivocally" to an agreement that the land was to be left by will to the appellant, McDermid J.A. held:

The learned trial judge considered the acts of labour done over the life of the agreement and the respondent's act of building the house were acts of part performance. With the greatest of respect I do not agree.

Here the acts of labour done over the whole life of the agreement are not 'unequivocally and in their own nature referable' to an agreement that the land on which the acts were performed was to be left by will to the person who did the labour. Ordinarily it would be expected that such acts of labour were referable to a contract of employment to pay wages. They are certainly not unequivocal acts. See also *Turner v. Prevost* (1890), 17 S.C.R. 283. Nor do I think the act of building the house on the farm was part performance. As stated in Fry on Specific Performance, 6th ed., at p. 284: 'For acts to amount to part performance, the contract "must be obligatory, and what is done must be done under the terms of the agreement and by force of the agreement."' The respondent was in possession of the farm under a lease and as a tenant. I do not see how in the circumstances the building of the house could have been considered to have been done under the terms of a contract that the respondent was to work for the deceased and be left the farm.

But having so found, McDermid J.A. continued:

However, although there was no part performance and the respondent is not entitled to recover the farm he is entitled to be compensated for his services.

* * * *

There was evidence corroborating the claim of the respondent as required by the provisions of *The Alberta Evidence Act*, R.S.A. 1955, c. 102, s. 13. Four witnesses were called by the respondent who all stated that over the course of years the deceased had said that on his death the respondent would get the farm.

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Ordinarily this case should be referred back to the trial judge to determine the amount owing to the respondent. However, as the trial judge has since retired the amount will be determined by this Division and counsel will be given the opportunity of making representations as to what this amount should be.

The issue for decision by this Court is whether the acts relied upon by the appellant over the period 1932 to 1961 are acts which are "unequivocally referable in their own nature to some dealing with the land which is alleged to have been the subject of the agreement sued on" as stated by Duff J. (as he then was) in *McNeil v. Corbett, supra,* and approved by this Court in *Deglman v. Guaranty Trust Co. of Canada and Constantineau, supra.*

It is clear that not all the acts relied on as testified to by the appellant and his wife can be regarded as "unequivocally referable in their own nature to some dealing with the land", but in my view the building of the house on the lands in question in the years 1946 and 1947 at the suggestion of Vercamert almost, if not wholly, at the appellant's expense was, as the learned trial judge found "unequivocally referable" to the agreement which the appellant alleged had been made and inconsistent with the ordinary relationship of employee or tenant.

With respect, I think that McDermid J.A. was in error in holding that the act of building the house on the farm in the circumstances detailed in the evidence and accepted by the learned trial judge was not part performance of the contract which both the learned trial judge and the Appellate Division found existed between the appellant and Vercamert.

I would, accordingly, allow the appeal and restore the judgment of Farthing J. with costs here and in the Appellate Division. The appellant is entitled to receive the $38,000 together with interest on the said sum which has accrued to the respondent since the receipt of the said moneys and the respondent shall account to the appellant for the same. The cross-appeal will stand dismissed with costs.

Appeal allowed and trial judgment restored, with costs; cross-appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Collier, Downton, Plotkins & Mackie, Calgary.

Solicitors for the defendant, respondent: Howard, Moore, Dixon, Mackie & Forsyth, Calgary.

NORCAN LIMITED .....APPELLANT;

AND

HAROLD LEBROCK .....RESPONDENT;

AND

HAROLD GOLTMAN and ALPHONSE RAYMOND JR. ..... APPLICANTS.

1969

*Mar. 17
May 16

MOTION FOR LEAVE TO INTERVENE

Practice and procedure—Intervention—Whether bondsmen entitled to intervene on appeal to Supreme Court of Canada—Rule 60.

The appellant appealed to this Court from a judgment of the Court of Appeal affirming a judgment of the Superior Court granting the respondent's petition to quash a writ of *capias* and discharging the bondsmen. The respondent has left the country, was not represented in the Court of Appeal and his solicitors will not represent him on the appeal. The bondsmen applied to a Judge in Chambers for leave to intervene under Rule 60 of the Rules of this Court. The application was opposed on the ground that the interest required to file an intervention must be an interest in the subject-matter of the litigation, not merely an interest in the result, and that the bondsmen could not be considered as having the required interest. The application was referred to the Court.

Held: The application to intervene should be granted.

Rule 60 should not be narrowly construed. Any interest is sufficient to support an application under that rule, subject always to the exercise of discretion.

Procédure—Intervention—Droit des cautions d'intervenir dans un appel devant la Cour suprême du Canada—Règle 60.

La compagnie appelante a interjeté appel à cette Cour d'un jugement de la Cour d'appel confirmant un jugement de la Cour supérieure accordant la requête de l'intimé pour faire annuler un bref de *capias* et libérant les cautions. L'intimé a quitté le pays, n'était pas représenté devant la Cour d'appel et ses avocats ne le représenteront pas sur l'appel. Les cautions ont présenté une requête à un Juge en chambre pour obtenir la permission d'intervenir selon la règle 60 des Règles de cette Cour. La requête a été contestée pour le motif que l'intérêt requis pour produire une intervention doit être un intérêt dans l'objet du litige, et non pas simplement un intérêt dans le résultat, et que les cautions ne pouvaient pas être considérées comme ayant l'intérêt requis. La requête a été déférée à la Cour.

Arrêt: La requête pour intervenir doit être accordée.

On ne doit pas interpréter la règle 60 d'une façon restreinte. Sous réserve de la discrétion judiciaire, tout intérêt est suffisant pour obtenir la permission d'intervenir en vertu de cette règle.

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*PRESENT: Fauteux, Abbott, Judson, Ritchie and Pigeon JJ.

NORCAN LTD. v. LEBROCK

REQUÊTE pour obtenir la permission d'intervenir déférée à la Cour par le Juge en chambre. Requête accordée.

APPLICATION for leave to intervene referred to the Court by the Judge in Chambers. Application granted.

J. M. Schlesinger, Q.C., for the applicants.

J. Gibb Stewart, Q.C., for the appellant.

The judgment of the Court was delivered by

PIGEON J.:—In this case Norcan Ltd. appeals from a judgment of the Court of Appeal for the Province of Quebec affirming a judgment of the Superior Court granting Harold Lebrock's petition to quash a writ of *capias* and discharging the bondsmen. It appears from the reasons for judgment that Lebrock has left the country and was not represented at the hearing. The solicitors who had been acting for him have notified the Registrar that their mandate has been revoked and that they will not represent him in this Court. Under those circumstances, the bondsmen ask for leave to intervene under rule 60.

Counsel for Norcan Ltd., the appellant, opposes the application relying on decisions under the provisions of the Quebec *Code of Civil Procedure* respecting intervention. These decisions are to the effect that the interest required to file an intervention must be an interest in the subject-matter of the litigation, not merely an interest in the result. As a consequence, the right of intervention has been denied to bondsmen, the latest case being *Druckman v. Stand Built Upholstery Corporation*[1] affirmed in this Court[2]. Seeing that the provisions of the old Quebec *Code of Civil Procedure* concerning intervention were practically identical with rule 60 and seem to have inspired it (Cameron, Supreme Court Practice, 3rd ed., p. 430), the objection appeared serious and I referred the matter to the Court.

Having now made a review of past decisions under rule 60, I have come to the conclusion that it should not be narrowly construed. It seems clear that any interest is sufficient to support an application under that rule subject always to the exercise of discretion.

[1] [1965] Que. Q.B. 615.

[2] [1966] S.C.R. v.

In *Massie & Renwick v. Underwriters' Survey Bureau* (unreported; reported on merits[3]), leave to intervene in an action for infringement of copyright was granted to persons against whom similar actions were pending. They were held to be "vitally interested and concerned with the questions involved in these appeals".

In *Winner v. S.M.T.* (unreported; reported on merits[4], varied by P.C.[5]), railway companies were granted leave to intervene in a case respecting the constitutional validity and application of provincial regulations of motor carriers in interprovincial or international operations.

I should also note that our rule is quite different from that which was held to have a narrow scope in *Moser v. Marsden*[6].

Finally, I should observe that in *Druckman v. Stand Built Upholstery*, the application was made only after judgment had been rendered dismissing the appeal. It is well settled that an application for permission to intervene may be made only as long as the case is pending. For that reason, all that was said in the Court of Queen's Bench as to the required interest is undoubtedly *obiter*.

On the merits of the application no reason was given for opposing it, except the contention that the bondsmen should not be considered as having the required interest.

Under the circumstances of this case it seems proper to make the order requested. The costs will be reserved for adjudication at the same time as the merits of the appeal.

Application granted.

Solicitor for the applicants: J. M. Schlesinger, Montreal.

Solicitor for the appellant: Stewart, Crépault, McKenna, Wagner & Loriot, Montreal.

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[3] [1937] S.C.R. 265, [1937] 2 D.L.R. 213 and [1940] S.C.R. 218, 7 I.L.R. 19, [1940] 1 D.L.R. 625.

[4] [1951] S.C.R. 887, 68 C.R.T.C. 41, [1951] 4 D.L.R. 529.

[5] [1954] A.C. 541, 13 W.W.R. (N.S.) 657, 71 C.R.T.C. 225.

[6] [1892] 1 Ch. 487.

1969
*Feb. 27
May 16

FANNY EID, Administratrix of the Estate of Ole Eid, Deceased, (*Plaintiff*);

AND

GILLES CHARLES DUMAS (*Defendant*).

BY AMENDMENT:

GLORIA HATHERLY, Administratrix *de bonis non* of the Estate of Ole Eid, Deceased, (*Plaintiff*) ..... APPELLANT;

AND

GILLES CHARLES DUMAS (*Defendant*) ..RESPONDENT.

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

Negligence—Motor vehicle accident—Driver falling asleep—Passenger killed—Driver grossly negligent—Defence of volenti non fit injuria—Whether deceased guilty of contributory negligence.

E was the supervisor of a mining crew of which the defendant was a member. The latter, after having worked a 12-hour daytime shift at the bottom of a 600-foot shaft, was persuaded by E, with reluctance, to drive him to a dance, at a place some 30 miles from the mine. The party lasted until 2 o'clock the next morning, and, thereafter, E insisted on being driven to the home of a friend, where he remained until about 4 a.m. During the greater part of the evening and particularly during the last two hours, the defendant repeatedly suggested that they should go home and more than once pointed out he was tired. E was drinking throughout the evening but the defendant only had one drink which he consumed shortly after arriving. When E finally consented to leave, he got into the passenger seat of the car and "just said a few words and then fell asleep".

After he had been driving towards home for a little while, the defendant got out of the car to relieve himself and left the front window down and the air conditioning turned on. Later, he wanted to stop again for a rest but he dozed off before the vehicle was brought to a stop. The car left the road, went into a ditch and struck a culvert, and as a result of the accident E suffered injuries which caused his death.

In an action brought by the plaintiff under the *Fatal Accidents Act*, R.S.N.B. 1952, c. 82, as administratrix of the deceased, the trial judge found that the defendant's action in going to sleep at the wheel of his car and thus causing it to leave the road amounted to gross negligence. The trial judge found also that the circumstances under which E embarked on the drive were such as to give rise to the inference that he had voluntarily accepted the risk of the defendant going to sleep and that the rule embodied in the maxim *volenti non fit injuria* applied so as to preclude the plaintiff from bringing the

*PRESENT: Cartwright C.J. and Martland, Ritchie, Hall and Pigeon JJ.

action. On appeal, the Court of Appeal affirmed the dismissal of the action. An appeal from the judgment of the Court of Appeal was then brought to this Court.

Held (Martland J. dissenting in part): The appeal should be allowed.

Per Cartwright C.J. and Ritchie, Hall and Pigeon JJ.: Neither when the defendant and E left the mine nor when E finally entered the car at 4 a.m., befuddled by alcohol, was the situation such as necessarily to lead to the conclusion that he had taken upon himself the whole risk of being injured as a result of the grossly negligent driving of the defendant, nor was the evidence such as to justify the conclusion that the defendant accepted him into his automobile on any such footing.

E did not actively contribute to the accident by any negligent act on his part; he was merely a passive victim and not responsible for the way the car was driven. He was incautious in embarking on the return journey with the defendant in the sense that it was 4 a.m. and he knew that his driver had been working for 12 hours on the day before, but no degree of fault could be attributed to E because the conscious act of the defendant in continuing to drive when he knew that he was sleepy was not conduct which could have been reasonably foreseen by his passenger.

Per Martland J., *dissenting in part:* The appeal should succeed only as to a portion of the damages involved. In the light of *Lehnert v. Stein, infra,* the defendant could not rely, successfully, upon the defence of *volenti non fit injuria.* However, there was contributory negligence on the part of E and he was responsible, in part, for the accident. By his own conduct, E had contributed to the physical condition of the defendant which led to the accident.

[*Yarmouth v. France* (1887), 19 Q.B.D. 647; *Lehnert v. Stein,* [1963] S.C.R. 38; *Car and General Insurance Corporation Ltd. v. Seymour and Maloney,* [1956] S.C.R. 322; *Nance v. British Columbia Railway Co. Ltd.,* [1951] A.C. 601; *Guay v. Picard,* [1964] B.R. 348, affirmed [1965] S.C.R. vi, referred to.]

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division[1], affirming a judgment of Dickson J. Appeal allowed, Martland J. dissenting in part.

P. A. A. Ryan, for the plaintiff, appellant.

D. M. Gillis, Q.C., and *J. T. Jones,* for the defendant, respondent.

The judgment of Cartwright C.J. and of Ritchie, Hall and Pigeon JJ. was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal of New Brunswick[1] affirming the dismissal of an action brought by the appellant under the *Fatal*

[1] (1968), 68 D.L.R. (2d) 261.

1969

EID
v.
DUMAS

HATHERLY
v.
DUMAS

Ritchie J.

Accidents Act as administratrix of the late Ole Eid for funeral expenses and on behalf of the estate of his widow and his minor and dependent son for compensation for the pecuniary loss suffered by them as a result of his death while he was being driven by the respondent in the respondent's motor vehicle.

The judgment appealed from dismissed an appeal from the judgment rendered at trial by Dickson J., whereby he found that the respondent's action in going to sleep at the wheel of his car and thus causing it to leave the road in the manner hereinafter described while driving the late Mr. Eid home from a dance at 4 a.m. on July 9, 1966, amounted to gross negligence. The learned trial judge found also that the circumstances under which Eid embarked on the drive were such as to give rise to the inference that he had voluntarily accepted the risk of the respondent going to sleep and that the rule embodied in the maxim *volenti non fit injuria* applied so as to preclude the appellant from bringing this action.

The circumstances surrounding and immediately preceding the accident which resulted in Mr. Eid's death, when the car left the road, have been fully described both by the trial judge and by the Chief Justice of New Brunswick who rendered the judgment on behalf of the majority of the Court of Appeal, but as I take a somewhat different view of their legal effect than that which was entertained by the Courts below, it will be necessary to review them briefly.

Mr. Eid was a man of 56 years of age and the respondent, who was only 29, was a shaftsman employed by a mining development company where he was a member of a crew working under the supervision of Mr. Eid on a 12-hour daytime shift at the bottom of a 600-foot shaft. On several occasions during the first week in July, 1966, Eid had approached the respondent asking him to drive him over to a dance at a Legion Hall about 30 miles from the mine on the night of Friday July 8 and the respondent finally, although reluctantly, consented to do this with the result that, after having put in a full day's work, he found himself attending a party which lasted until 2 o'clock in the morning, after which the older man insisted on being driven to the home of a friend where he had more to drink and from which he would not agree to go home until about 4 a.m. It should be stressed that during the greater part of the

evening and particularly during the last two hours, the respondent repeatedly suggested that they should go home and more than once pointed out that he was tired. Mr. Eid was drinking throughout the evening while the learned trial judge found that the respondent only had one drink which he consumed shortly after arriving. When Mr. Eid finally consented to leave, he got into the passenger seat of the car and "just said a few words and then fell asleep".

After he had been driving towards home for a little while, the respondent got out of the car to relieve himself and left the front window down and the air conditioning turned on. I am persuaded that the respondent had a forewarning of sleep because he made a statement to the police which was admitted in evidence in which he said:

> I wanted to go home but Ole wanted to stay. Finally we left this house and headed back towards the Mine, the same road we came on. Ole was asleep on the right side of the front seat. I got sleepy and wanted to stop for a rest, but I dozed off before I got stopped and I woke when the car hit the culvert. I was travelling maybe 30 or 40 M.P.H. I had been drinking maybe one or two glasses of rum but not enough to affect my driving.

In giving evidence at the trial, the respondent stated that he had at no time felt tired or experienced any premonition of being tired, and although at one point the learned trial judge appears to have accepted this statement, he later reconsidered this finding and said:

> Even though he disclaims awareness of premonitory signals of fatigue, it is inconceivable to me that they were not present and there for him to regard plainly if he so chose.

When the respondent dozed off the car was proceeding along a straight piece of paved highway 20 feet wide with a 3-foot gravelled shoulder on either side and it went off the pavement onto the right shoulder, tipped over sideways as its right wheels entered an appreciable ditch beside the road, knocked down a mailbox post located near the edge of the shoulder, snapped off a guy wire supporting a telephone pole near a culvert, and brought up with sudden force against the culvert which extended across the ditch. The wheels of the car left no mark on the pavement but the left wheels left an impression on the shoulder and in the ditch which extended 142 feet from where they entered on the shoulder. The tracks of the wheels did not suggest that the brakes had been applied.

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In the Province of New Brunswick, by virtue of s. 242(1) of the *Motor Vehicle Act*, 1955, c. 13, no gratuitous passenger has a cause of action for damages against the owner or driver of a motor vehicle

> ...for injury, death or loss, in case of accident, unless the accident was caused by the gross negligence or wilful and wanton misconduct of the owner or driver of the motor vehicle and unless the gross negligence or wilful and wanton misconduct contributed to the injury, death or loss, for which the action is brought.

Having regard to the way in which the motor vehicle was operated immediately before and at the time of the accident, and to the fact that the respondent fell asleep as he did while driving, I agree with the finding of the learned trial judge that his conduct amounted to gross negligence, and that he is therefore deprived of the defence which would otherwise have been available to him under the last-quoted section of the *Motor Vehicle Act*

In the present case the defence of *volenti non fit injuria* is pleaded in the following form:

> In the alternative, the Defendant says that if the Defendant was negligent as alleged (which is not admitted but expressly denied), that the said deceased OLE EID voluntarily assumed the risk of injury from such negligence by requesting the Defendant to wait for him until a late hour and the Defendant pleads and relies on *volenti non fit injuria.*

With respect to this defence, it was said many years ago by Lindley L.J., in the case of *Yarmouth v. France*[2], that:

> The question in each case must be, not simply whether the plaintiff knew of the risk, but whether the circumstances are such as necessarily to lead to the conclusion that the whole risk was voluntarily incurred by the plaintiff.

As pointed out by Bridges C.J.N.B., the rule embodied in the maxim *volenti non fit injuria* was discussed by the present Chief Justice speaking on behalf of the majority of this Court in *Lehnert v. Stein*[3], where he said, in reference to the case of *Car and General Insurance Corporation Ltd. v. Seymour and Maloney*[4]:

> That decision establishes that where a driver of a motor vehicle invokes the maxim *volenti non fit injuria* as a defence to an action for damages for injuries caused by his negligence to a passenger, the burden lies upon the defendant of proving that the plaintiff, expressly or by

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[2] (1887), 19 Q.B.D. 647 at 660.
[3] [1963] S.C.R. 38.
[4] [1956] S.C.R. 322.

necessary implication, agreed to exempt the defendant from liability for any damage suffered by the plaintiff occasioned by that negligence, and that, as stated in *Salmond on Torts,* 13th ed., p. 44:

> The true question in every case is: Did the plaintiff give a real consent to the assumption of the risk without compensation; did the consent really absolve the defendant from the duty to take care?

I think it proper to point out also that in the same case the majority of the Court adopted the following passages from Mr. Glanville Williams' work Joint Torts and Contributory Negligence (1951), at p. 308:

> It is submitted that the key to an understanding of the true scope of the *volens* maxim lies in drawing a distinction between what may be called physical and legal risk. Physical risk is the risk of damage in fact; legal risk is the risk of damage in fact for which there will be no redress in law.
>
> * * *
>
> To put this in general terms, the defence of *volens* does not apply where as a result of a mental process the plaintiff decides to take a chance but there is nothing in his conduct to show a waiver of the right of action communicated to the other party. To constitute a defence, there must have been an express or implied bargain between the parties whereby the plaintiff gave up his right of action for negligence.

As has been indicated, the project of driving to the Legion dance was born in the mind of Mr. Eid and the respondent was persuaded against his will to make himself and his car available for the trip, but with the greatest respect for the opinion of the trial judge and the majority of the Court of Appeal, I do not think it can be said that, either when they left the mine or when Mr. Eid finally entered the car at 4 a.m., befuddled by alcohol, the situation was such as necessarily to lead to the conclusion that he had taken upon himself the whole risk of being injured as a result of the grossly negligent driving of the respondent, nor do I think that the evidence is such as to justify the conclusion that the respondent accepted him into his automobile on any such footing. Although the respondent had complained of being tired during the evening, he stated in cross-examination that the true situation was that he was "fed up" with the party and that his complaints were "only an excuse so we could go". His own assessment of his condition before leaving at 4 a.m. was: "I was outside for quite a while and I was feeling all right." I take it from this evidence that when he started on the journey home the respondent had no

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reason to expect that there was any risk of his going to sleep at the wheel and I do not think that any such expectation can be attributed to his passenger.

Although the learned trial judge found that Mr. Eid must be considered to have been *volens,* he went on to consider the question of contributory negligence in case his first finding should be "the subject of consideration in subsequent proceedings". The learned trial judge's finding in this regard is as follows:

> ...I am of the opinion that the accident and the resultant death were caused in substantial measure by the deceased delaying, when he should have appreciated the possible consequences, the defendant in returning home. The deceased was particularly aware of the hours the defendant had worked, not only that day but through the whole week. He also knew that the defendant's duties in his work were most onerous, carried out as they were at the bottom of a 600-foot mine shaft with a heavy apparatus hauling excavated material to the surface over his head. Further, once in the car, instead of assisting the defendant in getting them safely back to camp by engaging in conversation or otherwise assisting in keeping him awake, the deceased immediately went to sleep and left the defendant on his own. The deceased must therefore be considered guilty of contributory negligence and I would apportion the fault two-thirds against the deceased and one-third against the defendant.

I do not think that any duty rested upon Mr. Eid to engage the respondent in conversation while they were driving and although he was aware of the hard work done by the respondent from day to day, I am, with the greatest respect, unable to agree that the delays for which Eid was responsible can be classified as negligence which contributed to the accident.

In my view Eid cannot be said to have actively contributed to the accident by any negligent act of his; he was merely a passive victim and not responsible for the way the car was driven, but the doctrine of contributory negligence is not confined to cases in which the plaintiff actively participates in the result; it is equally applicable where a plaintiff fails to take reasonable steps to protect himself from the consequences of the defendant's negligence. This appears to me to have been recognized in this Court in *Car and General Insurance Corporation Ltd. v. Seymour and Maloney, supra,* at p. 332, and also in the well-known judgment of Viscount Simon in *Nance v. British Columbia Electric Railway Co. Ltd.*[5] I think, therefore, that the question to be determined in this case is whether, when Mr. Eid

[5] [1951] A.C. 601 at 611.

allowed himself to be driven home by the respondent at 4 a.m., he showed such a disregard for his own safety as to relieve the respondent from a proportion of the responsibility for the tragic consequences which ensued.

It might perhaps be said that Eid was imprudent to expose himself to the possibility of his driver being tired and dropping off to sleep, but although the hour was late, the respondent was sober and the contemplated drive was a short one of 30 miles. Under all the circumstances, I do not think that there was any reason for Eid to foresee that Dumas would continue to drive after he knew that he was sleepy and when he "wanted to stop for a rest". I do not think that gross negligence of this kind can be said to be a reasonably foreseeable risk against which the passenger is required to protect himself at the risk of being found to have been guilty of contributory negligence.

I am fortified in this opinion by the case of *Guay v. Picard*[6], which was affirmed without reasons in this Court[7], in which the driver, who was 28 years of age, started out from Quebec at 3 a.m. with two others, drove to St. Simeon arriving at 6:30, and spent the entire day fishing, commencing the return journey at 8:30 in the evening. On the drive home he fell asleep and lost control of the car which went off the road, injuring the plaintiff. The defence of *volenti non fit injuria* and contributory negligence were both raised and after somewhat unsatisfactory answers had been given by the jury, the passenger plaintiff was awarded 55 per cent of the amount found by the jury. This award was set aside in the Court of Queen's Bench for the Province of Quebec where it was found there was no contributory negligence.

As I have indicated, I take the view that the act of Eid in embarking on the return journey with the respondent was an incautious one in the sense that it was 4 o'clock in the morning and he knew that his driver had been working for 12 hours on the day before, but I do not think that any degree of fault can be attributed to Eid because the conscious act of the respondent in continuing to drive when he knew that he was sleepy was not conduct which could have been reasonably foreseen by his passenger.

I would accordingly allow this appeal, set aside the judgments of the Courts below and give judgment for the

[6] [1964] B.R. 348.

[7] [1965] S.C.R. vi

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appellant in her capacity as administratrix of the late Mr. Eid and on behalf of the estate of his widow and of his minor and dependent son in the amount of the damages assessed by the learned trial judge.

The appellant will have her costs in this Court and in the Courts below.

MARTLAND J. (*dissenting in part*):—The facts of this case have been outlined in the reasons of my brother Ritchie. I am in agreement with him that, in the light of the decision of this Court in *Lehnert v. Stein*[8], the respondent cannot rely, successfully, upon the defence of *volenti non fit injuria*. With respect, however, I am unable to concur in the conclusion that there was no contributory negligence on the part of the deceased, Ole Eid.

The learned trial judge has found that the gross negligence of the respondent was "in dozing off and driving off the road." The reason why this occurred is clear. The respondent, after working a 12-hour, daytime shift at the bottom of a 600-foot shaft, with reluctance, had been persuaded by Eid, who was his supervisor at the mine, to drive him to a dance, at a place some 30 miles from the mine. The party lasted until 2 o'clock the next morning, and, thereafter, Eid insisted on being driven to the home of a friend, where he remained until about 4 a.m. The drive to return to the mine did not commence until then.

In my opinion, the drowsy condition of the respondent, which ultimately resulted in the accident, was caused, at least in part, by Eid himself, as a result of his demands upon the respondent. This is not a case in which the defendant seeks to impose part of the responsibility for an accident on the basis that, although himself negligent, the plaintiff failed to exercise reasonable care for his own safety. This is a case in which the plaintiff himself was a participant in actually causing the accident, and, if that is so, such conduct is clearly contributory negligence. I do not see how it would lie in the mouth of Eid, having helped to create the drowsy condition of the respondent, to say that, when that condition resulted in the respondent's dozing off and driving off the road, the responsibility for the accident rested solely with the respondent.

[8] [1963] S.C.R. 38.

With respect, I do not agree that the question to be determined in this case is whether, when Eid allowed himself to be driven by the respondent at 4 a.m., he showed such a disregard for his own safety as to relieve the respondent from a proportion of the responsibility for the accident. The question is rather whether Eid, by his own conduct, contributed to the physical condition of the respondent which led to the accident. This is not the simple case of a passenger accepting a lift from someone who, he knows, is short of sleep. It is a case in which a passenger, having caused that condition, seeks to recover 100 per cent of the damage which ultimately results from it.

Nor am I in agreement with the conclusion that there was a conscious act on the part of the respondent in driving when he knew that he was drowsy. The evidence on this point is only that:

> I got sleepy and wanted to stop for a rest, but I dozed off before I got stopped.

The respondent had become too drowsy to be able to make the conscious effort of will necessary to bring his car to a stop.

In my opinion, therefore, there was contributory negligence on the part of Eid and he was responsible, in part, for the accident. Because of the views of the other members of the Court as to liability, there is no point in my expressing any opinion as to what would be the appropriate division of responsibility.

In my opinion the appeal should succeed only as to a portion of the damages involved.

Appeal allowed with costs, MARTLAND J. *dissenting in part.*

Solicitors for the plaintiff, appellant: Ryan & Graser, Fredericton.

Solicitors for the defendant, respondent: Gilbert, McGloan & Gillis, Saint John.

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*May 8, 9
June 6

ROBERT DANIEL KING .....APPELLANT;

AND

THE UNIVERSITY OF SASKATCHEWAN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Mandamus—Application to compel university through its faculty council to hear and determine applicant's appeal—Applicant failing to obtain required standing for degree in law—Jurisdiction of Court to entertain application—Whether proceedings before various university bodies amounted to denial of natural justice—The University Act, R.S.S. 1953, c. 167 [later R.S.S. 1965, c. 181], s. 76(c) [am. 1964, c. 17, s. 21].

The appellant had, after several attempts, failed to obtain the standing required by the law school of the respondent university which would have entitled him to the degree of bachelor of laws. A special committee was appointed by the president of the university to consider an appeal by the appellant from the decision of the law school, and, after holding a number of hearings, the committee rendered its report which concluded with the recommendation that due to special circumstances and for compassionate reasons the appellant be granted his degree in law. This report was considered by an executive committee of the faculty council, and the executive committee, refusing to accept the recommendation of the special committee, recommended to the faculty council that the appellant be not granted the degree. The reports of the special committee and of the executive were presented to the council and the council agreed with the recommendation of the executive that the degree not be granted. The appellant then appealed to the chancellor. The latter considered the appeal to be one to the senate of the university and, in accordance with the provisions of statute XII of the statutes of the senate, he appointed a committee consisting of himself, the president of the university and three deans. Unlike the earlier hearings and meetings of the various university bodies, where the appellant was neither present nor represented by counsel, at the hearing of the senate committee the appellant was present in person and represented by counsel. The committee refused to allow the appeal.

An application for *mandamus* requiring the university through its faculty council, pursuant to s. 76(*c*) of *The University Act,* R.S.S. 1953, c. 167, to hear and determine the appeal of the applicant was dismissed on the ground that the granting of degrees was essentially a domestic matter and that therefore the jurisdiction of the visitor, as provided by s. 12(3) of *The Queen's Bench Act,* R.S.S. 1965, c. 73, excluded that of the ordinary Courts. An appeal from the judgment of the chambers judge to the Court of Appeal was dismissed. The Court of Appeal held that the respective duties of the faculty council and of the senate created by s. 76(*c*) were not domestic but public, and specially affected the rights of the appellant. There had been, how-

*PRESENT: Cartwright C.J. and Fauteux, Hall, Spence and Pigeon JJ.

ever, no failure by the council or the senate to perform their respective duties and for that reason the appellant had no right to a *mandamus*. The appellant was really taking the position that the proceedings were conducted in a manner which amounted to a denial of natural justice. Even if this were true, *mandamus* was not the appropriate remedy. An appeal from the judgment of the Court of Appeal was brought to this Court.

Held: The appeal should be dismissed.

On the question as to whether a denial of natural justice had occurred, an examination of the facts showed that there was no lack of natural justice before the senate appeal committee and that the proceedings in fact were carried out with the full knowledge and approval of the appellant and his counsel. Any possible failure of natural justice before the special appeal committee, the executive committee or the full faculty council, was quite unimportant when the senate, the appeal body under the provisions of *The University Act*, and also the body in control of the granting of degrees, had exercised its function with no failure to accord natural justice. If there were an absence of natural justice in the inferior tribunals, it was cured by the presence of such natural justice before the senate appeal committee.

As to the submission that in each case when the appellant's appeals were being considered by the successive tribunals, there was a duplication of membership in the body with the earlier tribunal, the Court was not ready to agree that such duplication would result in any bias or constitute a breach of natural justice. In such matters as were the concern of the various university bodies here, duplication was proper and was to be expected. It was significant that no member of any of the bodies was a member of the law faculty, and that when the dean or members of that faculty attended any of the bodies they withdrew before voting.

Posluns v. Toronto Stock Exchange, [1968] S.C.R. 330, applied; *Frome United Breweries Co. v. Bath Justices*, [1926] A.C. 586; R. v. *Alberta Securities Commission, Ex p. Albrecht* (1962), 36 D.L.R. (2d) 199; *R. v. Ontario Labour Relations Board, Ex p. Hall*, [1963] 2 O.R. 239, distinguished.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], dismissing an appeal from a judgment of Johnson J. Appeal dismissed.

K. C. Binks, Q.C., and *W. Simpson*, for the appellant.

D. E. Gauley, Q.C., for the respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Saskatchewan[1], made on December 5, 1968, wherein that Court dismissed an appeal from the judgment of Johnson J. of the Court of Queen's Bench

[1] (1969), 67 W.W.R. 126, 1 D.L.R. (3d) 721.

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made on October 11, 1968. By the latter judgment, Johnson J. refused the application of the appellant for a *mandamus* requiring the University of Saskatchewan, through its delegated authority the faculty council, to properly hear and determine the appeal of the appellant.

The appellant had, after several attempts, failed to obtain the standing required by the Law School of the University of Saskatchewan which would have entitled him to the degree of bachelor of laws. After rather lengthy negotiations and discussions with the authorities of the university, the appellant on August 8, 1964, by letter addressed to the president of the university, appealed from the decision of the law school and requested that he be given opportunity to be present at any hearing of such appeal and the opportunity to be represented by counsel.

The president of the university appointed a special committee of the faculty council of the university to consider this appeal and by his letter dated August 14, 1964, suggested that the appellant should provide a detailed brief in support of his appeal of August 8. The appellant did so. The said special committee held four hearings, to which reference shall be made hereafter, and rendered its report which concluded with the recommendation that due to special circumstances and for compassionate reasons the appellant be granted his degree in law. This report was considered by an executive committee of the faculty council on December 15, 1964, and the executive committee, refusing to accept the recommendation of the special committee, recommended to the faculty council that the appellant be not granted the degree. The faculty council considered the matter at a meeting which evidently occurred on February 18, 1965. Although the material does not include the minutes of that meeting of the university council, there is in the material a notice calling the meeting for February 16; evidently, the meeting was postponed for two days. Included with that notice is an agenda outlining a very large number of matters amongst them the report of the special faculty committee of the council (sometimes known as the special appeal committee) and reciting:

> At a special meeting of the Executive held in December the recommendation of the Special Committee of the Executive was considered in considerable detail and the appeal was rejected by the Executive by a large majority.

In the minutes of a meeting of the faculty council (entitled Saskatoon Council) of June 14, 1967, called to consider the matter, their disposition of the reports of the special appeal committee and of the executive committee made at its meeting on February 18, 1965, is outlined in these words:

> This report [that of the Special Appeal Committee] and the decision of the Executive was presented to the Council and the Council agreed with the recommendation of the Executive that the degree not be granted. (There were no votes in Council against this motion.)

Evidently as a result of a suggestion that he could take such action, the appellant thereafter appealed to the chancellor of the University of Saskatchewan, Chief Justice E. M. Culliton. The chancellor considered that appeal to be one to the senate of the university and took cognizance of statute XII of the statutes of the senate which reads as follows:

> All appeals to the Senate under the provisions of Section 76 subsection (*c*) of the University Act shall be heard and decided by a committee consisting of the Chancellor the Vice-Chancellor and three other members of the Senate appointed by the Chancellor for that purpose.

The chancellor appointed the committee in accordance with the provisions of that statute of the senate. It consisted of himself, the president of the university who was the vice-chancellor thereof, and three deans. At the hearing of this senate committee so composed, the appellant was present in person and represented by counsel. Further reference shall be made hereafter to this circumstance.

The committee met on November 3, 1965, and on the same day determined to disallow the appeal. The chancellor has sworn that on the next day he notified the appellant's counsel of such decision and thereafter upon the instructions of the committee he prepared and submitted to the senate of the university a formal report. This report concludes with this statement:

> After reviewing the submissions the committee unanimously concluded there was no evidence whatever to substantiate King's allegations of any breach of terms of his registration or that there was any breach of ethics by the faculty of the College of Law. The committee further unanimously decided:
>
> (*a*) That there was no basis within the University regulations under which a degree in law could be granted to King;
>
> (*b*) That there were no grounds upon which the ruling of the faculty, as confirmed by the special committee and by council, could be disturbed.

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The appellant served upon the university two demands, dated April 14 and 25, 1967, and the university having failed to comply with those demands he commenced these proceedings for *mandamus*.

The respondent urged before Johnson J. upon the hearing of the appellant's application five preliminary objections. In this Court, the respondent pursued only the first of these objections. That objection is outlined in the material in an addendum to the reasons of Johnson J., and it was that the Court lacked jurisdiction to entertain the application. It was submitted that the conferring of a degree is a domestic matter coming within the exclusive jurisdiction of the visitor and consequently the Court had no jurisdiction to entertain this application.

The University Act has, since the year 1907, made provision for a visitor. The provisions perhaps may best be cited from *The University Act,* 1968 (Sask.), c. 80, s. 9 of which reads:

> The Lieutenant Governor shall be the visitor of the university with authority to do all those acts that pertain to visitors as to him seem meet.

Section 12(3) of *The Queen's Bench Act,* R.S.S. 1965, c. 73, provides:

> In respect of the jurisdiction and powers of the Lieutenant Governor as visitor of corporations, conferred by statute or otherwise, the court shall, upon the direction of the Lieutenant Governor, have and exercise the jurisdiction and powers that in England, prior to the passing of *The Supreme Court of Judicature Act 1873,* were vested in, or capable of being exercised by, the Lord Chancellor representing the Crown as visitor of corporations.

Johnson J. gave effect to this preliminary objection being of the opinion that the granting of degrees was essentially a domestic matter and that therefore the statutory jurisdiction of the visitor excluded that of the ordinary Courts. Johnson J. pointed out that although by the aforesaid s. 12(3) that jurisdiction was to be exercised by the Court of Queen's Bench in Saskatchewan, it was only to be so exercised upon direction of the Lieutenant Governor as visitor and determined that lacking such direction he had no power to act.

When the matter was considered by the Court of Appeal for Saskatchewan, that Court dealt with the same preliminary objection and, with respect, I am of the opinion

that it came to the proper conclusion in reference thereto. Hall J.A., giving the reasons for the Court, pointed out the provisions of s. 76(*c*) of *The University Act*, R.S.S. 1953, c. 167:

> 76. It shall be the duty of the council and it shall have power:
>
> * * *
>
> (*c*) to deal with and, subject to an appeal to the senate, to decide upon all applications and memorials by students or others in connection with any faculty of the university;

and noted that although the ultimate aim of the appellant was to obtain a degree in law, the immediate purpose of his application was to compel compliance with this s. 76(*c*) of *The University Act*. The actual words in the application for *mandamus* were:

> requiring the said University of Saskatchewan pursuant to s. 76(*c*), R.S.S. 1953, c. 167, through its delegated authority, the said faculty council, to properly hear and determine the appeal of the said applicant according to law.

It was the learned justice in appeal's opinion that the section created a statutory duty to be performed by the faculty council subject to appeal to the senate and that compliance with the statutory duty may be controlled and enforced by the ordinary Courts and therefore such decisions as *R. v. Dunsheath, Ex p. Meredith*[2], and *Thorne v. University of London*[3], do not apply to exclude the jurisdiction of the Courts. Hall J.A. concluded:

> The respective duties [of the faculty council and of the senate] so created are therefore not domestic matters within the university but are in the nature of public duties, and as they specially affect the rights of the appellant, mandamus may be granted if there has been a failure to perform them.

With respect, I agree with that conclusion and I reject this preliminary objection.

Hall J.A. continued in his reasons:

> It is quite apparent, however, that in the instant case the university council has dealt with and decided upon the application of the appellant and also that the senate has heard and determined the subsequent appeal. The material filed by the appellant in support of his motion establishes this beyond doubt. There has been, therefore, no failure by the university council or the senate to perform their respective duties and for that reason the appellant has no right to a mandamus.

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[2] [1950] 2 All E.R. 741.

[3] [1966] 2 All E.R. 338.

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The appellant contends that the conclusion of the learned justice in appeal is erroneous and that on the other hand there occurred a series of acts on the part of the various university bodies considering his appeals which amounted in each case to such a denial of natural justice as would render the decisions arrived at nullities.

Hall J.A. concluded his reasons with the statement:

> The appellant really takes the position that the proceedings were conducted in a manner which amounted to a denial of natural justice. Even if this were true, mandamus is not, however, the appropriate remedy to obtain a review of the proceedings.
>
> The appeal is dismissed with costs.

If this Court is of the opinion that there existed such a denial of natural justice as would nullify the decisions of the special appeal committee, the executive committee, the faculty council, and the senate appeal committee, it would be required to determine whether *mandamus* was a procedure available to the appellant. First, however, we must determine whether such denial of natural justice occurred.

Counsel for the university has admitted that the appellant in his letter of August 8, 1964, addressed to the president, by which he initiated his appeal, included a request that he have an opportunity to be present and to be represented upon the hearing of his appeal. The president replied to that letter by his letter of August 14, 1964, in which he stated, in part:

> It would be helpful if you would send a detailed plea, as mentioned in the second page of your letter. If the Committee feels that it would be helpful for you to appear before them, I will let you know.

In reply, the appellant did submit what might well be termed a "detailed brief". This brief was produced as an exhibit to the president's affidavit and runs to nine and a half closely-typed pages. In such brief, the appellant did not repeat his request that he be present in person at the hearing or that he be represented by counsel. On the other hand, of course, he did not withdraw that request.

The committee met on four occasions: September 25, 1964, October 6, 1964, November 18, 1964, and November 24, 1964, and it submitted to the executive committee of the faculty council a carefully considered report in some considerable detail. It is true the appellant was never notified of any of those four meetings or given any opportunity

to be either present in person or represented by counsel. On the other hand, Dean Otto Lang, the presiding officer of the University of Saskatchewan Law School, whom the appellant has regarded as his opponent throughout, was present at the last two meetings and was assisted by at least one law professor. Whatever allegations of denial of natural justice the appellant seeks to advance, based on the failure to permit him or his counsel to be present at the hearings of this special appeal committee, are met and defeated by the fact that this special appeal committee concluded its report with the recommendation which it set out in the following words:

> While this Committee recognizes that R. D. King has not fulfilled the requirements for graduation in Law either according to the old merit point regulations or the new average regulations, nevertheless, the Committee recommends that, due to the exceptional circumstances surrounding the case and for compassionate reasons, this student be awarded the Bachelor of Laws Degree.

In my view, such a recommendation disposes of the consideration of any allegations as to lack of natural justice in the hearings of the special appeal committee.

This report with the above recommendation was presented to the executive committee of council on December 15, 1964. The solicitors for the university informed those of the appellant that there were present at such meeting of the executive committee the president, eight deans, including Dean Lang of the law school, an acting dean and thirteen professors, including at least one from the law school. Again, the appellant was given no notice of that meeting or opportunity to be present or to be represented by counsel. According to the minutes of a full university council, dated June 14, 1967, to which I have referred above, the report of the special appeal committee was presented in full with its recommendation, and it was considered by this executive committee on December 15, 1964. The motion to adopt the report of the special appeal committee "was lost by large majority". The executive committee (sometimes in the material referred to simply as the "Executive") recommended that the appellant be not granted the degree. As I have said, the matter was then considered by the full university council on February 18, 1965. This is a very large body.

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Although the minutes of the particular meeting of February 18, 1965, are not amongst the material, at the later meeting of the council, referred to above, in which that body reviewed its decision of February 18, 1965, there were 179 members present. The minutes of the latter meeting recite that the report of the special appeal committee and the recommendation of the executive were presented to the full university council and that the university council rejected the recommendation of the special appeal committee and agreed with the recommendation of the executive committee that the appellant be not granted his degree. Again, at this meeting of the full faculty council the appellant was not given an opportunity to be present or to be represented by counsel.

I realize that each case must be considered on its own circumstances. This is not such a situation as was considered in *Ridge v. Baldwin*[4], where a chief constable had been discharged by a watch committee, or in *Posluns v. Toronto Stock Exchange*[5], where the plaintiff Posluns had been held by a committee of the Toronto Stock Exchange to be disqualified from acting as a director or employee of a particular firm. What was being considered here was whether the appellant had attained the necessary standing in his studies in the law school to justify the granting to him of a degree of bachelor of laws. As was pointed out in the *Dunsheath* case, *supra,* and the *Thorne* case, *supra,* such a matter is essentially a domestic one within the university. The considerations which are given to such an issue are not those which can be assisted by an adversary formula, and it is difficult to conceive of a situation which would have the representatives of a law school faculty confronting the representatives of a student in the trial of an issue as to whether a degree should be granted. It must be remembered, however, that this appellant in his brief, which need not be analyzed in detail, made many contentions which were not solely related to his attainment of academic qualifications, and indeed as the chancellor pointed out in his report, to which further reference shall be made hereafter, the essence of the appellant's complaints were:

(1) that there was a breach of the terms of registration between him and the university,

[4] [1964] A.C. 40.

[5] [1968] S.C.R. 330.

(2) that there was a breach of ethics which amounted to a value judgment.

Whether this allegation of the denial of natural justice, in what may be termed private or academic bodies, would provide the appellant with the basis for proceedings in the ordinary Courts to have the decisions of such bodies declared nullities is a question of some importance. In view of my opinion as expressed hereunder, it need not be decided in the present case.

The appellant was not satisfied to leave this matter as disposed of by the full faculty council but, as I have pointed out, appealed to the chancellor. The chancellor then appointed a committee, guided therein by the statutes of the university, and this committee met on November 3, 1965. The chancellor has sworn and, of course, there is no contradiction, that the procedure arrived at for the hearing of the appeal by the special senate appeal committee was only determined after consultation and discussion with counsel for the appellant and in the presence of the appellant and that that procedure was agreed upon. Both the appellant and his counsel were aware of the intention to first hear the appellant and his counsel and then to hear Dean Otto Lang in the absence of the appellant. No objection was made by either the appellant or his counsel to that procedure and the procedure was carried out. This senate appeal committee was composed of the chief justice of the province, the president of the university, and three deans, all being persons of eminent qualification, and it can only be presumed to have given the appeal of the present appellant every possible consideration. As I have said, the procedure adopted was one of which the appellant knew and both he and his counsel had approved.

Counsel for the appellant in this Court made the submission that at that hearing the appellant did not have the advantage of full knowledge of what had gone before, and noted that until after the special senate committee had conducted its hearing and made its report, he did not know that the special appeal committee had recommended that despite his lack of qualifications he be granted a degree because of the exceptional circumstances and upon compas-

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sionate grounds. I am of the opinion that counsel was in error in that submission. The appellant in his affidavit in support of the application for *mandamus* swore:

> 8. That I was informed both by telephone and letter during the latter part of December, 1964, by the President that an adverse report was to be made to the Faculty Council and that after some conversation by telephone, the President did admit to me that his own Special Committee had been interfered with and subsequently over-ruled by an ad hoc committee or committees which had sat and adjudicated on my case without notice to me and without my having any knowledge of the hearing, and had tried my case in my absence.

The only inference from that evidence is that the appellant knew in December 1964 that the special appeal committee had recommended that his appeal be granted and that that recommendation had been rejected by what the appellant there refers to as "an ad hoc committee or committees".

The president, in his affidavit, sworn on September 11, 1968, has taken issue with the appellant's affidavit on the grounds that he would not have used the word "overruled" because the special appeal committee was not empowered to make a ruling but only a recommendation. I am of the opinion that such a matter of wording is irrelevant upon the present issue. It matters not whether the president used the word "overruled" or whether the president spoke of a recommendation which was rejected. At any rate, it is perfectly plain that the appellant knew in December 1964 that the recommendation made by the special appeal committee was that he should have a degree and knew that that recommendation had been rejected by the executive, although he might not even have known that such a body as one formally termed the "executive" existed. Surely, in the hearing before the senate appeal committee this early success would have been strongly urged by either the appellant or his counsel.

I have come to the conclusion, upon this examination of the facts, that there was no lack of natural justice before the senate appeal committee and that the proceedings in fact were carried out with the full knowledge and approval of the appellant and his counsel. It must be noted that the statutory duty of the faculty council as enacted by s. 76(*c*)

of *The University Act* was expressly subject to appeal to the senate. Moreover, the senate, in the University of Saskatchewan as elsewhere, is the sole body determining to whom the degrees of the university may be granted. Any possible failure of natural justice before the special appeal committee, the executive committee, or the full faculty council, is quite unimportant when the senate, the appeal body under the provisions of *The University Act,* and also the body in control of the granting of degrees, has exercised its function with no failure to accord natural justice. If there were any absence of natural justice in the inferior tribunals, it was cured by the presence of such natural justice before the senate appeal committee.

A similar matter was considered in *Posluns v. Toronto Stock Exchange, supra,* and Ritchie J., giving the reasons for the Court, distinguished the circumstances there present, where the second hearing was one in which the appellant was accorded a full measure of natural justice, from the situation in *Ridge v. Baldwin, supra,* where, as Lord Reid pointed out at p. 79:

> But here the appellant's solicitor was not fully informed of the charges against the appellant and the watch committee did not annul the decision which they had already published and proceed to make a new decision. In my judgment, what was done on that day was a very inadequate substitute for a full rehearing.

I am of the opinion that the situation here resembles that in *Posluns v. Toronto Stock Exchange, supra,* and that the hearing before the senate appeal committee, a small and very able body, was such as accorded the appellant every advantage of natural justice and rendered nugatory any alleged earlier failure to accord him such natural justice in any of the earlier hearings.

Reference should be made to another submission by counsel for the appellant. That submission was that in each case when his appeals were being considered by the successive tribunals, there was a duplication of membership in the body with an earlier tribunal.

The special appeal committee was as follows:

President:	J. W. T. Spinks
Deans:	Booth, Haslam and Tracey
Professors:	Mann, Langley, Pepper.

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The composition of the executive committee was:

Chairman:	The President, J. W. T. Spinks
Deans:	Begg, Booth, Currie, Haslam, Kirkpatrick, Lang and Smith
Acting Dean:	Goodspeed
Professors:	Buckley, Chambers, Douglas, DuWors, Katz, Langley, Ludwig, McMurray, Mann, Nind, Pepper, Rempel, D. C. Williams (I omit those not voting).

As I have pointed out the full faculty council meeting on February 18, 1965, had a very large number present and I am ready to presume included many of those whom I have already named.

The senate appeal committee was composed of:

The Chancellor:	Chief Justice Culliton
The President:	J. W. T. Spinks
Deans:	Barber, Begg, Currie.

There was therefore the duplication of which the appellant complains. The appellant has cited a series of cases including *Frome United Breweries Co. v. Bath Justices*[6]; *R. v. Alberta Securities Commission, Ex p. Albrecht*[7]; and *R. v. Ontario Labour Relations Board, Ex p. Hall*[8], for the proposition that under such circumstances there is a presumption of bias in favour of the former decision to which the member objected to was a party and that the decision should therefore be quashed. It is to be noted that those decisions all deal with either appeals from one administrative body to another or appeals from a licensing committee to the justice of the peace. In my view, they are inappropriate to apply to the situation under review in this appeal. These were all university bodies. It was inevitable that there would be duplication as one proceeded from one body to another; so, it was perfectly proper that the president of the university should be a member of the special appeal

[6] [1926] A.C. 586.

[7] (1962), 36 D.L.R. (2d) 199.

[8] [1963] 2 O.R. 239.

committee which he set up to consider the appeal that had been made originally to him. Again, the executive of the faculty council could not be presided over by anyone more fit for the office than the chief member of the faculty, that is, the president. And finally, the president of the university as vice-chancellor thereof was required, by the university statute, to be a member of the senate appeal committee. The other duplications are of persons carrying out their ordinary duties as members of the faculty of the University of Saskatchewan.

It was significant that no member of any of the bodies was a member of the faculty of the law school, and that when the dean or members of that faculty attended any of the bodies they withdrew before voting. I am of the opinion that, in such matters as were the concern of the various university bodies here, duplication was proper and was to be expected, and I am not ready to agree that such duplication would result in any bias or constitute a breach of natural justice.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Newsham & Raney, Saskatoon.

Solicitors for the respondent: Francis, Gauley, Dierker & Dahlem, Saskatoon.

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*May 7, 8
June 6

HUGO LOTHOLZ (*Plaintiff and Defendant by Counterclaim*) — APPELLANT;

AND

WILLIAM ROALD CHARLTON, ANITA KUROPATWA, WALTER GENE LAZZER, and GLORIA MOYER, Executors of the Estate of EMILY CHARLTON, deceased, and WILLIAM CHARLTON (*Defendants and Plaintiffs by Counterclaim*) — RESPONDENTS.

HUGO LOTHOLZ (*Defendant*) ..... APPELLANT;

AND

SHIRLEY CHARLTON, a minor, by her next friend WILLIAM CHARLTON and WILLIAM CHARLTON (*Plaintiffs*) — RESPONDENTS.

HUGO LOTHOLZ (*Plaintiff*) ..... APPELLANT;

AND

WILLIAM ROALD CHARLTON, ANITA KUROPATWA, WALTER GENE LAZZER, and GLORIA MOYER, Executors of the Estate of EMILY CHARLTON, deceased, and WILLIAM CHARLTON (*Defendants*) — RESPONDENTS;

AND

CANADA WEST INSURANCE COMPANY (Third Party) — RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Negligence—Motor vehicles—Head-on collision on dust-covered road—One vehicle almost entirely on wrong side of road—Driver fatally injured—Driver of other vehicle hugging centre of highway—Division of liability—Damages.

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*PRESENT: Cartwright C.J. and Martland, Ritchie, Hall and Spence JJ.

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LOTHOLZ v. CHARLTON et al.

Following the collision of two motor vehicles, in which accident C (the driver of one of the vehicles) was killed, three actions were brought and tried together. The trial judge found that both the deceased and the appellant L (the driver of the other vehicle) had been negligent and apportioned liability at 50 per cent to each driver.

The accident took place on a gravel road which was dry and very dusty. L was travelling northward at about 50 m.p.h. and was preceded by another vehicle which threw up a cloud of dust. This dust restricted the visibility of the deceased who was driving towards the south. As her automobile and that of L approached one another C's vehicle crossed over on to the northbound lane and the two vehicles met almost head on. The evidence established that when the collision occurred the left side of L's vehicle was either at or slightly to the left of the centre of the highway.

L was awarded $27,500 general damages plus $500 to cover plastic surgery and $500 for dental work. Special damages were fixed at $10,139. By way of counterclaim the executors of the estate of C were awarded $7,500 under *The Trustee Act,* R.S.A. 1955, c. 346, and an additional sum of $30,000 under *The Fatal Accidents Act,* R.S.A. 1955, c. 111. An appeal from the trial judgment was dismissed by the Appellate Division of the Supreme Court, one member of the Court dissenting on the question of the division of liability. L then appealed to this Court from the division of liability and from the damages awarded to the estate of C.

Held: The appeal as to percentage of liability should be allowed; the appeal as to damages should be dismissed.

The major responsibility for the collision lay upon the deceased driver. Her negligence was beyond question. The automobile she was driving was almost entirely on its wrong side of the road.

However, L was also in a measure at fault. A prudent and reasonable man would not hug the centre of a dust-covered highway at a speed of 50 m.p.h. without being aware that there was the likelihood that a driver bound in the opposite direction could also be driving at or near the centre, and that that driver might accidentally cross over or emerge from the dust too late for either driver to avoid meeting more or less head on. L was found to be 25 per cent at fault.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division, dismissing an appeal from a judgment of Primrose J. in three actions which arose out of a motor vehicle accident and were tried together. Appeal as to percentage of liability allowed; appeal as to damages dismissed.

R. E. Hyde, Q.C., and *G. W. Robertson,* for the appellant.

J. E. Redmond, for the respondent Charlton *et al.*

P. R. Chomicki, for the respondent Canada Life Insurance Co.

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LOTHOLZ v. CHARLTON et al.

The judgment of the Court was delivered by

HALL J.:—Three actions arising out of the same motor vehicle collision were tried together by Primrose J. in the Supreme Court of Alberta. He found both drivers equally at fault and apportioned liability at 50 per cent to each driver.

In Action No. 53614 in which the appellant Lotholz was plaintiff, he fixed Lotholz's damages at $27,500 general plus $500 to cover plastic surgery and $500 for dental work, and he also fixed the amount of the special damages at $10,139. In Action No. 54769 he fixed Lotholz's special damages at $3,615. In Action No. 54290 he fixed Shirley Charlton's general damages at $3,000 and William Charlton's special damages at $967.60. In Action No. 53614 he fixed the damages by way of counterclaim payable by Lotholz to the executors of the estate of Emily Charlton, deceased, at $7,500 under *The Trustee Act,* R.S.A. 1955, c. 346, and an additional sum of $30,000 under *The Fatal Accidents Act,* R.S.A. 1955, c. 111, and he also awarded William Charlton the sum of $1,175 special damages. The learned trial judge also ordered that Lotholz have costs in the sum of $500 plus disbursements; that Shirley Charlton have costs in the sum of $250 plus disbursements, and that Canada West Insurance Company have costs in the sum of $200 plus disbursements.

Canada West Insurance Company was joined on its application as a third party in Actions Nos. 53614 and 54769 pursuant to s. 302 of *The Alberta Insurance Act,* R.S.A. 1955, c. 159, and was represented by counsel at the trial.

The appellant Lotholz appealed to the Appellate Division of the Supreme Court of Alberta in all three actions against Primrose J.'s division of liability at 50 per cent and against that portion of the judgment in Action No. 53614 by which damages in the sum of $37,500 were fixed by Primrose J. in favour of the executors of the estate of Emily Charlton, deceased, and against that portion of the judgment in Action No. 54769 by which the third party, Canada West Insurance Company, was awarded costs in the sum of $200 and disbursements.

The Appellate Division dismissed the appeal with costs. Johnson J.A., dissenting, would have reduced Lotholz's

negligence and liability to 25 per cent instead of the 50 per cent fixed by Primrose J. The third party was given no costs in connection with the appeal.

Lotholz now appeals to this Court and claims that he should not have been held liable at all or, in any event if liable, that his percentage of fault was much less than that of the deceased, Emily Charlton, the driver of the Charlton vehicle. He also appeals against the amounts awarded to the executors of the Emily Charlton estate.

The facts are relatively simple. The collision between the Lotholz and the Charlton vehicles took place at about 8:45 a.m. on May 12, 1966. The vehicles met on a gravel road some $2\frac{1}{2}$ miles south of the Town of Barrhead in the Province of Alberta. Lotholz was driving his automobile northward toward Barrhead. The gravel highway was approximately 24 feet in width with gravel shoulders on each side of approximately 3 feet, giving an overall width of 30 feet 6 inches from ditch to ditch. There was no line or indication fixing the centre of the highway which had to be determined by measurement. The road on the morning in question was dry and very dusty. Visibility on the westerly half of the highway was very restricted by clouds of dust raised by traffic on the road whereas visibility on the eastern side of the highway was relatively better because an easterly wind was carrying the dust westward across the highway. Lotholz was preceded northward by another vehicle which threw up a cloud of dust as it went towards Barrhead. Lotholz was sufficiently far in rear of this vehicle that he had reasonably good visibility. He could not, however, see what was on the west half of the highway or the vehicle which was ahead of him.

The deceased, Emily Charlton, was driving the Charlton automobile southward on this highway and she met the vehicle which was preceding Lotholz some distance to the north of where the collision took place. Her visibility was undoubtedly restricted by the dust thrown up by the vehicle she just met and as the Charlton and Lotholz automobiles came towards one another the Charlton vehicle crossed over on to the northbound lane and the two vehicles met almost head on. As they met the Charlton vehicle was a matter of some 5 feet over the centre of the highway. Lotholz, who was driving with the left side of his automobile at or on the centre of the highway, saw the Charlton automobile emerge

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Hall J.

from the dust on his side of the road. He applied his brakes and skid marks 44 feet in length were discernible on the highway after the impact. There were no marks or indications of the application of brakes by the driver of the Charlton automobile.

The negligence of the deceased, Emily Charlton, is beyond question. The automobile she was driving was almost entirely on its wrong side of the road. The question for decision is whether Lotholz was negligent at all, and if negligent, what percentage of fault should be assessed against him?

The evidence establishes that when the collision occurred the left side of the Lotholz vehicle was either at or slightly to the left of the centre of the highway. There was considerable argument about the exact position of the Lotholz automobile in this regard, but in my view I do not think it is material to determine the location of the left side of the Lotholz vehicle to the inch in relation to the centre of the highway. The fact is that Lotholz was hugging the centre of the highway as he proceeded northward and he had no vision at all of what traffic might be coming southward on the west side of the highway. As stated, the highway, including the gravel shoulders on both sides, was 30 feet 6 inches wide. The centre of the highway was, therefore, 15 feet 3 inches from the outer edge of the east ditch. The east shoulder was approximately 3 feet wide so there remained 12 feet 3 inches on the east side of the centre for Lotholz to drive upon. His automobile was 80 inches in width. He could have driven some 5 feet closer to the east side of the highway without going on the east shoulder, and, in my opinion, it was negligence for him to drive at 50 miles per hour under the conditions as they existed at the time in question. It is true that there would probably have been a collision in any event even if Lotholz had been driving closer to the right shoulder as he should have been doing, but as against that, the driver of the Charlton vehicle might have been able to swerve to her right if she had not been faced with the Lotholz vehicle almost head on or Lotholz might, on seeing the Charlton vehicle, have avoided the collision by swerving a foot or so to his right.

The major responsibility for the collision must rest upon the driver of the Charlton automobile, but I cannot conclude that Lotholz was not also in a measure at fault. The

classic definition of negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. I do not think that a prudent and reasonable man would hug the centre of that highway, dust-covered as it was, and do so at a speed of 50 miles per hour without being aware that there was the likelihood that a southbound driver could also be driving at or near the centre, and that that driver might accidentally cross over or emerge from the dust too late for either driver to avoid meeting more or less head on.

The learned trial judge fixed the responsibility for the accident equally on both drivers. As previously stated, the major responsibility must rest on the driver of the Charlton automobile. Johnson J.A. in the Appellate Division fixed Lotholz's negligence at 25 per cent. I am prepared to accept his finding of 25 per cent. The judgment at trial should be varied accordingly and the amounts for which the parties are to have judgment calculated on this basis.

The damages awarded under *The Fatal Accidents Act* are on the generous side, but the amount is not such that I can say it is a completely erroneous assessment which should be set aside.

I would, accordingly, allow Lotholz's appeal in so far as the percentage of liability is concerned, but dismiss the appeal as to damages.

Lotholz is entitled to his costs of the appeal in this Court and in the Appellate Division. The order made by Primrose J. regarding the costs of trial should stand.

Appeal as to percentage of liability allowed, appeal as to damages dismissed; with costs.

Solicitors for the appellant: Wood, Moir, Hyde & Ross; Brower, Johnson, Liknaitzky, Robertson, Shamchuk & Veale, Edmonton.

Solicitors for the respondent Charlton et al.: Bishop, McKenzie, Jackson & Redmond, Edmonton.

Solicitors for the respondent third party: Kosowan & Wachowich, Edmonton.

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*Jan. 30, 31
*Feb. 3
June 6

CANADIAN PACIFIC RAILWAY COMPANY (*Defendant*) ..... APPELLANT;

AND

ANGELO BABUDRO, Administrator of the Estate of FERRUCCIO BABUDRO, Deceased, and the said ANGELO BABUDRO (*Plaintiff*) ..... RESPONDENT.

CANADIAN PACIFIC RAILWAY COMPANY (*Defendant*) ..... APPELLANT;

AND

LIVIA SDRAULIG, Administratrix of the Estate of DANTE ANTHONY SDRAULIG, Deceased, (*Plaintiff*) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Collision between car and train at level crossing—Driver and passenger killed—Several sets of tracks including siding tracks in addition to those for through traffic—Standing box cars limiting driver's view of approaching train—Whether railway liable—Whether doctrine of exceptional or special circumstances applicable.

Practice—Trial—Trial judge taking question of liability from jury—Court of Appeal in error in interfering with discretionary decision of trial judge.

Two actions arose as a result of a crossing accident in the City of Port Arthur when a northbound car was in collision with a westbound transcontinental train. Both driver and passenger were killed. The crossing traversed seven sets of tracks, the two most northerly of which were used for through traffic and the remainder were for siding and switching. The collision occurred on the track referred to as No. 1 (reference to the tracks being made by number from north to south), and at the time of the accident there was a string of box cars standing to the east of the crossing on track No. 4. These cars limited to a certain extent the easterly vision of the northbound motorist.

At the trial the judge took from the jury the question of liability and left to them only the assessment of the damages. On appeal from the subsequent dismissal of the actions, the Court decided that the judge had improperly dismissed the jury as to liability. They ordered a new trial since, in their opinion, there was some evidence on which the jury might have found negligence on the part of the railway which caused or contributed to the accident. On appeal to this Court, the

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*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Spence JJ.

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railway contended that there was error in interfering with the discretionary decision of the trial judge to dispense with the jury on the question of liability; that the railway was not negligent; and that the sole cause of the accident was the negligence of the driver of the car.

Held (Cartwright C.J. and Spence J. dissenting in part): The appeals should be allowed and the trial judgments restored.

Per Martland, Judson and Ritchie JJ.: There was good reason for the trial judge's decision to dispense with the jury on the question of liability. The assumption by the Court of Appeal of power to review this decision was in conflict with decisions in this Court which hold that the exercise of a trial judge's discretion to dispense with the jury is not a reviewable matter.

There was no evidence that the railway company had failed in any manner to comply with the provisions of the *Railway Act* or any order of the Board of Transport Commissioners, and there was no evidence of negligence on the part of the passenger train crew, either by breach of statute or running orders or at common law.

On the facts of the case, the trial judge was right in concluding that the box cars which were standing to the east of the crossing on track 4 could not be evidence of a dangerous situation created by the railway. The doctrine of exceptional or special circumstances was one to be applied with great care. It had no application here.

Per Cartwright C.J. and Spence J., *dissenting in part:* The Court of Appeal erred in holding that it could review and reverse the decision made by the trial judge in the exercise of his proper discretion to remove from the jury's consideration the question of liability.

As to the question of liability, the appellant railway was negligent in not providing some better warning under the special and exceptional circumstances present in this case. Those exceptional circumstances were that the crossing of the main line occurred after the unwary motorist had travelled north over five storage tracks some of which on both sides of the road bore standing box cars apparently merely stored at that place, and failing to provide an indication that the two tracks upon which the motorist should last come were not mere storage tracks but through lines upon which trains were entitled to proceed at 55 m.p.h.

On the evidence, the conclusion was reached that the driver contributed 25 per cent of the negligence which caused the accident while the railway company contributed 75 per cent. The passenger was a gratuitous passenger and therefore the provisions of s. 2(2) of *The Negligence Act,* R.S.O. 1960, c. 261, applied to the claim by his administrator who should be able to recover only 75 per cent of the damages as found by the jury.

Accordingly, the appeals should be allowed only to strike out the judgment of the Court of Appeal granting to the respondents a new trial but then the trial judgment should be varied to allow each of the plaintiffs to recover 75 per cent of the damages found by the jury in their actions.

[*Telford v. Secord,* [1947] S.C.R. 277; *Mizinski v. Robillard,* [1957] S.C.R. 351, applied; *Alexander v. T.H. & B. R. Co.,* [1954] S.C.R. 707; *Brown v. Wood* (1887), 12 P.R. 198; *Wise v. Canadian Bank of Commerce*

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(1922), 52 O.L.R. 342; *Currie v. Motor Union Insurance Co.* (1924), 27 O.W.N. 99; *Wilson & Kinnear* (1925), 57 O.L.R. 679; *Logan v. Wilson,* [1943] 4 D.L.R. 512; *Fillion v. O'Neill,* [1934] O.R. 716; *Anderson v. C.N.R. Co.,* [1944] O.R. 169; *Grand Trunk R. Co. v. McKay,* (1903), 34 S.C.R. 81; *C.P.R. Co. v. Rutherford,* [1945] S.C.R. 609; *C.P.R. Co. v. Smith* (1921), 62 S.C.R. 134; *Blair v. Grand Trunk R. Co.* (1923), 53 O.L.R. 405; *Reynolds v. C.P.R. Co.,* [1927] S.C.R. 505; *Flynn v. C.P.R. Co.* (1958), 25 W.W.R. 499, referred to.]

APPEALS from judgments of the Court of Appeal for Ontario[1], allowing the plaintiffs' appeals in actions brought under *The Fatal Accidents Act,* R.S.O. 1960, c. 138. Appeals allowed and judgments at trial restored, Cartwright C.J. and Spence J. dissenting in part.

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

Arthur Maloney, Q.C., and *J. Douglas Crane,* for the plaintiffs, respondents.

The judgment of Cartwright C.J. and Spence J. was delivered by

SPENCE J. (*dissenting in part*):—These reasons apply to two appeals from judgments of the Court of Appeal for Ontario[1]. By those judgments, the Court allowed the appeal of the plaintiffs Babudro and Sdraulig and directed a new trial of the two actions.

The two said plaintiffs had taken action against the Canadian Pacific Railway Company for damages due to the deaths of the late Angelo Babudro and Livia Sdraulig in a collision with a train owned and operated by the defendant Canadian Pacific Railway Company. The action had proceeded to trial with a jury before Moorhouse J. After all of the evidence had been completed, for reasons to which I shall hereafter refer, Moorhouse J. removed the question of liability from consideration by the jury but left with them the fixing of the quantum of damages. His Lordship then charged the jury upon the damages and, during the time the jury was considering its verdict, he heard argument upon the question of liability. The jury having announced its verdict as to the quantum of damages, from which there is no appeal, His Lordship reserved judgment and later, by written reasons, dismissed the action.

[1] [1968] 1 O.R. 377; 66 D.L.R. (2d) 475.

In the Court of Appeal, the two appeals were argued in full but the Court of Appeal first considered the question as to whether the removal of the issue of liability from the consideration of the jury was proper, and determined that the trial judge erred in adopting such a course. The Court of Appeal then proceeded to determine that evidence had been adduced upon which a jury, properly charged, could have found the defendant railway company negligent and directed a new trial before a jury as to liability only.

The first problem for this Court is whether the Court of Appeal erred in reversing the decision of the learned trial judge that the question of liability should be removed from the jury's consideration. The learned trial judge, when he announced his decision, gave his reasons in the following paragraph:

> Now, this case has been a most distressing case, and in view of counsel's question put to the witness Campbell when he was called in reply—in view of that being put in the presence of the jury, and in view of the general conduct of the trial, and certainly in view of the statements of counsel in respect of the law applicable, I feel that true justice cannot be done by leaving this case on the question of liability to the jury. I am taking from them the question of liability.

The learned trial judge extended the grounds upon which he had acted but, as Schroeder J.A. noted in his reasons for judgment, in the Court of Appeal for Ontario, counsel for the respondent railway company (here the appellant) placed no reliance upon such further grounds. Schroeder J.A. then continued:

> Viewing the evidence as a whole I am constrained to look upon this as one of those extreme cases in which the Court ought to intervene since, quite aside from his failure to give counsel an opportunity to argue the point and to put the plaintiffs to their election as previously mentioned, the learned judge's discretion was exercised upon such tenous grounds that it cannot be regarded as the exercise of a judicial discretion at all.

and therefore directed a new trial with a jury. Schroeder J.A. recognized the "well-settled rule that the exercise of discretion by a trial judge should not be interfered with except in extreme cases", but also noted that the Courts had not hesitated to interfere if the learned trial judge's discretion was exercised "under a mistake in law, in disregard of principle, under misapprehension as to facts, that he failed to exercise his discretion or that his order would result in an injustice". It would appear that the learned justice

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in appeal found some of these circumstances existed in the present case. In my respectful opinion, the proposition that a court of appeal may interfere with the discretion of a trial judge was stated much too broadly in applying it to the decision of such trial judge during the course of a trial to dispense with the assistance of a jury and dispose of the issues himself.

In Ontario as long ago as *Brown v. Wood*[2], at p. 200, Chancellor Boyd said:

> The difficulty is to get over sec. 255 of the C.L.P. Act. If this were an appeal from the order of a Judge in Chambers striking out a jury notice, before the trial, the cases cited by Mr. Read would be overwhelming in his favour, but the discretion of a Judge at the trial is much larger... As no affidavit of merits has been filed, and the defendant has not brought and does not seek to bring the amount of the verdict into Court, and as the motion is against a discretion that the trial Judge undoubtedly has to determine the method of trial, it should be dismissed, with costs.

That statement of principal has been cited and adopted since then in a long series of cases both in the Courts of Ontario and in this Court. In *Wise v. Canadian Bank of Commerce*[3], Middleton J. said at p. 345:

> It has been held that the discretion conferred upon the Judge presiding at the trial is an absolute discretion, not subject to review: *Brown v. Wood, supra.*

In *Currie v. Motor Union Insurance Co.*[4], Latchford C.J., for the Court, said:

> Even before the enactment of sec. 56(3) the discretion of a trial Judge in dispensing with a jury was not interfered with by an appellate Court: *Brown v. Wood supra.* It was within the power of the trial Judge to determine the method of trial, and his determination was not open to review.

See also *Wilson v. Kinnear*[5], *per* Middleton J.A. at p. 680; *Telford v. Secord; Telford v. Nasmith*[6], where Kellock J. said at p. 282:

> There rests with the trial judge sufficient power and authority to conduct the trial as it should be conducted, and, should he see reason to try the action without a jury or to dispense with the jury at any stage, his discretion is not subject to review; *Currie v. Motor Union Insurance Co.* (1924) 27 O.W.N. 99; *Wilson v. Kinnear* (1925) 57 O.L.R. 679.

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[2] (1887), 12 P.R. 198.
[3] (1922), 52 O.L.R. 342.
[4] (1924), 27 O.W.N. 99.
[5] (1925), 57 O.L.R. 679.
[6] [1947] S.C.R. 277.

And in *Mizinski v. Robillard and McLaughlin*[7], Cartwright J. (as he then was) said at p. 356:

> I have quoted from the above judgments, and there are many others containing expressions to the same effect, for the purpose of indicating that the order of a trial judge dispensing with a jury during the course of the trial is consistently treated as the exercise of a discretion vested in him by the statute. There may be cases in which the order could be shown to have been made otherwise, as for example if the judge in his reasons made it clear that he had discharged the jury only because he had erroneously decided that he was bound as a matter of law to do so. *Logan et al. v. Wilson et al.*, [1943] 4 D.L.R. 512, was a case of this sort.

Logan et al. v. Wilson et al.[8], to which Cartwright J. referred, was a case in which the trial judge acceded to an application by the counsel for the defence to discharge the jury mistakenly believing that if some of the evidence might tend to show medical malpractice in an attempt to reduce damages he was bound to remove the matter from the jury.

Another example of such unusual circumstances is the case where the existence of insurance is revealed in some answer of a witness. A whole series of cases in Ontario would appear to have resulted in a special jurisprudence and should not be extended beyond that type of case. *Fillion v. O'Neill*[9], cited by Schroeder J.A. in his reasons, was one of these cases in which a witness for the plaintiff in answer to a question put by the trial judge accidentally revealed that the defendant was insured. The portions of the judgment at pp. 727 and 728 referred to by Schroeder J.A. were concerned with the failure of the trial judge to permit the plaintiff to elect whether he might proceed without a jury or take an adjournment to the next sittings. No such situation existed here. Here, the learned trial judge dispensed with the jury for the reasons which he stated carefully and which he, in the exercise of his discretion, regarded as providing adequate basis for such a course in order to ensure that justice should be done. Although it would appear that the learned trial judge did not request counsel to submit argument on the topic before making the statement which I have quoted above, he certainly permitted counsel for the plaintiff to make submissions at length immediately thereafter and before the jury was

[7] [1957] S.C.R. 351.
[8] [1943] 4 D.L.R. 512.
[9] [1934] O.R. 716.

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recalled and instructed. Since it was only this latter event which foreclosed the matter, I am not ready to conclude that the learned trial judge did not permit argument.

For these reasons, I am of the respectful opinion that the Court of Appeal for Ontario erred in holding that it could review and reverse the decision made by the trial judge in the exercise of his proper discretion to remove from the jury's consideration the question of liability. Having determined that it could so review the learned trial judge's decision, the Court of Appeal were only called upon to determine that there was evidence which, when submitted to a jury upon a new trial, would have permitted that jury to find negligence on the part of the railway company. After a review of the facts and the many authorities dealing with level crossing accidents, the Court of Appeal determined that there was such evidence and therefore directed a new trial.

Having come to the conclusion that the learned trial judge's removal of the question of liability from the jury was not open to review, I therefore am required to proceed to consider the correctness of his judgment on the question of liability. This entails a rather detailed consideration of the facts and application thereto of the authorities to which I have referred.

The Canadian Pacific Railway had, for many years, a double-track line running into Port Arthur. When the city grew larger, the city authorities desired to cross the line with a municipal road known as Clavet Street. Upon the city's application, the Board of Railway Commissioners, by its Order No. 12083 of October 24, 1910, permitted the city to construct such crossing. Provisions in such order as to maintenance are not relevant here. The appellant railway owned the lands to each side of Clavet Street to the south of its main line and by orders of the Board of Railway Commissioners made on various dates thereafter, it was permitted to construct five more crossings over Clavet Street. The railway right of way over these five crossings was some 10 to 12 feet higher than Clavet Street to the north and south, so there was an upgrade of that street at both sides of the railway property. Therefore, in 1964 when the accident occurred Clavet Street running northerly from the bay area went up a grade and then crossed at level these five tracks of the appellant's storage yards which were

at each side of the street and finally the double-track main line. The southerly of the latter two tracks was for eastbound traffic and the northerly for westbound.

It was found convenient at trial and thereafter to refer to these tracks by numbers from one to seven, numbers 1 and 2 being the main line through-traffic tracks and numbers 3 to 7 inclusive being the freight car storage tracks. The distance from the north rail of track No. 1 to the south rail of track No. 7 was 89 feet and the distance from the southerly rail of track No. 1 to the northerly rail of track No. 4 was 36 feet. At the time of the accident, box cars stood on tracks Nos. 4 and 7, both to the east and west of Clavet Street. The box cars west of Clavet Street were 36 feet west of the street on track No. 7 and 92 feet west of the street on track No. 4, while those cars to the east of Clavet Street were 50 feet east of the street on track No. 7 and 47 feet or 47 feet 9 inches (the variation in the evidence is inconsequential) on track No. 4.

On February 17, 1964, a fine, sunny, mild day, the deceased Dante Sdraulig, to conduct some business in the office of the Great West Timber Limited on the Lakeshore Road, which ran from east to west south of this railway property, drove to that firm's office. He was accompanied in his motor car by his brother-in-law, the deceased Ferruccio Babudro. After a few moments, the two drove northerly on Clavet Street arriving at the crossing of the main line at almost exactly 1:40 p.m. and there the motor car collided with a locomotive of the appellant railway's transcontinental train, the Canadian, which was westbound on track No. 1. Both men were killed instantly and the vehicle, totally destroyed, tossed down the embankment to the north of track No. 1 about 76 feet west of the west limit of Clavet Street. The train which consisted of two diesel locomotives, a baggage car and fourteen passenger cars, stopped with the leading locomotive 1,425 feet west of Clavet Street. Only three persons other than the deceased occupants of the motor car were eye-witnesses of the impact; the engineer and fireman of the train, and Mr. Robert Campbell, who was repairing his automobile outside a residence on the north side of the right-of-way about 300 feet or more east of Clavet Street. The engineer Guina and Campbell gave evidence. The fireman was not called nor his absence from the trial explained. At the trial, all the

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witnesses agreed that the view of a northbound motorist approaching the main line would be blocked by these standing box cars and much evidence was tendered as to "view lines". This evidence dealt with the view to the east from which direction the Canadian had approached Clavet Street. It may be summarized as follows: Constable MacDonnell swore that the upgrade on Clavet Street levelled out as it crossed track No. 6 and that point 72 feet south of the north rail of track No. 1 he chose as the first point at which a northbound motor car would level out and permit a good view to east and west. The constable then sighted past the north-west corner of the box car standing on track No. 4 at a distance which he found to be 47 feet east of Clavet Street, and determined that his view line crossed the north rail of track No. 1 at a point 117 feet east of the east side of Clavet Street. William E. Mercer, a professional engineer, called for the defendant railway, agreed with this evidence although he chose a point 70 feet 4 inches south of the centre of the two rails of track No. 1 and he found that his view line past the corner of the box car sitting on track No. 4 struck the north rail of the main line westbound at a point 118 feet 8 inches east of Clavet Street. I see no practical difference between the evidence of the two witnesses. Mr. Mercer also produced an exhibit which was intended to illustrate the lengthening of the view to the east along the tracks which a motorist would experience as he drove northerly from that point 70 feet 4 inches south of the centre line of track No. 1. This exhibit was not the result of observation and measurement at the site but was a calculation based on the original observation at the 70 feet 4 inches point. By that table, he illustrated that the view to the east lengthened as the car proceeded northerly at first by quite small distances but thereafter by rapidly increasing distances so that when the motorist reached a point 42 feet south of the centre line of track No. 1 his view to the east extended for a distance of 398 feet and thereafter his view to the east was unlimited.

The liability of the railway company must be considered under three different headings: firstly, the operation of the defendant railway's train, secondly, whether or not it was in breach of any statute or regulation, and, thirdly, even if it were not so in breach was it guilty of negligence in common law?

As to the operation of the train, the learned trial judge found that the train was proceeding between 35 and 40 miles per hour and that that speed was reasonable in the circumstances and was not of any significance. The speed limit in the yard, and this was within the Port Arthur yard, was 55 miles per hour. The learned trial judge further found that the statutory warning signs were erected and the bell on the locomotive was ringing. A by-law of the municipality which had been approved by the Board of Railway Commissioners barred the operation of the whistle except in actual emergency. So soon as the fireman who rode on the left side of the locomotive saw the automobile driven by the deceased Sdraulig, which had just emerged into view on the crossing, and which would appear to have been at that time crossing track No. 4, he warned the engineer and the engineer, in view of the emergency, immediately sounded the whistle. Of course, that was much too late to be of any effect. It was the learned trial judge's conclusion that "there was no evidence from which I can attribute negligence to the train crew either from breach of statute, running orders or at common law". That is a finding of fact amply justified by the evidence.

I turn next to the respondents' submission that the appellant was in breach of the provisions of the Uniform Code of Operating Rules. There was produced at trial a copy of this Code which was effective on October 28, 1962, and thereafter which therefore governed the conduct of the appellant railway at the time of the accident. The respondent points out a provision of rule 103 which reads:

> When necessary to cut trains at public crossings at grade, except where a member of the crew is to protect the crossing, or where other protection is provided, cars or engines must not be left standing within 100 feet of the travelled portion of the public road.

That paragraph is only one of many paragraphs in rule 103 and must be considered with all other parts of the same rule. I quote the complete rule:

> 103. When cars are pushed by an engine, except when switching or making up trains in yards, and even then when conditions require, a member of the crew must be on the leading car and in a position from which signals necessary to the movement can be properly given.
>
> When cars not headed by an engine are passing along a public road or over a public crossing at grade which is not adequately protected by gates or otherwise, a member of the crew must be on the leading car to warn persons standing on, or crossing, or about to cross the track.

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No part of a car or engine may be allowed to occupy any part of a public crossing at grade for a longer period than five minutes, and a public crossing at grade must not be obstructed by switching operations for more than five minutes at a time.

When necessary to cut trains at public crossings at grade, except where a member of the crew is to protect the crossing, or where other protection is provided, cars or engines must not be left standing within 100 feet of the travelled portion of the public road.

Where special instructions require that switching movements over certain public crossings at grade be protected by a member of the crew, such protection must be provided by a member of the crew from a point on the ground at the crossing until the crossing is fully occupied.

When a train or engine passes over any public crossing at grade protected by automatic signals or automatic gates, it will be necessary before making a reverse movement over the crossing for a member of the crew to protect the same.

Before making switching movements over unprotected public crossings at grade where the engineman's view of the crossing is obscured, arrangements must be made for a member of the crew to be in position to observe the crossing and give signals to the engineman as necessary.

At public crossings at grade at which there are automatic warning devices to indicate the approach of trains or engines on the main track, movements over such crossings on other than main tracks, must not, unless otherwise provided, exceed ten miles per hour from 100 feet distant until the engine or leading car has passed over the crossing.

At public crossings at grade referred to in time table instructions, where protection devices are required to be operated by use of push buttons or other appliances, movements must not obstruct the crossing until the protection devices have been operating for at least twenty seconds.

In the rules, "train" is defined as follows:

An engine or more than one engine coupled, with or without cars, displaying markers.

It will be seen that in order to have these standing box cars be part of a train for the purpose of the rule, they must be coupled with an engine. There was no evidence of any engine coupled to any of the standing box cars.

It is also significant that the whole rule deals with the operation of switching cars, that is, moving them from one place to the other, and is not a rule which is applicable to the situation existing in the present case where the car had stood stored for some indefinite time upon these tracks, numbered 3 to 7. The paragraph of rule 103 relied upon by the respondents, by its terms, applies only when it is necessary to cut trains at public crossings at grade. No such cutting of a train nor the necessity for such cutting of a train was proved in this particular case. It was quite possible that these box cars had been moved into their position

from points east of or west of Clavet Street without ever having crossed Clavet Street and, therefore, it was quite possible that they never had been cut at Clavet Street. The paragraph of the rule being evidently for the protection of the public at level crossings against the movement of a "live train" simply had no application in the present circumstances, and the respondents fail in their reliance upon this rule to prove a breach of the statutory regulations in leaving the box cars standing where they stood particularly on track No. 4.

Counsel for the appellant railway, however, submits that since rule 103 does not apply to the present circumstances, and since the Board of Railway Commissioners, as it then was, have not made any regulation requiring the stationary box cars not attached to the train be left any specific distance away from a roadway that there can be no negligence found against his client based on the position of the box cars. I am unable to accede to such a submission. In my view, counsel having contended, and rightly contended, that the paragraph of rule 103 cited by the respondent had no application, it necessarily follows that the Board simply has not dealt with this question and that negligence may exist when there has been no breach of the regulation of the Board.

In *Anderson v. Canadian National Railway Co.*[10], Robertson C.J.O. considered such a contention. At pp. 175 and 176, the learned Chief Justice said:

> It will not be doubted, I think, that a railway company, such as appellant, has no more liberty than anyone else to be negligent. In *Imerson v. Nipissing Central Railway Co.*, 57 O.L.R. 588 at p. 593, [1925] 4 D.L.R. 504, Masten J.A., in speaking of the matter of the speed at which the car of the railway company was travelling, said, "But the absence of any statutory limitation of speed does not absolve the defendant from its common law liability if it is negligent, and it still remains liable for negligence if, 'having regard to all the circumstances of the case, its employees omit that reasonable degree of care which the law justly requires of those who, in the exercise of their rights, are using an instrument of danger'." The latter part of this statement is quoted from the judgment of King J. in *Fleming v. Canadian Pacific Railway Company* (1892), in 31 N.B.R. 318 at p. 345, which was adopted by the Supreme Court of Canada on appeal in (1893), 22 S.C.R. 33.
>
> This principle has been applied in cases of accidents at highway crossings, two of which may be referred to as illustrations. First is *The*

[10] [1944] O.R. 169.

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Lake Erie and Detroit River Railway Company v. Barclay (1900), 30 S.C.R. 360. In that case shunting operations were carried on near a highway crossing, and a train of cars was sent across a much frequented highway by what was called a "flying switch", the engine being detached and the cars proceeding by their own momentum. It was held that it was properly left to the jury whether it was not necessary, at that particular time and under the particular circumstances, to take greater precautions than were taken, and to be much more careful than in ordinary cases where these conditions did not exist. In *Montreal Trust Co. v. Canadian Pacific Railway Co.*, 61 O.L.R. 137, [1927] 4 D.L.R. 373, 33 C.R.C. 407, there was evidence that some box-cars of a freight train, placed on a passing-track to allow a passenger train to proceed on the main line, obstructed the view which the driver of a motor car would otherwise have had of the approaching passenger train. It was held that it was proper to submit to the jury the question whether, in the circumstances of the case, a duty was cast upon the railway company to take some precaution additional to the precautions prescribed by The Railway Act, and that it was open to the jury to find that the omission to take extra precaution was negligence.

There is nothing in the decisions in such cases as these I have referred to, in any way inconsistent with the principle laid down in *The Grand Trunk Railway Company of Canada v. McKay* (1903), 34 S.C.R. 81, 3 C.R.C. 52. In that case Davies J. (in whose judgment the Chief Justice and Killam J. concurred), said at p. 97, referring to the powers conferred by The Railway Act upon the Railway Committee of the Privy Council, of determining the character and extent of the protection which should be given to the public at level highway crossings: "I cannot think that these powers, so full, so complete, and so capable of being made effective, can if exercised be subject to review either as to their adequacy or otherwise by a jury, nor do I think that failure to invoke the exercise of the powers is of itself sufficient to take the matter away from the jurisdiction to which Parliament has committed it and vest it in a jury."

The result of the decisions seems to be that, under ordinary circumstances, the railway is permitted to carry on its usual operations in the normal way, at a highway level crossing, without other precautions and warnings than are prescribed by The Railway Act or by the Board, but if the operations are carried on in such a way, or are of such a character, that the public using the crossing is exposed to exceptional danger, as in the *Barclay* case, or if there are exceptional circumstances, as in the *Montreal Trust Co.* case, that render ineffective or insufficient the precautions and warnings generally prescribed, then, in such cases, it may be left to a jury to say whether or not the railway has been negligent in failing to adopt other measures for the protection of those who may use the crossing.

With respect, I adopt the view of the Chief Justice as to the decisions in the *Grand Trunk Railway Company of Canada v. McKay* case, and I am also of the view that *Canadian Pacific Railway Co. v. Rutherford*[11], at p. 613, does not carry the appellant railway any farther.

[11] [1945] S.C.R. 609.

The problem which remains, therefore, is to find whether, in the words of Chief Justice Robertson, there existed in this case such exceptional circumstances as would require the taking of other precautions.

Let us consider the position of a motorist, any motorist, not particularly the deceased Mr. Sdraulig, who approached the scene driving northerly on Clavet Street. About 200 feet south of track No. 7, he would start to climb a grade which in the next 200 feet rose 10 or 12 feet. He would then find himself crossing a series of seven railroad tracks; on either side of Clavet Street, box cars stood on some of the tracks, particularly on track No. 7, which he reached first, and on track No. 4. It was therefore apparent to him from the many railroad tracks and from the box cars which stood on some of them, that he was driving through a railway yard. In a railway yard, he could expect shunting to take place but he also would know, as it is mere common sense to know, that such shunting would be accompanied by some sort of notice to him, from either the whistle or bell of a slow moving locomotive, or a warning by a trainman. Indeed, the various paragraphs of regulation 103 which I have cited above require this. The evidence reveals no variation of any kind in the appearance of the crossings to warn a northbound motorist that the last two tracks he is approaching, Nos. 2 and 1, are two express tracks. These two would appear simply the last two of seven shunting or storage tracks in the railway yard. When the motorist had proceeded to a point only 70 feet south of the centre of that track No. 1, he still feeling himself in the midst of a railroad yard, would, if he had taken a view only have had one to his right, that is, the east, of 118 feet 7 inches in length. A train travelling only at 35 miles an hour would cover that 118 feet 7 inches in a little less than 2.3 seconds. If the motorist were driving at 20 miles an hour, it would take exactly the same 2.3 seconds for him to travel the intervening 70 feet between his first lookout point and the track upon which the Canadian was running.

Mr. Mercer, in the exhibit which he prepared and filed, showed that if that box car standing on track No. 4 had stood 100 feet east of Clavet Street, the distance suggested in rule 103, rather than merely 47 feet 9 inches, the motorist at this point would have had a view to the east of 228 feet. A train travelling at 35 miles an hour would

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require 4.3 seconds plus to cover those 228 feet. Therefore, I am of the opinion that the appellant railway company was negligent in not providing some better warning under special and exceptional circumstances present in this case. Those exceptional circumstances are that the crossing of the main line occurred after the unwary motorist had travelled north over five storage tracks some of which on both sides of the road bore standing box cars apparently merely stored at that place, and failing to provide an indication that the two tracks upon which the motorist should last come were not mere storage tracks but through lines upon which trains were entitled to proceed at 55 miles an hour.

The appellant railway has pleaded the provisions of *The Negligence Act*, R.S.O. 1960, c. 261. It is, therefore, necessary to consider the position of the late Mr. Sdraulig as he drove north over these seven tracks. Although the late Mr. Sdraulig was born in Europe, he had lived in Canada for about ten years prior to the accident, and he had evidently possessed an automobile driver's licence for about that length of time. He was married in Port Arthur in 1960 and it would seem that the trial judge was quite justified in concluding that he was familiar with the area. On at least two occasions, the late Mr. Sdraulig had called at the office of the North West Timber Company, south of the scene of the accident, but there is no evidence as to whether he had approached that timber company on Clavet Street or on one of the streets to the east or west of it. No matter which route he chose, the late Mr. Sdraulig would have had to have crossed this double track main line of the C.P.R. It must be noted that a southbound motorist on either Clavet Street, or the other streets to either side of it, would have an unobstructed view of the main line because they were the two northerly tracks and they were of course unoccupied by any standing box cars. Therefore, the late Mr. Sdraulig when he drove north across the five storage or shunting tracks must be taken to have known that ahead of him were the two main line tracks of the appellant company. Under those circumstances, therefore, he must be required to have exercised his ability to see what traffic was on the main line at the earliest possible moment. That earliest possible moment seems to be the time when his car was some 70 feet south of track No. 1

and at that moment, as I have said, his vision to the eastward was only 118 feet 7 inches easterly along track No. 1.

The learned trial judge put the late Mr. Sdraulig's speed at 15 to 20 miles an hour. That was the estimate which had been set out in the written statement of one Campbell, to whom I have referred and who was one of the three eye witnesses of the accident. In Campbell's evidence at trial, he gave the speed at 15 and described the vehicle as moving very slowly. Guina, the engineer on the Canadian, described the speed of the late Mr. Sdraulig's car in these words: "but I would estimate it would be 12 to 15 miles per hour, a very normal rate of speed going across a crossing. It was rough and so forth". It must be understood that both Campbell and Guina could have only a very fleeting moment to judge the speed of the late Mr. Sdraulig's car. In fact, I cannot see how Campbell would have ever had any opportunity to observe the automobile. He swore that he was attracted by the sound of the whistle; the engineer swore that he sounded the whistle when his locomotive was within about 100 feet of the crossing or perhaps a little longer distance. If the locomotive were in that position, the train would be between Campbell whose position was at least 300 feet east of Clavet Street and the late Mr. Sdraulig's car cutting off his vision completely. The best summary would seem to be that the late Mr. Sdraulig's automobile was proceeding at about 15 miles an hour at the time it emerged into view of those who were looking at it from the east, particularly the engineer on the Canadian. If that vehicle were more than 70 feet from the crossing and if the late Mr. Sdraulig had immediately so soon as he was able observed the approaching Canadian on track No. 1 he could have brought his vehicle to a stop in something around 42 to 45 feet, *i.e.*, 25 feet before he arrived at track No. 1. If, on the other hand, the late Mr. Sdraulig did not observe the approaching Canadian until he was level with the north side of the box cars standing on track No. 4, he was only at that time 36 feet away from track No. 1. At 15 miles an hour he would have covered that distance in 1.6 seconds and it was not said that his car decreased in speed before the impact nor were there any skid marks. It would, of course, have been impossible for the late Mr. Sdraulig to have stopped his car in that distance.

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It is, of course, perfectly plain and established by the authorities beyond any question that a motorist attempting to cross railway crossings must do so with caution and must take care to observe oncoming trains. The matter was put by Sir Louis Davies C.J., in this Court in *Canadian Pacific Railway Co. v. Smith*[12], at p. 135 in these words:

> The reasonable and salutary rule frequently laid down by the court with respect to persons crossing level railway crossings is that they must act as reasonable persons should act and not attempt to cross without looking for an approaching train to see whether they can safely cross. If they should choose recklessly and foolishly to run into danger, they must take the consequences.
>
> The rule so requiring persons crossing railway tracks to look for a possible approaching train may not be an absolutely arbitrary one. Circumstances may exist which might excuse their not looking, but those circumstances must be such as would reasonably warrant a jury in finding they were excused from their duty in that regard.

Middleton J. in *Blair v. Grand Trunk Railway Co.*[13], said at p. 407:

> I should deplore the adoption of any fixed standard of care, such as "stop, look, listen," but it is just as deplorable if an action will lie at the instance of a "man who rushed, with his eyes open, to his own destruction."

Two factors, however, must be kept in mind in considering those and many other decisions; firstly, every case depends on the facts in the particular case and, secondly, those two decisions, and many others, were rendered before the enactment of what is now the Ontario *Negligence Act*. The application of that statute will permit a plaintiff to recover a proportion of his damages despite the fact that he himself, as well as the defendant railway, had been negligent: *Reynolds v. Canadian Pacific Railway Co.; Craig v. Canadian Pacific Railway Co.*[14]; *Flynn et al. v. C.P.R.; Kwapisz Estate v. C.P.R.*[15]

It should also be noted that in *Canadian Pacific Railway Co. v. Smith, supra,* and *Blair v. Grand Trunk Railway Co., supra,* the drivers of the vehicles were alive and able to give evidence as to their lookout or lack of lookout. In the present case, both Sdraulig and Babudro were killed instantly and we are only able to determine whether or not the driver looked for the train by making inferences from the course of the vehicle and from the presence of these obstructing empty standing box cars.

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[12] (1921), 62 S.C.R. 134.
[13] (1923), 53 O.L.R. 405.
[14] [1927] S.C.R. 505.
[15] (1958), 25 W.W.R. 499.

After a careful review of all of the evidence, I have come to the conclusion that Sdraulig must be found to share a portion of the negligence which resulted in the accident, and I would find that the late Dante Sdraulig contributed 25 per cent of the negligence which caused the accident while the railway company contributed 75 per cent. I arrive at these percentages from a consideration of the salient fact that the view of the driver northbound on Clavet Street was so confined, particularly by the presence of the standing box car to the east of Clavet Street on track No. 4, that even at his earliest point of view he had a startling situation to face and that his failure to get his vehicle stopped had he observed the onrushing Canadian at this first possible moment was not such a fault as would justify a greater amount of negligence being assessed against him.

The late Ferruccio Babudro was a gratuitous passenger and therefore the provisions of s. 2(2) of *The Negligence Act,* R.S.O. 1960, c. 261, applied to the claim by his administrator who should be able to recover only 75 per cent of the damages as found by the jury.

Therefore, in the result, the appeals of the Canadian Pacific Railway Company should be allowed only to strike out the judgment of the Court of Appeal granting to the respondents a new trial but then the judgment of the learned trial judge should be varied to allow each of the plaintiffs Livia Sdraulig and Angelo Babudro to recover 75 per cent of the damages found by the jury in their actions. I would allow these respondents their costs of the trial and of the appeals to the Court of Appeal for Ontario; success being divided in this Court, I would make no order as to costs here.

The judgment of Martland, Judson and Ritchie JJ. was delivered by

JUDSON J.:—These two actions under *The Fatal Accidents Act,* R.S.O. 1960, c. 138, result from a crossing accident in the City of Port Arthur when a northbound car was in collision with a westbound transcontinental train. Both driver and passenger were killed. At the trial the judge took from the jury the question of liability and left to them only the assessment of the damages. On appeal[16], the Court decided that the judge had improperly dismissed the jury

[16] [1968] 1 O.R. 377, 66 D.L.R. (2d) 475.

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as to liability. They ordered a new trial since, in their opinion, there was some evidence on which the jury might have found negligence on the part of the railway which caused or contributed to the accident.

In this Court, the railway, as appellant, contends that there was error in interfering with the discretionary decision of the trial judge to dispense with the jury on the question of liability; that the railway was not negligent; and that the sole cause of the accident was the negligence of the driver of the car.

As to the decision of the trial judge to dispense with the jury on the question of liability, in my opinion there was good reason why he did so. This was not a capricious exercise of the discretion, nor one founded on an erroneous decision on a matter of law. The assumption by the Court of Appeal of power to review this decision is in conflict with two decisions in this Court. *Telford v. Secord; Telford v. Nasmith*[17] and *Mizinski v. Robillard and McLaughlin*[18], are clear that the exercise of a trial judge's discretion to dispense with the jury is not a reviewable matter.

The accident happened on Clavet Street in the City of Port Arthur. Clavet Street runs north and south and seven tracks of the Canadian Pacific Railway run east and west. The tracks have been numbered from north to south and I will adhere to these numbers. The westbound transcontinental line is No. 1. The motorist was travelling north. He was struck on track No. 1 by the westbound passenger train.

There were no box cars standing on either tracks 1, 2 or 3. There was a string of box cars standing to the east of the crossing on track 4. The nearest of these cars was 47 feet east of the easterly limit of the crossing. These cars limited the easterly vision of the northbound motorist. From the southerly line of track 4, the visibility to the east was 231 feet. From the centre of track 4, the visibility was 398 feet to the east. On the north line of track 4, the visibility to the east was unlimited.

The crossing in its present form was duly authorized by orders of the Board of Railway Commissioners. The two northerly tracks were used for through traffic. The other tracks were for siding and switching.

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[17] [1947] S.C.R. 277.

[18] [1957] S.C.R. 351.

The trial judge found that the train was travelling at a normal speed between 35 and 40 miles per hour. It was within the Port Arthur yards and was approaching the Port Arthur station. Its bell was ringing and had been ringing for some distance east of the crossing. There was a by-law of the City of Port Arthur passed under the authority of the *Railway Act*, R.S.C. 1952, c. 234, prohibiting the sounding of the whistle at this crossing. The railway had erected and maintained at the crossing signboards bearing the words "Railway Crossing—7 Tracks", as required by s. 270 of the *Railway Act*. These signs were plainly visible to motorists crossing in either direction.

There was no evidence that the railway company had failed in any manner to comply with the provisions of the *Railway Act* or any order of the Board of Transport Commissioners, and there was no evidence of negligence on the part of the passenger train crew, either by breach of statute or running orders or at common law.

The Court of Appeal recognized that the railway had complied with all applicable regulations and orders. Nevertheless, it held that the stationing of the box cars east of the crossing on track No. 4 could afford some evidence fit for submission to a jury that the accident was, at least in part, the result of a dangerous situation created by the defendants. With this conclusion I disagree.

The trial judge was of the opinion that the presence of the freight cars on track No. 4 could not be considered an exceptional danger or exceptional circumstances. The circumstances were ordinary and the operations usual. It must be remembered that this crossing was within the Port Arthur freight yards. This was a normal and every day use of these freight yards.

The only conclusion is that the motorist, in crossing, should have seen the oncoming train when he was on the north rail of track 4 and he should have been driving in such a way as to be able to stop.

We heard full argument on s. 103 of the Uniform Code of Operating Rules effective October 28, 1962, and in force at the time of the accident, which were fully approved and prescribed by the Board of Transport Commissioners. Section 103 reads:

> 103...
>
> When necessary to cut trains at public crossings at grade, except where a member of the crew is to protect the crossing, or where other protec-

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tion is provided, cars or engines must not be left standing within 100 feet of the travelled portion of the public road.

* * *

Both the trial judge and the Court of Appeal were in agreement that this section had no application. The apparent purpose of the section is to protect the public against movements of a live train which has been temporarily cut. The box cars on track No. 4 at the time of the accident did not constitute any part of a train as defined by the operating rules and there was no evidence at all that they had been placed in this position as a result of or during the cutting of a train at the Clavet Street crossing. Section 103 does not create a general rule that cars or engines must not be left standing within 100 feet of the travelled portion of the public road. This is only required when it is shown that it was the result of a cutting of a train at the particular crossing.

The standing box cars were, therefore, not on the tracks in breach of the Uniform Code of Operating Rules. Section 103 deals only with standing cars coming into position as a result of a certain operation. They must be 100 feet back. There is no general provision from the Board of Transport Commissioners dealing with other standing cars near level crossings. On the facts of this case, I think that the trial judge was right in concluding that box cars in this position on this track could not be evidence of a dangerous situation created by the railway. This Court in *Alexander v. Toronto, Hamilton & Buffalo Ry. Co.*[19], dealt with the doctrine of exceptional or special circumstances and it is one to be applied with great care. It has no application here.

I would allow the appeals and restore the judgments at trial. The appellant is entitled to its costs both here and in the Court of Appeal.

Appeals allowed and judgments at trial restored, with costs, CARTWRIGHT C.J. *and* SPENCE J. *dissenting in part.*

Solicitors for the defendent, appellant: Weiler, Weiler & Maloney, Fort William.

Solicitor for the plaintiffs, respondents: Alfred A. Petrone, Fort William.

[19] [1954] S.C.R. 707.

H. A. ROBERTS LIMITED ..... APPELLANT;

AND

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

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*Mar. 13, 14
June 6

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Termination of mortgage agency business—Whether compensation received capital or income—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4.

The appellant company carried on a real estate business and for a number of years prior to 1963 carried on also a mortgage business in one of the five separate departments into which it had organized its business. Most of the revenue from the mortgage business came from agency contracts obtained from three other companies. In 1963, these agency contracts were terminated. The appellant received payment of $83,633.72 as compensation and closed its mortgage department. The Minister assessed the amount of compensation received as income. The Exchequer Court upheld the Minister's assessment. The company appealed to this Court.

Held: The appeal should be allowed.

The payments were payments of compensation for the termination of a separate business of the appellant. Therefore, the compensation received was a capital.

Even if the mortgage business was not a business separate from its other activities, the cancellation of the agency contracts represented the loss of capital assets of an enduring nature the value of which has been built up over the years, and therefore the payments received by the appellant represented capital receipts.

Revenu—Impôt sur le revenu—Fin d'un contrat d'agence d'hypothèques—L'indemnité reçue est-elle un revenu ou un capital—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, art. 3, 4.

La compagnie appelante exerçait un commerce d'immeubles, et, durant plusieurs années avant 1963, elle exerçait aussi un commerce d'hypothèques dans l'un des cinq services dans lesquels elle avait réparti toute son entreprise. La majeure partie de son commerce d'hypothèques lui provenait de contrats d'agence qu'elle avait obtenus de trois autres compagnies. En 1963, on a mis fin à ces contrats d'agence. La compagnie appelante a reçu une somme de $83,633.72 comme indemnité et elle a fermé son service d'hypothèque. Le Ministre a cotisé le montant de l'indemnité comme un revenu et cette cotisation a été maintenue par la Cour de l'Échiquier. La compagnie en appela à cette Cour.

Arrêt: L'appel doit être accueilli.

Le paiement fut le paiement d'une indemnité pour la cessation d'une entreprise distincte de l'appelante. L'indemnité reçue était donc un capital.

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*PRESENT: Cartwright C.J. and Martland, Ritchie, Hall and Spence JJ.

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Même si le service d'hypothèques n'était pas une entreprise distincte des autres occupations de l'appelante, la résiliation des contrats d'agence représentait une perte d'un bien de capital d'une nature permanente et dont la valeur avait été acquittée au cours des années. Par conséquent, le paiement reçu par l'appelante représentait un reçu de capital.

APPEL d'un jugement du Juge de district Sheppard de la Cour de l'Échiquier du Canada[1], en matière d'impôt sur le revenu. Appel accueilli.

APPEAL from a judgment of Sheppard D.J. of the Exchequer Court of Canada[1], in an income tax matter. Appeal allowed.

P. N. Thorsteinsson, for the appellant.

G. W. Ainslie, Q.C., for the respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the decision of Mr. Justice Sheppard, District Judge of the Exchequer Court of Canada[1], delivered on October 28, 1968. By that judgment, the learned trial judge dismissed the appeal of the taxpayer H. A. Roberts Limited from the assessment by the Minister of National Revenue made in connection with the appellant's 1963 taxation year, and confirmed the allocation of two sums received by the appellant in that year, i.e., $73,633.72 from the Crown Life Insurance Company, and $10,000 from Burrard Mortgage Investments Limited, to income. It is necessary to outline the circumstances in some detail.

H. A. Roberts had been engaged in the real estate business for some time. On April 2, 1929, H. A. Roberts Limited was incorporated as a private company by Memorandum of Association under the British Columbia *Companies Act.* The taxpayer carried on as a real estate company for a considerable number of years. During that period, the company, as any other real estate dealer, was called upon from time to time to obtain mortgages for purchasers of real estate through it and to loan funds of its customers on mortgages.

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[1] [1969] 1 Ex. C.R. 266, [1968] C.T.C. 517, 68 D.T.C. 5330.

In the year 1946, the appellant was appointed mortgage representative in British Columbia for the Crown Life Insurance Company. At the time of that first appointment, the appellant was not the sole agent for the said insurance company in British Columbia but from and after the 7th of June 1948 the appellant occupied such sole and exclusive agency. For the appellant's services to the Crown Life it was entitled to receive 10 per cent of the interest collected for the company up to $100,000 and 7½ per cent on interest collected above that amount. Thereafter, the appellant organized its business in departments as follows:

1. Real Estate.
2. Mortgages.
3. Insurance.
4. Property Management.
5. Appraisals.

In the year 1964, i.e., after the taxation year with which this appeal is concerned, it added another department, that of Property Development. In the year 1953, the appellant had built its own building at 530 Burrard Street, Vancouver, B.C. On the ground floor of that building, it established the offices for the various departments other than the mortgage department; the second floor of the building was occupied in whole by the mortgage department. That department was staffed by from ten to thirteen persons and had as its head a manager. The department was operated as an altogether separate entity from the other kinds of businesses which the taxpayer carried on and it was made very specific that those in other departments were not entitled to obtain information from those employed in the mortgage department. That department, in addition to handling the Crown Life agency, took on other similar mortgage agencies. By an agreement made on August 1, 1960, it became the sole and exclusive agent in British Columbia for Burrard Mortgage Investments Limited and carried on as to second mortgages much the same business for Burrard as it was carrying on as to first mortgages for Crown Life. In addition, a company known as Abernathy Mortgage Corporation held an exclusive agency for the Occidental Life Insurance Company of California. The appellant purchased all the shares in the Abernathy Mortgage Corporation and as a result entered into an

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agency contract with the Occidental Life Insurance Company of California dated June 30, 1959. Mr. J. P. Roberts, giving evidence on behalf of the appellant, testified that with the ever increasing amount of the appellant's business being involved in the mortgage department and by far the greatest share of such business being that of the Crown Life Insurance Company, in the year 1960, he began to be concerned lest termination of that agency would result in a heavy loss to his company. The original agreement in the year 1946, and the subsequent amendments thereafter, had been carried out by letter and such agreements had contained no provision for termination. It would appear, therefore, that the agency could have been terminated on reasonable notice.

Mr. Roberts testified that he conferred with Mr. Jamieson, the mortgage superintendent of the Crown Life upon the topic. Mr. Jamieson was approaching retirement age and one of the motives moving Mr. Roberts to obtain an exact provision as to what would occur were the agency to be terminated was that the excellent relationship between him and Mr. Jamieson would not necessarily be continued with the latter's successor. Mr. Jamieson readily agreed that some compensation would be due to the appellant upon termination and as a result under date the 24th of February 1960, Mr. Jamieson, for the Crown Life Insurance Company, wrote to Mr. Roberts, for the appellant, outlining the new terms of the agency agreement. The commission upon interest collected was reduced from 7½ per cent to 6 per cent and it was specifically provided that

> the Crown Life Insurance Company shall have the right to discontinue the servicing portions of the agreement without cause on ninety (90) days' written notice to H. A. Roberts Limited upon payment to H. A. Roberts Limited of one-half of one per cent. (½%) of the then unpaid balance of the mortgages being serviced by H. A. Roberts Limited for the Crown Life Insurance Company.

The appellant continued to operate in the same fashion under those terms. By the year 1962, the appellant was servicing as agent a mortgage portfolio for the Crown Life Insurance Company of almost $15,000,000 in outstanding principal amounts, a mortgage portfolio for Burrard Mortgage Investments of about $2,000,000 outstanding principal, and a mortgage portfolio in the Occidental Life Insurance Company of California of about the same $2,000,000 figure. The appellant had, in addition, a very

few independent clients for whom it operated as mortgage agents and this small amount of business was, for the sake of finance and efficiency, turned into a mortgage department. The appellant had completely set up its accounting and reporting system to comply with the requirements of the Crown Life and Burrard Mortgage Investments, and particularly the former. The appellant had purchased an accounting machine at the cost of $6,000 for such purpose.

In the year 1962, the Crown Life Insurance Company, having built its own office building in Vancouver and having usable space therein, determined to establish its own mortgage department for British Columbia in such building and to terminate the agency held by the appellant. Therefore, on September 28, 1962, the Crown Life Insurance Company, over the signature of its vice-president and superintendent of mortgages, gave notice to the appellant in these terms:

> Pursuant to our letter to you of February 24th, 1960, we beg to give you formal notice of discontinuance of our agreement with you as of February 1st, 1963.

It will be seen that that notification was a little longer than that required by the letter of September 24, 1960. Thereafter, the Crown Life Insurance Company paid to the appellant the sum of $73,633.72, being one-half of one per cent of the principal value of Crown Life mortgages then in force in British Columbia which amount was $14,726,744. Upon that occurrence, the manager of the mortgage department of the appellant came to the conclusion that there was no future in remaining in that position. He was, at the same time, one of the controlling officers of the Burrard Mortgage Investments Limited and, therefore, he caused Burrard also to cancel its agency agreement. Under the agreement with Burrard, the latter was entitled to cancel the agreement without cause on ninety days' written notice and on the payment of the sum of $20,000. Burrard, however, objected to the accounting which had been made to it by the appellant and on solicitors' advice, to avoid litigation, the appellant accepted from Burrard the sum of $10,000 in settlement, and mutual releases were executed. It is these two sums of $73,633.72 and $10,000 which the Minister has put into income which the appellant submits should be regarded as capital receipts and, therefore, not subject to income tax.

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At the time the Crown Life Insurance Company terminated its agreement and established its own mortgage department in British Columbia, eight or nine of the employees of the appellant's mortgage department left the appellant's service and became employees of Crown Life's mortgage department in British Columbia. At roughly the same time, the Occidental Life Insurance Company of California cancelled its agency agreement and by an arrangement made between the appellant and the Occidental Life the agency business was transferred to another agent known as MacAulay Nichols, with that agency agreeing to pay to the appellant 25 per cent of the commissions it obtained. Amounts received under that agreement have been credited to income and we are not concerned with them in this appeal. One of the employees of the appellant's mortgage department went to MacAulay Nichols. The manager of the department and two more of the staff became employees of Burrard Investments Limited, and one retired.

It will be seen, therefore, that the appellant lost the complete staff of its mortgage department. The appellant moved its other departments into the second floor of the building previously occupied by that mortgage department, which it discontinued, and let out to tenants the ground floor which it had previously occupied with those other departments. Some attempts were made to obtain other correspondence agency contracts with other insurance companies but Mr. Roberts' evidence was that such attempts were, at best, half-hearted. He pointed out that having lost all his staff, he would have to, even if he were fortunate enough to obtain an agency, which he did not consider a possibility, have "started from scratch". It appears that the only possible market was in U.S. insurance companies and at that time the demand for mortgages in the U.S. was such that they were not interested in entering the mortgage field in British Columbia.

With the proceeds of the payments by Crown Life and Burrard Investments, the appellant purchased two different insurance agencies known as George Barker Agency and the Day Ross Roberts Agency. The amounts paid out, totalling $72,500, were treated as capital items. The payments for the shares of the Abernathy Mortgage Company,

to which I have referred above, were treated in the same fashion as capital outlay. Mr. Roberts testified that he had never sold an agency.

The appellant made its submission to this Court upon two bases. Firstly, that the mortgage correspondency business carried on by the appellant was a distinct business separate from its other activities and that the cancellation by the Crown Life Mortgage and Burrard Mortgage Investments effectively brought that business to an end and therefore compensation received therefor was a capital receipt to the appellant. Secondly, the appellant urged, in the alternative, that the loss of the Crown Life and Burrard Mortgage agency contracts represented the loss of capital assets of an enduring nature, the value of which had been built up over the years so that payment received by the appellant for such a loss was a capital receipt.

The trial judge, in his reasons for judgment, concluded:

> After the cancellation the Mortgage Department was closed and the staff disbanded, the majority of them being absorbed by the Crown Life and the individual mortgagees who were customers of the appellant were serviced by the Accounting Department of the appellant. Therefore, while the Mortgage Department was a separate department, it was not a separate business.

This Court had occasion, in *Frankel Corporation v. M.N.R.*[2], to consider a related question. The Frankel Corporation Limited, as did the present appellant, had carried on under one corporate structure a variety of businesses including, (1) a steel operation, (2) a wreckage and salvage operation, (3) a scrap iron and steel operation, and (4) a non-ferrous smelting and refining operation. The Frankel Corporation sold its non-ferrous smelting and refining operation including the inventory at hand. Frankel alleged that this sale of inventory was part of the sale of a business and was not a sale in the ordinary course of the company's business so that the proceeds from such sale should not be considered part of the company's income. It is true that the actual decision of this Court was that the sale of the inventory was not a sale in the ordinary course of business, but in order to come to that conclusion the Court had to hold that the subject of the contract between the Frankel Corporation and the purchaser was the sale

[2] [1959] S.C.R. 713, [1959] C.T.C. 244, 59 D.T.C. 1161, 19 D.L.R. (2d) 497.

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of a business despite the fact that that business was not the subject of any separate incorporation. Martland J., giving the judgment of the Court, quoted extensively the judgment of the trial judge in the Exchequer Court of Canada and then stated, "I agree with these conclusions".

The learned trial judge in the Exchequer Court had regard for such circumstances as the source of the material and supplies used in the operation, the employees of Frankel who bought the material and supplies, the machinery and equipment used in the operation, the employees who operated such machinery, the portion of the premises where the operation was carried on, the customers who bought the products, the employees of Frankel who sold those products, the name under which the operation was carried on, and the trade-mark and trade name used on the products. He said, in part:

> Indeed, the whole process by which profit was earned seems to have been quite distinct from the others, save in respect of the acquisition of minor quantities of scrap material from the wrecking and salvage operation, the combination for some purposes of the accounting with that of the ferrous scrap operation and such general matters as control by the same board of directors, the arrangement of a single union contract for employees of the appellant, employees' pension and insurance plans, and the ultimate preparation of the profit and loss account for the operations of the company.

In my view, the separation of the mortgage department of the appellant was at least as distinct and probably much more distinct than the separation of the non-ferrous smelting and refining department of the Frankel Corporation. The employees worked in a distinct premises, under a manager of that department only, the method of accounting was set up especially for that department, the mortgages issued on behalf of the Crown Life and Burrard were issued very generally to others than the customers of the appellant and because of the necessity of keeping confidential such customers' affairs the employees of the mortgage department were expressly prohibited from giving any other department in the appellant company information as to the affairs of those other customers. The only control of the mortgage department by anyone other than the staff thereof was by the directors of the company and, of course, it is the duty of the directors to control all departments, one may say, the different businesses, of the company.

I have come to the conclusion that, applying the decision of this Court in *Frankel Corporation v. M.N.R.*, it should be determined that the payments by the Crown Life Insurance Company and Burrard Mortgage Investments Limited were payments of compensation for the termination of a separate business of the appellant. Therefore, under *Van Den Berghs v. Clark (H. M. Inspector of Taxes)*[3] and *Barr, Crombie & Co. Ltd. v. Commissioners of Inland Revenue*,[4] the compensation received is capital and cannot be assigned to the appellant's income for the year 1963.

I turn to consider the appellant's alternative submission.

Even if the mortgage correspondency business carried on by the appellant was not a distinctive business separate from its other activities, the loss of the Crown Life and Burrard Mortgage contracts represented "the loss of capital assets of an enduring nature, the value of which had been built up over the years" so that the payment received by the appellant for the loss thereof represented a capital receipt.

As was said by Lord Evershed in *Wiseburgh v. Domville*[5], when referring to the distinction between the case where such payments are to be considered as capital receipts or, on the other hand, as income:

> But, the matter being largely one of degree and so of fact, as Lord Normand said, I think the question is one of fact for the commissioners to find.

The same view was expressed by Lord Normand (the Lord President) in *Kelsall Parsons & Co. v. Inland Revenue*[6]:

> ...no infallible criterion emerges from a consideration of the case law. Each case depends upon its own facts...

Again, as Lord Evershed pointed out in *Wiseburgh v. Domville, supra, Kelsall Parsons & Co. v. Inland Revenue* was very much at one end of the line and *Barr, Crombie v. Inland Revenue*[7] very much at the other. In the *Kelsall* case, the taxpayer had some sixteen agencies, and only one of them was cancelled. It was held that under such circumstances the obtaining of an agency or the cancellation

[3] [1935] All E.R. 874, [1935] A.C. 431, 19 Tax Cas. 390.
[4] (1945), 26 Tax Cas. 406.
[5] [1956] 1 All E.R. 754 at 757, 36 Tax Cas. 527.
[6] (1938), 21 Tax Cas. 608 at 619.
[7] (1945), 26 Tax Cas. 406.

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of an agency was very much in the course of business and that therefore any compensation paid for such cancellations would be part of the ordinary income of the taxpayer. On the other hand, in *Barr, Crombie v. Inland Revenue,* the company had a contract to manage the ships of the Barr Shipping Company Limited and from the beginning of its existence the taxpayer continued to act as manager for the shipping company receiving commissions and fees under a variety of headings. The contract was to run until 1951 and it provided that if the shipping company went into liquidation the remuneration to be paid to Barr, Crombie should become immediately due and payable. In November 1948, eight and a half years before the expiry of the agreement, the shipping company went into liquidation and had paid to the taxpayer £16,000 under the said article of the agreement. Lord Normand (the Lord President) pointed out at p. 412:

> And where you have a payment for the loss of the contract upon which the whole trade of the company had been built...and where in consequence of the loss the Company's structure and character are greatly affected, the payment seems to me to be beyond doubt a capital payment.

The payment was held to be a capital receipt not subject to income tax.

In *Commissioners of Inland Revenue v. Fleming & Co. (Machinery)* Ltd.[8], Lord Russell said at p. 63:

> The sum received by a commercial firm as compensation for the loss sustained by the cancellation of a trading contract or the premature termination of an agency agreement may in the recipient's hands be regarded either as a capital receipt or as a trading receipt forming part of the trading profit. It may be difficult to formulate a general principle by reference to which in all cases the correct decision will be arrived at since in each case the question comes to be one of circumstance and degree. When the rights and advantages surrendered on cancellation are such as to destroy or materially to cripple the whole structure of the recipient's profit-making apparatus, involving the serious dislocation of the normal commercial organisation and resulting perhaps in the cutting down of the staff previously required, the recipient of the compensation may properly affirm that the compensation represents the price paid for the loss or sterilisation of a capital asset and is therefore a capital and not a revenue receipt. Illustrations of such cases are to be found in *Van den Berghs, Ltd.,* 19 T.C. 390, [1935] A.C. 431, and *Barr, Crombie & Co. Ltd.,* 26 T.C. 406, 1945 S.C. 271. On the other hand when the benefit surrendered on cancellation does not represent the loss of an enduring asset in circumstances such as those above mentioned—where for example the structure of the recipient's business is so fashioned as to absorb the

[8] (1951), 33 Tax Cas. 57.

shock as one of the normal incidents to be looked for and where it appears that the compensation received is no more than a surrogatum for the future profits surrendered—the compensation received is in use to be treated as a revenue receipt and not a capital receipt. See e.g. *Short Brothers, Ltd.*, 12 T.C. 955; *Kelsall Parsons & Co.*, 21 T.C. 608.

Mr. Justice Thurlow in the Exchequer Court in *Parsons-Steiner Limited v. Minister of National Revenue*[9], considered these authorities and others in application to the following circumstances:

The taxpayer had, for many years, a contract with Doulton & Co. Ltd. of England whereby it acted as the exclusive agency in Canada for that company. The contract was, in the beginning, for one year definite, and was to continue thereafter until determined by three months' notice which might be given by either party. In 1954 the contract was determined effective at the end of 1955, and the parties negotiated a compensation of $100,000. It was agreed that $5,000 of that amount was applicable to the services performed by the taxpayer in the transfer of the agency business from it to Doulton's newly-created Canadian company, and it was admitted therefore that that sum fell into income. Thurlow J. held that the balance was a capital receipt. On the termination of the agency, two of the taxpayer's seventeen employees had transferred to Doulton's new company and in order to counter the expected drop in sales the taxpayer had employed several new salesmen and made a greater effort to augment sales of lines which it still carried. There were no changes in the premises occupied by the taxpayer and no salaries were cut as a result of the loss of the Doulton agency. One new agency was obtained but no agency could be obtained which would supply figurines comparable to the very well-known Doulton line. In the negotiations for the settlement of the compensation which Doulton would pay to the taxpayer the president of the taxpayer wrote a letter to Doulton one paragraph of which was as follows:

> At this point in our calculation, we stopped and gave thoughtful consideration to the matter of how much of the successful development of the Doulton market in Canada has been a joint effort, in the sense that you as manufacturers had created an acceptable product, and that we have done a fine job of establishing and servicing a distribution organization which you can be proud to take over without modification.

[9] [1962] Ex. C.R. 174, 62 D.T.C. 1148.

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Spence J.

Thurlow J. at p. 187, said:

> On the whole therefore having regard to the importance of the Doulton agency in the appellant's business, the length of time the relationship had subsisted, the extent to which the appellant's business was affected by its loss both in decreased sales and by reason of its inability to replace it with anything equivalent, to the fact that two of the appellant's employees became employees of the Doulton subsidiary on the termination of the relationship and the fact that from that time the appellant was in fact out of that part of its business, both as an agent and as a wholesale dealer, and particularly to the nature of the claim asserted in respect of which the payment was made, I am of the opinion that, except in so far as it was a consideration for services rendered to Doulton & Co. Limited, in connection with the take-over by its subsidiary, which is admitted to be income, and except in so far as it took the place of commissions on sales of goods ordered before, but invoiced after December 31, 1955, the payment in question was not income from the appellant's business, but was referable to the appellant's claim for loss of what it and Doulton Co. Limited as well considered to be the appellant's interest in the goodwill and business in Doulton products in Canada. In my view this was, to use Lord Evershed's expression, "A capital asset of an enduring nature". It was one which the appellant had built up over the years in which it had the Doulton agency and which on the termination of the agency the appellant was obliged to relinquish. The payment received in respect of its loss was accordingly a capital receipt.

In the present case, the cancellation of the two agencies, that of the Crown Life Insurance Company and Burrard Mortgage Investments Limited, did make a very distinct impact on the appellant's business. They were two out of the three such agencies which made possible the operation of the appellant's mortgage department. The loss of those agencies, as I have said, caused the mortgage department to simply cease to exist. The net income of the mortgage department, before general and administration expenses are considered, ranged from 27.6 per cent in 1958 to 51 per cent in 1961 of the whole net income of the taxpayer's business. In the fiscal year 1963, when the Crown Life agency was only in effect for ten months of the twelve, that percentage was 39 per cent.

Realizing therefore that the determination is one of degree, it would seem to me that the cancellation of the two correspondency agency contracts would fall into the line of cases illustrated by the *Barr, Crombie* case and the *Parsons-Steiner* case, and it would not be simply an example of the cancellation of one of a number of agencies as in *Kelsall Parsons & Co. v. Inland Revenue, supra.*

Substituting insurance agency vocabulary for mercantile agency vocabulary, I am of the opinion that the quota-

tion above from the letter written by Parsons-Steiner to Doulton & Co. Ltd. could be applied to the situation between this taxpayer and the Crown Life and Burrard Mortgage Investments.

The learned trial judge distinguished the *Parsons-Steiner* case from the present one on the grounds that in such case the taxpayer possessed an exclusive agency which was cancelled. In the present case the Crown Life agency was exclusive and I can see no difference in principle between an agency to sell china and one to solicit mortgages and manage them. The learned trial judge also pointed out that in the *Parsons-Steiner* case the compensation was negotiated while here the exact compensation paid was prescribed for in the agreement. Again, I cannot find such a circumstance decisive. In this case in 1960 the taxpayer realizing that it was building up a capital asset desired to assure that it would endure or that proper compensation would be paid for its loss and negotiated an exact provision for that compensation agreeing to a reduction of its income for the purpose of securing such compensation for loss of the capital asset. The payment of such prefixed compensation is no less a payment for a capital loss than a payment for such loss after negotiation at the time when it occurs. Finally, counsel for the Minister, if we were of the opinion that the *Parsons-Steiner* case was undistinguishable, invited us to hold it was badly decided and refuse to accept it. I am not willing to do so. With respect, I am of the opinion that Thurlow J. in *Parsons-Steiner* came to the correct conclusion after a careful and accurate analysis of the case law and the principles involved.

I am, therefore, of the opinion that the cancellation of these two agency contracts did represent the loss of capital assets of an enduring nature the value of which had been built up over the years and that therefore the payments received by this appellant represented capital receipts. For both of these reasons, I would allow the appeal with costs here and below and direct that the assessment for the 1963 taxation year be returned to the Minister of National Revenue for revision in accordance with these reasons.

Appeal allowed with costs.

Solicitors for the appellant: Thorsteinsson, Mitchell & Little, Vancouver.

Solicitor for the respondent: D. S. Maxwell, Ottawa.

1969
*Mar. 10, 11
June 6

FREDERICK BURTON, MALCOLM SWARTZ and MARTIN GOLDSMITH, executors of the Estate of HARRY M. SCHILLER ..... APPELLANTS;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Estate tax—Provincial tax credit—Situs of shares—Deceased domiciled in Ontario, a prescribed province—Company incorporated in Saskatchewan, a non-prescribed province—Shareholders register brought to prescribed province—Estate Tax Act, 1958 (Can.), c. 29, ss. 9(1), 9(8)(d), (e)—The Companies Act, R.S.S. 1955, c. 124, ss. 76(1), 77, 78a.

The deceased died in 1965, resident and domiciled in Ontario. At that time, he owned all the shares of a company incorporated in Saskatchewan. In 1958, he moved from Saskatchewan to Ontario and took the company's shareholders register with him. Neither the *Companies Act* of Saskatchewan nor the articles of association of the company authorized the keeping of a register anywhere except in the province of Saskatchewan. The executors of the estate contended that the shares were to be treated as having a situs in Ontario and that the estate was therefore entitled to a provincial tax deduction under s. 9(1) of the *Estate Tax Act*, 1958 (Can.), c. 29. Alternatively, the executors contended that if their situs could not be identified with reasonable certainty, that the shares were deemed to be situated in Ontario in accordance with the provisions of s. 9(8)(*e*) of the Act. The Exchequer Court upheld the Minister's contention that the shares were situated in Saskatchewan and that the estate was not entitled to the deduction. The executors appealed to this Court.

Held: The appeal should be dismissed.

The situs of a company's shares is at the place where its share register is required by law to be kept and the physical presence of the register in another jurisdiction has no effect upon the matter. (*Erie Beach Co., Ltd. v. A.G. for Ontario*, [1930] A.C. 161). The word "maintained" as used in s. 9(8)(*d*)(i) of the *Estate Tax Act* must be construed as meaning "maintained" in accordance with the requirements of the statute under which the company was incorporated, and in the present case this must mean in the province of Saskatchewan.

Revenu—Impôt successoral—Crédit pour taxes provinciales—Situs des actions d'une compagnie—Défunt domicilié en Ontario, une province prescrite—Compagnie constituée en Saskatchewan, une province non prescrite—Registre des actionnaires apporté dans la province prescrite—

*PRESENT: Cartwright C.J. and Ritchie, Hall, Spence and Pigeon JJ.

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Loi de l'impôt sur les biens transmis par décès, 1958 (Can.), c. 29, art. 9(1), 9(8)(d), (e)—The Companies Act, S.R.S. 1955, c. 124, art. 76(1), 77, 78a.

Lors de son décès en 1965, le *de cujus* résidait et était domicilié en Ontario. A ce moment, il détenait toutes les actions d'une compagnie qui avait été constituée en Saskatchewan. En 1958, il a déménagé de Saskatchewan à l'Ontario et il a apporté avec lui le registre des actionnaires de la compagnie. Ni le *Companies Act* de Saskatchewan ni les conventions d'association de la compagnie n'autorisaient la tenue d'un registre ailleurs que dans la province de Saskatchewan. La succession prétend que les actions de la compagnie doivent être considérées comme ayant leur situs en Ontario et qu'elle avait en conséquence droit à un crédit pour taxes provinciales en vertu de l'art. 9(1) de la *Loi de l'impôt sur les biens transmis par décès*, 1958 (Can.), c. 29. Alternativement, la succession prétend que si leur situs ne peut pas être déterminé avec une certitude raisonnable, que les actions sont censées être situées en Ontario en vertu des dispositions de l'art. 9(8)(*e*) de la Loi. La Cour de l'Échiquier a maintenu la prétention du Ministre que les actions étaient situées en Saskatchewan et que la succession n'avait pas droit au crédit. La succession en appela à cette Cour.

Arrêt: L'appel doit être rejeté.

Le situs des actions d'une compagnie est à l'endroit où la loi exige que le registre soit tenu et la présence physique du registre dans une autre juridiction n'a aucun effet sur la question (*Erie Beach Co., Ltd. c. A.G. for Ontario*, [1930] A.C. 161). Le mot «tenu» tel qu'employé dans l'art. 9(8)(*d*)(i) de la Loi doit être interprété comme signifiant «tenu» selon les exigences du statut en vertu duquel la compagnie a été constituée, et dans le cas présent ceci signifie dans la province de Saskatchewan.

APPEL d'un jugement du Président Jackett de la Cour de l'Échiquier du Canada[1], en matière d'impôt successoral. Appel rejeté.

APPEAL from a judgment of Jackett P. of the Exchequer Court of Canada[1], in an estate tax matter. Appeal dismissed.

Gordon W. Ford, Q.C., for the appellants.

F. J. Dubrule and M. J. Bonner, for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal brought by the Executors of the Estate of Harry M. Schiller, from a judgment rendered by President Jackett of the Exchequer Court of

[1] [1968] 2 Ex. C.R. 347, [1968] C.T.C. 233, 68 D.T.C. 5164.

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Canada[1], whereby he confirmed the assessment made by the Minister of National Revenue under the *Estate Tax Act* in relation to the shares held by the late Mr. Schiller in Schiller's Limited, a company incorporated under *The Companies Act*, of Saskatchewan.

The following portions of *The Companies Act*, R.S.S. 1955, c. 124 as amended by c. 18 of the Statutes of Saskatchewan 1956, appear to me to be particularly relevant:

76. (1) Every company shall keep in one or more books a register of its members, and shall enter therein the names of the subscribers to the memorandum and the name of every other person who agrees to become a member of the company, together with the following particulars:

(*a*) the full name, address and occupation of every such subscriber and person, and of every person to whom section 91 or 92 applies, and who requests the company to enter his name in a representative capacity;

(*b*) the date at which each person was entered in the register as a member;

(*c*) the date at which any person ceased to be a member;

(*d*) the kind and class of the shares held by each member, their nominal amount or par value, if any, and the amount paid or agreed to be considered as paid on each share;

(*e*) particulars of the transfer by any member of his shares;

(*f*) in the case of a person to whom section 91 or 92 applies, a description of the capacity in which such person represents any share in the company so held by him, and the name of the estate or person so represented.

77. On the application of the transferor of any share in a company, the company shall enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for the entry were made by the transferee.

Section 78*a*

78*a* The register of members shall be kept at the registered office of the company; provided that the register may be kept at an office in the province of a trust company licensed under *The Companies Inspection and Licensing Act*, and so long as the register is so kept the trust company shall be subject to the provisions of this Act respecting the register in the same manner and to the same extent as if the register were kept at the registered office of the company, but the trust company shall under no circumstances be entitled to a lien on the register.

The Company in question was incorporated on May 26, 1927. By its Memorandum of Association it was provided that the registered office was to be situate at the City of Regina in the Province of Saskatchewan and no provision was ever made, either in the Company's Articles of Association or otherwise for any other registered office or branch registry.

[1] [1968] 2 Ex. C.R. 347, [1968] C.T.C. 233, 68 D.T.C. 5164.

From the time of its incorporation until the date of his death, the late Mr. Schiller owned or controlled all the issued common shares of the Company; he was its president and exercised the full degree of control and management consequent upon his ownership of the shares and his office as president. Until March, 1953, Mr. Schiller resided in the City of Regina where he was domiciled and where the business of the Company was conducted, but from that date until his death he became resident and domiciled in the City of Toronto to which City he removed the Minute Book, Share Register Book and Shareholders' Register of the Company, and where he conducted all its affairs, although the Company continued to file annual returns as required by *The Companies Act* of Saskatchewan wherein it reported the address of its "Registered Office" as being 1702 Hamilton Street in the City of Regina, which was a building owned by it.

It is agreed between the parties that the Province of Ontario is a "prescribed Province" within the meaning of s. 9 of the *Estate Tax Act*, whereas Saskatchewan is not such a Province.

Under the provisions of s. 9(1) of the *Estate Tax Act* provision is made for the deduction from the tax otherwise payable upon the aggregate taxable value of property passing on the death of a person:

> 9.(1)(*a*) in the case of a person who was domiciled in a prescribed province at the time of his death,
>
> (i) the part of the tax otherwise payable that is applicable to
>
> (A) such of the property passing on the death of that person *as was situated in that or any other prescribed province*, and...
>
> multiplied by
>
> (ii) one-half;...

The italics are my own.

The fact that this deduction would be properly applicable to the late Mr. Schiller's shares in the company if they had a situs in the Province of Ontario and would have no application if they were to be treated as having a situs in Saskatchewan, gives rise to the objection here taken by the Schiller estate.

In the present case the Minister has determined that the shares in question are situate in Saskatchewan and that the estate of the deceased is therefore not entitled to the deduc-

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Ritchie J.

tion provided under s. 9(1); whereas the appellants contend that as all the Company's documents, including its Register of Shares, were physically situate in Ontario where the deceased was domiciled at the time of his death, they are to be treated as having a situs in that Province and that the estate is accordingly entitled to a deduction under s. 9(1)(*a*)(i)(A) or in the alternative that if their situs cannot be identified with reasonable certainty, that the shares are deemed to be situate in Ontario in accordance with the provisions of s. 9(8)(*e*) of the *Estate Tax Act*.

Section 9(8) of the *Estate Tax Act* provides statutory rules for determining the situs of shares passing on the death of a person, and the relevant portions of s. 9(8)(*d*) and (*e*) read as follows:

> (*d*) shares, stocks and debenture stocks of a corporation and rights to subscribe for or purchase shares or stocks of a corporation (including any such property held by a nominee, whether the beneficial ownership is evidenced by scrip certificates or otherwise) shall be deemed to be situated
>
> (i) in the province where the deceased was domiciled at the time of his death *if any register of transfers or place of transfer is maintained by the corporation in that province for the transfer thereof,* and
>
> (ii) otherwise,
>
> (A) in the nearest province, relative to the province where the deceased was domiciled at the time of his death, that is not a prescribed province and in which any register of transfers or place of transfer is maintained by the corporation for the transfer thereof,...
>
> (*e*) property for which no specific provision is made in any other paragraph of this subsection, or the situs of which, determined as provided therein, cannot with reasonable certainty be identified, shall be deemed to be situated in the place where the deceased was domiciled at the time of his death;...

It is agreed between the parties that at the time of Mr. Schiller's death the Share Register of the Company was physically situate in Toronto where entries were made in it from time to time as appears therein, but neither *The Companies Act* of Saskatchewan nor the Articles of Association of the Company authorized it to keep a Register of Members or a branch Register of Members anywhere except in the Province of Saskatchewan, and the whole question raised by this appeal is whether, notwithstanding the provisions of the Saskatchewan *Companies Act* requiring the Register of Members of a company to be kept in that Province, the fact that such Register was kept in the

Province of Ontario at the time of Mr. Schiller's death, had the effect of giving the Company's shares a situs in the Province of Ontario within the meaning of s. 9(8)(*d*) of the *Estate Tax Act*. In my view this case is governed by the direct authority of the decision of the Privy Council in *Erie Beach Company, Limited v. The Attorney-General for Ontario*[2]. In that case the question for determination was whether the shares of a company incorporated under the Ontario *Companies Act* were situate in the Province of Ontario or the State of New York for succession duty purposes. Under the Ontario *Companies Act* (R.S.O. 1914, c. 178) companies incorporated under that statute were required to keep a Register of Shares and Shareholders at the head office "within Ontario", but Mr. Bardol, who owned or controlled all the shares in the company, managed his business from his office in Buffalo, New York, where the books, records and documents of the company were kept, and such transfers as took place were made and recorded. In delivering the judgment on behalf of the Privy Council, Lord Merrivale said:

> In *Attorney-General v. Higgins* 1914 A.C. 176, as in *Brassard v. Smith,* 1925 A.C. 371, duty upon shares was in question. In *Attorney-General v. Higgins, supra,* Baron Martin held that when transfer of shares in a company must be effected by a change in the register, the place where the register is required by law to be kept determines the locality of the shares. Lord Dunedin, in delivering the judgment of this Board in *Brassard v. Smith,* epitomized the crucial inquiry in a sentence—'Where could the shares be effectually dealt with?' The circumstances relied upon by the appellants which show the predilection of the members of the plaintiff company for transacting its business in Buffalo—so far as they might—have, in their Lordships' opinion, no material weight. The shares in question can be effectually dealt with in Ontario only. They are therefore property situate in Ontario and subject to succession duty there.

I take this to be authority for the proposition that the situs of a company's shares is at the place where its share register is required to be kept by law and that the physical presence of the share register in another jurisdiction has no effect upon the matter. I am accordingly of opinion that the words "...if any register of transfers or place of transfer is maintained by the corporation in that province..." as they are used in s. 9(8)(*d*)(i) of the *Estate Tax Act* must be construed as meaning "maintained" in accordance

[2] [1930] A.C. 161, [1930] 1 W.W.R. 31, [1930] 1 D.L.R. 859.

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with the requirements of the statute under which the company in question was incorporated and that in the present case this must mean in the Province of Saskatchewan.

The learned President of the Exchequer Court has written careful reasons for judgment in which he has concluded that for the purpose of the *Estate Tax Act* the shares of Schiller's Limited are deemed to be situate in Saskatchewan at the date of Mr. Harry Schiller's death in accordance with the provisions of s. 9(8)(*d*). I am in agreement with this conclusion and would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: B. M. Singer, Toronto.

Solicitor for the respondent: D. S. Maxwell, Ottawa.

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*Fév. 11, 12
Mai 16

GUY TOWERS INC. .....APPELANTE;

ET

LA CITÉ DE MONTRÉAL .....INTIMÉE.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Corporation municipale—Évaluation d'un immeuble—Valeur réelle—Valeur économique—Valeur de remplacement—Valeur locative—Charte de la Ville de Montréal, 1959-60, 8-9 Eliz. II, c. 102.

Les griefs de la compagnie appelante à l'encontre de l'évaluation municipale de son immeuble au montant de $3,127,000 ont été successivement rejetés par le Bureau de revision, la Cour du magistrat et la Cour d'appel. La compagnie a alors appelé à cette Cour. Elle a invoqué le moyen retenu par le juge dissident en Cour d'appel à l'effet qu'en prenant la moyenne de la valeur économique, telle que rectifiée par lui, et de la valeur de remplacement on obtient un montant de $3,050,000 mais qu'un acheteur n'accepterait pas de payer ce montant alors qu'il peut obtenir un immeuble semblable mais vacant pour $2,500,000. D'où la conclusion du juge qu'il faudrait fixer la valeur réelle à $2,650,000.

Arrêt: L'appel doit être rejeté.

La valeur de remplacement est, tout comme la valeur économique, une estimation théorique faite selon des critères adoptés dans un but d'uniformité. Elle ne signifie pas que l'on puisse acheter un terrain semblable et construire un immeuble identique à ce prix. La preuve au dossier le démontre. Cette valeur de remplacement ne peut donc pas être équitablement employée comme l'a fait le juge dissident.

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*CORAM: Les Juges Fauteux, Abbott, Martland, Hall et Pigeon.

Bien qu'il y ait eu une erreur manifeste dans le jugement du Bureau de revision quant à la superficie louée par étage, cette erreur n'a pas causé préjudice parce qu'elle n'a pas influé sur le calcul, qui a été fait correctement, de la valeur locative ayant servi à déterminer la valeur économique.

Municipal corporations—Municipal valuation of property—Real value—Economic value—Replacement value—Rental value—City of Montreal Charter, 1959-60, 8-9 Eliz. II, c. 102.

The grounds advanced by the appellant company against the municipal valuation of $3,127,000 placed on its property were successively rejected by the Board of Revision, the Magistrate's Court and the Court of Appeal. It then appealed to this Court. The appellant invoked the ground advanced by the dissenting judge of the Court of Appeal that by taking the average between the economic value, as adjusted by him, and the replacement value a sum of $3,050,000 was obtained but that a buyer would not pay that price when he could have a similar building but vacant for $2,500,000. The judge then concluded that the real value should be fixed at $2,650,000.

Held: The appeal should be dismissed.

The replacement value is, as well as the economic value, a theoretical estimate calculated according to criteria adopted for purposes of uniformity. That value does not mean that one could purchase a similar lot and build an identical building for that price. That is in evidence. Such replacement value could not equitably be used as the dissenting judge did.

Although there was a manifest error as to the rented area on each floor, that error was not prejudicial as it did not influence the computation, which was correctly made, of the rental value which had served to determine the economic value.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming the municipal valuation of a property. Appeal dismissed.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], confirmant l'évaluation municipale d'un immeuble. Appel rejeté.

Gordon L. Echenberg, pour l'appelante.

Roger Pigeon, c.r., et *Pierre Godbout, c.r.,* pour l'intimée.

Le jugement de la Cour fut rendu par

LE JUGE PIGEON:—Le litige a trait à l'évaluation municipale d'un immeuble. Les griefs de l'appelante ont été suc-

[1] [1968] B.R. 277.

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Le Juge Pigeon

cessivement rejetés par le Bureau de revision, la Cour de magistrat et la Cour d'appel[1]. Comme il s'agit essentiellement d'une question de fait, il est clair qu'il n'y a pas lieu d'intervenir à moins d'une erreur manifeste. De tous les moyens soumis par l'appelante, deux seulement soulèvent une telle question.

Il y a en premier lieu le moyen qui fait l'objet de la dissidence du juge en chef de la Province. Après avoir rectifié comme il lui paraît à propos de le faire la base du calcul de la «valeur économique», il obtient en prenant la moyenne de cette valeur et de la «valeur de remplacement» un montant de $3,050,000, soit pratiquement le même chiffre que l'évaluation contestée de $3,127,000 pour le rôle déposé le 1er décembre 1955 et sensiblement plus que l'évaluation portée au rôle antérieur. Cependant, il dit ensuite:

> Même en tenant compte des baux existants, je ne crois pas qu'«un acheteur qui n'est pas obligé d'acheter, mais qui désire acheter» accepte de payer $3,050,000 pour un immeuble alors qu'il peut en obtenir un semblable mais vacant pour $2,500,000.

Et il conclut que pour rendre justice aux parties, il faudrait fixer la valeur réelle à $2,650,000.

A l'encontre de ce raisonnement, l'intimée a fait valoir que la valeur de remplacement fixée au chiffre ci-dessus mentionné est, tout comme la valeur économique, une estimation théorique faite selon des critères adoptés dans un but d'uniformité. Elle ne signifie pas que l'on puisse acheter un terrain semblable et construire un immeuble identique à ce prix. Au contraire, on a la preuve au dossier qu'alors que dans cette «valeur de remplacement» le terrain est estimé à $86,900, c'est $350,000 que l'appelante a déboursé pour s'en porter acquéreur. Quant au bâtiment, il est démontré qu'il aurait fallu en 1955 débourser plus que les $2,500,000 pour le reconstruire. Il faut donc dire que la «valeur de remplacement» comme elle a été établie ne peut pas équitablement servir de base au raisonnement ci-dessus relaté lequel suppose qu'il s'agit vraiment du prix courant.

Le second moyen découle d'une erreur incontestable dans le long jugement du Bureau de revision. On y a dit que la superficie louée par étage était de 14,810 p.c. alors que les

[1] [1968] B.R. 277.

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GUY TOWERS INC. v. CITÉ DE MONTRÉAL

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baux démontrent 13,810 p.c. En étudiant la décision on se rend compte, cependant, que cette erreur n'a pas causé préjudice à l'appelante parce qu'elle n'a pas influé sur le calcul de la valeur locative servant à déterminer la «valeur économique». Ce calcul a été fait correctement. C'est seulement en critiquant la méthode de calcul proposée par l'appelante que l'on s'est servi du chiffre inexact pour en déduire que la superficie non comprise dans les baux à chaque étage représente 7.5 pour-cent de la superficie totale. Si l'on avait employé le chiffre exact, on aurait trouvé 13.6 pour-cent. Vu que ce calcul avait pour seul objet de démontrer que le chiffre de 25 pour-cent proposé par l'appelante était excessif, la conclusion aurait été la même sans l'erreur, l'écart demeurant encore très appréciable.

Je suis d'avis de rejeter l'appel avec dépens.

Appel rejeté avec dépens.

Procureurs de l'appelante: Chait, Aronovitch, Salomon, Gelber, Reis & Bronstein, Montréal.

Procureurs de l'intimée: Pagé, Mercier & Beauregard, Montréal.

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*Apr. 29, 30
June 30

JOHN WINDHAM O'REILLY and JOHN WINDHAM O'REILLY, Executor of the Will of MARY BERESFORD O'REILLY, Deceased, (*Defendants*) ..... APPELLANTS;

AND

MARKETERS DIVERSIFIED INC. (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Sale of land—Purchaser suing for specific performance—Agreement subject to condition of purchaser being able to purchase adjacent lot—Non-performance of condition—Whether condition precedent may be waived unilaterally.

The purchaser company sued for specific performance of an agreement to sell a certain parcel of land. The contract was subject to the condi-

*PRESENT: Cartwright C.J. and Martland, Judson, Hall and Spence JJ.

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tion of the "purchaser being able to purchase" an adjacent lot. The action was dismissed at trial on the ground that the purchaser had failed to prove performance of a condition precedent. The Court of Appeal reversed this decision and decreed specific performance. They held that the condition was a stipulation simply and solely for the benefit of the purchaser, that the purchaser might waive performance of the condition and that it was entitled to specific performance of the contract. The vendor appealed from the judgment of the Court of Appeal to this Court.

Held: The appeal should be allowed and the judgment at trial restored.

When there is a stipulation or term in a contract non-fulfilment of which would render the contract incomplete and hence unenforceable, but which is for the benefit of the purchaser and severable, then the purchaser is entitled to waive it in order to be able to obtain a decree of specific performance. However, this is far removed from the case where the agreement is subject to a condition precedent. The vendor in the present appeal had no enforceable contract without performance of the condition. Neither had the purchaser. With the consent of the vendor, he could have introduced a term permitting him to waive the condition.

The case throughout was argued on the narrow ground of non-performance of the condition. If it had been pleaded and proved that performance of the condition precedent had been prevented by the act of the vendor, the result here might have been different.

Turney v. Zhilka, [1959] S.C.R. 578; *F. T. Developments Ltd. v. Sherman,* [1969] S.C.R. 203, followed; *Hawksley v. Outram,* [1892] 3 Ch 359; *Morrell v. Studd & Millington,* [1913] 2 Ch 648, referred to.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], reversing a decision of Wootton J. dismissing an action for specific performance of a contract for the sale of land. Appeal allowed and judgment at trial restored.

J. S. de Villiers, for the defendants, appellants.

A. N. Patterson, for the plaintiff, respondent.

The judgment of the Court was delivered by

JUDSON J.:—Marketers Diversified Inc. sued John Windham O'Reilly, in his personal capacity and as executor of the Will of Mary Beresford O'Reilly, for specific performance of an agreement to sell Lot 7, James Bay, Prevost Island, Cowichan District, British Columbia. The contract was subject to the following condition:

Purchaser being able to purchase Lot No. 8 (described as adjacent to Lot 7, James Bay, Prevost Island,) owned by Mr. DeBerg on terms and conditions satisfactory to purchaser prior to September 1, 1966.

[1] (1968), 1 D.L.R. (3d) 387.

The action was dismissed at trial on the ground that the purchaser had failed to prove performance of a condition precedent. The Court of Appeal[1] reversed this decision and decreed specific performance. They held that the condition was a stipulation simply and solely for the benefit of the purchaser, that the purchaser might waive performance of the condition and that it was entitled to specific performance of the contract.

I would allow the appeal and dismiss the action.

The judgment under appeal is in direct conflict with two judgments of this Court: *Turney v. Zhilka*[2], and *F. T. Developments Ltd. v. Sherman*[3]. It is insecurely founded upon a passage in Fry on Specific Performance, 6th ed., p. 175:

> Where a contract contains stipulations which are simply and solely for the benefit of the purchaser, and are severable, the purchaser may waive them, and obtain judgment for specific performance of the rest of the contract.

The passage is supported by the authority of two cases: *Hawksley v. Outram*[4] and *Morrell v. Studd & Millington*[5]. But they are not authority for the proposition that a condition precedent may be waived unilaterally. They are illustrations of the principle that a plaintiff, seeking specific performance of a contract, may elect to take less than the promised performance from the other side. In the one case it was the right to use the name of the vendor partnership; in the other, it was the right to security for the unpaid balance of the purchase price. This was explained in *Turney v. Zhilka.*

In the chapter from which this passage was taken, the learned author was dealing with the subject of incompleteness of the contract. He had this to say:

> 368. (iv) It is of course essential to the completeness of the contract that it should express not only the names of the parties, the subject-matter, and the price, but all the other material terms. What are, in each case, the material terms of a contract, and how far it must descend into details to prevent its being void as incomplete and uncertain, are questions, which must of course be determined by a consideration of each contract separately. It may, however, be laid down that the Court will carry into effect a contract framed in general terms, where the law will supply the details; but if any details are to be supplied in modes which cannot be adopted by the Court, there is then no concluded contract capable of being enforced.

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[1] (1968), 1 D.L.R. (3d) 387.
[2] [1959] S.C.R. 578.
[3] [1969] S.C.R. 203, 70 D.L.R. (2d) 426.
[4] [1892] 3 Ch. 359.
[5] [1913] 2 Ch. 648.

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Judson J.

In the passage relied upon as the foundation for the judgment of the Court of Appeal the learned author is saying that when there is a stipulation or term in a contract non-fulfilment of which would render the contract incomplete and hence unenforceable, but which is for the benefit of the purchaser and severable, then the purchaser is entitled to waive it in order to be able to obtain a decree of specific performance. The authorities quoted and reviewed in *Zhilka* support this proposition. However, this is far removed from the case where the agreement is subject to a condition precedent.

The vendor in the present appeal had no enforceable contract without performance of the condition. Neither had the purchaser. With the consent of the vendor, he could have introduced a term permitting him to waive the condition. Such terms are common.

Throughout the British Columbia Courts and on this appeal, the case was argued on the narrow ground of non-performance of the condition. I am not overlooking the fact that soon after the contract was executed, O'Reilly wrote to his neighbour, the owner of Lot 8, regretting the fact that he had agreed to sell and notifying him that the contract was subject to a condition. There is very little evidence on this point. A representative of the purchaser company did go to see the neighbour. There is no evidence that he made any offer. The neighbour was not called as a witness.

The case was not put in and not argued on the basis that performance of the condition precedent had been prevented by the act of the vendor. If this had been pleaded and proved, the result here might have been different.

I would allow the appeal with costs here and in the Court of Appeal and restore the judgment at trial dismissing the action.

Appeal allowed and judgment at trial restored; with costs.

Solicitors for the defendants, appellants: de Villiers, Jones & Marsden, Victoria.

Solicitors for the plaintiff, respondent: Clay, Macfarlane, Ellis & Popham, Victoria.

CHARLES-EUGÈNE MARTEL (*Demandeur*) ..... APPELANT;

ET

HÔTEL-DIEU ST-VALLIER (*Défendeur*) ..... INTIMÉ.

1969

*Mars 17, 18, 19 Juin 10

PATRICK VIGNEAULT (*Défendeur*) ..... APPELANT;

ET

CHARLES-EUGÈNE MARTEL (*Demandeur*) ..... INTIMÉ.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Faute—Responsabilité des médecins—Présomption de fait de l'art. 1242 du Code Civil—Qualité de préposés des médecins employés par l'hôpital—Effet interruptif de prescription de la poursuite à l'égard du débiteur solidaire—Code Civil, art. 1054, 1238, 1242, 2231, 2262.

Le demandeur a souffert d'une paralysie des membres inférieurs à la suite d'une anesthésie caudale pratiquée à l'Hôtel-Dieu de Chicoutimi le 11 janvier 1960 à l'occasion d'une intervention chirurgicale mineure. Dans l'action, qu'il a intentée en décembre 1960, le demandeur a assigné l'institution hospitalière et le médecin responsable du service d'anesthésie. Par la suite, le 25 avril 1962, le demandeur apprit que l'anesthésie avait été pratiquée par un autre médecin et, avec l'autorisation du tribunal, il a modifié sa poursuite et assigné le véritable anesthésiste. Le tribunal de première instance a statué que l'hôpital et l'anesthésiste étaient solidairement responsables.

La Cour d'appel, par un jugement majoritaire, a infirmé la décision rendue contre l'hôpital et a retenu celle contre le médecin anesthésiste. Le juge dissident aurait annulé la décision contre l'anesthésiste seulement en se fondant sur les dispositions relatives à la prescription d'un an pour «lésions ou blessures corporelles». Le demandeur et le médecin anesthésiste ont interjeté appel de cette décision.

Arrêt: L'appel du demandeur contre l'institution hospitalière doit être accueilli et l'appel du médecin anesthésiste rejeté.

Quand une personne subit un préjudice par suite d'un événement ou d'une initiative qui normalement n'aurait pas eu ce résultat et qu'on peut conclure en toute probabilité que la chose ne se serait pas produite en l'absence de faute, il existe une présomption de fait (art. 1238 et 1242 C.C.) qui conclut à la responsabilité de celui qui a causé le

*CORAM: Les Juges Fauteux, Abbott, Judson, Ritchie et Pigeon.

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dommage. Comme on ne peut pas, en matière civile, exiger un degré de certitude autre que celui d'une probabilité raisonnable, la présomption ci-dessus s'applique au médecin anesthésiste.

On doit conclure à la responsabilité quasi-délictuelle de l'hôpital du fait que l'anesthésiste dont le choix n'était pas laissé au patient, et qui ne pouvait pour cette raison être son mandataire, était un employé salarié de l'hôpital faisant partie d'un service qui n'était pas, à ce moment-là, juridiquement distinct des autres services de cette institution.

Negligence—Physicians' liability—Presumption of fact arising under art. 1242 of the Civil Code—Whether the physician was a servant of the hospital—Interruption of prescription by court action as against another joint and several debtor—Civil Code, art. 1054, 1238, 1242, 2231, 2262.

Prior to a minor surgery, which he underwent on January 11, 1960, in the Hôtel-Dieu de Chicoutimi, a spinal anaesthesia was administered to the plaintiff following which his lower limbs were paralyzed. In an action he initiated in December 1960, the plaintiff sued both the hospital and the physician in charge of the department of anaesthesia. At a later date, on April 22, 1962, the plaintiff was informed that the anaesthesia had been performed by another doctor and, with the Court's permission, he amended his claim to join in the action the proper person. The Court found that the hospital and the anaesthetist were jointly liable. The Court of Appeal, by a majority, allowed the appeal as regards the hospital but maintained the decision of the Superior Court against the anaesthetist. The dissenting judge would have allowed the anaesthetist's appeal on the basis of that article of the *Civil Code* which provides for a one-year time limitation for claims arising out of "bodily injuries". Both the plaintiff and the anaesthetist appealed to this Court.

Held: The plaintiff's appeal as against the hospital should be allowed and the anaesthetist's appeal dismissed.

If damage is caused to someone by reason of an event or operation which normally would not have such a result and if it can further be shown that, in all probability, it would not have happened that way in the absence of a fault, there is a presumption of fact (art. 1238 and 1242 C.C.) as against the person who has caused the damage. Inasmuch as in civil matters no higher degree of certainty than a reasonable probability can be required, the presumption above applies to the anaesthetist.

The hospital's liability is based on the fact that the anaesthetist, who was not the patient's choice and who, for this reason, was not his agent, was a salaried employee of the hospital and a staff member of a department that was not, at the time, a separate legal entity.

APPEALS from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reversing in part a judgment of Miquelon J. Plaintiff's appeal allowed and the anaesthetist's appeal dismissed.

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[1] [1968] B.R. 389.

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APPELS d'un jugement de la Cour du banc de la reine, province de Québec[1], infirmant en partie un jugement du Juge Miquelon. Appel du demandeur accueilli et appel de l'anesthésiste rejeté.

Richard Dufour, pour l'appelant Charles-Eugène Martel.

Michael Cain, pour l'intimé Hôtel-Dieu St-Vallier.

Preston B. Lamb, c.r., et *Pierre S. Sébastien*, pour l'appelant Patrick Vigneault.

Richard Dufour, pour l'intimé Charles-Eugène Martel.

Le jugement de la Cour fut rendu par

LE JUGE PIGEON:—Au début de janvier 1960, en vue d'une hémorroïdectomie, l'appelant Charles-Eugène Martel («le demandeur») alors âgé de 49 ans a été hospitalisé chez l'intimé, l'Hôtel-Dieu St-Vallier de Chicoutimi («l'hôpital»). Après quelques jours de traitement pour hypertension et de multiples examens avec radiographies, etc., on l'a conduit à une salle d'opération où une anesthésie caudale a été pratiquée par l'appelant Patrick Vigneault («l'anesthésiste»), un médecin résident qui, le mois précédent, avait reçu du Collège des Médecins son certificat de spécialiste en anesthésie. L'opération a ensuite été faite par le docteur Émile Simard, chirurgien choisi par le patient. Cette opération classée comme chirurgie mineure a parfaitement réussi mais dès le lendemain, 12 janvier, on constatait une espèce de paralysie des membres inférieurs particulièrement du côté droit. En tentant de se lever le matin, le demandeur faisait une chute. Le surlendemain, il présentait en outre ce que le docteur Gaston Comtois, chef du service d'anesthésie, a appelé «des phénomènes assez étranges», savoir des contractions musculaires douloureuses.

Le 23 janvier, un examen neurologique pratiqué par le docteur Claude Bélanger révélait une «paraparésie» des membres inférieurs beaucoup plus marquée à droite qu'à gauche attribuée à une «arachnoïdite de la queue de cheval, vraisemblablement par inflammation d'étiologie chimique». A ce moment-là le docteur Bélanger ajoutait à ce diagnostic les mots «sans évidence de myélite». Toutefois, à l'enquête, il a admis que les signes observés démontraient l'existence

[1] [1968] B.R. 389.

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d'une lésion au niveau de la moelle épinière appuyant ainsi l'opinion du docteur Lionel Lemieux, expert en neurologie, à l'effet qu'il y avait des indices certains d'atteinte de la moelle.

Malgré tous les traitements, le demandeur est resté invalide. On a même constaté lors de l'enquête en 1964 que son degré d'invalidité était plus prononcé qu'à la fin de septembre 1960, et ne pourrait que s'aggraver davantage.

Saisie d'une poursuite contre l'hôpital et l'anesthésiste, la Cour supérieure (Paul Miquelon J.) les a condamnés solidairement à payer une indemnité de $58,216.33.

En Cour d'appel la majorité (Brossard et Salvas JJ.) a infirmé la condamnation contre l'hôpital. Taschereau J. dissident, aurait au contraire annulé la condamnation contre l'anesthésiste.

A l'encontre de cet arrêt, les deux parties se sont pourvues devant nous, le demandeur pour faire rétablir la condamnation prononcée contre l'hôpital, l'anesthésiste pour faire annuler la sienne.

Disons d'abord en ce qui concerne la responsabilité de l'anesthésiste, qu'il y a sur l'existence d'une faute présumée contre lui identité d'opinion entre le juge de première instance et tous ceux de la Cour d'Appel. Ceux de la majorité ont conclu à l'irresponsabilité de l'hôpital uniquement parce qu'ils n'ont pas voulu admettre que l'anesthésiste devait être considéré comme un préposé de l'hôpital. Quant au dissident, c'est seulement pour cause de prescription qu'il aurait rejeté la poursuite contre l'anesthésiste.

Ensuite, il faut noter que les défendeurs ont admis au procès que le préjudice subi par le demandeur avait été causé par l'anesthésie caudale qui lui a été administrée. Ils contestent cependant le bien-fondé de la conclusion que l'on en a tirée à l'existence d'une faute dans l'administration de l'anesthésie. Le principe sur lequel on s'est fondé pour conclure ainsi a été énoncé comme suit par le juge Taschereau (avant de devenir juge en chef) dans un arrêt sans dissidence de cette Cour, *Parent c. Lapointe*[2]:

> Quand, dans le cours normal des choses, un événement ne doit pas se produire, mais arrive tout de même, et cause un dommage à autrui, et quand il est évident qu'il ne serait pas arrivé s'il n'y avait pas eu de négligence, alors, c'est à l'auteur de ce fait à démontrer qu'il y a une cause étrangère, dont il ne peut être tenu responsable et qui est la source de ce

[2] [1952] 1 R.C.S. 376 à 381, [1952] 3 D.L.R. 18.

dommage. Si celui qui avait le contrôle de la chose réussit à établir à la satisfaction de la Cour, l'existence du fait extrinsèque, il aura droit au bénéfice de l'exonération.

Ces phrases écrites dans une affaire d'accident d'automobile ont été déclarées applicables à la responsabilité médicale: *Cardin c. Cité de Montréal*[3], un arrêt unanime de cette Cour. C'est à bon droit que les tribunaux du Québec à l'instar de ceux des autres provinces et de Grande-Bretagne ont depuis assez longtemps rejeté une certaine théorie d'après laquelle en matière de responsabilité médicale, une preuve directe de la faute aurait été nécessaire. Les textes qui admettent la preuve par présomption de fait (art. 1238, 1242, C.C.) ne font aucune distinction et il n'y a pas lieu d'en introduire arbitrairement.

Il faut donc uniquement rechercher si la preuve faite était suffisante pour permettre de conclure qu'en toute probabilité ce qui s'est produit ne serait pas arrivé en l'absence de faute. Je dis «en toute probabilité» car il est clair que lorsque dans le texte ci-dessus cité le juge Taschereau dit «il est évident», il n'entend pas exiger un degré de certitude autre que celui qui doit servir à juger les causes civiles, soit une probabilité raisonnable. Il ne s'agit pas d'une certitude hors de tout doute raisonnable qui est exigée en matière criminelle seulement. Encore moins peut-on exiger une certitude mathématique, une démonstration qui exclut toute autre probabilité. Dans *Montreal Tramways c. Léveillé*[4], cette Cour a admis une présomption de fait comme preuve suffisante de la relation de cause à effet entre une chute faite par une femme enceinte et la difformité de son enfant.

Ici, il y a sûrement une preuve suffisante pour démontrer que la paralysie ne devait pas normalement se produire comme conséquence d'une anesthésie caudale bien administrée. Le docteur Comtois, chef du service d'anesthésie de l'hôpital, a témoigné qu'on y avait pratiqué plus de 10,000 anesthésies de ce genre sans qu'un pareil résultat se produise. Quant au témoin expert de la défense en matière d'anesthésie, le Docteur Dubeau, il a parlé d'un seul autre cas sans d'aucune manière affirmer qu'il avait été démontré qu'il s'agissait d'un accident inévitable. Certains anesthésistes ont témoigné qu'à leur avis il était possible qu'une

[3] [1961] R.C.S. 655, 29 D.L.R. (2d) 492.
[4] [1933] R.C.S. 456, 41 C.R.C. 291, [1933] 4 D.L.R. 337.

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sensibilité particulière à l'anesthésique employé, la «xilocaïne» additionnée d'adrénaline, ait causé l'inflammation grave qui s'est produite, mais d'autres l'ont nié catégoriquement, et parmi ces derniers on trouve le chef du service d'anesthésie de l'hôpital, le docteur Comtois. Après avoir mentionné diverses réactions possibles telles qu'une chute de pression, il a dit:

> Alors ça, ce sont des choses qu'on rencontre assez souvent, mais de là à avoir des paraplégies, et des paralysies, non.

Il faut dire que la seule explication suggérée par la défense pour expliquer l'accident en excluant une faute, savoir une susceptibilité particulière à l'anesthésique utilisé, est une pure hypothèse qui n'est aucunement démontrée et que la preuve tend fortement à exclure. Au reste, tous les témoignages médicaux sont unanimes à constater l'absence de toute contre-indication pour le genre d'anesthésie employée.

Il faut maintenant observer que l'on n'a aucunement démontré que la Cour supérieure et la Cour d'appel avaient fait erreur en jugeant que la présomption n'avait pas été repoussée. Il est bien vrai que l'anesthésiste a juré être certain d'avoir fait correctement l'injection de l'anesthésique et d'avoir bien vérifié en lisant l'étiquette sur les deux fioles qu'il avait injecté la solution voulue. Cela ne suffisait pas pour obliger le tribunal à conclure à l'absence de faute surtout lorsque l'accident n'était pas expliqué. Dans *Parent c. Lapointe*, le conducteur de l'automobile avait bien juré qu'il n'avait aucunement senti venir le sommeil. On a cependant refusé de le croire et on l'a jugé coupable d'avoir commis la faute de conduire une automobile alors qu'il avait sommeil.

Ici, pour justifier le tribunal de ne pas accepter l'affirmation de l'anesthésiste, il y a plus que le résultat inexpliqué de l'injection. Il y a également le fait que son témoignage malgré sa sincérité n'est pas convaincant parce qu'il n'a aucun souvenir précis de ce cas particulier. Ce n'est pas parce qu'il se souvient exactement de ce qu'il a fait qu'il affirme ne pas avoir commis d'erreur mais uniquement parce qu'il est convaincu d'avoir fait comme il fait toujours. Il se souvient si peu de ce qui s'est passé que jusqu'à ce qu'on lui montre que l'infirmière en charge de la salle de réveil y avait noté une visite de sa part, il affirme ne pas y avoir été. A cela, il faut ajouter que la technique décrite par

l'anesthésiste et qui consiste à mélanger dans un petit bocal deux solutions d'anesthésique dont une seule devait renfermer de l'adrénaline, ne permet aucunement d'exclure l'hypothèse de toutes sortes d'erreurs conciliables avec les effets observés.

Il faut maintenant rechercher si la majorité en Cour d'appel a eu raison de statuer que «le contrat conclu entre l'hôpital et le docteur Vigneault n'a pas créé entre eux les liens de préposition de maître à domestique ou de mandant à mandataire envisagés par le dernier alinéa de l'article 1054 C.C. ou par les articles 1720 et 1731 C.C.». Le juge Brossard dit à ce sujet:

> Avec déférence pour les opinions contraires, il ne m'est pas possible, même de faire un rapprochement, juridiquement ou autrement, entre le contrat qui intervient entre une institution d'hospitalisation et le malade qu'elle reçoit et le contrat d'entreprise auquel sont parties des entrepreneurs en travaux de plomberie ou d'électricité ou en enlèvement de vidanges, ni surtout d'assimiler juridiquement le contrat qui intervient entre une institution hospitalière et un médecin au contrat de travail liant les entrepreneurs susdits à un plombier, un électricien ou un boueur; sans transformer l'obligation née du premier contrat en obligation de résultat ou modifier celle née du second contrat en obligation de moyens.

Avec respect, ce raisonnement me paraît aller à l'encontre de la décision unanime rendue dans *Cardin c. Cité de Montréal*[5]. Depuis l'arrêt de cette Cour dans *Sœurs de St-Joseph c. Fleming*[6], personne ne soutient que les techniciens, infirmières et infirmiers ne doivent pas être considérés comme des préposés. Il est cependant indubitable qu'ils sont susceptibles de commettre des fautes professionnelles dans l'administration de traitements ou autres soins médicaux. Nul ne prétend qu'on impose à un hôpital une obligation de résultat en le tenant pour responsable du préjudice découlant de fautes commises par eux dans l'exécution de leurs fonctions. En effet, leur responsabilité s'apprécie d'après le même critère que celle des médecins, on ne les juge pas en faute du seul fait qu'un traitement ne procure pas la guérison. Cependant, lorsqu'il y a lieu de le faire, on leur applique comme aux médecins la présomption que la Cour d'appel est unanime à admettre contre ces derniers. Puisque l'on rejette à bon droit une théorie de la responsabilité médicale impliquant une règle de preuve autre que le principe ordinaire acceptant les présomptions de fait, je ne vois

[5] [1961] R.C.S. 655, 29 D.L.R. (2d) 492.
[6] [1938] R.C.S. 172.

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pas comment on peut considérer que l'application aux médecins de la règle ordinaire sur la relation de préposition est inconciliable avec une conception exacte de la responsabilité dont il s'agit.

Ici, l'anesthésiste était l'employé salarié de l'hôpital. En outre de son salaire à titre de résident en anesthésie, il recevait un montant mensuel fixe prélevé sur les honoraires perçus par l'hôpital comme frais d'anesthésie chargés aux patients. Le demandeur n'a eu rien à voir dans le choix de son anesthésiste. Celui-ci a été désigné par le chef du service d'anesthésie de l'hôpital. On ne saurait prétendre qu'il soit ensuite passé sous la direction du chirurgien car l'anesthésie était faite quand celui-ci est arrivé à la salle d'opération. De plus, il faut souligner que le service d'anesthésie était à ce moment-là un service de l'hôpital et non une entreprise distincte. Certains témoins ont prétendu que le patient avait toujours le droit de choisir son anesthésiste. Considérant l'ensemble de la preuve sur ce point, la seule conclusion possible c'est qu'il pouvait être apporté des exceptions à la règle d'après laquelle l'anesthésie était pratiquée par un médecin du service d'anesthésie désigné par le chef de ce service.

On a fait état d'un document signé par le demandeur lors de son entrée à l'hôpital et qui se lit comme suit:

> Par la présente j'autorise le médecin ou les médecins en charge du soin de M. Charles-Eugène Martel, à administrer tout traitement ou à admi-
> *Nom du patient.*
> nistrer tels anesthésiques et à accomplir telles opérations jugées nécessaires ou recommandables dans le diagnostic, et le traitement de ce patient.

On ne saurait voir là autre chose qu'un consentement aux interventions. Il ne s'y trouve rien qui modifie la nature juridique du contrat entre le demandeur et l'hôpital. Celui-ci est clairement une convention par laquelle l'établissement s'est engagé à fournir des soins au demandeur. C'est en exécution de ce contrat que l'anesthésie a été pratiquée sans qu'intervienne aucune relation contractuelle entre l'anesthésiste et le demandeur: ni lui, ni son médecin traitant, ni son chirurgien n'ont été consultés à ce sujet. L'anesthésiste en l'occurrence a donné ses soins comme l'y obligeait son contrat d'emploi avec l'hôpital et comme l'ont fait les autres membres du personnel: radiologistes, techniciens de laboratoire, infirmières, infirmiers, etc. Sa qualité de médecin spécialiste n'y change rien. Il serait contraire aux faits

prouvés que de considérer l'hôpital comme un mandataire ayant requis pour le compte du demandeur les services professionnels de l'anesthésiste. Ce n'est pas ce qui s'est produit.

Le préjudice subi par le demandeur ayant donc été causé par une faute présumée de l'anesthésiste au cours de l'exécution des fonctions auxquelles il était préposé par l'hôpital, il faut conclure à la responsabilité quasi-délictuelle de l'institution.

Cette conclusion suffit à disposer du plaidoyer de prescription invoqué par l'anesthésiste. Quand le demandeur a intenté son action en décembre 1960, il croyait que c'était le docteur Gaston Comtois qui avait pratiqué l'anesthésie. En effet, le rapport d'anesthésie porte sur la dernière ligne en regard du mot «Anesthésiste» la signature suivante: «Vigneault Comtois». Il a donc dirigé sa poursuite contre l'hôpital et le docteur Comtois et ce n'est qu'au cours d'un interrogatoire préalable de ce dernier, le 25 avril 1962, qu'il a appris que ce n'était pas lui qui l'avait anesthésié. Après cette révélation inattendue, le demandeur s'est désisté de sa poursuite contre le docteur Comtois et, avec l'autorisation du tribunal, il l'a amendée pour assigner comme défendeur solidaire avec l'hôpital le véritable anesthésiste, le docteur Vigneault. Si la demande n'était pas accueillie contre l'hôpital, il faudrait rechercher si la prescription d'un an «pour lésions ou blessures corporelles» devrait être écartée parce qu'il s'agirait d'une responsabilité contractuelle ou parce qu'il y aurait eu impossibilité d'agir. Mais vu que l'on doit conclure à la responsabilité de l'hôpital, il me semble évident que la prescription interrompue par la signification de l'action à l'hôpital a été également interrompue contre l'anesthésiste, art. 2231 C.C., premier alinéa:

2231. Tout acte qui interrompt la prescription contre l'un des débiteurs solidaires, l'interrompt contre tous.

D'après une jurisprudence bien établie, il y a solidarité entre tous les responsables d'un même dommage délictuel ou quasi-délictuel. Dans *The Grand Trunk Railway et la Cité de Montréal c. McDonald,*[7] cette Cour a statué à l'unanimité qu'il y a solidarité entre deux employeurs à l'égard de l'obligation découlant des fautes distinctes commises par leurs préposés respectifs et ayant causé le préjudice. Vu

[7] (1918), 57 R.C.S. 268, 23 C.R.C. 361, 44 D.L.R. 189.

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qu'en l'occurrence, il fallait pour justifier la condamnation contre le second employeur, la municipalité, statuer que la prescription avait été interrompue par la poursuite contre le premier, la conclusion à l'existence de la solidarité est un motif essentiel de l'arrêt. Il va de soi que si l'on reconnaît la solidarité entre deux commettants pour un dommage découlant de la faute commune de leurs préposés, à plus forte raison faut-il l'admettre entre le commettant et le préposé. Parmi les nombreux arrêts en ce sens on peut citer: *Beaubien c. Laframboise*[8], *Cité de Montréal c. Beauvais*[9].

Je ne puis cependant méconnaître la difficulté qui est signalée par les juges Taschereau et Fauteux dans *Modern Motor Sales Ltd. c. Masoud*[10], et qui découle de l'art. 1106 C.C. Ce texte ajouté après la première rédaction du titre des obligations se lit comme suit:

1106. L'obligation résultant d'un délit ou quasi-délit commis par deux personnes ou plus est solidaire.
1106. The obligation arising from the common offence or quasi-offence of two or more persons is joint and several.

On ne saurait nier qu'à proprement dire le commettant est responsable du délit ou quasi-délit commis par son préposé dans l'exécution de ses fonctions sans l'avoir commis lui-même. D'après les dictionnaires, le délit ou quasi-délit c'est le fait fautif, non la responsabilité qui en découle.

A ce sujet il faut observer que dans l'affaire *McDonald* le juge en chef et le juge Brodeur, les seuls à étudier la question de solidarité, se sont largement appuyés sur la jurisprudence de la Cour de Cassation. Or, au *Code Napoléon,* après les art. 1200, 1201 et 1202 correspondant substantiellement aux art. 1103, 1104 et 1105 C.C. (sauf le dernier alinéa), on ne trouve aucune disposition analogue à l'art. 1106. Au *Code pénal,* l'art. 55 vise seulement «les individus condamnés pour un même crime ou un même délit». En France, on ne peut donc se fonder que sur l'art. 1200 C.N. pour conclure à la solidarité entre personnes civilement responsables d'un même dommage. C'est bien ce que décidait autrefois la Cour de Cassation, ainsi dans un arrêt du 17 mars 1902 (*Hayem et comp. c. Nico* D.P. 1902, 1, 541), on lit:

Attendu qu'il était constant et reconnu par toutes les parties, que Nico et Christmann se trouvaient obligés, envers Hayem et comp., à la réparation

[8] (1926), 40 B.R. 194.
[9] [1944] B.R. 215.
[10] [1953] 1 R.C.S. 149 à 156.

intégrale du préjudice résultant pour ces derniers de quasi-délits auxquels tous deux avaient participé, de manière que chacun des débiteurs pouvait y être contraint pour la totalité, et que le payement, fait par un seul aurait eu pour effet de libérer l'autre;—Attendu que ces conditions, qui sont celles déterminant, d'après l'art. 1200 c. civ., l'existence de la solidarité entre les débiteurs, leur rendaient applicable l'art. 1285 c. civ., d'après lequel la remise ou décharge conventionnelle au profit de l'un des codébiteurs solidaires libère tous les autres, à moins que le créancier n'ait expressément réservé ses droits contre ces derniers;

Invariablement, l'objection à la solidarité dans des cas semblables a été fondée sur l'art. 1202 C.N., qui correspond aux deux premiers alinéas de l'art. 1105 C.C. Quoique le Code décrète à l'art. 1200: «Il y a solidarité de la part des débiteurs, lorsqu'ils sont obligés à une même chose, de manière que chacun puisse être contraint pour la totalité, et que le payement fait par un seul libère les autres envers le créancier», on soutient qu'il n'y a qu'une obligation *in solidum* si la loi ou la convention ne l'a pas qualifiée «solidaire» et cela parce qu'à l'art. 1202 on dit ensuite: «La solidarité ne se présume point; il faut qu'elle soit expressément stipulée. Cette règle ne cesse que dans les cas où la solidarité a lieu de plein droit, en vertu d'une disposition de la loi». Cette manière de voir sur laquelle les auteurs sont divisés, semble prévaloir actuellement en jurisprudence française. Les juges Bissonnette et Rinfret y ont fait écho dans *Blumberg c. Wawanesa Mutual Ins. Co.*[11] sans que ce motif soit retenu par une majorité. Cette Cour[12] a confirmé l'arrêt sans se prononcer sur cette question. C'est aussi ce qu'il semble à propos de faire dans le cas présent. Comme il s'agit ici d'une obligation quasi-délictuelle il n'est pas nécessaire de décider si la solidarité découle de l'art. 1103 ou de l'art. 1106 du *Code civil*.

Il convient d'observer qu'il n'est aucunement contraire à la notion de solidarité que de considérer solidaires à l'égard du créancier deux débiteurs dont l'un est, envers l'autre, responsable du tout. Cette éventualité est prévue à l'art. 1120.

1120. Si l'affaire pour laquelle la dette a été contractée solidairement ne concerne que l'un des codébiteurs, celui-ci est tenu de toute la dette vis-à-vis des autres codébiteurs, qui ne sont considérés par rapport à lui que comme ses cautions.

Le fait que dans la poursuite à l'origine on ait mentionné le docteur Comtois et non le docteur Vigneault comme codé-

[11] [1960] B.R. 1165.

[12] [1962] R.C.S. 21.

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biteur ne saurait empêcher l'effet interruptif de la demande. L'amendement apporté ultérieurement est admis par la jurisprudence: *Lefaivre c. Fontaine*[13]. De toute façon, la demande initiale était suffisamment libellée contre l'hôpital en alléguant le fait cause du dommage, malgré l'erreur dans le nom de l'auteur et il faut appliquer le second alinéa de l'art. 2224 C.C.:

> Cette interruption se continue jusqu'au jugement définitif et elle vaut pour tout droit et recours résultant de la même source que la demande.

Pour ces raisons, je suis d'avis d'accueillir avec dépens l'appel de Charles-Eugène Martel contre l'Hôtel-Dieu St-Vallier; d'infirmer le jugement de la Cour du banc de la reine afin de rejeter avec dépens l'appel de l'hôpital contre le jugement de la Cour supérieure en date du 18 juin 1965, et de rétablir la condamnation solidaire prononcée contre lui et contre le défendeur Patrick Vigneault au montant de $58,216.33 avec intérêt depuis l'assignation et les dépens. Quant à l'appel de Patrick Vigneault, je suis d'avis de le rejeter avec dépens.

Appel du demandeur C. E. Martel accueilli et appel du défendeur P. Vigneault rejeté.

Procureurs de C. E. Martel: Dufour, Tremblay et Larouche, Chicoutimi.

Procureurs de P. Vigneault: Lafleur et Brown, Montréal.

Procureurs de l'Hôtel-Dieu St-Vallier: Fradette, Bergeron, Cain, Lamarre, Bouchard et Wells, Chicoutimi.

[13] [1962] B.R. 483.

IVAN COSO (*Plaintiff*) .....APPELLANT;

AND

ALEXANDER POULOS (*Defendant*) .....RESPONDENT.

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*May 1, 2
June 10

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Damages—Pedestrian struck in crosswalk—Personal injuries—Degree of fault—Increased award by Court of Appeal further increased by Supreme Court of Canada.

The appellant was struck by the respondent's automobile as he was crossing a highway from north to south in an unmarked crosswalk at an intersection. The highway ran east and west and had six lanes, the two outside lanes being parking lanes. The appellant, as he was about to leave the curb at the northeast corner, saw a truck approaching from the east in the most northerly driving lane. The truck slowed down to permit him to cross. As he crossed in front of the truck, he looked to his left, and not seeing the respondent's automobile because it was still hidden by the truck concentrated his attention on traffic coming from the west. After he had taken a few steps from in front of the truck, he was hit by the respondent's automobile which was in the inside lane.

The appellant was severely bruised on his right hip and suffered a wrenched back with a probable extrusion of a lumbar disc. In hospital he underwent a painful operation and thereafter his injuries continued to cause him pain. About a year later he suffered an attack of phlebitis which was found to have been caused by the accident.

At the time he was injured the appellant was a man 29 years of age with the ability and opportunity to earn as much as $1,000 a month as a tunnel construction worker. The permanent and partially disabling nature of his injuries made it necessary that he avoid the field of heavy industry and he was thus reduced to less remunerative employment.

At trial, the respondent was found wholly responsible for the accident.

The appellant was awarded $7,000 general damages and $973 special damages. On appeal, the Court of Appeal increased the award of general damages to $12,000 and on the respondent's cross-appeal found the appellant 20 per cent at fault. The appellant then appealed to this Court against the 20 per cent finding of fault and for an increase in general damages beyond the $12,000 awarded by the Court of Appeal.

Held (Abbott J. dissenting): The appeal should be allowed.

Per Cartwright C.J. and Ritchie, Hall and Spence JJ.: The finding by the trial judge that the respondent was solely at fault should be restored. The Court of Appeal had erred in saying that the trial judge had held that as the appellant entered the southerly lane he was running or walking fast. This was a recapitulation of what the respondent had said and not a finding of fact by the trial judge.

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*PRESENT: Cartwright C.J. and Abbott, Ritchie, Hall and Spence JJ.

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The appellant was entitled to a substantial award for pain and suffering and for loss of enjoyment of life apart altogether from loss of income prior to trial and for future loss by reason of the permanent nature of his injuries. The amount awarded by the Court of Appeal was inordinately low and such a wholly erroneous assessment that this Court was justified in increasing the award for general damages from $12,000 to $30,000.

Per Abbott J., *dissenting*: Very exceptional circumstances had not been established in the present case, and, except in such circumstances, a second appellate Court will not interfere with the amounts fixed by the first appellate Court where they differ from the damages assessed by the trial judge.

APPEAL from a judgment of the Court of Appeal for British Columbia, allowing an appeal and a cross-appeal from a judgment of Wilson C.J.S.C. Appeal allowed, Abbott J. dissenting.

B. W. F. McLoughlin, for the plaintiff, appellant.

J. A. Fraser, for the defendant, respondent.

The judgment of Cartwright C.J. and Ritchie, Hall and Spence JJ. was delivered by

Hall J.:—The appellant, a pedestrian, was injured when struck by the right front corner of the respondent's automobile as he was crossing Broadway Avenue in the City of Vancouver at about 2:30 p.m. on September 18, 1965. The day was bright and clear, visibility good and the pavement dry. He brought action against the respondent and recovered judgment for $7,000 as general damages and $973 special damages following a trial before Chief Justice Wilson of the Supreme Court of British Columbia who found the respondent wholly responsible for the accident.

The appellant appealed to the Court of Appeal for British Columbia, claiming the amount awarded for general damages was insufficient. The respondent cross-appealed on the issue of liability. The Court of Appeal increased the award for general damages to $12,000 and on the cross-appeal found the appellant 20 per cent at fault.

The appellant now appeals to this Court against the 20 per cent finding of fault and for an increase in general damages beyond the $12,000 awarded by the Court of Appeal.

Broadway Avenue is a six-lane highway running east and west, the two outside lanes being parking lanes. The accident occurred at the intersection of Broadway Avenue and Laurel Street which intersects Broadway Avenue at right

angles. The appellant was at the northeast corner of the intersection and intended crossing to the southeast corner. There were no traffic-control signals at this intersection. Accordingly, s. 169 of the *Motor-vehicle Act*, R.S.B.C. 1960, c. 253, as it read in 1965 applied. The section then read:

169. (1) Subject to section 170, where traffic-control signals are not in place or not in operation when a pedestrian is crossing the highway within a crosswalk and the pedestrian is upon the half of the highway upon which the vehicle is travelling or is approaching so closely from the other half of the highway that he is in danger, the driver of the vehicle shall yield the right-of-way to the pedestrian.

(2) No pedestrian shall leave a curb or other place of safety and walk or run into the path of a vehicle that is so close that it is impracticable for the driver to yield the right-of-way.

(3) Where a vehicle is slowing down or stopped at a crosswalk or at an intersection to permit a pedestrian to cross the highway, no driver of another vehicle approaching from the rear shall overtake and pass the vehicle which is slowing down or stopped.

(4) The driver of a motor-vehicle shall obey the instruction of school pupils acting as members of school patrols provided under the *Public Schools Act*.

A crosswalk is defined by s. 121 of the *Motor-vehicle Act* as follows:

"crosswalk means"

(*a*) any portion of the roadway at an intersection or elsewhere distinctly indicated for pedestrian crossing by signs or by lines or other markings on the surface; or

(*b*) the portion of a highway at an intersection that is included within the connection of the lateral lines of the sidewalks on the opposite sides of the highway, or within the extension of the lateral lines of the sidewalk on one side of the highway, measured from the curbs or, in the absence of curbs, from the edges of the roadway;

As he was about to cross Broadway Avenue, the appellant saw a truck approaching from his left (east). It was in the most northerly driving lane. This truck slowed down and appellant accepted this as an indication that it was safe for him to proceed to cross the intersection in the unmarked crosswalk. The appellant saw no other vehicle approaching from the east. The respondent's automobile was actually approaching from the east and catching up to the truck, but it was hidden from appellant's view by the truck. As he crossed in front of the truck, the appellant looked to his left, and not seeing the respondent's automobile because it was still hidden by the truck concentrated his attention on traffic coming from the west, which might affect him once he was at or over the centre of the street. After he

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had taken a few steps from in front of the truck, he was hit by respondent's automobile which was in the inside lane. The truck which had slowed down to allow the appellant to cross in front of it continued westward its driver apparently unaware that the pedestrian who had just passed in front of his truck had been struck.

The respondent appears to have seen the pedestrian (the appellant) because he applied his brakes and skidded some 24 feet before striking the appellant. There is no question of the respondent's negligence. He was clearly in breach of s. 169 of the Act in that, having seen the truck slow down at the approach to the intersection, he proceeded to overtake and pass the truck and did not abate his speed sufficiently until it was too late for him to avoid hitting the appellant who was lawfully in the crosswalk and had right-of-way over approaching vehicles.

The learned trial judge said in this regard:

> This is one of the most common situations in city motoring. The defendant could not, because of the truck, see to the right where the plaintiff was. When he saw the truck on his right slow or stop he ought at once to have known that danger was present and that in all probability the danger was that of striking a pedestrian coming from the north of the truck, where he had no view. It became his duty at once to slow or stop his car to avert the possibility of an accident and he did not do so but drove on until he saw the plaintiff when it was too late to stop. His speed, reasonable under other circumstances, was excessive, because, so soon as he saw the truck slow or stop (and he was behind it) he should have so controlled his car as to avoid any chance of striking a pedestrian in the crosswalk.

and regarding the allegation of contributory negligence made against the appellant, he said:

> Was the plaintiff guilty of contributory negligence? He had the right-of-way and was entitled to expect that motorists would respect it. The truck did respect it. Was he not then entitled to expect that vehicles to the south of the truck would observe the action of the truck and act accordingly? I think he was. I do not say that he might not, by the exercise of extreme vigilance, have avoided this accident, but I do not think that in the circumstances such a degree of vigilance was required of him. I find that the defendant is wholly liable.

The Court of Appeal accepted the learned trial judge's finding that the respondent was negligent, but found the appellant guilty of contributory negligence and fixed his percentage of fault at 20 per cent. In so doing, the Court of Appeal said:

> The appellant did not see the respondent's car as he left the curb because, as other evidence establishes, the pickup truck, which the appellant saw, was running about a length ahead of the respondent's car and

obscured his vision. The respondent did not see the appellant until it was too late to avoid the collision, and the appellant never did see the respondent's car. It is quite apparent, however, that if he had paused momentarily and looked to his left before entering the southerly westbound lane he would have seen the respondent's car. *The learned Trial Judge has held that as the appellant entered the southerly lane he was running or walking fast.* It seems to me that a quick look before entering the southerly lane would have sufficed to enable him to avoid being struck down.

(Emphasis added.)

The Court of Appeal was in error in saying: "The learned Trial Judge has held that as the appellant entered the southerly lane he was running or walking fast." It is clear from the record that no such finding was made by Wilson C.J.S.C. He did say when recapitulating the evidence of the respondent that the respondent had said: "He (the appellant) was running or walking fast" but that was a statement of what the respondent had said and not a finding of fact, and Wilson C.J.S.C. did not say that he accepted the respondent's evidence in this regard for it is evident that he did not do so. He chose instead to accept the evidence of Preovolos who was a passenger in the respondent's automobile.

This error appears to have influenced the Court of Appeal to find the appellant partly at fault to the extent of 20 per cent. I do not think that the Court of Appeal was justified in disturbing the learned trial judge's finding that the appellant was not at fault on the basis of this misreading of Wilson C.J.S.C.'s reasons. I would accordingly allow the appeal on this aspect of the case and restore the finding that the respondent was solely at fault.

The Court of Appeal's award of $12,000 as general damages is also challenged by the appellant as being a wholly erroneous assessment in the light of the injuries sustained by the appellant and the permanent and partially disabling nature of those injuries as established in evidence. The evidence as to the injuries sustained by the appellant is fully reviewed by the Court of Appeal as follows:

The accident happened on the 18th of September, 1965. The plaintiff (appellant), then an active man of 29 years of age, was struck by the respondent's car, thrown into the air and landed on the ground. He was severely bruised on the right hip and suffered a wrenched back with a probable extrusion of a lumbar disc. He has suffered extreme pain in the lower back area. He was in the hospital for 29 days and was at home for another two weeks without being able to move very much. Following this period he was partially mobile at home for a period of some six weeks.

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While in hospital the appellant underwent an operation whereby fluid was extracted from his spine and a pigment inserted for the purpose of tracing the flow of pigment in order to assist the diagnosis of his lower back injuries. The operation caused the appellant excruciating pain. The injury to the lower back caused pain right up to the time of trial. The pain radiated down into his right leg.

On November 30th, 1966, the appellant suffered an attack of phlebitis at Prince George shortly after he had taken a bus ride from Vancouver. Following this attack he could not work for the following seven months.

Up to November, 1966, the physician looking after the appellant had considered his principal difficulty to be that arising from the injury to his lower spine. The presence of phlebitis had not been suspected but when the phlebitis attack took place on November 30th, 1966, it became apparent that the appellant's principal complaint arose from the phlebitis in his right leg. In view of the fact that the appellant's phlebitis was not diagnosed as such until after a year from the date of the accident, there was some conflict of medical opinion as to whether the condition was caused by the accident. However, there was a sound basis for the learned trial Judge's finding that the accident caused the phlebitis.

Dr. Sladen, a vascular specialist, described in some detail the damage caused by the disease to the appellant's right leg and he said that the leg was permanently damaged. The best that he could hold out for the patient was that he could control the effects of the trouble by keeping the leg raised at night and by the application of a rubber bandage by day. Failure to take these precautions may bring about a throbbing sensation which could be followed by ulceration. Further, the doctor said that the patient's condition would be a handicap to him in his work, and that heavy lifting increased the pressure and therefore the reflux.

Later in his evidence he said:

A. . . . The leg itself, the basic pathology, is certainly not improving. It's there. And the same problem will re-occur any time that he stresses this leg. And I think if you talk to him you will find that he has tried to work and it has swollen up on him during this period. So I don't think the leg is any better really than when I saw him initially.

Q. You have described for us, Doctor, a number of events that might occur, having had this phlebitis condition. Is it fair to say that there are many people who suffer from phlebitis who can lead a normal life thereafter?

A. I don't think "normal" is the word. I think that everybody that has had this disease pays some sacrifice to it or some penalty for it. And it depends on its degree and the amount involved and the type of stress that the patient is going to put on it as to where they fall on the scale.

Dr. W. H. Sutherland, likewise a vascular specialist, confirmed the opinion of Dr. Sladen and said that: ". . . there is evidence of deep vein phlebitis in this leg; in fact, a very extensive amount of this disease."

He also said that:

"I would confirm exactly what Dr. Sladen said. Depending on the amount of the care he can give this limb, it will serve him reasonably well but will slowly progress. The less care he is able to give it the more rapid will be the progression."

Dealing again with the patient's ability to engage in heavy industry, he said:

> "I think heavy lifting would be troublesome to him by the end of the day. The problem about heavy industry or heavy labour is the real possibility of further injury to this limb."

As will be seen, the principal residual disability stems from the phlebitis which the learned trial judge found was caused by the accident. This finding was concurred in by the Court of Appeal and is fully supported by the evidence. The original low award of $7,000 arose, I think, from the learned trial judge's view that the appellant was regarded initially by his doctors as being guilty of emotional exaggeration of the extent of his pain and injuries. This assessment, now recognized to be erroneous of the appellant's condition and subsequent pain, was due to the fact that the phlebitis was not recognized and diagnosed as such until January 5, 1967, more than a year after the accident.

Once it is accepted that the appellant is suffering from phlebitis, the medical evidence conclusively establishes that he should avoid heavy lifting and violent movement. One of the medical witnesses suggested that a job as a bar tender would be about right for the appellant's capabilities. Maclean J.A. said in his reasons:

> It is of course obvious that the accident has considerably narrowed the field of employment open to the appellant. If he has any regard at all for his future welfare and health he must avoid the field of heavy industry in which he previously made his living, and he must take lighter employment even though it may be less remunerative.

It is on this basis that appellant's damages should be assessed. He was a man 29 years of age with the ability and opportunity to earn as much as $1,000 a month as a member of the Tunnel and Rock Workers' Union. Such an opportunity was available to him at the time he was injured and he would have been able to earn approximately $1,000 a month in the interval between the time he was injured and the date of the trial. He estimated this loss at $10,750. He had no assurance, of course, that such work would always be available in British Columbia or even in Canada or that he could work continuously at tunnelling work, and besides he was always subject to the hazards of illness and accident to which all men are liable. He suffered a great deal of pain and will have pain in the future. He is permanently reduced to employment from which his earnings

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will not nearly approximate what he could have made as a member of his union even if he did not work full time at tunnelling or similar jobs.

He was, by every standard, entitled to a substantial award for pain and suffering and for loss of enjoyment of life apart altogether from loss of income prior to trial and for future loss by reason of the permanent nature of his injuries. Taking everything into consideration, including his record of earnings for the five-year period preceding the accident, I am of the view that the amount awarded by the Court of Appeal is inordinately low and such a wholly erroneous assessment that this Court is justified in increasing the award for general damages from $12,000 to $30,000. I would give the appellant judgment for this amount plus his special damages. The judgment of the learned trial judge should be affirmed but varied by increasing the sum awarded by way of general damages to $30,000. The appellant should also have his costs in the Court of Appeal and in this Court.

ABBOTT J. (*dissenting*):—The facts are set out in the reasons of my brother Hall which I have had the advantage of considering. As he has stated, the Court of Appeal increased the award to appellant for general damages from $7,000 to $12,000, and on the cross-appeal found the appellant 20 per cent at fault. It is trite law of course that, as to the quantum of damages, a second appellate Court will not, except in very exceptional circumstances, interfere with the amounts fixed by the first appellate Court where they differ from the damages assessed by the trial judge. In my opinion, such exceptional circumstances have not been established in the present case and I would dismiss the appeal with costs.

Appeal allowed with costs, ABBOTT J. *dissenting.*

Solicitors for the plaintiff, appellant: Lawrence & Shaw, Vancouver.

Solicitors for the defendant, respondent: Ladner, Downs & Co., Vancouver.

1969

*Mai 21
Juin 26

FERNAND PROULX (*Défendeur*) .....APPELANT;

ET

GÉRARD LEBLANC ET MARIE-ROSE LEBEL (*Demandeurs*)..INTIMÉS.

DAME ODILON BENOÎT (*Défenderesse*) ..APPELANTE;

ET

GÉRARD LEBLANC ET MARIE-ROSE LEBEL (*Demandeurs*)..INTIMÉS.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Immeubles—Vente—Stipulation pour autrui—Délégation de paiement—Responsabilité du délégant envers le vendeur originaire—Solidarité—Code Civil, art. 1029, 1173.

Les intimés, qui originairement avaient vendu un hôtel connu sous le nom d'«Auberge Mario», ont réclamé de six acquéreurs successifs le solde du prix de la vente. Chaque nouvel acquéreur s'était engagé dans le contrat d'achat à payer la somme encore due aux intimés. Le dernier acquéreur n'a pas contesté la poursuite. En ce qui a trait aux cinq autres la Cour supérieure n'a accueilli l'action que contre le premier étant d'avis que les opérations subséquentes n'avaient créé aucun lien de droit entre les autres défendeurs et les intimés qui n'étaient pas partie au contrat. La Cour d'appel, par un jugement majoritaire, a condamné les défendeurs solidairement avec le premier ayant conclu qu'il s'agissait d'une clause de stipulation pour autrui et que la signification de la poursuite aux défendeurs était une manifestation suffisante de la volonté des intimés de l'accepter. Deux des défendeurs ont interjeté appel à cette Cour.

Arrêt: L'appel est rejeté.

Le texte de la clause en litige contenue dans les contrats de vente successifs intervenus entre les appelants (défendeurs) étant une stipulation pour autrui (art. 1029 C.C.) elle entraînait pour chacun l'obligation de payer la dette et non seulement celle de subir l'hypothèque.

Le fait que les acquéreurs successifs ont accepté la délégation de paiement ne libère pas les autres débiteurs qui ont fait la délégation à moins d'une intention contraire qui ne se présume pas (art. 1173 C.C.).

Sans qu'il soit nécessaire de se prononcer sur la question de savoir s'il résulte une solidarité du fait de la pluralité des débiteurs, chacun d'eux est redevable du montant entier de la dette.

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*CORAM: Les Juges Fauteux, Abbott, Martland, Hall et Pigeon.

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v.
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LEBEL

BENOÎT
v.
LEBLANC et
LEBEL

Real Property—Sale—Stipulation for the benefit of a third party—Delegation of debtor—Responsibility of delegating party towards original creditor—Joint and several liability—Civil Code, art. 1029, 1173.

The respondents, who originally had sold an hotel known as "Auberge Mario", claimed the balance due on the purchase price from six successive purchasers. As a condition of the contract of sale, each purchaser had agreed to pay the balance owing to the respondents. The person who had last purchased the property did not dispute the claim. With respect to the five others the Superior Court upheld the claim as against the first purchaser only because, in the Court's opinion, there was no privity of contract between the respondents and the other defendants inasmuch as the respondents were not a party to the subsequent deals. The Court of Appeal, by a majority, held that the other purchasers of the property were also jointly and severally liable for the whole debt in that their undertakings were, in fact, a stipulation for the benefit of a third person and the service of a writ was sufficient to indicate the appellants' intention to accept the benefit of the stipulation made in their favour. Two of the defendants appeal to this Court.

Held: The appeal should be dismissed.

The provision contained in the successive purchase contracts executed by the appellants (defendants) was a stipulation for the benefit of a third person (art. 1029 C.C.), each appellant did not merely agree to suffer the hypothec but made himself personally liable for the debt (art. 1173 C.C.).

The fact that each successive purchaser accepted the delegation of the debt did not operate as a discharge because such a discharge must have been intended by all the parties concerned and that intention cannot be presumed.

Irrespective of whether or not a joint and several liability existed by reason of the plurality of debtors, each debtor was personally liable for the whole debt.

APPEALS from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reversing a decision in favour of certain defendants rendered by Smith J. Appeals dismissed.

APPELS d'un jugement de la Cour du banc de la reine, province de Québec[1], infirmant à l'égard de certains défendeurs un jugement du Juge Smith. Appels rejetés.

André St-Jacques, pour l'appelant Fernand Proulx.

Jacques Pagé, pour l'appelante Dame Odilon Benoît.

Gilles St-Hilaire et *Pierre De Bané,* pour les intimés Gérard Leblanc et Marie-Rose Lebel.

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[1] [1969] B.R. 461.

Le jugement de la Cour fut rendu par

LE JUGE PIGEON:—Par leur action les intimés ont réclamé des six acquéreurs successifs d'un hôtel connu sous le nom d'«Auberge Mario» le solde du prix de la vente au premier. Le dernier, Roland Bédard, qui était propriétaire de l'établissement lors de l'institution des procédures, a été le seul à ne pas contester la poursuite qui lui a été signifiée.

La Cour supérieure a accueilli l'action contre Édouard Desgagné, le premier acquéreur seulement. Elle a également accordé les conclusions en déclaration de privilège sur l'immeuble qui avaient été ajoutées par amendement à l'audience mais elle a rejeté la demande avec dépens envers les acquéreurs autres que le premier et le dernier, c'est-à-dire: Fernand Proulx, Albert Martel, Dame Odilon Benoît et Phil Auto Inc.

Avec une dissidence, la Cour d'appel a modifié ce jugement et condamné ces quatre défendeurs solidairement avec Édouard Desgagné tout en ajoutant que cette solidarité devait être sans effet entre les défendeurs. Deux d'entre eux, savoir Fernand Proulx et Dame Odilon Benoît qui sont respectivement les deuxième et quatrième acquéreurs de l'immeuble, ont interjeté appel à cette Cour de la condamnation ainsi prononcée contre eux.

Notons immédiatement comment sont rédigés les actes d'achat signés par les deux appelants. Celui de Fernand Proulx, consenti par Édouard Desgagné comme vendeur, comporte sous le titre «Prix» les stipulations suivantes:

Cette vente est faite pour le prix de vente de $32,750.00 acompte duquel le vendeur reconnaît avoir reçu comptant de l'acquéreur la somme de $5,000.00 dont quittance.

Quant au solde de $29,750.00 l'acquéreur s'engage à le payer pour et à l'acquit du vendeur de la façon suivante:

(1) Une somme de $2,450.00 étant le solde restant dû sur un montant originaire de $5,200.00 à M. Armand Laforest, d'Asbestos, aux termes d'un acte d'obligation reçu devant Me J. M. Beauchesne, notaire, le 29 mai 1958, et enregistré à Richmond sous le n° 64116.

(2) Une somme de $27,300.00 due à MM. Calixte Boisvert et Gérard Leblanc, à titre de balance de prix de vente aux termes d'un acte reçu devant Me Paul André Adam, notaire, le 23 mars 1960, et enregistré à Richmond sous le numéro 68098.

* * *

L'acquéreur remplira à l'entière libération du vendeur toutes les obligations mentionnées auxdits actes et dont il déclare avoir pris communication.

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L'appelant Fernand Proulx ayant à son tour cédé l'établissement à Louis Albert Martel, celui-ci l'a revendu à l'autre appelante Dame Odilon Benoît. Dans ce dernier acte, on trouve sous le titre «Prix» les stipulations suivantes:

La présente vente est faite pour le prix de $50,250.00 dont $21,000.00 que le vendeur reconnaît avoir reçu dont quittance pour autant.

Quant à la balance l'acquéreur s'engage à la payer de la façon suivante:

(1) Une somme de $2,450.00 payable pour et à l'acquit du vendeur à M. Armand Laforest, à qui pareille somme est due aux termes d'un acte d'obligation reçu devant Me J. Beauchesne, enregistré à Richmond sous le numéro 64116, et aux termes d'une vente enregistrée sous le nº 75817.

. . .

(2) Une somme de $26,800.00 payable pour et à l'acquit du vendeur à MM. Calixte Boisvert et Gérard Leblanc, à qui pareille somme est due aux termes d'un acte reçu devant Me P. A. Adam, enregistré à Richmond sous le numéro 68098, et d'un acte de vente enregistré sous le numéro 75817.

. . .

L'acquéreur remplira à l'entière libération du vendeur toutes les obligations mentionnées auxdits actes.

En Cour d'appel, la majorité a vu dans ces clauses une stipulation pour autrui au sens de l'art. 1029 C.C. et elle a statué que la signification de la poursuite aux défendeurs était une manifestation suffisante de la volonté des demandeurs de l'accepter.

A l'encontre de ce raisonnement appuyé d'une revue de la doctrine et de la jurisprudence y compris l'arrêt de cette Cour dans *Hallé c. Canadian Indemnity*[2], les appelants ont invoqué deux autres décisions: *Reeves c. Perrault*[3], et *Legault c. Desève*[4]. Ni l'une ni l'autre ne supporte leurs prétentions, c'est le contraire qu'il faut dire.

Dans l'affaire *Reeves*, cette Cour a formellement décidé qu'un vendeur d'immeuble a recours contre le tiers qui, s'en portant subséquemment acquéreur avec plus grande étendue, s'engage envers l'acheteur à en payer le prix. Si en l'occurrence l'on n'a admis le recours que pour une partie de ce prix c'est uniquement parce qu'avant d'accepter la délégation de paiement, le créancier avait exercé l'action hypothécaire contre l'immeuble qu'il avait vendu et en

[2] [1937] R.C.S. 368.
[3] (1885), 10 R.C.S. 616.
[4] (1920), 61 R.C.S. 65.

avait obtenu le délaissement. On a appliqué le passage suivant de Pont (Priv. & Hypo., suite de Marcadé, n° 1180) qui est cité par le juge Taschereau (à p. 630):

> Seulement, les créanciers devront soigneusement éviter, dans ces divers cas de mettre en avant l'action hypothécaire, s'ils tiennent à conserver l'action personnelle qu'ils ont contre le tiers détenteur; s'ils concluaient tout d'abord au délaissement, ou s'ils procédaient aux poursuites par la sommation de payer ou de délaisser ils seraient censés renoncer par cela même à l'action personnelle, et désormais, ils seraient non recevables à l'exercer.

Il n'est aucunement nécessaire de se demander si ce principe devrait aujourd'hui s'appliquer en regard de la législation actuelle sur la procédure car ici la situation est tout à fait différente: les intimés n'ont pas d'abord exercé l'action hypothécaire mais bien l'action personnelle. Ce n'est que par amendement qu'ils y ont joint, non pas à proprement parler des conclusions hypothécaires qui impliquent une demande de délaissement mais des conclusions en déclaration de privilège. Le cumul des actions étant maintenant permis, ils avaient indubitablement le droit de les joindre à leur demande personnelle sans renoncer à cette dernière. Au contraire, dans *Reeves c. Perrault* c'est bien une action hypothécaire proprement dite et suivie de délaissement qui avait été intentée et c'est le délaissement impliquant éviction qui a été considéré comme ayant éteint, avant l'acceptation de la délégation de paiement, une partie de la créance proportionnelle à la valeur de l'immeuble délaissé.

Dans *Legault c. Desève,* le défendeur avait acquis un immeuble par dation en paiement «à la charge de l'hypothèque» le grevant en faveur du demandeur. Il s'agissait de savoir si cette stipulation l'obligeait seulement à subir l'action hypothécaire sans recours en garantie ou si elle avait également pour effet de créer une obligation personnelle. On en est venu à la conclusion qu'en l'occurrence le défendeur avait seulement consenti à subir l'éviction, le juge Mignault disant (à p. 75):

> On aurait pu éviter toute équivoque en disant: à la charge *de payer* l'hypothèque de $15,000.00 ci-après mentionnée, et alors il aurait été certain que Lecavalier et Chassé voulaient faire une délégation de paiement, et non pas seulement se protéger contre un recours éventuel en garantie de la part de Desève.

Dans le cas présent, aucun doute n'est possible. Les actes d'achat signés par les appelants stipulent tous deux la

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charge *de payer* la dette dont il s'agit et non pas seulement celle de subir le privilège qui la garantit. Cela ressort tant de la stipulation elle-même que du fait que cet engagement est stipulé comme partie du prix de vente. En prenant l'immeuble chacun des appelants s'est obligé à en payer le prix et a convenu que cette obligation jusqu'à concurrence de la somme qui fait l'objet du présent litige serait exécutée par le paiement aux intimés à l'acquit du débiteur primitif.

Les appelants ont soutenu devant nous que cet engagement avait été révoqué par la revente de l'immeuble avant que les intimés eussent accepté la stipulation en leur faveur. Cette question de révocation a été considérée par cette Cour dans l'affaire *Reeves*. On y a noté que l'action hypothécaire et le délaissement avaient précédé l'acceptation de la délégation de paiement et que par conséquent l'obligation s'était trouvée éteinte jusqu'à concurrence de la valeur de l'immeuble délaissé avant que l'acceptation ait lieu. Ici, rien de tel ne se présente. Aucune des ventes successives n'a été annulée et jamais l'un des vendeurs n'a révoqué la stipulation en faveur des intimés. Tout ce que chacun d'eux a fait a été de charger un nouvel acquéreur d'exécuter son obligation à sa place. On ne se libère pas d'une obligation en chargeant un tiers de l'exécuter. Même en acceptant la délégation de paiement, le créancier ne libère pas le débiteur primitif mais acquiert un débiteur additionnel à moins d'une intention contraire qui ne se présume pas. C'est ce que l'art. 1173 C.C. exprime dans les termes suivants:

> 1173. La délégation par laquelle un débiteur donne à son créancier un nouveau débiteur qui s'oblige envers le créancier, n'opère point de novation à moins qu'il ne soit évident que le créancier entend décharger le débiteur qui fait la délégation.

Quelle est la conséquence de la pluralité de débiteurs découlant d'une telle situation? En résulte-t-il solidarité? Sur ce point la doctrine et la jurisprudence sont divisées. Cependant, on est unanime à reconnaître que chacun des débiteurs est redevable du montant entier de la dette. C'est évidemment pour que cette question n'ait pas besoin d'être tranchée dans la présente cause que les demandeurs ont conclu non pas à une condamnation solidaire mais à une condamnation *in solidum*. Comme on l'a vu, la Cour d'appel a jugé à propos de prononcer une condamnation solidaire en ajoutant cependant que celle-ci était sans effet à l'égard

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des défendeurs entre eux. Les motifs de jugement font voir que l'on entendait par là prononcer une condamnation ayant exactement les mêmes conséquences juridiques que celles que les demandeurs recherchaient par leurs conclusions *in solidum*, savoir une condamnation de chacun des défendeurs à payer la totalité de la dette de telle façon que l'acquittement par un libère tous les autres mais sans les autres effets spéciaux de la solidarité. Vu qu'en la présente cause ces autres effets de la solidarité n'ont pas besoin d'être considérés, il ne paraît pas qu'il y ait lieu d'intervenir pour modifier la formule adoptée par la Cour d'appel ce qui n'implique cependant aucune expression d'opinion sur cette question de solidarité.

Je suis d'avis de rejeter les appels avec dépens.

Appels rejetés avec dépens.

Procureur de l'appelant Fernand Proulx: Brissette, St-Jacques et Dureault, Longueuil.

Procureur de l'appelante Dame Odilon Benoît: Jacques Pagé, Sherbrooke.

Procureurs des intimés: Letarte, St-Hilaire, De Blois, De Bané, Proulx, Becotte et Parent, Québec.

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*Mai 22
Juin 26

RODRIGUE CHARTIER et ANDRÉ CHARTIER (*Demandeurs*) ..... APPELANTS;

ET

LIONEL LARAMÉE (*Défendeur*) ..... INTIMÉ.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Automobile—Collision entre motocyclette et camion—Partage de responsabilité—Second accident à l'hôpital—Responsabilité—Suite directe du premier accident—Code de la route, S.R.Q. 1964, c. 231, art. 40(13), (18).

L'appelant, alors âgé de 17 ans, a subi une fracture ouverte du tibia et une fracture multiple du fémur vers 9 h. 30 du soir, le 10 juin 1965, alors que sa motocyclette entra en collision avec un petit camion qui, venant en sens inverse, a fait soudainement un virage à gauche sans que le chauffeur du camion n'ait précédemment indiqué son intention autre-

*CORAM: Les Juges Fauteux, Abbott, Judson, Hall et Pigeon.

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ment que par un geste du bras. L'accident est survenu dans une agglomération urbaine sur une route bien éclairée. Le temps était clair et le pavé sec. D'après les constatations faites après l'accident, la trace laissée par la motocyclette de l'appelant, qui avait appliqué les freins en voyant la manœuvre du camion, était de 68 pieds. Une fois à l'hôpital l'appelant a été victime d'une seconde fracture lorsqu'il tenta, avec l'autorisation de son médecin, de se lever et de marcher à l'aide de béquilles sur sa jambe qui n'avait pas été blessée. Il perdit l'équilibre en voulant franchir une porte munie d'un ressort. La Cour supérieure sur la poursuite du père de l'appelant, qui agissait en sa qualité personnelle et en tant que tuteur, a imputé l'accident à la faute commune du motocycliste et du camionneur. Quant aux dommages subis par l'appelant en raison de sa seconde fracture à l'hôpital, le juge de première instance a conclu qu'ils n'étaient pas directement imputables à l'accident de circulation. La Cour d'appel a confirmé la décision rendue par la Cour supérieure sur l'un et l'autre point. L'appelant, devenu majeur, a interjeté appel à cette Cour. Le père a obtenu l'autorisation de se joindre à lui comme appelant pour faire valoir sa réclamation personnelle, même si le montant réclamé était inférieur à $10,000.

Arrêt: L'appel est accueilli.

En l'absence de preuve d'une faute imputable au motocycliste et ayant contribué à l'accident, l'intimé doit être tenu totalement responsable, parce qu'il n'a pas observé les dispositions du *Code de la route* en s'engageant à gauche de la ligne médiane pour tenter de compléter son virage sans s'assurer qu'aucun véhicule ne venait en sens inverse.

Étant donné que la seconde fracture n'est nullement attribuable à une faute de la victime et que, d'autre part, sa condition était une conséquence directe du premier accident, c'est à ce premier accident qu'il faut rattacher la seconde fracture subie à l'hôpital.

Motor vehicle—Collision between a truck and a motorcycle—Contributory negligence—Second accident in hospital—Whether directly attributable to the first accident—Highway Code, R.S.Q. 1964, c. 231, s. 40(13), (18).

On the evening of June 10, 1965, at approximately 9:30 (P.M.), the appellant, who was then 17 years of age, suffered an open fracture of his shin-bone and a multiple fracture of his thigh-bone when the motorcycle he was riding on collided with a small size truck coming in the opposite direction. The driver of the truck had suddenly attempted to complete a left turn without signalling his intention otherwise than by a sign with his arm. The accident happened in an urban area on a well lighted road. It was a clear night and the pavement was dry. According to the findings made after the accident the tire marks left on the pavement by the motorcycle when the appellant applied the brakes after he had noticed the truck move extended over a distance of sixty-eight feet. Once in the hospital the appellant sustained a further fracture of his injured leg. While he attempted, with his doctor's permission, to get out of his bed and to walk on his other leg using the assistance of crutches, he lost his balance and fell as he was trying to pass through a door equipped with a spring device. Upon a claim by the appellant's father, who was acting both for himself and as his son's tutor, the Superior Court found that both the driver of the motorcycle and the driver

of the truck were at fault. As regards the damages sustained by the appellant by reason of his leg being fractured a second time at the hospital, the Court expressed the view that his further injuries were not directly attributable to the traffic accident. The Court of Appeal confirmed the above decision of the Superior Court on both points. The appellant, now of full age, appealed to this Court. The father was authorized to join in the action although his claim was under $10,000.

Held: The appeal should be allowed.

In the absence of a fault attributable to the driver of the motorcycle which would have contributed to the accident, the respondent should be held fully liable, in that he had not complied with the provisions of the *Highway Code* by crossing the center line and entering the left hand side of the road without making sure that there was no vehicle coming in the opposite direction.

In view of the fact that the second fracture was in no way attributable to the victim's fault and that, on the other hand, his condition was a direct consequence of the first accident, both accidents should be regarded as interrelated.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], affirming a judgment of Veilleux J. Appeal allowed.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], confirmant un jugement du Juge Veilleux. Appel accueilli.

Gérard G. Boudreau, pour les appelants.

Gérald Allaire, pour l'intimé.

Le jugement de la Cour fut rendu par

LE JUGE PIGEON:—L'appelant Rodrigue Chartier, alors âgé de 17 ans, roulait en motocyclette dans une route provinciale à Bromptonville. L'intimé, qui venait en sens inverse au volant d'un petit camion, fit soudainement un virage à gauche pour s'engager dans une rue transversale. Malgré un freinage énergique, la motocyclette vint frapper en plein milieu le flanc droit du camion et le motocycliste fut grièvement blessé subissant une fracture ouverte du tibia droit de même qu'une fracture ouverte comminutive et multi-fragmentaire du fémur droit. Pour comble de malheur, alors que la victime était à l'hôpital et y marchait avec des béquilles, un faux mouvement lui fit porter une partie de son

[1] [1969] B.R. 80.

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poids sur la jambe blessée provoquant la rupture de la fracture du fémur en voie de guérison et il a fallu faire ultérieurement une réduction sanglante avec greffe osseuse.

La Cour supérieure, sur la poursuite du père agissant tant personnellement qu'en qualité de tuteur, a jugé l'accident imputable à la faute commune du motocycliste et du camionneur. De plus, elle a considéré les dommages découlant de la seconde fracture à l'hôpital comme n'étant pas imputables à l'accident de circulation, de telle sorte que l'intimé n'a été condamné à payer que la moitié d'une partie du préjudice total.

La Cour d'appel ayant confirmé, le motocycliste devenu majeur s'est pourvu devant nous et permission a été accordée à son père de se joindre à lui comme appelant pour faire valoir sa réclamation personnelle quoique le montant soit inférieur à $10,000.

L'accident est survenu dans un chemin pavé de 40 pieds de largeur, rue principale de Bromptonville. C'était le 10 juin 1965, vers 9 h. 30 du soir, le temps était clair et le pavé sec. D'après la version non contredite du motocycliste, son phare était allumé. Comme le dit le juge de première instance:

> Il est assez difficile de comprendre la version du défendeur qui nous dit qu'il n'a pu voir la motocyclette alors qu'il pouvait voir 500 pieds devant lui.

Cependant, il a partagé la responsabilité par le motif suivant:

> Quant au jeune Rodrigue Chartier, il devait certainement aller plus vite qu'il nous dit, car avant de venir en collision avec le véhicule du défendeur, sa motocyclette a laissé des traces sur une distance de 68 pieds. S'il avait été à une vitesse moindre, vu la largeur de la rue, il aurait pu contourner le véhicule du défendeur et éviter la collision. Dans ces circonstances, la responsabilité sera partagée également.

Il s'agit essentiellement d'une question de fait sur laquelle le jugement de première instance a été confirmé en appel, par conséquent, suivant une règle depuis longtemps établie (*Lefeunteum c. Beaudoin*)[2], nous ne devons intervenir que s'il y a clairement erreur dans l'appréciation de la preuve. Celle-ci est extrêmement succincte. Le défendeur qui circulait dans une rue bien éclairée, on voit les réverbères sur les photographies, déclare simplement qu'il n'a rien vu venir. André Ouellette, qui était assis à côté de lui dans le

[2] (1897), 28 R.S.C. 89.

camion, dit qu'il a aperçu la motocyclette «trop vite pour dire un mot», il ajoute qu'il n'a «pas remarqué s'il y avait de l'éclairage dessus» et il relate qu'après le choc le défendeur a dit: «veux-tu bien me dire qui c'est qui nous frappe à l'arrière comme ça?»

Quant au motocycliste, il affirme qu'il a appliqué les freins à environ 60 pieds du camion au moment où celui-ci commençait à faire son virage à gauche sans l'avoir préalablement signalé par un feu clignotant. Cela n'est pas contredit par l'intimé qui dit «j'ai sorti mon bras». Le chiffre de 68 pieds mentionné par le juge de première instance a été fourni par l'agent de la paix qui a mesuré la trace après l'accident. Aucune preuve n'a été faite de la vitesse qu'il fallait en déduire. De même, aucune preuve n'a été faite qu'à 30 milles à l'heure, vitesse maximum permise à l'endroit dont il s'agit, le motocycliste aurait pu contourner le camion et éviter la collision. On sait cependant, comme les photographies l'indiquent, que le motocycliste dévalait une pente appréciable. Dans ces conditions, où sont dans la preuve les éléments nécessaires pour conclure à un excès de vitesse? Nous ne savons pas quelle influence la déclivité a pu jouer dans la longueur de la trace, n'ayant aucune indication précise à cet égard. De même, rien ne nous fait voir si la longueur de la trace de freinage pour la motocyclette dont il s'agit doit être sensiblement la même que pour une automobile. Par contre, nous savons que la visibilité était d'au moins 500 pieds ce qui fait que l'on voit fort mal quel rôle une vitesse excessive aurait pu jouer dans cet accident.

Pour ce qui est de la possibilité de contourner le camion, la seule preuve est la réponse du motocycliste à la question du juge: «j'étais rendu trop proche». On voit mal comment le tribunal pouvait juger autrement en l'absence de toute preuve à l'encontre de cette affirmation, on voit également mal comment cette manœuvre aurait pu se faire tout en freinant, mais sans freiner, il aurait fallu passer derrière le camion avant qu'il ne soit engagé dans la rue transversale. Au reste, s'il est vrai que la rue est large, les photographies montrent au centre une double ligne blanche qu'il est interdit de franchir. En le faisant le motocycliste, dont la vue était obstruée par le camion, risquait d'aller heurter de face un véhicule venant en sens inverse et c'est ce qu'il a déclaré au juge avoir redouté.

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Le Juge Pigeon

Les faits de la présente cause sont substantiellement identiques à ceux qui ont fait l'objet de l'arrêt de notre Cour dans *Latreille c. Lamontagne et Carrière*[3] et il convient d'y appliquer ce que mon collègue, le juge Fauteux, y a dit au nom de la majorité (à p. 104):

> En droit, l'intimé qui voulait tourner à gauche, devait, suivant le *Code de la route,* 8-9 Eliz. II, c. 67, art. 36, para. 18, s'approcher de la ligne médiane de la route 29, continuer en ligne droite jusqu'à la ligne médiane de la rue St-Édouard et effectuer le virage à gauche dès que la voie était libre. Il devait aussi, suivant le para. 13 du même article, céder le passage à tout véhicule venant en direction inverse et entrant dans l'intersection ou qui en était si près qu'il pouvait y avoir danger de tourner devant ce véhicule. Ce qui est certain, c'est qu'en quittant sa droite pour conduire à gauche de la ligne blanche, avant d'arriver au côté est de l'intersection, puis, étant arrivé à ce point, en tentant de reprendre sa droite, comme semble fortement l'indiquer la position des roues d'avant du camion, ou en immobilisant, comme lui-même l'a prétendu, son véhicule complètement à gauche de la ligne blanche, Carrière a violé le *Code de la route,* il a créé une situation propre à jeter la confusion dans l'esprit des personnes venant en sens opposé, et au regard de toutes les circonstances révélées par la preuve, il a créé le danger que ces dispositions du *Code de la route* avaient pour objet de conjurer et dont l'inobservance, en l'espèce, eut l'accident pour conséquence.

Avec déférence pour le juge de la Cour supérieure et ceux de la Cour d'appel, il faut donc dire que l'on a fait erreur en partageant également la responsabilité entre celui qui a fait la manœuvre illégale, cause de l'accident, et celui qui n'a pu réussir à l'éviter. En l'absence de preuve d'une faute imputable au motocycliste et ayant contribué à l'accident, l'intimé doit en être tenu totalement responsable.

Pour ce qui est maintenant de l'accident survenu à l'hôpital et qui a causé une seconde fracture, le juge de première instance a dit simplement: «les dommages comme résultat de cette chute ne doivent pas être imputés au défendeur». En Cour d'appel le juge Casey a dit:

> After having been in the hospital with a broken leg for some time, Appellant's son was allowed to go home, but not to use the injured leg. Some time later, he returned to the hospital to have his cast removed. While there, he had an accidental fall and broke the same leg again.
>
> The trial judge refused to allow any of the damages arising out of this second accident. In the circumstances disclosed by the evidence, I am satisfied that this decision was well founded.

Quelles sont ces circonstances révélées par la preuve? On les trouve uniquement dans le témoignage de la victime. En effet, tout ce que le médecin a dit c'est qu'à ce moment-

[3] [1967] R.C.S. 95.

là il lui avait donné la permission de se lever et de marcher sur une jambe, celle qui n'avait pas été blessée, avec des béquilles. Il ne sait pas ce qui s'est passé. Quant au blessé, il a au procès répété en substance ce qu'il avait dit à l'interrogatoire préalable:

> Le matin, après avoir déjeuné, je suis parti pour aller à la toilette, pour la porte c'est une chose à air, pour revenir elle revient assez vite, à peu près un pied avant d'être fermée complètement, elle revient tranquillement, j'ai mis ma béquille pour la retenir, la porte a frappé dessus, j'ai perdu l'équilibre. Pour me garantir, j'ai mis mon pied à terre, en mettant mon pied à terre, ça recassé et j'ai tombé sur le dos.

Peut-on conclure de cette preuve que ce second accident est imputable à une faute de la victime ou doit-on, au contraire, le rattacher au premier dont l'intimé est responsable? Il est évident que si le jeune homme n'avait pas subi une première fracture par la faute de l'intimé, il n'aurait pas subi la seconde. On ne peut pas lui reprocher d'avoir marché avec des béquilles. Son médecin le lui avait prescrit. Évidemment, il lui avait également dit de ne pas faire porter son poids sur la jambe blessée mais de se supporter avec des béquilles. Cependant, sans le faire exprès, il a perdu l'équilibre en voulant passer dans une porte à ressort. Faut-il voir là une faute? Celui qui est obligé de marcher avec des béquilles n'est évidemment pas entraîné à le faire mais on ne peut sûrement pas le lui reprocher. S'il est obligé de s'y aventurer, c'est comme conséquence du premier accident dont la responsabilité est imputable à l'intimé.

Dans son mémoire, l'appelant fait état d'instructions données à un jury par le juge Yves Bernier de la Cour supérieure dans les termes suivants:

> Alors, ce sera à vous de décider si cette deuxième section du tendon est due à l'accident d'automobile, c'est-à-dire à l'état général où il fut mis par cet accident, ou si c'est dû à une faute personnelle du demandeur, de sa part en cette occasion au retour de l'hôpital. A-t-il pris un risque, a-t-il fait quelque chose d'insensé, a-t-il été négligent? Et vous pouvez vous demander si sa condition dans laquelle il se trouvait n'est pas aussi une cause à ce deuxième incident.
>
> Était-ce dû à l'état du tendon, à sa faiblesse, à la faiblesse de celui-ci ou à une conduite négligente ou répréhensible de la part du demandeur?

Ici la preuve ne démontre pas que la seconde fracture soit le résultat d'une faute de la victime. Comme elle est évidemment par ailleurs la conséquence de la condition dans laquelle cette dernière s'est trouvée par suite du premier accident, il faut l'y rattacher.

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Le Juge Pigeon

Le juge de première instance ayant fait l'estimation des dommages en excluant ce qu'il croyait devoir rattacher à la seconde fracture, une nouvelle estimation devient nécessaire.

Pour les souffrances, la preuve révèle que ce qui en a occasionné le plus a été la dernière intervention avec prélèvement d'un greffon sur la crête iliaque. Il y a donc lieu d'accorder $1,000 au lieu des $300 alloués par le juge de première instance. Pour les inconvénients, il semble à propos de doubler le montant de $200. Pour l'incapacité totale temporaire, la preuve justifie le montant réclamé par l'appelant dans son factum, savoir $5,785. Par contre, il ne semble pas que l'on doive modifier le montant de $8,000 accordé pour incapacité partielle permanente vu que le juge de première instance ne paraît pas avoir considéré que celle-ci avait été aggravée par l'accident survenu à l'hôpital. Pour ces raisons, le montant accordé à l'appelant Rodrigue Chartier est fixé à $15,185 au lieu de $5,250 (la moitié de $10,500).

Quant à la condamnation en faveur de l'appelant André Chartier, il faut ajouter à la somme de $1,873.50, à laquelle le juge de première instance a estimé ses dommages avant d'en retrancher la moitié pour responsabilité partagée, la somme de $550 pour partie du compte du chirurgien imputable au second accident et $100 pour frais de voyage et de déplacement à ce sujet. La condamnation en faveur d'André Chartier sera donc portée à $2,523.50.

Pour ces motifs, je suis d'avis d'accueillir l'appel des appelants avec les dépens d'un seul appel pour le tout en cette Cour et en Cour d'appel; d'infirmer le jugement de la Cour d'appel et de modifier le jugement de la Cour supérieure pour porter à $2,523.50 le montant accordé au demandeur André Chartier, et à $15,185 la somme payable à Rodrigue Chartier à titre de demandeur ayant repris l'instance à la place de son tuteur.

Appel accueilli avec dépens.

Procureur des appelants: Gérard Boudreau, Sherbrooke.

Procureurs de l'intimé: Leblanc, Barnard, Leblanc, Allaire, Bédard & Fournier, Sherbrooke.

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ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Constitutional law—Ontario insurance company licenced to do business in Ontario ordered to be wound-up under federal statute—Administration of deposit whether governed by provincial or federal legislation—Winding-up Act, R.S.C. 1952, c. 296. ss. 33, 165(1), 173—"Charge" in s. 173—Insurance Act, R.S.O. 1960, c. 190, ss. 41, 42(5), 48—Whether deposit must be transferred to liquidator.

The Ontario Insurance Act provides, *inter alia,* that every insurer carrying on business in Ontario shall be required to deposit with the Minister a defined amount of approved securities which are vested in the Minister for the protection of the insured. *The Insurance Act* further provides that, should a claim be made against the fund, the order of priority shall favour those who have suffered losses and that those who have claims for unearned premiums should come second. The order of priority provided for in the *Winding-up Act* ranks both claims for losses and claims for unearned premiums on an equal footing. On December 13, 1966, The Wentworth Insurance Company which had been incorporated under the laws of the Province of Ontario and had carried out business in that province with its head office in Toronto, was ordered to be wound-up and a provisional liquidator was appointed. The appointment of a permanent liquidator was made on January 27, 1967. In the meantime, by order dated December 19, 1966, the provisional liquidator was appointed receiver so to administer the deposit pursuant to the provisions of *The Insurance Act* without prejudice to the right of the provisional and of the permanent liquidator to administer the fund under the *Winding-up Act.* The Master's interim report required the liquidator to administer the fund in accordance with *The Insurance Act.* Upon appeal by these policyholders who had claims for refund of unearned premiums the Court of first instance confirmed the report. Upon

*PRESENT: Cartwright C.J. and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

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further appeal, the Court of Appeal unanimously held that the interim report should be varied and that the fund and securities be deposited in the manner provided for in the *Winding-up Act*. Leave to appeal to this Court was granted.

Held (Ritchie, Hall, Spence and Pigeon JJ. dissenting): The appeal should be dismissed.

Per Cartwright C.J. and Fauteux, Abbott, Martland and Judson JJ.: The words of s. 165(1) of the *Winding-up Act* regarding the transfer to the liquidator of all funds and securities that may be on deposit with any government in Canada or with trustees for the benefit of policyholders are plain and cannot mean anything else than that the fund deposited had to be distributed according to the provisions of that Act. Furthermore, the provisions of *The Insurance Act* which purports to lay down a scheme of distribution upon insolvency were invalid *per se* or, in any event, were certainly overborne by the distribution provisions of the *Winding-up Act* with which they cannot be compatibly administered.

Section 173 of the *Winding-up Act*, which provides that "the priority of any mortgage, lien or charge on the property of the company" shall not be prejudiced by reason of the winding-up, is not applicable to the present case. The word "charge" does not include any type of interest created by the alleged statutory trust and refers to an interest in existence, whereas the policyholders acquired no interest except perhaps, at the very most, a prospective one, prior to the administrative order which was, in fact, made at a date subsequent to the winding-up.

Per Hall, Ritchie, Spence and Pigeon JJ., *dissenting*: The power granted to the Minister under *The Insurance Act of Ontario* to require a deposit as a condition precedent to the granting of a licence must include as a necessary consequence the power to administer it if such power is not to become, to a great extent, illusory. The vital question is, therefore, not the exclusive jurisdiction of the Parliament of Canada on matters of bankruptcy and insolvency but whether Parliament, by enacting section 165(1) of the *Winding up Act*, in fact, intruded in a field of legislation, namely insurance, which by virtue of section 92 of the *B.N.A. Act* and of a succession of decisions in the Privy Council and in this Court, has been held as exclusively subject to provincial law. *The Insurance Act* is in "pith and substance" insurance legislation and consequently its disputed sections, in so far as they relate to the administration of a deposit, deal with bankruptcy and insolvency only as incidental to the right to legislate regarding insurance. It follows that section 165(1) of the *Winding-up Act*, by attempting to divert the deposit of its true purpose was *ultra vires* of Parliament.

Assurances—Droit constitutionnel—Compagnie opérant en vertu d'un permis de la province d'Ontario mise en liquidation sous l'autorité d'une loi fédérale—Argents et titres déposés auprès du ministre devaient-ils être gérés aux termes de la loi provinciale ou de la loi fédérale—Loi sur les liquidations, S.R.C. 1952, c. 296, art. 33, 165(1), 173—Sens du mot "charge" dans l'art. 173—Insurance Act, R.S.O. 1960, c. 190, art. 41, 42(5), 48—Argents et titres déposés auprès du ministre doivent-ils être confiés au liquidateur.

La loi d'Ontario sur les assurances stipule, entre autres choses, que tout assureur avant de se livrer au commerce d'assurance doit déposer auprès du ministre un certain montant en titres agréés dont le ministre est saisi pour la protection des assurés. La *Loi sur les assurances* prévoit en outre que, dans le cas d'une réclamation contre ce dépôt, les créances de ceux qui ont droit à une indemnité contre les pertes sont préférées aux créances de ceux qui ont droit à un remboursement de primes. L'ordre de préférence établi par la *Loi sur les liquidations* place sur un pied d'égalité les réclamations contre les pertes et celles portant sur un remboursement de primes. La compagnie Wentworth Insurance, dont le siège social était à Toronto, qui avait été constituée suivant les lois de la province d'Ontario et avait exercé le commerce d'assurance dans cette province, fut mise en liquidation le 13 décembre 1966 conformément aux termes de la *Loi sur les liquidations*. Un liquidateur provisoire fut désigné. La nomination d'un liquidateur permanent fut faite le 27 janvier 1967. Précédemment, par une ordonnance, datée le 19 décembre 1966, le liquidateur provisoire avait été nommé receveur aux fins de gérer le dépôt suivant les exigences de la *Loi sur les assurances* et sans préjudice aux droits du liquidateur provisoire et du liquidateur permanent désignés en vertu des dispositions de la *Loi sur les liquidations*. Le conseiller-maître à la Cour suprême de l'Ontario a, dans son rapport provisoire, exigé que le liquidateur administre le dépôt suivant les dispositions de la *Loi sur les assurances*. La Cour de première instance, qui a entendu les appels des détenteurs de police qui réclamaient un remboursement de primes, a confirmé le rapport. La Cour d'appel, à l'unanimité, a jugé que le rapport provisoire devait être modifié et que les argents et les titres devaient être déposés en la manière prescrite par la *Loi sur les liquidations*. L'autorisation d'interjeter appel à cette Cour a été accordée.

Arrêt: L'appel doit être rejeté, les Juges Ritchie, Hall, Spence et Pigeon étant dissidents.

Le Juge en Chef Cartwright et les Juges Fauteux, Abbott, Martland et Judson: Les termes de l'art. 165(1) de la *Loi sur les liquidations* concernant le transfert au liquidateur des fonds et valeurs dont peut être dépositaire tout gouvernement au Canada ou pouvant être en dépôt chez des fiduciaires pour protéger les porteurs de polices d'assurance sont clairs et ne peuvent pas signifier autre chose que ces fonds et valeurs doivent être répartis en la manière prescrite par cette loi. De plus, les dispositions de la *Loi sur les assurances* qui prétendent imposer un autre ordre de distribution au cas d'insolvabilité sont nulles de plein droit ou, à tout le moins, sont devenues inopérantes par l'effet des dispositions de la *Loi sur les liquidations* régissant l'ordre de distribution avec lesquelles elles ne sont plus compatibles.

L'article 173 de la *Loi sur les liquidations* aux termes de laquelle la liquidation ne doit pas porter préjudice à «la priorité de toute hypothèque, privilège ou charge» ne s'applique pas à la présente cause. Le mot «charge» ne comprend aucun des droits accordés par cette prétendue fiducie et ne s'applique qu'à un droit existant, tandis que les détenteurs de polices d'assurance n'avaient tout au plus qu'un droit éventuel avant la date de l'ordonnance administrative qui, de fait, fut postérieure à la liquidation.

Les Juges Ritchie, Hall, Spence et Pigeon, *dissidents:* Les pouvoirs conférés au ministre aux termes de la *Loi d'Ontario sur les assurances*

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d'exiger un dépôt avant qu'un permis ne puisse être accordé doit avoir pour conséquence nécessaire la faculté de l'administrer, sans quoi ces pouvoirs, dans une large mesure, risquent de devenir illusoires. La question essentielle n'est donc pas celle de la compétence exclusive du Parlement du Canada en matière de faillite ou d'insolvabilité, mais celle de savoir si le Parlement fédéral, en introduisant l'art. 165(1) dans la *Loi sur les liquidations* n'a pas, en fait, empiété sur un domaine législatif, à savoir l'assurance, qui en vertu des dispositions de l'art. 92 de l'*A.A.N.B.* et suivant les décisions répétées du Conseil Privé, fait partie du domaine exclusif des législatures provinciales. La *Loi sur les assurances* est dans son essence et dans sa réalité objective une législation régissant l'assurance et, en conséquence, les articles en litige, dans la mesure où ils se rapportent à l'administration du dépôt, ne traitent de faillite et d'insolvabilité que d'une façon accessoire inséparable du droit de légiférer en matière d'assurance. Il s'ensuit que l'art. 165(1) de la *Loi sur les liquidations*, parce qu'il cherche à détourner le dépôt de son véritable sens, est *ultra vires*.

APPEL d'un jugement de la Cour d'Appel de la province d'Ontario[1], infirmant un jugement du Juge Hartt portant sur la validité des articles de *la Loi d'Ontario sur l'Assurance* prévoyant un ordre de distribution au cas d'insolvabilité. Appel rejeté, les Juges Ritchie, Hall, Spence et Pigeon étant dissidents.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing the judgment of Hartt J. on the issue of the validity of the distribution provisions upon insolvency as found in *The Insurance Act of Ontario*. Appeal dismissed, Ritchie, Hall, Spence and Pigeon JJ. dissenting.

F. W. Callaghan, Q.C., and *R. Scott*, for the appellant.

H. H. Siegal, Q.C., for Policyholders of Wentworth Ins. and others claiming for losses.

Fred M. Catzman, Q.C., and *Marvin A. Catzman*, for Policyholders of Wentworth Ins. and others claiming for refund of unearned premiums.

Carl H. Morawetz, Q.C., for the Clarkson Co., liquidator.

N. A. Chalmers, Q.C., and *S. F. Weislo*, for the Attorney General of Canada.

Claude Gagnon, Q.C., for the Attorney General of Quebec.

S. Friedman, Q.C., for the Attorney General of Alberta.

[1] [1968] 2 O.R. 416.

The judgment of Cartwright C.J. and Fauteux, Abbott, Martland and Judson JJ. was delivered by

JUDSON J.:—Under the provisions of *The Ontario Insurance Act*, R.S.O. 1960, c. 190, s. 41, every insurer carrying on business in Ontario is required to deposit with the Minister approved securities in certain defined amounts. While these securities are on deposit the property is vested in the Minister without any formal transfer (s. 42(5)). Nevertheless, the insurer is entitled to receive the interest on the deposits as long as it satisfies the conditions of the Act and no notice of any final judgment against the insurer or order for its winding-up or for the distribution of its assets or for the administration of its deposit is given to the Minister.

By order dated December 13, 1966, Wentworth Insurance Company was ordered to be wound up under the *Winding-up Act*, R.S.C. 1952, c. 296. A provisional liquidator was appointed the same day and a permanent liquidator on January 27, 1967. In the meantime, by order dated December 19, 1966, the company's deposit of securities under s. 41 of *The Insurance Act* was ordered to be administered pursuant to the provisions of that Act, and the provisional liquidator was appointed receiver so to administer the deposit. This order was made without prejudice to the rights of the provisional liquidator and the permanent liquidator under the *Winding-up Act* and, particularly, s. 165 of that Act.

It is apparent that the issue with which we are concerned was recognized very early in the proceedings. *The Ontario Insurance Act* provides for a certain order of priorities for claimants against this fund. Briefly, those insured persons who have suffered losses come first. Those who have claims for unearned premiums come second. Under the *Winding-up Act* these two classes of creditors rank *pari passu*.

In the winding-up proceedings, in his interim report, dated September 19, 1967, the Master found that the liquidator was required to administer the fund in the manner provided by ss. 58 and 59 of *The Insurance Act*. There was an appeal from this report by those policyholders who had claims for refunds of unearned premiums. The judge of first instance, by order dated February 21, 1968, dismissed the appeal and confirmed the report. An appeal to the

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Judson J.

Court of Appeal followed. That Court unanimously held that the appeal should be allowed and the interim report of the Master varied and an order made that the liquidator administer the funds and securities deposited as above mentioned in the manner provided by the *Winding-up Act*. Leave to appeal was granted by this Court on July 4, 1968.

The Master held that the legislation relating to the deposit was in "pith and substance" insurance legislation and that the deposit was vested in the Minister *in trust* for the benefit of the policyholders and that he should be free to deal with it according to the provisions of the *Insurance Act*. In his view, the deposit was a "charge" within the meaning of that word in s. 173 of the *Winding-up Act*, which reads as follows:

> 173. Nothing in this Part prejudices or affects the priority of any mortgage, lien or charge upon the property of the company.

Mr. Justice Hartt, while affirming the decision of the Master, did so for different reasons. In his view, the effect of s. 41 of *The Insurance Act* was to vest the deposit in the Minister in trust for the policyholders. Therefore, on ordinary principles of the law of trusts, the deposit was not the property of the company and could not be distributed on insolvency according to the *Winding-up Act*. He did not agree with the Master that s. 173 was applicable. This section only applied where there was a charge upon the company's property. He rested his judgment on the statutory trust which took the deposit out of the classification of "property of the company".

The Court of Appeal unanimously reversed this decision. Mr. Justice Laskin, speaking for the Court, conceded that Hartt J.'s reasoning would be most convincing if one had to rely solely upon s. 33 of the *Winding-up Act*. Section 33 reads:

> 33. The liquidator, upon his appointment, shall take into his custody or under his control, all the property, effects and choses in action to which the company is or appears to be entitled, and he shall perform such duties in reference to winding up the business of the company as are imposed by the court or by this Act.

However, there was s. 165(1) which was enacted to deal with this very situation. Section 165(1) reads:

> 165. (1) The funds and securities of the company in Canada that may be on deposit with any government in Canada or with trustees or otherwise held for the company or for the protection of the policyholders of

the company of the class or classes that are affected by the winding-up order shall, on order of the court having jurisdiction, be transferred to the liquidator.

He could not see how the plain words of this section could mean anything else than that the fund deposited had to be distributed according to the provisions of the *Winding-up Act*. Furthermore, he was of opinion that the provisions of *The Insurance Act* purporting to provide for a scheme of distribution upon insolvency were invalid *per se* or, in any event, were certainly overborne by the distribution provisions of the *Winding-up Act*.

And finally, there were in his view at least three reasons why s. 173 was not applicable. First, on an *ejusdem generis* construction, the word "charge" did not include the type of interest created by the alleged statutory trust. Secondly, the term "charge" refers to an interest in existence at the time of the winding-up order. Here the policyholders acquired no interest until an administration order was made. Their interest was at the very most prospective until the advent of the order. Thirdly, the winding-up order was made before the administration order. Therefore, the deposit was subject to the transfer order under s. 165(1) before the creation of any beneficial interest in the loss claimants.

I agree with the reasons of the Court of Appeal in their entirety and have nothing to add. I would dismiss the appeal and make the same order as to costs in this Court, namely, that the permanent liquidator and the competing classes of policyholders should have their costs of the appeal out of the deposit on a solicitor and own client basis. There will be no costs to or against the Attorney-General for Ontario and the Intervenants.

The judgment of Ritchie, Hall, Spence and Pigeon JJ. was delivered by

HALL J. (*dissenting*):—The Wentworth Insurance Company was incorporated under the laws of the Province of Ontario and carried on the business of insurance in Ontario, with head office at Toronto. A succession of decisions in the Privy Council and in this Court have held that the business of insurance is exclusively subject to provincial law and that by s. 92 of the *B.N.A. Act* the provinces have exclusive jurisdiction to prescribe the way in which insurance business shall be carried on in the province. Dominion legislation which encroaches upon or intermeddles with such

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exclusive provincial jurisdiction is *ultra vires* of the Dominion Parliament. *Citizens Ins. Co. v. Parsons*[2]; *A.-G. Canada v. A.-G. Alta*[3]; *Re Reciprocal Ins. Legislation*[4]; *In Re The Insurance Act of Canada*[5], *Re Home Assurance Co.*[6].

Acting within its exclusive right to legislate regarding insurance, the Province of Ontario enacted *The Insurance Act* R.S.O. 1960, c. 190. This Act is a lengthy statute with XVI Parts, 353 sections, and deals with all phases and modes of insurance, other than those specifically excluded by s. 21(4). This Act and Part VI of *The Corporations Act*, R.S.O. 1960, c. 71, was intended by the Legislature to cover the entire field of insurance and to provide a complete and comprehensive code respecting the law of insurance in the Province of Ontario. Martin J.A., as he then was, in *Crown Bakery v. Preferred Accident Insurance Company*[7] said:

> A perusal of *The Saskatchewan Insurance Act*, as it was enacted in 1915 and again in 1924-25, convinces me that the Legislature intended to cover the entire field of insurance, and to enact a complete code of law to govern all insurance contracts in the province, . . .

The *Saskatchewan Insurance Act* and *The Ontario Insurance Act* are almost identical in scope and this observation would apply equally to the Ontario legislation.

Part I of *The Insurance Act* provides for a Superintendent of Insurance by s. 2(1) which reads:

> 2. (1) A Superintendent of Insurance shall be appointed who shall exercise the powers and perform the duties vested or imposed upon him by this or any other Act, shall have the general supervision of the business of insurance in Ontario and shall see that the laws relating to the conduct thereof are enforced and obeyed.

Part II of *The Act* applies to insurance undertaken in Ontario and to all insurers carrying on business in Ontario (s. 20(1)). S. 21(1) and (2) read:

> 21. (1) Every insurer undertaking insurance in Ontario or carrying on business in Ontario shall obtain from the Minister and hold a licence under this Act.
>
> (2) Every insurer undertaking insurance or carrying on business in Ontario without having obtained a licence as required by this section is guilty of an offence.

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[2] [1881] 7 App. Cas. 96, 51 L.J.P.C. 11.
[3] [1916] 1 A.C. 588, 26 D.L.R. 288, 10 W.W.R. 505, 25 Que. K.B. 187.
[4] [1924] A.C. 328, [1924] 1 D.L.R. 789, 2 W.W.R. 397, 41 C.C.C. 336.
[5] [1932] A.C. 41, [1932] 1 D.L.R. 97, 53 Que. K.B. 34.
[6] [1949] 2 D.L.R. 382, [1949] 1 W.W.R. 656, 16 I.L.R. 56.
[7] [1933] 2 W.W.R. 33 at p. 41.

and prohibit anyone undertaking insurance or carrying on the business of insurance in Ontario unless licenced to do so. A licence issued under s. 21(1) authorizes, as stated in s. 23:

23. (1) Upon due application and upon proof of compliance with this Act, the Minister may issue a licence to undertake contracts of insurance and carry on business in Ontario to any insurer coming within one of the following classes:

1. Joint stock insurance companies.
2. Mutual insurance corporations.
3. Cash-mutual insurance corporations.
4. Fraternal societies.
5. Mutual benefit societies.
6. Companies duly incorporated to undertake insurance contracts and not within classes 1 to 5.
7. Reciprocal or inter-insurance exchanges.
8. Underwriters or syndicates of underwriters operating on the plan known as Lloyds.
9. Pension fund associations.

(2) A licence issued under this Act authorizes the insurer named therein to exercise in Ontario all rights and powers reasonably incidental to the carrying on of the business of insurance named therein that are not inconsistent with this Act or with its act or instrument of incorporation or organization.

Certain conditions precedent to the issuing of a licence are set out in s. 32.

S. 41 and 42 which read:

41. (1) Every insurer carrying on the business of insurance in Ontario *shall, before receiving a licence under this Act, deposit approved securities* with the Minister in the following amounts: (emphasis added)

1. Where the insurer undertakes life insurance—$50,000.
2. Where the insurer undertakes any one or more classes of insurance other than life,
   i. in Ontario only—$25,000.
   ii. in Ontario and elsewhere—$50,000.

(2) The Superintendent may require the deposit referred to in subsection 1 to be increased, either before or after granting the licence, to such amount as he considers necessary.

(3) An insurer may voluntarily make a deposit in excess of the amount prescribed by this section, but no part of a voluntary deposit shall be withdrawn without the sanction of the Minister.

42. (1) The value of such securities shall be estimated at their market value, not exceeding par, at the time they are deposited.

(2) If any other than approved securities are offered as a deposit, the Minister may accept them on such valuation and on such conditions as he deems proper.

(3) If the market value of any securities that have been deposited by an insurer declines below that at which they were deposited, the

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Minister may notify the insurer to make such further deposit as will ensure the accepted value of all the securities deposited by the insurer being equal to the amount that is required by this Act to be deposited.

(4) On failure by the insurer to make such further deposit within sixty days after being called upon so to do, the Minister may suspend or cancel the licence of the insurer.

(5) *The property in any stock, bonds or debentures deposited with the Minister under this Act or any predecessor thereof is vested in the Minister by virtue of his office without any formal transfer while such stock, bonds or debentures form the whole or any part of the deposit required by this Act.* (emphasis added)

(6) So long as the conditions of this Act are satisfied and no notice of any final judgment against the insurer or order for its winding-up or for the distribution of its assets or for administration of its deposit is given to the Minister, the insurer is entitled to receive the interest upon the securities forming the deposit.

are the sections which provide for the deposit, and it will be observed that the deposit called for by section 41 is made a condition precedent to receiving a licence under the Act.

In sections 46 to 73 the Act provides for the administration of the deposit required by s. 41. Specifically, sections 48 to 52 provide as follows:

48. (1) The deposit made by an insurer under this Act is subject to administration in the manner hereinafter provided.

(2) *Subject to sections 69 and 70, the deposit shall be held and administered for the benefit of all insured persons under Ontario contracts and they are entitled to share in the proceeds of the deposit.* (emphasis added)

(3) An insured person under an Ontario contract is entitled to share in the proceeds of the deposit in respect of,

(a) a claim for a loss that is covered by the contract and that occurred before the termination date fixed under section 53 of this Act or section 233 of The Corporations Act; or

(b) a claim for refund of unearned premiums, except in the case of life insurance; or

(c) a claim for payment of the legal reserve in respect of the contract in the case of life insurance; or

(d) claims under both clauses a and b.

49. (1) An application for administration of a deposit shall be made by originating notice of motion to a judge of the Supreme Court.

(2) The application shall be made in the county or district,

(a) in which the head office of the insurer is situate; or

(b) in which the chief office of the insurer in Ontario is situate if its head office is out of Ontario.

50. (1) With the approval of the Minister, the Superintendent may make application for administration at any time when, in his opinion, it is necessary or desirable for the protection of the insured person entitled to share in the proceeds of the deposit.

(2) In the case of a reciprocal deposit held in Ontario, the superintendent of insurance of a reciprocating province may make application for administration of the deposit.

(3) An insured person entitled to share in the proceeds of a deposit may make application for administration of the deposit upon producing evidence,

(a) that he has served the Superintendent with a notice in writing of his intention to make application if the Superintendent or the superintendent of insurance of a reciprocating province does not apply; and

(b) that sixty days have elapsed since the service of the notice and that no application for administration of the deposit has been made.

(4) In the case of a reciprocal deposit, if the Superintendent is served with a notice as provided in subsection 3, he shall forthwith notify the superintendent of insurance of each reciprocating province that he has been so served.

51. (1) The applicant for administration of the deposit shall serve the originating notice of motion at least ten days before the date specified in the notice for the making of the application,

(a) upon the insurer or, where the insurer is in liquidation, upon the liquidator of the insurer; and

(b) upon the Superintendent; and

(c) in the case of a reciprocal deposit, upon the superintendent of insurance of each reciprocating province.

(2) An applicant for administration is entitled to an order for administration upon proof,

(a) that the licence of the insurer has been cancelled, and that its assets are insufficient to discharge its outstanding liabilities; or

(b) that an order has been made for the winding up of the insurer, or

(c) that the insurer has failed to pay,

(i) an undisputed claim for sixty days after it has been admitted, or

(ii) a disputed claim after final judgment and tender of a valid discharge,

if the claim arose under a contract of insurance in respect of which the deposit is subject to administration.

52. (1) Upon granting an order for administration, the court shall appoint a receiver to administer the deposit.

(2) Where a provisional liquidator or a liquidator has been appointed under this Act or The Corporations Act or a liquidator has been appointed under the Winding-up Act (Canada) to wind up a company that has made a deposit under this Act, the court may appoint the provisional liquidator or the liquidator as the receiver to administer the deposit.

(3) Thereupon the provisional liquidator or the liquidator shall administer the deposit for the benefit of the insured persons entitled to share in the proceeds thereof in accordance with the provisions of and the priorities set out in this Act.

Sections 58 and 59 read:

58. The proceeds of the deposit are payable,

(a) first, in payment of the receiver and of all costs and expenses incurred by him in the administration of the deposit and in payment of the remuneration, costs and expenses of the provisional liquidator as ordered by the Minister under section 229 of *The Corporations Act*;

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(b) second, in payment of the insured persons who are entitled to share in the proceeds of the deposit in accordance with the priorities set out in section 59.

59. (1) Except in the case of life insurance, each insured person who claims in respect of a loss covered by the contract that occurred before the termination date fixed under section 53 of this Act or section 233 of *The Corporations Act* is entitled to receive payment of his approved or settled claim in full in priority to the insured persons who claim in respect of refunds of unearned premiums.

(2) Subject to subsection 1, an insured person who claims in respect of a refund of unearned premiums may claim such part of the premium paid as is proportionate to the period of his contract unexpired,

(a) at the termination date fixed by the receiver under section 53 or fixed by the provisional liquidator or the liquidator under section 233 of *The Corporations Act;* or

(b) at the date the insured person cancelled the contract, whichever is the earlier date.

(3) In the case of life insurance, each insured person who has a claim for a loss covered by the contract that occurred before the termination date fixed under section 53 of this Act or section 233 of *The Corporations Act* ranks in the distribution of the proceeds of the deposit for the approved or settled amount of the claim *pari passu* with insured persons under unmatured life insurance contracts.

(4) An insured person under an unmatured life insurance contract is entitled to the full amount of the legal reserve in respect of his contract determined by the receiver according to the valuation thereof approved by the Superintendent under this Act.

These sections must be read in conjunction with sections 231 and 232 of Part VI of *The Corporations Act*, respecting insurance corporations. These sections provide:

231. (1) The provisional liquidator or the liquidator, before any order granting administration of the deposit and before the fixing of a termination date pursuant to section 233, may arrange for the reinsurance of the subsisting contracts of insurance of the insurer with some other insurer licensed in Ontario.

(2) For the purpose of securing the reinsurance, the following funds shall be available:

1. The entire assets of the insurer in Ontario other than the deposit except the amount reasonably estimated by the provisional liquidator or the liquidator as being required to pay,

(a) the costs of the liquidation or winding up;

(b) all claims for losses covered by the insurer's contracts of insurance of which notice has been received by the insurer or provisional liquidator or liquidator before the date on which the reinsurance is effected;

(c) the claims of the preferred creditors who are the persons paid in priority to other creditors under the winding up provisions of this Act,

all of which shall be a first charge on the assets of the insurer, other than the deposit.

2. All or such portion, if any, of the deposit as is agreed upon pursuant to subsection 3.

(3) If it appears necessary or desirable to secure reinsurance for the protection of insured persons entitled to share in the proceeds of the deposit, the Minister, on the recommendation of the Superintendent, or, in the case of a reciprocal deposit, the superintendents of insurance of the reciprocating provinces, may enter into an agreement with the provisional liquidator or the liquidator, whereby, pursuant to section 47 or 71 of *The Insurance Act*, all or any part of the securities in the deposit may be used for the purpose of securing the reinsurance.

(4) The creditors of the insurer, other than the insured persons and the said preferred creditors, are entitled to receive a payment on their claims only if provision has been made for the payments mentioned in subsection 2 and for the reinsurance.

(5) If, after providing for the payments mentioned in subsection 2, the balance of the assets of the insurer, together with all or such portion, if any, of the deposit as is agreed upon under subsection 3, is insufficient to secure the reinsurance of the contracts of the insured persons in full, the reinsurance may be effected for such portion of the full amount of the contracts as is possible.

(6) No contract of reinsurance shall be entered into under this section until it is approved by the Supreme Court.

232. (1) In the winding up of an insurer that has made a deposit pursuant to *The Insurance Act*, if the person appointed as receiver to administer the deposit pursuant to section 52 of *The Insurance Act* is not the person appointed as the provisional liquidator or the liquidator under *The Insurance Act* or this Act or appointed as the liquidator under the *Winding-up Act* (Canada), as the case may be, the Supreme Court at any time in its discretion may order that the deposit and the administration thereof be transferred from the receiver to the provisional liquidator or the liquidator.

(2) Upon the making of an order under subsection 1, the provisional liquidator or the liquidator shall administer the deposit for the benefit of the persons entitled to share in the proceeds thereof in accordance with the provisions of and the priorities set out in this Act.

(3) The amount payable to the provisional liquidator or the liquidator for administering the deposit and all costs and expenses incurred by him in administering the deposit shall be paid out of the deposit in accordance with the priorities fixed by clause a of section 58 of *The Insurance Act*, but the amount payable to the provisional liquidator or the liquidator and all costs and expenses incurred by him in the winding up of the insurer shall not be paid out of the deposit but shall be paid out of and are a first charge on the assets of the insurer except as provided in subsection 3 of section 229.

It will be seen that the provisions of section 232 above correspond to those in s. 52 of *The Insurance Act*.

Wentworth Insurance Company became insolvent and was ordered to be wound up under the *Winding-up Act* R.S.C. 1952, c. 296. Clarkson Company Limited was appointed provisional liquidator on December 13, 1966 (later confirmed as permanent liquidator). On December 19, 1966, the following order was made respecting the

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deposit which Wentworth Insurance Company had been required to put up as a condition of being licenced to do business in Ontario:

UPON the application of counsel on behalf of the Superintendent of Insurance, in the presence of counsel for The Clarkson Company Limited, Provisional Liquidator of Wentworth Insurance Company under *The Winding-Up Act*, R.S.C. 1952, Chapter 296, upon reading the affidavit of Cecil Richards, the consent of The Clarkson Company Limited to act as receiver to administer the deposit of Wentworth Insurance Company under the said Insurance Act and the consent of the said Provisional Liquidator through its solicitors, filed, and upon hearing what was alleged by counsel aforesaid,

1. IT IS ORDERED that the deposit of securities deposited by Wentworth Insurance Company pursuant to Section 41 of the said Insurance Act with the Minister, as defined by the said Act, be administered pursuant to the provisions of the said Act.

2. IT IS FURTHER ORDERED that The Clarkson Company Limited be and is hereby appointed receiver to administer the said deposit pursuant to the said Act.

3. IT IS FURTHER ORDERED that The Clarkson Company Limited be and is hereby authorized to exercise in respect of the account of the insurer all or any of the powers that the Master of the Supreme Court would have if he were taking an account of the claims against the said deposit.

4. IT IS FURTHER ORDERED that The Clarkson Company Limited be and is hereby authorized to sell or realize upon bank deposit receipts in the aggregate sum of approximately $60,000.00 comprising part of the said deposit.

5. IT IS FURTHER ORDERED that this matter be and is hereby referred to the Master at Toronto to give such further directions or advice pertaining to any matter arising in the administration of the deposit as may be necessary from time to time and that the said Master be and is hereby conferred with all the powers conferred upon the Court by the said Insurance Act in and about the administration of the said deposit, passing the accounts of the said receiver, approving the accounts and discharging the said receiver.

6. IT IS FURTHER ORDERED that all the above provisions of this order be without prejudice to the rights of The Provisional Liquidator and The Permanent Liquidator, or either of them of Wentworth Insurance Company appointed under The Winding-Up Act, R.S.C. 1952, Chapter 296 and in particular Section 165 thereof.

7. AND IT IS FURTHER ORDERED that the costs of this application be taxed and paid to the applicant and to the said Provisional Liquidator out of the said deposit.

On July 14, 1967, an application was made to the Master for advice and direction of the Court as to the manner in which the deposit under s. 41 of *The Insurance Act* in the hands of the Liquidator was to be administered, whether under *The Insurance Act*, or as a general asset of the company under the *Winding-up Act*. On this application counsel for the Attorney General for Canada submitted that the

provisions of *The Insurance Act* respecting the administration of the deposit were legislation relating to insolvency and *ultra vires* Ontario.

The Master directed the Liquidator to deal with the deposit in the manner provided by sections 58 and 59 of *The Insurance Act*. An appeal was taken to Hartt J., who upheld the Master and ordered insofar as is relevant here, as follows:

2. AND THIS COURT DOTH FURTHER ORDER that The Clarkson Company Limited, Permanent Liquidator of Wentworth Insurance Company, do administer the funds and securities deposited pursuant to the provisions of The Insurance Act, R.S.O. 1960, Chapter 190, in the manner provided by Sections 58 and 59 of the said Insurance Act.

The Policyholders entitled to claim for refunds of unearned premiums appealed to the Court of Appeal and that Court allowed the appeal and ordered:

2. AND THIS COURT DOTH FURTHER ORDER that The Clarkson Company Limited, Permanent Liquidator of Wentworth Insurance Company, do administer the funds and securities deposited pursuant to the provisions of The Insurance Act, R.S.O. 1960, Chapter 190, in the manner provided by The Winding-up Act, R.S.C. 1952, Chapter 296.

The effect of this order was to require distribution of the deposit as set out in s. 162 of *The Winding-up Act*.

Laskin J.A., writing for the Court, said in his reasons:

It was contended that where on a winding-up under the federal Act by reason of insolvency (which is the present case) securities are on deposit with the Minister, they are not assets of the insolvent company administrable under the federal Act. If the matter rested only on the reach of section 33 of the federal Act, previously mentioned, or on the stark question whether the securities were property of the insolvent company at the time of insolvency the argument would be a formidable one. But it fails to take account of what to me are the plain words of section 165(1).

and

Having regard to the making of a winding up order by reason of insolvency of the Wentworth Insurance Company, I would, as a matter of construction of the Ontario Insurance Act, hold that Act inapplicable to govern the distribution of the deposit in view of the order made under section 165(1) of the Winding-up Act. In so far as the Ontario provisions purport to provide a scheme of distribution upon insolvency, they are invalid *per se*. In any event, they are overborne by the Winding-up Act and especially by sections 162 and 165(1) with which they cannot be compatibly administered.

With respect, I cannot agree. In my view, sections 58 and 59 of *The Insurance Act* are, in pith and substance, valid provincial legislation and further, that s. 165(1) of the

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Winding-up Act is *ultra vires* Parliament; an intrusion into a field of legislative power reserved exclusively to the provinces.

The present case is another in the series of decisions in litigation between the Federal authority and the provinces involving insurance and in every case without exception the exclusive jurisdiction of the provinces as to the conduct of the business of insurance has been upheld by the Courts. Insurance is defined by *The Insurance Act 1960*, R.S.O. c. 190, as follows:

> 1. (31) "insurance" means the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value upon the happening of a certain event;

This is the definition used by all provinces which have adopted the uniform approach, being all ten provinces except Quebec and Newfoundland.

It is accordingly of the essence of insurance that when an eventuality occurs which entitles the insured to indemnity that there be in existence a fund or assets in the hands of someone from which the indemnity will be forthcoming, otherwise the insurance may be no more than a delusion. The deposit feature of the several insurance acts, including the Ontario Act, thus became an integral part of the whole scheme of insurance. To deny access to that deposit to the very persons for whose protection it was established at the time when they need it most is to destroy one of the fundamentals of insurance protection in Ontario.

The deposit is the day to day assurance to insureds who, having no means of their own to evaluate the reliability of insurers, are given that assurance by the provisions of *The Insurance Act* which require the deposit as a condition of being permitted to do business in Ontario. Accordingly an insured in Ontario buys insurance with the knowledge that he will be indemnified if he has a valid claim; in other words that the umbrella will be there if and when it rains; i.e. when *any* of the eventualities set out in s. 51(2) occur.

In these circumstances, how can it be said that *The Ontario Insurance Act* in requiring the deposit and administering it if need be for any of the reasons stated in s. 48 is in pith and substance other than valid insurance legislation?

The pith and substance test of legislative validity has been recognized as the most valid test in determining whether legislation of the Dominion or of a province is *intra vires* or *ultra vires* and particularly so in the much traversed field of insurance law in Canada. The leading case in this respect would appear to be *Attorney-General for Ontario v. Reciprocal Insurers*[8]. The Judgment of their Lordships in that case was delivered by Duff J. (later C.J.C.) sitting as a member of the Privy Council. He said at pp. 336 to 338:

> In *Attorney-General for Canada v. Attorney-General for Alberta* (1916) 1 A.C. 588, it was decided by this Board that it was not competent to the Dominion to regulate generally the business of insurance in such a way as to interfere with the exercise of civil rights in the Provinces.
>
> The provisions relating to licences in the Insurance Act of 1910, which by this judgment was declared to be ultra vires, and the regulations governing licences under the Act and applicable to contracts and to the business of insurance, did not, in any respect presently material, substantially differ from those now found in the legislation of 1917; but the provisions of the statute of 1910 derived their coercive force from penalties created by the Insurance Act itself.
>
> The distinction between the legislation of 1910 and that of 1917, upon which the major contention of the Dominion is founded, consists in the fact that s. 508c is enacted in the form of an amendment to the statutory criminal law, and purports only to create offences which are declared to be indictable, and to ordain penalties for such offences. The question now to be decided is whether, in the frame in which this legislation of 1917 is cast, that part of it which is so enacted can receive effect as a lawful exercise of the legislative authority of the Parliament of Canada in relation to the criminal law. It has been formally laid down in judgments of this Board, that in such an inquiry the Courts must ascertain the "true nature and character" of the enactment: *Citizens Insurance Co. v. Parsons* (1881) 7 App. Cas. 96; its "pith and substance": *Union Colliery Co. v. Bryden* (1899) A.C. 580; and it is the result of this investigation, not the form alone, which the statute may have assumed under the hand of the draughtsman, that will determine within which of the categories of subject matters mentioned in ss. 91 and 92 the legislation falls; and for this purpose the legislation must be "scrutinised in its entirety": *"Great West Saddlery Co. v. The King* (1921) 2 A.C. 91, 117. Of course, where there is an absolute jurisdiction vested in a Legislature, the laws promulgated by it must take effect according to the proper construction of the language in which they are expressed. But where the law-making authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the Legislature is really doing. Upon this principle the Board proceeded in 1878, in *Attorney-General for Quebec v. Queen Insurance Co.* (1878) 3 App. Cas. 1090, where a statute of Quebec (39 Vict. c. 7), which took the form of a licensing Act, enacted under the authority of s. 92, head 9, of the British North America Act, was held to be in its true character

[8] [1924] A.C. 328, [1924] 1 D.L.R. 789, 2 W.W.R. 397, 41 C.C.C. 336.

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a Stamp Act and an attempt to impose a tax which was an indirect tax, in contravention of the limitation to which the Provincial powers of taxation are subject under the second head of that section. The principle is recognized in *Russell v. The Queen* (1882) 7 App. Cas. 829, and in *Citizens Insurance Co. v. Parsons* 7 App. Cas. 96, and in 1899, conformably to this doctrine, it was held, in the well-known case of *Union Colliery Co. v. Bryden* (1899) A.C. 580, that a statutory regulation, professedly passed for governing the working of coal mines, which admittedly "might be regarded as establishing a regulation applicable" to the working of such mines, and which, "if that were an exclusive description of the substance of it," was "within the competency of the Provincial Legislature by virtue either of s. 92, No. 10, or s. 92, No. 13," must be classed, its "true character," its "pith and substance" being ascertained, as legislation in relation to the subject of "aliens and naturalisation," a subject exclusively within the Dominion sphere of action. The general doctrine was later applied in *John Deere Plow Co. v. Wharton* (1915) A.C. 330, and again in *Great West Saddlery Co. v. The King* (1921) 2 A.C. 91, 117.

and at p. 340:

The power which this argument attributes to the Dominion, is, of course, a far-reaching one. Indeed, the claim now advanced is nothing less than this, that the Parliament of Canada can assume exclusive control over the exercise of any class of civil rights within the Provinces, in respect of which exclusive jurisdiction is given to the Provinces under s. 92, by the device of declaring those persons to be guilty of a criminal offence who in the exercise of such rights do not observe the conditions imposed by the Dominion. Obviously the principle contended for ascribes to the Dominion the power, in execution of its authority under s. 91, head 27, to promulgate and to enforce regulations controlling such matters as, for example, the solemnization of marriage, the practice of the learned professions and other occupations, municipal institutions, the operation of local works and undertakings, the incorporation of companies with exclusively Provincial objects—and superseding Provincial authority in relation thereto. Indeed, it would be difficult to assign limits to the measure in which, by a procedure strictly analogous to that followed in this instance, the Dominion might dictate the working of Provincial institutions, and circumscribe or supersede the legislative and administrative authority of the Provinces.

Such a procedure cannot, their Lordships think, be justified, consistently with the governing principles of the Canadian Constitution, as enunciated and established by the judgments of this Board.

and again at pp. 342-3:

In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid. And indeed, to hold otherwise would be incompatible with an essential principle of the Confederation scheme, the object of which, as Lord Watson said in *Maritime Bank of Canada v. Receiver-General of New Brunswick* (1892) A.C. 437, 441, was "not to weld the Provinces into

one or to subordinate the Provincial Governments to a central authority." "Within the spheres allotted to them by the Act of the Dominion and the Provinces are," as Lord Haldane said in *Great West Saddlery Co. v. The King* (1921) 2 A.C. 91, 100, "rendered in general principle co-ordinate Governments."

Having the power to require the deposit as a condition of granting a licence (and that power is expressly conceded by the respondents and by the Attorney General for Canada) for no one challenges the validity of sections 41 and 42 of *The Insurance Act of Ontario,* the power to administer the deposit follows as a necessary consequence. This argument was recognized as sound as long ago as 1880 where, in *The Queen Insurance Company v. Parsons*[9], Ritchie C.J. said:

> How can this be said to be an interference with the general regulation of trade and commerce? Yet it deals as effectually with the matter or contract of insurance in these particulars as this Act does in reference to the matters with which it deals. If the Legislative power of the provincial legislatures is to be restricted and limited, as it is claimed it should be, and the doctrine contended for in this case, as I understand it, is carried to its legitimate logical conclusion, the idea of the power of the local legislature to deal with the local works and undertakings, property and civil rights, and matters of a merely local and private nature in the province is, I humbly think, to a very great extent, illusory.
>
> I scarcely know how one could better illustrate the exercise of power to the local legislature to legislate with reference to property and civil rights, and matters of a merely local and private nature, than by a local Act of incorporation, whereby a right to hold or deal with real or personal property in a province is granted, and whereby the civil right to contract and sue and to be sued as an individual in reference thereto is also granted. If a legislature possesses this power, as a necessary sequence, it must have the right to limit and control the manner in which the property may be so dealt with, and as to the contracts in reference thereto the terms and conditions on which they may be entered into, whether they may be verbal, or shall be in writing, whether they shall contain conditions for the protection or security of one or other or both the parties, or that they may be free to deal as may be agreed on by the contracting parties without limit or restriction.
>
> Inasmuch, then, as this Act relates to property in Ontario, and the subject-matter dealt with is therefor local, and as the contract between the parties is of a strictly private nature, and as the matters thus dealt with are therefore, in the words of the *British North America Act,* "of a merely local and private nature in the province," and as contracts are matters of civil rights and breaches thereof are civil wrongs, and as the property and civil rights in the province only are dealt with by the Act, and as "property and civil rights in the provinces" are in the enumeration of the "exclusive powers of provincial legislatures," I am of opinion that the legislature of Ontario, in dealing with these matters in the Act in question, did not exceed their legislative powers.

[9] (1880), 4 S.C.R. 215 at pp. 247-248.

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I am happy to say I can foresee, and I fear, no evil effects whatever, as has been suggested, as likely to result to the Dominion from this view of the case. On the contrary, I believe that while this decision "recognizes and sustains the legislative control of the Dominion parliament over all matters confided to its legislative jurisdiction, it, at the same time, preserves to the local legislatures those rights and powers conferred on them by the *B.N.A. Act*, and which a contrary decision would, in my opinion, in effect, substantially, or to a very large extent, sweep away.

Similarly, Lord Atkin in *Ladore v. Bennett*[10], said:

But in the present case nothing has emerged even to suggest that the Legislature of Ontario at the respective dates had any purpose in view other than to legislate in times of difficulty in relation to the class of subject which was its special care—namely, municipal institutions. For the reasons given the attack upon the Acts and scheme on the ground either that they infringe the Dominion's exclusive power relating to bankruptcy and insolvency, or that the deal with civil rights outside the Province, breaks down. *The statutes are not directed to insolvency legislation; they pick out insolvency as one reason for dealing in a particular way with unsuccessful institutions; and though they affect rights outside the Province they only so affect them collaterally, as a necessary incident to their lawful powers* of good government within the Province. (emphasis added)

And in this Court in the case of *Attorney-General for Ontario v. Barfried Enterprises Ltd*[11], Judson J. said:

The issue in this appeal is to determine the true nature and character of the Act in question and, in particular, of s. 2 above quoted. The Act deals with rights arising from contract and is *prima facie* legislation in relation to civil rights and, as such, within the exclusive jurisdiction of the province under s. 92(13). Is it removed from the exclusive provincial legislative jurisdiction by s. 91(19) of the Act, which assigns jurisdiction over interest to the federal authority? In my opinion, it is not legislation in relation to interest but legislation relating to annulment or reformation of contract on the grounds set out in the Act, namely, (a) that the cost of the loan is excessive, and (b) that the transaction is harsh and unconscionable. The wording of the statute indicates that it is not the rate or amount of interest which is the concern of the legislation but whether the transaction as a whole is one to which it would be proper to maintain as having been freely consented to by the debtor. If one looks at it from the point of view of English law it might be classified as an extension of the doctrine of undue influence. As pointed out by the Attorney General for Quebec, if one looks at it from the point of view of the civil law, it can be classified as an extension of the doctrine of lesion dealt with in articles 1001 and 1012 of the *Civil Code*. The theory of the legislation is that the Court is enabled to relieve a debtor, at least in part, of the obligations of a contract to which in all the circumstances of the case he cannot be said to have given a free and valid consent. The fact that interference with such a contract may involve interference with interest as one of the constituent elements of the contract is incidental.

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[10] [1939] A.C. 468 at p. 482, [1939] 3 D.L.R. 1, [1939] 3 All E.R. 98, [1939] 2 W.W.R. 566, 21 C.B.R. 1.

[11] [1963] S.C.R. 570, at pp. 577-578, 42 D.L.R. (2d) 137.

And Cartwright J., as he then was, said at page 579:

The Unconscionable Transactions Relief Act appears to me to be legislation in relation to Property and Civil Rights in the Province and the Administration of Justice in the Province, rather than legislation in relation to Interest. Its primary purpose and effect are to enlarge the equitable jurisdiction to give relief against harsh and unconscionable bargains which the courts have long exercised; it affects, but only incidentally, the subject-matter of Interest, specified in head 19 of s. 91 of the *British North America Act*.

Regarding the validity of s. 165(1) of the *Winding-up Act*, which reads:

165. (1) The funds and securities of the company in Canada that may be on deposit with any government in Canada or with trustees or otherwise held for the company or for the protection of the policyholders of the company of the class or classes that are affected by the winding-up order shall, on order of the court having jurisdiction, be transferred to the liquidator.

(2) Where the company is a Canadian company that has deposited with the government of any state or country outside of Canada, or with any trustee or other person in such state or country, any of its funds or securities for the protection of the company's policyholders in such state or country, the liquidator may request such government trustee or other person to transfer to him the said funds and securities and on such transfer being made, the said funds and securities shall be used for the benefit of all the company's policyholders in the same manner as any other assets of the company.

(3) Where the said government, trustee or other person does not transfer the said funds and securities within such period commencing with the date of the liquidator's request therefor as the Court may fix, the policyholders of the company, for whose protection the said deposit was made, shall be deemed to have refused the reinsurance, if any, arranged by the liquidator, and, whether reinsurance has been arranged or not, to have forfeited all right and claim to any share of the assets of the company other than the funds or securities so deposited for their protection outside of Canada.

it is significant to note that Parliament tried unsuccessfully to regulate the conduct of the insurance business in Canada by enacting that all insurers must obtain a licence. The device employed was by purporting to make it an offence under the *Criminal Code* for any insurer to do business without a Dominion Licence. The field of criminal law is unquestionably in the exclusive competence of Parliament just as is bankruptcy and insolvency under s. 91 of the *British North America Act*. The Privy Council struck down that attempt in the *Reciprocal Insurers* case previously referred to.

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The next attempt was by the *Insurance Act of Canada*, R.S.C. 1917, c. 29. Sections 11 and 12 of the *Insurance Act of Canada* read:

11. It shall not be lawful for (a) any Canadian company; or (b) any alien, whether a natural person or a foreign company, within Canada to solicit or accept any risk, or to issue or deliver any receipt or policy of insurance, or to grant, in consideration of any premium or payment, any annuity on a life or lives, or to collect or receive any premium, or, except as provided in section one hundred and twenty-nine of this Act, to inspect any risk or adjust any loss, or to advertise for or carry on any business of insurance, or to prosecute or maintain any suit action or proceeding, or to file any claim in insolvency relating to such business, unless under a licence from the Minister granted pursuant to the provisions of this Act.

12. (1) It shall not be lawful for any British company, or for any British subject not resident in Canada, to immigrate into Canada for the purpose of opening or establishing any office or agency for the transaction of any business of or relating to insurance, or of soliciting or accepting any risk or issuing or delivering any interim receipt or policy or insurance, or granting, in consideration of any premium or payment, any annuity on a life or lives, or of collecting or receiving any premium, or except as provided in section one hundred and twenty-nine of this Act, of inspecting any risk or adjusting any loss, or of carrying on any business of or relating to insurance, or of prosecuting or maintaining any suit, action or proceeding or filing any claim in insolvency relating to such business, unless under a licence from the Minister granted pursuant to the provisions of this Act.

(2) A company shall be deemed to immigrate into Canada within the meaning of this section if it sends into Canada any document appointing or otherwise appoints any person in Canada its agent for any of the purposes mentioned in subsection one of this section.

Sections 65 and 66 of the same act prescribed penalties for contravention of sections 11 and 12. The validity of these provisions were dealt with by the Privy Council in the case of *In Re Insurance Act of Canada*[12]. The judgment of the Privy Council was delivered by Viscount Dunedin, who said:

It is not in their Lordship's opinion necessary for them, as it was for the judges in the Courts below, to examine in detail the various cases that have arisen in the Canadian Courts. They think that the questions raised can be conclusively dealt with in the light of four cases which have reached this Board. These are in chronological order: *Citizens Insurance Co. v. Parsons* (1881) 7 App. Cas. 96; *John Deere Plow Co. v. Wharton* (1915) A.C. 330; *Attorney General for Canada v. Attorney-General for Alberta* (1916) 1 A.C. 588; and *Attorney-General for Ontario v. Reciprocal Insurers* (1924) A.C. 328.

The case of the *Citizens Insurance Co. v. Parsons* (1881) 7 App. Cas. 96, was not fought directly between the Dominion and the Provinces, either as parties or inteveners. It was an action by a private individual

[12] [1932] A.C. 41, [1932] 1 D.L.R. 97, 53 Que. K.B. 34.

to recover money under an insurance contract for a loss by fire. The defence was non-compliance on the part of the insured with certain statutory conditions imposed by a Provincial Ontario Act and applicable to insurers, to which the answer was made that the provisions were ultra vires as trespassing on the province of Dominion legislation. It was held that the conditions were not ultra vires, and the defence was good. The arguments turned on what may be called the competing claims of ss. 91 and 92 of the British North America Act. The principle laid down was clear. It is within the power of the Dominion legislature to create the person of a company and endow it with powers to carry on a certain class of business to wit, insurance; and nothing that the Provinces can do by legislation can interfere with the status so created; but none the less the Provinces can by legislation prescribe the way in which insurance business or any other business shall be carried on in the Provinces. The great point of the case is the clear distinction drawn between the question of the status of a company and the way in which the business of the company shall be carried on. This distinction was clearly acted on in the next case, which was not an insurance case.

John Deere Plow Co.'s case (1915) A.C. 330; related to a company incorporated under Dominion legislation to carry on the business of trading in agricultural implements throughout Canada. The Parliament of British Columbia sought means to restrain any such trade by enacting that the trader should have no power to sue unless he had obtained a licence to trade from the Provincial authorities. It was held that this was ultra vires of the Province, as being an attempt to interfere with the status of the company.

Then came the case of *Attorney-General for Canada v. Attorney-General for Alberta* (1916) 1 A.C. 588; this was the first direct trial of strength between a Province and the Dominion. By s. 4 of the Dominion Insurance Act of 1910 it was provided that no company or person should do insurance business unless they had received a Dominion license so to act. This provision was fortified by a penalty for contravention under s. 70. Two questions were put to the Court: (1) Are ss. 4 and 70 of the Act or any part thereof ultra vires of the Parliament of Canada? (2) Does s. 4 operate to prohibit a foreign company carrying on business without a licence even though its business is confined to one Province?

The Board answered the first question in the affirmative. Here again the arguments turned on the competing claims of ss. 91 and 92, and the decision on this question conclusively and finally settled that regulations as to the carrying on of insurance business were a Provincial and not a Dominion matter. It really only carried to their logical conclusion the two cases already cited.

As to the second question, Lord Haldane said: (1916) 1 A.C. 588, 597: "The second question is, in substance, whether the Dominion Parliament has jurisdiction to require a foreign company to take out a licence from the Dominion Minister, even in a case where the company desires to carry on its business only within the limits of a single province. To this question their Lordships' reply is that in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction. It appears to them that such a power is given by the heads in s. 91, which refer to the regulation of trade and commerce and to aliens. This question also is therefore answered in the affirmative."

The first question in the present appeal really turns upon whether the sections impugned fall within the sentence of the Board just quoted.

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But before discussing this it will be well to examine the remaining case mentioned—namely, the *Reciprocal Insurers' case* (1924) A.C. 328. After the decision against them on the first question in the last case in 1916, the Dominion legislation on this subject was altered. A new Act was passed in 1917. In place of the old s. 4, which had been declared ultra vires by the decision, there were now enacted ss. 11 and 12 in these terms:—(See ss. 11 and 12 previously quoted)

Contravention of these provisions was dealt with by sections imposing penalties. But besides that, there had been inserted in the Criminal Code two new sections, 508C and 508D, which constituted as a criminal offence the doing of insurance business without a Dominion license. Meantime Ontario had passed an Act dealing with mutual insurance. This led to the case in which the questions proposed were as follows: (1) Is it within the legislative competence of the legislature of the Province of Ontario to regulate or license the making of reciprocal contracts by such legislation as that embodied in the Reciprocal Insurance Act, 1922? (2) Would the making or carrying out of reciprocal insurance contracts licensed pursuant to the Reciprocal Insurance Act, 1922, be rendered illegal or otherwise affected by the provisions of ss. 508C and 508D of the Criminal Code as enacted by c. 26 of the Statutes of Canada 7 and 8 Geo. 5 in the absence of a license from the Minister of Finance issued pursuant to s. 4 of the Insurance Act of Canada, 7 & 8 Geo. 5, c. 29? (3) Would the answers to questions 1 or 2 be affected, and if so, how, if one or more of the persons subscribing to such Reciprocal Insurance contracts is: (a) a British subject not resident in Canada immigrating into Canada? (b) an alien?

Mr. Justice Duff, who delivered the judgment of the Board, expressed himself thus (1): "The provisions relating to licenses in the Insurance Act of 1910, which" (by the judgment of 1916) "was declared to be ultra vires, and the regulations governing licenses under the Act and applicable to contracts and to the business of insurance, did not, in any respect presently material, substantially differ from those now found in the legislation of 1917; but the provisions of the statute of 1910 derived their coercive force from penalties created by the Insurance Act itself. The distinction between the legislation of 1910 and that of 1917, upon which the major contention of the Dominion is founded, consists in the fact that s. 508C is enacted in the form of an amendment to the statutory criminal law, and purports only to create offences which are declared to be indictable, and to ordain penalties for such offences. The question now to be decided is whether in the frame in which this legislation of 1917 is cast, that part of it which is so enacted can receive effect as a lawful exercise of the legislative authority of the Parliament of Canada in relation to the criminal law. It has been formally laid down in judgments of this Board, that in such an inquiry the Courts must ascertain 'the true nature and character' of the enactment: *Citizens Insurance Co. v. Parsons* 7 App. Cas. 96; its 'pith and substance': *Union Colliery Co. v. Bryden* (1899) A.C. 580..."

The Board proceeded to decide that the amendment of the criminal law by s. 508C was not a genuine amendment of the criminal law, but was really an attempt by a soi-disant amendment of the criminal law to subject insurance business in the Province to the control of the Dominion, that which had exactly been determined to be ultra vires by the judgment of 1916. This decided the main question.

As regards question 3, it was answered in the negative, but there was added the following addendum: "Their Lordships do not express

any opinion as to the competence of the Dominion Parliament, by virtue of its authority in relation to aliens and to trade and commerce, to enact ss. 11 and 12, sub-s. 1, of the Insurance Act. This, although referred to on the argument before their Lordships' Board, was not fully discussed, and since it is not directly raised by the question submitted, their Lordships, as they then intimated, considered it inadvisable to express any opinion upon it. Their Lordships think it sufficient to recall the observation of Lord Haldane, in delivering the judgment of the Board, in *Attorney-General for Canada v. Attorney-General for Alberta* (1916) 1 A.C. 588, to the effect that legislation, if properly framed, requiring aliens, whether natural persons or foreign companies, to become licensed, as a condition of carrying on the business of insurance in Canada, might be competently enacted by Parliament."

Following on this judgment, the Dominion Parliament, by an amending statute in 1924, repealed sub-s. 2 of s. 12 of the Act of 1917. The Act of 1927, which is the Act with which the present case has to do, reproduces, as has been seen, ss. 11 and 12 and the corresponding penal sections renumbered as 66 and 67, and in the Criminal Code of 1927 the old 508C reappears as 507, but with an exception as to reciprocal insurance companies so as to avoid the direct result of the judgment of 1924.

Their Lordships are now in a position to address themselves directly to the first question in this case. It is clear from the quotations from the *Reciprocal Insurers'* case (1924) A.C. 328, that the question is technically still open, and it is clear from the judgment in the 1916 case that the sections in question can only be justified if to them can be applied what was there said by Lord Haldane in his answer to query 2. Their Lordships will repeat it: "To this question their Lordships' reply is that in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction. It appears to them that such a power is given by the heads in s. 91, which refer to the regulation of trade and commerce and to aliens."

The state of opinion in the Court below was as follows: Two learned judges thought that the sections were ultra vires, whether applied to British or to foreign insurers; but three judges, while holding the sections ultra vires as to British subjects, held that they were intra vires as to aliens. Now so far as British subjects were concerned the view was that Lord Haldane's dictum showed clearly that the only power of restriction given rested upon its being possible to connect it with alien legislation, and that therefore it was impossible to bring British subjects within the scope of the dictum. So far as this argument goes, their Lordships think it is sound, but at the same time they think it unnecessary because they think it is swallowed up in the wider consideration which makes the sections bad as regards both aliens and British subjects. Their Lordships consider that although the question was studiously kept open in the *Reciprocal Insurers'* case (1924) A.C. 328, it was really decided by what was then laid down. The case decided that a colourable use of the Criminal Code could not serve to disguise the real object of the legislation, which was to dominate the exercise of the business of insurance. And in the same way it was decided that to try by a false definition to pray in aid s. 95 of the British North America Act, 1867, which deals with immigration, in order to control the business of insurance, was equally unavailing. What has got to be considered is whether this is in a true sense of the word alien legislation, and that is what Lord Haldane meant by "properly framed legislation." Their Lordships have no doubt that the Dominion Parliament might

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pass an Act forbidding aliens to enter Canada or forbidding them so to enter to engage in any business without a license, and further they might furnish rules for their conduct while in Canada, requiring them, e.g., to report at stated intervals. But the sections here are not of that sort, they do not deal with the position of an alien as such: but under the guise of legislation as to aliens they seek to intermeddle with the conduct of insurance business, a business which by the first branch of the 1916 case has been declared to be exclusively subject to Provincial law. Their Lordships have therefore, no hesitation in declaring that this is not "properly framed" alien legislation.

As regards British subjects, who cannot be styled aliens, once the false definition is gone, the same remark applies as to alien immigrants. This is not properly framed law as to immigration, but an attempt to saddle British immigrants with a different code as to the conduct of insurance business from the code which has been settled to be the only valid code, i.e., the Provincial Code.

And regarding the claim that Parliament had a right to provide by section 16 of the *Special War Revenue Act*, R.S.C. 1927, c. 179 that:

"(16) Every person resident in Canada, who insures his property situate in Canada, or any property situate in Canada in which he has an insurable interest, other than that of an insurer of such property, against risks other than marine risks: (a) with any British or foreign company or British or foreign underwriter or underwriters, not licensed under the provisions of the Insurance Act, to transact business in Canada; or (b) with any association of persons formed for the purpose of exchanging reciprocal contracts of indemnity upon the plan known as interinsurance and not licensed under the provisions of the Insurance Act, the chief place of business of which association or of its principal attorney-in-fact is situate outside of Canada; shall on or before the thirty-first day of December in each year pay to the Minister, in addition to any other tax payable under any existing law or statute a tax of five per centum of the total net cost to such person of all such insurance for the preceding calendar year."

Viscount Dunedin said:

Now as to the power of the Dominion Parliament to impose taxation there is no doubt. But if the tax as imposed is linked up with an object which is illegal the tax for that purpose must fall. Sect. 16 clearly assumes that a Dominion license to prosecute insurance business is a valid license all over Canada and carries with it the right to transact insurance business. *But it has been already decided that this is not so; that a Dominion license so far as authorizing transactions of insurance business in a Province is concerned, is an idle piece of paper conferring no rights which the party transacting in accordance with Provincial legislation has not already got, if he has complied with Provincial requirements. It is really the same old attempt in another way.* (emphasis added)

Their Lordships cannot do better than quote and then paraphrase a portion of the words of Duff J. in the *Reciprocal Insurers'* case (1924) A.C. 328, 342. He says: "In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of

jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid." If instead of the words "create penal sanctions under s. 91, head 27" you substitute the words "exercise taxation powers under s. 91, head 3," and for the word "Criminal" substitute "taxing", the sentence expresses precisely their Lordships' views.

It was after this decision in the *Insurance Act of Canada* case that s. 165(1) of the *Winding-up Act* was enacted. This would appear to be the last attempt by Parliament to control a facet of insurance operations by purporting to do so through legislation dealing with insolvency. Bankruptcy and insolvency is, by head 21 of s. 91 of the *B.N.A. Act* within the exclusive jurisdiction of Parliament. This is not questioned any more than criminal law was within the jurisdiction of Parliament in the *Reciprocal Insurers'* case or that immigration was in the case of *In Re Insurance Act of Canada*, or interest in the *Barfried* case, or bankruptcy and insolvency in *Ladore v. Bennett*.

It is not the fact that bankruptcy and insolvency is within the exclusive jurisdiction of Parliament that is vital to the question here, but rather that Parliament, by enacting s. 165(1), sought again to intrude into a field of legislation, namely insurance, which by virtue of s. 92, and the cases previously referred to, is committed exclusively to the jurisdiction of the Provinces.

Sections 40 to 73 of *The Insurance Act of Ontario* as well as ss. 225 to 240 of Part VI of *The Corporations Act* respecting Insurance Corporations are part and parcel of the law of Ontario respecting insurance, and the relevant sections, insofar as they relate to the administration of a deposit, deal with bankruptcy and insolvency only as incidental to the right to legislate regarding insurance.

The effect of s. 165(1) of the *Winding-up Act* and of s. 162 of the same Act is to make available to all creditors of an insolvent insurance company the deposit which the Province has required for the protection of policyholders in Ontario for a number of reasons. The requirement that the deposit be handed over to the liquidator may be in itself innocuous. It is the fact that once it is in his hands the liquidator must distribute the deposit as provided in s. 162 of the *Winding-up Act*. This means a distribution different from that called for in s. 48 of *The Insurance Act*. The

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liquidator under the *Winding-up Act* and the receiver under s. 52(1) of *The Insurance Act* may, by s. 52(2), be the same person. I see nothing repugnant in this procedure. It is the manner in which the deposit is to be administered that is the vital issue here, not by whom it is to be distributed. Parliament has chosen by the seemingly innocuous direction in s. 165(1) of the *Winding-up Act* to divert the deposit from its true purpose to a purpose wholly repugnant to the intent of the Legislature of Ontario which, in providing for the deposit, did so for the protection of policyholders as set out in s. 48.

With deference to contrary opinion, the contention that there is no room for any suggestion that s. 165(1) is merely colourable ignores, I think, the history of Parliament's attempts to invade the field of insurance legislation following upon the decision in *Citizens Insurance v. Parsons*[13]. Having attempted to invade the insurance field:

(a) Through the licensing requirement door (*Attorney General for Canada v. Attorney General for Alberta*[14]);

(b) Through the criminal law door (*The Reciprocal Insurers case*[15]);

(c) Through the immigration door (*In Re Insurance Act of Canada*[16]);

and having been repulsed on these three attempts, Parliament then chose immediately after the *Insurance Act of Canada* decision in 1932 to gain entry through another door by s. 165(1) which is not a section dealing with bankruptcy and insolvency generally but one of limited application specifically aimed at insurance companies only. It must be seen as an attempt to make that which is not an asset of an insolvent insurance company into an asset by some sort of legislative transmutation.

Surely it cannot be said that this is valid Dominion legislation. It is patently a foray into the field of insurance, an area forbidden to Parliament. It is colourable legislation and, because of this, *ultra vires*. It ignores completely that by s. 41(5) the deposit is vested in the Minister. There can be no legislative divesting of the deposit under the guise of bankruptcy and insolvency. The effective answer, it appears

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[13] [1881] 7 App. Cas. 96, 51 L.J.P.C. 11.

[14] [1916] 1 A.C. 588, 26 D.L.R. 288, 10 W.W.R. 505, 25 Que. K.B. 185.

[15] [1924] A.C. 328, [1924] 1 D.L.R. 789, 2 W.W.R. 397, 41 C.C.C. 336.

[16] [1932] A.C. 41, [1932] 1 D.L.R. 97, 53 Que. K.B. 34.

to me, is that s. 165(1) attempted to deal with something which is not an asset of the bankrupt by purporting to say that it is. The deposit is vested in the Minister (The Attorney General of Ontario) to be held by him under s. 48(2) "... for the benefit of all insured persons under Ontario contracts..."

The case of *Royal Bank of Canada v. Larue*[17], was cited as supporting the proposition that bankruptcy legislation enacted by Parliament took precedence over the provisions of Art. 2121 of the *Civil Code* of Quebec regarding the priority of a judicial hypothec upon real assets of a debtor in that province. It was held that it was within the powers of the Parliament of Canada to enact, in relation to bankruptcy and insolvency, the relative priorities of creditors under a bankruptcy or authorized assignment. That proposition is not questioned, but it is not relevant here. The *Bankruptcy Act* is general bankruptcy legislation validly enacted under Head 21 of s. 91 of the *British North America Act*.

Larue (Viscount Cave L.C. at p. 197) recognizes that an execution creditor who has realized upon his execution and become satisfied by payment is not affected by a receiving order. In other words, the asset which has been realized upon or the proceeds therefrom are not regarded as belonging to the bankrupt. *A fortiori* an asset which is not the property of the insurance company but is vested in the Minister who can deal with it independently of the company is necessarily beyond the reach of the receiver.

Section 165(1) of the *Winding-up Act* is not a case of a general provision applying to all bankruptcies and insolvencies. It is a section specifically aimed at deposits put up by insurance companies as a condition of being licensed to do business in the Province by which that deposit *vested* in the Minister is sought to be *translated* into an asset of the insolvent insurance company and the title of the Minister to the deposit so vested in him is extinguished. *Larue* dealt with the rights of creditors *inter se* to property of the bankrupt and did not purport to make available to creditors an asset which was not the property of the bankrupt at the time of the bankruptcy.

[17] [1928] A.C. 187, 8 C.B.R. 579, [1928] 1 W.W.R. 534.

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ATTORNEY GENERAL FOR ONTARIO v. POLICY-HOLDERS OF WENTWORTH INS. *et al.*

Hall J.

The decision of this Court in *Provincial Treasurer of Manitoba v. Minister of Finance for Canada*[18], is, in my opinion directly applicable to the present case. The facts as set out in the headnote are as follows:

> The Imperial Canadian Trust Company and the Great West Permanent Loan Company, both having charter power to receive moneys on deposit, were closely associated in management. In 1924, the Loan Company, having decided to discontinue its deposit business, entered into an agreement with the Trust Company whereby the latter took over the deposits of the former on terms set out in the agreement. The amount of deposits so turned over was $124,249.16, and the Loan Company delivered to the Trust Company securities aggregating that amount in estimated value. The Trust Company proceeded from time to time to dispose of these trust assets and to pay depositors and, on December 27th, 1927, had paid off $105,968.87, leaving an unpaid balance of $18,280.29. On that same date, the Trust Company was ordered to be wound up under the *Winding-up Act* and the Montreal Trust Company was appointed as liquidator. In August, 1929, an immovable property, the only remaining security still undisposed of, was sold by the liquidator for $30,336.65 and the liquidator "set aside and earmarked", in May, 1930, the above sum of $18,280.29. The liquidator paid out of that sum $8,435.89 to depositors who had filed claims pursuant to an order made by the Master in Chambers, leaving a balance of $9,844.40. The Provincial Treasurer of Manitoba, by an application filed in December, 1937, claimed that sum as *bona vacantia*, and this is the subject-matter of the first appeal. Then, in April, 1940, the Manitoba legislature passed an Act called the *Vacant Property Act*, and, in July, 1940, the Attorney-General for Manitoba claimed the same moneys under the provisions of that Act, and this is the subject-matter of the second appeal. The Minister of Finance for Canada contended in both cases that the moneys were the property of the Crown in right of the Dominion as unclaimed dividends under sections 139 and 140 of the *Winding-up Act*. The appellate court held that the Dominion had jurisdiction over these moneys as part of its jurisdiction over bankruptcy and that its legislation should prevail.

This Court held that the judgments in the Manitoba Court should be reversed and directed that the moneys be paid to the Provincial Treasurer for Manitoba under the provisions of *The Vacant Property Act*. The unanimous judgment of this Court (Rinfret C.J., Davis, Kerwin, Hudson and Taschereau JJ.) was delivered by Hudson J. who, after having discussed the facts and the various transactions which resulted in the sum of $9,844.40 being in dispute, said:

> The fund here in question represents what remains of the securities transferred under the agreement of 1924. That agreement was primarily a contract between the loan company and the trust company to effect a substitution of the latter for the former in relation to the depositors.

[18] [1943] S.C.R. 370, [1943] 3 D.L.R. 673, 24 C.B.R. 320.

The agreement, however, incorporated a trust which upon the transfer of the securities to the trust company became an "executed" trust, the beneficiaries of which were the depositors. Although these depositors were not parties to the agreement they were interested. The assets transferred by the loan company diminished *pro tanto* the capacity of that company to pay the depositors and the provision for the trust was for their protection.

The language of clause 4 is explicit: the trust company covenants and agrees

"to earmark and specially set aside the securities which shall be taken over...and to retain them solely and only as security and provision to take care of and pay off the deposits above referred to and said securities shall not fall into or become part of the assets"

of such party, "but shall be held and used only as above provided." When the securities were allocated to the trust company, the trust was irrevocable without the consent of the beneficiaries who thereupon acquired an independent right to enforce the trust.

* * *

When the order was made for winding-up, the securities undisposed of were held by the trust company as trustee for the unpaid depositors and, as such, they did not form any part of the assets of the estate. See Palmer's Company Law (Winding-Up) 1937 ed., p. 252 and also p. 672.

* * *

It would appear then that the fund in question is held to fulfil the trust of 1924 and can be treated in no other way.

In this view of the matter, sections 139 and 140 of the *Winding-Up Act* can have no application. The moneys were held by the liquidator as trustee for the individual depositors and not for the trust estate or for anybody else.

The Privy Council in *Attorney-General for Canada v. Attorney-General for the Province of Quebec and Attorneys-General for Saskatchewan, Alberta and Manitoba*[19], in referring to *Provincial Treasurer of Manitoba v. Minister of Finance for Canada,* said:

Indeed, the Chief Justice would himself have decided in favour of the appellants had he not felt himself constrained by the reasoning of the Supreme Court of Canada in *Provincial Treasurer of Manitoba v. Minister of Finance for Canada,* (1943) S.C.R. (Can.) 370 to hold otherwise. That case decided that certain trust money in the hands of a trustee which had not been, and some of which could not be, distributed to the cestuis que trustent could not be regarded as bona vacantia, but that it passed to the Province under an Act which provided that: "2. All personal property, including money or securities for money deposited with or held in trust by any person in the province, which remains unclaimed by the person entitled thereto for twelve years from the time when such property, money or securities were first payable shall notwithstanding that the depositee or trustee has delivered or paid or transferred such personal property, money or securities to any other person or official within or

[19] [1947] A.C. 33 at pp. 44-45, [1947] 1 D.L.R. 81.

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without the province as depositee or trustee vest in and be payable to His Majesty in the right of the province of Manitoba subject only to His Majesty's pleasure with respect to any claim thereafter made by any person claiming to be entitled to such property, money or securities." The only question in that case material to that which their Lordships are now considering was whether the special Act was in conflict with ss. 139 and 140 of the Winding-up Act of the Dominion Parliament or trenched on the field of bankruptcy and insolvency. It was held that the special Act was not invalidated for either reason. The money in question was not simply a debt—it was trust money—a fund secured on immovable property, and was not an asset of the liquidator in the winding-up but held as trustee for the individual depositors. There was no reason therefore why the Province should not transfer the possession, which the court held to be all that passed, to the Attorney-General for Manitoba as trustee for the depositors, or, indeed, for that matter, to him as bona vacantia. Winding-up and insolvency were not interfered with—only property and civil rights; the sum in dispute being trust money could not be used by the liquidator in the winding-up.

To paraphrase Hudson J. in the quotation given above, the deposit in question here was vested in the Minister as trustee for the policyholders in Ontario pursuant to the provisions of *The Ontario Insurance Act* and not for the Wentworth Insurance Company or for anybody else.

It is clear from s. 33 of the *Winding-up Act* that the property which vests in the liquidator upon his appointment is "...all the property, effects and choses in action to which the company is or appears to be entitled...", and s. 93 of the *Act* says that the property of the company is to be applied in satisfaction of its debts and liabilities and the charges, costs and expenses incurred in winding up its affairs. The liquidator, therefore, has no right under the general provisions of the *Act* to property unless that property is property which comes within the meaning of s. 33. It cannot be said that a deposit *vested* in the Minister is property to which the company is or appears to be entitled. The deposit is not the property of the company at all although in certain circumstances it may revert to the company, but that is much different from saying that the company is or appears to be entitled to it at the relevant time, namely, at the time of the bankruptcy. It cannot be suggested that immediately prior to the making of the receiving order Wentworth Insurance Company could have maintained an action against the Minister for the return to it of the deposit. The receiver has no greater rights in that respect than the insolvent company.

A statement by Lord Atkin in *Lymburn v. Mayland*[20], where he said:

> The provisions of this part of the Act may appear to be far-reaching; but if they fall, as their Lordships conceive them to fall, within the scope of legislation dealing with property and civil rights the legislature of the Province, sovereign in this respect, has the sole power and responsibility of determining what degre of protection it will afford to the public.

is, in my view, very, very apt here. The province has the sole power and responsibility to determine what degree of protection it will stipulate from insurers in favour of insureds in the Province of Ontario.

I would accordingly allow the appeal and restore the judgment of Hartt J. with costs in this Court and in the Court of Appeal.

Appeal dismissed, RITCHIE, HALL, SPENCE and PIGEON JJ. *dissenting.*

Solicitor for the Attorney-General for Ontario: F. W. Callaghan, Toronto.

Solicitors for those policyholders and others claiming for losses: Siegal, Fogler and Greenglass, Toronto.

Socilitors for those policyholders claiming for refund of unearned premiums: Catzman and Wahl, Toronto.

Solicitor for the liquidator: Morawetz and Strauss, Toronto.

[20] [1932] A.C. 318 at p. 326, [1932] 2 D.L.R. 6, [1932] 1 W.W.R. 578, 57 C.C.C. 311.

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*June 11, 12
June 30

GLENS FALLS INSURANCE COMPANY (*Defendant*) ..... APPELLANT;

AND

ETHEL EPSTEIN *et al.* (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Automobile—Class action to have proceeds of policy applied in satisfaction of judgments and claims against insured—Transfer of registration of insured's vehicle prior to accident little more than sham—Policy in force at time of accident—Judgment in personal injuries action assigned to Minister of Transport as result of payment from Unsatisfied Judgment Fund—Validity of payment and assignment—The Motor Vehicle Accident Claims Act, 1961-62 (Ont.), c. 84, s. 21—The Insurance Act, R.S.O. 1960, c. 190, s. 223(1).

In a class action brought pursuant to the provisions of *The Insurance Act*, R.S.O. 1960, c. 190, to have the proceeds of a policy of motor vehicle liability insurance, issued by the defendant, applied in satisfaction of judgments and claims against the insured, judgment at trial was given in favour of the plaintiff. The Court of Appeal unanimously affirmed the trial judgment, and the defendant then appealed to this Court.

The plaintiff had recovered judgment for $1,500 against the insured and P in respect of damages suffered by her motor vehicle in a collision with one operated by the insured and at least partly owned by him. The plaintiff and her son recovered a further judgment against the insured for the sum of $10,500 for injuries received by the son in the accident and for expenses incidental thereto.

No question was raised as to the liability of the insured, but the records of the Ontario Department of Transport disclosed that the registration of the insured's vehicle was transferred to P on a date prior to the day of the accident. The defendant contended that the registration of the transfer was evidence of the fact that the insured sold the vehicle on the said date and that the policy thereupon lapsed and thus was not in force at the time of the accident. However, the record in the case revealed that the transfer did not disclose the true situation and was little more than a sham. P was not really a beneficial owner of the vehicle but had the care of it to accommodate the insured who had lost his licence.

Held: The appeal should be dismissed.

The Court did not find it necessary to consider the question of whether or not the policy would have lapsed if there had been a genuine sale or transfer of ownership because the record showed that there was never any such sale or transfer. The policy in question was, therefore, in force at the time of the accident and the insurance moneys payable thereunder should be applied in or towards the satisfaction of the claims made by the plaintiff.

*PRESENT: Judson, Ritchie, Hall, Spence and Pigeon JJ.

The disposition ordered by the trial judge of the moneys payable in satisfaction of the judgment in the personal injuries action was occasioned because that judgment was assigned to the Minister of Transport for Ontario as the result of a payment having been made from the Unsatisfied Judgment Fund. The Court rejected the defendant's contention that the payment so made was illegal as being in contravention of s. 21 of *The Motor Vehicle Accident Claims Act*, 1961-62 (Ont.), c. 84, and that the assignment which was made in consequence thereof was also illegal.

APPEAL from a judgment of the Court of Appeal for Ontario, dismissing an appeal from a judgment of Morand J. Appeal dismissed.

J. P. Bassel, Q.C., and *R. A. O'Donnell*, for the defendant, appellant.

W. S. Wigle, for the plaintiff, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal brought by the Glens Falls Insurance Company from a unanimous judgment of the Court of Appeal of Ontario rendered without recorded reasons which dismissed an appeal from a judgment rendered by Mr. Justice Morand wherein he declared that the respondent was entitled to have the insurance moneys, payable by the appellant under an "owner's policy" of automobile liability insurance in which Trifun Cvetkovics (hereinafter called the insured) was the named insured, applied in or towards satisfaction of two judgments recovered against him; one such judgment having been recovered at the suit of Ethel Epstein alone and the other by her and her son.

This is a class action brought pursuant to the provisions of s. 223(1) of *The Insurance Act*, R.S.O. 1960, c. 190, by Ethel Epstein on behalf of herself and all other persons having judgments or claims against Trifun Cvetkovics arising out of an automobile collision in respect of which it is alleged that indemnity is provided under a motor vehicle liability policy issued by the appellant. Section 223(1) of *The Insurance Act* reads as follows:

223. (1) Any person having a claim against an insured, for which indemnity is provided by a motor vehicle liability policy, is, notwithstanding that such person is not a party to the contract, entitled, upon recovering a judgment therefor against the insured, to have the insurance money payable under the policy applied in or towards satisfaction of his

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judgment and of any other judgments or claims against the insured covered by the indemnity and may, on behalf of himself and all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied.

The effect of this section as it occurs in the Saskatchewan *Insurance Act* is succinctly stated by Judson J. in *Canada Security Assurance Co. v. Joynt*[1], at p. 113 where he says:

> The question in the statutory action is not whether the judgment in the liability action is correct but whether the plaintiff has a judgment against the insured for which indemnity is provided in the motor liability policy. A plaintiff in such an action proves his case by putting in the judgment against the insured, the insurance policy and proof of non-payment. All else is a matter of defence with the onus of proof on the insurance company.

The respondent in the present action has put in evidence a judgment which she recovered in the amount of $1,500 and costs against the insured and Borivoje Pesic in respect of damages suffered by her motor vehicle in a collision with one operated by the insured and at least partly owned by him, and she also put in evidence a further judgment against the insured in the sum of $10,500 recovered by herself and her son arising out of the same accident and relating to injuries suffered therein by her son and expenses incidental thereto.

The respondent also put in evidence the "owner's policy" of automobile liability insurance, hereinbefore referred to, by which the appellant agreed (*inter alia*) to indemnify the insured against liability imposed upon him by law to the limit of $100,000 for loss or damage arising from his ownership, use or operation within Canada of the automobile which was operated by the insured at the time of the accident in question. The policy purported to cover a period from February 28, 1959, until February 28, 1960, and the accident occurred on January 10, 1960.

"Owner's Policy" is defined by s. 198 (*g*) of *The Insurance Act* as follows:

> "owner's policy" means a motor vehicle liability policy insuring a person named therein in respect of the ownership, operation or use of an automobile *owned by him* and specifically described in the policy and in respect of the *ownership,* operation or use of any other automobile that may be within the definition thereof appearing in the policy.

The italics are my own.

[1] [1967] S.C.R. 110.

No question is raised as to the liability of the insured, but the records of the Ontario Department of Transport disclose that the registration of the vehicle in question in his name "was transferred March 18, 1959 to Borivoje Pesic. . ." and the appellant contends that the registration of this transfer is evidence of the fact that the insured sold the vehicle on March 18, 1959, and that the policy thereupon lapsed and thus was not in force at the time of the accident. The transfer on the records of the Department of Transport was proved by introduction of a copy of a statement required to be kept under *The Highway Traffic Act* and purporting to be certified by the Registrar of Motor Vehicles. In this regard s. 152(2) of *The Highway Traffic Act* reads as follows:

> A copy of any writing, paper or document filed in the Department pursuant to this Act, or any statement containing information from the records required to be kept under this Act, purporting to be certified by the Registrar under the seal of the Department, shall be received in evidence in all courts without proof of the seal or signature and is *prima facie* evidence of the facts contained therein.

It will be noted that the production of the certified copy of the transfer to Pesic provides only *prima facie* evidence of the facts contained therein and in my view the following circumstances appearing from the record in this case make it clear that the transfer so recorded did not disclose the true situation and was little more than a sham:

In the action brought by Mrs. Epstein against the insured and Pesic for damage to her motor vehicle, the defendants were both represented by a lawyer named N. Pasic who prepared a statement of defence in which it was admitted that at all material times both defendants were the owners of the motor vehicle and that the insured was the operator thereof. At the trial of that action Mr. Pasic appeared on behalf of the defendants and stated:

> I feel that the only problem I have in front of me is the position regarding these two defendants, there will be a certain conflict of interests between them. In my defence I stated that both defendants were owners of this motor vehicle. Subsequently, I found that the defendant, Pesic, was not really a beneficial owner of this vehicle, but he had care of this motor vehicle to accommodate the other defendant who had lost his licence. There are other proceedings involved in this action in Hamilton. There are, unfortunately, injuries to the driver of the other vehicle. However, the only other thing I would like to straighten up is the error that the defendant, Cvetkovics is the owner—the other defendant, Pesic, is not really an owner, he was merely an accommodating party.

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Mr. Pasic later said:

> The only worry was Cvetkovics, he told me he was worried about his friend in Hamilton who was merely an accommodating party, and I told them that if they did not give me instructions I would withdraw, so I have to be struck off the record.

When the action was later brought against the same two defendants in respect of the injuries sustained by David Epstein and the expenses incidental thereto, a defence was filed containing the following allegations:

> 2. The defendant Borivoje Pesic denies that he was the owner of the motor vehicle mentioned in the Statement of Claim and the fact is that the said motor vehicle was transferred by the defendant Cvetkovics to Borivoje Pesic as a matter of convenience and that the defendant Cvetkovics retained at all material times ownership of the same.
>
> 3. At the material time of the accident the defendant Cvetkovics was in sole control of the motor vehicle owned by him.

As I have indicated, it was strongly contended that the policy lapsed immediately upon the transfer of registration being filed in the records of the Department of Transport but, like the learned trial judge, I do not find it necessary to consider the question of whether or not the policy would have lapsed if there had been a genuine sale or transfer of ownership because the record of the cases before us satisfies me that there was never any such genuine sale or transfer and I am therefore of opinion that the policy here in question was in force at the time of the accident and the insurance moneys payable thereunder should be applied in or towards the satisfaction of the claims made by the respondent herein.

In the judgment of the learned trial judge, which was affirmed on appeal, it is declared that the respondent is entitled to have the insurance moneys payable under the policy in question applied in or towards the satisfaction of the judgments hereinbefore referred to in manner following:

(*a*) The Judgment of Ethel Epstein dated the 22nd day of September, 1961, in the sum of $1,500.00 with interest at five (5%) percent per annum from the date thereof and the sum of $453.50 with interest at the said rate from the 6th date of November, 1961;

(*b*) Her Majesty the Queen represented by the Minister of Transport for the Province of Ontario pursuant to the Judgment in favour of Ethel Epstein and David Epstein dated the 28th day of May, 1962, together with interest at five (5%) per annum from the 28th day of May, 1962, the said Judgment being in the sum of $10,500.00 inclusive of costs.

The disposition of the moneys payable in satisfaction of the judgment obtained in the personal injuries action was occasioned because that judgment was assigned to the Minister of Transport for the Province of Ontario as the result of a payment having been made from the Unsatisfied Judgment Fund, and the appellant contends that the payment so made was illegal as being in contravention of s. 21 of *The Motor Vehicle Accident Claims Act*, 1961-62 (Ont.), c. 84, and that the assignment which was made in consequence thereof was also illegal. Section 21 of *The Motor Vehicle Accident Claims Act* reads as follows:

> No payment shall be made out of the fund in respect of a claim or judgment for damages or in respect of a judgment against the Registrar of an amount paid or payable by an insurer by reason of the existence of a policy of insurance within the meaning of *The Insurance Act*, other than a policy of life insurance, and no amount sought to be paid out of the Fund shall be sought in lieu of making a claim or receiving a payment that is payable by reason of the existence of a policy of insurance within the meaning of *The Insurance Act*, other than a policy of life insurance, and no amount so sought shall be sought for payment to an insurer to reimburse or otherwise indemnify the insurer in respect of any amount paid or payable by the insurer by reason of the existence of a policy of insurance within the meaning of *The Insurance Act*, other than a policy of life insurance.

In July 1962, when the payment and assignment above referred to were made, the appellant denied, as it did before us, that there was any valid policy of insurance in existence and this issue was not determined by any Court until judgment was rendered herein by the learned trial judge on February 10, 1967. Under these circumstances it does not appear to me that the Minister of Transport was in breach of s. 21 in authorizing payment out of the Fund to Mrs. Epstein and her son. The fact that it was decided more than four years later that the policy in question was in existence and in force at the time of the accident cannot, in my view, be treated as invalidating the payment made out of the Fund or the assignment given to the Minister of Transport for Ontario.

The position therefore, in my opinion, is that at the time when the present action was brought, the Minister of Transport held a valid assignment of a claim for personal injuries which was covered by the indemnity provided in the policy issued by the appellant to which reference has hereinbefore been made. The present action is a class action brought on behalf of all persons having judgments or claims

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covered by the policy and in my opinion Mrs. Epstein was suing on behalf of the Minister of Transport in so far as the judgment in the personal injuries action was concerned, and the judgment of the learned trial judge should be affirmed in the form in which it was rendered.

For these reasons I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Bassell, Sullivan, Holland & Lawson, Toronto.

Solicitors for the plaintiff, respondent: Hughes, Amys, Wigle, Monaghan, Duke & Harlock, Toronto.

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*Mai 20
Juin 16

DAME FRANÇOISE MASSICOTTE .....REQUÉRANTE;

ET

JOSEPH RAPHAËL BOUTIN .....INTIMÉ.

REQUÊTE POUR PERMISSION D'APPELER

Relations domestiques—Jugement conditionnel de divorce—Requête pour permission d'appeler à la Cour suprême du Canada—Délais prescrits par la Loi sur le divorce expirés—Délais prescrits par loi spéciale priment ceux de la loi générale—Loi sur la Cour suprême, S.R.C. 1952, c. 259, art. 41, 64—Loi sur le divorce, 1968 (Can.), 16-17 Eliz. II, c. 24, art. 18.

Le 29 novembre 1968, l'intimé a obtenu un jugement conditionnel de divorce, qui a été confirmé en appel le 19 mars 1969. Dans une requête datée du 25 avril 1969 et présentée à cette Cour le 20 mai, la requérante demande la permission d'en appeler à cette Cour. L'intimé soutient que le délai de 30 jours prévu à l'art. 18 de la *Loi sur le divorce*, 1968 (Can.), 16-17 Eliz. II, c. 24, est expiré et que la Cour n'a pas le pouvoir d'accorder la permission. La requérante soutient au contraire que les art. 41 et 64 de la *Loi sur la Cour suprême*, S.R.C. 1952, c. 259, s'appliquent et que les délais ne sont pas expirés.

Arrêt: La requête pour permission d'appeler doit être rejetée.

La Cour n'a pas juridiction pour accorder la requête. Les dispositions de l'art. 18 de la *Loi sur le divorce* s'appliquent en vertu du principe que les dispositions d'une loi spéciale, dans le cas où elles sont inconciliables avec celles d'une loi générale, priment celles de la loi générale.

CORAM: Les Juges Fauteux, Abbott et Pigeon.

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MASSICOTTE v. BOUTIN

Domestic relations—Conditional divorce decree—Motion for leave to appeal to the Supreme Court of Canada—Delays prescribed by Divorce Act expired—Delays of special law overriding those of general law—Supreme Court Act, R.S.C. 1952, c. 259, ss. 41, 64—Divorce Act, 1968 (Can.), 16-17 Eliz. II, c. 24, s. 18.

On November 29, 1968, the respondent was granted a conditional divorce decree which was affirmed by the Court of Appeal on March 19, 1969. In a petition dated April 25, 1969, and presented to this Court on May 20, the petitioner asked leave to appeal to this Court. The respondent argued that the delay of 30 days prescribed by s. 18 of the *Divorce Act*, 1968 (Can.), 16-17 Eliz. II, c. 24, were expired and that this Court did not have the power to grant leave. The petitioner argued that ss. 41 and 64 of the *Supreme Court Act*, R.S.C. 1952, c. 259, applied and that the delays therein mentioned were not expired.

Held: The motion for leave to appeal must be dismissed.

The Court had no jurisdiction to grant the motion. The provisions of s. 18 of the *Divorce Act* were applicable by virtue of the principle that the provisions of a special law, in case of conflict with those of a general law, override those of the general law.

APPLICATION for leave to appeal in a divorce matter. Application dismissed.

REQUÊTE pour permission d'appeler en matière de divorce. Requête rejetée.

E. Colas, c.r., pour la requérante.

B. Lacombe, pour l'intimé.

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:—Dans une requête, datée du 25 avril 1969 et présentée à cette Cour le 20 mai dernier, dame Massicotte, épouse de l'intimé Boutin, demande la permission d'interjeter appel d'une décision rendue le 19 mars 1969 par la Cour d'appel de la province de Québec. Par cette décision, la Cour d'appel a rejeté le pourvoi que dame Massicotte avait logé à l'encontre d'un jugement conditionnel de divorce, prononcé à Montréal, le 29 novembre 1968, par M. le juge Hector Perrier, siégeant en Cour supérieure (Division des divorces), en vertu de la *Loi sur le divorce*, 16-17 Eliz. II, c. 24.

L'intimé s'oppose à cette demande. Il représente qu'aux termes de la loi particulière qui régit la matière, soit la *Loi sur le divorce*, la Cour suprême n'a plus, en l'espèce, le pouvoir d'accorder la permission demandée. Au soutien de cette prétention, l'intimé invoque les dispositions du deuxiè-

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Le Juge Fauteux

me alinéa de l'art. 18 de cette loi, lesquelles prescrivent qu'une telle permission peut être accordée dans les trente jours du jugement ou de l'ordonnance frappés d'appel ou dans le délai plus long que la Cour suprême ou un juge de cette Cour peuvent, avant l'expiration de ces trente jours, fixer ou accorder; et l'intimé signale que ce délai de trente jours est expiré en l'espèce.

D'autre part, la requérante se retranche sur les dispositions de l'art. 41 de la *Loi sur la Cour suprême.*

Il convient de juxtaposer le texte de l'art. 41(1) et (2) de la *Loi sur la Cour suprême* et celui de l'article 18 de la *Loi sur le divorce.*

Loi sur la Cour suprême:

41. (1) Sous réserve du paragraphe (3), il peut être interjeté appel à la Cour suprême, avec l'autorisation de cette Cour, contre tout jugement définitif ou autre de la plus haute cour de dernier ressort dans une province, ou de l'un de ses juges, où jugement peut être obtenu dans la cause particulière dont on veut appeler à la Cour suprême, qu'une autre cour ait refusé ou non l'autorisation d'en appeler à la Cour suprême.

(2) L'autorisation d'appel aux termes du présent article peut être accordée pendant la période fixée par l'article 64 ou dans les trente jours qui la suivent, ou dans tel autre délai prorogé que la Cour suprême ou un juge peut fixer ou accorder, soit avant, soit après l'expiration desdits trente jours.

Notons que la période fixée par l'art. 64 est de soixante jours, les mois de juillet et août étant exclus dans le calcul de ces soixante jours.

Loi sur le divorce:

18. (1) Appel d'une décision de la Cour d'appel rendue en vertu de l'article 17 peut être interjeté, sur une question de droit, devant la Cour suprême du Canada, avec la permission de cette Cour.

(2) La permission d'interjeter appel en vertu du présent article peut être accordée dans les trente jours du jugement ou de l'ordonnance frappés d'appel ou dans le délai plus long que la Cour suprême du Canada ou un juge de cette Cour peuvent, *avant* l'expiration de ces trente jours, fixer ou accorder.

Les soulignés sont de moi.

Il est manifeste que ces dispositions de l'art. 41 sont inconciliables avec celles de l'art. 18, et ce, non seulement quant à la nature des questions sur lesquelles un appel peut être interjeté avec la permission de la Cour, mais aussi quant au délai dans lequel la Cour a le pouvoir d'accorder cette permission et quant à la période de temps pendant laquelle la Cour ou un juge de la Cour a le pouvoir d'étendre ce délai.

Généralement, lorsque le Parlement donne à cette Cour ou à l'un de ses juges le pouvoir d'étendre le délai dans lequel une permission d'appeler peut être accordée, il permet que ce pouvoir puisse être exercé même après l'expiration du délai fixé. Tel est le cas, par exemple, dans la *Loi sur la Cour suprême*, cf. art. 41(2), dans le *Code criminel*, cf. art. 599 et dans la *Loi sur la Cour de l'Échiquier*, cf. art. 82(3).

Telle n'est pas la situation sous la *Loi sur le divorce*. Sous cette loi, la Cour ou l'un de ses juges n'ont aucun pouvoir d'étendre le délai de trente jours, après son expiration. La disposition de l'art. 18 sur le point est claire et précise.

La requérante peut-elle, dans les circonstances, invoquer victorieusement les dispositions de l'art. 41 de la *Loi sur la Cour suprême*? En présence de deux lois du Parlement, dont l'une, générale, a pour objet l'établissement de la Cour suprême et la définition de la juridiction d'appel de cette Cour et l'autre, spéciale, a exclusivement pour objet le divorce et épuise, sur le sujet, la matière de la loi, nous devons, à mon avis, appliquer le principe voulant que les dispositions de la loi spéciale, dans le cas où elles sont inconciliables avec celles de la loi générale, priment celles de la loi générale. Maintes fois, ce principe et sa raison d'être ont été rappelés. On en trouve l'expression dans *Re Township of York and Township of North York*[1]:

> It is, of course, elementary that special legislation overrides general legislation in case of a conflict—the general maxim is *Generalia specialibus non derogant*—see *Lancashire Asylums Board v. Manchester Corporation*, (1900) 1 Q.B. 458, at p. 470, per Smith, L.J.—even where the general legislation is subsequent; *Barker v. Edgar*, (1898) A.C. 748, at p. 754, in the Judicial Committee. The reason is that the Legislature has given attention to the particular subject and made provision for it, and the presumption is that such provision is not to be interfered with by general legislation intended for a wide range of objects: Craies on Statute Law, 3rd ed., p. 317.

Je dirais donc que nous n'avons pas juridiction pour accorder la demande de dame Massicotte et, pour cette raison, je rejetterais avec dépens la requête pour permission d'appeler.

Requête rejetée avec dépens.

Procureurs de la requérante: Deschesnes, de Grandpré, Colas, Godin et Lapointe, Montréal.

Procureurs de l'intimé: Martineau, Walker, Allison, Beaulieu, Phelan et Tetley, Montréal.

[1] (1925), 57 O.L.R. 644 at 648.

1969

*Juin 2
Juin 10

SA MAJESTÉ LA REINE .....REQUÉRANTE;

ET

JOSEPH JACOBS .....INTIMÉ.

REQUÊTE POUR PERMISSION D'APPELER

Droit criminel—Juridiction—Demande de permission d'appeler à la Cour suprême du Canada—Cour d'appel ayant rescindé son propre jugement.

Ayant été déclaré coupable par un juge de la Cour des sessions de la paix d'avoir été en possession d'instruments d'effraction, l'intimé interjeta appel à la Cour du banc de la reine. Le jour de l'audition, ses procureurs firent défaut de comparaître. La Couronne a alors demandé et obtenu le rejet de l'appel. Quelques semaines plus tard, sur requête de l'intimé expliquant le défaut des procureurs, la Cour d'appel, différemment composée, rescinda son jugement antérieur. La Couronne a alors demandé à cette Cour la permission d'appeler de ce jugement. La Couronne allègue que la Cour d'appel n'avait pas juridiction pour rescinder son jugement. Par contre, l'intimé soutient que la Cour suprême n'a pas juridiction pour accorder la permission demandée.

Arrêt: La permission d'appeler doit être accordée. Cependant la détermination de la question de juridiction de cette Cour soulevée par l'intimé est laissée au banc qui sera saisi de la cause.

Criminal law—Jurisdiction—Motion for leave to appeal to Supreme Court of Canada—Court of Appeal having revised its own judgment.

The respondent was convicted of possession of housebreaking instruments in the Court of the Session of the Peace and appealed to the Court of Appeal. On the day of the hearing, his lawyers defaulted although duly called. The Crown then obtained the dismissal of the appeal. A few weeks later, on a motion made by the respondent explaining the lawyers' default, the Court of Appeal, constituted differently, rescinded its previous judgment. The Crown applied to this Court for leave to appeal this judgment of the Court of Appeal. The Crown argued that the Court of Appeal did not have jurisdiction to rescind its judgment. The respondent submitted that the Supreme Court did not have jurisdiction to grant leave.

Held: The application for leave to appeal should be granted. However, the question of the jurisdiction of this Court raised by the respondent was left to be decided at the hearing of the appeal.

APPLICATION for leave to appeal from a judgment of the Court of Appeal revoking a previous judgment. Application granted.

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*CORAM: Les Juges Fauteux, Abbott et Pigeon.

REQUÊTE pour permission d'appeler d'un jugement de la Cour d'appel rescindant un jugement antérieur. Requête accordée.

C. Chamberland, pour la requérante.

F. D. Shoofey, pour l'intimé.

Le jugement de la Cour fut rendu par

Le JUGE FAUTEUX:—Il s'agit d'une demande de permission d'appeler.

Le 31 octobre 1968, l'intimé Joseph Jacobs a été déclaré coupable, par un juge de la Cour des sessions de la paix, d'avoir, à Montréal, le ou vers le 8 juillet 1968, commis l'acte criminel décrit à l'art. 295(1) du *Code criminel*, soit possession d'instrument d'effraction.

L'intimé interjeta appel de cette déclaration de culpabilité à la Cour du banc de la reine (Juridiction d'appel) et cet appel vint pour audition le 24 mars 1969. Les procureurs de Jacobs firent défaut de comparaître bien que dûment appelés. C'est alors que, séance tenante, le procureur de la Couronne demanda et obtint de la Cour le rejet de l'appel.

Le 18 avril 1969, la Cour d'appel, différemment composée, rescinda ce jugement du 24 mars 1969 et ce à la requête de l'intimé Jacobs et vu l'explication donnée par ses procureurs quant à leur défaut de comparaître le 24 mars précédent.

Le Procureur général demande à cette Cour la permission d'appeler de ce jugement du 18 avril 1969. On représente, de sa part, que la Cour du banc de la reine (Juridiction d'appel) n'avait pas juridiction pour rescinder son propre jugement. D'autre part, l'intimé Jacobs s'oppose à la requête du Procureur général. Il soutient que la Cour suprême n'a pas juridiction, en l'espèce, pour accorder la permission d'appeler.

Il convient, je crois, d'accueillir la requête du Procureur général, sujet cependant à laisser au banc de cette Cour, qui sera saisi de la cause, la détermination de la question de juridiction soulevée par l'intimé; le mérite de l'appel ne

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LA REINE v. JACOBS

Le Juge Fauteux

devant être considéré que dans le cas, évidemment, où il serait alors décidé que la Cour a juridiction, en l'espèce, pour accorder la permission d'appeler du jugement prononcé par la Cour d'appel le 18 avril 1969.

Requête accordée.

Procureur de la requérante: *C. Chamberland, Montréal.*

Procureur de l'intimé: *F. D. Shoofey, Montréal.*

1968

*May 24

1969

May 16

AUTOMOTIVE PRODUCTS COMPANY LIMITED and MAURICE GAGNON (*Plaintiffs*) ..... APPELLANTS;

AND

INSURANCE COMPANY OF NORTH AMERICA (*Defendant*) ..... RESPONDENT;

AND

INDUSTRIAL ACCEPTANCE CORPORATION LIMITED ..... MIS-EN-CAUSE.

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

Insurance—"Blanket or reporting policy"—Clause obliging insured to report all sales—Interpretation—Whether reporting requirement a condition of the contract—Policy null—Art. 1013, 2490 and 2491 of the Civil Code.

The appellant company is a dealer in heavy equipment. Its sales are often made on a deferred payment basis and were, during the period relevant to this case, financed by one of the finance companies with which it had arrangements. Through the agency of its brokers and representatives, which incidentally were also brokers for the other party, the appellant negotiated with the respondent three blanket insurance policies very similar in substance, one related to each of the three finance companies. These policies contemplate insurance coverage from the date the sale is completed to the end of the financing period. The contract, *inter alia*, provides that "all such

*PRESENT: Fauteux, Judson, Ritchie, Spence and Pigeon JJ.

sales" shall be reported "as soon as practicable" to the respondent or to its brokers. The appellant company sold a tractor to the appellant G. This sale was referred to and approved by the finance company (mis-en-cause) but before notice of such sale had been given to the respondent or its brokers, the tractor was damaged beyond repairs. It was then found that some of the clients of the appellant company had insured their financed equipment through their own finance company. Upon request by the appellants for the issuance of an insurance certificate, the respondent denied all liability under the contract and refused to issue such a certificate on the grounds that all financed sales had not been reported and that such a failure amounted to a breach of a condition which is of the essence of the contract. In the Superior Court the trial judge came to the conclusion that the disputed clause of the blanket policy could not be interpreted as being a reciprocal undertaking by the appellant company to report all financed sales. In his opinion, this interpretation found support in another clause of the blanket policy which provides that, if other valid and collectible insurance exists at the time of the loss, the respondent's policy shall apply only as excess after all other insurance has been exhausted. The Court of Appeal found that the reporting requirement was a promissory condition of the blanket policy and that the respondent was justified under the terms of art. 2490 of the *Civil Code* to ask that the policy be considered as null and void on account of the failure of the appellant company to report all financed sales.

Held (Spence and Pigeon JJ. dissenting): The appeal should be dismissed.

Per Fauteux, Judson and Ritchie JJ.: The obligation to report all financed sales amounted to a promissory condition and was of the essence of the contract in that the acceptance of the risk and the rate of premiums were directly related to the volume of business. The reporting requirement was, thus, truly a condition of the contract within the meaning of art. 2490 of the Quebec *Civil Code* and the failure by the appellant company to comply with that condition justified the respondent to ask that the contract be declared null and void.

Per Spence and Pigeon JJ., *dissenting*: The existence of two other similar contracts shows that the insurance policy sued upon did not intend to cover all financed sales made by the appellant company. The respondent's plea also is not that all three policies should be considered as one single document but that only one should be voided. As to the contract in question, it further contains no express stipulation that it should be void if the sales are not promptly reported. It follows that, as the literal reading does not show the true intention of the parties, recourse must be had to interpretation in compliance with the rule enunciated in art. 1013 of the Quebec *Civil Code*. The true question is, therefore, whether or not in the light of relevant circumstances, the contract did become void by reason of the appellant's failure to report, as soon as it was feasible, full details of all financed sales. Inasmuch as there was no provision regarding the avoidance of the contract if the reporting requirement was not

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AUTOMOTIVE PRODUCTS COMPANY LIMITED *et al.* *v.* INSURANCE COMPANY OF NORTH AMERICA *et al.*

complied with, such requirement was simply one among many stipulations of the contract most of which are certainly not resolutive conditions. Every stipulation in an insurance policy is not necessarily a warranty or condition within the meaning of art. 2490 of the *Civil Code* with the drastic consequences that this implies. Notwithstanding the provisions contained in art. 2490 and 2491 of the *Civil Code,* the general rule remains that the breach of an obligation does not bring about dissolution of a contract unless there is a resolutive condition, but only gives rise to the remedies enumerated in art. 1075 of the *Civil Code.* Otherwise, any breach whatsoever of any stipulation would *ipso facto* make the contract void. The insurer could then disclaim liability even if the breach is immaterial to the loss and thus make the protection illusory.

Assurance—Police d'assurance en compte-courant—Disposition obligeant l'assuré de déclarer toutes ses ventes—Interprétation—La nécessité de déclarer les ventes est-elle une condition du contrat—Nullité—Art. 1013, 2490 et 2491 du Code Civil.

La compagnie appelante fait le commerce de matériel lourd. Ses ventes comportent souvent des versements échelonnés et, au cours de la période comprise dans cet appel, le financement des ventes à paiements différés se faisait par l'entremise de l'une des compagnies de finance avec lesquelles la compagnie appelante s'était préalablement entendue. Par l'intermédiaire de son courtier et représentant, qui incidemment était aussi le courtier de l'autre partie, la compagnie appelante avait négocié et obtenu trois polices d'assurance en compte-courant, fort semblables quant au contenu, chacune se rapportant à l'une des trois compagnies de finance. Ces polices d'assurance prévoient que la protection qu'elles accordent s'étend à compter du jour où la vente est complétée jusqu'à la fin de la période de financement. La compagnie appelante a vendu un tracteur à l'appelant G. La compagnie de finance (mise-en-cause) fut informée de cette vente et l'approuva. Mais avant que l'intimée ou son courtier n'ait été avisé de cette vente le tracteur fut endommagé irréparablement. On apprit alors que certains clients de la compagnie appelante avaient fait financer leurs achats de matériel lourd par leur propre compagnie de finance. Lorsque les appelants ont demandé qu'un certificat d'assurance leur soit remis, l'intimée a nié toute responsabilité aux termes du contrat parce qu'elle n'avait pas été informée de toutes les ventes à paiements différés faites par la compagnie appelante. A son avis, ceci constituait un manquement à une condition essentielle du contrat. En Cour supérieure le juge de première instance a estimé que la clause qui fait l'objet du litige ne pouvait pas être interprétée comme une contrepartie des obligations de l'assureur imposant à la compagnie appelante le devoir de déclarer toutes ses ventes à paiements différés. Selon lui, cette interprétation était appuyée par une autre clause de la police aux termes de laquelle, au cas où il existerait d'autres polices d'assurance valides et recouvrables, la responsabilité de l'assureur ne s'étendrait qu'à la portion de la

perte qui n'aurait pas été couverte et après que toutes les autres indemnités auraient été perçues. La Cour d'appel a conclu que l'obligation de déclarer était une condition promissoire de la police et que l'intimée était en conséquence justifiée aux termes de l'art. 2490 du *Code Civil* d'en demander l'annulation en compte-courant en raison du défaut de la compagnie appelante de rapporter toutes ses ventes à paiements différés.

Arrêt: L'appel doit être rejeté, les Juges Spence et Pigeon étant dissidents.

Les Juges Fauteux, Judson et Ritchie: L'obligation de déclarer les ventes à paiement différé se ramène à une condition promissoire essentielle en ce sens que l'acceptation du risque et le taux des primes ont un rapport direct avec le volume des affaires. Le devoir de déclarer les ventes est, en conséquence, une véritable condition du contrat au sens donné à ce mot dans l'art. 2490 du *Code Civil* et le défaut de la compagnie appelante de se conformer à cette condition justifiait pleinement l'intimée de demander l'annulation du contrat.

Les Juges Spence et Pigeon, *dissidents:* L'existence de deux autres contrats semblables démontre que la police d'assurance qui fait l'objet du litige n'entendait pas couvrir toutes les ventes à paiements différés faites par la compagnie appelante. L'intimée, également, n'a pas prétendu, en guise de défense, que les trois polices d'assurance devaient être interprétées comme formant un tout, mais plutôt qu'une seule police devait être annulée. Quant au contrat en question il ne contient aucune stipulation expresse prévoyant son annulation au cas où les ventes ne seraient pas promptement déclarées. Il s'ensuit que, si le sens littéral du texte ne révèle pas l'intention des parties, on doit la rechercher par interprétation conformément à la règle énoncée dans l'art. 1013 du *Code Civil* de la province de Québec. Le problème véritable est donc de savoir si, à la lumière de toutes les circonstances qui se rapportent à cette cause, le contrat d'assurance est devenu nul du fait seulement que la compagnie appelante a négligé de déclarer toutes ses ventes à paiement différé. Étant donné que le contrat d'assurance ne contient aucune disposition prévoyant son annulation au cas où les ventes ne seraient pas déclarées, une telle exigence est simplement l'une des nombreuses stipulations du contrat qui, pour la plupart, ne constituent certainement pas des conditions résolutoires. Toute stipulation contenue dans une police d'assurance n'est pas nécessairement une garantie ou une condition au sens de l'art. 2490 du *Code Civil* avec les conséquences rigoureuses que cela implique. Nonobstant les dispositions contenues dans les art. 2490 et 2491 du *Code Civil,* la règle générale est toujours que le manquement à une obligation n'entraîne pas la dissolution du contrat à moins qu'il n'y ait une condition résolutoire. Ce manquement donne uniquement ouverture aux recours énoncés à l'art. 1075 du *Code Civil.* Autrement, tout défaut quelconque de se conformer à l'une des stipulations du contrat rendrait le contrat nul *ipso facto.* L'assureur pourrait alors se dégager de sa responsabilité même dans le cas où le défaut serait étranger à la perte et, de cette façon, rendre la protection illusoire.

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AUTOMOTIVE PRODUCTS COMPANY LIMITED *et al.* *v.* INSURANCE COMPANY OF NORTH AMERICA *et al.*

APPEL d'un jugement de la Cour du banc de la reine[1], province de Québec, infirmant un jugement du Juge St-Germain. Appel rejeté, les Juges Spence et Pigeon étant dissidents.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reversing a judgment of St-Germain J. Appeal dismissed, Spence and Pigeon JJ. dissenting.

Richard B. Holden, for the appellants.

L. P. de Grandpré, c.r., for the respondents.

The judgment of Fauteux, Judson and Ritchie JJ. was delivered by

FAUTEUX J.:—This is an appeal from a unanimous judgment of the Court of Appeal[1], composed of Hyde, Brossard and Salvas, JJ.A., setting aside a judgment of the Superior Court which had maintained appellants' action and condemned respondent to pay $14,633.29 with interest and costs.

The facts leading to this litigation are recited at length in the reasons for judgment of Hyde, J.A.; for the determination of this appeal, only the following need be stated. Appellant, Automotive Products Co. Ltd., sells various payments, its sales, on such occurrence, were, during the types of heavy equipment. Frequently made on deferred period relevant to these proceedings, financed by one of three finance companies with which it had arrangements, namely the mise-en-cause Industrial Acceptance Corp. Ltd., Traders Finance Corporation Limited and Canadian Acceptance Corporation Limited. Through the agency of its brokers and representatives, Messrs. Rolland, Lyman, Burnett Ltd.,—subsequently succeeded by Dale & Company Limited,—appellant company negotiated with J. S. McDowell, agent for respondent insurer, three blanket or

[1] [1968] Que. Q.B. 140.

reporting insurance policies, one related to each of the three finance companies. These three blanket policies, similar in substance, envisage automatic cover, attaching at the time of the sale and lasting during the period of financing, on equipment sold on an instalment plan basis, and contemplate that, in each particular case, an individual certificate or policy would be issued, on request, in favour of the dealer Automotive Products Co. Ltd., the purchaser and the finance company concerned. The blanket policy designed to apply to sales financed by the mise-en-cause bears number 1BR 6775 of respondent's policies and is filed in the record as exhibit P-2.

On September 19, 1960, appellant company sold a tractor to appellant Gagnon. This sale, made on an instalment plan, was referred to the mise-en-cause to be financed. A few days later and before respondent or the broker for Automotive Products Co. Ltd. had been apprised of the sale, to wit on September 26, the tractor was irreparably damaged in an accident. Subsequent to this loss, appellants invoked the blanket policy filed as P-2 and requested respondent to issue an insurance certificate or individual policy, in their joint names, retroactive in effect to the date of the sale. Respondent refused to do so. It pointed out to appellants that the obligation assumed by the insurer in this respect no longer subsisted in view of the failure of Automotive Products Co. Ltd. to comply with the promissory condition, contained in P-2, according to which appellant company had undertaken to report and include in the cover *all its financed sales*. Appellants did not deny that many of these financed sales were insured with insurance companies other than respondent as indeed the evidence clearly shows. They contended, however, that nothing in the blanket policy prevented that to be done. Hence their action against respondent. In their declaration, they offer to respondent the amount of $360.00, alleged to be the premium payable under the terms of the blanket policy, and pray for judgment condemning respondent to pay them jointly and severally the amount of $21,229.64 with interest from the date of the loss or subsidiarily to pay these sums

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to them and the mise-en-cause as their respective interests may appear from the record or to the Court. The mise-en-cause did not appear.

As pointed out by appellants in their factum, the only issue, at this stage of the proceedings, is one of interpretation of contract P-2 of which the relevant parts may now be quoted:

INSURANCE COMPANY OF NORTH AMERICA
Philadelphia

No. 1BR 6775

LIMIT OF LIABILITY:	Rate: as per form	Premium $
Amount $200,000.00	attached.	as earned

IN CONSIDERATION OF THE STIPULATIONS HEREIN NAMED

and of ..... AS EARNED ..... dollars, premium,
AUTOMOTIVE PRODUCTS CO. LTD.

IN CONSIDERATION OF THE PREMIUMS ACCRUING UNDER POLICIES TO BE ISSUED UNDER THIS CONTRACT
—THE—
INSURANCE COMPANY OF NORTH AMERICA
DOES INSURE
AUTOMOTIVE PRODUCTS CO. LTD.
(hereinafter called the "VENDOR")

in respect to *all sales* made to any person, firm, or corporation,
(hereinafter called the "OWNER")

of merchandise consisting principally of contractors' equipment, road making and heavy machinery, tractors, bulldozers and the like, assembled or not, their parts and equipment attached or otherwise, subject to the following stipulations:—

(A) that a correct description of *all such sales* be inscribed on a policy of insurance to be issued under this contract to the Vendor and Owner jointly, the terms and conditions of which shall be in conformity with Clauses I to XIV cited hereunder,

(B) that the Insurers liability shall be limited to the amount set opposite *each article sold* or the actual cash value at the time of loss whichever is the lesser,

(C) that the cover granted under this Contract and any policy issued hereunder shall apply only to such merchandise sold by the Vendor on a deferred payment, financed payment, or lease agreement plan, and *shall attach at the time of such sale,*

(D) that the cover provided herein shall apply as follows:—

(1) as to the Contract—until such time as cancellation is effected in accordance, and contemporaneously with Clause XIII hereinafter set forth,

(2) as to any Policy issued hereunder—for the period specified thereunder, unless cancelled in accordance with the terms of said Policy prior to such expiry date,

(E) that full details of *all such sales* be reported during the life of this policy to this Company and/or Messrs. Rolland, Lyman, Burnett Ltd. of Montreal, P.Q., as soon as practicable after consummation thereof,

(F) that the wording of Clauses I to XIV, both numbers inclusive, as hereunder set forth and which are embodied in each Policy issued hereunder, is hereby made, and does form part of the obligations of this Contract, anything to the contrary notwithstanding. The terms and conditions of this Contract shall commence from 12.01 A.M. Standard Time, December 9th, 1955, Montreal, P.Q. ...

CLAUSE IX. NOTICE OF LOSS

Every claim for a loss under this policy shall be immediately reported in writing with full particulars to the INSURANCE COMPANY OF NORTH AMERICA, Montreal, P.Q., or to MESSRS. ROLLAND, LYMAN, BURNETT LTD. of Montreal, P.Q., issuing this policy, and a detailed sworn proof of loss shall be filed with the Company or its said Agent within four (4) months of the date of the loss. Failure by the Insured to file either such claim or such proof shall invalidate the claim.

CLAUSE X. OTHER INSURANCE

This Company shall not be liable for loss, if at the time of loss or damage, there is other valid and collectible insurance which would attach if this insurance had not been effected, except that this insurance shall apply only as excess and in no event as contributing insurance and then only after all other insurance has been exhausted. ...

CLAUSE XIV. LOSS PAYABLE

It is hereby understood and agreed that loss, if any, is payable to THE INDUSTRIAL ACCEPTANCE CORPORATION, LIMITED and/or the Insureds as their respective interests may appear. ...

The italics and the underlines are mine.

In the Superior Court, Mr. Justice St-Germain found that respondent's obligation to ensure all equipment sold on the instalment plan, was not subordinated to a reciprocal undertaking by appellant company to submit to respondent for insurance all such sales. The basis of his finding is that, on a consideration of the blanket policy, he could find no express or implied covenant subordinating respondent's obligation to the undertaking of appellant company. He

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referred to what was said, at page 249 et seq., in *The Queen v. MacLean*[2] as to conditions governing the right to imply a covenant in a contract. The learned judge found support for his interpretation in Clause X of the blanket policy, the presence of which, he said, was a clear indication that respondent had foreseen the possibility of appellant company ensuring with other insurance companies. For these reasons, he accepted appellants' interpretation of the contract, granted *acte* of their tender and deposit and condemned respondent to pay them jointly and severally the sum of $14,633.29 with interest from the date of the loss of the tractor, namely from September 26, 1960.

In the Court of Appeal, the premises upon which the Trial Judge predicated his interpretation were rejected as ill-founded. The Court accepted as valid respondent's explanation that Clause X was a standard clause in all inland marine contracts which would operate, in this case, to modify the rights of the insured against the insurer,—but not his obligations towards the latter,—should the equipment sold be covered by a master policy issued in the United States by the factory itself, in which event, the insured would be entitled, under P-2, to excess insurance only. Appellants' interpretation of Clause X was found by the Court to lead to a conflict between its provisions and those of the introductory paragraph of P-2,—where the cause and consideration of the contract are set out,—and it was found to denude of their literal, true and clear meaning the unambiguous words *all sales, all such sales* and other expressions italicized in the other paragraphs quoted above. It was also considered that appellants' interpretation was furthermore offending the rule that all the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire act (1018 C.C.). The Court concluded that the stipulations in the contract were onerous, synallagmatic, clear, precise and expressing without ambiguity the mutual intent of the parties in that they oblige respondent to ensure and appellant company to report and submit for insurance with respondent all its financed sales.

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[2] (1882), 8 S.C.R. 210.

The Court then noted that, some time in 1959, McDowell complained to Dale & Company that the respondent insurer was not getting the volume of business which had been anticipated when the blanket policy was written and that the following explanation was given by Dale & Company in a letter addressed, on October 15, 1959, to respondent insurer, for attention of McDowell:

> Dear Sirs:
>
> Further to our conversation of a fortnight ago, the captioned coverage has been discussed with both our Sub-Agent and Automotive Products Limited.
>
> It has now been established that the bulk of Sales made by Automotive have been the type that does not require financing. They cite considerable government business and sales to very large companies.
>
> We can assure you, however, that it is their feeling that this is a passing phase and that considerable sales of a financing nature will be made. The Assured is most interested in retaining the type of coverage offered by your Company and will make every endeavour to make it more attractive to you.

The Court also noted that McDowell, who had then accepted that explanation, did not learn of the breach of the promissory condition until this particular loss was being investigated and that when respondent complained of this breach, Dale & Company wrote respondent a letter on behalf of its client, Automotive Products Co. Ltd., which, in part, reads as follows:

> In our discussions with the Automotive Products Co. concerning this loss, they have been most emphatic in stating that it has been the intention that the insurance on all financed equipment was to be reported under your Policy, and this has only been deviated from where the buyers have requested that they be allowed to insure under their own existing Policies, or where, in error, their Offices outside of Montreal have not been aware of the arrangements and have allowed the insurance to go to Merit.

Having found that there had been a breach of the promissory condition contained in the blanket policy, the Court of Appeal concluded that respondent was justified to invoke the provisions of art. 2490 C.C. and to ask that the policy be declared null and void. Hence the appeal to this Court.

I am clearly of opinion that, under contract P-2, Automotive Products Co. Ltd. undertook to report to respondent insurer and include in the cover *all sales*

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financed by Industrial Acceptance Corp. Ltd. and that Automotive Products Co. Ltd. assumed a like obligation under the blanket policies respectively related to sales financed by Traders Finance Corporation Limited and by Canadian Acceptance Corporation Limited. I am also of opinion that the undertaking of appellant company, of which respondent's obligation to ensure is the counterpart, amounts to a promissory condition which, related to the volume of insurance business, accruing premiums and spreading of the risk, is, as shown in the evidence and found by the Court of Appeal, of the essence, in the consideration of the acceptance of the risk and the determination of the rate of premiums. In view of the breach of the promissory condition, art. 2490 C.C. receives its application in this case, there being nothing in the contract indicating an intent to derogate from the provisions of that article. In their note under 2490 C.C., the codifiers indicate that they have adopted *la doctrine reçue et fixée depuis longtemps du droit anglais telle qu'on la trouve dans les auteurs.* In *Aero Insurance Company v. Obalski Chibougamau Mining Company*[3], Chief Justice Lafontaine of the Court of Appeal referred to this note of the codifiers and said, at page 156, *la règle universellement suivie dans tout contrat d'assurance et qui doit s'appliquer par analogie à l'assurance des aéroplanes est énoncée dans Halsbury, Laws of England, Vo. Marine Insurance, p. 417:*

> The essential characteristic of a warranty is that it must be exactly complied with, whether it be material to the risk or not. If it be not complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach, but without prejudice to any liability incurred by him before that date.
>
> Any inquiry into the materiality or immateriality to the risk is entirely precluded, and so are all questions, whether there has or has not been a substantial compliance with the warranty; and, where a warranty has been broken, although the loss may not have been in the remotest degree connected with the breach, the underwriter is none the less discharged of that account from all liability for the loss ...

At page 155, Chief Justice Lafontaine said:

> La police devient nulle et l'intimée ne peut en conséquence réclamer les indemnités stipulées, suivant la règle qu'une partie contractante ne

[3] (1931), 51 Que. K.B. 145.

peut réclamer l'exécution des obligations de son cocontractant à moins d'avoir commencé par remplir les siennes. Dans l'espèce, le paiement de la prime n'était pas la seule obligation de l'intimée, il y avait de plus l'obligation importante, essentielle, on pourrait dire, d'obtenir les certificats nécessaires et d'enregistrement requis pour pouvoir opérer un avion. Aussi longtemps que les certificats n'étaient pas obtenus, l'intimée ne pouvait en aucune façon se servir de l'avion assuré sans manquer à son contrat et à la bonne foi envers l'assureur. En sorte que le débat est clos et il faut dire que l'action est irrecevable.

The decision of the Court of Appeal in that case was appealed to this Court and the appeal was dismissed with costs.[4]

With deference to those who have a contrary view and being of opinion that the Court of Appeal rightly dismissed the action taken by appellants against respondent, I would dismiss the appeal with costs.

The judgment of Spence and Pigeon JJ. was delivered by

PIGEON J. (*dissenting*):—Appellant, Automotive Products Co. Ltd. (hereinafter called Automotive), is a dealer in tractors and other contractors' equipment. In 1955, Rolland, Lyman, Burnett Ltd., acting as its brokers, applied to respondent Insurance Company of North America for what might be called blanket insurance coverage for goods sold on finance.

On November 17, respondent issued a contract for such coverage. This contract provides for the issue of policies describing "all such sales" to the vendor and purchaser jointly and stipulates that "the cover shall attach at the time of such sale". Full details of "all such sales" are to be promptly reported to the respondent or to the above-named brokers. Clauses to be inserted in each policy to be issued are attached. In one of these notice of any loss is required to be given to the respondent or to "its said agent" and in another it is agreed that any loss "is payable to the Canadian Acceptance Corporation, Limited and/or the insureds as their respective interests may appear".

On December 7, 1955, another contract was issued by respondent with identical wording except that in the

[4] [1932] S.C.R. 540.

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clause concerning the payment of losses, the Industrial Acceptance Corporation, Limited (hereinafter called I.A.C.) is named instead of the other finance company.

Finally, on August 2, 1956, a third similar contract was issued in which the name of the finance company is Traders Finance Corporation Limited.

From time to time, policies (also called "certificates") were issued under each of the three contracts or master policies. It also appears that although no change was made in the clauses providing for the reporting of the sales and of the losses, Dale & Company Limited were authorized to act as brokers for the purpose of Automotive's contracts with respondent.

Early in October 1959, its manager in Montreal complained to them of the small volume of premiums from Automotive business. By a letter dated October 15, he was advised "that the bulk of sales made by Automotive have been of the type that do not require financing". In fact, many sales that did require financing were not being reported to the respondent or Dale & Company because Automotive allowed purchasers on the instalment plan to obtain insurance from other sources if they preferred and did not report such sales. Also, the reporting and the payment of the premiums were not being done by Automotive itself but by the finance companies and the company financing each purchase reported the sale and paid the premium to the brokers only when no other insurance coverage was obtained.

On September 19, 1960, Automotive sold to appellant Maurice Gagnon through its Quebec branch a tractor with angledozer for a total price, including sales tax, of $18,000. The terms were $2,000. cash, the balance to be financed by I.A.C. over a term of thirty months. The purchaser does not appear to have requested insurance coverage by a company other than the respondent and the contract provided for an insurance premium to be added to the unpaid balance in addition to finance charges. The amount that was entered for this premium was $405. instead of $450. as required under respondent's policies in which clause XV requires premiums at the rate of $1. per $100. per annum.

On September 22, the conditional sale contract was received by I.A.C. in Montreal. It immediately enquired from its Victoriaville branch the same day and, on the following day, received a telegram recommending favourable action. On September 26, which was a Monday, cheques were issued to Automotive in the amount of $16,000. for the balance of the purchase price, and in favour of Dale & Company in the amount of $405. for the insurance premium. This cheque was received by them and cashed the following day.

Unfortunately, it also happened that on the 26th, the tractor was damaged beyond repair by accident, a fact that became known to Automotive the following day. Thus, Dale & Company had to report the sale and the accident to respondent at the same time. The respondent denied liability on two grounds:

> 1° that the tractor had not been intended to be covered by an insurance policy to be issued under its contract with Automotive;
>
> 2° that this contract was void because all sales made under finance had not been reported.

The trial judge came to the conclusion on the first point that the amount of $405. appearing in the conditional sale contract as insurance premium instead of $450. was not necessarily an indication that the risk was intended to be placed with Merit Insurance Company (I.A.C.'s subsidiary). He added that the uncontradicted evidence was to the effect that the incorrect amount was the result of an error made by an employee in Automotive's Quebec office. This finding was upheld in the Court of Appeal and was not challenged before us.

On the second point, the trial judge considered that there was no express undertaking by Automotive to insure all merchandise sold under financed sales. He quoted an excerpt from the reasons of Gwynne J. in *The Queen v. MacLean*[5] and then clause X of the policy conditions re-

[5] (1882), 8 S.C.R. 210 at p. 249.

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specting other insurance, and held that it would not have been inserted if respondent had in mind that Automotive could not insure some financed sales elsewhere under pain of nullity of the contract.

In the Court of Appeal, it was considered on the contrary that the contract did require Automotive to report all financed sales and it was said that this obligation was not watered down by the clause respecting other insurance. Article 2490 C.C. was quoted and it was held that this justified Automotive in asking that the policy be declared null and void.

At this point, it appears necessary to quote at length the wording of the policy down to par.(F) as well as clauses IX, X and XIV of the policy conditions incorporated in it.

IN CONSIDERATION OF THE PREMIUMS ACCRUING UNDER POLICIES TO BE ISSUED UNDER THIS CONTRACT

—THE—

INSURANCE COMPANY OF NORTH AMERICA

DOES INSURE

AUTOMOTIVE PRODUCTS CO. LTD.

(hereinafter called the "VENDOR")

in respect to all sales made to any person, firm, or corporation,
(hereinafter called the "OWNER")

of merchandise consisting principally of contractors' equipment, road making and heavy machinery, tractors, bulldozers and the like, assembled or not, their parts and equipment attached or otherwise, subject to the following stipulations:—

(A) that a correct description of all such sales be inscribed on a policy of insurance to be issued under this contract to the Vendor and Owner jointly, the terms and conditions of which shall be in conformity with Clauses I to XIV cited hereunder,

(B) that the Insurers liability shall be limited to the amount set opposite each article sold or the actual cash value at the time of loss whichever is the lesser,

(C) that the cover granted under this Contract and any policy issued hereunder shall apply only to such merchandise sold by the Vendor on a deferred payment, financed payment, or lease agreement plan, and shall attach at the time of such sale,

(D) that the cover provided herein shall apply as follows:—

(1) as to the Contract—until such time as cancellation is effected in accordance, and contemporaneously with Clause XIII hereinafter set forth,

(2) as to any Policy issued hereunder—for the period specified thereunder, unless cancelled in accordance with the terms of said Policy prior to such expiry date,

(E) that full details of all such sales be reported during the life of this policy to this Company and/or Messrs. Rolland, Lyman, Burnett Ltd. of Montreal, P.Q., as soon as practicable after consummation thereof,

(F) that the wording of Clauses I to XIV, both numbers inclusive, as hereunder set forth and which are embodied in each Policy issued hereunder, is hereby made, and does form part of the obligations of this Contract, anything to the contrary notwithstanding. The terms and conditions of this Contract shall commence from 12.01 A.M. Standard Time, December 9th, 1955, Montreal, P.Q. ...

Clause IX. NOTICE OF LOSS

Every claim for a loss under this policy shall be immediately reported in writing with full particulars to the INSURANCE COMPANY OF NORTH AMERICA, Montreal, P.Q., or to MESSRS. ROLLAND, LYMAN, BURNETT LTD. of Montreal, P.Q., issuing this policy, and a detailed sworn proof of loss shall be filed with the Company or its said Agent within four (4) months of the date of the loss. Failure by the Insured to file either such claim or such proof shall invalidate the claim.

CLAUSE X. OTHER INSURANCE

This Company shall not be liable for loss, if at the time of loss or damage, there is other valid and collectible insurance which would attach if this insurance had not been effected, except that this insurance shall apply only as excess and in no event as contributing insurance and then only after all other insurance has been exhausted. ...

CLAUSE XIV. LOSS PAYABLE

It is hereby understood and agreed that loss, if any, is payable to THE INDUSTRIAL ACCEPTANCE CORPORATION, LIMITED and/or the Insureds as their respective interests may appear. ...

Concerning clause X, there is uncontradicted evidence that this is a usual clause in such contracts. It is apt to have effect even on the assumption that all financed sales are to be reported and covered by policies issued under the contract. There may be insurance taken by other parties and uncontradicted evidence shows how this may occur. Therefore the judges in appeal were right in holding that clause X did not show that the contract was not intended to

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cover all financed sales. This conclusion on the effect of that clause does not dispose of the case because there are other formidable difficulties in respondent's way.

In the first place it should be noted that respondent issued to Automotive not only the contract sued upon but a total of three such contracts. Mention of this fact is made in the reasons of Hyde J. but he does not appear to give it any consideration when dealing with the crucial point, namely whether the contract sued upon is intended to cover all financed sales. With respect, I feel that this is essential because the existence of two other contracts makes it impossible to conclude that this particular contract was intended to cover all such sales. As a matter of fact, respondent's manager, when heard as a witness, said:

> My intention was that all financed sales would be insured through this policy or the other two.

It should be noted that respondent does not contend that the three documents or policies are evidence of one contract, not three. In its plea it asked that one only be declared void. This is not an oversight on its part. The record shows that on December 9, it sent a letter to the brokers suggesting that the other two policies be "picked up for cancellation and returned to us". On December 15, the brokers answered that the insureds have no desire at the present time to cancel any of the policies presently held by them. Respondent having taken no step to have the other two policies cancelled or declared void cannot now be heard to say that the three made up one contract. If they did, it would not be entitled to have it cancelled in part only. As a matter of fact, respondent's prayer by its plea is that the insurance policy filed as P-2 be declared void. This implies a judicial admission that it is a distinct contract.

Such being the case, it is impossible to hold that the contract sued upon must be read literally as covering all financed sales by Automotive. In fact, respondent's contention, as we have seen, is not that this is the intention of the contract. Also there is no express stipulation that the contract shall become void if all financed sales are not promptly reported. Under those circumstances, it is impossible in

the present case to seek the intention of the parties in a literal reading; it must be sought by interpretation in accordance with article 1013 of the *Quebec Civil Code*. On that basis, the question becomes: Does the contract, read in the light of all relevant circumstances, provide, as respondent contends, that it will become *ipso facto* void if Automotive fails at any time to report as soon as practicable full details of any financed sale for the issue of a policy under that contract or another similar contract with respondent?

A major difficulty in reaching that conclusion is the fact that no reference whatsoever is made to the other contracts. If the intention had been to subject the coverage to such a drastic condition, operating as of right, would this have been overlooked? If we assume that when the first contract was issued the intention was, as respondent's Montreal manager contends, are we also to assume that when a second and a third contract were issued the first was simply copied and the necessity of any reference simply overlooked? On what basis is it reasonably certain that Automotive would understand in the absence of any such reference that the meaning of the document was as respondent contends its intention was? It must also be borne in mind that the second contract was for the benefit of I.A.C., the mise-en-cause. On what basis could the latter be expected to read into the document all that which respondent contends should be read?

As we have seen, I.A.C. took charge of the reporting of the sales covered by insurance and of the payment of the premiums. Its course of action in reporting only the sales financed by it which were not otherwise covered by insurance undoubtedly indicates that this was not considered a breach of the conditions invalidating the contract. The same must be said of Automotive's decision to treat the contract as not compelling it to report financed sales otherwise insured. Of course, the construction thus put upon the contract by some parties is not decisive, especially because there is no evidence that it was brought to the knowledge of the respondent. On the contrary, the letter written by the brokers in 1959 was apt to put them under the erroneous

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impression that Automotive was reporting all financed sales. It must be noted that the brokers were in this instance agents of both parties, being expressly described as agents of the respondent in clause IX and treated as such in clause (E). The concluding sentence of their letter indicates that the worry appeared to be over a possible cancellation by notice: "The Assured is most interested in retaining the type of coverage offered by your Company and will make every endeavour to make it more attractive to you".

It must also be stressed that the contract between the parties does not expressly provide that it shall *ipso facto* become void if any financed sale is not reported as required. The reporting requirement is simply a stipulation of the contract. Of course, there are no sacrosanct words for expressing a resolutive condition that effects of right the dissolution of a contract when accomplished (1088 C.C.). However, such a condition is a departure from the usual effect of a stipulation in a contract. As a general rule, the breach of an obligation gives rise to the remedies enumerated in art. 1065 C.C., not to dissolution of the contract as of right. Therefore, it is safe to say that, as a rule, a stipulation is not to be construed as a resolutive condition unless the intention to do so is expressed. In the present case, the clause relied upon is merely one among many stipulations most of which are certainly not resolutive conditions. There is nothing in its wording indicating that it is of a different nature such as the word "warranted" commonly used in insurance contracts to indicate that a resolutive condition is being stipulated.

Hyde J. appears to rely exclusively on art. 2490 C.C. quoted at length in his reasons and following which he says that in his opinion it was a condition of the blanket policy in question that Automotive would report all financed sales. On the assumption that the contract is to be read as so requiring, I fail to see how art. 2490 can be read together with 2491 as enacting that every stipulation in an insurance policy is a warranty or condition with the drastic consequences that this implies. In my view, those articles do not alter the general principles under which the breach of an

obligation does not of itself effect the dissolution of the contract unless a resolutive condition is stipulated. If it was otherwise, it would mean that any breach whatsoever of any stipulation in an insurance policy would *ipso facto* make the contract void so that the insurer could disclaim liability even if the breach is completely immaterial to the loss. This would, of course, make the protection illusory in cases such as this. Human nature being what it is, it is simply impossible that no error or omission in reporting sales be made in a large business with many branches over many years. Upon a loss occurring, all the underwriter would have to do to avoid liability would be to make a careful check. Of course, such a contract could validly be made and, in that case, it would be the duty of the courts to give effect to it, but it would have to appear from the language used that such a contract was in fact made. Otherwise the general principles governing contracts should be applied as this Court applied them in the case of *The Employers' Liability Assurance Company v. Lefaivre*[6] where the question was the effect of the non-payment of premiums due to bankruptcy.

I must also point out that, assuming the contract should be construed as embodying a resolutive condition which was breached, I doubt seriously that respondent would be entitled to have it declared null as prayed for without any refund of premiums. The record shows that a number of policies were issued under that contract and substantial premiums paid. These policies were in favour of a number of purchasers. Some of them had no doubt expired but several were recent. In its plea, respondent alleged that it had no premium refund to make. It is obvious that respondent so denied being obliged to return any premium because it considered the policies issued as remaining in force and unaffected by the dissolution of the master contract effected *ipso facto* by the omission to report all sales. It cannot be so unless the insurance coverage under the policies issued to Automotive and the purchasers jointly is considered as subsisting independently of the main contract. That it is so is far from clear. The policies or certifi-

[6] [1930] S.C.R. 1, [1930] 1 D.L.R. 689, 11 C.B.R. 290.

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cates as they were sometimes called, are clearly nothing but instruments evidencing a contract. Is there not a single contract, does not the word "contemporaneously" in clause (D), par. 1 bear out that it is so? Of course, if there is a single contract, it cannot be declared null in part only. I do not find it necessary to express a conclusion on this point but it may be one more reason why clause (F) should not be read as a resolutive condition.

The amount allowed to appellants in capital and interest by the trial judge was not challenged before us and for the above reasons, I would allow the appeal with costs, reverse the judgment of the Court of Appeal and dismiss the appeal to that Court with costs and re-establish the judgment of the Superior Court.

Appeal dismissed with costs, SPENCE *and* PIGEON JJ. *dissenting.*

Solicitors for the appellants: Paré, Ferland, Mackay, Barbeau, Holden & Steinberg, Montreal.

Solicitors for the respondent: Tansey, de Grandpré, Bergeron & Monet, Montreal.

Solicitors for the mis-en-cause: O'Brien, Howe, Hall, Nolan, Saunders, O'Brien & Smyth, Montreal.

STANLEY MILLER (*Defendant*) .....APPELLANT;

AND

ADVANCED FARMING SYSTEMS LIMITED (*Plaintiff*) .....RESPONDENT.

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*Mar. 21, 24
May 16

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mechanics' liens—Enforcement action—Contract for erection of dairy barn complex—Substantial deficiencies—Measure of damages—Amount to which lienor entitled—The Mechanics' Lien Act, R.S.O. 1960, c. 233.

In a mechanics' lien action in which the plaintiff's claim was for the sum of $25,984.60, being the cost of services and materials supplied in building certain farm buildings for the defendant under a written agreement between the parties, the trial judge gave judgment for the plaintiff in the sum of $22,654.60 together with interest and costs. On appeal, the Court of Appeal affirmed the trial judgment and the defendant then appealed to this Court.

Having held that the concrete work generally was substandard, the trial judge concluded that although the work had not been done as called for in the contract that there had been substantial performance and that the plaintiff was entitled to be paid under the contract the amount provided for therein, giving credit for any deficiencies that he found to exist in the work. He thereupon proceeded to make what he called reasonable allowances for a number of so-called deficiencies which were, in fact, very serious defects in the whole of the concrete work and in other areas.

Held: The appeal should be allowed and the judgment at trial varied.

The correct measure of the defendant's damages was the cost of making good the defects and omissions in the work the plaintiff contracted to do. Applying this principle, the Court found that the total of the amounts which the defendant was entitled to was $13,423. Deducting this amount from the plaintiff's net claim of $25,984.60 left a balance of $12,561.60 that the plaintiff was entitled to recover under its lien.

Hoenig v. Isaacs, [1952] 2 All E.R. 176; *H. Dakin & Co., Ltd.,* [1916] 1 K.B. 566, applied.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming a judgment of Robinson D.C.J., sitting as Local Judge, in an action for enforcement of a mechanics' lien. Appeal allowed; judgment at trial varied.

Joseph A. Mahon, Q.C., for the defendant, appellant.

G. W. Cameron, for the plaintiff, respondent.

The judgment of the Court was delivered by

HALL J.:—This is an appeal in an action for enforcement of a mechanics' lien filed on the appellant Miller's farm

*PRESENT: Cartwright C.J. and Martland, Judson, Hall and Spence JJ.

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property in the District of Temiskaming. The action was tried by His Honour J. B. Robinson, sitting as Local Judge of the Supreme Court, who declared that the respondent was entitled to a lien under *The Mechanics' Lien Act*, R.S.O. 1960, c. 233, on the lands of the appellant for the sum of $22,654.60 and interest at 7 per cent from February 8, 1966, together with costs to be taxed on the Supreme Court scale. The appellant Miller appealed to the Court of Appeal for Ontario, and that Court, on January 19, 1968, affirmed, without written reasons, the judgment of His Honour Judge Robinson. The appellant now appeals to this Court.

The validity of the mechanics' lien was disputed at the trial, but the respondent's right to a lien was upheld by his Honour Judge Robinson. This issue was not argued before us, and I will deal with the matter on the basis that the lien was properly filed.

The parties entered into a contract in writing dated October 5, 1965, whereby the respondent agreed to erect for the appellant a dairy barn complex on the appellant's farm. The contract contained specific plans and specifications for the buildings and equipment to be installed therein. The contract called for four buildings as follows:

(a) Cattle Feeding Building, 50′ x 40′ x 19′ eave height called the feed barn;

(b) Free Stall Barn, 75′ x 50′ x 9′ eave height (the loafing area);

(c) Milking Parlour, 40′ x 15′ x 9′ eave height;

(d) Milkhouse, 20′ x 20′ x 9′ eave height.

The appellant who had limited experience as a dairy farmer relied on the respondent to build him a barn complex of good quality and in accordance with the regulations of *The Milk Industry Act* of Ontario, R.S.O. 1960, c. 239. The specifications provided that all the concrete work was to be 3,000 p.s.i. The respondent did not do the work itself but employed a subcontractor. On the completion of the work, the appellant took the position that the contract had not been fulfilled and that the work had not been done in accordance with the plans and specifications, and, in particular, the concrete work was very deficient and that the whole job had been done in a negligent manner.

The learned trial judge, after a relatively long trial and having heard evidence on behalf of the appellant and the respondent, held as follows:

> A careful review of the evidence has impelled me to the conclusion that the concrete work generally was substandard in that the psi rating was below specifications, the porosity of the floors was too high as indicated by the absorption factor and the finish upon the floors in the milk parlour and milk house was inadequate.
>
> It appears that these defects were contributed to by the use of pit run gravel to begin with, by the failure to increase the strength by compensating for this by using more cement (*e.g.* three to one instead of four to one), by inconsistent batching and lack of control over the concrete mix, by failure to remove large stones from the gravel and by pouring the cement in cold frosty weather with inadequate precautions to keep it from freezing.
>
> Indeed of four holes drilled for cores in the two outside slabs only one hole permitted the recovery of a core and that one was not suitable for a compression test.
>
> The tests indicated that the concrete in the outside slabs were very weak ranging from below 1,000 psi for three holes, to below 1,590 psi for one hole.
>
> The natural inference from the evidence as to the outside concrete slabs was that they had been poured upon frozen ground and that the frost had affected the curing of the cement.

Having so held, he concluded that although the work had not been done as called for in the contract that there had been substantial performance and that the respondent was entitled to be paid under the contract the amount provided for therein, giving credit for any deficiencies that he found to exist in the work. He thereupon proceeded to make what he called reasonable allowances for a number of so-called deficiencies which were, in fact, very serious defects in the whole of the concrete work and in other areas. In my view this is a case in which the learned trial judge might well have found that the contract had not been substantially performed, but he did not do so, and, as stated, found that he could apply the doctrine of substantial performance. That position was accepted by the appellant in this Court and the case remains to be determined on the basis that the finding of substantial performance is valid. However, having found that there were substantial deficiencies, the learned trial judge proceeded to allow deductions from the contract price therefor on a completely erroneous principle. Having found that the concrete work was wholly unsatisfactory, he went on to say that in lieu of having it replaced that it would be made serviceable by the application of

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some surface treatments by patching up and coating over and that that was all that the circumstances required.

The correct measure of damage in a case such as the present one was stated by Lord Denning in *Hoenig v. Isaacs*[1], where from the principles laid down in *H. Dakin & Co., Ltd. v. Lee*[2] he stated:

> The measure is the amount which the work is worth less by reason of the defects and omissions, and is usually calculated by the cost of making them good.

or as Pickford L.J. said in *Dakin v. Lee,* at p. 582:

> ...the case must go back...in order that it may be ascertained what is the expenditure necessary, first, to put this underpinning right and make it accord with the contract both in regard to quality and quantity, and, secondly, to do the work which ought to have been done...

Further, Ridley J., quoting Parke J. said in the same case at p. 571:

> "What the plaintiff is entitled to recover is the price agreed upon in the specification, subject to a deduction; and the measure of that deduction is the sum which it would take to alter the work, so as to make it correspond with the specification."

In my view the measure of the appellant's damage is the cost of making good the defects and omissions in the work which the respondent contracted to do.

The learned trial judge found that the area of concrete which was in the milk parlour, platform, free stall area, outside slabs, curbs and gutters was 5,300 square feet. The evidence of Helmer Pedersen, a masonry contractor of 18 years' experience, was that it would cost 50¢ per square foot to remove the deficient concrete and $1 per square foot to put in new concrete. The appellant is accordingly entitled to an award of $7,950 under this heading in lieu of the $2,285 allowed him by the learned trial judge.

In addition to the deficient concrete work, the learned trial judge found that the walls of the milk house did not meet contract specifications in that they were not impervious to liquids up to three feet from the floor. The area to be altered in this respect was 133 square feet. He allowed $1.20 per square foot as a reasonable estimate to remedy the defect for a total of $160 and that amount should stand.

The learned trial judge also found that the contract had not been performed as to the exterior door, the screen door

[1] [1952] 2 All E.R. 176 at 181. [2] [1916] 1 K.B. 566.

and the ceiling of the milk house and he allowed $75 for these items. However, Lorne M. Jelly, a local carpenter and contractor, whose evidence would appear to be credible, estimated it would cost $620 to alter the building and put in five windows and a proper door in accordance with the plans. I think that this is the amount which should be allowed which, with the $160 to make the walls of the milk house impervious to liquid, comes to $780.

The taking out of the concrete flooring in the milk parlour will necessitate the replacement of the floor heating coil at a cost of $358, according to the evidence of John A. Brown, the electrician who installed the electric cable originally. A claim for loss of heat and additional cost of electrical energy would be eliminated by placing the floor heating coil where it was intended to be placed by the specifications, and the appellant would, therefore, suffer no loss of heat or incur any additional expense for electrical energy. He is, however, entitled to the cost of replacing the floor heating coil at the figure of $358.

Replacing the concrete also involves removing, storing and reinstalling the stalls and equipment in the milk room and milk parlour. The witness Albert Cooper, a dairy farm equipment dealer, testified that it would cost $2,645 to dismantle and store the equipment, to set up the stalls, to reinstall the milking equipment, and to take out and put back the auto-feed system as well as the electrical controls.

The learned trial judge made certain minor allowances as follows which should not be disturbed:

(a) Reinstalling the stalls in the free stall area	$ 65.00
(b) Deficiency in insulation in the ceiling of the free stall barn	35.00
(c) Defects in the construction of the feed barn and manger being short posts and other minor matters ..	75.00
(d) For a defective beam and rafters in the feed barn ..	15.00

The learned trial judge also found that the gutters in which the barn cleaner operated were of such poor quality that the barn cleaner was constantly breaking down and could not run properly. He allowed $160 under this heading. The witness, Jean Trudel, a farm machinery and equipment dealer who supplied the barn cleaner, testified that the chain which should have lasted 15 years was almost worn out at the end of two years and required replacing.

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Hall J.

The cost of the chain was $1,232 and with installation would come to $1,500. This amount should be allowed in lieu of the $160 fixed by the learned trial judge.

If is manifest that when all of the work has been redone, the appellant will not have the kind of modern dairy barn complex that he contracted for, but there was no evidence as to whether there was any actual loss in this regard or how it could be estimated, and I do not find it possible in the circumstances to make an award under this heading.

The total of the amounts which I find the appellant is entitled to is $13,423 and he is entitled to have this amount deducted from the respondent's net claim of $25,984.60 as found by the learned trial judge which leaves a balance of $12,561.60 that the respondent is entitled to recover under its lien. The judgment of the learned trial judge should be varied by substituting the sum of $12,561.60 for the sum of $22,654.60 where this figure appears in the formal judgment of the Court. The respondent will also be entitled to interest on the sum of $12,561.60 at the rate of 5 per cent per annum from the date of the judgment, namely, March 1, 1967.

As success at the trial was divided, I would direct that there be no costs to either party at the trial. The appellant is entitled to his costs in the Court of Appeal and in this Court, the amount thereof to be set off against the amount which the respondent is entitled to recover.

Appeal allowed; trial judgment varied.

Solicitor for the defendant, appellant: Joseph A. Mahon, Toronto.

Solicitors for the plaintiff, respondent: Clement, Eastman, Dreger, Martin & Meunier, Kitchener.

AGENCE MARITIME INC. ..... APPELANTE;

ET

CONSEIL CANADIEN DES RELATIONS OUVRIÈRES, ROGER L. FOURNIER, J. LORNE MACDOUGALL ET SYNDICAT DES MARINS CANADIENS ..... INTIMÉS.

1968
*Juin 4, 5
1969
Juin 26

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Relations ouvrières—Requête en évocation d'une décision du Conseil canadien des relations ouvrières—Pouvoir de surveillance et contrôle de la Cour supérieure—Navigation et bâtiments ou navires—Juridiction du Conseil canadien des relations ouvrières—Loi sur les relations industrielles et sur les enquêtes visant les différends du travail, S.R.C. 1952, c. 152, art. 55(a), (c)—Acte de l'Amérique du Nord britannique, art. 91(10), (29), 92(10)(a), (b)—Code de procédure civile, art. 20, 33, 846, 847.

L'appelante possède et exploite trois navires caboteurs dont Québec est le port d'attache. Ces navires effectuent le transport général de marchandises dans les limites et à l'intérieur des eaux de la province de Québec, particulièrement entre Montréal et Québec et les ports le long du fleuve Saint-Laurent. L'appelante a sept bureaux régionaux et installations portuaires, tous situés dans la province de Québec. Ces navires ont en trois circonstances seulement, et ceci exceptionnellement, fait des voyages au-delà des limites territoriales de la province, soit deux à Toronto en 1964 et un en Nouvelle-Écosse en 1965.

Sur la demande du syndicat intimé d'être accrédité comme agent négociateur des employés de l'appelante, le Conseil canadien des relations ouvrières a ordonné la tenue d'un scrutin. L'appelante s'est alors adressée à la Cour supérieure pour obtenir, en vertu des art. 846 et 847 du *Code de procédure civile*, la délivrance d'un bref introductif d'instance pour faire suspendre les procédures. Le juge de première instance accorda la délivrance du bref. Par un jugement majoritaire, la Cour d'Appel rejeta la requête de l'appelante pour le motif que le Conseil n'était pas soumis au droit de surveillance et de réforme de la Cour supérieure. L'appelante a obtenu la permission d'en appeler à cette Cour.

Arrêt: L'appel doit être accueilli.

La Cour supérieure a un pouvoir de surveillance et de réforme sur les procédures et décisions du Conseil canadien des relations ouvrières en vertu des art. 20 et 846 du *Code de procédure civile* (*Three Rivers Boatman Ltd. c. Conseil canadien des relations ouvrières et al.*, [1969] R.C.S. 607).

Au regard du dossier, les opérations maritimes de l'appelante sont intra-provinciales et se limitent au territoire de la province de Québec.

*CORAM: Les Juges Fauteux, Martland, Hall, Spence et Pigeon.

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Les trois voyages effectués exceptionnellement en dehors de la province ne suffisent pas à changer le caractère permanent de l'entreprise de l'appelante. De plus, ce n'est pas aller au-delà des limites de la province, au sens de l'art. 92(10) de l'*Acte de l'Amérique du Nord britannique* et de l'art. 53(*c*) de la *Loi sur les relations industrielles et sur les enquêtes visant les différends du travail* que de sortir des eaux intérieures pour aller d'un point à un autre dans la même province ainsi que doivent le faire les navires de l'appelante pour se rendre de la ville de Québec à Gaspé.

Quoique le pouvoir conféré au Parlement par l'art. 91(10) de l'*Acte de l'Amérique du Nord britannique* doit être interprété libéralement dans un cas comme le cas présent et sauf en ce qui concerne l'aspect navigation, les dispositions des art. 91(29) et 92(10)(*a*) et (*b*) ont collectivement pour effet d'exclure de la compétence du Parlement les entreprises de transport maritime dont les opérations sont effectuées strictement à l'intérieur d'une même province. Le droit de grève et le droit de négocier collectivement ainsi que la détermination de matières telles que les heures de travail, les taux des salaires, les conditions de travail et autres semblables, sont une partie essentielle de l'administration et de l'opération de toute entreprise commerciale ou industrielle. Le pouvoir de réglementer ces matières dans le cas d'une entreprise tombant sous l'autorité du Parlement appartient au Parlement. Le même principe s'applique aux entreprises du ressort législatif des provinces. La Loi qu'on a voulu appliquer à l'appelante—*Loi sur les relations industrielles et sur les enquêtes visant les différends du travail*—ne peut régir que les entreprises qui sont du ressort du Parlement. Tel n'étant pas le cas de l'appelante, elle ne peut y être assujettie. Le juge de première instance était donc justifié d'autoriser la délivrance du bref.

Labour relations—Motion to evoke decision of Canada Labour Relations Board—Superintending and reforming power of the Superior Court—Navigation and shipping—Jurisdiction of Canada Labour Relations Board—Industrial Relations and Disputes Investigation Act, R.S.C. 1952, c. 152, s. 55(a), (c)—B.N.A. Act, ss. 91(10), (29), 92(10)(a), (b)—Code of Civil Procedure, art. 20, 33, 846, 847.

The appellant owned and operated three coastal boats attached to the port of Quebec for general cargo transport within the limits of and in the interior waters of the province of Quebec, particularly between Montreal and Quebec and ports along the St. Lawrence River. The appellant operated seven regional port offices and facilities all within the province of Quebec. On three exceptional circumstances only, these boats went twice to Toronto in 1964 and once to Nova Scotia in 1965.

On the petition of the respondent Union for certification for the appellant's employees, the Canada Labour Relations Board ordered that a vote be taken. The appellant then applied to the Superior Court under art. 846 and 847 of the *Code of Civil Procedure* for the issuance of a writ of summons to suspend all subsequent proceedings. The trial judge granted the issuance of the writ. By a majority judgment, the Court of Appeal dismissed the appellant's petition on the ground that the Board was not subject to the superintending and reforming power of the Superior Court. The appellant was granted leave to appeal to this Court.

Held: The appeal should be allowed.

The Superior Court has a superintending and reforming power under art. 20 and 846 of the *Code of Civil Procedure* over the procedings and decisions of the Canada Labour Relations Board (*Three Rivers Boatman Limited v. Conseil canadien des relations ouvrières et al.*, [1969] S.C.R. 607).

On the evidence, the maritime operations of the appellant were intra-provincial and were limited to the territory of the province of Quebec. The three exceptional trips outside the province did not change the permanent character of the appellant's undertaking. Furthermore, to leave the interior waters in order to go from one point to another in the same province, as the appellant's boats must do to go from the City of Quebec to Gaspé, could not be considered as going beyond the limits of the province within the meaning of s. 92(10) of the *B.N.A. Act* and s. 53(*c*) of the *Industrial Relations and Disputes Investigation Act.*

Although the power given to Parliament by s. 91(10) of the *B.N.A. Act* had to be interpreted liberally, in a case such as the present one and excepting what concerned the navigation aspect, the provisions of s. 91(29) and s. 92(1)(*a*) and (*b*) have the collective effect of excluding from the jurisdiction of Parliament the maritime transport undertakings, the operations of which are carried out strictly within the same province. The right to strike and the right to bargain collectively as well as the determination of such matters as hours of work, rates of wages, working conditions and the like, are a vital part of the management and operation of any commercial or industrial undertaking. The power to regulate these matters in the case of an undertaking which falls within the legislative authority of Parliament lies with Parliament. The same principle applies to undertakings which fall within the legislative authority of the provinces. The statute which is sought to be applied to the appellant—*The Industrial Relations and Disputes Investigation Act*—can only regulate undertakings which fall under the legislative authority of Parliament. This is not the case of the appellant. The trial judge was therefore justified in authorizing the issuance of the writ.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], allowing an appeal from a judgment of Côté J. Appeal allowed.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], infirmant un jugement du Juge Côté. Appel accueilli.

Philippe Casgrain, pour l'appelante.

C. A. Geoffrion, c.r., et *Rodrigue Bédard, c.r.,* pour les intimés, le Conseil, R. L. Fournier et J. L. MacDougall.

Phil. Cutler et *Pierre Langlois* pour l'intimé, le Syndicat.

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[1] [1968] B.R. 381.

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AGENCE MARITIME INC. *v.* CONSEIL CANADIEN DES RELATIONS OUVRIÈRES *et al.*

Le jugement de la Cour fut rendu par

LE JUGE FAUTEUX:—L'appelante se pourvoit contre un arrêt majoritaire de la Cour d'appel[1], qui infirme une décision de la Cour supérieure autorisant la délivrance d'un bref introductif d'instance (847 C.P.C.) enjoignant aux intimés de suspendre, jusqu'à jugement final sur le bref, toutes procédures relatives à la tenue d'un scrutin ordonné le 2 novembre 1966 par le Conseil canadien des relations ouvrières et toutes procédures relatives à l'exécution de cette ordonnance.

Cet appel soulève deux points.

Le premier consiste à savoir si la Cour supérieure a un pouvoir de surveillance et de réforme sur les procédures ou décisions du Conseil canadien,—organisme qui relève de la compétence du Parlement et qui exerce des pouvoirs judiciaires ou quasi-judiciaires,—et, dans l'affirmative, si, en l'absence de moyens prescrits pour faire appel à ce pouvoir de la Cour supérieure, les justiciables peuvent recourir à la procédure applicable dans le cas de tribunaux administratifs relevant de la compétence de la Législature de Québec. Disposons immédiatement de cette première question en disant que cette Cour y a déjà répondu affirmativement dans une décision, rendue le 13 mai 1969, dans la cause de *Three Rivers Boatman Ltd. v. Conseil canadien des relations ouvrières, Roger L. Fournier, J. Lorne MacDougall et Syndicat international des marins canadiens*[2].

La deuxième question est de savoir si, *prima facie,* le Conseil canadien a excédé sa juridiction, en l'espèce, en procédant à exercer le pouvoir d'accréditation que lui confère la première partie de la *Loi sur les relations industrielles et sur les enquêtes visant les différends du travail,* S.R.C. 1952, c. 152, ci-après désignée sous le titre abrégé de *Loi sur les différends du travail.* Il nous faut donc rechercher si, comme en a décidé le Conseil canadien, la première partie de ce statut s'applique à l'entreprise de l'appelante ou, plus précisément, si cette entreprise entre dans l'une des catégories d'entreprises mentionnées à l'art. 53 de la *Loi sur les différends du travail.*

A ces fins, les faits et les seuls faits dont il y a lieu de tenir compte sont ceux qu'expose la requête présentée à la Cour

[1] [1968] B.R. 381.

[2] [1969] R.C.S. 607.

supérieure par l'appelante pour obtenir la délivrance du bref introductif d'instance. En effet, nous n'avons pas à nous préoccuper des faits que le Conseil canadien a jugé avoir été prouvés devant lui. Le Conseil canadien ne saurait, en effet, s'attribuer une juridiction en mésinterprétant ou ignorant la preuve qu'on lui a soumise et c'est là le fait qu'on lui reproche à la requête et que nous devons, à l'instar des autres faits qui y sont allégués, présumer au stade préliminaire où en est cette requête, ainsi que le veut la disposition du second alinéa de l'art. 847 C.P.C. et ainsi, par ailleurs, qu'en ont convenu les parties. Résumons ces faits.

Constituée suivant les lois de la province de Québec et ayant sa principale place d'affaires en la cité de Québec, l'appelante possède et exploite trois navires caboteurs dont Québec est le port d'attache. Ces navires n'effectuent que le transport général de marchandises et ce, seulement dans les limites et à l'intérieur des eaux de la province de Québec, particulièrement entre Montréal, Québec, les ports de la rive nord et les ports de la rive sud du Saint-Laurent. L'appelante a, de plus, sept bureaux régionaux et installations portuaires, tous situés dans la province de Québec, soit dans les ports de Montréal, Québec, Baie Comeau, Sept-Îles, Matane, Ste-Anne-des-Monts et Gaspé. Elle ne fait aucun acheminement de fret (freight forwarding), ni ne s'en occupe en dehors de la province de Québec. Ces navires n'ont qu'en trois circonstances près, et ceci exceptionnellement et seulement dans le but de compléter des cargaisons, fait des voyages au-delà des limites territoriales de la province, soit deux à Toronto, aux cours de l'année 1964, et un à Pugwash, en Nouvelle-Écosse, au cours de 1965. Il n'appert pas que les navires de l'appelante soient sortis de la province en 1966.

Disons incidemment qu'on allègue d'autres faits dans la requête. Ainsi, on allègue qu'un syndicat autre que le syndicat intimé, nommément le *District 50 United Mines Workers of America, unité locale 13946,* est déjà et ce, depuis 1964, le représentant, accrédité par la Commission des relations ouvrières de Québec, du même groupe de travailleurs dont le syndicat intimé cherche à se faire accréditer comme représentant par le Conseil canadien. Ce fait ajoute sans doute à l'importance de la question de juridiction soulevée par l'appelante, mais c'est là, cependant, un fait étranger à la solution de cette question.

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Il convient maintenant de reproduire les dispositions suivantes de l'art. 53 de la *Loi sur les différends du travail.*

53. La Partie I s'applique à l'égard des travailleurs employés aux ouvrages, entreprises ou affaires qui relèvent de l'autorité législative du Parlement du Canada, ou relativement à l'exploitation de ces choses, y compris, mais non de manière à restreindre la généralité de ce qui précède:

a) les ouvrages, entreprises ou affaires exécutés ou exercés pour ou concernant la navigation et la marine marchande, intérieures ou maritimes, y compris la mise en service de navires et le transport par navires partout au Canada;

b) les chemins de fer, canaux, télégraphes et autres ouvrages et entreprises, reliant une province à une ou plusieurs autres provinces, ou s'étendant au delà des limites d'une province;

c) les lignes de vapeurs et autres navires reliant une province à une ou plusieurs autres provinces, ou s'étendant au delà des limites d'une province;

d) les bacs transbordeurs entre une province et une autre, ou entre une province et tout pays autre que le Canada;

e) ...

f) ...

g) ...

h) ...

et à l'égard des patrons de ces travailleurs dans leurs rapports avec ces derniers, ainsi qu'à l'égard des syndicats ouvriers et organisations patronales composés desdits travailleurs ou patrons.

En Cour supérieure, M. le juge Côté, s'appuyant principalement sur les diverses opinions exprimées par les membres de cette Cour dans *Validity and Applicability of the Industrial Relations and Disputes Investigation Act,* maintenant citée sous le titre abrégé de *Eastern Canada Stevedoring Co. Ltd.*[3], considéra que les allégations de la requête de l'appelante suffisaient à classer son entreprise comme entreprise de navigation intra-provinciale et jugea que, dans l'état actuel du dossier et jusqu'à ce qu'une preuve au contraire soit rapportée, il y avait, en l'espèce, une apparence de droit suffisante pour agréer les conclusions de la requête et permettre ainsi un débat entre les parties sur le fond du litige, tant en fait qu'en droit. En conséquence, il autorisa la délivrance du bref introductif d'instance et ordonna la suspension de toutes procédures relatives à la tenue du scrutin ordonné par le Conseil canadien et la suspension de toutes procédures relatives à l'exécution de cette ordonnance.

[3] [1955] R.C.S. 529, [1955] 3 D.L.R. 721.

En Cour d'appel[4], MM. les juges Taschereau et Owen exprimèrent l'avis que le Conseil canadien n'était pas soumis au pouvoir de surveillance et de réforme de la Cour supérieure et, pour cette raison, ne se sont pas prononcés sur la question qui nous occupe. Dissident, M. le juge Choquette affirma, au contraire, la juridiction de la Cour supérieure et jugea que, pris dans leur ensemble, les allégués de la requête en évocation ne démontrent pas que le juge de première instance ait erré, ni en décidant que jusqu'à preuve du contraire l'entreprise de l'appelante était une affaire intra-provinciale, ni en autorisant la délivrance du bref demandé et ni en sursoyant aux procédures du Conseil canadien.

Au regard des faits dont nous devons tenir compte à ce stade préliminaire de la requête en évocation, il nous faut conclure que les opérations maritimes de l'appelante se limitent au territoire de la province de Québec. On a cherché à mettre en doute cette conclusion de fait en soulevant deux moyens. On a d'abord invoqué les trois voyages, effectués par les navires de l'appelante, en dehors des limites de la province et on a, de plus, représenté que, voyageant sur le fleuve Saint-Laurent pour se rendre de la ville de Québec à celle de Gaspé, les navires de l'appelante doivent nécessairement franchir les frontières des *eaux intérieures du Canada,* suivant la définition donnée à cette expression dans et aux fins de la *Loi sur la marine marchande,* S.R.C. 1952, c. 29, art. 2(41).

En ce qui concerne le premier moyen, je dirais, à l'instar de M. le juge Choquette de la Cour d'appel, que ce n'est pas trois voyages effectués exceptionnellement au-delà des limites de la province, soit deux en 1964 et un seul en 1965, qui suffisent à changer le caractère permanent de l'entreprise de l'appelante. Dans *Re Tank Truck Transport Ltd.*[5] et dans *Regina v. Cooksville Magistrate's Court, Ex parte Liquid Cargo Lines Ltd.*[6], décisions citées par le syndicat intimé au soutien de ce premier moyen, les faits sont différents. Dans la première de ces causes, le voiturier détenait, pour le transport de marchandises, un permis de la province d'Ontario, un permis du fédéral pour le transport de marchandi-

[4] [1968] B.R. 381.
[5] [1960] O.R. 497, 25 D.L.R. (2d) 161.
[6] [1965] 1 O.R. 84, 46 D.L.R. (2d) 700.

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ses entre l'Ontario et le Québec et un permis de l'autorité concernée aux États-Unis pour le transport d'un certain produit d'un point aux États-Unis à un autre point au Canada. Bien que les divers voyages, en dehors des limites de la province d'Ontario, n'étaient pas effectués suivant un horaire arrêté, ils étaient raisonnablement réguliers; ce qui n'est pas le cas en l'espèce. J'ajouterai que cette décision de la Cour suprême d'Ontario, non seulement ne supporte pas la prétention du syndicat intimé mais elle va précisément à l'encontre, ainsi qu'il appert du passage ci-après à la page 172 du recueil:

> I agree with counsel for the respondent that not every undertaking capable of connecting Provinces or capable of extending beyond the limits of a Province does so in fact. The words "connecting" and "extending" in s. 92(10)(*a*) must be given some significance. For example a trucking company or a taxicab company taking goods or passengers occasionally and at irregular intervals from one Province to another could hardly be said to be an undertaking falling within s. 92(10)(*a*). As appears from the *Winner* case and the *Underwater Gas Developers* case, "undertaking" involves activity and I think that to connect or extend, that activity must be continuous and regular, but if the facts show that a particular undertaking is continuous and regular, as the undertaking is in this case, then it does in fact connect or extend and falls within the exception in 10(*a*) regardless of whether it is of greater or less in extent than that which is carried on within the Province.

Dans la seconde cause, le voiturier offrait et fournissait un service extra-provincial de façon constante et ininterrompue à tous ceux qui en faisaient la demande.

Il faut donc écarter ce premier moyen comme non fondé.

En ce qui concerne le second, basé sur la *Loi sur la Marine marchande,* je dirais que ce moyen ne peut être soulevé vu qu'il est allégué spécifiquement dans la requête que, sauf les trois voyages ci-dessus mentionnés, les navires de l'appelante naviguent dans les limites et à l'intérieur des eaux de la province de Québec. Je ne vois guère, par ailleurs, que ce soit aller au-delà des limites de la province, au sens de l'art. 92(10) de l'*Acte de l'Amérique du Nord Britannique* et de l'art. 53(*c*) de la *Loi sur les différends du travail,* que de sortir des eaux intérieures pour aller d'un point à un autre dans la même province.

Il faut donc retenir qu'au regard du dossier, tel que présentement constitué, les opérations maritimes de l'appelante sont des opérations intra-provinciales.

Même si tel est le cas, dit-on de la part des intimés, ces opérations relèvent quand même de la compétence du Parlement en raison de l'art. 91(10) (Navigation and Shipping) du statut de 1867 et sont assujetties à la compétence du Conseil canadien en vertu du paragraphe d'ouverture et de l'alinéa (*a*) de l'art. 53 de la *Loi sur les différends du travail*. Cette assertion repose purement et simplement sur l'interprétation qu'on donne aux articles cités et aucunement sur un fait afférent à l'entreprise de l'appelante et susceptible de donner à cette entreprise un aspect requérant une considération particulière. On ne saurait accueillir l'interprétation suggérée sans être conduit à conclure qu'en édictant les dispositions des art. 91(29) et 92(10)(*a*) du statut de 1867 et de l'alinéa (*c*) de l'art. 53 de la *Loi sur les différends du travail*, le Législateur a parlé pour ne rien dire. En ce qui concerne particulièrement les dispositions de l'art. 53, il me paraît clair que l'alinéa (*c*), visant les lignes de vapeurs et autres navires reliant une province à une ou plusieurs autres provinces, ou s'étendant au-delà des limites d'une province, implique nécessairement que les autres lignes ne sont pas visées. Il faut en conclure que lorsque dans l'alinéa (*a*) du même article on mentionne la navigation et transport par navires, on ne vise pas ce qui se trouve implicitement exclu par la disposition de l'alinéa (*c*). En somme et si libéralement que doit être interprété le pouvoir conféré au Parlement par l'art. 91(10) du statut de 1867, ainsi qu'en a jugé le comité judiciaire du Conseil Privé dans *City of Montreal v. Montreal Harbour Commissioners*[7], je suis d'avis que dans un cas comme celui qui nous occupe et sauf en ce qui concerne l'aspect navigation, les dispositions des art. 91(29) et 92(10)(*a*) et (*b*) ont collectivement pour effet d'exclure de la compétence du Parlement les entreprises de transport maritime dont les opérations sont effectuées strictement à l'intérieur d'une même province. Dans *Commission du salaire minimum v. Bell Telephone Co. of Canada*[8], cette Cour a unanimement approuvé le principe énoncé comme suit par mon collègue, M. le juge Abbott, dans le renvoi touchant la validité de la loi qui régit le Conseil canadien[9]:

> The right to strike and the right to bargain collectively are now generally recognized, and the determination of such matters as hours

[7] [1926] A.C. 299, [1926] 1 W.W.R. 398, [1926] 1 D.L.R. 840.
[8] [1966] R.C.S. 767, 59 D.L.R. (2d) 145.
[9] [1955] R.C.S. 529 à 592, [1955] 3 D.L.R. 721.

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> 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.

Cela implique évidemment qu'en règle générale c'est la législation provinciale qu'il faut appliquer en ces matières aux entreprises du ressort législatif des provinces. Il reste évidemment certaines exceptions à faire spécialement pour ce qu'il faut considérer comme relevant de l'aspect navigation. Il n'est sûrement pas à propos d'entreprendre de définir l'étendue du champ d'application de ces exceptions, il suffit de dire que cela ne saurait s'étendre à la matière qui nous concerne: la loi qu'on a voulu appliquer à l'appelante ne peut régir que les entreprises qui sont du ressort du Parlement. Tel n'étant pas le cas de l'appelante, elle ne peut y être assujettie.

Ces considérations me paraissent suffisantes pour conclure que dans l'état actuel du dossier, le juge de première instance était justifié d'autoriser la délivrance du bref demandé et de surseoir aux procédures du Conseil canadien.

Je ferais droit au pourvoi de l'appelante, infirmerais le jugement de la Cour d'appel et rétablirais le dispositif du jugement de première instance; le tout avec dépens en cette Cour et en Cour d'appel.

Appel accueilli avec dépens.

Procureurs de l'appelante: Byers, McDougall, Casgrain & Stewart, Montréal.

Procureurs des intimés, le Conseil, R. L. Fournier et J. L. MacDougall: Geoffrion & Prud'homme, Montréal.

Procureurs de l'intimé, le Syndicat: Cutler, Lamer, Bellemare, Robert, Desaulniers, Proulx & Sylvestre, Montréal.

DAME THÉRÈSE VEILLEUX (*Demanderesse*) ..... APPELANTE;

ET

ROBERT MARINEAU (*Défendeur*) ..... INTIMÉ.

1969
*Mai 21
Juin 10

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Prescription—Réclamation en dommages-intérêts basée sur les art. 1053 et 1056 du Code Civil—Décès par suite d'un incendie—Requête pour amender le bref et la déclaration pour joindre un autre défendeur—Solidarité—Interruption de prescription s'applique-t-elle à la réclamation découlant du décès—Code Civil, art. 1053, 1056, 1106, 2188, 2224, 2231, 2262—Code de procédure civile, art. 202.

A la suite du décès de son mari dans l'incendie d'un hôtel appartenant au défendeur, la demanderesse, tant personnellement que comme tutrice de ses enfants mineurs, a réclamé du défendeur des dommages-intérêts. La réclamation porte sur les dommages découlant du décès en vertu de l'art. 1056 du *Code Civil* aussi bien que ceux dus aux héritiers en vertu de l'art. 1053. Plus d'un an après le décès de son mari, la demanderesse a présenté une requête demandant la permission d'amender le bref et la déclaration pour joindre comme défendeur solidaire un nommé Lampron qui était prétendument le fournisseur de la cuisinière à gaz dont l'explosion a provoqué l'incendie. La requête a été rejetée en Cour supérieure pour le motif qu'il y avait prescription. La Cour d'appel a modifié ce jugement en permettant l'amendement à seule fin d'exercer la réclamation en vertu de l'art. 1053 C.C. La demanderesse a obtenu la permission d'appeler à cette Cour.

Arrêt: L'appel doit être accueilli.

Vu l'état de la jurisprudence et vu que l'amendement dont il s'agit est susceptible d'être attaqué par d'autres moyens, il semble plus sage de s'abstenir d'émettre une opinion sur toute cause éventuelle de déchéance du droit d'action, avant l'amendement même. La requête de la demanderesse pour amender le bref et la déclaration doit être accordée.

Prescription—Claim in damages based on art. 1053 and 1056 of the Civil Code—Death in fire of hotel—Motion to amend writ and declaration to summon joint and several defendant—Whether interruption of prescription applies to claim arising from the death—Civil Code, art. 1053, 1056, 1106, 2188, 2224, 2231, 2262—Code of Civil Procedure, art. 202.

Following the death of her husband in the fire that destroyed an hotel owned by the defendant, the plaintiff, personally and as tutrix of her children, claimed damages from the defendant. The claim was for

*CORAM: Les Juges Fauteux, Abbott, Martland, Hall et Pigeon.

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damages resulting from the death under art. 1056 as well as for damages due to the heirs under art. 1053. More than one year after her husband's death, the plaintiff moved to amend the writ and the declaration to include as a joint and several defendant one Lampron who allegedly had supplied the gas stove, the explosion of which had provoked the fire. The motion was dismissed by the Superior Court on the basis that there was prescription. The Court of Appeal varied the judgment by allowing the amendment only with respect to the claim based on art. 1053 C.C. The plaintiff was granted leave to appeal to this Court.

Held: The appeal should be allowed.

In view of the authorities and of the fact that the amendment in question may be contested by other means, it seems preferable to abstain from giving an opinion on a possible cause of loss of the right of action, before the amendment is made. The plaintiff's motion to amend the writ and the declaration should be allowed.

APPEAL from a judgement of the Court of Queen's Bench, Appeal Side, province of Quebec[1], varying a judgment of Beaudoin J. Appeal allowed.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], modifiant un jugement du Juge Beaudoin. Appel accueilli.

Gilles Duguay, pour la demanderesse, appelante.

Le défendeur, intimé, n'était pas représenté à l'audition.

Le jugement de la Cour fut rendu par

LE JUGE PIGEON:—A la suite du décès de son mari dans un incendie, l'appelante a intenté contre l'intimé une action en responsabilité. Agissant également comme tutrice de ses enfants, elle réclame pour elle et pour eux $50,400 à titre de dommages découlant du décès et $1,600 qui leur seraient dus comme héritiers du défunt pour frais funéraires et effets personnels détruits dans l'incendie.

A cette action intentée contre le propriétaire de l'immeuble incendié, elle a subséquemment voulu joindre comme défendeur un nommé Valmore Lampron qui serait le fournisseur de la cuisinière à gaz propane dont l'explosion a provoqué l'incendie. Dans ce but elle a présenté à la Cour

[1] [1969] B.R. 11.

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Supérieure une requête demandant la permission d'amender le bref et la déclaration pour alléguer les fautes qu'elle reproche au nommé Lampron et conclure à une condamnation solidaire contre les deux défendeurs.

Selon la pratique au Québec, l'avis de cette requête n'a été donné qu'au défendeur déjà poursuivi, l'intimé Marineau, et non pas au nouveau défendeur que l'appelante désire assigner. Après audition des procureurs des deux parties, la requête a été rejetée par les motifs suivants:

CONSIDÉRANT qu'à l'encontre de ladite requête, on a présenté au tribunal que la demanderesse n'était plus dans les délais pour poursuivre ledit Lampron vu qu'il y avait prescription;

CONSIDÉRANT qu'à l'article 4 de sa déclaration, la demanderesse allègue que son époux est décédé le 22 septembre 1964;

CONSIDÉRANT que la demanderesse, dans son action, poursuivait tant en vertu de l'article 1053 du code civil qu'en vertu de l'article 1056 et que dans ce dernier cas, elle devait poursuivre pendant l'année à compter du décès de son époux;

En appel[1], ce jugement a été modifié par un arrêt permettant l'amendement à seule fin d'exercer la réclamation de $1,600 à titre d'héritiers du défunt. On admet que l'appelante est recevable à soutenir qu'il y a eu interruption de la prescription par l'assignation de l'un de ceux qu'elle prétend être ses débiteurs solidaires. Cependant, on décide que l'interruption de prescription prévue aux art. 2224 et 2231 du *Code civil* ne s'applique pas à la prescription ou déchéance décrétée à l'art. 1056 auquel renvoie le para. 2 de l'art. 2262. Citant ce que le Conseil Privé a dit de ces deux derniers articles dans *Robinson c. C.P.R.*[2], le juge Montgomery, dissident, aurait repoussé cette distinction et admis la requête pour le tout. Cette dernière opinion mérite sûrement d'être considérée attentivement car notre Cour semble, dans *Grand Trunk Railway et Cité de Montréal c. McDonald*[3], avoir admis l'interruption de prescription tant à l'encontre du délai fixé par 1056 C.C. que de celui qui est prévu à la charte de la ville de Montréal.

Cependant, avec déférence pour le juge de première instance et ceux de la Cour d'appel, il paraît clair qu'il vaut beaucoup mieux en la présente cause adopter la même attitude que la Cour d'appel dans *Coupal c. Crispino*[4]. On a

[1] [1969] B.R. 11.
[2] [1892] A.C. 481.
[3] (1918), 57 R.C.S. 268.
[4] [1965] B.R. 189.

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infirmé un jugement refusant de permettre un amendement parce que le droit d'action était éteint par prescription, le regretté juge Bissonnette disant (à p. 192):

> comme cet amendement est susceptible d'être attaqué par d'autres moyens, il semble plus sage de s'abstenir d'émettre une opinion sur toute cause éventuelle de déchéance du droit d'action, avant l'amendement même.

Il faut bien songer que lorsqu'un amendement est ainsi refusé, le demandeur peut se pourvoir en appel. Alors on risque qu'il se trouve, comme dans le présent cas, à comparaître seul devant le tribunal, le premier défendeur n'ayant aucun intérêt à prendre le risque de demander le rejet d'un appel où ce n'est pas lui mais celui qu'on n'a pas encore assigné qui est réellement visé. Le demandeur se voit donc obligé de subir les frais d'un appel à seule fin de faire décider qu'on ne doit pas trancher la question de prescription.

Il est bien vrai que l'art. 2188 C.C. permet aux tribunaux de suppléer d'office le moyen résultant de la prescription dans les cas où la loi dénie l'action. Cela ne veut pas nécessairement dire qu'ils doivent le faire avant même que le défendeur soit assigné. Au surplus, si les règles du titre de la prescription ne s'appliquent pas en l'occurrence, peut-on se fonder sur celle-là pour le décider?

Pour ces raisons je conclus qu'il faut infirmer le jugement de la Cour d'Appel et réformer le jugement de la Cour Supérieure aux fins de permettre l'amendement du bref et de la déclaration suivant la requête de la demanderesse appelante. Quant aux dépens de l'incident et ceux des appels, il me paraît que dans les circonstances il faut réserver au juge du fond le soin de les adjuger.

Appel accueilli.

Procureurs de la demanderesse, appelante: Duguay, Salois & Boyer, Montréal.

Procureurs du défendeur, intimé: Létourneau, Stein, Marseille, Bienvenue, Delisle & Larue, Québec, et Boulet & Venne, Grand'Mère.

MICHAEL MENDICK .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1969

*April 28
June 16

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Habitual criminal—Preventive detention—46 convictions prior to substantive offence—Most of the offences being related to possession and use of gasoline credit cards or automobiles—Whether it was expedient for the protection of the public to impose sentence of preventive detention—Menace to society—Criminal Code, 1953-54 (Can.), c. 51, s. 662.

Following his conviction on a charge of theft of an automobile in January 1967, the appellant, who had been apprehended in May 1967, was sentenced to a term of 3-year imprisonment on June 10, 1967. The notice required by s. 662(1) of the *Criminal Code* was duly served and the appellant was brought before the magistrate on November 14. The notice specified 46 convictions in addition to the substantive offence. With the exception of one conviction for armed robbery and one for theft of money, all convictions related to unlawful possession and use of gasoline credit cards or automobiles. The magistrate found that at the time of the commission of the substantive offence the appellant was leading persistently a criminal life and that he was an habitual criminal. A sentence of preventive detention was then imposed. The Court of Appeal affirmed the finding and the sentence. The appellant was granted leave to appeal to this Court.

Held (Fauteux, Abbott, Martland and Ritchie JJ. *dissenting*): The appeal should be allowed and the sentence imposed in respect of the substantive offence restored.

Per Cartwright C.J. and Judson, Hall, Spence and Pigeon JJ.: On the evidence, the finding that the appellant was an habitual criminal was a proper finding. However, it has not been shown beyond a reasonable doubt that it was expedient for the protection of the public that the appellant should be sentenced to preventive detention. His criminal record is a formidable one but there is evidence that his last employer would be willing to re-employ him on his release. The appellant did not constitute so grave a menace that the protection of the public required that he be deprived of his liberty for the remainder of his life, subject only to the provisions of s. 666 of the *Criminal Code* and the *Parole Act*.

Per Fauteux, Abbott, Martland and Ritchie JJ., *dissenting*: The finding that the appellant was an habitual criminal was a proper one under the circumstances and the Court of Appeal did not err in affirming the magistrate's finding that it was expedient for the protection of the public in that province to sentence him to preventive detention. In forming its opinion as to whether or not it is expedient for the protection of the public to sentence an habitual criminal to preventive detention, one of the main questions to be determined by the Court is whether he is a man whose record indicates that after he has

*PRESENT: Cartwright C.J. and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

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derived the maximum benefit from imprisonment the public will be best protected, and his own interest best served, by ensuring that his return to society is made subject to supervision and control of the Parole Board. In imposing a sentence of preventive detention the Court must be satisfied that there is a real danger to the public in the prospect of the accused being allowed at large in society without supervision after the expiration of his sentence for the substantive offence with which he is charged. Section 660 is to be applied in the cases of persons who have shown themselves to be so habitually addicted to serious crime as to constitute a threat to other persons or property in any community in which they live, and for so long as they remain at large without supervision. Habitual criminals with records such as the present appellant are proper subjects for the application of s. 660 of the *Criminal Code*.

Droit criminel—Repris de justice—Détention préventive—46 condamnations antérieures à la dernière infraction—La plupart des infractions se rapportent à la possession et l'utilisation illégales d'automobiles ou de cartes de crédit de gazoline—Opportunité pour la protection du public d'imposer une sentence de détention préventive—Menace pour la société—Code Criminel, 1953-54 (Can.), c. 51, art. 662.

Ayant été déclaré coupable sur une inculpation de vol d'une automobile en janvier 1967, l'appelant, qui avait été arrêté en mai 1967, a été condamné à un terme de trois ans d'emprisonnement le 10 juin 1967. L'avis requis par l'art. 662(1) du *Code Criminel* lui a été dûment signifié et l'appelant a comparu à nouveau devant le magistrat le 14 novembre. L'avis contenait 46 condamnations en plus de l'infraction dont il s'agit. Sauf une déclaration de culpabilité pour vol à main armée et une pour vol d'argent, toutes les déclarations de culpabilité se rapportent à la possession et l'utilisation illégales d'automobiles ou de cartes de crédit de gazoline. Le magistrat a conclu qu'au moment de la commission de l'infraction dont il s'agit l'appelant menait avec persistance une vie criminelle et il l'a déclaré repris de justice. Une sentence de détention préventive lui a alors été imposée. La Cour d'appel a confirmé la déclaration ainsi que la sentence. L'appelant a obtenu la permission d'appeler à cette Cour.

Arrêt: L'appel doit être accueilli et la sentence de trois ans imposée le 10 juin doit être rétablie, les Juges Fauteux, Abbott, Martland et Ritchie étant dissidents.

Le Juge en Chef Cartwright et les Juges Judson, Hall, Spence et Pigeon: Sur la preuve, la conclusion que l'appelant était un repris de justice est la conclusion appropriée. Cependant, il n'a pas été démontré hors d'un doute raisonnable qu'il était opportun pour la protection du public que l'appelant soit condamné à la détention préventive. Son dossier est formidable mais la preuve contient une déclaration que son dernier employeur serait consentant à l'employer à nouveau après sa mise en liberté. L'appelant n'est pas une menace si grave que la protection du public exige qu'il soit privé de sa liberté pour le reste de sa vie, sujet seulement aux dispositions de l'art. 666 du *Code Criminel* et de la *Loi sur la libération conditionnelle de détenus*.

Les Juges Fauteux, Abbott, Martland et Ritchie, *dissidents*: Dans les circonstances, il était approprié que l'appelant soit déclaré repris de justice, et la Cour d'appel n'a pas fait erreur en confirmant la conclu-

sion du magistrat qu'il était opportun pour la protection du public dans cette province d'imposer à l'appelant une sentence de détention préventive. En se faisant une opinion sur la question de savoir s'il est opportun pour la protection du public d'imposer une sentence de détention préventive à une personne déclarée repris de justice, une des questions principales que la Cour doit déterminer est de savoir s'il s'agit d'un homme dont le dossier indique qu'après qu'il a tiré le plus grand avantage possible de l'emprisonnement le public sera des mieux protégé, et ses propres intérêts à lui seront des mieux servis, si l'on s'assure que son retour dans la société est sujet à la surveillance et au contrôle de la Commission nationale des libérations conditionnelles. La Cour doit être satisfaite, lorsqu'elle impose une sentence de détention préventive, qu'il y a un danger réel pour le public dans la perspective qu'il soit permis à l'accusé de s'en aller en liberté dans la société sans surveillance après l'expiration de sa sentence pour l'infraction dont il a été accusé. L'article 660 s'applique aux cas de personnes qui se sont montrées tellement adonnées habituellement au crime qu'elles constituent une menace pour les autres personnes ou la propriété dans la communauté où elles vivent, et pour aussi longtemps qu'elles demeurent en liberté sans surveillance. L'article 660 du *Code Criminel* s'applique aux personnes déclarées repris de justice et possédant un dossier comme celui que possède l'appelant.

APPEL d'un jugement de la Cour d'appel de la Colombie-Britannique, confirmant une sentence de détention préventive. Appel maintenu, les Juges Fauteux, Abbott, Martland et Ritchie étant dissidents.

APPEAL from a judgment of the Court of Appeal for British Columbia, affirming a sentence of preventive detention. Appeal allowed, Fauteux, Abbott, Martland and Ritchie JJ. dissenting.

Kenneth G. Young, for the appellant.

W. G. Burke-Robertson, Q.C., for the respondent.

The judgment of Cartwright C.J. and of Judson, Hall, Spence and Pigeon JJ. was delivered by

THE CHIEF JUSTICE:—This appeal is brought, pursuant to leave granted by this Court, from a unanimous judgment of the Court of Appeal for British Columbia, pronounced on January 30, 1968, dismissing an appeal against a sentence of preventive detention imposed upon the appellant by His Worship Magistrate Isman, at Vancouver, on November 14, 1967, in lieu of a sentence of three years

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imprisonment imposed upon him by His Worship Magistrate Walker, at Vancouver, on June 10, 1967, following his conviction on June 3, 1967, on a charge that, at the City of Vancouver, between the 1st and 11th days of January, 1967, he did commit theft of a 1966 Ford Galaxie automobile of a value in excess of $50.

At the date of the hearing before Magistrate Isman, November 14, 1967, the appellant was forty-seven years of age.

No question was raised as to the fulfilment of the conditions precedent to the hearing of the application by Magistrate Isman prescribed by s. 662(1) of the *Criminal Code*. The notice required by that subsection was duly served on the appellant and a copy was filed with the Clerk of the Court.

The notice specified forty-six convictions in addition to the conviction on June 3, 1967, before Magistrate Walker of the offence set out in the opening paragraph of these reasons, which is hereinafter referred to as "the substantive offence", and concluded

B. Other circumstances:

1. That you are an habitual associate of criminals;
2. That after brief periods of freedom you have consistently returned to your criminal way of life;
3. That during your brief periods of freedom you have not had regular gainful employment.

No evidence was called by the Crown to show that since his release early in October 1966 the appellant was associating with criminals.

The learned magistrate found that it was proved beyond a reasonable doubt that at the time of the commission of the substantive offence the appellant was leading persistently a criminal life. This finding was concurred in by the Court of Appeal and I can find no ground for disagreeing with it. This leaves for consideration the question whether it is expedient for the protection of the public to sentence the appellant to preventive detention.

Davey C.J.B.C., who gave the judgment of the Court of Appeal, opened his reasons on this branch of the matter with the sentence:

The only doubt I have, or did have, is whether a sentence of preventive detention is expedient.

The learned Chief Justice continued:

...This man produced a letter from his employer, Ann Kostrich, which said that he was an honest man, which perhaps is true limited to her experience with him, but certainly was not true in view of his record and in view of his conduct while he was employed by her, because while employed by her he bought a car in Ontario for one hundred and twenty-five dollars and he switched the licence plates from the Ontario car to the B.C. car and vice versa, so that the presence of the B.C. car would not be noticed and identified. During that time, from the statement of Staff Sergeant Campbell, he continued to use the credit card, notwithstanding that he was gainfully employed at seventy-five dollars a week, I think it was.

Now the learned Magistrate expressly refrained from taking those circumstances into consideration. In my judgment they were both relevant and material, and important. They are relevant to the question of whether this man was persistently leading a criminal life at the date of the substantive offence, because while they occurred after the commission of the substantive offence, they show full light on his activities at the time of the commission of the offence, and they explain what he did. They are also relevant and material to the question of the expediency of preventive detention, because they show that while gainfully employed he was still using the motor car which he had stolen; he switched the plates to conceal its identity; and he continued to use the stolen credit card. To my mind those circumstances destroy the inference which might have otherwise been open that by getting gainful employment he had determined to rehabilitate himself and that a sentence of preventive detention was no longer necessary. On those grounds I would dismiss the appeal.

It should be explained that while the substantive offence was committed between the 1st and 11th of January 1967, the appellant was not apprehended until the end of May 1967. The exact date of his arrest does not appear in the record.

I agree with the view of Davey C.J.B.C. that evidence as to the appellant's way of life between the date of the commission of the substantive offence and his arrest some time thereafter was admissible and relevant to both the questions (i) whether he was leading persistently a criminal life and (ii) whether it is expedient to sentence him to preventive detention. The contrary view expressed by the learned magistrate was, no doubt, founded on the following passage in *Kirkland v. The Queen*[1]:

In my opinion it is established by these decisions, and I would so hold on the wording of s. 575c(1) if the matter were devoid of authority, that before an accused can be found to be an habitual criminal the Crown, in addition to proving the prescribed number of previous convictions, must

[1] [1957] S.C.R. 3 at 8, 117 C.C.C. 1, 25 C.R. 101.

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satisfy the onus of proving beyond a reasonable doubt that at the time when he committed the indictable offence referred to in s. 575B the accused was leading persistently a criminal life.

While the question which I am now considering did not arise in the *Kirkland* case, as there the accused was arrested immediately after committing the substantive offence, the statement that the date as of which it is to be determined whether an accused is leading persistently a criminal life is the date of the substantive offence has been repeated in subsequent judgments of this Court.

In *Paton v. The Queen*[2], Judson J. who delivered the judgment of the majority of the Court said at p. 355:

> ...One thing that *Kirkland v. The Queen* does decide is that it must be shown on the application to have the accused declared an habitual criminal that he is leading 'persistently' a criminal life, and that on this branch of the case the date to be taken is the date of the commission of the primary or substantive offence.

In *Hadden v. The Queen*[3], with the concurrence of Judson, Hall and Spence JJ., I said:

> It has been held in a unanimous judgment of this Court in *Kirkland v. The Queen* that the time at which the Crown must show that an accused is leading persistently a criminal life is the time of the commission of the substantive offence.

But Pigeon J., while agreeing in the result, did not agree with this passage.

The question which I am now considering did not arise for decision in either *Paton v. The Queen* or *Hadden v. The Queen*. In each of these cases the accused was arrested on the same day as that on which he committed the substantive offence.

I find myself in complete agreement with the following passage in the reasons of Pigeon J. in *Paton v. The Queen, supra,* at pp. 362 and 363:

> Concerning the unanimous decision of this Court in *Kirkland v. The Queen*, this appears to be a case for the application of the rule enunciated by Lord Halsbury in *Quinn v. Leathem* and often referred to in this Court *v.g. Regina v. Snider; The Queen v. Harder; Robert v. Marquis*, 'that a case is only an authority for what it actually decides'. In the *Kirkland* case the determination of the period of time to be considered in making a finding that an accused is an habitual criminal was not in issue. The only question considered was what evidence is necessary to prove that an accused is 'leading persistently a criminal life'. In the

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[2] [1968] S.C.R. 341, 3 C.R.N.S. 242, 63 W.W.R. 713, [1968] 3 C.C.C. 287, 68 D.L.R. (2d) 304.

[3] [1968] S.C.R. 258 at 263, 3 C.R.N.S. 321, [1968] 4 C.C.C. 1.

reasons for judgment it was said (at p. 7) that 'the Crown had failed to satisfy the onus of proving that at the time of the commission of the substantive offence, the appellant was leading persistently a criminal life'. In that case the accused had been apprehended immediately after the commission of the primary offence and undoubtedly was afterwards in custody until the sentence was passed. Therefore, it was obvious that the fact of leading persistently a criminal life was to be proved to have existed at the time of the commission of the primary offence and not subsequently as must indeed be the case in practically every instance, seeing that accused with criminal records such as to render them apt to be declared habitual criminals are not usually let out on bail. Thus, it appears to me that what was said in *Kirkland v. The Queen* should be taken merely as a statement of what had to be proved in that case, not as an exposition of the meaning of the statute applicable to different circumstances.

In the case at bar if it were shown beyond a reasonable doubt that up to the time when he was arrested in May 1967 the appellant was leading persistently a criminal life and the other conditions prescribed in s. 660(2) were fulfilled, this would warrant a finding that the appellant was an habitual criminal. I have already stated my conclusion that this was a proper finding on the evidence in this case.

I am, however, of opinion that it has not been shown beyond a reasonable doubt that it is expedient for the protection of the public that the appellant should be sentenced to preventive detention.

Of the 47 convictions set out in the Notice of Application, 27 (Nos. 7, 20, 21 and 23 to 46 inclusive), relate to the unlawful possession and use, by the appellant, of gasoline credit cards. Twenty-four of them, Nos. 23 to 46 inclusive, all of which were made on July 21, 1965, and involved sums totalling $245.95 resulted, in the words of counsel for the appellant, from "a single spree" extending over the month of December 1964 and early January 1965. Of the remaining offences enumerated in the Notice of Application 8, Nos. 1, 3, 5, 10, 13, 18, 19 and the "substantive offence" itself, relate to the theft and/or unlawful possession and use, by the appellant, of automobiles.

Since 1957, with the exception of one conviction for theft of money in March 1965, the appellant has been involved in no criminal activity which has not, in some way, related to automobiles or gasoline credit cards.

Only one of the 47 convictions was for a crime of violence, armed robbery. This conviction was in October 1957 and the appellant was sentenced to 8 years imprisonment. He

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appears to have served 5 years of this sentence and I think it not unreasonable to assume that that sentence has had the effect of deterring him from the commission of further violent crime.

The appellant has now served almost two years of the sentence of three years imposed for the substantive offence. He must realize that if he is set at liberty at the expiration of that sentence and thereafter commits either of the offences of stealing an automobile or obtaining gasoline by fraudulent means he will be liable to a maximum sentence of 10 years imprisonment. His criminal record is indeed a formidable one but there is evidence that his last employer is willing to re-employ him on his release. On the whole, I am of opinion that, although it is impossible to say that the appellant is merely a nuisance, he does not constitute so grave a menace that the protection of the public requires that he be deprived of his liberty for the remainder of his life, subject only to the provisions of s. 666 of the *Criminal Code* and the *Parole Act*.

I would allow the appeal, set aside the sentence of preventive detention and restore the sentence of three years imprisonment imposed in respect of the substantive offence.

The judgment of Fauteux, Abbott, Martland and Ritchie JJ. was delivered by

RITCHIE J. (*dissenting*):—I have had the advantage of reading the reasons for judgment of the Chief Justice and after careful consideration, I have decided that it is desirable for me to record my reasons for dissenting from his view.

The Chief Justice has concluded that the finding that the appellant was an habitual criminal was a proper one under the circumstances and with this I respectfully agree; but I cannot assign any ground for holding that the Court of Appeal of British Columbia erred in affirming the opinion of the learned magistrate that it was expedient for the protection of the public in that Province to sentence the appellant to preventive detention.

I think it to be convenient at the outset to reproduce in full the habitual criminal provisions contained in s. 660 of the *Criminal Code* which read as follows:

660. (1) Where an accused has been convicted of an indictable offence the court may, upon application, impose a sentence of preventive deten-

tion in lieu of any other sentence that might be imposed for the offence of which he was convicted or that was imposed for such offence, or in addition to any sentence that was imposed for such offence if the sentence has expired, if

(*a*) the accused is found to be an habitual criminal, and

(*b*) the court is of the opinion that because the accused is an habitual criminal, it is expedient for the protection of the public to sentence him to preventive detention.

(2) For the purposes of subsection (1), an accused is an habitual criminal if

(*a*) he has previously, since attaining the age of eighteen years, on at least three separate and independent occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more and is leading persistently a criminal life, or

(*b*) he has been previously sentenced to preventive detention.

(3) At the hearing of an application under subsection (1), the accused is entitled to be present.

In the case of *Poole v. The Queen*[4], which was heard by the full Court in December of last year, it was decided by the majority that this Court has jurisdiction under s. 41 of the *Supreme Court Act* to entertain an application for leave to appeal from a finding that, in relation to the appellant "it is expedient for the protection of the public to sentence him to preventive detention". In the reasons for judgment of the majority it was stipulated that:

Whether or not in any particular case it is expedient to so sentence a person found to be an habitual criminal is a question of fact or perhaps a question of mixed law and fact; it is certainly not a question of law alone.

It was also recognized by the Court of Appeal of British Columbia in *Regina v. Channing*[5] that the determination of what is expedient for the protection of the public is a question of fact in each case, but as the determination of this issue is, under the provisions of s. 660(1)(*b*) of the *Criminal Code* made dependent upon the opinion of the courts concerned, it is desirable, as the Chief Justice appears to me to have recognized, that some principle should be established according to which such opinion is to be formulated. It appears to me that the guiding principle to be gathered from the reasons for judgment of the Chief Justice in the present case is expressed in the following terms:

...I am of opinion that, although it is impossible to say that the appellant is merely a nuisance, he does not constitute so grave a

[4] [1968] S.C.R. 381, 3 C.R.N.S. 213, [1968] 3 C.C.C. 257.

[5] (1965), 52 W.W.R. 99, [1966] 1 C.C.C. 97, 51 D.L.R. (2d) 223.

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menace that the protection of the public requires that he be deprived of his liberty for the remainder of his life, subject only to the provisions of s. 666 of the *Criminal Code* and the *Parole Act*.

The requirement that a man must be found to be a menace before a sentence of preventive detention can be properly imposed upon him finds its origin in the decision of Lord Goddard in *Rex v. Churchill*[6], where he said, at page 110:

> The object of preventive detention is to protect the public from men or women who have shown by their previous history that they are a menace to society while they are at large.

In order to determine the sense in which Lord Goddard used the word menace, it is necessary to consider the statement he made in the same case at page 112 where he said:

> As we have already said, when such sentences have to be passed the time for punishment has gone by, because it has had no effect. It has become a matter of putting a man *where he can no longer prey upon society* even though his depredations may be of a comparatively small character, as in the case of habitual sneak thieves.

The italics are my own.

The test of whether or not a man constitutes a "menace to society" was first applied in this Court in relation to s. 660(1)(*b*) in *Poole v. The Queen, supra,* where it was said of the appellant on behalf of the majority of the Court:

> ...I am not satisfied that his release at the expiration of the terms of imprisonment to which he has been sentenced for the substantive offences will, to use the words of Lord Goddard, constitute a menace to society or that the protection of the public renders it expedient that he should spend the rest of his life in custody.

If the word "menace" as used in this excerpt from the reasons for judgment in that case and in the present case were to be given the meaning attributed to it by Lord Goddard, it would appear to include anyone who could be said to "prey upon society"; but in the present case the Chief Justice appears to have added a further ingredient as a prerequisite to the imposition of a sentence of preventive detention by indicating that before such a sentence is imposed, the accused man must "constitute *so grave a menace* that the protection of the public requires *that he*

[6] (1952), 36 Cr. App. R. 107, 2 Q.B. 637.

be deprived of his liberty for the remainder of his life, subject only to the provisions of s. 666 of the *Criminal Code* and the *Parole Act*". (The italics are my own).

In this regard I think it desirable to examine the provisions of s. 666 of the *Criminal Code* and the *Parole Act* in order to determine whether the question of "being deprived of his liberty for the remainder of his life" is one which necessarily arises at all as a result of the imposition of a sentence of preventive detention. I think on the contrary that under the provisions of s. 666 of the *Criminal Code* and the terms of the *Parole Act*, 1958 (Can.), c. 38, Parliament has expressly provided for the supervised return to society of habitual criminals who have been sentenced to preventive detention. Section 666 of the *Criminal Code* reads as follows:

> Where a person is in custody under a sentence of preventive detention, *the Minister of Justice shall, at least once in every year, review the condition, history and circumstances* of that person for the purpose of determining whether he should be permitted to be at large on licence, and if so, on what conditions.

The italics are my own.

By s. 24(5) of the *Parole Act*, it is indicated that the powers, functions and duties of the Minister of Justice under s. 666 of the *Criminal Code* are transferred to the National Parole Board established by that Act. Turning to the provisions of the *Parole Act* itself, the following sections appear to me to be relevant:

> 8. The Board may
>
> (*a*) grant parole to an inmate if the Board considers that the inmate has derived the maximum benefit from imprisonment and that the reform and rehabilitation of the inmate will be aided by the grant of parole;
>
> (*b*) Grant parole subject to any terms or conditions it considers desirable;...

Section 11 provides:

> 11. (1) The sentence of a paroled inmate shall, while the parole remains unrevoked and unforfeited, be deemed to continue in force until the expiration thereof according to law.
>
> (2) *Until a parole is revoked, forfeited or suspended* the inmate is not liable to be imprisoned by reason of his sentence, and *he shall be allowed to go and remain at large* according to the terms and conditions of the parole and subject to the provisions of this Act.

The italics are my own.

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In the case of *Poole v. The Queen, supra,* at p. 392, these provisions are referred to in the reasons for judgment of the majority of the Court in the following terms:

> In Canada if sentence is passed at all it must decree imprisonment for the remainder of the person's life subject to the possibility of his being allowed out on licence if so determined by the parole authorities, a licence which may be revoked without the intervention of any judicial tribunal.

It is true that a parole granted by the Parole Board may be revoked "without the intervention of any judicial tribunal". What Parliament has seen fit to do is to establish a Board composed of people who are experienced in dealing with criminals and to assign to that Board the duty of reviewing at least once in each year "the *condition, history* and *circumstances*" of every person upon whom a sentence of preventive detention has been passed, together with the power to allow such persons "to go and remain at large" under its supervision and subject to its right to recall such persons to imprisonment.

It is true that a man who is on parole has less than complete freedom, but in my view the *Parole Act* is directed to his "reform and rehabilitation" rather than to depriving him "of his liberty for the remainder of his life". It seems to me that in forming its opinion as to whether or not it is expedient for the protection of the public to sentence an habitual criminal to preventive detention, one of the main questions to be determined by the Court is whether he is a man whose record indicates that after "he has derived the maximum benefit from imprisonment" the public will be best protected, and his own interests best served, by ensuring that his return to society is made subject to the supervision and control of the Parole Board.

It is my view that in imposing a sentence of preventive detention the Court must be satisfied that there is a real danger to the public in the prospect of the accused being allowed at large in society without supervision after the expiration of his sentence for the substantive offence with which he is charged.

I do not find any decision so far rendered by this Court which makes it plain that a sentence of preventive detention is only to be imposed on persons who have been guilty of repeated crimes of violence, and I can find nothing in s. 660 itself to indicate that it is directed solely to the pro-

tection of the public against violence; it rather appears to me that the section is to be applied in the cases of persons who have shown themselves to be so habitually addicted to serious crime as to constitute a threat to other persons or property in any community in which they live, and for so long as they remain at large without supervision. The persons to whom Parliament intended the preventive detention provisions to apply are specified in s. 660(2) where "habitual criminal" is defined as one who has

> ...since attaining the age of eighteen years, on at least three separate and independent occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more and is leading persistently a criminal life...

It will be observed that it is not necessary for a man to have committed any crime of violence in order to be an habitual criminal and thus to be subject to a sentence of preventive detention. In my view the section has particular, though not exclusive, application to the hardened criminal who has spent the greater part of his life in prison and who, on his release, unless supervised, will commit a further offence. These are the people for whom, as Lord Goddard observed: "...the time for punishment has gone by, because it has had no effect".

As I have indicated, the question of what is expedient for the protection of the public is a question of fact in each case, but it is essential that some principles be established against which to assess the facts. While I do not consider that we are bound in this case by the decision in *Poole v. The Queen, supra,* the two cases are undoubtedly similar and it has been suggested that as this Court has decided that it was not expedient for the protection of the public to sentence a man with such a formidable criminal record as Poole to preventive detention, it would be inconsistent to impose such a sentence on the present appellant.

It therefore appears to me to be desirable to examine the facts in these two cases.

In the case of Poole, the following factors appear to have influenced the majority of the Court:

> Since his convictions in 1959, the appellant has been guilty of no violent crime. For the crime of theft of an automobile in 1962 and the four substantive offences in 1965, which involved comparatively trifling sums, he has been sentenced to severe punishment; there is some evidence of his trying to live a normal life; he is now 35 years of age.

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In the case of the present appellant, he is 47 years of age and has a record of 47 convictions which, according to my calculations, has resulted in his spending far the greater part of his adult life in prison, and I can find no evidence that he was at any time "trying to live a normal life". Very soon after his release from prison in 1967, he stole an automobile in British Columbia and drove it to Ontario, using stolen credit cards with which to fuel it. Of this incident he says:

> A. I couldn't find no work.
> Q. So you decided to steal a car?
> A. So I was reading the paper and there was work in Ontario, so I figured—I didn't know how to get to tell you the truth the proper way, I haven't got too much money, to get there.
> Q. So you decided to steal a car?
> A. So I decided to get a car and get over there.
> Q. Steal a car?
> A. Steal a car.

It was not surprising that the appellant should follow this course as he had previously been convicted on six separate occasions for unlawful possession of motor vehicles and his convictions for use of other people's credit cards were numerous.

When the appellant got to Hamilton he obtained employment as a bartender in a hotel which was apparently owned by a woman by the name of Ann Kostrich with whom he became "quite friendly". He kept this job from February 1967 until he was arrested on the 30th of May in that year, and all the time he was so employed he was driving a stolen motor vehicle and fueling it with gasoline obtained with a stolen credit card. After his arrest his lawyer wrote to Ann Kostrich and received a reply which was admitted in evidence by consent and which read, in part, as follows: (referring to the appellant as Michael)

> Michael was a very good worker, honest and non-drinker, in fact I went away on two different occasions and left him in charge looking after the business. Whenever he is released, he always has a job with me, this I guarantee. If there is anything that I can do to help him, I will.

The Chief Justice was apparently referring to this letter when he said, after reviewing the appellant's criminal record:

> His criminal record is indeed a formidable one but there is evidence that his last employer is willing to reemploy him on his release. On the whole I am of opinion that...he does not constitute so grave a menace that the protection of the public requires that he be deprived of his liberty for the remainder of his life.

The Chief Justice also points out that the appellant "must realize that after he is set at liberty at the expiration of his present sentence and thereafter commits either of the offences of stealing an automobile or obtaining gasoline by fraudulent means, he will be liable to a maximum sentence of 10 years' imprisonment". It is perhaps worth observing that if the accused should receive such a ten-year sentence there will be no obligation upon the Minister of Justice *"at least once in every year"* to review his "condition, history and circumstances".

The disturbing feature of this case and one which in my opinion differentiates it from the *Poole* case, is indicated in the following paragraph of the Chief Justice's reasons for judgment:

> Since 1957, with the exception of one conviction for theft of money in March 1965, the appellant has been involved in no criminal activity which has not in some way related to automobiles or gasoline credit cards.

When one considers that the appellant has been convicted 28 times since 1957, the record certainly appears to disclose a pattern of behaviour which is well illustrated by the appellant's own evidence in cross-examination when he said:

> Q. First question, Mr. Mendick, at any time during your career from 1937 on, did you ever decide to quit the life of crime and stop committing offences?
>
> A. Well, I've tried many times; I never made, I never made—I wasn't thinking of making any, of making a living out of crime. It seems like I was enjoying taking these cars and pass a few cheques. I didn't make no money at all. As a crime, I don't know what—can't explain why I do all this, because I'm working all the—nearly all the time.

In my view, habitual criminals with records such as the present appellant are proper subjects for the application of s. 660 of the *Criminal Code* and I can find no ground for holding that the courts below were wrong in forming the opinion which they did.

I would dismiss this appeal.

Appeal allowed, FAUTEUX, ABBOTT, MARTLAND *and* RITCHIE JJ. *dissenting.*

Solicitors for the appellant: Wilder, Young & Chambers, Vancouver.

Solicitors for the respondent: Douglas, Symes & Brissenden, Vancouver

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*Apr. 24
June 6

THE MINISTER OF MINES FOR THE PROVINCE OF ONTARIO — APPELLANT;

AND

RIO ALGOM MINES LIMITED — RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Taxation—Computation of tax—Appraisal of value of ore at the pit's mouth—Deductions—Processing allowance computed on all milling capital—Whether interest on borrowed capital deductible—The Mining Tax Act, R.S.O. 1950, c. 237 [am. 1955, c. 46, s. 2(1)].

The respondent company owned and operated two uranium mines in Ontario. The ore from these mines was not sold as such, but was processed by the company. As there was no "actual market value of the output at the pit's mouth" and "no means of ascertaining the market value", the mine assessor was required by s. 4(3) of *The Mining Act, R.S.O.* 1950, c. 237, to appraise the value of the output at the pit's mouth. The assessor, in working out his assessment, began with the value of the concentrate produced from the ore mined during the year in question and from this figure he deducted four items, referred to as "processing and marketing deductions". On appeal from the assessment, the Ontario Municipal Board increased the deduction for "processing allowance", and, in the end result, reduced the amount of tax. The company appealed to the Court of Appeal and the Minister cross-appealed. The effect of changes made by the Court of Appeal was to further reduce the tax payable. The Minister then appealed to this Court and sought to have the original assessment, made by the assessor, restored. By way of cross-appeal, the company sought to vary the judgment of the Court of Appeal, which had allowed, as an item of processing expense, two-thirds of the interest paid by the company in the year of assessment on borrowed processing capital, by increasing such item to the full amount of such interest paid.

Held: The appeal should be allowed in part and the cross-appeal dismissed.

Except with respect to the item of deduction for interest charges, the Court was in agreement with the judgment of the Court of Appeal. The company was not entitled to this deduction.

In view of the allowance, which was already granted on all milling capital, including capital which was borrowed as well as equity capital, it was not proper also to allow an outright deduction of interest on borrowed capital. To permit this, in computing the value of the output at the pit's mouth, for computation of tax, was to say that such value was lesser or greater depending upon the extent to which the milling capital was derived from borrowing or through equity capital. Furthermore, it would permit a taxpayer not only to deduct the interest charges, but also to obtain the benefit of the allowance on the borrowed capital upon which such interest was paid.

*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

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MINISTER OF MINES FOR ONTARIO v. RIO ALGOM MINES LTD.

APPEAL and CROSS-APPEAL from a judgment of the Court of Appeal for Ontario, allowing in part an appeal and dismissing a cross-appeal from a decision of the Ontario Municipal Board on an appeal from an assessment made under *The Mining Act*, R.S.O. 1950, c. 237. Appeal allowed in part and cross-appeal dismissed.

J. D. Arnup, Q.C., and *S. Sadinsky*, for the appellant.

John J. Robinette, Q.C., for the respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal by the Minister of Mines for the Province of Ontario from a judgment of the Court of Appeal for Ontario, together with a cross-appeal by Rio Algom Mines Limited, hereinafter referred to as "the Company", from that judgment. The issues involve an assessment for taxes for the year 1957 under *The Mining Tax Act*, R.S.O. 1950, c. 237.

The Company in the year 1957 owned and operated two uranium mines at Elliot Lake, Ontario, together with a concentrating plant near each mine. The ore came out of the mine in chunks of 6″ to 8″ in diameter, and proceeded to the mill and concentrating unit, in which it was first crushed to pieces about $\frac{3}{4}$″ in diameter, and then was subjected to a chemical process which resulted in the chemical extraction of uranium concentrate.

The Mining Tax Act imposed a tax on mines whose "profits" exceed $10,000 per annum. Section 4(3) of the Act provided as follows:

> (3) The annual profits shall be ascertained and fixed in the following manner, that is to say: the gross receipts from the output during the calendar year of the mine, or in case the ore, mineral or mineral-bearing substance or any part thereof is not sold, but is treated by or for the owner, holder, lessee, tenant, occupier or operator of the mine upon the premises or elsewhere, then the actual market value of the output at the pit's mouth, or if there is no means of ascertaining the market value, or if there is no established market price or value, the value of the same as appraised by the mine assessor shall be ascertained, and from the amount so ascertained, the following, and no other, expenses, payments, allowances or deductions shall be deducted and made, that is to say:

Then followed a series of deductions to be made from the ascertained value of the output at the pit's mouth. These permitted deductions are not relevant to the issues in this case, which are concerned with the proper method of ascertaining that initial value.

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Since the ore was not sold as such, but was processed by the Company, the assessor first had to consider whether, within the meaning of s. 4, there was a "market value of the output at the pit's mouth"; he concluded that there was not. The Ontario Municipal Board found as a fact that there was no "actual market value of the output at the pit's mouth" and "no means of ascertaining the market value" and in the Court of Appeal it was common ground that this was correct and that accordingly the task of the assessor was to appraise the value of the ore at the pit's mouth. The assessor, in working out his assessment, began with the value of the concentrate produced from the ore mined in 1957; there is no dispute that this value is $45,432,565.10. He then proceeded to take into account the cost of milling the ore and producing the concentrate therefrom, allowing a reasonable profit to the milling operation. From the sale price of the concentrate he deducted four items which he called "processing and marketing deductions" as follows:

Processing and marketing expenses	$10,562,491.41
Proportion of office, administrative and mine general expenses referable to processing	1,637,559.48
Depreciation—processing plant at 25%	6,406,581.66
Processing allowance	2,071,640.36

As to "processing allowance", the assessor followed a method which he had adopted some time previously to determine processing allowance for uranium and other ores. This involved determining a value for the Company's assets devoted in the year to milling, making an allowance for what he considered a fair rate of return thereon (which he placed at 8 per cent), or alternatively 15 per cent of the profit calculated under *The Mining Tax Act* before processing allowances, deducting whichever figure was the greater. In this case, as he calculated it, the percentage of profit under *The Mining Tax Act* was greater and amounted to $2,071,640.36.

The Company appealed the assessment to the Ontario Municipal Board which held that while the assessor's method of calculating the "processing allowance" of 8 per cent of capital invested in processing assets was proper, he had not applied the 8 per cent to the proper figure. He had applied it to the capital invested at the end of the previous year, December 31, 1956; a further $4,957,571 capital was

invested in the year 1957, more than half of it in the first three months of that year, and the Board held that two-thirds of the 1957 investment should be added to the figure for "capital invested" to which the 8 per cent figure was applied. The Board further held that there should be an addition to the capital figure for "pre-production expenses chargeable to the milling operation." The Company's books showed this at $4,106,325, but this included $1,397,000 for interest on borrowed money and $439,224 for financing expenses. The Board decided these two items should be deducted from the book figure of pre-production expenses but that the balance of that item, amounting to $2,270,101, should be added to the capital invested.

This increased the deduction from $2,071,640.36 to $2,503,034.48, and, in the end result, reduced the tax from $1,308,115.45 to $1,256,348.17.

The Company appealed to the Court of Appeal and the Minister of Mines cross-appealed. The Company asserted that the Ontario Municipal Board had been wrong in not allowing the whole of the pre-production expense as an element of invested capital, *i.e.*, had been wrong in deducting the items for interest and financing costs. The Company succeeded on this ground of appeal.

The Company further asserted that in calculating the total deduction referable to milling, the amount expended in 1957 for interest on borrowed capital and financing charges in raising the capital should be deducted as a direct expense. The Court of Appeal accepted this contention in part, allowing as an expense two-thirds of the interest claimed.

The effect of the changes made by the Court of Appeal was to reduce the tax payable from $1,256,348.17 (as fixed by the Ontario Municipal Board) to $1,133,115.28.

From this judgment the Minister of Mines appeals and seeks to have the original assessment, made by the assessor, restored. The Company seeks to vary the judgment of the Court of Appeal, which had allowed, as an item of processing expense, two-thirds of the interest paid by the Company in 1957 on borrowed processing capital, by increasing such item to the full amount of such interest paid.

Counsel on both sides were in agreement, with respect to this item, that there was no valid basis for apportioning

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the interest expense. The position of counsel for the Minister was that it should not be allowed at all, while counsel for the Company contended that it should be allowed in full.

Except with respect to this last item of deduction, I am in agreement with the judgment of the Court of Appeal.

The assessor, when computing the 8 per cent processing allowance, appears to have excluded from the Company's milling capital pre-production expenses, on the basis that, by analogy, such expenses could not be taken into account, by virtue of s. 4(4) of the Act, when computing allowable deductions from the value of the output at the pit's mouth. In my view, however, there is no such analogy.

Section 4(3) of the Act required the assessor to appraise the value of the output at the pit's mouth. In making that appraisal the provisions of the statute governing deductions from that figure for mining expenses were not relevant. In adopting the method which he used, which was held to be a proper method, he rightly included, when working back from the value of the concentrate produced from the ore mined in 1957, an allowance of 8 per cent on the Company's milling capital. In determining that capital it was necessary that he take into account all capital used in the processing which occurred in the year 1957. All of the pre-production expenses in accordance with good accounting practice were properly capitalized by the Company.

Similarly, the allowance made by the Board, and approved by the Court of Appeal, of two-thirds of the capital expended for milling in 1957 was properly made, in view of the fact that more than half of the milling capital expended in 1957 was expended in the first three months of that year. Consequently, that proportion of 1957 capital expenditure could properly be considered as having been used for the milling of the ore which produced the concentrate, in 1957, from the value of which the assessor had to work back in making his appraisal of the value of the ore at the pit's mouth.

On the other hand, with respect, I am not in agreement with the decision of the Court of Appeal to allow, as a direct expense of milling, two-thirds of the amount expended by the Company in 1957 for interest paid upon borrowed processing capital.

The basis for the decision of the Court of Appeal on this point is stated as follows:

> The Board considered that an allowance to appellant of two-thirds of the milling capital actually invested in 1957 was a fair and just allowance. It is impossible upon the facts to say that the Board was in error in doing so. I would allow the appellant as an expense of 1957 milling operations the same proportion of 1957 interest paid, namely two-thirds thereof.

This reference to what the Board had done relates to the decision of the Board that, for the purpose of determining what should be included in the Company's milling capital assets on which the 8 per cent processing allowance was computed, it was proper to include two-thirds of capital additions made in 1957. The assessor had made his computation on the basis of milling capital at the end of the year 1956.

With respect, it is my view that there is no relationship between that matter and the matter now under consideration. The Company seeks to deduct, as a direct expense, interest charges on borrowed capital devoted to the processing operation. What the Board was dealing with was the amount of capital upon which the 8 per cent processing allowance should be computed.

What the assessor was required to do by s. 4(3) of the Act was to appraise the value of the output at the pit's mouth. His method of doing this was to work back from the value of the concentrate, by deducting the cost of milling the ore and producing the concentrate. Included in the deductions is the allowance of 8 per cent on milling capital assets. This 8 per cent allowance is computed upon all milling capital, including capital which is borrowed as well as equity capital. It is the means by which, in computation of the tax, recognition is given to the right of the taxpayer to take into account a reasonable rate of return on the capital used in the milling operations.

In view of this allowance I do not think it is proper also to allow an outright deduction of interest on borrowed capital. To permit this, in computing the value of the output at the pit's mouth, for computation of tax, is to say that such value is lesser or greater depending upon the extent to which the milling capital is derived from borrowing or through equity capital. Furthermore, it would permit

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a taxpayer not only to deduct the interest charges, but also to obtain the benefit of the 8 per cent allowance on the borrowed capital upon which such interest is paid.

In my opinion the Company was not entitled to this interest deduction. Accordingly, I would allow the appeal, in so far as it relates to this item. The judgment of the Court of Appeal should be varied by deleting from the deductions permitted in determining the value of the output at the pit's mouth, for computation of tax, the amount of $880,042.66, representing two-thirds of the 1957 interest on borrowed milling capital. The amount of the tax payable by the Company should be varied accordingly. The appellant should have the costs of the appeal. The respondent's cross-appeal should be dismissed with costs.

Appeal allowed in part, with costs; cross-appeal dismissed with costs.

Solicitors for the appellant: Arnup, Foulds, Weir, Boeckh, Morris & Robinson, Toronto.

Solicitors for the respondent: McCarthy & McCarthy, Toronto.

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*June 2
June 26

SMARO (SMAROULA) MOSHOS and minor children, SULTANA and PANAGIOTIS ..... APPELLANTS;

AND

THE MINISTER OF MANPOWER AND IMMIGRATION ..... RESPONDENT.

ON APPEAL FROM THE IMMIGRATION APPEAL BOARD

Immigration—Non-immigrant taking employment without permission—Deportation order—Wife and children included in deportation order—Wife not given opportunity to establish that she and her children should not have been so included—Order not validly made with respect to wife and children—Immigration Act, R.S.C. 1952, c. 325, ss. 23, 37(1)—Immigration Regulations, s. 34(3)(e)—Immigration Inquiries Regulations, s. 11.

The appellant's husband entered Canada as a non-immigrant, and, while his application for permanent admission was pending, took employment without permission, contrary to the *Immigration Regulations* and in spite of the following endorsement on his passport: "not

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*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

permitted to take employment in Canada". The appellant and her two children entered Canada as non-immigrants some four months after the husband had entered. She applied for permanent residence but never received any advice as to the disposition of her application. At an inquiry held by a special inquiry officer following a report made by an immigration officer concerning her husband, the appellant was called as a witness. Before her evidence was given, the special inquiry officer read the provisions of s. 37(1) of the *Immigration Act* to her and told her that should a deportation order be issued against her husband, she and her two children could be included in that order. A deportation order was subsequently made against the husband, the appellant and the two children. The Immigration Appeal Board affirmed the deportation order. The appellant was granted leave to appeal to this Court.

Held: The appeal should be allowed and the deportation order, in so far as it relates to the wife and children, should be set aside.

The deportation order, as against the appellant and the two children, was not valid because of the failure of the special inquiry officer to comply with s. 11 of the *Immigration Inquiries Regulations* which provides that no person shall be included in a deportation order unless the person has first been given an opportunity of establishing to an immigration officer that she should not be so included. What took place between the special inquiry officer and the appellant when she appeared as a witness at the inquiry was not sufficient compliance with that section. At no point was she told that she had the right to an opportunity to establish that she should not be included in the order.

Immigration—Non-immigrant acceptant sans permission un emploi—Ordonnance d'expulsion—Épouse et enfants inclus dans l'ordonnance—Aucune occasion fournie à l'épouse de prouver qu'elle et ses enfants ne doivent pas être inclus—Invalidité de l'ordonnance quant à l'épouse et les enfants—Loi sur l'immigration, S.R.C. 1952, c. 325, art. 23, 37(1)—Règlements sur l'immigration, art. 34(3)(e)—Règlements sur les enquêtes de l'immigration, art. 11.

Le mari de l'appelante est entré au Canada à titre de non-immigrant, et, alors que sa demande pour y résider en permanence était en suspens, il a accepté sans permission un emploi, contrairement aux *Règlements sur l'immigration* et malgré que son passeport spécifiait qu'il ne lui était pas permis d'accepter de l'emploi au Canada. Quelque quatre mois après l'entrée du mari, l'appelante et ses deux enfants sont entrés au Canada à titre de non-immigrants. L'appelante a présenté une demande pour y résider en permanence mais n'a jamais été avisée du résultat de cette demande. Au cours d'une enquête tenue par un enquêteur spécial à la suite d'un rapport fait au sujet de son mari par un fonctionnaire à l'immigration, l'appelante a été appelée comme témoin. Avant d'entendre son témoignage, l'enquêteur spécial lui a lu les dispositions de l'art. 37(1) de la *Loi sur l'immigration* et lui a dit que si une ordonnance d'expulsion était rendue contre son mari, elle et ses deux enfants pourraient être inclus dans cette ordonnance. Subséquemment une ordonnance d'expulsion a été rendue contre le mari, l'appelante et les deux enfants. La Commission d'appel de l'immigration a confirmé l'ordonnance. L'appelante a obtenu la permission d'appeler à cette Cour.

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MOSHOS *et al.* v. MINISTER OF MANPOWER AND IMMIGRATION

Arrêt: L'appel doit être accueilli et l'ordonnance d'expulsion, dans la mesure où elle vise l'épouse et les enfants, doit être mise de côté.

L'ordonnance d'expulsion contre l'appelante et les deux enfants est invalide à cause du défaut de l'enquêteur spécial de se conformer à l'art. 11 des *Règlements sur les enquêtes de l'immigration* qui stipule que nulle personne ne sera incluse dans une ordonnance d'expulsion sans avoir eu d'abord l'occasion de prouver à un fonctionnaire de l'immigration qu'elle ne doit pas y être incluse. Ce qui s'est passé à l'enquête entre l'enquêteur spécial et l'appelante lorsque celle-ci a témoigné ne peut pas être considéré comme étant suffisamment en conformité avec les dispositions de cet article. On ne lui a jamais dit qu'elle avait droit qu'on lui fournisse l'occasion de prouver qu'elle ne devait pas être incluse dans l'ordonnance.

APPEL d'une décision de la Commission d'appel de l'immigration confirmant une ordonnance d'expulsion. Appel accueilli.

APPEAL from a decision of the Immigration Appeal Board affirming a deportation order. Appeal allowed.

N. A. Endicott, for the appellants.

A. Garneau, for the respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal, with leave of this Court, from a decision of the Immigration Appeal Board, which dismissed the appeal of the appellant, and of her two children, from a deportation order made by a Special Inquiry Officer, on December 6, 1968, which included them in the order made against the appellant's husband, John Moshos.

John Moshos, who was born in Greece on December 1, 1936, is a naturalized citizen of Australia, to which country he had emigrated when he was eighteen years old. He married the appellant in Australia in 1959. She was also born in Greece and is an Australian citizen. Their two infant children were born in Australia.

Early in 1966 he returned to Greece, his wife having preceded him, as her mother was not well. While in Greece he decided to travel to Canada. He completed an application for permanent admission to Canada, while he was in Greece, but says he did not receive a letter of refusal. He says that he was advised by an immigration officer, in

Athens, that, as a British subject and an Australian citizen, he could go to Canada as a tourist, and apply, in Canada, for permanent admission.

He entered Canada on November 22, 1967, as a non-immigrant. He had about $1,500. He applied for permanent admission on January 2, 1968. His passport was endorsed "not permitted to take employment in Canada".

The appellant and the two children entered Canada on March 9, 1968, as non-immigrants. She applied on March 19 for permanent residence and was interviewed by the immigration authorities on April 19. She has never received any advice as to the disposition of this application. Her trade is that of a carpet weaver, at which she had worked for five or six years in Australia, except for the times she could not work because of her pregnancies.

The husband's finances were not sufficient to enable him to support his wife and children without earning an income. He says that he applied to the immigration authorities for permission to work on three occasions, but received no reply to his request. Finally, he had to take employment, without permission.

On August 13, 1968, an immigration officer made a report concerning the husband, pursuant to s. 23 of the *Immigration Act*, R.S.C. 1952, c. 325, and on December 6, 1968, an inquiry was held by a Special Inquiry Officer, as required by the Act as a result of that report.

The appellant was called as a witness by the Special Inquiry Officer. She was not present while her husband was testifying. After being sworn, and before her evidence was given, the following occurred:

BY: Special Inquiry Officer to Witness:

Q. Mrs. Moshos, do you speak English as well as your husband, or do you have difficulty?

A. I speak a little.

I would like to remind you that if you do not understand any of the questions that I ask you, we have an interpreter here, Mrs. Daskalakis, and will have her translate the questions into Greek before you answer them if you are not absolutely sure.

Q. What is your correct name, in full?

A. Roula Moshos.

Q. What was your maiden name?

A. Chrisostomou.

Q. Are you the wife of John Moshos concerning whom this Inquiry is being held?

A. Yes.

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MOSHOS *et al.* *v.* MINISTER OF MANPOWER AND IMMIGRATION

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Mrs. Moshos, subsection (1) of section 37 of the Immigration Act reads as follows:

"Where a deportation order is made against the head of the family, all dependent members of the family may be included in such order and deported under it".

BY: Counsel (who was Mr. Amourgis):

At this particular point I would like to make a submission to you sir that it not be interpreted by you or anyone else that I am appearing on behalf of this witness and I have come here only for the purpose of defending the rights of Mr. John Moshos so as an amicus curiae I would like to make the following submission that this particular lady might want to retain a lawyer to protect her rights in the event some of the facts used in this inquiry be used at a much later date against her. On her behalf I take the liberty of asking the protection of the Canada Evidence Act for all answers she might give in this inquiry that will tend to incriminate her or be used against her at any later proceedings. If this witness is brought on behalf of the Immigration Department, I, as counsel, to John Moshos reserve my right to cross examine her on the evidence she might give pertaining to my client's inquiry. Thank you.

BY: Special Inquiry Officer to Witness:

In view of this section of the Regulations, in the event a deportation order is issued against your husband it may be necessary on the basis of the evidence that we wish you to give now to include you and the children in such deportation order.

Q. Do you understand that?

A. Yes, of course.

Q. As your husband's counsel has pointed out, he is not prepared to act for you and you do have the right to be represented by counsel yourself. Do you wish to secure counsel?

A. Yes, Mr. Amourgis.

Q. Mr. Amourgis is not prepared to accept you as a client at this time?

A. Why, I have to get a lawyer.

Q. Do you wish to secure other counsel before giving evidence?

A. No, I do not want a lawyer.

Q. In the event Mr. Amourgis is not prepared to act as counsel, do you wish to proceed with the giving of evidence without counsel?

A. Yes.

Following the inquiry, a deportation order was made against the husband, the appellant and the two children. The basic ground for the deportation order against the husband was that he had taken employment, without the written approval of an officer of the Department, contrary to s. 34(3)(*e*) of the Immigration Regulations.

Section 34(3) of the Regulations reads as follows:

34. (3) Notwithstanding section 28, an applicant in Canada who

(*a*) if outside Canada would be an independent applicant; and

(*b*) is not in possession of an immigrant visa or letter of pre-examination but, in the opinion of an immigraton officer, would on application be issued a visa or letter of pre-examination if outside Canada;

may be admitted to Canada for permanent residence if

(*c*) he complies with the requirements of the Act and these Regulations;

(*d*) he makes application in the form prescribed by the Minister before the expiration of the period of temporary stay in Canada authorized for him by an immigration officer;

(*e*) he has not taken employment in Canada without the written approval of an officer of the Department; and

(*f*) in the opinion of an immigration officer, he would have been admitted to Canada for permanent residence if he had been examined outside Canada as an independent applicant and assessed in accordance with the norms set out in Schedule A, except with respect to arranged employment.

With respect to the appellant and the children the deportation order was based upon s. 37(1) of the Act which provides:

37. (1) Where a deportation order is made against the head of a family, all dependent members of the family may be included in such order and deported under it.

Both the husband and the appellant appealed, without success, to the Immigration Appeal Board. The appellant appeals to this Court from the Board's decision.

An appeal to this Court is limited, by s. 23 of the *Immigration Appeal Board Act*, 1966-67 (Can.), c. 90, to a question of law, including a question of jurisdiction. In my opinion the deportation order, as against the appellant and the two children, was not valid because of the failure of the Special Inquiry Officer to comply with s. 11 of the Immigration Inquiries Regulations. That section provides as follows:

11. No person shall, pursuant to subsection (1) of section 37 of the Act, be included in a deportation order unless the person has first been given an opportunity of establishing to an immigration officer that he should not be so included.

I have already quoted that which took place between the Special Inquiry Officer and the appellant when she appeared as a witness at the inquiry. In my opinion there was not a sufficient compliance with this section. The appellant's status at that inquiry was as a witness in an inquiry concerning John Moshos. She was not there throughout the inquiry.

It is true that the Special Inquiry Officer read the provisions of s. 37(1) to her and told her that "in view of this

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Martland J.

section of the Regulations (sic), in the event a deportation order is issued against your husband it may be necessary on the basis of the evidence that we wish you to give now to include you and the children in such deportation order". He also asked her if she wished to secure counsel "before giving evidence". He then proceeded to question her.

However, at no point was she told that she had the right to an opportunity to establish that she should not be included in the order. I do not regard the mere reading of s. 37(1) to her, when she was on the stand as a witness, followed by questioning by the Special Inquiry Officer, as constituting the giving of such an opportunity.

In my opinion the deportation order was made against the appellant and the children without complying with s. 11 of the Immigration Inquiries Regulations. In view of this conclusion, it is unnecessary to consider the other grounds of appeal submitted on behalf of the appellants.

The appeal should, therefore, be allowed and the deportation order, in so far as it relates to the appellant and the children, should be set aside.

Appeal allowed.

Solicitors for the appellant: Endicott & Rothman, Toronto.

Solicitor for the respondent: D. S. Maxwell, Ottawa.

1968

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DAME ANTOINETTE JOLETTE-BONENFANT et JEAN-YVES BONENFANT (*Demandeurs*) .. APPELANTS;

ET

SOLBEC COPPER MINES LIMITED (*Défenderesse*) ..... INTIMÉE.

EN APPEL DE LA COUR DU BANC DE LA REINE, PROVINCE DE QUÉBEC

Commettant et préposé—Automobile—Collision—Employé conduisant sa propre voiture dans l'exécution de ses fonctions—Compagnon de travail voyageant comme passager bénévole pour ses fins personnelles —Responsabilité de l'employeur envers les autres usagers de la route mais non à l'égard du passager bénévole—Code Civil, art. 1053, 1054.

*CORAM: Les Juges Fauteux, Abbott, Ritchie, Spence et Pigeon.

Les demandeurs sont la veuve et les enfants d'un passager bénévole décédé lorsque le véhicule dans lequel il se trouvait, appartenant à un nommé Roy et conduit par lui, entra en collision avec une autre automobile. Roy et son passager étaient tous deux à l'emploi de la défenderesse. Roy, qui lui aussi a été tué, faisait un voyage pour le compte de la défenderesse, mais son passager voyageait pour ses fins personnelles à la connaissance de la défenderesse. Le juge de première instance a imputé l'accident entièrement à la faute de Roy et il a condamné la défenderesse solidairement avec les héritiers de Roy, tant sur la poursuite de l'autre automobiliste que sur celle des demandeurs. La Cour d'appel a confirmé la condamnation contre la défenderesse en faveur de l'autre automobiliste mais elle a infirmé celle qui avait été prononcée contre elle en faveur des demandeurs. Les demandeurs ont interjeté appel à cette Cour. La défenderesse n'a pas interjeté appel de la décision en faveur de l'autre automobiliste.

Arrêt: L'appel doit être rejeté.

L'article 1054 du *Code Civil* ne décrète la responsabilité des maîtres et commettants qu'à l'égard «du dommage causé par leurs domestiques et ouvriers dans l'exécution des fonctions auxquelles» ils sont employés. A l'égard des autres usagers de la route Roy était «dans l'exécution des fonctions auxquelles» il était employé. Mais tel n'était pas le cas lorsque Roy transportait son compagnon de travail. Il n'était aucunement chargé par son employeur de cette mission. C'est lui seul qui à titre personnel et non comme préposé de l'intimée, le faisait non dans l'intérêt de son employeur mais dans l'intérêt exclusif de son compagnon de travail qui se déplaçait pour ses affaires personnelles. L'interprétation stricte des mots «dans l'exécution des fonctions» implique une distinction entre les actes faits dans l'exécution des fonctions et les actes qui sont seulement accomplis à l'occasion des fonctions ou qui ne s'y rattachent que par des circonstances de temps, de lieu et de service.

Master and servant—Automobile—Collision—Employee driving his own vehicle in the performance of his duties—Fellow-worker travelling as a gratuitous passenger for personal matters—Liability of employer towards other users of the road but not towards the gratuitous passenger—Civil Code, art. 1053, 1054.

The plaintiffs are the widow and the children of a gratuitous passenger killed when a vehicle in which he had taken place and which was owned and driven by one Roy, collided with another automobile. Roy and his passenger were both employed by the defendant. Roy, who was also killed, was travelling in the execution of his duties, but his passenger was travelling on personal matters with the knowledge of the defendant. On the actions taken by both the driver of the other automobile and the plaintiffs, the trial judge found that the accident was wholly attributable to the fault of Roy and held the defendant jointly and severally liable with Roy's heirs. The Court of Appeal affirmed the judgment against the defendant in favour of the driver of the other automobile but set aside the one pronounced against the defendant in favour of the plaintiffs. The plaintiffs appealed to this Court. The defendant did not appeal against the decision in favour of the driver of the other automobile.

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Held: The appeal should be dismissed.

Article 1054 of the *Civil Code* enacts that the masters and employers are responsible only for the "damage caused by their servants and workmen in the performance of the work for which they are employed". With respect to the other users of the road Roy was "in the performance of the work for which" he was employed. But such was not the case when Roy gave a ride to his fellow-worker. He was not performing this service for his employer. He was doing it in his personal capacity and not as a servant of the defendant. He was not acting in the interest of his employer but in the exclusive interest of his fellow-worker who was travelling on personal matters. Strictly construed, the words "in the performance of the work" imply a distinction between what is done in the performance of the work and what is done only on the occasion of the work or is connected with the work only by circumstances of time, location and service.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], reversing as to the appellants only a judgment of Mayrand J. Appeal dismissed.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], infirmant à l'égard des appelants seulement un jugement du Juge Mayrand. Appel rejeté.

Marcel Cinq-Mars, c.r., pour les demandeurs, appelants.

A. J. Campbell, c.r., pour la défenderesse, intimée.

Le jugement de la Cour fut rendu par

LE JUGE PIGEON:—Les appelants sont la veuve et les enfants d'Edmond Bonenfant qui a trouvé la mort dans une collision d'automobiles alors qu'il était passager bénévole dans la voiture d'un nommé René Roy. Celui-ci, qui a été tué en même temps, était acheteur au service de plusieurs sociétés. Lors de l'accident il faisait un voyage pour le compte de l'une d'elles, l'intimée. Il était en route de Solbec vers Val d'Or en passant par Montréal où il se proposait d'arrêter prendre son épouse et sa fille. Edmond Bonenfant qui était au service du même employeur lui avait demandé de l'emmener jusqu'à Montréal d'où il se proposait de continuer jusqu'à Peterborough pour une visite à sa famille. René Roy y avait consenti à la connaissance de leur employeur commun.

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[1] [1968] B.R. 846.

Ayant entendu simultanément des poursuites dirigées à la fois contre les héritiers de René Roy et ses employeurs, la Cour supérieure a jugé l'accident entièrement imputable à sa faute et condamné l'intimée solidairement avec les héritiers tant sur la poursuite de l'autre automobiliste que sur celle des appelants.

Au contraire, la Cour d'appel laissant subsister la condamnation contre l'intimée en faveur de l'autre automobiliste, a infirmé celle qui avait été prononcée contre elle en faveur des appelants.

L'appel devant nous ne soulève qu'une seule question, savoir: Cette distinction est-elle justifiée? En effet, l'intimée ne nie pas maintenant qu'elle ait été à bon droit condamnée à indemniser l'autre automobiliste. Elle admet qu'à l'égard des autres usagers de la route René Roy conduisant sa propre voiture était, en l'occurrence, «dans l'exécution des fonctions auxquelles» il était employé. Elle nie cependant qu'il en ait été ainsi à l'égard d'Edmond Bonenfant parce que celui-ci était passager bénévole dans la voiture pour ses fins personnelles. Par conséquent, dit-elle, René Roy agissait en dehors de ses fonctions en transportant bénévolement un compagnon de travail puisque ses fonctions ne consistaient pas à faire pareil transport.

Le juge de première instance a refusé de suivre la jurisprudence des tribunaux du Québec sur ce point y compris deux arrêts récents de la Cour d'appel. Son motif est le suivant:

La relation de commettant à préposé résulte d'un état de fait, de relations entre ces deux personnes et ne dépend pas des rapports que l'une ou l'autre peut avoir à l'égard d'une tierce personne.

Au contraire, en Cour d'appel, le juge en chef a dit:

A mon avis, rien ne s'oppose à ce qu'une personne agisse dans l'exécution de plusieurs fonctions en même temps. Lors de l'accident, Roy exécutait son mandat envers Solbec, mais il agissait aussi en son nom personnel en voiturant Bonenfant. Quant aux tiers, ils pouvaient choisir celle des fonctions qui leur était plus avantageuse. Key pouvait considérer Roy comme voiturant Bonenfant et agissant en son nom personnel ou comme exécutant son mandat envers Solbec et engageant la responsabilité de celle-ci. Quant à Bonenfant, il ne peut considérer Roy que comme celui qui le transporte.

. . . . . .

Si l'accident était survenu au cours du trajet entre East Sullivan et Montréal, aurait-il fallu tenir Solbec responsable des dommages qu'auraient pu subir l'épouse et la fille de Roy? Il me répugnerait d'en venir à cette

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Le juge Pigeon

conclusion. Tant que la Cour suprême du Canada ne se prononcera pas en sens contraire, je suivrai la jurisprudence établie dans les décisions citées.

Ce dernier raisonnement semble préférable. Comme les juges Anglin et Mignault l'ont fait observer dans *Curley c. Latreille*[2], l'art. 1054 du *Code Civil* du Québec ne décrète la responsabilité des maîtres et commettants qu'à l'égard «du dommage causé par leurs domestiques et ouvriers dans l'exécution des fonctions auxquelles» ils sont employés, en anglais, «for the damage caused by their servants and workmen in the performance of the work for which they are employed». Sous le Code Napoléon où l'on dit seulement «dans les fonctions», on a pu croire que cette expression vise même les faits accomplis «à l'occasion de» l'exercice des fonctions (*Beaudry-Lacantinerie & Barde,* Obligations, T.4, no. 1274), ou bien qu'il suffit que l'acte dommageable se rattache aux fonctions «par des circonstances de temps, de lieu et de service» (D.P. 74.2.52). Sous le Code du Québec, cela n'est pas possible.

Dans *Vaillancourt c. La Compagnie de la Baie d'Hudson*[3], cette Cour a admis que l'exercice abusif des fonctions reste dans le cadre de leur exécution au sens de l'article. Cela ne signifie pas qu'il soit possible d'appliquer le texte en dehors de ce cadre, savoir l'exécution des fonctions auxquelles l'auteur du dommage est employé. Il me semble clair que ce n'est pas «dans l'exécution des fonctions» auxquelles il était employé que René Roy transportait son compagnon de travail. Il n'était aucunement chargé par son employeur de cette mission. C'est lui seul qui à titre personnel et non comme préposé de l'intimée, le faisait non dans l'intérêt de son employeur mais dans l'intérêt exclusif de son compagnon de travail. En effet, celui-ci ne se déplaçait pas pour les affaires de son employeur mais pour ses affaires personnelles.

On ne peut nier que par des circonstances de temps, de lieu et de service le transport se rattachait aux fonctions de René Roy, mais cela ne suffit pas pour qu'il y ait responsabilité. L'interprétation stricte des mots «dans l'exécution des fonctions» à laquelle notre Cour s'est arrêtée dans *Curley c. Latreille* implique une distinction entre les actes faits dans l'exécution des fonctions et les actes qui

[2] (1920), 60 R.C.S. 131, 55 D.L.R. 461.
[3] [1923] R.C.S. 414, [1923] 2 D.L.R. 1008.

sont seulement accomplis à l'occasion des fonctions ou qui ne s'y rattachent que par des circonstances de temps, de lieu et de service. Ces deux possibilités ont été considérées et rejetées définitivement par cet arrêt.

Il semble d'ailleurs que l'on n'en viendrait pas à une conclusion différente en suivant la dernière interprétation adoptée par la Cour de Cassation dans l'arrêt des Chambres Réunies du 9 mars 1960 (*Époux Biehner c. Huret*—D. 1960.329), savoir qu'il faut rechercher s'il s'agit d'un «acte indépendant du rapport de préposition». Evidemment, il ne s'agit pas ici comme dans cette affaire-là, d'un acte accompli contre le gré de l'employeur ni à son insu, toutefois il est bien sûr que ni la connaissance, ni même l'assentiment du patron ne peuvent avoir pour effet de faire entrer dans l'exécution des fonctions un acte qui en est indépendant.

Les appelants, tout comme le juge de première instance, objectent que le déplacement de René Roy en automobile était en l'occurrence fait dans l'exécution de ses fonctions d'acheteur. Il leur paraît illogique qu'un même acte, savoir la fausse manœuvre cause de l'accident, soit considéré comme accompli dans l'exécution des fonctions à l'égard d'un autre automobiliste et non à l'égard du passager bénévole. La réponse à cette objection c'est que la question cruciale qu'il faut se poser est la suivante: le dommage dont il s'agit a-t-il été causé *dans l'exécution* des fonctions? A l'égard de l'autre automobiliste, la réponse doit être affirmative puisque René Roy l'a causé en faisant un voyage qu'il avait mission de faire. A l'égard du compagnon d'infortune et de ses dépendants, la réponse doit, au contraire, être négative parce que le dommage a été causé non pas dans l'accomplissement de la mission confiée par l'employeur mais en rendant un service personnel pour des fins personnelles et non celles de l'employeur.

Pour ces motifs, je suis d'avis de rejeter l'appel avec dépens.

Appel rejété avec dépens.

Procureurs des demandeurs, appelants: Cinq-Mars, Grimard et Bélanger, Rouyn.

Procureurs de la défenderesse, intimée: Brais, Campbell, Pepper, Durand, Riopel et Laffoley, Montréal.

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*June 16, 17
June 17

NORANDA MINES LIMITED, Potash Division (*Respondent*) ..... APPELLANT;

AND

HER MAJESTY THE QUEEN on the relation of UNITED STEELWORKERS OF AMERICA, CLC and KENNETH A. SMITH (*Applicants*) ..... RESPONDENTS;

AND

THE LABOUR RELATIONS BOARD OF THE PROVINCE OF SASKATCHEWAN (*Respondent*) ....

THE LABOUR RELATIONS BOARD OF THE PROVINCE OF SASKATCHEWAN (*Respondent*) .... APPELLANT;

AND

HER MAJESTY THE QUEEN on the relation of UNITED STEELWORKERS OF AMERICA, CLC and KENNETH A. SMITH (*Applicants*) ..... RESPONDENTS;

AND

NORANDA MINES LIMITED, Potash Division (*Respondent*). .....

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Labour relations—Determination by Labour Relations Board as to whether proposed unit of employees appropriate for collective bargaining—Factors considered—Whether Board's decision subject to review—The Trade Union Act, R.S.S. 1965, c. 287, as amended 1966, c. 83.

An application by a union to the Labour Relations Board of Saskatchewan to become the representative of a unit of employees of the

*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

appellant company for the purpose of bargaining collectively was dismissed, by a majority decision, on the ground that the number of employees employed by the company at the time the application was made did not constitute a substantial and representative segment of the working force to be employed by the company in the future. The union applied to the Court of Appeal for a writ of *mandamus* requiring the Board to exercise its jurisdiction under s. 5(*a*), (*b*) and (*c*) of *The Trade Union Act,* R.S.S. 1965, c. 287, as amended 1966, c. 83, in respect of the union's application; for a writ of *certiorari*; and for an order quashing the order of the Board. The application was granted and the company and the Board then appealed to this Court.

Held: The appeal should be allowed and the order of the Board restored.

Under *The Trade Union Act,* the Board had exclusive jurisdiction to determine whether or not a proposed unit of employees was appropriate for collective bargaining. In determining that issue the Board was not subject to any directions contained in the Act and it could, therefore, consider any factors which might be relevant.

The Court of Appeal erred in holding that the Board had dismissed the application on a ground which was wholly irrelevant and had declined to exercise its jurisdiction. What the Board did do was to take into consideration, when determining whether the proposed unit of employees was appropriate for collective bargaining, and whether the union represented a majority of employees in that unit, the nature of the company's business, the fact that it was at its inception, and the fact that it was expected to increase its labour force enormously within a year. This it was entitled to do, and its decision, based on those and other factors, was not subject to review by the Court.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], quashing an order of the Labour Relations Board of Saskatchewan and issuing a peremptory writ of *mandamus* to the Board to determine, according to law, an application for certification. Appeal allowed and order of the Board restored.

D. K. MacPherson, Q.C., for the appellant company.

Michael Chan, for the appellant Labour Relations Board of Saskatchewan.

G. J. D. Taylor, Q.C., for the respondents.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Court of Appeal for Saskatchewan[1], which quashed an order of the Labour Relations Board of the Province of

[1] (1969), 69 W.W.R. 58, 5 D.L.R. (3d) 173.

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Saskatchewan (hereinafter referred to as "the Board") and issued a peremptory writ of *mandamus* to the Board to determine, according to law, the application of the United Steelworkers of America, C.L.C. (hereinafter referred to as "the Union"), to become the representative of a unit of employees of the appellant company (hereinafter referred to as "Noranda"), for the purpose of bargaining collectively.

The Union's application to the Board was made on November 28, 1968. The proposed unit of employees comprised all employees of Noranda's Potash Division at its mine site near Colonsay, Saskatchewan, except managers, superintendents, foremen, office and clerical staff, plant security, and any person having and regularly exercising authority to employ or discharge employees or regularly acting on behalf of management in a confidential capacity.

The application asked the Board to determine: that this was an appropriate unit of employees for the purpose of bargaining collectively; and that the Union represented a majority of the employees in that unit; and to require Noranda to bargain collectively with it.

By a majority decision, the Board, on January 11, 1969, ordered that the application be dismissed. The order stated that the majority of the Board found that, in this particular case, the number of employees employed by Noranda, at the filing date of the application, did not constitute a substantial and representative segment of the working force to be employed in the future by Noranda.

In the reasons delivered by the majority of the Board, the following statement is made:

> As of November 28, 1968, the date of this application, there were 23 employees only in the bargaining unit applied for and as of the date of hearing, namely, January 7, 1969, there were 25 employees in the bargaining unit. The Respondent Company estimated that the full complement of employees in December, 1969, will number approximately 326. There was no evidence to indicate that the proposed full complement of employees would not be reached by the estimated date or that their reaching this complement depended on foreseeable factors outside the control of the Respondent that might cause them to not reach their targeted complement of employees by the said date.
>
> * * *
>
> The problem the Board is faced with in this type of application is balancing the right of present employees to be represented by a union for the purpose of bargaining collectively and the rights of future

employees to select a bargaining agent as was stated in the Emil Frants and Peter Wasilowich case, Volume 1 (1944-1959) C.L.L.C. Paragraph 18057, and applied by this Board in the International Brotherhood of Electrical Workers, Local Union No. 2038 and ITT Canada Limited case, 1967 C.L.L.C. Paragraph 16016.

The Board, in coming to its decision, must consider the type of operation, the segment of the employees employed in the proposed bargaining unit at time of application, the total number of employees estimated there will be in the proposed bargaining unit, and the date at which the proposed build-up will be achieved.

The minority of the Board took the position that the "principle" applied by the majority was in direct contradiction to the provisions of *The Trade Union Act*, R.S.S. 1965, c. 287, as amended. It was their view that:

In this case the basic requirements to obtain certification under *The Trade Union Act* were present.

1. There was an "Employer".
2. There were a number of "Employees".
3. An appropriate bargaining unit had been set out and agreed upon.
4. There was clear cut evidence of support.
5. All forms had been filed in proper order.

The Union applied to the Court of Appeal for Saskatchewan for a writ of *mandamus* requiring the Board to exercise its jurisdiction under s. 5(*a*), (*b*) and (*c*) of the above Act, in respect of the Union's application; for a writ of *certiorari;* and for an order quashing the order of the Board.

This application was granted. The reasons for so doing are stated in the following passages from the judgment of the Court:

Learned counsel for both the employer and the Labour Relations Board contended that the order of the Board must be construed as a determination by the Board that the unit of employees described in the application did not constitute an appropriate unit for the purpose of bargaining collectively; that such determination was a matter wholly within the Board's jurisdiction and therefore not subject to review, either in *certiorari* or *mandamus* proceedings.

If the order made by the Board were one within its jurisdiction, then even if wrong in law or fact, the order would not be open to judicial review. *Farrell et al. v. Workmen's Compensation Board,* [1962] S.C.R. 48. Too, if the decision of the Board could be construed as contended for by learned counsel for the employer, and the Board, a strong argument might be advanced that the decision, even if wrong, cannot be questioned in these proceedings. In my respectful view, however, the decision of the Board cannot be construed as a determination that the unit of employees described in the application do not constitute an appropriate

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unit for the purpose of bargaining collectively. Clearly, the Board dismissed the application because, in its opinion, the number of employees employed by the employer at the time of the application, did not constitute a substantial and representative segment of the working force to be employed in the future. There was no finding that the unit of employees described in the application was not an appropriate unit, nor was there any finding that the applicant union did not represent a majority of employees in such unit. What the Board in fact did, was to dismiss the application because, in its opinion, the time for making the same was not appropriate.

* * *

While the language of section 5(*a*), (*b*) and (*c*) is permissive in form, it imposes the duty upon the Board to exercise the powers when called upon to do so, by a party interested and having the right to make the application. In the present case, the right of the union to make the application, and that the union represents a majority of employees in the proposed unit, were never questioned.

When the application was made, it was the duty of the Board to hear the application and to give effect to the statutory rights of the employees. While the Board considered the application, it failed to direct its consideration to the rights of the employees as provided for in *The Trade Union Act* and rejected the application on a ground which was wholly irrelevant. By so doing, in my opinion, the Labour Relations Board declined to exercise the jurisdiction and to perform the duties imposed upon it by the section of the Act I have quoted.

From this judgment Noranda and the Board have appealed to this Court.

The relevant provisions of the Act are the following:

3. Employees shall have the right to organize in and to form, join or assist trade unions and to bargain collectively through representatives of their own choosing, and the representatives designated or selected for the purpose of bargaining collectively by the majority of employees in a unit appropriate for that purpose shall be the exclusive representatives of all employees in that unit for the purpose of bargaining collectively.

5. The board shall have power to make orders:

(*a*) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit, professional association unit or a subdivision thereof or some other unit;

(*b*) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees;

(*c*) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;

20. There shall be no appeal from an order or decision of the board under this Act, and its proceedings, orders and decisions shall not be reviewable by any court of law or by any *certiorari, mandamus,* prohibition, injunction or other proceeding whatever.

Section 3 is the primary section of the Act, giving to employees the right to organize and to bargain collectively,

through representatives of their own choosing, "in a unit appropriate for that purpose." Whether or not a unit is appropriate for the purposes of collective bargaining is a matter which requires determination, and, while s. 5(*a*) is not as clearly worded, in this connection, as it might be, it is my view that, reading ss. 3, 5(*a*) and 5(*b*) together, the Act obviously contemplates that the determination of that question is for the Board. By virtue of s. 20, the jurisdiction of the Board in this matter is made exclusive. Therefore, as is pointed out in the judgment of the Court of Appeal, if the order in question here is within that jurisdiction, it is not open to judicial review because of error, whether of law or fact: *Farrell et al. v. Workmen's Compensation Board, supra,* at p. 51.

The Court of Appeal was of the view that the Board's order was not made within its jurisdiction, because, in the opinion of the Court, it did not thereby determine that the proposed unit of employees was not appropriate for collective bargaining, or that the Union did not represent a majority of the employees in the unit. In the view of the Court, "what the Board in fact did, was to dismiss the application because, in its opinion, the time for making the same was not appropriate". In so doing, it was said, it failed to give effect to the legal rights of the employees conferred by the statute, which it was under a legal obligation to do.

With respect, I do not share this view. In my opinion, the Board has jurisdiction under the Act to determine whether or not it considers a proposed unit of employees to be appropriate for collective bargaining. In determining that issue the Board is not subject to any directions contained in the Act and it can, therefore, consider any factors which may be relevant. The application to the Board asked it, *inter alia,* to determine that the unit described in the application was an appropriate one. The application was dismissed, thereby demonstrating that the Board was not prepared to make that determination in the Union's favour. The Board ruled on a matter over which it had exclusive jurisdiction.

The reasons which were given by the Board for this exercise of its jurisdiction were that the number of em-

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ployees employed by Noranda at the time the application was made did not constitute a substantial and representative segment of the working force to be employed by Noranda in the future. In my opinion, the Board had full discretion under the Act to take that factor into consideration when considering the application. The expected increase in Noranda's work force, in the year 1969, from 25 to approximately 326 was a factor of great weight in deciding whether the proposed unit was appropriate and, as provided in s. 5(*b*), in "determining what trade union, if any, represented a majority of employees in an appropriate unit of employees".

That the Board should consider this factor in cases of this kind, in the interests of employees, seems to me to be logical. A union selected by a handful of employees at the commencement of operations might not be the choice of a majority of the expected large work force. The selection of a union at that early stage could be more readily subject to the influence of an employer. A large work force, when a plant went into operation, might comprise employees in various crafts for whom a plant unit, comprising all employees, other than management, might not be appropriate. In my view the Board not only can, but should, consider these factors in reaching its decision when asked to make a determination under s. 5(*a*) and (*b*).

To summarize the position, in my opinion, with respect, the Court of Appeal erred when it held that the Board had dismissed the application on a ground which was wholly irrelevant and had declined to exercise its jurisdiction. What the Board did do was to take into consideration, when determining whether the proposed unit of employees was appropriate for collective bargaining, and whether the Union represented a majority of employees in that unit, the nature of Noranda's business, the fact that it was at its inception, and the fact that it was expected to increase its labour force enormously within a year. This it was entitled to do, and its decision, based on those and other factors, is not subject to review by the Court.

At the conclusion of the argument of this appeal the Court announced its decision, advising that written reasons would be delivered later. That decision was that the appeal

be allowed, that the judgment of the Court of Appeal be set aside and that the order of the Labour Relations Board be restored, with costs to both appellants in this Court and in the Court of Appeal.

Appeal allowed and order of the Labour Relations Board restored, with costs.

Solicitors for the appellant company: MacPherson, Leslie & Tyerman, Regina.

Solicitor for the appellant Labour Relations Board of Saskatchewan: Roy S. Meldrum, Regina.

Solicitors for the respondents: Goldenberg, Taylor, Tallis, Goldenberg & Schulman, Saskatoon.

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BRUNO PEDA .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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*Mar. 11, 12
June 2

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Motor vehicles—Dangerous driving—Charge to jury—Section of Code read and paraphrased—Must jury be told that advertent negligence necessary—Effect of previous judgments of Supreme Court of Canada—Criminal Code, 1953-54 (Can.), c. 51, ss. 221(4), 597(1)(a).

The appellant was convicted by a jury of dangerous driving. The conviction was affirmed by a majority judgment in the Court of Appeal. An appeal was taken to this Court where it was argued that the directions of the trial judge as to the nature of the offence were inadequate and that it should have been made clear to the jury that the offence involved an element of advertent as opposed to inadvertent negligence. The trial judge simply read and paraphrased s. 221(4) of the *Criminal Code*.

Held (Cartwright C.J. and Hall and Spence JJ. dissenting): The appeal should be dismissed.

Per Fauteux, Abbott, Martland, Judson and Ritchie JJ.: The charge was adequate and correct. Section 221(4) is straightforward and free of ambiguity. It contains its own definition of dangerous driving. It was not necessary to instruct the jury as to the difference between "advertent" and "inadvertent" negligence. The decision of this Court in *Binus v. The Queen*, [1967] S.C.R. 594, in which the opinion was expressed that *Mann v. The Queen*, [1966] S.C.R. 238, had decided that proof of inadvertent negligence was not sufficient to support a conviction under s. 221(4), and that it was necessary to instruct the

*PRESENT: Cartwright C.J. and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

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jury to this effect, was not binding as that opinion was not a necessary step to the judgment pronounced. The *Mann* case was concerned with constitutional law. The issue in the present case was as to the instruction to be put to a jury. There is nothing in the *Mann* case which would require the Court, when explaining to the jury the nature of the offence charged, to do so in terms other than those contained in the section itself. Parliament has defined the kind of conduct which shall constitute an offence under that subsection, and this Court, in the *Mann* case, has said that such definition is not to be construed as creating a crime of inadvertent negligence.

Per Pigeon and Ritchie JJ.: The instructions were sufficient. The actual decision in *Mann v. The Queen* was essentially that the offence requires *mens rea* and therefore differs in nature from statutory offences aimed at specific acts irrespective of intention. The majority opinion in *Binus v. The Queen* that the jury must be instructed that dangerous driving by inadvertence is not contemplated by the section, is not binding as that case was decided on application of s. 592(1)(*b*)(iii). Only such instructions need be given as the case being tried actually requires. Although *mens rea* is always required on the charge, it is only in exceptional circumstances that the jury need instructions in this connection. In most cases the fact itself is sufficient proof of the intention. In this case there was no suggestion of a circumstance from which the jury might infer that the accused's manner of driving was inadvertently dangerous. The only question therefore was whether the driving was actually dangerous within the meaning of the section. Such being the case, it was not necessary to instruct the jury that the accused should not be found guilty if the accident had occurred by his inadvertence.

Per Cartwright C.J. and Hall and Spence JJ., *dissenting*: Assuming that, on a strict application of the principle of *stare decisis*, *Binus v. The Queen* is not a binding authority as to the manner in which a judge must instruct a jury on a charge under s. 221(4), the combined effect of the judgments of this Court in *O'Grady v. Sparling*, [1960] S.C.R. 804, and *Mann v. The Queen*, [1966] S.C.R. 238, is to decide that s. 221(4) does not render "inadvertent negligence" a crime. The enunciation of that legal proposition was a necessary step to the judgment pronounced in both cases. Although this Court has power to depart from the *ratio decidendi* of both of these cases, there was no ground sufficient to warrant the refusal to follow them. Such a course could result in the re-opening of the question of the constitutional validity of the provincial statutory provisions considered in *O'Grady* and *Mann*. So long as it is the law that a necessary ingredient of the offence of dangerous driving is "advertent negligence" it is essential that the trial judge should so instruct the jury in all cases in which on the evidence they might properly find that the conduct of the accused, while dangerous in fact, did not involve "advertent negligence". On the evidence in this case, a properly instructed jury might well have either convicted or acquitted the appellant.

Droit criminel—Automobile—Conduite dangereuse—Directives au jury—Article du Code lu et paraphrasé—Doit-on dire au jury que la négligence intentionnelle est nécessaire—Effet des arrêts antérieurs de la Cour suprême du Canada—Code criminel, 1953-54 (Can.), c. 51, art. 221(4), 597(1)(a).

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L'appelant a été déclaré coupable par un jury d'avoir conduit d'une façon dangereuse. La déclaration de culpabilité a été confirmée en Cour d'appel par un jugement majoritaire. Sur appel à cette Cour, l'appelant a prétendu que les directives du juge concernant la nature de l'infraction avaient été inadéquates et que le juge aurait dû expliquer clairement au jury que l'infraction contenait un élément de négligence intentionnelle par opposition à la négligence par inadvertance. Le juge au procès s'est contenté de lire et de paraphraser l'art. 221(4) du *Code criminel.*

Arrêt: L'appel doit être rejeté, le Juge en Chef Cartwright et les Juges Hall et Spence étant dissidents.

Les Juges Fauteux, Abbott, Martland, Judson et Ritchie: Les directives étaient adéquates et correctes. L'article 221(4) est simple et sans ambiguïté. Il contient sa propre définition de la conduite dangereuse. Il n'était pas nécessaire que le juge donne des directives sur la différence entre la négligence intentionnelle et la négligence par inadvertance. L'arrêt de cette Cour dans *Binus c. The Queen,* [1967] R.C.S. 594, où l'on exprime l'opinion que *Mann c. The Queen,* [1966] R.C.S. 238, avait décidé que, pour obtenir une déclaration de culpabilité sous l'art. 221(4), une preuve de négligence par inadvertance n'est pas suffisante et qu'il est nécessaire de donner des directives à cet effet au jury, n'est pas un précédent obligatoire parce que cette opinion n'est pas un élément essentiel du jugement prononcé. Dans l'arrêt *Mann,* il s'agissait d'une question de droit constitutionnel. Dans le cas présent, il s'agit des directives qui doivent être données au jury. Il n'y a rien dans l'arrêt *Mann* qui exige que la Cour explique au jury la nature de l'infraction en des termes autres que ceux de l'article lui-même. Le Parlement a donné une définition du genre de conduite qui constitue une infraction en vertu de l'alinéa 4, et cette Cour, dans l'arrêt *Mann,* a dit qu'une telle définition ne doit pas être interprétée comme faisant un crime de la négligence par inadvertance.

Les Juges Pigeon et Ritchie: Les directives étaient suffisantes. L'essence de l'arrêt *Mann c. The Queen* est que l'infraction créée par l'alinéa 4 exige la *mens rea* et que par conséquent elle diffère par nature des infractions statutaires visant des actes spécifiques sans égard à l'intention. L'opinion majoritaire dans *Binus c. The Queen* que les directives doivent spécifier que la conduite dangereuse par inattention n'est pas visée par l'article, ne constitue pas un précédent obligatoire parce que cette affaire a été décidée par application de l'art. 592(1)(*b*)(iii). Seules les directives actuellement requises pour les fins du procès doivent être données. Quoique la *mens rea* soit toujours requise sur une inculpation de conduite dangereuse, ce n'est que dans des circonstances exceptionnelles que des directives à cet égard doivent être données. Dans la plupart des cas le fait lui-même fait preuve de l'intention. Dans le cas présent, on ne suggère aucune circonstance de laquelle le jury pourrait conclure que la manière de conduire de l'accusé était dangereuse par inadvertance. La seule question est donc de savoir si la conduite était réellement dangereuse dans le sens de l'article. Tel étant le cas, il n'était pas nécessaire que le juge donne des directives que l'accusé ne devait pas être déclaré coupable si l'accident s'était produit par inadvertance.

Le Juge en Chef Cartwright et les Juges Hall et Spence, *dissidents*: Prenant pour acquis qu'en vertu de l'application stricte du principe de *stare decisis,* l'arrêt *Binus c. The Queen* n'est pas un précédent

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obligatoire au sujet des directives qu'un juge doit donner au jury sur une accusation en vertu de l'art. 221(4), l'effet combiné des arrêts de cette Cour dans *O'Grady c. Sparling*, [1960] R.C.S. 804, et *Mann c. The Queen*, [1966] R.C.S. 238, est de décider que l'art. 221(4) ne fait pas un crime de la négligence par inadvertance. L'énoncé de cette proposition est un élément essentiel du jugement prononcé dans les deux causes. Quoique cette Cour ait le pouvoir de s'écarter de la *ratio decidendi* de ces deux causes, il n'y a aucun motif suffisant pour justifier le refus de s'y conformer. Une telle ligne de conduite pourrait avoir comme résultat de remettre en question la validité constitutionnelle des dispositions législatives provinciales considérées dans *O'Grady* et *Mann*. Tant que la loi est à l'effet que la négligence intentionnelle est un élément nécessaire de l'infraction de conduite dangereuse, il est essentiel que le juge au procès donne des directives dans ce sens dans tous les cas où les jurés peuvent conclure de la preuve que la conduite de l'accusé, quoique dangereuse en fait, ne comporte pas un élément de négligence intentionnelle. Dans le cas présent, un jury ayant reçu des directives adéquates aurait pu tout aussi bien acquitter l'appelant que le déclarer coupable.

APPEL d'un jugement majoritaire de la Cour d'appel de l'Ontario[1], confirmant une déclaration de culpabilité. Appel rejeté, le Juge en Chef Cartwright et les Juges Hall et Spence étant dissidents.

APPEAL from a majority judgment of the Court of Appeal for Ontario[1], affirming the appellant's conviction. Appeal dismissed, Cartwright C.J. and Hall and Spence J.J. dissenting.

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

M. Manning, for the respondent.

The judgment of Cartwright C.J. and of Hall and Spence JJ. was delivered by

THE CHIEF JUSTICE (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for Ontario[1] pronounced on June 20, 1968, dismissing an appeal from the conviction of the appellant of the offence of dangerous driving.

The appeal is brought, pursuant to s. 597(1)(*a*) of the *Criminal Code*, on the questions of law on which Laskin J.A. dissented in the Court of Appeal.

The appellant was tried before His Honour Judge Martin and a jury on an indictment containing two counts (i)

[1] [1969] 1 O.R. 90. 4 C.R.N.S. 161.

driving a motor vehicle while his ability to drive was impaired by alcohol (contrary to s. 223 of the Code) and (ii) dangerous driving (contrary to s. 221(4)). The wording of these counts is set out in full in the reasons of my brother Judson. The appellant was acquitted on the first count and found guilty on the second.

Both charges arose out of the same occurrence. The facts are summarized as follows in the reasons of McLennan J.A.:

> The events giving rise to the two counts occurred about 6:30 a.m. on June 29, 1967. It was raining at the time. The appellant was driving his taxi-cab easterly on the exit lane from the Gardiner Expressway which runs into Lakeshore Boulevard. Between the exit lane and the southerly lane of Lakeshore Boulevard is a narrow strip separating the two lanes. This dividing strip is some inches higher than the level of the exit lane and Lakeshore Boulevard. The two eastbound lanes are separated from the westbound lanes by a median the level of which is higher than the highway.
>
> The case for the Crown, on the count of dangerous driving was that the appellant drove his car from the exit lane, across the dividing strip, then across the two eastbound lanes on Lakeshore Boulevard and over the median striking a car being driven westerly on the north side of Lakeshore Boulevard. There is no direct evidence as to the speed at which the appellant was driving but there was evidence from which it might be inferred that the speed was high, the strongest being what happened to the appellant's car in leaving the exit lane.
>
> The appellant gave evidence stating that as he was driving down the exit lane the driver of a car ahead of him, who he said had been driving quite erratically just before the accident, suddenly applied his brakes and he remembers nothing until after the accident occurred. A passenger in his car, a friend of the appellant, gave the same evidence. He, likewise, remembered nothing after seeing the brake lights of the car ahead illuminate suddenly.

There was conflicting evidence as to whether or not the appellant's ability to drive was impaired by alcohol.

In answer to a question from the Bench counsel stated that the record does not show what is the maximum rate of speed permitted by law at the point where the appellant's vehicle went out of control.

McLennan J.A. who delivered the main reasons of the majority in the Court of Appeal was of the view that had the appellant offered no evidence the facts summarized above would have constituted sufficient circumstantial evidence to justify a conviction of dangerous driving, that it followed from the verdict of guilty that the jury must have rejected the appellant's defence, which was that the real cause of the course which his car took was that the sudden application of the brakes by the driver of the car ahead

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caused the appellant to lose control, or, alternatively, that the jury must have taken the view that the speed at which the appellant was driving was the cause of the accident.

MacKay J.A. agreed with the reasons of McLennan J.A. and added that the explanation offered by the appellant having been rejected by the jury, "there was only one rational conclusion to be reached on the evidence—that is that the admittedly dangerous manner in which the accused's car was driven was due to the advertent negligence on the part of the accused".

The majority examined and rejected the grounds on which Laskin J.A. would have allowed the appeal.

The first ground on which Laskin J.A. proceeded was that this Court has decided in *Binus v. The Queen*[2] that proof of inadvertent negligence is not sufficient to support a conviction of dangerous driving under s. 221(4) of the *Criminal Code* and, that being so, the charge of the learned trial Judge in the case at bar was inadequate. He concluded his reasons on this point as follows:

> ...If advertent negligence is the test I do not see how it can suffice to direct the jury merely in the words of the Statute without additional elaboration. In these circumstances, and having regard to the other facts detailed here as to the course of the trial, I am unable to say that there was no substantial wrong or miscarriage of justice.

I have had the advantage of reading the reasons of my brother Judson and, for the purposes of this appeal, am prepared to assume that, on a strict application of the principle of *stare decisis*, *Binus* is not a binding authority as to the manner in which a judge must instruct a jury on the trial of a charge under s. 221(4). It appears to me, however, that the combined effect of the judgments of this Court in *O'Grady v. Sparling*[3] and *Mann v. The Queen*[4] is to decide that s. 221(4) does not render "inadvertent negligence" a crime.

O'Grady was decided prior to the enactment of s. 221(4). My brother Judson, giving the judgment of seven Members of the Court, said at p. 809:

> What the Parliament of Canada has done is to define 'advertent negligence' as a crime under ss. 191(1) and 221(1). It has not touched

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[2] [1967] S.C.R. 594, 2 C.R.N.S. 118, [1968] 1 C.C.C. 227.

[3] [1960] S.C.R. 804, 33 C.R. 293, 33 W.W.R. 360, 128 C.C.C. 1, 25 D.L.R. (2d) 145.

[4] [1966] S.C.R. 238, 47 C.R. 400, [1966] 2 C.C.C. 273, 56 D.L.R. (2d) 1.

'inadvertent negligence". Inadvertent negligence is dealt with under the provincial legislation in relation to the regulation of highway traffic. That is its true character and until Parliament chooses to define it in the *Criminal Code* as 'crime', it is not crime.

Mann's case arose after the enactment of s. 221(4) and it was sought to distinguish *O'Grady* on the ground that by s. 221(4) Parliament had made inadvertent negligence a crime. Of the seven Judges who sat in *Mann's* case five decided that s. 221(4) did not create a crime of "inadvertent negligence". It is sufficient to quote a sentence from the judgment of Ritchie J., concurred in by Martland and Judson JJ.; he said at pp. 250 and 251:

> I have had the advantage of reading the reasons for judgment of my brothers Cartwright and Spence and I agree with them that this appeal should be dismissed and that the provisions of s. 221(4) of the *Criminal Code* are not to be construed as creating a crime of 'inadvertent negligence'.

The other two judges who sat in *Mann's* case did not find it necessary to express an opinion on this question.

It is quite true that in both *O'Grady* and *Mann* the question to be decided was whether a section of a provincial Highway Traffic Act was effective, but the conclusion appears to me to be inescapable that the decision that Parliament has not defined "inadvertent negligence" as a crime was the enunciation of a legal proposition which was a necessary step to the judgment pronounced in each case. It follows that unless we are prepared to depart from the *ratio decidendi* of both of these cases we cannot say that s. 221(4) has created a crime of "dangerous driving" where the manner of driving is in fact dangerous but the conduct of the accused does not amount to "advertent negligence" (as that expression was used in *O'Grady* and in *Mann*).

As I said in *Binus,* with the concurrence of Ritchie and Spence JJ., I do not doubt the power of this Court to depart from previous judgments of its own; but I can find no ground sufficient to warrant our refusing to follow the carefully considered judgments of this Court in *O'Grady* and in *Mann* on the point now under consideration and to say that a person can be convicted on a charge under s. 221(4) when his conduct amounted to "inadvertent" but not to "advertent" negligence. If this Court should take that course the result might well be to make possible the

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re-opening of the question of the constitutional validity of those provincial statutory provisions considered in *O'Grady* and in *Mann* which make "careless driving" a punishable offence. It must not be forgotten that in the two last mentioned cases we had the advantage of hearing full argument not only from counsel for the parties but also from counsel for the Attorney-General of Canada and for the Attorneys-General of several of the Provinces.

So long as it is the law that a necessary ingredient of the offence of dangerous driving is "advertent negligence" it is essential that the trial judge should so instruct the jury in all cases in which on the evidence they might properly find that the conduct of the accused, while dangerous in fact, did not involve "advertent negligence". I do not mean by this that the judge should employ the adjectives "inadvertent" and "advertent"; but he must, in my view, bring home to the jury that in order to convict they must be satisfied that there was "negligence of sufficient gravity to lift the case out of the civil field into that of the *Criminal Code*.....something more than mere inadvertence or mere thoughtlessness or mere negligence or mere error of judgment" that there was on the part of the accused "knowledge or willful disregard of the probable consequences or a deliberate failure to take reasonable precautions". I have taken the words in quotation marks from the judgment of Casey J. in *Loiselle v. The Queen*[5]. The passage in which they occur was quoted in *Mann v. The Queen, supra,* at p. 245, and I remain of the opinion that I there expressed that Casey J. has stated the law accurately.

No doubt there may be cases where evidence of the manner in which an accused did in fact drive may, in the absence of an acceptable explanation, be sufficient evidence to warrant a finding that his conduct involved "advertent negligence". The judgment of Laskin J.A. on this first ground does not proceed on the basis that there was not evidence on which it was open to the jury to convict but on the view that in this respect the charge of the learned trial Judge was insufficient.

Since writing the above I have had the advantage of reading the reasons of my brother Pigeon. I agree with what

[5] (1953), 17 C.R. 323 at 332, 109 C.C.C. 31.

he says in his analysis of the judgments of this Court in *O'Grady* and in *Mann* and with his conclusion that in those cases:

> The actual decision was essentially that the offence created by subsection 4 (of section 221) requires *mens rea* and therefore differs in nature from statutory offences aimed at specific acts irrespective of intention.

The reason that I differ from his view as to how this first ground of appeal should be disposed of is that, in my opinion, on the evidence in this case a properly instructed jury might well have either convicted or acquitted the appellant.

As I agree with Laskin J.A. that this appeal should be allowed on the first ground with which he has dealt, it becomes unnecessary to examine the other grounds on which he based his decision, but I wish to say a few words about them.

Laskin J.A. described these grounds as follows:

> Second, whether in view of the single trial on two charges arising out of the same facts the trial judge adequately separated the issues relating to each charge so as to leave the jury with a clear understanding of the relevant law; and, third, whether the acquittal of the accused on the impaired driving charge resulted in an inconsistent verdict of guilty of dangerous driving in the light of the charge which was in fact delivered.

While these two grounds raise questions of law their decision is, of course, closely related to the manner in which this particular case was presented and to the charge to the jury which was in fact delivered.

Where both charges arise out of the same occurrence, the acquittal of an accused on a charge of driving while impaired and his conviction on a charge of dangerous driving do not necessarily involve any inconsistency for a person may be perfectly sober and yet drive dangerously. But when the learned trial Judge had said to the jury in the passage quoted by both McLennan J.A. and Laskin J.A.:

> Now, did the accident happen as the accused man has related, that is, that he was forced to apply his brakes suddenly by the sudden stoppage of the car in front of him? Or did the accident happen, did the accused's car go out of control—and in my opinion the car was completely out of control—or did this car go out of control because the accused was impaired by alcohol and was not in possession of his proper faculties necessary to keep the car under control? As I see it, that is the question which you have to decide and which is entirely a matter for you to do so.

it appears to me that it was necessary for him to tell them that if they found that the ability of the accused to drive

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was not impaired by alcohol they could not convict of dangerous driving unless the evidence other than that led to show impairment satisfied them of the guilt of the accused.

With the greatest respect I disagree with the following statement of McLennan J.A.:

> ...In any event, a verdict of acquittal does not mean that there was no impairment—it means only that the Crown has not established impairment to the satisfaction of the jury beyond a reasonable doubt.

The law in this regard is, in my opinion, correctly stated by Lord MacDermott giving the judgment of the Judicial Committee in *Sambasivam v. Public Prosecutor Federation of Malaya*[6], where he said:

> The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim *'Res judicata pro veritate accipitur'* is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial. And the appellant was no less entitled to rely on his acquittal in so far as it might be relevant in his defence.

On the following page Lord MacDermott makes it clear that the result of an accused having been found not guilty of an offence is that he is to be taken to be "entirely innocent of that offence".

If in the case at bar there should be a new trial on the charge of dangerous driving, the Crown would be precluded from taking any step to suggest that the accused's ability to drive was impaired by alcohol and the accused would be entitled to have the jury instructed that they must take it as conclusively established that, at the relevant time, his ability to drive was not so impaired. This principle is not altered, although its application is to some extent complicated, by the circumstance that the two counts were tried together and were both left to the jury at the same time. I agree with what I understand from their reasons to be the view of all the Members of the Court of Appeal that in the case at bar the counts should have been dealt with separately.

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[6] [1950] A.C. 458 at 479.

However, I base my conclusion that the conviction cannot stand on the first ground upon which Laskin J.A. proceeded.

For the above reasons I would allow the appeal and quash the conviction. As the view of the majority is that the appeal fails it is unnecessary for me to consider what further order should have been made if the appeal had proved successful.

Fauteux, Abbott, Martland and Ritchie JJ. concurred with the judgment delivered by

JUDSON J.:—The appellant was indicted on two counts, which read as follows:

1. The jurors for Her Majesty the Queen present that Bruno Peda on or about the 29th day of June in the year 1967 at the Municipality of Metropolitan Toronto in the County of York, while his ability to drive a motor vehicle was impaired by alcohol or a drug, drove a motor vehicle, contrary to the Criminal Code.

2. The said jurors further present that Bruno Peda on or about the 29th day of June in the year 1967 at the Municipality of Metropolitan Toronto in the County of York, drove a motor vehicle on a street highway or other public place, to wit: The Frederick Gardiner Expressway and Lakeshore Boulevard at approximately 6:40 a.m., in a manner that was dangerous to the public to wit: by driving in the wrong lanes, having regard to all the circumstances including the nature, condition and use of such place and the amount of traffic that at that time was or might reasonably have been expected to be on such place, contrary to the Criminal Code.

He was tried before a judge and jury. The jury acquitted him on the impaired driving count but convicted him on the dangerous driving count. He was sentenced to twelve months imprisonment. On appeal[7] his conviction was affirmed by a majority, with Laskin J.A. dissenting. He now appeals to this Court and although his appeal was based on a number of grounds, in my view the only one of any substance is the contention that the jury were not properly instructed on the meaning of s. 221(4) of the Criminal Code. He contends that the direction of the trial judge was inadequate with respect to the elements which constitute the charge of dangerous driving and that it should have been made clear that the charge involved an element of advertent as opposed merely to inadvertent, negligence in accordance with what was said by the majority of this Court in *Binus v. The Queen*[8].

[7] [1969] 1 O.R. 90, 4 C.R.N.S. 161.

[8] [1967] S.C.R. 594, 2 C.R.N.S. 118, [1968] 1 C.C.C. 227.

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The extent of the direction of the trial judge on this point was to read s. 221(4) to the jury and then to paraphrase it in the following words:

> So, briefly, it is driving a car on a street, road, highway or other place in a manner that is dangerous to the public, and again, gentlemen, there is really no ambiguity in that language, it is a matter which you will have to decide: was the manner in which the accused drove the car, under the circumstances which have been related to you was it dangerous to the public having regard to all the circumstances?

In my opinion this is adequate and correct. The section is straightforward and free of ambiguity. As I pointed out in *Binus v. The Queen,* it contains its own definition of dangerous driving. The essence of the offence is the manner or character of the accused's driving, and the section instructs the jury to determine whether he was in fact driving in a manner which was dangerous to the public having regard to all the circumstances, including the nature, condition and use of such place and the amount of traffic that at the time was or might reasonably be expected to be at such place. Their task is to determine the actual behaviour of the driver in the light of the section and while this will necessarily entail some consideration of the state of mind of the driver, as a car does not drive itself, it does not mean that the jury must find that a given state of mind exists before they can convict. This was the judgment of the Ontario Court of Appeal in *Binus v. The Queen*[9], and, as I stated in the same case in this Court, I think that it is the correct one.

The decision of this Court in *Binus v. The Queen* is not a binding authority so as to prevent this conclusion being reached. The accused, in that case, appealed from a judgment of the Court of Appeal for Ontario from a conviction for dangerous driving, under s. 221(4) of the Criminal Code. The appeal was heard by a Court of five members and was dismissed by unanimous decision. Three of the five members of the Court did express an opinion which apparently differs from that which is expressed above, to the extent that they were of the opinion that *Mann v. The Queen*[10] had decided that proof of inadvertent negligence was not sufficient to support a conviction under s. 221(4), and that it was necessary to instruct the jury to this effect.

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[9] [1966] 2 O.R. 324, 48 C.R. 279, [1966] 4 C.C.C. 193.

[10] [1966] S.C.R. 238, 47 C.R. 400, [1966] 2 C.C.C. 273, 56 D.L.R. (2d) 1.

Nevertheless, Cartwright J., as he then was, who delivered the reasons of these three members, went on to say, at p. 602:

> On the view of the meaning of s. 221(4) of the Code which I have expressed above, I incline to think that the instruction given by the learned trial Judge when the jury were re-called, and particularly the passages which I have italicized, was adequate in the circumstances of this case. Be that as it may, on consideration of all the record I agree with the conclusion of Laskin J.A. that this was a proper case in which to apply the provisions of s. 592(1)(*b*)(iii) of the *Criminal Code*.

It is apparent, therefore, that the opinion expressed as to the effect of *Mann v. The Queen* was not a necessary step to the judgment pronounced, and is not binding.

Mann v. The Queen was a judgment of this Court as to the constitutional validity of s. 60 of the *Highway Traffic Act* of Ontario, R.S.O. 1960, c. 172, which defined the offence of careless driving. It was held, unanimously, that this section was validly enacted.

The issue was whether this section was in conflict with s. 221(4) of the *Criminal Code,* which was not in existence when the earlier case of *O'Grady v. Sparling*[11] was decided, and which had affirmed the constitutional validity of s. 55(1) of the Manitoba *Highway Traffic Act,* R.S.M. 1954, c. 112, which created in that province the offence of driving without due care and attention.

In the *O'Grady* case, it had been said, at p. 809:

> What the Parliament of Canada has done is to define "advertent negligence" as a crime under ss. 191(1) and 221(1). It has not touched "inadvertent negligence." Inadvertent negligence is dealt with under the provincial legislation in relation to the regulation of highway traffic. That is its true character and until Parliament chooses to define it in the *Criminal Code* as "crime", it is not crime.

The contention in the *Mann* case was that by s. 221(4) of the *Criminal Code,* Parliament had defined "inadvertent negligence" as a crime.

Cartwright J., with whom Spence J. concurred, held that Parliament had not defined "inadvertent negligence" as a crime, and that the case was indistinguishable from the *O'Grady* case.

Fauteux J., with whom Abbott and Judson JJ. concurred, held that the provisions of s. 221(4) of the *Criminal*

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[11] [1960] S.C.R. 804, 33 C.R. 293, 33 W.W.R. 360, 128 C.C.C. 1, 25 D.L.R. (2d) 145.

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Code and of s. 60 of the *Highway Traffic Act* differed in legislative purpose and in legal and practical effect. The provincial enactment imposed a duty to serve bona fide ends not otherwise secured and in no way conflicted with the federal enactment. There were no obstacles to prevent both enactments living together and operating concurrently.

Ritchie J., with whom Martland and Judson JJ. concurred, said that s. 221(4) was not to be construed as creating a crime of "inadvertent negligence". He went on to say:

> The purpose and effect of s. 221(4) is to make it a criminal offence for anyone to drive to the public danger but, notwithstanding the careful argument to the contrary addressed to us on behalf of the Attorney General of Canada, I am satisfied that there is a type of careless and inconsiderate driving which falls short of being "dangerous" within the meaning of that section and that the purpose of s. 60 of the *Highway Traffic Act* is to provide appropriate sanctions for the regulation and control of such driving in the interests of the lawful users of the highways of Ontario.

This case was concerned with the constitutionality of the provision in the provincial statute. It was held that it was not in conflict with s. 221(4). In the reasons of Cartwright J. and of Ritchie J. it was held that s. 221(4) did not define a crime of "inadvertent negligence".

The issue in the present case is as to the proper instruction to be put to a jury in a case involving a charge under s. 221(4). It being accepted that that subsection, as framed, does not create a crime of "inadvertent negligence", there is nothing in the *Mann* case which would require the Court, when explaining to the jury the nature of the offence charged, to do so in terms other than those contained in the section itself. Parliament has defined the kind of conduct which shall constitute an offence under that subsection, and this Court, in the *Mann* case, has said that such definition is not to be construed as creating a crime of "inadvertent negligence". In my opinion, therefore, in this case, the charge to the jury, in the terms of the subsection, was adequate and correct, and it is not necessary, as the appellant contends, for the trial judge to instruct the jury as to the difference between "advertent" and "inadvertent" negligence.

I would dismiss the appeal.

Ritchie J. concurred with the judgment delivered by

PIGEON J.:—The appellant was convicted of "dangerous driving". The conviction was affirmed with a dissent in the Court of Appeal for Ontario[12] and the main question of substance raised on the appeal to this Court is the adequacy of the judge's instructions to the jury concerning the nature of the offence. He simply read and paraphrased subs. 4 of s. 221 of the *Criminal Code* without telling them that this did not make inadvertent negligence a crime as this Court has said in *Mann v. The Queen*[13]. I agree with Judson J. that those instructions were sufficient in this case and I wish to add the following observations.

Prior to the enactment of subs. 4 of s. 221 this Court, in *O'Grady v. Sparling*[14], dealt with subs. 1 of the same section, that makes it an offence to be "criminally negligent in the operation of a motor vehicle", that is, by virtue of s. 191(1), to drive with "wanton or reckless disregard for the lives or safety of other persons". Judson J. speaking for the majority of the Court, after stating (at p. 808) that between "criminal negligence" thus defined and negligence as contemplated in the enactments of regulatory authorities there is "a difference in kind and not merely one of degree", adopted as part of his reasons J. W. C. Turner's statement of this difference (Kenny's Outlines of Criminal Law, 17th ed., p. 34) in which he says:

> There are only two states of mind which constitute *mens rea*, and they are intention and *recklessness*.

Therefore the essential basis on which subsection 1 was held to be aimed at a kind of negligence different from the negligence contemplated in the enactments of regulatory authorities is that "criminal negligence" requires *mens rea*. It follows, of course, that inadvertent negligence is not criminal. Because negligence in the usual language includes both advertent and inadvertent negligence, it is obvious that in charging a jury on an indictment for "criminal negligence" a judge must in some way explain adequately the kind of negligence that is criminal and make it clear,

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[12] [1969] 1 O.R. 90, 4 C.R.N.S. 161.

[13] [1966] S.C.R. 238, 47 C.R. 400 [1966] 2 C.C.C. 273, 56 D.L.R. (2d) 1.

[14] [1960] S.C.R. 804, 33 C.R. 293, 33 W.W.R. 360, 128 C.C.C. 1, 25 D.L.R. (2d) 145.

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but not necessarily in those words, that inadvertent negligence is not criminal. It may well be that he can do it by using the language of s. 191(1), seeing that "wanton or reckless" undoubtedly exclude mere inadvertence.

When in *Mann v. The Queen* this Court had subsequently to consider subs. 4 making "dangerous driving" a lesser offence, the question arose whether inadvertent negligence consisting in dangerous driving had thereby been made a crime. Following the principle established in *Beaver v. The Queen*[15] and *The Queen v. King*[16] it was, in effect, decided that *mens rea* was an element of the offence of "dangerous driving" as of other criminal offences generally. This was expressed by Cartwright J. (as he then was) by saying (at p. 246) "that in enacting s. 221(4) Parliament had not defined 'inadvertent negligence' as a crime" and by Ritchie J. (at p. 251) by saying similarly that "the provisions of s. 221(4) of the *Criminal Code*" are not to be construed as creating a crime of "inadvertent negligence".

In the context of a decision respecting the constitutional validity of provincial enactments with which subs. 4 was alleged to be in conflict, this mode of expression was, it appears to me, perfectly appropriate. However, because "a case is only an authority for what it actually decides", one should not read what was thus written as if it was an enactment but ascertain what was actually decided. It seems clear that the actual decision was essentially that the offence created by subs. 4 requires *mens rea* and therefore differs in nature from statutory offences aimed at specific acts irrespective of intention.

This construction, it should be noted, does not deprive subs. 4 of its effect. By virtue of s. 191(1), a conviction for "criminal negligence" requires "wanton or reckless disregard for the lives or safety of other persons". As against that, subs. 4 contemplates danger to other persons only. There is, therefore, ample room for distinction between the two offences even excluding inadvertence from the lesser.

However, wantonness and recklessness of themselves clearly imply the exclusion of mere inadvertence while "dangerous driving" does not necessarily. Does this mean that in a jury trial on that latter charge the judge must

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[15] [1957] S.C.R. 531, 26 C.R. 193, 118 C.C.C. 129.

[16] [1962] S.C.R. 746, 38 C.R. 52, 133 C.C.C. 1, 35 D.L.R. (2d) 386.

necessarily instruct the jurors that dangerous driving by inadvertence is not contemplated? A majority of the members of this Court sitting in *Binus v. The Queen*[17] expressed that opinion, however as the case was decided by application of s. 592(1)(*b*)(iii), this is not binding. With great deference to them, I must disagree because only such instructions need be given as the case being tried actually requires. Although *mens rea* is always required, it is only in exceptional circumstances that the jury need instructions in this connection. In most cases the fact itself is sufficient proof of the intention. It is only when a question arises as to the existence of this element of the offence that the jury need be bothered with it.

Therefore, in my view, the practical question is whether, in the circumstances of this case, there was something from which the jury might reasonably have concluded that, although objectively considered the accused's driving was "dangerous", it could be unconsciously so or be attributable to inadvertence. The only fact from which such an inference might be considered possible in this case is the sudden braking of the car ahead on the exit ramp, assuming accused's story of how the accident occurred was believed by the jury. Bearing in mind that the accused admitted being aware of the presence of the car ahead, his loss of control of his own car could not possibly be considered the normal result of a sudden application of the brakes by the other car. This result could only obtain if he was driving dangerously. When one is not driving dangerously, he does not lose control of his car because the driver of the car ahead suddenly puts on the brakes especially on an exit ramp where this is to be anticipated.

I fail to see in the present case any suggestion of a circumstance from which the jury might infer that the accused's manner of driving was inadvertently dangerous. If he had bumped into the car ahead and said that he had failed to notice that the latter was stopping, a question would have arisen whether this was inadvertent. It might equally have been so if he had said that he had not immediately noticed the braking action due to momentary inattention. Nothing of the kind was suggested and therefore, the only question was whether the driving was

[17] [1967] S.C.R. 594, 2 C.R.N.S. 118, [1968] 1 C.C.C. 227.

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actually dangerous within the meaning of the section. Such being the case, it was not necessary for the judge to instruct the jury that the accused should not be found guilty if the accident had occurred by his inadvertence. There was nothing to suggest that the ordinary rule ought not to be applied, namely that one must be deemed to intend to do what he is actually doing.

Although this may not be strictly necessary, I wish to add that, in my opinion, it would not be desirable when there is a need for instructions on the question of intention, to do it by saying that subsection 4 is not aimed at inadvertent negligence. While this wording was entirely appropriate in the context of the constitutional question that was decided in the *Mann* case, I feel it should be avoided in addressing a jury. My reason for this is that Parliament has created two distinct offences: one of "criminal negligence", the other of "dangerous driving". Although "dangerous driving" is admittedly a kind of "criminal negligence" because it is a lesser offence than that which is described by those words, the use of the word "negligence" appears to me highly undesirable in any instructions to a jury with respect to subsection 4 as being apt to create confusion.

Being of opinion that the jury was properly instructed in the terms of the section creating the offence of dangerous driving without any reference to negligence, the evidence respecting impairment became irrelevant to that charge. It was, therefore, unnecessary to add that if the accused was acquitted on the count of impairment that evidence should be excluded from consideration on the other count.

I would dismiss the appeal.

Appeal dismissed, CARTWRIGHT C.J. *and* HALL *and* SPENCE JJ. *dissenting.*

Solicitors for the appellant: Goodman & Goodman, Toronto.

Solicitor for the respondent: The Attorney General for Ontario, Toronto.

D. FREEBORN *et al.* (*Defendants*) .....APPELLANTS;

AND

HENRY G. GOODMAN (*Plaintiff*) .....RESPONDENT.

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*June 7, 11, 12
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ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real property—Mortgages—Developer conveying apartment building to company and taking back second mortgage—Exclusive right of occupancy of individual suites sold to proprietary lessees—Whether priority of interest conveyed to proprietary lessees over that of assignee of second mortgage.

On June 15, 1959, F entered into an agreement with B Ltd. for the sale to B Ltd. of a parcel of land on which he had commenced the construction of an apartment building. B Ltd. had recently been incorporated by F, and, at the time was controlled by him. B Ltd. agreed to buy the lands and premises with the apartment building "completed and equipped" for $844,500, which was to be paid by the assumption of a first mortgage on the premises in the amount of $310,000 and the sale of the exclusive right of occupancy of the apartment suites. Such sales were to be in accordance with the terms set out in a form of offer to purchase attached to the agreement. F agreed to accept as security a second mortgage if B Ltd. could not pay him the balance of the purchase price in cash on the closing date. As a further protection it was stipulated in the agreement that F was to be entitled to retain possession of all unsold suites until he had been paid in full.

The offer to purchase, which incorporated by reference a form of agreement and lease, contemplated the sale by B Ltd. of the exclusive right of occupancy of a suite in the apartment building and that one share of B Ltd. was to be issued in respect of each dollar paid by the purchaser who could make payment either wholly in cash or partly in cash and the balance by assuming part of the total mortgage encumbrance against the apartment premises.

Although the appellant purchasers went into possession of their suites in accordance with the terms of the agreement and lease, the document itself was not signed by any of them until the amount of the second mortgage had been determined. The executed agreements were dated April 1, 1960, which was one day after the date of the deed to B Ltd. and the second mortgage to F Ltd., the nominee of F, and twenty-five days prior to the recording of the latter document.

In 1961 the second mortgage was assigned for value to one S in trust and in 1963 was assigned by S without consideration to the respondent. At the time S took he had full knowledge of all dealings between the F companies and the appellants.

As a result of having recovered a judgment *nisi* against B Ltd. for foreclosure of the second mortgage, the respondent demanded that from April 1, 1964, the appellants should vacate their respective suites or enter into a rental determined by him. Following their refusal to comply with his demand, the respondent brought an

*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Spence JJ.

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action for possession of the suites and for payment of occupation rent with respect thereto. The appellants claimed the right to retain possession so long as they made the payments stipulated in their agreements with B Ltd. At trial, it was held that they were licensees, with a contractual right to exclusive possession which they could maintain against the respondent. The respondent's appeal was allowed by unanimous decision of the Court of Appeal. From that judgment an appeal was brought to this Court.

Held (Martland J. dissenting): The appeal should be allowed and the trial judgment restored.

Per Cartwright C.J. and Judson, Ritchie and Spence JJ.: Each of the appellants acquired by way of purchase an equitable title to the exclusive right of occupancy of their respective suites and to quiet possession thereof so long as they remained the owner of the shares allotted to them in B Ltd. and were not in default under the terms of the agreement and lease.

The question of priority as between the interests of the appellants and that of the respondent was dependent upon the nature of the interest vested in B Ltd. at the time when the second mortgage was executed on March 31, 1960. It was apparent that on that date when F executed the deed to B Ltd. he had, in concert with that company and in accordance with the terms of the agreement of sale, already divested himself of the interest conveyed to the appellants and that this was well known and accepted by F Ltd. and by the successive holders of the second mortgage. It followed that the interests conveyed to the appellants were no longer the property of B Ltd. to mortgage, and that the property mortgaged to F Ltd. was then encumbered to the extent of the suites which it had sold.

Under the special circumstances of this case the equities against the recognition of an outstanding vendor's lien outweighed those in favour of it. The second mortgage was a security which was entirely independent of the lien and which was from the very outset contemplated as being accepted by F as full payment and therefore as a substitution for any unpaid vendor's lien which might otherwise have been outstanding.

Accordingly, the judgment *nisi* rendered in favour of the respondent against B Ltd. for foreclosure of the second mortgage did not clothe him with any right to disturb the appellants in the quiet enjoyment of the apartment suites acquired by them pursuant to the agreement of sale and the offer to purchase and agreement and lease which were annexed thereto.

Per Martland J., *dissenting*: The agreement of June 15, 1959, contemplated that, in entering into agreements for the occupancy of suites, B Ltd. could only do so on the basis of an agreement with the occupants which specifically recognized the existence of a second mortgage on the whole of the lands and premises. B Ltd., in dealing with the appellants, carried out this obligation. The fact that most of the appellants took possession of their suites before signing the final agreements with B Ltd. did not alter the position, in view of the fact that each suite occupant did sign such an agreement, which, by its terms, replaced all prior agreements, and which specifically acknowledged the amount of the second mortgage against the whole of the lands and premises.

The position was, therefore, that B Ltd. could not grant any right or interest in the lands which was not subject to the second mortgage, and that, in fact, it never purported to do so.

The agreement of B Ltd. to give a second mortgage to secure the balance of the purchase price was performed, and the second mortgage was executed and registered. The second mortgagee, therefore, had equitable rights prior to any rights of the appellants, which mortgagee's rights, in due course, were assigned to the respondent.

Also, as held by the Court below, the submission that there was an equitable estoppel which precluded F, and his successors, from asserting priority for the second mortgage as against the appellants should fail.

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Donnelly J. Appeal allowed, Martland J. dissenting.

A. S. Pattillo, Q.C., and *J. W. Garrow*, for the defendants, appellants.

S. L. Robins, Q.C., for the plaintiff, respondent.

The judgment of Cartwright C.J. and Judson, Ritchie and Spence JJ. was delivered by

RITCHIE J.:—This is an appeal brought with leave of this Court from a unanimous judgment of the Court of Appeal for Ontario[1] which allowed an appeal by the respondent from a judgment of Donnelly J., whereby he had dismissed the respondent's action against the appellants for possession of certain apartment suites occupied by them and for payment of occupation rent with respect thereto.

The respondent's claim was asserted as the result of his having recovered a judgment *nisi* against Hamilton Benvenuto Apartments Limited (hereinafter called Benvenuto) for foreclosure of a second mortgage dated March 31, 1960, and recorded on April 26 of that year, made by Benvenuto as mortgagor in favour of Frisina Enterprises (Hamilton) Limited (hereinafter called Frisina Enterprises), which second mortgage was assigned for value to one Samuel Stein in trust and by him assigned without consideration to the respondent who is his partner. The Benvenuto Company, of which all the appellants are shareholders, was the owner of an apartment building in which they all occupied apart-

[1] [1968] 1 O.R. 105, 65 D.L.R. (2d) 545.

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ment suites, the exclusive right of occupancy to which had been sold to each of them in accordance with certain agreements which will hereafter be discussed.

The practical question here at issue between the parties is whether or not the interests purchased by the appellants in the Benvenuto apartment building should take priority over the respondent's interest as assignee of the second mortgage. The learned trial judge found that the appellants had acquired a licence to occupy their apartments coupled with a contractual interest of which the respondent had full notice when he took the assignment of the second mortgage, and that the appellants' title therefore took precedence over that of the respondent; whereas Mr. Justice Laskin, in the reasons for judgment which he rendered on behalf of the Court of Appeal, treated the appellants as having acquired no interest in land which could take precedence over the respondent's mortgage and found that in any event there was an outstanding interest by way of unpaid vendor's lien to which the respondent fell heir as the assignee of the second mortgage and that this took priority over any interest which the appellants may have acquired.

This litigation arises out of the implementation of a plan or scheme devised by one Alfonso Frisina in the spring of 1959 for financing the construction and operation of a 48-suite apartment building to be erected on property owned by him in Hamilton. As will hereafter appear, Frisina's plan was to a great extent modelled on the type of co-operative housing arrangement which in the past has been more commonly used in the United States of America than in this country, but it will be seen that the method here employed departed in certain essential respects from the procedure which is usually employed in such cases.

The essence of the Frisina scheme can best be explained by reference to the agreement of sale dated June 15, 1959, by which he conveyed the apartment building to Benvenuto, a company which had then issued only five shares, all of which were owned or controlled by Frisina.

The agreement discloses that Frisina had mortgaged the premises in August, 1958, in the amount of $310,000 to the London Life Insurance Company and had commenced the construction of the apartment building. Benvenuto agreed to buy the lands and premises with the apartment building "completed and equipped" for $844,500, which was to be

paid by the assumption of the London Life mortgage and the sale of the exclusive right of occupancy of the apartment suites, and it was provided also that:

> If on the closing of the transaction herein the Company is unable to pay to the vendor the whole of the balance due on closing, namely, Five Hundred and Thirty-Four Thousand and Five Hundred Dollars ($534,500.00)...then on account of such deficiency and to the extent of such deficiency the vendor agrees to take back a second mortgage on the said lands and premises and the said forty-eight suite apartment building...

In order to afford greater security to Frisina, the vendor, it was also provided:

> ...that until all the suites in the said forty-eight suite apartment building shall have been sold and the vendor shall have been paid the full balance of the purchase of the said apartment building and premises as aforesaid, then the vendor shall be entitled to retain possession of all such unsold suites upon payment to the Company of the monthly operating charge, as referred to and defined in the said Offer to Purchase (appendix A), designated in respect to such unsold suites and the vendor shall further be entitled to sell the same to such person or persons as the said vendor may deem fit, ...

In my view the paramount condition pursuant to which the company was to acquire title under this agreement is that contained in para. 7 which reads:

> The Company agrees to sell the exclusive right of occupancy of the suites in the said forty-eight suite apartment building at the prices shown in and in accordance with the terms and conditions set out in the form of Offer to Purchase attached hereto as Appendix A.

It is important in considering the nature of the title which Benvenuto conveyed to the purchasers of suites to bear in mind the fact that their occupancy was in all cases controlled by the terms of an "Offer to Purchase" which incorporated by reference a form of "agreement and lease" which was designed to be executed before possession was taken but which was in fact not signed by any of the appellants until some considerable time later. It is enough to say of the form of "Offer to Purchase" that it clearly contemplated the sale by Benvenuto of the "exclusive right of occupancy" of a "suite in the apartment building known as Benvenuto Apartments" and that one share of the Benvenuto Company was to be issued in respect of each dollar paid by the purchaser who could make payment either wholly in cash or partly in cash and the balance "by assuming part of the total mortgage encumbrance against the said apartment building premises".

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The terms of the form of "agreement and lease", however, require closer examination. Throughout this document the purchasers are referred to as "proprietary lessees" and although no second mortgage was in existence when the form of "agreement and lease" was prepared, and, if all had gone well and all the apartments had been sold there would have been no need for such an encumbrance, there is, nevertheless, an express reference to it in the third recital which reads:

> AND WHEREAS the said described lands and premises are vested in the Company subject to a first mortgage in favour of the London Life Assurance Company for $310,000.00 with interest at 6¾% per annum, and... subject to a second mortgage in favour of Alfonso Frisina securing the sum of $ with interest at 6¾%, which second mortgage shall be an open mortgage (it being the intention of all parties that the second mortgage shall if possible be paid off in full out of the proceeds of moneys paid by the Proprietary Lessees in respect of the said apartment suites and the said car parking spaces sold under the terms of this agreement).

All but three of the appellants had entered into the agreements and had taken possession of their suites before March 1, 1960, and of the other three, the appellant Swan, who had by that time also entered into possession, had acquired his title from a Mr. Airey, who was one of the original "proprietary lessees" and the other two appellants had acquired title through Frisina himself and had also signed the agreement before March 1, 1960. As to the respective positions of the appellants, I adopt the approach taken by Mr. Justice Laskin when he said, speaking on behalf of the Court of Appeal:

> Following the execution of the agreement of June 15, 1959, between Frisina and Benvenuto the former proceeded thereunder to arrange for sales of exclusive rights of occupancy of the various suites. In this connection it is unnecessary to distinguish the positions of those defendants who were original occupants and those who bought unsold suites held by Frisina and those who took an approved assignment from an original occupant. I shall take it that the defendants went into possession of their respective suites between September 14, 1959 and March 1st, 1960 (after entering into agreements with Benvenuto in the form of the specimen offer to purchase.)

The singular feature of the last-quoted recital is that at the time when the purchasers, or their predecessors in title signed the form of "Offer to Purchase" which was in each case accepted by Benvenuto, and of which the "agreement and lease" forms a part, Frisina had not yet deeded the property to Benvenuto and all concerned with the trans-

action knew perfectly well that there was no second mortgage in existence and that the agreement under which Benvenuto was purchasing the building from Frisina made it clear that such a mortgage would only be given if the company was unable to pay the whole of the balance of the purchase price on closing.

The second and fourth clauses of the form of "agreement and lease" indicate the nature of the interest which was purchased by the appellants and which Benvenuto intended to convey. Clause 2 provides that:

Each Proprietary Lessee shall be entitled to exclusively use and enjoy the apartment suite set opposite his or her name in the second column of said Schedule "B" so long as such Proprietary Lessee is the owner of all the shares set opposite his or her name in the eighth column of the said schedule "B" and on condition that such Proprietary Lessee abides by the terms and conditions of this agreement including the rules and regulations established by the Company as hereinafter provided.

Clause 4 of the agreement provides that:

So long as each Proprietary Lessee is the owner of the shares set opposite their respective names and is not in default under this agreement and fully complies with all rules and regulations established by the Company, such Proprietary Lessee shall have quiet possession of the apartment suite set opposite such Proprietary Lessee's name.

Clauses 10 and 11 of the same document contain some interesting provisions describing the company's powers in the event of default by the proprietary lessees. Clause 10 provides that if the default continues for more than one month

...then the Company may on one month's written notice to such Proprietary Lessee, if default continues, retake possession of the said apartment suite occupied by such Proprietary Lessee or his sub-tenant.

And cl. 11 reads:

And it is further covenanted, declared and agreed that in the event of default having occurred in the payment of any sum payable as aforesaid by any Proprietary Lessee to the Company, the Company may (notwithstanding any other right or power of the Company) distrain therefor upon the lands, tenements, hereditaments, and premises of the Proprietary Lessee and by distress warrant recover by way of rent reserved, *as in the case of a demise,* so much of such sum as shall remain in arrears and unpaid together with all costs attending such distress.

(The italics are my own).

The 12th clause of this document provides that:

12. This agreement shall replace any previous agreement or agreements entered into by any of the proprietary lessees with reference to the ownership, use and occupancy of the said apartment suites.

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Although the appellants had taken possession of their suites to the extent hereinbefore indicated in accordance with the terms of the agreement and lease, the document itself was not signed by any of them until the amount of the second mortgage had been determined and inserted in the third recital. The executed agreements are dated April 1, 1960, which is one day after the date of the deed to Benvenuto and the second mortgage to Frisina Enterprises and twenty-five days prior to the recording of the latter document.

It will be seen from all the above that the title to the premises and apartment building taken by Benvenuto under the agreement of sale of June 15, 1959, was subject to its agreement to sell the exclusive right of occupancy of the suites and in my opinion as each such suite was sold in accordance with this agreement, the interest of Benvenuto was diminished to the extent that it had conveyed to another the exclusive right of occupancy of its building. The only title which Benvenuto acquired by the deed of March 31, 1960, and which it had to dispose of on the same date when it gave the second mortgage to Frisina Enterprises Limited was, in my opinion, encumbered by reason of the sales which had already been made. In the course of his reasons for judgment, Mr. Justice Laskin makes something of the fact that the date upon which the form of agreement and lease was executed by the purchasers is not established by the evidence and may well have been after the second mortgage but, as I have indicated, he accepts the fact that the defendants went into possession of their respective suites before the second mortgage was given and in accordance with the offer to purchase which incorporated the form of agreement and lease. I think that the purchasers must be treated as having acquired whatever title they did acquire at the time when they took possession in accordance with the offer.

It will be apparent from the passages which I have quoted from the "Offer to Purchase" and the "Agreement and Lease" that what was conveyed by way of sale to the purchasers or "tenant lessees" was "the exclusive right of occupancy" of a suite in the apartment building with quiet possession thereof for so long as each of them continued to be the owner of the shares alloted to them and was not in default under the agreement. There is elaborate

provision in clauses 10 and 11 of the "Agreement and Lease" for eviction of any tenant lessee who is in default, including a covenant to the effect that in such event Benvenuto could distrain for recovery "by way of rent reserved, as in the case of a demise", but there is no suggestion that any of the appellants was at any time in default and in my view until such default occurs, no "proprietary lessee" could be subject to eviction at the suit of Benvenuto. As I mentioned at the outset, the scheme employed for the financing and operation of the apartment building was in many respects based on the method devised for financing similar undertakings in the United States of America. This is made evident by reference to an article on Co-operative Apartment Housing in 61 Harvard Law Review at p. 1408 where it is said:

> A co-operative apartment house requires legal machinery which will give the individual tenant-owner something closely approximating "title to a slice of air," while reserving to a collective entity the function of management and the power to assure proportional sharing of common expenses. Customarily, the promoter initiating the venture organizes a corporation, which acquires the land and building, normally subject to a mortgage. The prospective tenant-owner buys a block of shares corresponding to the value of the apartment to be occupied, receiving also a long-term or renewable lease. Rent is nominal, but the board of directors, elected by the tenant-shareholders, makes assessments for current expenses as well as for payments of interest and principal on the mortgage. The leases include provision for forfeiture at the option of the corporation on failure to pay assessments or on assignment without the consent of the board of directors.

The most essential difference between Frisina's scheme and the model upon which it appears to have been based, is that in the case of the present proprietary lessees the duration of the term of their occupancy was not fixed by specifying the number of years in the first instance or by reference to some collateral matter in itself certain or capable of being rendered certain. I agree with the submission of the respondent that by reason of this omission the interests taken by the appellants cannot be said to be leases in the strict sense of the word, but in a case such as the present one where the tenant lessees have taken possession for valuable consideration and where their tenancy is terminable only on default, I do not think that the failure to fix a term is to be construed as cutting down the extent of the interest conveyed to them under the provisions of the "agreement and lease".

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In the case of *The Trust and Loan Company of Canada v. Lawrason*[2], the question to be determined was whether the Trust and Loan Company, by reason of the terms of the mortgage held by it, was to be treated as having redemised certain lands so as to create a landlord and tenant relationship whereby mortgage payments were to be considered as rent so that they would rank in priority to the claims of other creditors. The mortgage contained an "attornment" clause as follows:

> ...and the mortgagor does release to the Company all his claims upon the said lands and doth attorn to and become tenant at will of the Company subject to the said proviso,...

and there was also a provision for the mortgagor to distrain for arrears of interest after notice "as in the case of the demise of said land" and there was a covenant that until default of payment the mortgagor should have quiet possession. The Court of Appeal held that there was no fixed term and that the interest payments could not be treated as "fixed rent" under a tenancy. This Court was equally divided but the reasons for judgment affirming the Court of Appeal were written by Mr. Justice Strong who, in rejecting the argument that a tenancy at will was created by the attornment clause said:

> This attornment clause appears to be so utterly inconsistent with the proviso, that the mortgagor should have quiet possession until default, that the one or the other of these clauses must be void for repugnancy. The mortgage deed, operating as a conveyance to the mortgagee of the whole fee, these provisions are in the nature of redemises to the mortgagor, and, therefore, must be construed beneficially to the mortgagor, and strictly against the mortgagee, who is in the position of a grantor as regards them. Then it being impossible to reconcile a tenancy at will, that is, a tenancy determinable at the will of the mortgagee, under which the latter can, at any time, take possession, with a provision, though in form but a mere personal covenant, that the mortgagor shall remain in quiet possession until default in payment; one or the other of these two clauses must necessarily give way, and upon the principle of construction just stated, it is clear that this must be the attornment clause being less beneficial to the mortgagor. It is no answer to this argument to say that the tenancy at will can subsist with the collateral personal convenant of the mortgagee not to take possession until default, for such a covenant would be enforced specifically by a court of equity, which would restrain the mortgagee from taking possession in violation of its terms, and thus there would arise a direct repugnancy between such a provision and a tenancy at will.

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[2] (1882), 10 S.C.R. 679.

Mr. Justice Strong went on to say, at p. 704:

> Then, the tenancy at will created by express words in the attornment clause being thus rejected we have only to deal with the provision that the mortgagor shall hold until default in payment of principal or interest at the times stipulated in the deed; if any tenancy is created it must be by that clause. Now, when I say that this clause is in the nature of a redemise, I do not mean to say that it creates a strict legal tenancy, that it confers upon the mortgagor a chattel interest amounting to a legal term, for it has been determined—and upon long established principles of the law relating to leases and terms for years, it could not be otherwise held—that the uncertainty in the duration of the term is fatal to such a construction, though, *as I have before said, the covenant is one which a court of equity would undoubtedly enforce by restraining the mortgagee from ejecting the mortgagor before default.*

The italics are my own.

I think that at the very least the interest taken by the appellants in the present case was a demise secured by a covenant for quiet possession which a court of equity would undoubtedly enforce by restraining Benvenuto from ejecting any of them before default, and as the second mortgagee and its assignee Stein and the respondent who took his assignment without consideration, must all be taken to have had full knowledge of all the circumstances, including the covenant for quiet possession, I conclude that the respondent was bound by that covenant which is enforceable at equity by restraining him in the same manner as it would have been enforceable against Benvenuto.

Not only must the respondent be taken to have had notice of the interests of the appellants, but the appellants were in actual occupation of their suites when the second mortgage was given, and in this regard reference may be had to the case of *Barnhart v. Greenshields*[3], decided in the Privy Council in 1853, which appears to be accepted as a modern authority. (See Halsbury's Laws of England, 3rd ed., vol. 14, p. 546 and vol. 34 at pp. 303 and 366, and Hanbury's Modern Equity, 8th ed., at p. 33.) In that case at p. 33 their Lordships accepted the statement of the rule governing such circumstances as made by Sir James Wigram in the case of *Jones v. Smith*[4], where he said:

> If a person purchases an estate which he knows to be in the occupation of another than the vendor, he is bound by all the equities which the party in such occupation may have in the land...for possession is *prima facie* evidence of seisin in fee.

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[3] 9 Moo. P.C.C. 18, 14 E.R. 204. [4] (1841), 1 Hare, 43 at 60.

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The exact factual situation in the present case appears to be a unique one and an extensive search of the authorities has not resulted in the discovery of any decided cases which characterize the exact interest acquired by the purchasers in terms of any of the categories heretofore accepted by the courts, but it appears that similar situations have arisen in the United States and have given rise to a comment in a work entitled *The Influences of the Metropolis on the Concepts, Rules and Institutions Relating to Real Property,* 1954, which is quoted in an article in 18 Stanford Law Review at p. 1328 as follows:

> In some of these cases the question has arisen as to the extent and quality and legal character of the interest which is possessed by a purchaser of a co-operative apartment who is commonly called a 'tenant owner'. The question remains largely unanswered. Some of the courts in discussing the question have expressly refused to give the interest a name, while others have used the designations ranging from 'tenancy' through 'equitable title'. Apparently there has arisen in the field of real property a type of interest, peculiar to the co-operative apartment concept, which does not fit precisely in any of the ancient legal pigeonholes and which is not fully or adequately defined by existing legal terminology

The learned trial judge expressed the opinion that the appellants

> ...are licensees with a contractual right to exclusive possession of the apartments which they occupy so long as they retain the shares and comply with the terms of the agreement; and to sell such shares to a purchaser with the approval in writing of the Board of Directors of the Company and to assign to such purchaser all their rights under the Agreement with the Company, including the right to use and occupy the accommodation covered by the agreement.

In support of this proposition, reference was made to the case of *Errington v. Errington*[5], but I take the facts of the present case as being more favourable to the appellants than they were to the licensees in that case, and I think that what each of the appellants acquired by way of purchase was an equitable title to the exclusive right of occupancy of their respective suites and to quiet possession thereof so long as they remained the owner of the shares allotted to them in Benvenuto and were not in default under the terms of the agreement and lease.

It appears to me to be fitting at this point to make reference to the fact that in the course of purchasing their exclusive rights of occupancy, although the appellants ap-

[5] [1952] 1 All E.R. 149.

pear to have been dealing with three different entities, they were in fact dealing with only one controlling mind, namely that of Alfonso Frisina. Mr. Frisina incorporated Benvenuto and all its original five shares were held by or for him. This was the company to which he eventually conveyed the apartment house and with which the appellants entered into their agreements for exclusive occupancy of the suites. Frisina also incorporated Frisina Enterprises which was destined to become the second mortgagee and which ultimately assumed a number of administrative obligations in respect of the apartment building.

Mr. Justice Laskin said in the course of his reasons for judgment that this method of doing business was "a permissible device" and there can be no quarrel with this description. It was certainly a device and it was a permissible one having regard to the rule in *Salomon v. Salomon & Co.*[6] It is no part of my reasoning that the corporate veil should be pierced, and at this stage I am only referring to Frisina's method of operation in order to make it plain that at all times each of Frisina, Benvenuto and Frisina Enterprises knew exactly what the other was doing and no undertakings were made by one without the knowledge of the others. It is also significant to note that Frisina Enterprises, which was controlled by Frisina, was designated by him as the second mortgagee and it is to be appreciated that Mr. Stein, to whom Frisina Enterprises and Frisina assigned the second mortgage, took it with full knowledge of all the dealings between the Frisina companies and the appellants and that the present respondent is in this regard in the same position as Stein.

As I have indicated, I think that the question of priority is dependent upon the nature of the interest vested in Benvenuto at the time when the second mortgage was executed on March 31, 1960, and as I have said, I think it to be apparent that on that date when Frisina executed the deed to Benvenuto he had, in concert with that company and in accordance with the terms of the agreement of sale, already divested himself of the interest conveyed to the appellants and that this was well known and accepted by Frisina Enterprises and by the successive holders of the second mortgage. It follows, in my view, that the interests

[6] [1897] A.C. 22.

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conveyed to the appellants were no longer Benvenuto's property to mortgage, and that the property mortgaged to Frisina Enterprises was then encumbered to the extent of the suites which it had sold.

It was argued on behalf of the respondent that the fact that the forms of "agreement and lease" which were not signed until April 1 or later and which each contained a recital specifying the amount of the second mortgage should, having regard to para. 12 thereof, be treated as replacing any previous agreement and as acknowledging the priority of the Frisina Enterprises' mortgage. There appears to me to be a number of answers to this contention. In the first place the "agreement and lease" which was finally signed contained all the same covenants as the document which was attached to the original offer to purchase, including the stipulation that the proprietary lessees were "to be entitled to exclusively use and enjoy the apartment suite set opposite his or her name" and the covenant for quiet possession of the suites and I think that these covenants must be treated as evidencing the recognition by all concerned that the mortgage referred to in the recital was a mortgage of property from which the interest of the proprietary lessees had already been carved out. In this regard it is to be remembered that the second mortgage was dated one day before the signed forms of "agreement and lease" and that it was not recorded until twenty-six days later.

In the second place, it is to be noted that the mortgagee was not a party to the "agreement and lease" and it is difficult to understand how its successor can invoke this document in aid of his claim to priority.

I think it should be noted also that the only mention of the contemplated second mortgage in the original offer to purchase was in the following terms:

> ...the Purchasers covenant and agree that they will not in any manner whatsoever, alienate or encumber or cause to be alienated or encumbered, the said lands and premises, or any part thereof, prior to the date upon which the full proceeds of the said mortgage, including any holdback have been received by the Vendor Company *and the second mortgage, referred to in the said form of agreement and lease attached hereto, has been registered.*

(The italics are my own.) It is difficult to give any clear meaning to this language without concluding that the

vendor and the purchasers recognized that the interest which was conveyed was one which was capable of and could be "alienated or encumbered" and that the purchasers were agreeing not to alienate or encumber their interests until the first mortgage had been fully advanced and the second mortgage had been registered. In my view this presupposes the conveyance to the purchasers of an equitable interest in the apartment building which vested in them prior to the execution and registration of the second mortgage. When this language is considered in conjunction with the various agreements which were entered into for the purpose of implementing the Frisina scheme for selling the apartment suites, it appears to me to confirm the view that Benvenuto had divested itself of the exclusive right to occupy the suites which it sold before it entered into the second mortgage.

Although no evidence was given at the trial by either the respondent or his partner, Mr. Samuel Stein, the letter written by their law firm to Benvenuto on March 29, 1962, clearly indicates that they recognized the prior interests of the appellants over the second mortgage which was then held by Stein. The first paragraph of that letter reads as follows:

> We wish to advise you that we act for the second mortgagee on the above-mentioned property and *inasmuch as the second mortgage is encumbered with collateral agreements covering the sale of the co-operative apartments,* we feel that we must request copies of the yearly financial statements of the Hamilton Benvenuto Apartments Limited.

The italics are my own.

In my view the matter could not have been put more accurately and I conclude that everybody concerned recognized that the second mortgage was encumbered in the manner described in this letter.

In the course of his reasons for judgment, Mr. Justice Laskin gave expression to the opinion that even if the appellants had such an equitable interest, their title was nonetheless subject to Frisina's prior equitable interest as unpaid vendor. In this regard Mr. Justice Laskin said:

> Even if it be assumed that the defendants have an equitable interest by reason of their contractual licences to occupy certain apartment suites, Frisina had a prior equitable interest, an equitable charge as unpaid vendor, under the agreement for sale of June 15, 1959: see *Cave v. Cave* (1880), 15 Ch. D. 639. An equitable charge arises in favour of the unpaid vendor of an equitable estate which he has agreed to sell no less

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than in the case of an agreement of sale of a legal estate. Further, the defendants had notice of this prior interest (commonly, although not quite accurately, called a vendor's lien) which must, on this ground at least, rank ahead of their own. The present case does not compel a determination whether the contractual licences should be given the dignity of equitable interests in land or whether they should be regarded, at best, as mere equities which must be either personal as between the parties or might enjoy a farther reach but short of binding a subsequent purchaser for value and certainly short of binding a subsequent purchaser for value without notice. I refer in this connection to a recent consideration of these matters in *National Provincial Bank Ltd. v. Ainsworth*, [1965] A.C. 1175, [1965] 2 All E.R. 472; and see also *Hanbury*, Modern Equity, 8th ed., pp. 29, 428 ff.

It appears to me that the views so expressed on behalf of the Court of Appeal are fundamental to the reasoning upon which its decision was based and should therefore be considered in some detail.

With the greatest respect, I am unable to find direct authority in the cases which Mr. Justice Laskin has cited for the propositions which he has stated so clearly, but even proceeding on the assumption that an equitable charge in favour of an unpaid vendor may arise immediately upon his entering into an agreement for sale, it has, I think, been recognized in the past that there may be situations in which the conduct of the vendor or the terms under which the sale is made or other circumstances make it inequitable to allow the vendor to retain his lien. In this regard reference may be had to *Austen v. Halsey*[7], *per* Lord Eldon at p. 483; *Rice v. Rice*[8]; *Mathers v. Short*[9]; *Kettlewell v. Watson*[10]. In my opinion the principle to be followed is well expressed in the judgment of Spragge V.C. in *Boulton v. Gillespie*[11], where he said at p. 228:

> *Prima facie*, certainly the lien exists, and it lies upon the grantee to rebut it. It is the vendor's "natural equity," as it has been termed, to have a lien on his estate until he has been paid for it; but the vendee may show, I apprehend, that under the circumstances of the purchase it is not equitable that such a lien should be retained, and if he can shew that the retention of such lien would defeat or even materially interfere with the known object of the purchase, so as to clog it with difficulties which it is reasonable to conclude that the parties could not have intended that the purchase should be incumbered with; then I think he rebuts the vendor's *prima facie* equity and establishes a state of things under which the retention of a lien would be the reverse of equitable. It is sometimes put—that the parties indicate an intention that the lien should not be preserved—sometimes that the intention to retain a lien is

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7 (1801), 6 Ves. 474, 31 E.R. 1152.
8 (1854), 2 Drew. 73, 61 E.R. 646.
9 (1868), 14 Gr. 254.
10 (1884), 26 Ch.D. 501.
11 (1860), 8 Gr. 223.

negatived; but inasmuch as the right to a lien does not grow out of contract or intention, but out of the natural equity of the vendor, it seems to follow that wherever it can be shewn to be more equitable that the purchaser should have his land free from the lien, than that the vendor should retain it, no lien for unpaid purchase money can exist, for the equity against it outweighs the equity in favour of it...

Under the agreement of June 15, 1959, Frisina *agreed* to accept as security a second mortgage if Benvenuto could not pay him the balance of the purchase price in cash on the closing date. As further protection it was stipulated in cl. 8 of the agreement that Frisina was to be entitled to retain possession of all unsold suites until he had been paid in full. In my opinion it is reasonable to conclude from this that Frisina never intended to preserve his equitable charge. He had obtained sufficient and adequate security under the agreement. In my view, under the special circumstances of this case the equities against the recognition of an outstanding vendor's lien outweigh those in favour of it. As I have indicated, I have formed the opinion that the interest conveyed to the appellants takes priority over that of the second mortgagee and I should point out that I do not consider that the second mortgage can be treated as the successor or reincarnation of Frisina's vendor's lien. It is a security which is entirely independent of the lien and which was from the very outset contemplated as being accepted by Frisina as full payment and therefore as a substitution for any unpaid vendor's lien which might otherwise have been outstanding. This does not mean that the second mortgagee fell heir to the rights of an unpaid vendor. There was nothing in the nature of an assignment of a vendor's lien and indeed no encumbrance created by the purchaser could possibly have such an effect.

In the course of these reasons I have not dealt with the facts in such detail as did the judges of the Courts below, but I can perhaps summarize my view by saying that I agree with the factual analysis to be found in the judgment of the learned trial judge and that I consider the title of the appellants to have been controlled by the provisions of the agreement of sale of June 15, 1959, and the "offer to purchase" and "agreement and lease" which were annexed thereto. Mr. Justice Laskin has referred to an agreement of April 19, 1960, between Frisina and Frisina Enterprises of the one part and Benvenuto of the other as "an amended agreement", but after careful consideration of the provi-

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sions of that document, I do not consider that it has any material effect on the problem with which we are here concerned.

Having regard to all the above, it will be seen that I do not consider that the judgment *nisi* rendered in favour of the respondent against Hamilton Benvenuto Apartments Limited for foreclosure of the second mortgage clothes him with any right to disturb the appellants in the quiet enjoyment of the apartment suites acquired by them pursuant to the documents hereinbefore discussed.

I would allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of the learned trial judge.

The appellants will have their costs in this Court and in the Court of Appeal.

MARTLAND J. (*dissenting*):—The facts of this case are fully outlined in the reasons for judgment of Laskin J.A., who delivered the unanimous judgment of the Court of Appeal[12], which are, in part, repeated in these reasons.

On June 15, 1959, Alfonso Frisina (hereinafter referred to as "Frisina") entered into an agreement with Hamilton Benvenuto Apartments Limited (hereinafter referred to as "Benvenuto") for the sale to Benvenuto of a parcel of land in the City of Hamilton on which he had commenced the construction of a 48-suite apartment building. Benvenuto had recently been incorporated by Frisina, and, at that time, was controlled by him. The price was $844,500 less the assumption of a first mortgage on the land in favour of The London Life Insurance Company, for $310,000 principal amount, leaving a balance of $534,500 payable by Benvenuto to Frisina on closing. The closing date was October 1, 1959, subject to extension by the vendor to such time as 51 per cent of the issued shares of Benvenuto had been sold.

Clauses 5, 6 and 7 of this agreement provided as follows:

5. The Company hereby irrevocably directs that the full proceeds of the said mortgage made by The London Life Insurance Company and being Instrument No. 66502 H.L. (which mortgage is being assumed by the Company as heretofore set out), be paid to the vendor by The London Life Insurance Company, as and when advances made thereon are approved by The London Life Insurance Company's inspector, not-

[12] [1968] 1 O.R. 105, 65 D.L.R. (2d) 545.

withstanding any direction or stipulation of the Company to the contrary, which may have been or may hereafter be made, and *the Company covenants and agrees that it will not in any manner whatsoever alienate or encumber or cause to be alienated or encumbered, the said lands and premises, or any part thereof, prior to the date upon which the full proceeds of the said mortgage, including any holdback, have been received by the vendor, and the second mortgage (if any) hereinafter referred to has been registered.* If for any reason whatsoever any monies are paid by The London Life Insurance Company to the Company in respect to the said mortgage Instrument No. 66502 H.L. such monies shall immediately be paid by the Company to the vendor.

6. If on the closing of the transaction herein the Company is unable to pay to the vendor the whole of the balance due on closing, namely Five Hundred and Thirty-Four Thousand and Five Hundred Dollars ($534,500.00) as above set out, then on account of such deficiency and to the extent of such deficiency the vendor agrees to take back a second mortgage on the said lands and premises and the said forty-eight suite apartment building (*subject only to the said first mortgage to The London Life Insurance Company,* being Instrument No. 66502 H.L. bearing interest at the rate of 6¾% per annum and for a term of ten (10) years, maturing at the same time as the said first mortgage, repayable at Seven Dollars and Fifty-eight Cents ($7.58) per month per One Thousand Dollars.

7. The Company agrees to sell the exclusive right of occupancy of the suites in the said forty-eight suite apartment building at the prices shown in and *in accordance with the terms and conditions set out in the form of Offer to Purchase attached hereto as Appendix A.*

(The emphasis is my own.)

The agreement contemplated that Benvenuto would sell exclusive rights of occupancy of the suites to persons who would be required to become shareholders of that company and the proceeds realized from the sale of shares and from such rights of occupancy were to be applied to the balance owing to Frisina and to the second mortgage which Frisina or his nominee would take back to the extent of any deficiency in payment of the closing balance.

The specimen Offer to Purchase, referred to in cl. 7, and a following memorandum of agreement, contained a schedule of share allotments and prices assigned to each suite and to parking spaces in the apartment building, and also contained blank columns envisaging proportionate assumptions of first and second mortgage liabilities by persons who did not pay the full cash price for their shares and exclusive right of occupancy of suites. These specimen documents were the basis on which Benvenuto would sell its shares and accompanying rights of occupancy of the various suites.

It is clear from the facts that if all the apartment suites were disposed of at the prescribed prices, Benvenuto would

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be able to pay off Frisina as well as the first mortgagee, and have a balance on hand. As protection, however, to Frisina the agreement of June 15, 1959, provided that until this result was achieved Frisina would retain possession of all unsold suites on payment of the prescribed monthly operating charge assigned to each such suite and would be entitled to sell them under an obligation of Benvenuto to enter into an agreement with the purchasers whereby the sums paid for the appropriate stock subscription would be paid to Frisina to reduce Benvenuto's debt to him. Frisina also retained the right to rent any unsold suites on such terms as he desired. Should the deal with Benvenuto be closed before sale of all the suites, the shares in Benvenuto referable to each unsold suite were to be issued to Frisina who would be liable to pay the monthly mortgage encumbrance charge on each such suite in addition to the monthly operating charge, until the suite was sold. Frisina could also require Benvenuto to sell the suites at a price below that prescribed but in such case the sale price of the apartment building would be correspondingly reduced.

The Offer to Purchase had annexed to it a memorandum of agreement with schedules describing the apartment building land and showing the prices of the various suites (ranging from $13,000 to $22,500) and the number of shares in Benvenuto pertaining to each suite at a cost of $1 per share. There were blank columns in this schedule headed: (1) Share of First Mortgage Assumed; (2) Share of Second Mortgage Assumed (if any); (3) No. of Fully Paid Shares Issued; (4) Portion of Monthly Payment Relating to Total Mortgage Encumbrance Assumed; (5) Portion of Monthly Payment Relating to All Other Company and Apartment Expenses (Estimated); and (6) Total Monthly Payments Presently Estimated. The parties to this memorandum of agreement were to be Benvenuto and the shareholder-occupants of all the suites. It was apparently contemplated that all would join in the one memorandum of agreement but when this document came to be executed in April, 1960, separate documents in the same general terms were prepared for each shareholder-occupant.

It was a term of the Offer to Purchase that the purchasers of the suites (*i.e.*, of the exclusive right of occupancy thereof) would "execute an agreement and lease in the form attached to this Offer before taking possession of the said

apartment suite and (if applicable) the parking space hereinafter referred to." In fact, possession was given in pursuance of the execution of the Offer to Purchase and payment of the sum prescribed as a condition of such possession. Execution of the contemplated "agreement and lease" came later.

The following terms of the Offer to Purchase must be noted. The total price payable thereunder was for the exclusive right of occupancy of a designated suite and for the number of shares corresponding to the total price at $1 per share. Any balance of the purchase price, beyond that portion stipulated as a condition of possession, was payable "by assuming part of the total mortgage encumbrance against the said apartment building premises to the extent of the said amount... and paying for such as hereinafter set out." The reference later was to a sum monthly, called the monthly mortgage encumbrance charge, calculated on the basis of $7.58 per month per thousand dollars of mortgage encumbrance assumed by the purchaser. In addition, the purchaser undertook to pay a monthly operating charge in a specified sum "or such monthly payment as may be fixed from time to time by the directors of (Benvenuto)."

Portions of two other clauses of the Offer to Purchase are relevant:

...the Purchasers covenant and agree that they will not in any manner whatsoever alienate or encumber or cause to be alienated or encumbered the said lands and premises, or any part thereof, prior to the date upon which the full proceeds of the (first) mortgage, including any holdback, have been received by (Benvenuto) and the second mortgage, referred to in the said form of agreement and lease attached hereto, has been registered.

The Purchasers acknowledge that they have been advised that (Benvenuto) has agreed to purchase from Alfonso Frisina the said lands and premises...together with the complete 48 Suite Apartment Building erected thereon at the price of $844,500.00. And the Purchasers agree with the Vendor that all monies payable by the Purchasers under this agreement may be disbursed by (Benvenuto) at its discretion and direction to the said Alfonso Frisina in payment of the cost of construction of the said 48 Suite Apartment Building being erected on the said lands and premises, such monies to be credited on account of the purchase price of the said lands and buildings payable by (Benvenuto).

The "agreement and lease" form attached to the Offer to Purchase contains, *inter alia*, a recital and a number of terms which are relevant. The recital states that the apartment property is vested in Benvenuto subject to the first mortgage already mentioned in these reasons and subject

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to a second mortgage in an unstated sum in favour of Frisina, "it being the intention of all parties that the second mortgage shall if possible be paid off in full out of the proceeds of moneys paid by the proprietary lessees in respect of the said apartment suites and said car parking spaces sold under the terms of this agreement." The following numbered clauses of the "agreement and lease" form are relevant:

1. The Company agrees to issue and allot to each of the said Proprietary Lessees the number of shares set opposite each respective owner's name in the eighth column of said Schedule "B" as fully paid and non-assessable shares of the Company, and the Company does acknowledge receipt from each Proprietary Lessee of the amount set opposite their respective names in the fifth column of said Schedule "B". The Company doth further acknowledge that it has not issued and allotted any shares except as set out in the eighth column of said Schedule "B", and the five (5) shares issued to the applicants for incorporation of the Company. The Company further agrees that no additional shares will be issued except to the respective Proprietary Lessee for the number of shares set opposite each respective Proprietary Lessee's name in the third column of said Schedule "B" less the number of shares set opposite such Proprietary Lessee's name in the eighth column of said Schedule "B", and that no additional shares shall be issued until payment therefor is made to the Company.

2. Each Proprietary Lessee shall be entitled to exclusively use and enjoy the apartment suite set opposite his or her name in the second column of said Schedule "B" so long as such Proprietary Lessee is the owner of all the shares set opposite his or her name in the eighth column of the said Schedule "B" and on condition that such Proprietary Lessee abides by the terms and conditions of this agreement including the rules and regulations established by the Company as hereinafter provided.

4. So long as each Proprietary Lessee is the owner of the shares set opposite their respective names and is not in default under this agreement and fully complies with all rules and regulations established by the Company, such Proprietary Lessee shall have quiet possession of the apartment suite set opposite such Proprietary Lessee's name.

5. Each Proprietary Lessee agrees to pay to the Company on the first day of each and every month the sum set opposite such Proprietary Lessee's name in the eleventh column of said Schedule "B" or an amount greater or less than such sum as may be determined by the Directors of the Company expressed in formal resolution of such Directors from time to time, it being intended that the said monthly payments made by all the Proprietary Lessees shall be sufficient to pay and discharge the principal and interest payments on the aforesaid mortgage(s) and all taxes, insurance premiums, janitor's services, heat, repairs and all other expenses incidental to the operation of the lands and apartment building and any incidental expenses in operating the Company. ....

7. Each Proprietary Lessee covenants not to sell, assign, or pledge such Proprietary Lessee's shares of stock set opposite his or her name in said Schedule "B" without selling all such shares to a proposed purchaser nor will such Proprietary Lessee sell his or her shares without the approval to such sale or dealing being first given in writing by the Board of Direc-

tors of the Company. In the event that the Company approves the assignment of any Proprietary Lessee's shares in the Company to any purchaser, the selling Proprietary Lessee shall thereafter cease to be liable for any further payments under this agreement,....

Clause 10 deals with the default of a proprietary lessee in any payments required to be made under the agreement, with breach of any terms and conditions thereof and with breach of any rules and regulations which the Board of Directors of Benvenuto are authorized to make; and provides in certain circumstances that Benvenuto may take possession of the particular suite and sell it. Clause 11 provides for distress by Benvenuto in case of default in any required payments.

12. This agreement shall replace any previous agreement or agreements entered into by any of the Proprietary Lessees with reference to the ownership, use and occupancy of the said apartment suites.

After a selling effort in the late summer and fall of 1959 to fill the apartment building with shareholder-occupants, the various parties moved through solicitors to complete both the corporate and real estate aspects of the interrelated deals. It was not until closing was near that the exact amount of the contemplated second mortgage was determined. Frisina's deed to Benvenuto was dated and executed on March 31, 1960, but was not registered until April 22, 1960. The second mortgage back was also dated March 31, 1960. It recites the amount secured as being $258,391.85 and was in favour of Frisina Enterprises (Hamilton) Limited, Frisina's nominee. When it was actually executed is not clear, but the mortmain affidavit was not sworn until April 19, 1960, and the document itself was not registered until April 26, 1960. It was contended that it was delivered in escrow, awaiting execution on April 19, 1960, of a supplementary agreement between Frisina, his nominated company, which became the second mortgagee, and Benvenuto (which by that time was in the hands of a new Board of Directors consisting of the shareholder-occupants), amending the original agreement of June 15, 1959. The evidence shows that a draft of the amending agreement of April 19, 1960, had been prepared as of March 29, 1960, and that by this date the amount of the second mortgage had been determined.

This amending agreement of April 19, 1960, was made in the light of a statement of adjustments calculated as of

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April 1, 1960, and in the light of the sequential agreements between Benvenuto and its shareholder-occupants who took over direction of Benvenuto on April 5, 1960. These agreements, although dated April 1, 1960, and executed by Benvenuto on that date or between that date and April 4, 1960, were executed by the shareholder-occupants at various dates following April 4, 1960. When these agreements were mailed out for execution they included the ascertained sum of $258,391.85 as the amount of the second mortgage recited therein.

These individual agreements had annexed to them as a schedule a list of the shareholder-occupants of each suite (including those retained by Frisina as unsold) and an attribution in respect of each of the portions of the first and second mortgages assumed by the respective shareholder-occupants, representing the unpaid balances of the total purchase prices of the respective exclusive rights of occupancy; and the schedule also showed the assigned amounts of the monthly maintenance payments.

The agreements of April 1, 1960, were in substance in the terms indicated in the specimen form attached to the Offers to Purchase executed earlier by the shareholder-occupants. In particular, they retained the provision that "this agreement shall replace any previous agreement or agreements entered into by any of the proprietary lessees with reference to the ownership, use and occupancy of the said apartment suites."

Each such agreement contained the following recital:

> AND WHEREAS the said lands and premises are vested in the Company subject to a first mortgage in favour of The London Life Insurance Company for $310,000.00 with interest at 6¼% per annum (collaterally secured by a chattel mortgage to The London Life Insurance Company on all the chattels owned by the Company and contained in the said Apartment Building) and subject to a second mortgage in favour of Alfonso Frisina (or in favour of such mortgagee as he may designate) securing the sum of $258,391.85 with interest at 6¼%, which second mortgage shall be an open mortgage (it being the intention of all parties that the second mortgage shall if possible be paid off in full out of the proceeds of moneys paid by the Proprietary Lessees in respect of the said apartment suites and said car parking spaces sold under the terms of this agreement).

What was added to the individual agreements of April 1, 1960, beyond the terms specified in the specimen form already referred to, were clauses indicating the collective adherence of the shareholder-occupants to their provisions

and to the schedule distributing shares in Benvenuto, the exclusive rights of occupancy attendant thereon and the financial burden of participation in the venture. They also fixed April 1, 1960, as the date on which the prescribed monthly payments assigned to each shareholder-occupant would begin.

The amending agreement of April 19, 1960, provided for the disbursement by Benvenuto of certain money, owing to it by certain listed shareholders, to pay off specified tax and public utility charges and some other debts so as to permit closing on the basis of adjustments as of April 1, 1960. Upon the money being paid over Frisina was to deliver to Benvenuto the resignations of all the first directors, save his own, together with the resignations of the officers of Benvenuto. The amending agreement also confirmed Frisina's right to sell his rights of occupancy and the shares pertaining thereto to persons approved by Benvenuto's board of directors and to rent suites to which he held such rights to persons similarly approved, but such approval was not to be unreasonably withheld. Frisina could require the issue to him of additional shares in Benvenuto at $1 per share or through a reduction in the amount of the second mortgage at that rate per share. In no case, however, could Frisina vote more than 49 per cent of issued stock regardless of his holding more; and he was required at Benvenuto's request to transfer any excess over 49 per cent to a trustee (being either the president or an officer of Benvenuto) to vote them in the best interests of all shareholders.

Stein purchased the second mortgage under an assignment dated June 10, 1961, and registered on July 12, 1961. The mortgage statement supplied in connection with the purchase showed a balance owing on the second mortgage of $228,271.07, rounded off, both in the assignment and in an acknowledgment by Benvenuto to Stein, at $228,273.00. It is admitted that at the time he took, Stein had notice of the two mortgages and had been previously provided with blank and unexecuted forms of (1) the Offer to Purchase to Benvenuto and (2) the memorandum of agreement dated as of April 1, 1960; and had also received a copy of the amending agreement of April 19, 1960. The abstract of title of the apartment property did not show any registered assertion of an interest by any of the share-

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holder-occupants before Stein took. The defendant Walton purported to register her proprietary lease on July 2, 1964, but this was after the crystallization of the issues between the parties.

It appears that the second mortgage was in good standing to the time when Frisina disposed of his shares pertaining to unsold suites to Henry Stenekes Holdings Limited under an agreement dated April 1, 1963. Benvenuto was also a party thereto, giving its consent to the assignment of the shares and the accompanying rights of occupancy.

The plaintiff herein became holder of the second mortgage under an assignment dated May 28, 1963, at which time the amount owing thereon was $216,271.49. Since he did not take for value he stood in no better position than Stein. The claim in the foreclosure action was $219,290.18 and, with interest and costs, the redemption sum as of October 1, 1964, was $226,753.23.

A default foreclosure judgment was obtained by the respondent against Benvenuto on April 1, 1964. The final order of foreclosure was signed on October 2, 1964.

The appellants in occupation of all but three of the suites in issue in these proceedings, and H. Airey, who subsequently assigned his interest to the appellant, Swan, took possession of their respective suites between August, 1959, and March 1, 1960, after signing the written Offers to Purchase, in the specimen form, dated between July 24 and December 30, 1959. Two of the appellants, who purchased rights of occupancy from Frisina, took possession on May 1 and June 25, 1960, respectively.

The present proceedings were brought by the respondent claiming possession of the apartment building. The appellants, occupants of suites in the building, and shareholders of Benvenuto, claim the right to retain possession of their suites, so long as they make the payments stipulated in their agreements with Benvenuto.

At trial, it was held that they were licensees, with a contractual right to exclusive possession which they could maintain as against the respondent. The respondent's appeal was allowed by unanimous decision of the Court of Appeal. From that judgment the present appeal is brought.

In the Court of Appeal, it was apparently conceded by the appellants that their interests in the land did not have

the character of either a leasehold or a freehold estate. While this concession was not made in this Court, the argument of the appellants was, essentially, first, that they had an "equity" which should have priority over the interest of Frisina, and accordingly over his nominee company, the second mortgagee, and over the respondent, who had acquired the second mortgage. Secondly, it was also contended that there was an equitable estoppel which precluded Frisina, and his successtors, from asserting priority for the second mortgage as against the appellants.

As to the second of these arguments, I adopt what was said by Laskin J.A. in the Court of Appeal, as follows:

> Before turning to examine the facts out of which the issues between the parties arise, it should be noted that the defendants did not and do not rely on any oral representations of Frisina to found their claim of estoppel; they rely only on such representations as are contained in written documents, to some of which the defendants became parties through agreements with Benvenuto. No attack was made on the validity of those agreements, and it is unreal to talk of estoppel so far as they are concerned. The defendants are entitled to whatever rights those agreements confer. But since the rights are against Benvenuto, the estoppel argument appears to amount to a contention that Frisina used Benvenuto as an instrument. In assessing this contention, it is a relevant consideration that those defendants who became original shareholders of Benvenuto when the complex transaction involved herein was carried through by Frisina, were represented by counsel. All interested parties had legal advice, and all documents were scrutinised and all transactions concluded with the participation of lawyers.
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> . . . .
>
> It remains to deal with the defendants' submission of estoppel which was forcibly urged against the plaintiff's claim. The contention is that the alleged estoppel was operable against Frisina and that it was equally operable against Stein (and hence against the plaintiff) who had notice of the representations which are asserted as the basis for the defence of estoppel. Whether Stein and the plaintiff would be estopped in this case if this defence was established against Frisina does not arise for determination because, in my opinion, estoppel cannot be maintained against Frisina.
>
> I agree that estoppel may arise in respect of words or conduct that induce the representee to become party to a contract with another, and, equally, it may arise by reason of subsequent words or conduct that would preclude reliance on a previously concluded contract. But, in either case, there must be a representation from which the representor seeks to recede after it induced a detrimental change of position. I do not find in the present case any representation by Frisina to the defendants with reference to the subordination of his equitable charge or of the second mortgage to their rights of occupancy or with respect to the fragmentation of the amount owing on the second mortgage according to their outstanding liabilities to Benvenuto. Nor do I find any attempt to recede from such representations as Frisina may have made in any documents to which he was a party.

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Certainly, estoppel cannot be grounded on representations which are themselves terms of a bargain between the alleged representor and the alleged representees. The question in such case becomes one of construction and application of the bargain. As has already been stated, the representations relied on here are not oral but are those reflected in the written transactions. Two of them only need be mentioned. The agreement of June 15, 1959 preceded any relationships involving the defendants; its terms were not addressed to them. The offers to purchase which the defendants executed represented their bargain with Benvenuto. The balance of benefit and detriment under that bargain does not give rise to any issue of estoppel outside of it. The defendants got what they bargained for from Benvenuto; nothing was promised to them by Frisina personally. They cannot lay at his door any mistaken belief they may have had that the payments they were required to make under their agreements with Benvenuto would protect them against persons with rights in the property superior to those of Benvenuto. Their counsel admitted on appeal that there were no misrepresentations; and I note again that they had solicitors to guide them In short, the defendants knew what was afoot and were not misled.

In my opinion the first and main submission of the appellants should also fail, for the following reasons:

Whatever rights the appellants acquired in relation to the lands in question were derived and could only be derived by virtue of their contracts with Benvenuto. In making those contracts, Benvenuto was contracting on its own behalf, as principal, and not as agent for Frisina. There were no representations made by Frisina on the basis of which any such agency could be established.

That being so, it is necessary to determine what rights Benvenuto had in relation to those lands, for it could not confer upon the appellants any rights greater than those which it, itself, had. Benvenuto's rights in respect of the lands were spelled out in its contract with Frisina, dated June 15, 1959. That was an agreement for the sale of the lands by Frisina to Benvenuto at a price of $844,500. Benvenuto, by virtue of that contract, obtained the right to acquire Frisina's equitable interest (the lands being subject to a legal mortgage), but subject to the terms of the agreement.

The lands were subject to a first mortgage in favour of The London Life Insurance Company, and Benvenuto's equitable interest in the lands, as purchaser under an agreement for sale, was, of course, subject to that. But in addition, Benvenuto had agreed, for consideration, that if it was unable to pay the whole of the balance of the purchase price of $534,500 on the closing date, Frisina should have

a second mortgage for the unpaid amount, "subject only to the said first mortgage to The London Life Insurance Company." Benvenuto's equitable interest in the lands was also subject to that, and Frisina, by virtue of the agreement to give a mortgage, retained an equitable charge on the lands, which would continue until he had been paid the full balance of the purchase price which Benvenuto had agreed to pay (*Rooker v. Hoofstetter,* (1895), 26 S.C.R. 41).

This being so, Benvenuto could not, itself, create any equitable interests in the lands which would not be subject to Frisina's interest, unless and until it had paid up the balance due. This situation is emphasized in the agreement in two respects. First is Benvenuto's covenant not to alienate or encumber, or cause to be alienated or encumbered, the lands in any manner whatsoever until the second mortgage had been registered. Second was the provision that Benvenuto would sell the exclusive right of occupancy of the suites in accordance with the terms and conditions set out in the Offer to Purchase. That form provided, as a part of the agreement with Benvenuto, that the parties to the agreement would not alienate or encumber, or cause to be alienated or encumbered, the lands, until the second mortgage had been registered. It also provided that the persons acquiring the occupancy of suites from Benvenuto would execute the agreement attached to the Offer to Purchase, before taking possession of their suites. The attached agreement provided that it should replace any previous agreement with reference to the ownership, use and occupancy of the suites. It contained a specific recital that the lands on which the apartment building had been erected were subject, in addition to the first mortgage, to a second mortgage in favour of Frisina.

The agreement of June 15, 1959, therefore contemplated that, in entering into agreements for the occupancy of suites, Benvenuto could only do so on the basis of an agreement with the occupants which specifically recognized the existence of a second mortgage on the whole of the lands and premises. Benvenuto, in dealing with the appellants, carried out this obligation. The fact that most of the appellants took possession of their suites before signing the final agreements with Benvenuto does not alter the position, in view of the fact that each suite occupant did sign such an agreement, which, by its terms, replaced all prior

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agreements, and which specifically acknowledged the amount of the second mortgage against the whole of the lands and premises.

The position is, therefore, that Benvenuto could not grant any right or interest in the lands which was not subject to the second mortgage, and that, in fact, it never purported to do so.

The agreement of Benvenuto to give a second mortgage to secure the balance of the purchase price was performed, and the second mortgage was executed and registered. For the above reasons it is my opinion that the second mortgagee had equitable rights prior to any rights of the appellants, which mortgagee's rights, in due course, were assigned to the respondent.

For these reasons, as well as those given by Laskin J.A. in the Court of Appeal, with which I agree, I would dismiss the appeal with costs.

Appeal allowed and trial judgment restored, with costs, MARTLAND J. *dissenting.*

Solicitors for the defendants, appellants: Minden, Dales & Tick, Hamilton.

Solicitors for the plaintiff, respondent: Robins & Robins, Toronto.

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*Feb. 14
Feb. 14

KELLY DOUGLAS & COMPANY LIMITED (*Defendant*) ..... APPELLANT;

AND

MUTUAL LEASEHOLDERS LIMITED (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Lease—Rectification of written lease.

The respondent sued the appellant for a portion of the rent accrued under a lease. The appellant counterclaimed for rectification of the lease. The lease stipulated an annual rent of $12,000 "together with additional rent in a sum equal to the amount (if any) by which one (1%) per cent of the annual gross sales of the business carried on by the lessee ... exceeds the said minimum annual rental ...". The expression "gross sales" is further defined as meaning the appellant's gross revenues less certain deductions, including "... any amount paid by

PRESENT: Cartwright C.J. and Abbott, Ritchie, Hall and Pigeon JJ.

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the lessee hereunder for taxes and insurance premiums". The appellant alleged that the true agreement between the parties was that taxes and insurance premiums were to be deducted from one per cent of gross sales rather than from gross sales. The trial judge dismissed the claim for rectification. The Court of Appeal held that the appellant had failed to adduce evidence of a prior concluded agreement in the terms alleged by it and that the trial judge had reached the right conclusion. The appellant appealed to this Court.

Held: The appeal should be dismissed.

APPEAL from a judgment of the Court of Appeal for British Columbia affirming a judgment of Nemetz J. Appeal dismissed.

R. P. Anderson, for the defendant, appellant.

D. M. M. Goldie, for the plaintiff, respondent.

At the conclusion of the argument of counsel for the appellant, the following judgment was delivered:

THE CHIEF JUSTICE (*orally for the Court*):—Mr. Goldie, we do not find it necessary to call upon you. Mr. Anderson has said everything that could be said in support of this appeal and has done so most persuasively; but we find ourselves unable to reverse the concurrent findings of fact made in the Courts below.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Boughton, Anderson, Dunfee & Mortimer, Vancouver.

Solicitors for the plaintiff, respondent: Russell & Dumoulin, Vancouver.

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Feb. 17

JOHN WESLEY CLARKE .....APPELLANT;

AND

THE ATTORNEY-GENERAL FOR ONTARIO, JOHN D. MILLAR and DOUGLAS GLEN CREBA ..... RESPONDENTS.

MOTION TO QUASH

Appeals—Motion to quash—Jurisdiction—Amount in controversy—Final judgment—Taxation of costs—Solicitor retained by third party on behalf of defendant—Action dismissed with costs—Whether defendant entitled to tax costs—Supreme Court Act, R.S.C. 1952, c. 259, ss. 36, 41.

*PRESENT: Cartwright C. J. and Martland, Hall, Spence and Pigeon JJ.

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et al.

His action against the respondents having been dismissed at trial, the appellant was ordered to pay the costs of the respondents Millar and Creba who had been represented by counsel retained by the Crown. The taxing officer rejected the appellant's objection that because the respondents were not liable for costs they were not entitled to costs against him. The taxing officer taxed the costs at $29,230.50. An appeal to a judge was dismissed. A further appeal to the Court of Appeal was quashed on the ground that the judgment appealed from was interlocutory and not final. An appeal *de plano* was filed in this Court by the appellant. The respondents moved to quash the appeal and the appellant applied for leave to appeal.

Held: The motion to quash should be dismissed.

Appels—Requête en annulation—Juridiction—Montant en litige—Jugement définitif—Taxation de dépens—Avocat engagé par un tiers pour représenter le défendeur—Action renvoyée avec dépens—Défendeur a-t-il droit à ses dépens—Loi sur la Cour suprême, S.R.C. 1952, c. 259, art. 36, 41.

A la suite du renvoi en première instance de l'action de l'appelant contre les intimés, il a été ordonné à l'appelant de payer les dépens des intimés Millar et Creba qui avaient été représentés par un procureur engagé par la Couronne. L'appelant a soutenu devant l'officier chargé de faire la taxation que les intimés n'avaient pas droit aux dépens contre lui parce qu'eux-mêmes n'étaient pas responsables des dépens. Cette objection a été rejetée et les dépens ont été taxés à la somme de $29,230.50. La Cour d'appel a rejeté un appel du jugement de première instance refusant de reviser la taxation pour le motif que le jugement dont appel était interjeté était un jugement interlocutoire et non définitif. L'appelant a formé un pourvoi de plein droit à cette Cour. Les intimés ont présenté une requête en annulation et l'appelant a demandé la permission d'appeler.

Arrêt: La requête en annulation doit être rejetée.

REQUÊTE en annulation d'un appel d'un jugement de la Cour d'appel de l'Ontario[1], confirmant un jugement du Juge Lieff. Requête rejetée.

MOTION to quash an appeal from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of Lieff J. Motion dismissed.

P. J. Brunner, for the petitioners, respondents.

J. Sopinka, for the appellant.

At the conclusion of the argument of counsel for both parties, the following judgment was delivered:

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THE CHIEF JUSTICE (*orally for the Court*):—We are all of opinion that the decision of the Court of Appeal that the appellant had no right of appeal to that Court without leave from the judgment of Lieff J. was a decision determining a substantive right of the appellant. If that judgment stands unreversed the result is that the appellant must pay to the respondents $29,230.50 and therefore the amount in controversy in the appeal to this Court is more than $10,000. The motion to quash is dismissed with costs.

Motion to quash dismissed with costs; motion for leave to appeal withdrawn, no order as to costs.

Solicitors for the appellant: Fasken & Calvin, Toronto.

Solicitors for the respondents: Kimber, Dubin, Morphy & Brunner, Toronto.

1969

*Feb. 13
Feb. 13

WAYDE ALLAN CYR and WILLIAM ROBERT MILLIER ..... APPELLANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Trafficking in narcotics—Certificate of analyst as to contents of substance—Admissibility—Narcotic Control Act, 1960-61 (Can.), c. 35, s. 9.

At the trial of the appellants on a charge of trafficking in a narcotic, the Crown tendered in evidence, under s. 9 of the *Narcotic Control Act*, 1960-61 (Can.), c. 35, the certificate of an analyst as to the contents of the substance in question. The certificate identified the package containing the substance, indicated the time and place and from whom the analyst had received it, and gave a description of the contents of the package with its analysis. The magistrate held that part of the certificate was inadmissible and dismissed the charge for lack of proof. The Court of Appeal held that all the statements contained in the certificate were admissible and ordered a new trial. An appeal to this Court was launched by the appellants.

Held: The appeal should be dismissed.

Droit criminel—Trafic de stupéfiants—Certificat d'un analyste sur le contenu d'une substance—Admissibilité—Loi sur les stupéfiants, 1960-61 (Can.), c. 35, art. 9.

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*PRESENT: Cartwright C.J. and Fauteux, Judson, Ritchie and Pigeon JJ.

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CYR AND MILLIER v. THE QUEEN

Lors du procès des appelants sur une inculpation d'avoir fait le trafic d'un stupéfiant, la Couronne a déposé en preuve, en vertu de l'art. 9 de la *Loi sur les stupéfiants*, 1960-61 (Can.), c. 35, le certificat d'un analyste sur le contenu de la substance en question. Le certificat identifiait le paquet contenant la substance, indiquait le temps et l'endroit et de qui l'analyste l'avait reçu, et donnait une description de ce que le paquet contenait ainsi que le résultat de son analyse. Le magistrat a jugé qu'une partie du certificat n'était pas admissible et a rejeté l'accusation pour manque de preuve. La Cour d'appel a statué que tous les énoncés contenus dans le certificat étaient admissibles et a ordonné un nouveau procès. Les appelants ont interjeté appel à cette Cour.

Arrêt: L'appel doit être rejeté.

APPEL d'un jugement de la Cour d'appel de la Colombie-Britannique[1], ordonnant un nouveau procès. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], ordering a new trial. Appeal dismissed.

John E. Hall, for the appellants.

C. D. MacKinnon, for the respondent.

At the conclusion of the argument of counsel for the appellants, the following judgment was delivered:

THE CHIEF JUSTICE (*orally for the Court*):—Mr. MacKinnon, we do not find it necessary to call upon you.

We are all of opinion that the Court of Appeal have arrived at the right conclusion, that there is nothing in the certificate of the analyst which went beyond what is contemplated in s. 9 of the *Narcotic Control Act*, Statutes of Canada 1960-61, c. 35.

The appeal is dismissed.

Appeal dismissed.

Solicitor for the appellants: M. R. V. Storrow, Vancouver.

Solicitor for the respondent: D. S. Maxwell, Ottawa.

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6. Income tax—Benefit to shareholder—Additions and improvements to property owned by shareholder and leased to corporation—Additions and improvements paid for by corporation—Whether benefit to shareholder—Whether additions and improvements the property of the shareholder—Civil Code, art. 413, 1640—Income Tax Act, R.S.C. 1952, c. 148, s. 8(1).

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7. Income tax—Deductions—Car dealer issuing credit notes—Notes redeemable on later purchase of car before specified date—Whether unredeemed notes current liabilities or contingent account—Accounting principles—Income Tax Act, R.S.C. 1952, c. 148, s. 12(1)(*a*), (*e*).

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8. Income tax—Profit on purchase and redemption of debentures of insolvent company in a loss position—Whether profit realized in an "adventure in the nature of trade" and therefore taxable—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 8(1), 137(2), 139(1)(*e*).

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9. Income tax—Valuation of closing inventory—Stock promoter—Valuation of shares—Specific identification—Certificate numbers—Stock exchange quotation—Cost to taxpayer or fair market value—Income Tax Act, R.S.C. 1952, c. 148, ss. 12(1)(*e*), 14(2).

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10. Sales tax—Margarine made in part from fish oil—Whether exempt from tax as a product of fish—Trade designation—Construction by reference to subsequent amendment rejected—Excise Tax Act, R.S.C. 1952, c. 100, ss. 30(1), 32(1), and Schedule III.

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11. Income tax—Company incorporated to acquire land—No definite intention as to exploitation or disposition—Long-term lease granted with option to buy—Profits from exercise of option and from expropriation—Whether business profits or capital gains—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(*e*).

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12. Income tax—Termination of mortgage agency business—Whether compensation received capital or income—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4.

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13. Estate tax—Provincial tax credit—Situs of shares— Deceased domiciled in Ontario, a prescribed province—Company incorporated in Saskatchewan, a non-prescribed province—Shareholders register brought to prescribed province—Estate Tax Act, 1958 (Can.), c. 29, ss. 9(1), 9(8)(*d*), (*e*)—The Companies Act, R.S.S. 1955, c. 124, ss. 76(1), 77, 78a.

BURTON *et al.* v. MINISTER OF NATIONAL REVENUE, 732.

14. Computation of tax—Appraisal of value of ore at the pit's mouth—Deductions—Processing allowance computed on all milling capital—Whether interest on borrowed capital deductible—The Mining Tax Act, R.S.O. 1950, c. 237 [am. 1955, c. 46, s. 2(1)].

MINISTER OF MINES FOR ONTARIO v. RIO ALGOM MINES LIMITED, 880.

TRADE MARKS

Registration—Opposition on ground of confusion—"Golden Circlet" in association with cigarettes—"Gold Band" previously